How to Fulfill it Sophisticatedly in Japan ?

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1. The Ratification of the Convention

1980.10.25 Hague Convention on the Civil Aspects of International Child Abduction was concluded.
2009.3.17 The Canada Embassy in Tokyo had a study session on the convention.
2009.5.21 The U.S. Embassy in Tokyo had the Symposium on International Parental Child Abduction.
2010.3.17-18 International Parental Child Abduction Symposium *Demystifying the Hague*: organized by the Canadian Embassy along with U.K., U.S., French, Spanish, New Zealand, Australian, and Italian Embassies in Tokyo.
2011.7.13 Housei Shingikai of Ja Gov began to make a drafting policy.
2011.9.30 -10.31 Public comments for the tentative report on the implementation by Ministry of Justice (Housei Shingikai).
2011.9.30 -10.31 Public comments for the report on the central authority of Japan by Ministry of Foreign Affairs
2012.1.19 Ministry of Foreign Affairs published the report on the central authority of Japan.
2012.1.23 Housei Shingikai prepared the report on the policy to draft the implementing law.
2012.2.27 Housei Shingikai sent the report to the minister of Ministry of Justice.
2012.3.9 The government submitted the draft of implementing act to the Diet.
2013.3.15 The government submitted the draft of implementing act to the Diet again.
2013.6.19 The implementing law, Kokusaiteki na Ko no Dashu no Minjijou no Minjijou no Sokumen ni Kansuru Jyouyaku no Jissi ni Kansuru Houritsu (国際的な子の奪取の民事上の側面に関する条約の実施に関する法律 平成二十五年六月十九日法律第四十八号) was enacted.

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* This article is the current revised version of my material on the implementation of the Hague Convention 1980 at the session, *the Promise of the 1980 Hague Child Abduction Convention in Asia* in *the International Families: Money, Children and Long Term Planning*, American Bar Association at Seattle Wash. on 20 June 2014. Revised on 2014.09.17, 2014.10.15. Typographical modifications on 2014.12.14, 2015.03.21, 2016.01.23, 2016.04.13 and 2016.04.30.

2014.1.24 Japan deposited instrument of ratification and became the 91st contracting state.
2014.4.1 The Convention entered into force for Japan. The implementing law took effect.

There was a big controversy on whether Japan should join the convention or not. Some lawyers was for the ratification but some against it. It maybe reported in U.S. that some activists fighting against domestic violence opposed Japan's becoming a signatory country.

It should be noted that Japanese family courts have never or almost never ordered on internal relocation. Until recently they seldom ordered returning a child without deciding the merits when a parent took a child to another place at the beginning of or during separation without the other's consent.[1]

2. Substantive Elements to Get a Return Order

Japanese implementing law has 153 articles(sections) and the court rule on return order proceedings has 97 articles(sections). They provide so much detailed rules. There is no mention like the sec. 11601 (b)(2) of ICARA ("The provisions of this chapter are in addition to and not in lie of the provisions of the Convention"). I would like to argue that the convention itself has same effects as (or stronger effects than) an law enacted by the Diet has as the convention is signed under the consent of the Diet and Japanese constitution requires honoring any ratified international convention.

2.1 Petition

Article 26 of the implementing act, Act for Implementation of the Convention on the Civil Aspects of International Child Abduction provides, "A person whose rights of custody with respect to a child are breached due to removal to or retention in Japan may file a petition against the person who takes care of the child with a family court to seek an order to return the child to the state of habitual residence pursuant to the provisions of this Act."

Petitioner have to clearly write cause of action and facts constituting the cause of action and also attach copies of evidences for the facts.
The advocating attorney must attach original power of attorney to the motion. A printed copy of power of attorney from a PDF file will not be accepted and it is possible Tokyo Family Court will not proceed further when a counsel submitted only a printed one.

Article 2(viii) defines the "Return of child" as "a return of a child to a Contracting State which is his/her state of habitual residence". It seems that the implementing

1 When a parent who are not taking care of the child took her/him from the other parent taking care of the child esp. between sessions of mediations etc, some courts has ordered returning the child to the other parent without detailed hearing on the merits of child's interests. The reasoning of the cases has some flavor of the convention. See Appendix B7 Your favorite cases.

law allows an taking parent to return a child whose habitual residence is in Seattle to N.Y. where the taking parent want to live a new life. I wonder how much worth it is. I would like to know what kind measure can be taken to return him/her to Seattle under federal or states law.

2.1.1 Removal or Retention

Article 2(iii) defines the "Removal" as "to have a child depart from the state where he/she holds his/her habitual residence, for the purpose of having the child leave said state" and 2(iv) the "Retention" as "a situation where, after his/her departure from the state where he/she holds his/her habitual residence, a child is prevented from traveling to said state".

According to this definition, removal happens not when the child is taken into another signatory country but when he/her is taken out Japan. If a child is taken by a flight which departs from Seattle on 31 March 2014 and arrives at Tokyo on 1 April 2014, can't it be a removal under the implementing law? The Article 1 of the convention provides, "to secure the prompt return of children wrongfully removed *to* or retained in any Contracting State". The word *to* suggests the removal is accomplished when the child is entered into a signatory country.

2.1.2 Habitual Residence

The implementing act doesn't provide a definition of habitual residence. There are some cases of lower courts which decided on the definition of the word habitual residence in the context of deciding a applicable law. [2] It doesn't seem that these cases will make precedents for rulings on the concept of habitual residence of the implementing law.

2.1.3 Under 16

Article 27 prescribes, "The court, when it finds that the petition for the return of child falls under all of the grounds listed in the following items, shall order the return of child". The article provides a list of conditions to give a return order. The first condition is "(i)The child has not attained the age of 16".

2.1.4 The Child is Located in Japan

The second condition is "(ii) The child is located in Japan".

2.1.5 Breaches of the Rights of Custody

The third requirement item (iii) is "Pursuant to the laws or regulations of the state of habitual residence, said removal or retention breaches the rights of custody with respect to the child attributed to the petitioner".

What is custody is defined in the Article 5 of the convention: "'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence".

2 *Chushaku Kokusaisihou vol. 2* at 275-293 (2011)

Japanese family law uses two very confusing terms on custody and/or parental responsibilities. They are so similar that it is very difficult to choose proper words to translate them into.

Anyway, the article 818 of the civil code admits joint *shinken*, joint custody/shared parental responsibility of parents in marital relationship. The article 819 also suggests joint *shinken* in marital relationship.

Shinken is translated into the word "parental authority" by Japanese Law Translation[3] offered by Ministry of Justice.

The article 818(3) clearly requires, "Parental authority shall be exercised jointly by married parents". The word "jointly" means to exercise the *shinken*, the parental authority under the mutual agreement or under the consent of the other parent.[4]

The article 820 provides that a person who exercises *shinken* holds the right and bears the duty to care for and educate the child. The article 821 defines that Residence of a child shall be determined by a person who exercises *shinken*. The article 824 prescribes that the right to administer the property of the child is also a content of *shinken*.

It is obvious that parents in marriage have the right jointly to determine where the child will live with mutual consent.

The article 825 answers the question whether a transaction is binding on the child when a parent dealt with others in the name of both parents who are exercising the joint *shinken* for the benefit of the child. "Where parents exercise parental authority jointly and one parent, in the name of both parents, performs a juristic act on behalf of a child, or give his/her consent for the child to perform a juristic act [ex. to sell a property]""if it is contrary to the intention of the other parent""the effect of that act" would be prevented and the contract would be void under the principle of joint *sinken* of the article 818 without the article 825. This outcome harms the purchaser[5]. So the article 825 was put into soon after the article 824 on "Administration and Representation over Property" to protect the other party and facilitate transactions. The article doesn't protect those who "has knowledge", in ohter words, not *bona fide* persons. It shows the reverse side of the article 818(3) which requires joint exercise of the *shinken*.

