# Trends in Final Orders in Cases of Petitions for the Return of Children Based on the Act for the Implementation of the Convention on the Civil Aspects of International Child Abduction

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## Section 1. Introduction

The Convention on the Civil Aspects of International Child Abduction ("the Convention") lays out a framework of international cooperation for the prompt return of a child to his or her State of habitual residence if he/she has been removed wrongfully from that State or is being retained illegally in a country other than his or her State of habitual residence, in such cases where an international marriage has broken down. In addition, the Act for the implementation of the Convention in Japan ("the Act") sets out in Section 3 of Chapter 2, the procedures of petitions to return a child, as the court procedures to return the child who has been removed to Japan or retained in Japan to the State of habitual residence. The Convention became effective in Japan on April 1, 2014, and the Act has been implemented from the same day, and so the practice of cases of petitions for the return of children entered its fourth year from April 1, 2017.

Meanwhile, within the courts, a certain number of cases of petitions for the return of children that have reached their final orders have accumulated, but it seems that there have not been chances to introduce individual examples of final orders outside of the courts. This is probably because there is a possibility of parties and people involved in the Hague cases being identified if individual final orders are made available to the public since the number of final orders has not yet reached a sufficient number, which may ignore the purpose of the Act which is in place to inhibit the disclosure of proceedings concerning cases seeking the return of a child to the public (the Act, Article 60) and to place strict regulations on the inspection of the records, etc. (the Act, Article 62).

On the other hand, the Convention and the Act require that the proceedings for the return of the child are carried out promptly (see the Convention Article 11, the Act, Article 151). Based on this, in practice, the cases are managed in order to reach the final orders within roughly six weeks[1] after receiving the petition. With this tight schedule, in order to gather necessary evidence and accurate information in a timely manner, it is beneficial to share views among the parties involved in petitions for the return of the child regarding the circumstances surrounding cases and how those circumstances were considered in the past final orders. Even though examples of final orders themselves are not made available to the public, by introducing trends in judicial decisions, it seems that the need to share views can be met to some degree.

In this paper, I would like to analyze the final orders[2] ( "the Final orders") in a total

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[1] In the Tokyo and Osaka Family Courts, case management is carried out based on what is called "the 6-week model for trials." For more details, see LAWASIA (The Law Association for Asia and the Pacific) family law section, "Practical Operation of Hague Convention cases", Family Law and Judgement No. 6 (2016) p. 122; Yasuji Shinohara, "Trials of Cases Relating to the Return of Children in the Tokyo Family Court", Case Studies No. 326 (2016) p. 45; Tetsuo Tanahashi et al., "The Practical Operation of Hague Convention Cases Centering on the Return of Children", Case Studies No. 329 (2017) p. 153

[2] The total number of the Final orders in courts in the first and second instances is 35. A breakdown of the results of the Final orders and the cases resulting in the children not being returned and a breakdown of the grounds are as shown in a separate table. Also, for reference, in the table, for the three years between April 1, 2014 and March 31, 2017, there is shown the number of cases of conciliation at each of the family courts in Tokyo and Osaka and a breakdown results which the children were returned or not returned. According to this table, there was a total of 14 cases and 20 children which were successfully resolved by

of 21 cases (31 children) which the High Courts of both Tokyo and Osaka and the Family Courts of both Tokyo and Osaka made in three years between the implementation day of the Act, April 1, 2014 and March 31, 2017. Then, based on those decisions, I will try to make a general summary of the tendency of decisions of the courts.

Please note that any opinions offered in this paper reflect my personal view.

## Section 2. Structure of Paper

A person whose rights of custody over a child has been breached ("LBP"[3]) by the child's removal or retention in Japan may file a petition to a Family Court[4] to order the person taking care of the child ("TP"[5]) to return the child to his or her State of habitual residence (the Act, Article 26). This is a petition for the return of the child, and the Family Court, which receives such a petition, when all of the grounds for ordering the return of the child in Article 27 of the Act are met, shall order the return of the child except in the case where there are any grounds for refusing to order the return of child as stated in Article 28 of the Act.[6]

In each of the Final orders, based on the legal structure of the petition for the return of the child, the case is reviewed in such an order as follows: First, the courts decide whether all of the grounds for ordering the return of the child are met. Then if it is affirmed that the grounds are met, they will consider whether there are valid grounds for refusing to order the return of a child that are alleged by the TP. Accordingly, I will try to summarize the trends in making decisions about the grounds for granting the return order in Section 3, and the trends in making decisions about the grounds for refusing the return followed in Section 4 respectively.

## Section 3. Grounds for Ordering Return of Child

Article 27 of the Act lists following items as grounds for the return of a child: the child has not attained the age of 16 (Article 27 (i)); the child is located in Japan (Article 27 (ii)); the said removal or retention breaches the petitioner's rights of custody over the child pursuant to the laws and regulations of the State of habitual residence (Article 27 (iii)); and the State of habitual residence was a Contracting State at the time of said removal or at the time of the commencement of said retention (Article 27 (iv)).

The issues which were discussed and determined in the Final orders were the

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conciliation. It can be seen that a considerable number of the case of petition for the return of a child was settled by conciliation.

[3] An abbreviation for "Left Behind Parent". Strictly speaking, those who had their right of custody breached by the removal or retention of the child were not limited to parents of the children, but there were also cases of guardians of minors, and according to the laws of the states of habitual residence, these might be private facilities, government agencies, courts or other facilities. Of course, in almost all cases one parent of the child is the petitioner asking to have the child returned, so in this paper for convenience, unless otherwise specifically stated, the argument here proceeds on the assumption that LBP are claiming that their own right of custody has been breached and they are petitioning for the return of their child.