A mother of a child out of wedlock[6] has the *shinken* of the child unless the parents agree or a court orders that the father has the *shinken* (as for a child out of wedlock, joint *shinken* is not available.[7]).

When parents in marriage get divorced, only one of the patent will have the *shinken* of the child between them. Who will have the *shinken* is decided by an agreement or a

3 http://www.japaneselawtranslation.go.jp Italicized words in cited translations in this article are not italicized originally.

4 Taichi Kajimura *The article 818* in *Kihonhou Konmentar Sinzoku 5th ed.* Nihon Hyouronsha 2008 at 201

5 Those who has received gifts or was made a promise to gift something can be also protected by the article 825. An agreement without a consideration can be regarded as a binding *contract,* if the agreement is such kind, in Japanese civil law.

6 Colin P.A. Jones, Legitimacy-Based Discrimination and the Development of the Judicial Power in Japan as Seen through Two Supreme Court Cases, 9 (number 2) Univ. of Pen. East Asia Law Review

7 It seems violating human rights of the child.

court order. To put it another way, the other will *lose* the *shinken* which has been shared with the ex spouse. It is inevitable even if both parents hopes keeping shared *shinken*.

On the other hand, here is the notion of *Ko no Kango ni Kansuru Jikou* which is translated into the word "necessary matters regarding custody" by Japanese Law Translation. Article 766 of the civil code provides it: "If parents divorce by agreement, the matter of who will have custody over a child, visitation and other accesses of the mother or the father to the child, sharing the costs to take care the child and any other necessary matters regarding custody shall be determined by that agreement. In that case the interests of the child shall have the priority over all other considerations." Paragraph 2 and 3 of the Article provides that a court can determine such matters when parents can't make an agreement. These articles say only that parents or a court can determine necessary matters regarding custody. They don't introduce a right of parents in their words. But it is not clear whether *Kango* is derived from *Shinken* or not. The relation between *Sinken* and *Kango* is an enigma. Procedure in a family court to decide *Necessary matters regarding custody* is called *Ko no Kango ni Kansuru Shobun* in the Family Procedure Act Article 150 item 4. A person who will have custody over a child is called *kangosha*.

The article on the *necessary matters regarding custody* is provided for children of a married couple after a divorce. The Supreme Court had applied the Article 766 to a case relating to a child between a couple living apart before divorce.[8]

Soon it might become a recommendable practice to make it clear who has and/or doesn't have the right to relocate the child when a party make an agreement on *Kango* or a court does *Ko no Kango ni Kansuru Shobun*.

Word	Japanese Law Translation	Actually, probably it means
Shinken Civil Code 819 819 821	parental authority	custody / all the parental responsibilities
Ko no Kango ni Kansuru Jikou Civil Code 766. *Ko no Kango ni Kansuru Shobun* Family Procedure Act 150	custody necessary matters regarding custody	matters relating to taking care of the child

Japanese Law Translation: Civil Code §818 – 825, 766, 771, 788

Civil Code(Part IV and Part V) Law number:Act No. 89 of 1896 Amendment : Act No. 78 of 2006 Dictionary Ver : 2.0 Translation date : April 1, 2009 http://www.japaneselawtranslation.go.jp/law/detail/?re=02&dn=1&x=-179&y=-293&co=1&ia=03&yo=民法&gn=&sy=&ht=&no=&bu=&ta=&ky=民法&page=4

8 The Supreme Court on May 1, 2010 (No Heisei 12 (kyo) 5) 54-5 Minshu 1607.

（親権者）
(Person Who Has Parental Authority)
第八百十八条　成年に達しない子は、父母の親権に服する。
Article 818 (1) A child who has not attained the age of majority shall be subject to the parental authority of his/her parents.
2　子が養子であるときは、養親の親権に服する。
(2) If a child is an adopted child, he/she shall be subject to the parental authority of his/her adoptive parents.
3　親権は、父母の婚姻中は、父母が共同して行う。ただし、父母の一方が親権を行うことができないときは、他の一方が行う。
(3) Parental authority shall be exercised jointly by married parents; provided that if either parent is incapable of exercising parental authority, the other parent shall do so.

（離婚又は認知の場合の親権者）
(Person Who Has Parental Authority in the Case of Divorce or Recognition)
第八百十九条　父母が協議上の離婚をするときは、その協議で、その一方を親権者と定めなければならない。
Article 819 (1) If parents divorce by agreement, they may agree upon which parent shall have parental authority in relation to a child.
2　裁判上の離婚の場合には、裁判所は、父母の一方を親権者と定める。
(2) In the case of judicial divorce, the court shall determine which parent shall have parental authority.
3　子の出生前に父母が離婚した場合には、親権は、母が行う。ただし、子の出生後に、父母の協議で、父を親権者と定めることができる。
(3) In the case where parents divorce before the birth of a child, the mother shall exercise parental rights and duties; provided that the parties may agree that the father shall have parental authority after the child is born.
4　父が認知した子に対する親権は、父母の協議で父を親権者と定めたときに限り、父が行う。
(4) A father shall only exercise parental authority with regard to a child of his that he has affiliated if both parents agree that he shall have parental authority.
5　第一項、第三項又は前項の協議が調わないとき、又は協議をすることができないときは、家庭裁判所は、父又は母の請求によって、協議に代わる審判をすることができる。
(5) When the parents do not, or cannot, make the agreements referred to in paragraph (1), paragraph (3), and the preceding paragraph, the family court may, on the application of the father or the mother, make a ruling in lieu of agreement.
6　子の利益のため必要があると認めるときは、家庭裁判所は、子の親族の請求によって、親権者を他の一方に変更することができる。
(6) The family court may, on the application of any relative of the child, rule that the other parent shall have parental authority in relation to the child if it finds it necessary for the interests of the child.

[This article was revised in 2011. Japanese Law Translation offers a translation of the article before the revision. This is the previous article and its translation by Japanese Law Translation.]

（監護及び教育の権利義務）

(Right and Duty of Care and Education)

第八百二十条　親権を行う者は、子の監護及び教育をする権利を有し、義務を負う。

Article 820 A person who exercises parental authority holds the right, and bears the duty, to care for and educate the child.

[This is the current article and its translation by me.]

第八百二十条　親権を行う者は、子の利益のために子の監護及び教育をする権利を有し、義務を負う。

Article 820 A person who exercises parental authority holds the right, and bears the duty, to care for and educate the child for the interests of the child.

（居所の指定）

(Determination of Residence)

第八百二十一条　子は、親権を行う者が指定した場所に、その居所を定めなければならない。

Article 821 Residence of a child shall be determined by a person who exercises parental authority.

[This article was revised in 2011. Japanese Law Translation offers a translation of the article before the revision. This is the previous article and its translation by Japanese Law Translation.]

（懲戒）

(Discipline)

第八百二十二条　親権を行う者は、必要な範囲内で自らその子を懲戒し、又は家庭裁判所の許可を得て、これを懲戒場に入れることができる。

Article 822 (1) A person who exercises parental authority may discipline the child to the extent necessary, or enter the child into a disciplinary institution with the permission of the family court.