[4] The jurisdiction of first instance of the petition for the return of the child is concentrated on the Tokyo Family Court and the Osaka Family Court. The Tokyo Family Court has jurisdiction over cases which a child's residential address, etc. is in East Japan (the jurisdictional district of Tokyo High Court, Nagoya High Court, Sendai High Court, or Sapporo High Court). The Osaka Family Court has jurisdiction over cases which a child's residential address, etc. is in West Japan (the jurisdictional district of Osaka High Court, Hiroshima High Court, Fukuoka High Court, Takamatsu High Court). (Article 32-1 of the Act)

[5] An abbreviation for "Taking Parent". The person who is the respondent in the petition for the return of a child is the person who has the child in custody, but the respondent does not need to be the child's parent. However, for the return of a child, in almost all the cases, the parent who removed or is retaining the child is the respondent. So, in this paper, it is assumed that the respondent is the TP.

[6] Although having said that, according to the Act, Article 28-1 main paragraph proviso, even though a court found the reasons in the Act, Article 28-1, (i) to (iii) or (v) but if the court decides that it is beneficial for a child to return him/her to the State of habitual residence after considering all circumstances, the court could order the return of the child.

whereabouts of the State of habitual residence, the presence or absence of a breach of rights of custody of the child, and the date when retention was commenced. Each of these elements are necessary facts to be confirmed in order to judge if Articles 27 (iii) and (iv) of the Act are met. Accordingly, we will consider below the trends of making decisions in the Final orders relating to these points.

**1 The State of Habitual Residence**

(1) "State of habitual residence" means the State in which the child held his/her habitual residence at the time of the removal or immediately before the commencement of the retention (the Act, Article 2 (v)). The Convention and the Act do not define habitual residence, but in the Final orders, some courts clearly expressed that habitual residence is a place where a person ordinarily resides, as opposed to a simple dwelling. The habitual residence is a place of residence for a fairly long period[7].

(2) The determination of the State of habitual residence is strongly unique to each case, and it is difficult to formulate a standard for determining the State of habitual residence. In fact, in many decisions, the length of dwelling, the purpose of dwelling, the history surrounding the taking up of the dwelling, the circumstances of the dwelling, and various other factors were considered comprehensively. The courts made decisions individually and specifically, depending on the case. In cases where it was not disputed that a child lived in a particular country with the child's parents continuously from birth to the time of travel to Japan and they intended to live there permanently, that country was clearly the State of habitual residence and the State of habitual residence was never disputed. On the other hand, in cases where there were no such circumstances, it was not rare that whether the country which the LBP claimed as the State of habitual residence could be determined as the one became an issue.

To determine the State of habitual residence, the courts usually considered the following factors: the place where the child lived since birth, the place where both parents worked or the child attended school or kindergarten, the backgrounds leading up to the child living in the country which the LBP claimed, whether there were plans for the child to move to another country, whether there were specific preparations for the moving and how thoroughly prepared they were, and whether there was a proper residential status. According to these factors, if the courts conclude that it could be expected that the child would continue living for a relatively long period in the country where the LBP claimed at the time when the child was removed or retained, the courts tend to determine that country as the State of habitual residence. In the Final orders, some courts stated that it should give weight to whether both parents shared a common intention of giving up the previous dwelling and settling in a new dwelling, especially if the child was young, in order to judge whether the child had acquired a new dwelling as his or her habitual residence or not.

(3) a. Among the cases where the whereabouts of the State of habitual residence became an issue, there are cases where the TP claimed that the country which the LBP claimed as the State of habitual residence had been the one, but the country was no longer the child's State of habitual residence since there had been a plan to move the dwelling from that country right before the time of the removal or the commencement of the retention.

However, in cases where no appropriate evidence was provided for presenting a basis of specific preparations for moving a dwelling, such as securing of a prospective employment, a new school for the child, or a new dwelling in a new State, courts tend to reject the TP's arguments since a specific plan to move a dwelling is not established. Even in cases where there was an actual agreement between a married couple about moving their

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[7] In the Final orders, the courts pointed out that the habitual residence and the residence for deciding the court's jurisdiction were not necessarily the same. (in some countries' legal systems, a certain number of years residence is required.)

dwelling, the courts tend to reject the TP's argument as well if the agreement was contingent upon some conditions such as ensuring to find a new job, a school or kindergarten for the child, and a new dwelling, and unless specific evidence can be provided as a basis to show that these conditions have been fulfilled.

b. In addition, there are cases where the TP acknowledged that the country which LBP claimed as the State of habitual residence had been the child's former State of habitual residence, but with the fact of travelling to Japan, the former State of habitual residence had been abandoned and Japan had become his or her new State of habitual residence.

In the Final orders, however, there are no cases where the courts upheld this type of argument. In cases where the TP made this type of argument, the courts rejected the argument due to a lack of common understanding among the LBP, the TP and the child over their stay in Japan without a time limit or due to the incompetency in presenting concrete evidence of their preparations for moving to Japan such as securing a job, a school or kindergarten in Japan.

c. Furthermore, in cases where a considerable period of time had passed from the time of travel to Japan to the time of commencement of the retention, the TP argued that Japan had become his or her new State of habitual residence since there were circumstantial changes after the child's travel to Japan and the previous State of habitual residence has been abandoned by the time of the commencement of the retention.

However, in the Final orders, there is no case where the courts upheld this argument. Changes of environment in which the child was placed and negotiations between the parties might be examples of changes in circumstances from the time of passage to Japan to the commencement of the retention. However, there are no cases in which the courts considered such change of circumstances as a factor in determining the State of habitual residence even though there are cases where the courts considered them as grounds for refusing the return as prescribed in Article 28-1 of the Act.

**2 Existence of Breach of the Right of Custody**

(1) There is no definition of the right of custody in the Convention or the Act. However, in the Final orders, there are cases where the court clearly showed the meaning of the right of custody; i.e. the court stated that even if the LBP did not have the right to care for the child, in cases where the LBP had the right to determine residence or the right to approve or disapprove the child's leaving a country, it can be said that the LBP had the right of custody as stated in Article 27-3 of the Act.