2　子を懲戒場に入れる期間は、六箇月以下の範囲内で、家庭裁判所が定める。ただし、この期間は、親権を行う者の請求によって、いつでも短縮することができる。

(2) The family court may determine that the child shall stay in a disciplinary institution for a period of no more than six months; provided that this period may be shortened at any time on the application of a person who exercises parental authority.

[This is the current article and its translation by me.]

（懲戒）

第八百二十二条　　親権を行う者は、第八百二十条の規定による監護及び教育に必要な範囲内でその子を懲戒することができる。

[Article 822 A person who exercises parental authority may discipline the child to the extent necessary to take care for and educate the child prescribed in Article 820.]

（職業の許可）
(Permission for Occupation)
第八百二十三条　子は、親権を行う者の許可を得なければ、職業を営むことができない。
Article 823 (1) A child may not have an occupation without the permission of a person who exercises parental authority.
2　親権を行う者は、第六条第二項の場合には、前項の許可を取り消し、又はこれを制限することができる。
(2) A person who exercises parental authority may revoke or limit the permission referred to in the preceding paragraph in the case referred to in paragraph (2) of Article 6.

（財産の管理及び代表）
(Administration and Representation over Property)
第八百二十四条　親権を行う者は、子の財産を管理し、かつ、その財産に関する法律行為についてその子を代表する。ただし、その子の行為を目的とする債務を生ずべき場合には、本人の同意を得なければならない。
Article 824 A person who exercises parental authority shall administer the property of the child and represent the child in any legal juristic act in respect of the child's property; provided, however, that if an obligation requiring an act of the child is to be created, the consent of the child shall be obtained.

（父母の一方が共同の名義でした行為の効力）
(Effect of Acts Done by One Parent in the Name of Both Parents)
第八百二十五条　父母が共同して親権を行う場合において、父母の一方が、共同の名義で、子に代わって法律行為をし又は子がこれをすることに同意したときは、その行為は、他の一方の意思に反したときであっても、そのためにその効力を妨げられない。ただし、相手方が悪意であったときは、この限りでない。
Article 825 Where parents exercise parental authority jointly and one parent, in the name of both parents, performs a juristic act on behalf of a child, or give his/her consent for the child to perform a juristic act, the effect of that act shall not be prevented, even if it is contrary to the intention of the other parent; provided, however, that this shall not apply if the other party has knowledge.

[This article was revised in 2011. Japanese Law Translation offers a translation of the article before the revision. This is the previous article and its translation by Japanese Law Translation.]
（離婚後の子の監護に関する事項の定め等）
(Determination of Matters regarding Custody of Child after Divorce etc.)

第七百六十六条　父母が協議上の離婚をするときは、子の監護をすべき者その他監護について必要な事項は、その協議で定める。協議が調わないとき、又は協議をすることができないときは、家庭裁判所が、これを定める。

Article 766 (1) If parents divorce by agreement, the matter of who will have custody over a child and any other necessary matters regarding custody shall be determined by that agreement. If agreement has not been made, or cannot be made, this shall be determined by the family court.

2　子の利益のため必要があると認めるときは、家庭裁判所は、子の監護をすべき者を変更し、その他監護について相当な処分を命ずることができる。

(2) If the family court finds it necessary for the child's interests, it may change who will take custody over the child and order any other proper disposition regarding custody.

3　前二項の規定によっては、監護の範囲外では、父母の権利義務に変更を生じない。

(3) The rights and duties of parents beyond the scope of custody may not be altered by the provisions of the preceding two paragraphs.

[This is the current article and its translation by me.]

（離婚後の子の監護に関する事項の定め等）

第七百六十六条　父母が協議上の離婚をするときは、子の監護をすべき者、父又は母と子との面会及びその他の交流、子の監護に要する費用の分担その他の子の監護について必要な事項は、その協議で定める。この場合においては、子の利益を最も優先して考慮しなければならない。

Article 766 (1) If parents divorce by agreement, the matter of who will have custody over a child, visitation and other accesses of the mother or the father to the child, sharing the costs to take care the child and any other necessary matters regarding custody shall be determined by that agreement. In that case the interests of the child shall have the priority over all other considerations.

2　前項の協議が調わないとき、又は協議をすることができないときは、家庭裁判所が、同項の事項を定める。

(2) If agreement referred to in the previous paragraph has not been made, or cannot be made, this shall be determined by the family court.

3　家庭裁判所は、必要があると認めるときは、前二項の規定による定めを変更し、その他子の監護について相当な処分を命ずることができる。

(3) If the family court finds it necessary for the child's interests, it may change the determination by the previous two paragraphs and order any other proper disposition regarding custody.

4　前三項の規定によっては、監護の範囲外では、父母の権利義務に変更を生じない。

(4) The rights and duties of parents beyond the scope of custody may not be altered by the provisions of the preceding three paragraphs.

（協議上の離婚の規定の準用）

(Application Mutatis Mutandis of Divorce by Agreement Provisions)

第七百七十一条　第七百六十六条から第七百六十九条までの規定は、裁判上の離婚について準用する。
Article 771 The provisions of Articles 766 to 769 inclusive shall apply mutatis mutandis to the case of judicial divorce.

（認知後の子の監護に関する事項の定め等）
(Determination of Matters with Regard to Custody of Child after Affiliation etc.)
第七百八十八条　第七百六十六条の規定は、父が認知する場合について準用する。
Article 788 In the case where a father gives affiliation, the provisions of Article 766 shall apply mutatis mutandis.

2.1.6 Contracting Sates

The forth requirement is "(iv) At the time of said removal or the commencement of said retention, the state of habitual residence was a Contracting State".

2.2 Defense

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

2.2.1 One Year and Settled

The first one is "(i) The petition for the return of child was filed after the expiration of the period of one year since the time of the removal or the commencement of the retention of the child, and the child is now settled in his/her new environment".

2.2.2 Not Actually Exercised

The second one is "(ii) The petitioner was not actually exercising the rights of custody at the time of the removal or the commencement of the retention of the child (except in the case where it could be deemed that the rights of custody would have actually been exercised by the petitioner but for said removal or retention)".

Kilpatrick Townsend *Litigating International Child Abduction Cases Under the Hague Convention* National Center for Missing & Exploited Children 2012 at 10 explains, "Courts have recognized that the petitioner establish a *prima facie* case if he or she proves three elements: … (3) the petitioner actually was exercising custody rights at the time of the removal or wrongful retention." The implementing act, however, defined it as a defense.

2.2.3 Consent and Acquiescence

The third one is "(iii) The petitioner had given prior consent or subsequently approved the removal or retention of the child".
It is possible that any written document will be taken as a strong and reliable evidence in a court in Japan.

2.3.4 Grave Risk of Harm

The most controversy defense before the ratification was this one. The forth item is "(iv) There exists a grave risk that his/her return to the state of habitual residence would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".

This defense clause doesn't allow a Judge to exercise the discretion[9]. The article 27 gives discretions to the judge except this defense. It provides, "even in cases where there exist grounds prescribed in items (i) to (iii) or item (v), the court may order the return of child if it finds that it serves the interests of the child to have him/her returned to his/her state of habitual residence after taking into account all the circumstances."

The implementing act has a guideline article how to decide the grave risk of harm. The article doesn't extend the grave risk of harm defense to the broader one than the convention provides, though some fears that too liberal construction of this article would harm the narrow interpretation of grave risk defense.

The return order of the convention decides not how the custody of the child should be but where the custody of the child will is decided. The structure of the convention is showing this core principle. It is repeatedly expressed by courts of signatory countries.