(2) The courts usually make decisions whether there is a breach of the rights of custody based on the considerations whether the LBP hold the rights of custody under the laws of the child's State of habitual residence[8] at the time of the child's removal or the commencement of retention. There is no case where the courts did not find a breach of the rights of custody by the removal or retention despite the fact that the LBP had the rights of custody over the child. Once the State of habitual residence is determined, it could be clarified whether or not the LBP has the rights of custody under the laws of the State of habitual residence. Therefore, there are few cases in which the breach of the LBP's rights of custody became an issue. However, in the case where the State of habitual residence has a different legal system relating to custody rights from Japan's system, the interpretation and application

[8] The law of the State of habitual residence includes the private international law of the State of habitual residence. Therefore, if as a result of applying the private international law of the State of habitual residence, the courts chose the other applicable law than the one of the habitual residence, a decision must be made as to whether there was a breach of the right of custody according to the law of that other country.
In addition, the law of the State of habitual residence includes case law or customary law See, Osamu Kaneko, "Question and Answer: A Systematic Response to International Child Abduction", Shojihomu Co., Ltd, (2015) Q61 p. 128.

of the laws of the State of habitual residence could be disputed[9].

(3) In addition, although it is a rare case scenario, there are cases where the TP attempted to claim the non-existence of breach of rights of custody because in Japanese domestic cases, physical separation into another residence with a child was not immediately considered illegal. However, such an argument is rejected as an uncommon view.

### 3 Time of Commencement of the Retention

(1) Retention means a situation where a child is prevented from traveling to the State of his or her habitual residence after the said child's departure from the said State (the Act, Article 2 (iv)).

The time when the retention commenced was not only a relevant factor to decide whether there was a ground for ordering the return of the child but also a meaningful factor as the criterion time to decide whether there was a ground for refusing to order the return of the child as prescribed in Article 28-1 (i) and (ii) of the Act. In addition, in cases where it was argued that there was a breach of the rights of custody by retention, it often became an issue for a while after the Act came into effect since the time of commencement of the retention also had a meaning as a concept of defining the period of time for application of the law[10].

(2) In regard to the time of commencement of the retention, there is a tendency for the courts to find the time when it can be objectively judged that the TP expressed no intention of returning the child to the State of habitual residence as the time of commencement. For example, there is a case in which the court decided the retention of the child had begun when the TP cancelled a return flight and notified the LBP that the TP had no intention to return the child to the State of habitual residence via email because the negotiation on returning the child home between the parties had failed.

(3) a. However, as opposed to this, the court did not find that it would be enough to admit the commencement of the retention in cases where the TP determined in his or her mind not to return the child to the State of his or her habitual residence prior to the expiration of the arranged period on which the both parties initially agreed.

b. Also, the courts tend to find that the retention did not commence during the time the LBP and the TP continued to negotiate the time and conditions of returning the child after the initial arranged period of visit which the parties agreed had passed, because the courts consider the TP did not objectively state not to return the child to the State of habitual residence yet.

## Section 4. Grounds for Refusal of Return of Child

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[9] For example, in English common law, even when a parent that does not have custody rights under the law of the State of habitual residence, the said parent has "inchoate rights of custody" and constitutes the rights of custody under the Convention, if certain requirements are fulfilled such as taking care of a child and taking responsibilities as a parent. In addition, when a parent removed a child without obtaining permission from the other non-custodial parent while a court proceeding about custody of a child was pending in the State of habitual residence, a court decided that the said removal constituted the breach of custody rights under the Convention because the said removal breached "rights of custody in a court." Therefore, in cases where the State of habitual residence has custody laws derived from English common law, it can become an issue whether there existed the breach of the rights of custody given pursuant to English common law.

With reference to the above mentioned English common law, see following references as an example: Japan Federation of Bar Associations, Commissioned Study About Examples of Judgements Related to The Hague Convention and International Child Removal, report 2011 p. 43; Yuko Nishitani, Comparative Legal Study Related to Established Practice of the Child Abduction Convention, Case Studies No. 329 (2017) p. p. 33

[10] In Article 2 of the supplementary provisions of the Act, it is constituted that, "This Act applies neither to a wrongful retention that was commenced before the Act enters into force".

Article 28-1 of the Act, in Items (i) through (vi), prescribes each of the grounds for refusing to order the return of a child. In the Final orders, all these grounds for refusing to order the return of the child were disputed, but Article 28-1 items (iii), (iv) and (v) of the Act were frequently disputed. I will look at trends in decisions on each of the grounds for refusing to order the return of the child in Article 28-1 of the Act.

**1 Ground for Refusal of Return of Child in Article 28-1 (i) of the Act**

Article 28-1(i) of the Act gives a ground for the refusal of an order to return a child in the case where the petition for the return of the child has been filed after the expiration of a period of one year from the time of the removal or the commencement of the retention, and the child is now settled in his or her new environment.

In almost all cases, since it is objectively clear that the period of one year has not elapsed from the time of the removal or the commencement of the retention to the time of filing a petition for the return of the child, there are very few cases where this item (i) is raised. In the Final orders, since there are no cases in which the courts decided that petitions for the return of the child were filed after one year had elapsed[11] from the time which the courts recognized as the time of the removal or the commencement of the retention. There are no cases in which the courts refused the return of the child under this item (i).

There are a few cases where the TP argued that Article 28-1 (i) of the Act should be applied by analogy although less than one year had elapsed from the time of the commencement of the retention to the time of the file of the petition. However, the argument was rejected as an uncommon view because the purpose of the Act is to ensure that one year is required as the shortest period sufficient to refuse the return even when there is a breach of rights of custody.