Explanatory documents prepared by Tokyo Family Court for parties suggests that they are eager to be punctual[10]. It is totally out of expectations to go through full blown hearings on the merits of custody issue. It seems sure that the central concept of the convention will be kept also in Japan when a court applies the grave risk defense.

> Article 28
> 2　裁判所は、前項第四号に掲げる事由の有無を判断するに当たっては、次に掲げる事情その他の一切の事情を考慮するものとする。
> (2) The court, when judging whether or not the grounds listed in item (iv) of the preceding paragraph exist, shall consider all circumstances such as those listed below:

9 To say more precisely, this clause doesn't give discretion to the Judge. I think that most Japanese judges don't consider that a judge has discretion which isn't based on an act and directly given by common law or unwritten law.

10 A paper "For Applicant of a Return Order by the Implementing Law of the Hague Convention" http://www.courts.go.jp/tokyo-f/vcms_lf/B-01.pdf It reads, "It is expected that basically judgment will be given in 6 weeks." The first hearing will be two weeks after the filing.

A paper "For Respondent of a Return Order by the Implementing Law of the Hague Convention" also reads the 6 weeks phrase. http://www.courts.go.jp/tokyo-f/vcms_lf/B-06.pdf

一　常居所地国において子が申立人から身体に対する暴力その他の心身に有害な影響を及ぼす言動（次号において「暴力等」という。）を受けるおそれの有無
(i) Whether or not there is a risk that the child would be subject to the words and deeds, such as physical violence, which would cause physical or psychological harm (referred to as "violence, etc." in the following item) by the petitioner, in the state of habitual residence;
二　相手方及び子が常居所地国に入国した場合に相手方が申立人から子に心理的外傷を与えることとなる暴力等を受けるおそれの有無
(ii) Whether or not there is a risk that the respondent would be subject to violence, etc. by the petitioner in such a manner as to cause psychological harm to the child, if the respondent and the child entered into the state of habitual residence;
三　申立人又は相手方が常居所地国において子を監護することが困難な事情の有無
(iii) Whether or not there are circumstances that make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence.

（審理の状況についての説明）
(Explanation concerning Status of Proceedings)
第百五十一条　子の返還申立事件の申立人又は外務大臣は、子の返還の申立てから六週間が経過したときは、当該子の返還申立事件が係属している裁判所に対し、審理の状況について説明を求めることができる。
Article 151 A petitioner of the case seeking the return of child or the Minister for Foreign Affairs, where six weeks have elapsed from the date on which a petition for the return of child is filed, may seek explanation concerning the status of the proceedings of the case from the court before which said case is pending.

2.3.5 The Child's Objections

The fifth is “(v) The child objects to being returned, in a case where it is appropriate to take account of the child's views in light of his/her age and degree of development”.

In the proceeding of return order (not limited to the defense of the child's objection), the family court is required to hear the voice of the child by “appropriate means”.

第四目　子の返還申立事件の手続における子の意思の把握等
Division 4 Understanding of Intention of Child in Proceedings of Case Seeking Return of Child, etc.
第八十八条　家庭裁判所は、子の返還申立事件の手続においては、子の陳述の聴取、家庭裁判所調査官による調査その他の適切な方法により、子の意思を把握するように努め、終局決定をするに当たり、子の年齢及び発達の程度に応じて、その意思を考慮しなければならない。
Article 88 In the proceedings of the case seeking the return of child, the family court shall endeavor to understand the intention of the child through appropriate means such as hearing of his/her statements and examination by a family

court probation officer [internal investigator, *chousakan*], and shall take into account his/her intention according to his/her age and degree of development in making a final order.

Japanese family courts have internal investigators, *chousakan*. When a judge in charge of a case thinks it necessary to examine the child's objection, they can instruct the *chousakan* of the court to research it in a limited time and make a report. The conclusion of the report can be the opinion of the *chousakan* on whether the child's objection should be considered and whether returning the child should be ordered.

Children are rarely allowed to intervene a proceeding in custody cases of the child by the court. If the child is allowed to enter into the proceeding, how to act in the proceeding is the next problem. In such a case, an attorney of the child who act in the proceeding can be appointed by the court. The number of the examples of attorneys of children is very small until now.

A guardian ad litem or an attorney of the child who only transmits or reports children's voice to the court is not provided by the implementing law.

(Intervention of Child)
Article 48 (1) A child who is sought to be returned in the case seeking the return of child may *intervene* in the proceedings of the case seeking the return of child.
(2) The court, when it finds it appropriate, by its own authority, may allow a child who is sought to be returned to intervene in the proceedings of the case seeking the return of child.
(3) An application for intervention under the provision of paragraph (1) shall be made by means of a document.
(4) The court, when it finds that it would harm the interests of the child who intends to intervene in the proceedings of the case seeking the return of child for said child to intervene in said proceedings while taking into account the age and degree of development of the child and all other circumstances, shall dismiss the application for intervention under the provision of paragraph (1) without prejudice.
(5) An immediate appeal may be filed against a judicial decision to dismiss without prejudice the application for intervention under the provision of paragraph (1).
(6) *The child* who intervenes in the proceedings of the case seeking the return of child pursuant to the provisions of paragraphs (1) and (2) (hereinafter simply referred to as an "intervening child") *may perform such procedural acts that a party to the case is able to perform* (excluding the withdrawal and change of the petition for the return of child, and the withdrawal of an appeal against a judicial decision and of an objection to disposition made by a court clerk); provided, however, that, with respect to an appeal against a judicial decision and an objection to disposition made by a court clerk, this shall apply only where the intervening

child is able to perform such procedural acts pursuant to other provisions of this Act concerning an appeal and objection.

(Principle of Capacity to Be a Party and Capacity to Perform Procedural Acts, etc.)
Article 43 (1) The provisions of Articles 28, 29, 33, 34 (1) and (2), and Article 36 (1) of the Code of Civil Procedure shall apply mutatis mutandis to the capacity to be a party, the capacity to perform procedural acts in the proceedings of the case seeking the return of child (hereinafter referred to as "procedural acts"), the statutory representation for a person without the capacity to perform procedural acts, the delegation of powers necessary for performing procedural acts, and the extinction of authority of statutory representation.
(2) A minor or an adult ward may perform procedural acts by him/herself without being required to obtain the consent of a statutory agent or without a statutory agent. The same shall apply where a person under curatorship or a person under assistance does not have the consent of the curator or supervisor of the curator, or assistant or supervisor of the assistant.

(Statutory Agent of Minor or Adult Ward)
Article 44 A person who exercises parental authority or a guardian may perform procedural acts on behalf of a minor or an adult ward.

(Appointment of Counsel by Presiding Judge, etc.)
Article 51 (1) Where a minor, an adult ward, a person under curatorship, or a person under assistance (hereinafter referred to as "minor, etc." in this Article) intends to perform procedural acts, and when the presiding judge finds it necessary, he/she may, upon petition, appoint an attorney at law as a counsel.
(2) Even where a minor, etc. does not file a petition set forth in the preceding paragraph, the presiding judge may order that an attorney at law be appointed as a counsel, or may, by his/her own authority, appoint an attorney at law as a counsel.
(3) The amount of remuneration to be paid by a minor, etc. to the attorney at law appointed as a counsel by the presiding judge pursuant to the provision of the preceding two paragraphs shall be the amount that the court finds reasonable.

2.3.6 fundamental principles

The sixth defense is "(vi) It would not be permitted by the fundamental principles of Japan relating to the protection of human rights and fundamental freedoms to return the child to the state of habitual residence. " It is the implementing clause of the Article 20 of the convention. No part to play.

2.4 Burden of Proof

2.4.1 Principle of Burden of Proof in Civil litigations

Plaintiff have to establish every facts constituting the cause of action by proof beyond ordinary man's doubt, according to the expression used in judgments of civil case by the Supreme Court.[11] The Supreme Court had used almost same[12] phrase to express the burden of proof in criminal cases[13] [14]. Scholars studying civil litigation call the burden adopted in civil litigations *high probability to convince the judge*[15]. Professor Makoto Ito, one of the leading scholars on civil litigations and bankruptcy and also a lawyer, advocates *reasonable probability* as a standard of burden of proof in civil cases, which is lower than proof beyond a reasonable doubt and surely higher than preponderance of the evidence.[16]

2.4.2 Burden of Proof in the Hague case

The same principle on proof in the civil litigations shall be applied in cases of returning order as provisions on evidence of the Code of Civil Procedure shall be applied to return proceedings.

Probably both party have to establish what each party have to establish to the high probability, by proof beyond the ordinary person's doubt.

（証拠調べ）
(Examination of Evidence)
第八十六条　子の返還申立事件の手続における証拠調べについては、民事訴訟法第二編第四章第一節から第六節までの規定（同法第百七十九条、第百八十二条、第百八十七条か

11 The Supreme Court ruled, "To prove the relation between the cause and effect in a litigation ... is to establish high probability that the matter caused the result and criteria for it is so much proof that an ordinary person can believe it so much as to have no doubt". (24 Oct 1975, 29-9 Minshu (civil reports of the Supreme Court) 1417) The Supreme Court followed this precedent in Nagasaki Atomic Bomb case (18 July 2000, 1724 Hanreijihou 29).

12 Toshio Uehara, *Soshoujou no Shoumei* (*Proof in a litigation)* in Hiroshi Takahashi, Hironari Takada and Mizuho Hata ed., *Minjisoshouhou Hanrei Hyakusen (selected one hundred cases of civil litigation)* 4th, Yuhikaku 2010,at 123.

13 5 Aug 1947, 2-9 keishu (criminal reports of the Supreme Court) 1123

14 Judge Shintarou Kato who has been appointed twice as professor of the Legal Training and Research Institute of Japan by the Supreme Court points out that "not only majority of scholars but also case law don't adopt 'preponderance of evidence' and therefore I must say explanations of these text books are wrong as explanations of present situation", citing some text books on criminal procedure written by professors of criminal procedure which explains that burden of proof in civil procedure is preponderance of evidence (Shintarou Katou *Shoumeidoron (On burden of proof)* in Jijituninteiron *(on fact finding)* , Koubundou 2014, at 43-44).

15 *Id*, at 37-40

16 Makoto Ito *Shoumei Shoumeido Oyobi Shoumei Sekinin* 254 Hougakukyousitu 33 Nov 2001. He uses the word "相当程度の蓋然性". I think that in reality of today it can happen a court, taking the nature of the case it is hearing into consideration, adopts a little bit lower criteria than that required by precedents of Supreme Court without admitting doing so.

ら第百八十九条まで及び第二百七条第二項の規定を除く。）を準用する。この場合において、同法第百八十五条第一項中「地方裁判所若しくは簡易裁判所」とあるのは「他の家庭裁判所」と、同条第二項中「地方裁判所又は簡易裁判所」とあるのは「家庭裁判所」と読み替えるものとする。

Article 86 (1) The provisions of Part II, Chapter IV, Sections 1 to 6 of the Code of Civil Procedure (excluding the provisions of Articles 179, 182, 187 to189, and Article 207 (2) of said Code) shall apply mutatis mutandis to the examination of evidence in the proceedings of the case seeking the return of child. In this case, the term "a district court or summary court" in Article 185 (1) of said Code shall be deemed to be replaced with "another family court" and the term "district court or summary court" in Article 185 (2) of said Code shall be deemed to be replaced with "family court."

2　前項において準用する民事訴訟法の規定による即時抗告は、執行停止の効力を有する。

(2) An immediate appeal under the provisions of the Code of Civil Procedure as applied mutatis mutandis pursuant to the preceding paragraph shall have the effect of stay of execution.

3. Procedural Elements of the Implementing Act

3.1 Motion

3.1.1 Counsel

(Qualification of Counsel)

Article 50 (1) Except for an agent who may perform judicial acts under the laws and regulations, no person other than *an attorney at law* may serve as a counsel; provided, however, that in a family court, with its permission, a person who is not an attorney at law may be appointed as a counsel.

3.1.2 Jurisdiction

Tokyo Family Court or Osaka Family Court.

（管轄）

(Jurisdiction)

第三十二条　子の返還申立事件（第二十六条の規定による子の返還の申立てに係る事件をいう。以下同じ。）は、次の各号に掲げる場合には、当該各号に定める家庭裁判所の管轄に属する。

Article 32 (1) In the cases listed in the following items, the case seeking the return of child (which means the case pertaining to the petition for the return of child under the provision of Article 26; the same shall apply hereinafter.) shall be subject to the jurisdiction of the respective family courts specified in each of said items:

一　子の住所地（日本国内に子の住所がないとき、又は住所が知れないときは、その居所地。次号において同じ。）が東京高等裁判所、名古屋高等裁判所、仙台高等裁判所又は札幌高等裁判所の管轄区域内にある場合　東京家庭裁判所

(i) In cases where the place of domicile of the child (when the child has no domicile in Japan or his/her domicile is unknown, his/her residence; the same shall apply in the following item) is located within the jurisdictional district of the Tokyo High Court, the Nagoya High Court, the Sendai High Court, or the Sapporo High Court: The Tokyo Family Court;

二　子の住所地が大阪高等裁判所、広島高等裁判所、福岡高等裁判所又は高松高等裁判所の管轄区域内にある場合　大阪家庭裁判所

(ii) In cases where the place of domicile of the child is located within the jurisdictional district of the Osaka High Court, the Hiroshima High Court, the Fukuoka High Court, or the Takamatsu High Court: The Osaka Family Court.

2　子の返還申立事件は、日本国内に子の住所がない場合又は住所が知れない場合であって、日本国内に子の居所がないとき又は居所が知れないときは、東京家庭裁判所の管轄に属する。

(2) A case seeking the return of child shall be subject to the jurisdiction of the Tokyo Family Court where the child has no domicile in Japan or his/her domicile is unknown, and when he/she has no residence in Japan or his/her residence is unknown.

3.1.3 Service

A copy of the petition will be send to the respondent by the family court. It will be done by courts. The applicant can't do it privately.

Article 72(1) provides, “Where a petition for the return of child is filed, the family court shall send a copy of the written petition for the return of child to the respondent except where the petition is unlawful or it is obvious that the petition is groundless.”

What will happen when Neither the Applicant nor the Central Authority can know the whereabouts of the Respondent ?

Even if you can't find the whereabouts of the respondent (with the child in Japan), the Article 72 (2) prescribes, “Sending of a copy of the written petition for the return of child under the provision of the preceding paragraph shall not be made through the method of service by publication.” The result can be summery dismissal when the court can't know whereabouts of the respondent from the Applicant nor from the Central Authority of Japan as the 72(3) prescribes, “The provisions from Article 70 (4) to (6) shall apply mutatis mutandis to the case where it is impossible to send a copy of the written petition for the return of child under the provision of paragraph (1)” citing th 70 (5) which reads, “shall dismiss the written petition for the return of child without prejudice”.