**2 Ground for Refusal of Return of Child in Article 28-1(ii) of the Act**

Article 28-1 (ii) of the Act gives a ground for refusing the return of a child in the case where 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 said removal or retention).

Perhaps since it is hard to imagine a situation where the LBP has the rights of custody but does not actually exercise it, there are few cases where this ground for refusing the return of the child under this item becomes an issue. In the Final orders, there are no cases where the court found that the ground for refusing the return of the child under this item was applicable.

In addition, there are a few cases where the TP argued that there was a ground for refusing the return under this item because the LBP did not pay sufficient attention to the child or committed domestic violence towards the child while living together with the child. However, the proceedings for the return of the child are not a mechanism for deciding if either the LBP or the TP is qualified as a custodian. It was rejected as an uncommon view that the way of exercising the right of custody being inappropriate did not denote a ground that the rights were not being exercised.

**3 Ground for Refusal of Return of Child in Article 28-1(iii) of the Act**

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[11] It is possible that the court finds the time for the commencement of the retention of the child has been later than the time claimed by the TP. As a result, one year has not passed between the commencement of retention of the child and the petition for the return of the child. So, the ground for considering a reason to refuse to return the child under Article 28-1 (i) can be lost.

(1) Article 28-1 (iii) of the Act gives a ground to refuse the child's return based on the fact that the petitioner had consented to the removal or retention before the removal or the commencement of the retention or subsequently approved of the said removal or retention.

Whether a ground to refuse the child's return under this item exists or not is reviewed in the light of the process of negotiation between the parties up to the petition for the return, and determined based on the fact whether the above consent or approval can be established or not. Even though documents such as emails relating to the preceding process have been kept, it is not rare that there is a difference in interpreting them by the parties since the parties' opinions expressed in these documents are usually changed in time and opinions themselves are ambiguous. Hence, there are not few disputes over whether there are grounds to refuse the return of the child under this item.

(2) In the Final orders, there are many cases where the courts required a party to prove that the LBP consented to or approved the child not only staying in Japan for a short time period but also continuing to reside there for a relatively long period of time. If so, it can be said that the LBP abandoned the right to seek the return of the child and the courts can find the ground for refusing the return of the child under this item.

Therefore, in many cases where, even though the time period of the child's stay which the parents initially planned had elapsed, the LBP sought the return of the child from the TP before or after the elapse of the planned period, the courts stated that the LBP just consented to or approved an extension of the period of the stay and it was not considered as consent or approval as referred to in this item. Moreover, even when the LBP showed understanding that the child could not be expected to be returned immediately, the courts did not consider it consent or approval as referred to in this item as well, if the parties left the issue of where the child would reside in the future as an unresolved problem.

(3) In deciding whether there was consent or approval as specified in this item, it is necessary to assess the meaning of the views expressed by the parties in the process of their negotiation concerning the time of the child's return home, the necessity of his or her return, and so on. There are cases where, in order to assess the views properly, it is not enough to simply interpret words as they are in documents including agreements made between the parties before the removal or retention or emails that exchanged between the parties to the time of filing the petition for the child's return.

In the Final orders, there are cases where the courts carefully decided the meaning and certainty of the views expressed by the parties in the process of their negotiation, considering following matters: to what degree the LBP provided necessary cooperation so that the child could stay in Japan (for example, cooperating in the necessary processes for securing a dwelling, transferring of school or kindergarten in Japan or sending the personal belongings of the child left in the State of habitual residence to Japan); whether this cooperation exceeded the scope of a short stay and whether it was necessary for a relatively long residence; conversely, to what extent preparation was carried out for the return of the child (for example, scheduling the time of the child's return, organizing the return tickets, and applying for re-entry to school in the State of habitual residence).

In addition, in cases where the parties carried out negotiation on the issue of their child's return home together with the issue of their divorce, the court made decisions paying due attention to the details of the negotiation on divorce issues. In one of the cases where it was concluded that the parties had conclusively agreed that the TP would have parental authority over the child and in the future the child would reside with the TP in Japan, the consent or approval prescribed in this item was affirmed. In contrast to this, in the case where the LBP could not hope as a practical matter to have the child returned home quickly, and in the meantime the LBP gave priority to the divorce negotiations, the court acknowledged that the LBP had approved the TP having the custody over the child during the time of negotiation but did not give up the idea of having the child return home. The court also acknowledged

that the LBP reserved the right to give priority to the child's return home putting the divorce negotiations on hold, depending on the progress of the divorce negotiations. In this case, even though the court noted the LBP expressed the idea that the parties would get divorced with the condition that the TP would have parental authority, it did not find the consent or approval as prescribed in this item with the recognition that it was no more than one option as the LBP considered at that time.

(4) In the Final orders, there are no cases where the court found a ground for refusing to order the return under this item but ordered the child's return upon its own discretion (Act, Article 28-1 main paragraph proviso).

**4 Ground for Refusal of Return of Child in Article 28-1(iv) of the Act**

(1) Article 28-1(iv) of the Act gives a ground for refusing the return of a child when there exists a grave risk that the child's 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.

The ground for refusing the return of the child in this item makes it possible for the TP, who thinks returning the child is not in the child's best interest, to raise the reasons, which he/she believes, to justify the non-return of the child directly as a ground for refusing to return the child. There are quite a few cases where the existence of this ground becomes an issue.

(2) This item corresponds to Article 13-1(b) of the Convention and, in other contracting States as well, there are many cases where the parties dispute whether Article 13-1(b) of the Convention is applicable. Nonetheless, since the sharing of information on how to judge the applicability of Article 13-1 (b) of the Convention has been insufficient among the contracting States, it has been considered a major practical challenge to establish a prompt and appropriate framework in order to judge the applicability of Article 13-1(b) of the Convention[12]. In response to this, in Article 28-2, the Act lists such circumstances which are often alleged and are important among the circumstances which should be taken into account when judging whether there is a ground for refusing the return of the child under this item, and thereby tries to ensure the clarification of the norm and predictability for parties[13]. In looking at the Final orders, in cases where the existence of grounds for refusing to order the return a child under Article 28-1 (iv) of the Act became an issue, basically, the courts made decisions by considering the factors in Article 28-2.