3.1.4 Prohibition of Removal and Surrender of Passports

I thank courts in other jurisdictions for seising passports effectively. I hope so in Japan too.

(Ne Exeat Order)
Article 122 (1) Where there is a risk that a party to the case seeking the return of child has the child depart from Japan, the family court before which the case seeking the return of child is pending, *upon petition by either party to the case*, may order *the other party not to have the child depart from Japan*.
(2) The family court, when it finds that *the respondent* of the case pertaining to the petition under the provision of the preceding paragraph holds the passport of which the child is the registered holder, *upon petition*, shall make a judicial decision under the provision of said paragraph *to order the surrender of said passport* to *the Minister for Foreign Affairs*.
(4) An ne exeat order shall *cease to be effective when a final order on a petition for the return of child becomes final and binding*.

(Hearing of Statement)
Article 124 An ne exeat order may *not* be made *without hearing* the statement of the respondent of the case on the ne exeat order; provided, *however*, that this shall not apply where there are circumstances under which the purpose of the petition for the ne exeat order cannot be achieved if the proceedings to hear statements are held.

(Retention of Passport by Minister for Foreign Affairs)
Article 131 (1) When the Minister for Foreign Affairs receives a passport pertaining to the judicial decision under the provision of Article 122 (2) surrendered by the person who has received said judicial decision, the Minister shall retain said passport.
(2) When a ne exeat order *ceases to be effective*, the Minister for Foreign Affairs, upon request of *the person who has surrendered the passport* pursuant to the preceding paragraph, shall return said passport *to said person*.

3.1.5 Custody

It would be honest to say that it is very difficult or totally impossible to get a order to allow the applicant to have custody of the child pending the trial.

3.2 Hearings

3.2.1 Power of Judge

Professor Colin P.A. Jones points out that strength of the power of justices can be known by the Article 73. It reads, "(2) The presiding judge may permit a person to speak or prohibit a person who does not comply with his/her direction from speaking."[17] I

17 Colin P.A. Jones, *Hague Convention on child abduction may shape Japan's family law — or vice versa*, June 11 2013 Japan Times http://www.japantimes.co.jp/community/2013/06/11/issues/hague-convention-on-child-abduction-may-shape-japans-family-law-or-vice-versa/#.U4IZCXZU76E

think that justices of Japanese courts have another kind of powers but that they can't give fine nor imprisonment against a contempt of court.

3.2.2 Conduct and Cooperation

Court examines facts and evidences and parties cooperate the court theoretically. Actually judge will ask parties to submit arguments and exhibitions and give their judgments based on them.

> Article 77 (1) The family court, by its own authority, shall conduct an examination of the facts and, upon petition or by its own authority, shall conduct an examination of evidence deemed to be necessary.
> (2) The petitioner and the respondent shall present the materials on the grounds prescribed in Article 27 (including the grounds relating to the case prescribed in Article 28 (1) (ii)) and the materials on the grounds prescribed in said paragraph, respectively and shall cooperate in the examination of the facts and the examination of evidence.

3.2.3 To hear children's voice

See 2.3.5 The Child's Objections

3.3 Mediation

3.3.1 Ordinary Family Law Cases

Mediation procedure in family courts in Japan may be slightly different from that in states of U.S. or in England. They are co-mediation (female and male citizens and a judge), legal representatives are not unusual, shuttle mediation is almost always offered, not all information is shared and the mediator may hold secrets if necessary and proper.

When parties reach an agreement, the three mediators order the court clerk to make a document. What are written on it have same effects as court orders have.

When a mediation on parental responsibilities, child support or access etc. ends without an agreement, the procedure changes from a mediation to a court proceeding (adversary proceeding, hearings but not public) without any petition. The judge who was one of the mediators can become the judge who will sit before parties and give an order, which is usual in Tokyo Family Court.

I expect that this sounds very strange to legal professions in U.S. or in England. But actually the system is working in family courts in Japan.

3.3.2 Mediation First Rule

In/before family law litigations such as divorce cases, parties have to try mediation before the trial with the few exceptions. In family law cases such as custody, parental

responsibility or access (these are not litigation matters), courts usually order parties to try mediation when a motion/filing is made without trying a mediation.

3.3.3 Return Proceeding

Parties don't have to try mediation before filing for a return order. Instead this article is provided.

> （付調停）
> (Referral to Conciliation)
> 第百四十四条　家庭裁判所及び高等裁判所は、当事者の同意を得て、いつでも、職権で、子の返還申立事件を家事調停に付することができる。
> Article 144 A family court and a high court [appealed cases], *with the consent of the parties*, by its own authority, *may refer* the case seeking the return of child to the conciliation of domestic relations at any time.

Parties will not be forced but perhaps be encouraged to solve in not a confrontational way. The next problem is whether the proceeding for the order will be stayed.

> （子の返還申立事件の手続の中止）
> (Suspension of Proceedings of Case Seeking Return of Child)
> 第百四十六条　裁判所が第百四十四条の規定により事件を家事調停に付したときは、当該裁判所は、家事調停事件が終了するまで子の返還申立事件の手続を中止することができる。
> Article 146 The court, when it refers the case to the conciliation of domestic relations pursuant to the provision of Article 144, *may* suspend the proceedings of the case seeking the return of child until the case of conciliation of domestic relations is closed.

Probably they will not suspend as quick proceeding is expected.

3.3.4 Examples & Explanations

Robert E Oliphant &Nancy Ver Steegh, *Family Law Examples & Explanations 4th* Wolters & Kluwer 2013 at 662 gives these examples:

> 2. P and D decided to divorce and were ordered by the court to attend mediation. After mediation concluded, the wife objected to the mediated agreement because during the mediation, the mediator
> (1) told the wife that she would lose in court on an issue;
> (2) threw papers on the table and announced “That’s it – I give up”;
> (3) threatened to report to the court that mediation had failed because of the wife;

I would like to give an explanations when the examples happen in Japan:

> (1) Mediators often teaches parties their prospect of the most likely ruling if the mediation failed. They often suggests a better solution. No problem.

(2) I have almost never seen such a rude mediator. They are very polite.
(3) Mediation is usually done by two mediators and a judge. Mediators report the judge what happened in the session.

3.4 Mirror Order

I hope more progress in this area.

3.5 Ameliorative Measures

It can become ordinary practice for a lawyer of respondent to try to get ameliorative measures in the mediation when a return order is probable or possible. It may be astute for a lawyer of plaintiff to offer them in the mediation and to get a voluntary return.

3.6 Order and *Stay*

Final orders shall be notified to the parties and the child. Final orders except return orders will take effect after the notice to the parties.

Return order will become enforceable only after the notice and "the expiration of the period for filing an immediate appeal".

Perhaps it seems that every return order shall be automatically stayed until the expiration of the period.

(Notice of Final Order and Effectuation, etc.)
Article 93 (1) A final order shall be notified to the parties and the child by a method that is considered to be appropriate; provided, however, that this shall not apply where it is found that a notice to the child (excluding the intervening child) would harm his/her interests, taking into consideration his/her age and degree of development and all other circumstances.
(2) A final order shall become effective when it is notified to the parties; provided, however, that the final order to order the return of child shall not become effective until it becomes final and binding.
(3) A final order shall not become final and binding until the expiration of the period for filing an immediate appeal.
(4) The process of a final order becoming final and binding shall be interrupted by the filing of an immediate appeal within the period set forth in the preceding paragraph.

3.7 Appeal

If the Respondent appeals, the Applicant can't try enforcement. After the appeal, the family court will send the files of the case to the appealed court. It takes a lot of time and days in usual family cases but I expect it will be done quickly.

When the appeal is dismissed, the return order by the family court will become final and binding unless the Respondent appeal further to the Supreme Court. The

further appeal usually can't prevent the return order from being enforced but exceptions are prescribed.

> (Judicial Decision subject to Immediate Appeal)
> Article 101 (1) A party may file an immediate appeal against a final order.
> (2) A child may file an immediate appeal against a final order to order the return of child.
> (3) An immediate appeal may not be filed independently against a judicial decision on the burden of procedural costs.
>
> (Period for Filing Immediate Appeal)
> Article 102 (1) An immediate appeal against a final order shall be filed within *an unextendable period of two weeks*; provided, however, that this shall not preclude the effect of an immediate appeal filed prior to that period.
> (2) *The period of filing an immediate appeal by a party* or an intervening child shall *commence to run at the time when he/she is notified of the final order*.
> (3) The period of filing an immediate appeal by a child (excluding an intervening child) shall commence to run at the time when a party is notified of the final order (when there are two or more dates, the latest date among them).

3.8 Costs

Lawyer's fee of each party is on that party. Fee shifting (English rule) is not taken by the implementing law of the convention as well as in other family law cases.

Court asks applicant to pay stamps for filing fees and postal costs. They are very much inexpensive. (For a return order, filing fee:1200yen and postal costs 4350yen. For a prohibition of the removal and surrender of the passports, 1000yen and 2610yen for each[18]).

4. Enforcement of a Returning Order

4.1 Enforcement

The Article 136 requires that you should request the family court to order the Respondent to pay fixed sum of money per day (or a term) to the Applicant until the return before requesting a specific enforcement.

After it failed, you can request a specific enforcement, to have the order fulfilled by persons other than the Respondent. A court execution officer (sheriff/tipstaff) will release the child, though the Article 140 (3) reads, “Necessary acts for releasing the child from the care of the obligor under the provisions of the preceding two paragraphs may be carried out only when the child is with the obligor.”

> （子の返還の強制執行）

18 http://www.courts.go.jp/tokyo-f/vcms_lf/B-02.pdf

(Compulsory Execution of Return of Child)
第百三十四条　子の返還の強制執行は、民事執行法（昭和五十四年法律第四号）第百七十一条第一項の規定により執行裁判所が第三者に子の返還を実施させる決定をする方法により行うほか、同法第百七十二条第一項に規定する方法により行う。
Article 134 (1) Compulsory execution of the return of child shall be carried out by the method in which the execution court issues an order to have a third party implement the return of child pursuant to the provision of Article 171 (1) of the Civil Execution Act (Act No. 4 of 1979) or by the method prescribed in Article 172 (2) of said Act.
2　前項の強制執行は、確定した子の返還を命ずる終局決定（確定した子の返還を命ずる終局決定と同一の効力を有するものを含む。）の正本に基づいて実施する。
(2) Compulsory execution set forth in the preceding paragraph shall be implemented on the basis of an authenticated copy of the final order to order the return of child which has become final and binding (including those having the same effect as the final order to order the return of child which has become final and binding).

（子の年齢による子の返還の強制執行の制限）
(Limitation of Compulsory Execution due to Age of Child)
第百三十五条　子が十六歳に達した場合には、民事執行法第百七十一条第一項の規定による子の返還の強制執行（同項の規定による決定に基づく子の返還の実施を含む。以下「子の返還の代替執行」という。）は、することができない。
Article 135 (1) Where the child has attained the age of 16, the compulsory execution under the provision of Article 171 (1) of the Civil Execution Act (including the implementation of the return of child based on the order under the provision of said paragraph; hereinafter referred to as the "execution by substitute of the return of child") may not be carried out.
2　民事執行法第百七十二条第一項に規定する方法による子の返還の強制執行の手続において、執行裁判所は、子が十六歳に達した日の翌日以降に子を返還しないことを理由として、同項の規定による金銭の支払を命じてはならない。
(2) The execution court, in the proceedings of the compulsory execution of the return of child by the method prescribed in Article 172 (1) of the Civil Execution Act, shall not order a payment of money under the provision of said paragraph for the reason that the child is not returned after the date following the day on which the child attains the age of 16.

（間接強制の前置）
(Preposition of Indirect Compulsory Execution)
第百三十六条　子の返還の代替執行の申立ては、民事執行法第百七十二条第一項の規定による決定が確定した日から二週間を経過した後（当該決定において定められた債務を履行すべき一定の期間の経過がこれより後である場合は、その期間を経過した後）でなければすることができない。
Article 136 A petition for the execution by substitute of the return of child may not be filed until two weeks have elapsed from the day on which the order un-

der the provision of Article 172 (1) of the Civil Execution Act became final and binding (where the elapse of a certain period to perform the obligations specified by said order comes after the elapse of said two weeks, until the elapse of said period).

（子の返還の代替執行の申立て）
(Petition for Execution by Substitute of Return of Child)
第百三十七条　子の返還の代替執行の申立ては、債務者に代わって常居所地国に子を返還する者（以下「返還実施者」という。）となるべき者を特定してしなければならない。
Article 137 A petition for the execution by substitute of the return of child shall be filed by specifying a person who is to return the child to the state of habitual residence on behalf of the obligor (hereinafter referred to as the return implementer").

（子の返還を実施させる決定）
(Order to Have Return of Child Implemented)
第百三十八条　第百三十四条第一項の決定は、債務者による子の監護を解くために必要な行為をする者として執行官を指定し、かつ、返還実施者を指定してしなければならない。
Article 138 An order set forth in Article 134 (1) shall be issued by designating a court execution officer as a person who carries out necessary acts for releasing the child from the care of the obligor and by designating the return implementer.

（子の返還の代替執行の申立ての却下）
(Dismissal of Petition for Execution by Substitute of Return of Child)
第百三十九条　執行裁判所は、第百三十七条の返還実施者となるべき者を前条の規定により返還実施者として指定することが子の利益に照らして相当でないと認めるときは、第百三十七条の申立てを却下しなければならない。
Article 139 The execution court, where it finds it inappropriate in light of the interests of the child to designate the person who is to be a return implementer set forth in Article 137 pursuant to the provision of the preceding Article, shall dismiss the petition set forth in Article 137 without prejudice.