(3) In Article 28-2 of the Act, the following circumstances are listed: whether or not there is a risk of the child being subject to the words and deeds, such as physical violence, which would cause physical or psychological harm ("the Violence or other harm to the child") by the LBP in the State of habitual residence; whether or not there is a risk of the TP being subject to violence, etc. by the LBP in such a manner as to cause psychological harm to the child ( "the Violence or other harm to the TP", and together with Violence or other harm to the child, "Violence or other harm by the LBP"), if the TP and the child were to enter the State of habitual residence; and whether or not there are obstacles that would make it difficult for

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[12] Given this situation, at the 6th special commission meeting Part II convened by the Hague Conference on Private International Law (2012), in order to ensure a common interpretation and operation, it was necessary to develop an interpretation guide (a good practice guide) for the judicial authorities in each country in order to promote consistency in the interpretation and application of Article 13 (1) b and it was recommended to establish a working group composed of judges and others (Conclusion and Recommendations (Part II) para 81-82).

Later, based on these recommendations, it seems that a draft of good practice guide was made. Moreover, in the 7th special commission meeting convened in October 2017, there was discussion about the proposal, but it was decided to continue the working group and deepen their discussion. Further details are available at Special Commission meetings on the practical operation of the convention at: https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction

[13] Kaneko, cited above note (8), Q69, pp. 141ff

the LBP or the TP to provide care for the child ( “the Obstacles to provide care”) in the State of habitual residence. In many cases where the grounds for refusing the return of the child under Article 28-1 (iv) of the Act became an issue, the TP made arguments based on each of the circumstances mentioned above.

At the same time, although the number of the cases was not great, there were some abstract arguments from the TP that there was the possibility that a change in environment along with return would harm the child if he or she was forced to return to the State of habitual residence. There are also some cases in which the TP just enumerated concerns and discomfort concerning a different language, culture, custom, climate, and natural conditions or inconvenience in their daily lives. Moreover, although decision on whether it is appropriate for the LBP or the TP to have the rights over custody of the child is a matter which should be decided in the State of habitual residence and is not a matter which should be discussed during the proceedings of the petition for the return of the child[14], there are certain number of cases where the TP argued how inadequate the LBP was as a custodian of the child as if it were divorce proceedings. Such arguments were rejected as an uncommon view which missed the point of the Act.

(4) a. (a) Among the circumstances under Article 28-2 of the Act, the one that is given the most weight is the risk of the Violence or other harm by the LBP. Regarding this matter, the basic method used by the courts is to find whether there has been violence or other harm by the LPB against the child or the TP in the past and then make an inference as to whether there is a risk that the similar violence or other harm will be repeated if the child is returned to the State of habitual residence.

Then, the courts were reluctant to find violence simply based on statements by the TP when the courts decided whether there was the Violence or other harm by the LBP in the past. In many cases, the TP provided some kind of objective evidence to support the existence of the Violence or other harm by the LBP. On the other hand, however, the courts did not find basically any Violence or other harm by the LBP in cases where there had been no particular problem with living with the LBP in the State of habitual residence and where there was no objective evidence to support the existence of the Violence or other harm by the LBP.

There is no uniform rule explaining what objective evidence is required in order to establish the Violence or other harm by the LBP. However, for example, in cases where there were previous interventions by child welfare agencies in the State of habitual residence, the contents of investigation reports by these agencies were given weight as evidence. There have not necessarily been many such cases as of yet, and it seems that photos or emails indicating the Violence or other harm by the LBP or records of reports by the TP to the police, etc. are commonly submitted by the TP.

Moreover, although there are cases where the TP presented a child’s written statements or recorded media with the child’s opinion, there are no cases where the courts found a risk of the Violence or other harm by the LBP, based on these materials. In addition, there are few cases where the TP submitted doctors’ notes with diagnoses or opinions relating to the child’s mental status with an assumption of the Violence or other harm by the LBP (for example, a doctor’s note that the child had symptoms of flashbacks or post-traumatic stress disorder or such symptoms may occur in the future). However, there are no cases where the courts found that the Violence or other harm by the LBP based on the notes, which

[14]Althouigh having said that, until the time when the decision whether or not the child needs to be returned in the case of a petition for the return of a child is made, it is considered that facilitating smooth visitation or contact between the LBP and the Child is extremely beneficial ( "Temporary visitation or contact"). There are actually a number of cases where the Temporary visitation or contact is carried out while the case is pending, where the Temporary visitation or contact is tried out as a part of the conciliation accompanying the case, and where [a party] separately files the conciliation for seeking the Temporary visitation or contact. There are also cases where [some courts] consider a situation of the temporary visitation or contact and the child’s condition, etc. to judge if there exist the grounds for refusal of the return of a child under the Act 28 (1)(iv) or (v).

might have been intentionally made to be used as evidence in the proceedings of the return of the child from the beginning. In cases where the courts rejected the reliability of written medical notes the courts' reasoning were as follows: doctor's notes that the TP presented were based mostly on a situation that the TP explained and that the accuracy of their contents could not be certainly ensured; parts of the doctor's notes contained facts which were inconsistent with the situation of an amicable visitation that had taken place between the LBP and the child; and notes that showed the fact that the child was suddenly brought to the doctor after his or her travel to Japan in response to the LBP's activities of returning the child although the child had not visited a doctor or received a medical diagnosis of mental status in the State of habitual residence. These were indicated as grounds for rejecting the reliability of the notes.

(b) In order to prove that there was the Violence or other harm by the LBP, the courts tend to require that violence of a certain intensity occurred repeatedly or chronically. For example, even in the case where LBP shouts, the Violence or other harm by the LBP could not be found, as long as the voice of the LBP stays at the level the LBP used a harsh voice to scold the TP or the child in instances of carelessness of them or the LBP spoken with a loud voice sometimes in particular when he was drunken. Moreover, if the LBP hits the child or the TP, the courts did not find the Violence or other harm by the LBP as long as it is limited to the level of hitting the child's buttocks, etc. in discipline or hitting the TP's cheek several times with an open hand during domestic quarrels. The same applies to the cases where the LBP ignored requests of the child and this did not go beyond inconvenience and restraint that the child should put up with during their development and this fact could not be assessed as neglect.

In addition, because the Violence or other harm to the TP shall cause psychological trauma to the child in order for the court to find that it constitutes serious harm to the child, the courts tend to hold the view that such violence had to take place in front of the child or elsewhere in a situation where the child was aware of it.

(c) Even when the courts, based on previous instances of the Violence or other harm by the LBP in the State of habitual residence, could find the possibility of the repetition of the same kind of violence or other harm in cases where the child was returned to the State of habitual residence, the courts maintained that there was no risk of the Violence or other harm by the LBP if there was a legal system in the State of habitual residence to protect the life of the TP and the child ( "the Protective measures") and where the Protective measures were sufficient to avoid the risk of the LBP's violence, etc.

It is difficult to judge whether the Protective measures of the State of habitual residence can be an effective system in connection with the concrete risk of the Violence or other harm by the LBP which the court recognized, because it needs to assess another country's legal system. In cases where this point became an issue, the courts made decisions considering the following points regarding the Protective measures: what kind of organizations get involved; what kind of system for implementation of the protection takes place; how powerful the enforcement is; whether there is any legal obstacles for the TP to use the Protective measures; and what sanctions can be expected if the LBP takes action in violation of the Protective measures.

It is further difficult to decide how far the situation of actual practice of the system should be considered beyond the details of the legal system. In this regard, there are cases where the courts considered how the Protective measures were implemented at the time when the TP and the child used to live in the State of habitual residence and receive the said Protective measures. Beyond this, there are also cases where the TP argued that the Protective measures could not sufficiently remove the risk of the Violence or other harm by the LBP, since there was a serious dysfunction in the actual implementation of the said Protective measures. However, this type of argument contains an aspect which is equivalent to assessing that another country's legal system is dysfunctional. Therefore, in order to adopt

this argument in the court proceedings, it is a prerequisite to be presented with sufficient evidence to analyze the situation of the said country's legal system accurately and examine the system comprehensively and multi-directionally.

Moreover, the question as to whether there are effective Protective measures in the State of habitual residence does not basically become an issue for investigation until and unless a specific risk of the Violence or other harm by the LBP is found. In other words, in the Final orders, there are no cases where the courts positively examined in advance whether there were sufficient Protective measures in the State of habitual residence based on the assumption that there was a risk of the Violence or other harm by the LBP as the TP claims.

b. (a) The next issue is the Obstacles to provide care. In order to find these circumstances, the courts consider (the TP's) status of residence in the State of habitual residence or the possibility of acquiring the status of residence, the degree of motivation and ability to work, the possibility of securing a workplace and a school for the child, the degree of assistance that may be received from family, friends, or supporting organizations, and the presence and degree of physical and mental health issues such as alcoholism or drug addiction and mental illness.

(b) Circumstances which would prevent the TP from caring for the child him- or herself in the State of habitual residence include those cases when the TP will unavoidably face a criminal prosecution if the TP enters into the State of habitual residence since removing or retaining a child is treated as a crime in the State, and cases when it is almost impossible for the TP to secure the status of residence, dwelling, or living expense, etc. .

(c) It is also sometimes argued by the TP that the return of the child means the separation of the child from the TP since the TP has no intention to return to the State of habitual residence, and having the child reside in the State of habitual residence will place him or her in an intolerable situation.

However, if the TP returns with the child to the State of habitual residence and they live separately from the LBP in that State, this can be deemed as accomplishment of the return of the child. So, the courts did not uphold arguments that returning the child would inevitably mean the separation of the TP and the child unless it was objectively established that the TP could not return with the child and live separately from the LBP with appropriate supporting evidence. Such circumstances might include the following cases: the TP will inevitably face a criminal prosecution if the TP returns to the State of habitual residence; there is almost no expectation for the TP of receiving support (including public support) to live in the State of habitual residence; the TP is a victim of serious domestic violence from the LBP; and there is a danger that the TP will attempt to commit suicide or self-harm. However, even in cases where there are objective circumstances making it inevitable that the child will be separated from the TP, it cannot be readily assumed that the child is placed in an intolerable situation, because the psychological burden placed on the child by the separation between the TP and the child could be adjudged to be limited, depending on the LBP's attitude and situation related to custody (including a cooperative attitude to visitation or contacts when the TP and the child are separated).

c. In regard to the point as to how far the LBP may be expected to give voluntary cooperation in the State of habitual residence (for example, compliance with the Protective measures relating to domestic violence or child abuse, the provision of living expenses or dwelling, withdrawal of complaint or allegation relating to removal or retention, and an expeditious petition relating to custody), the courts tend not to consider the fact of the expected voluntary cooperation in the making of the decision as to whether there are grounds for not returning the child under Article 28-1 (iv) of the Act, because such voluntary cooperation cannot be sufficiently guaranteed within the course of the proceedings of the

petition for the return of the child[15].

**5 Ground for Refusal of Return of Child in Article 28-1(v) of the Act**

(1) Article 28-1 (v) of the Act gives a ground for refusing to return the child in the case where the child objects to being returned, when it is appropriate to take account of his/her view in the light of the child's age and degree of development.

As there are many cases where the TP thinks the child does not wish to return to the State of habitual residence and the child is expressing an opinion in line with the TP's intention to the TP, there are many cases where this item becomes an issue.

(2) In cases where this item becomes an issue, basically the family court investigating officer carries out an investigation on the child's view on the current situation, the details of the child's opinion about returning to the State of habitual residence, and what caused the child to come to hold that opinion etc. With these factors, the courts decide whether the child has reached an age and development to the level where his/her opinion can be considered in the judgement and whether the child's opinion can be said to be an objection to returning to the State of habitual residence.

Furthermore, in cases where the family court investigating officer's investigation report does not verify an objection by the child, there are a few cases where the TP submits letters written in the child's name expressing a wish not to return to the State of habitual residence and argues that the child's opinion written in the said letter is indeed the child's true view. However, in the light of the timing of writing the letter and the content of the letter, it has been thought difficult to accept these letters as composed voluntarily by the child without the influence of the TP or the TP's family members.

(3) a. In regard to a child's age or degree of development where it is appropriate to consider his/her opinions in the judgement, it cannot be easily judged because there are individual differences among children, but there are no cases in the Final orders where pre-school children under six years of age were regarded old enough to have their opinions considered. There are some but not many cases where children of age over six and under ten whose opinions were regarded appropriate to be considered. On the other hand, for children who are 10 years old and above, there are relatively many cases where it was regarded appropriate to consider their opinion. However, since there were different degrees of development among children of the same age, even for children who were 10 years old and above, there are cases where it was regarded not appropriate to consider the children's opinions in the judgement.

b. In regard to the child's degree of development, the content of the child's answers and attitude at the time of the interview by the family court investigating officer, the child's school reports submitted by the parties, and other materials were used as a basis for consideration in making a decision. The courts consider if the child answered the questions with understanding that he or she was asked about returning to the State of habitual residence and not about whether the child wished to live with either the LBP or the TP, and also that returning to the State of habitual residence did not necessarily mean the separation from the TP. Following elements are also considered by the courts: whether he or she could understand the intention of the family court investigating officer's questions; whether the child could appropriately grasp the surrounding facts; whether the child could express his or her own wish based on the child's own life experiences which are distinguished from the intention of the TP or the TP's family; and whether the child could specifically explain reasons why he or she does not wish to return to the State of habitual residence after comparing the merits

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[15] Although having said that, it is possible to think differently if the courts have already commenced the case and the LBP's cooperation has been secured in the State of habitual residence.[16] Kaneko, cited above note (8), Q75, p. 154

and demerits of returning to the State of habitual residence and staying in Japan based on a medium to long term view.

For example, in cases where the child refused to return to the State of habitual residence, when it could be considered that the opinion was based on fragmentary information which the child had heard from the TP or the TP's relatives, the courts tend to decide that the child has not reached the level of development where it is appropriate to take his or her opinions into the consideration. That is because the child is unable to express his or her own opinions based on his or her own life experiences which are uninfluenced from opinions of the TP and the TP's relatives. Moreover, there are cases where the child refused to return to the State of habitual residence based on a short-sighted judgement of the situation, namely living in Japan made the child's life easier to meet his or her demands in everyday life than living in the State of habitual residence because there was less intervention from the parents and that made his or her life easier in Japan. In such cases, the courts tend to decide that the child has not reached the level of development where it is appropriate to take his or her opinions into consideration because the child could not compare the merits and demerits of returning to the state of habitual residence or staying in Japan from a long-term viewpoint.

c. There are cases where the TP occasionally argued that deciding whether the child should be returned without giving a chance to him or her to be heard his or her opinion, even though the child was not considered to have reached an age or a degree of development appropriate to take his or her opinion into consideration, breaches the Convention on the Rights of Child. However, such arguments were rejected as an uncommon view that ignores the text of the Hague Convention on Child Abduction.

(4) Since the return of the child is accomplished if the TP returns to the State of habitual residence with the child, the excuse that the child wishes to continue being cared by the TP is not considered as refusal by the child of returning to the State of habitual residence. Moreover, in cases where the child only stated abstract concerns or worries about not being able to continue living with the TP as reasons to refuse returning to the State of habitual residence, the courts tend to evaluate the opinions merely as an expression of wishing to continue being cared by the TP and not as an expression of refusing to the State of habitual residence.

(5) Even if the courts could recognize the existence of the ground for refusal of return of a child under this item, in a case where the dismissal of the petition with this ground would result in separating siblings, the courts considered whether or not the child should be returned in accordance with Article 28-1 proviso of the Act.

In the Final orders, there is a case that, in the light of a child's age and previous living circumstances, a court refused the return of a child because it could be anticipated that harmful effects would be avoided by tightening the interaction between the siblings. On the other hand, there is a case where a court ordered the return of a child because it was necessary to investigate all the children and to decide about the children's custody in a uniform manner under the same proceedings of a court in the State of habitual residence.

### 6 Ground for Refusal of Return of Child in Article 28-1(vi) of the Act

(1) Article 28-1 (vi) of the Act gives a ground for refusing the return of the child to the State of habitual residence in case where it would not be permitted by the fundamental principles of Japan relating to the protection of human rights and fundamental freedom.

(2) The ground in this item is interpreted in an extremely limited way. For example, this item would be applied[16] only in those cases where the State of habitual residence uses

[16] Kaneko, cited above note (8), Q75, p. 154

a legal system which unjustly limits fundamental human rights and freedom, or the State of habitual residence is in a state of severe civil war and the legal order has broken down. Therefore, it is rare that the TP uses this item as a ground to refuse the return and in fact, there is no case where the courts found the ground under this item.

(3) The TP occasionally departs from general interpretations of this item and argued that the return of the child is against the child's best interests under the Article 9-1 of the Convention on the Rights of the Child, etc, hence there exists the ground for refusing the return of the child in this item. However, these arguments were rejected as an uncommon view.

## Section 5. In Conclusion

This paper summarized the trends in judgments regarding grounds to return or grounds to refuse the return of the child by using Final orders in the first three years after the Act was put into effect. This year is only the fourth year since the Japanese courts had begun to deal with cases of petitions for the return of children, and the courts may, in the future, make judgements in a different manner from the trend of judgement described in this paper. However, if those who are involved in the Hague cases can adequately share a common understanding on what circumstances were considered, how those circumstances were considered and what framework the court used in the past final orders, not only would the collection of useful information for court proceedings be promoted but also I believe that the possibility of foreseeing the whole proceedings of the child return will be increased. In that sense, it would be very grateful if this paper helps to manage the petitions for the return of the child more appropriately and expeditiously.

*(Note) This is a provisional translation of the Japanese original, and is provided for your convenience only without any warranty as to its accuracy.*

## Attachment

### 1 Breakdown of the Final Orders by Result

<table>
<tr><td colspan="6">Number of the Final Orders in the court of the first instance</td></tr>
<tr><td colspan="6">21 Cases / 31 persons</td></tr>
<tr><td colspan="3">Granted (return)[*1]</td><td colspan="3">Rejected（non-return）[*1]</td></tr>
<tr><td colspan="3">15 cases / 23 persons</td><td colspan="3">7 cases / 8 persons</td></tr>
<tr><td colspan="6">An immediate appeal was made and a final order was made in the period from April 1, 2014 to March 31, 2017.</td></tr>
<tr><td colspan="3">12cases / 20 persons</td><td colspan="3">6 cases / 7 persons</td></tr>
<tr><td>Appeal dismissed<br>(return)<br>8 cases / 15persons</td><td>Revocation<br>(non-return)<br>2 cases / 3 [*3]</td><td>Other[*2]<br>2 cases / 2 persons</td><td>Appeal dismissed<br>(non-return)<br>4 cases / 4 [*4]</td><td>Revocation<br>(return)<br>1 case / 2 persons[*5]</td><td>Other[*2]<br>1 cases / 1 person[*6]</td></tr>
</table>

### 2 Breakdown of the Final Orders that Resulted in a Rejection to Return by the Ground for Rejection

<table>
<tr><td colspan="5">Number of non-return Final Orders in the court of the first instance</td></tr>
<tr><td colspan="5">7 cases / 8 persons</td></tr>
<tr><td rowspan="2">State of habitual residence denied</td><td rowspan="2">Breaching rights of custody denied</td><td colspan="3">Act, Article 28-1</td></tr>
<tr><td>Article 28-1(iii)</td><td>Article 28-1(iv)</td><td>Article 28-1(v)</td></tr>
<tr><td>1 Case / 1 person</td><td>1 Case / 1 person</td><td>2 Cases / 2 persons</td><td>0 Case / 0 persons</td><td>3 Cases / 4 persons</td></tr>
<tr><td colspan="5">Number of non-return Final Orders in the court of the second instance</td></tr>
<tr><td colspan="5">6 Cases / 7 persons</td></tr>
<tr><td rowspan="2">State of habitual residence denied</td><td rowspan="2">Breaching rights of custody Denied</td><td colspan="3">Act, Article 28-1</td></tr>
<tr><td>Article 28-1(iii)</td><td>Article 28-1(iv)</td><td>Article 28-1(v)</td></tr>
<tr><td>1 Case / 1 person</td><td>1 Case / 1 person</td><td>2 Cases / 3 persons</td><td>1 Case / 1 person</td><td>1 Case / 1 person</td></tr>
</table>

### 3 (For reference) Breakdown by Results of Cases where Settlement was Reached through Conciliation in the First Instance[*7] (From April 1, 2014 to March 31, 2017)

<table>
<tr><td colspan="2">Number of Cases with Conciliation Set Up</td></tr>
<tr><td colspan="2">14 Cased / 20 persons</td></tr>
<tr><td>Return</td><td>Non-return</td></tr>
<tr><td>8 Cases / 10 persons</td><td>6 Cases / 10 persons</td></tr>
</table>

∗1 In one case, some children were ordered to return, but for the other children, the petition to return was rejected. This case is counted in both granted (return) and rejected (non-return).
∗2 “Other” included withdrawal, settlement, and a conclusion of case caused by the death of a party.
∗3 In the court of the second instance, Article 28-1 (iii) of the Act (1 case, 2 persons) and Article 28-1 (iv) of the Act (1 case, 1 person) were the grounds for refusing to order of return of a child.
∗4 In cases where the court of second instance upheld the conclusion at the first instance, there are cases where the courts of first and second instance used the same grounds (Denial of Infringement of custody rights (1 case 1 person), Article 28-1 (iii) of the Act (1 case 1 person), Article 28-1 (v) of the Act (2 cases 2 people). There is a case where in the court of the first instance, Article 28-1 (iii) of the Act was used as a ground for refusing to order of the return of a child, but in the court of the second instance, the finding that the requesting State was not recognized as the State of habitual residence was used as the ground for refusing to order the return of a child (1 case 1 person).
∗5 In the court of the first instance, Article 28-1 (v) of the Act was the ground for refusing to order the return of a child, but the court of the second instance ordered the return of a child (1 case 2 persons).
∗6 In the court of the first instance, the court refused to order the return of a child because it did not uphold the claim of the State of habitual residence, but in the court of the second instance, the final decision was made based on conditions under “Other” (1 case 1 person).
∗7 In the period between April 1, 2014 and March 31, 2017, there was a case which was resolved through settlement in the court of the second instance (The court of the first instance ordered return of a child, and in the court of the second instance, the parties agreed on the return of the child through the settlement.)