（執行官の権限）
(Authority of Court Execution Officer)
第百四十条　執行官は、債務者による子の監護を解くために必要な行為として、債務者に対し説得を行うほか、債務者の住居その他債務者の占有する場所において、次に掲げる行為をすることができる。
Article 140 (1) A court execution officer may carry out the following acts, in addition to persuading the obligor, in the residence of the obligor or any other place possessed by the obligor, as necessary acts for releasing the child from the care of the obligor:
一　債務者の住居その他債務者の占有する場所に立ち入り、その場所において子を捜索すること。この場合において、必要があるときは、閉鎖した戸を開くため必要な処分をすること。

(i) To enter the residence of the obligor or any other place possessed by the obligor and to search for the child at such place, in which case, if it is necessary, to take a necessary disposition to open a closed door;
二　返還実施者と子を面会させ、又は返還実施者と債務者を面会させること。
(ii) To have the return implementer meet the child or to have the return implementer meet the obligor;
三　債務者の住居その他債務者の占有する場所に返還実施者を立ち入らせること。
(iii) To have the return implementer enter the residence of the obligor or any other place possessed by the obligor.
2　執行官は、前項に規定する場所以外の場所においても、子の心身に及ぼす影響、当該場所及びその周囲の状況その他の事情を考慮して相当と認めるときは、子の監護を解くために必要な行為として、債務者に対し説得を行うほか、当該場所を占有する者の同意を得て、同項各号に掲げる行為をすることができる。
(2) A court execution officer, in any place other than those prescribed in the preceding paragraph, when he/she finds it appropriate while taking into consideration the impact on the physical and psychological conditions of the child, the situation of said place and the surroundings thereof, and any other circumstances, may carry out the acts listed in each of the items of said paragraph, as necessary acts for releasing the child form the care of the obligor, with the consent of the person who possesses said place, in addition to persuading the obligor.
3　前二項の規定による子の監護を解くために必要な行為は、子が債務者と共にいる場合に限り、することができる。
(3) Necessary acts for releasing the child from the care of the obligor under the provisions of the preceding two paragraphs may be carried out only when the child is with the obligor.
4　執行官は、第一項又は第二項の規定による子の監護を解くために必要な行為をするに際し抵抗を受けるときは、その抵抗を排除するために、威力を用い、又は警察上の援助を求めることができる。
(4) A court execution officer, if he/she faces resistance when carrying out necessary acts for releasing the child from the care under the provision of paragraph (1) or (2), may use force or request police assistance in order to eliminate such resistance.
5　執行官は、前項の規定にかかわらず、子に対して威力を用いることはできない。子以外の者に対して威力を用いることが子の心身に有害な影響を及ぼすおそれがある場合においては、当該子以外の者についても、同様とする。
(5) A court execution officer, notwithstanding the provision of the preceding paragraph, shall not use force against the child. Where there is a risk that use of force against persons other than the child would cause physical or psychological harm to the child, the same shall apply to said persons.
6　執行官は、第一項又は第二項の規定による子の監護を解くために必要な行為をするに際し、返還実施者に対し、必要な指示をすることができる。
(6) A court execution officer, in carrying out necessary acts for releasing the child from the care under the provision of paragraph (1) or (2), may give necessary instructions to the return implementer.

（返還実施者の権限）

(Authority of Return Implementer)

第百四十一条　返還実施者は、常居所地国に子を返還するために、子の監護その他の必要な行為をすることができる。

Article 141 (1) A return implementer may carry out necessary acts, such as providing care for the child, in order to return the child to the state of habitual residence.

2　子の返還の代替執行の手続については、民事執行法第百七十一条第六項の規定は、適用しない。

(2) The provision of Article 171 (6) of the Civil Execution Act shall not apply to the proceedings of the execution by substitute of the return of child.

（外務大臣の協力）

(Cooperation by Minister for Foreign Affairs)

第百四十二条　外務大臣は、子の返還の代替執行に関し、立会いその他の必要な協力をすることができる。

Article 142 The Minister for Foreign Affairs may provide necessary cooperation, such as attendance, with regard to the execution by substitute of the return of child.

4.2 Passports

The seised passports will be returned not to the petitioner but to the respondent. See 3.1.4 Seising the Passports of the Children.

5. Central Authority

Article 3 of the implementing act provides that the central authority is the Minister for Foreign Affairs. Hague Convention Division of Consular Affairs Bureau of the Ministry of Foreign Affairs is in charge of central authority works.

The measures they will take to secure prompt return to a contracting state is called "Assistance in Child's Return to Foreign State" (Article 4).[19]

The minister is given a power by the Article 5 to request listed governmental and private organizations and persons to provide information about names and whereabouts of the child and persons living with the child. The names obtained can be disclosed to the applicant of the assistance. The whereabouts obtained can be disclosed to the courts handling a return order case, enforcements of a return order, an access case or enforcements of access.[20]

19 http://www.mofa.go.jp/fp/hr_ha/page22e_000276.html

20 Article 62 of the implementing act on the coping the case file of the court provides, "(4) With respect to the part describing or recording the place of domicile or residence of the respondent or the child provided by the Minister for Foreign Affairs pursuant to the provision of Article 5 (4) (limited to the part pertaining to item (ii)) (referred to as "the part that indicates address, etc." in item (i) and Article 149 (1)) within the record of the case seeking the return of child, the court, notwith-

6. Legal Aid

Japan Legal Support Center offers legal aid for Japanese nationals and resident aliens who has status to stay in Japan to raise an action or file a lawsuit. Foreigners outside Japan can't use it for other cases than Hague cases. However residents of or nationals of a contracting state can use it for Hague cases, both return order cases and access cases. Applicant have to pass means test. It is actually not support for the legal costs without an obligation to pay back but loans without interests. Clients have to make monthly payments (probably from 5,000yen to 10,000yen per month) to them.

They assess lawyers' fees according to their standard. Their standard, Minji Houritu Fujo Gyoumu Unei Sisoku Sec. 14.6 reads as following[21]:

Returning Order Case

	When a lawyer takes the case	When the case is cased
TP	on average 340,200yen max 567,000yen	on average 129,600yen from 97,200yen to 194,400yen
LBP	on average 567,000yen max 756,000yen	on average 194,400yen from 129,600yen to 259,200yen

Access Case, Negotiation and ADR Case

	When a lawyer takes the case	When the case is cased
TP	on average 238,140yen max 396,900yen	on average 97,200yen from 68,040yen to 136,080yen
LBP	on average 396,900yen max 529,200yen	on average 136,080yen from 97,200yen to 181,440yen

7. Fulfillment

7.1 Impact of the Ratification and Implementation on the Family Law

When there is so strong conflict among members of a family that it is not functioning properly, it is necessary for judiciary system to intervene in the parties to settle

standing the provision of the preceding paragraph, shall not grant the permission pertaining to the petition set forth in said paragraph; provided, however, that this shall not apply to either of the following items:

(i) Where the respondent has given consent to the inspection, etc. of the part that indicates address, etc., or reproduction thereof;

(ii) Where it is necessary to carry out the compulsory execution relating to a final order to order the return of child after said final order has become final and binding.

21 http://www.houterasu.or.jp/cont/100556210.pdf

the matter and make parties happy, especially for the best interests of the children of the family.

As diversity of families and individuals in Japan has been getting greater, the judicial role has become more important than former days. We can't expect other social systems too much to solve family disputes.

Japanese courts might be more eager to take active part in family disputes than in other disputes. Around 10 percent of divorces in Japan are done by mediations, judgments or settlements in family courts or its upper courts. Maybe less than 10 percent of commercial disputes are solved in courts.

I hope and expect that Japanese family courts will play its role more actively.

7.2 The Promise is Promising

I am sure that Japanese family courts and lawyers will honor the promise.

Appendix A: Resources

Honda Law Office: International Child abductions
http://www.hondalaw.com/childabduction/index.html
You can go from this page to the following pages.
I am going to do updates on this page.

Japanese law Translation: Act for Implementation of the Convention on the Civil Aspects of International Child Abduction(Tentative translation)
http://www.japaneselawtranslation.go.jp/law/detail/?id=2159&vm=04&re=02&new=1

Japan Federation of Bar Associations: Lawyer Referral Service for Hague Convention Cases
http://www.nichibenren.or.jp/en/legalinfo/hague.html

Ministry of Foreign Affairs of Japan: The Convention on the Civil Aspects of International Child Abduction (The Hague Convention)
http://www.mofa.go.jp/fp/hr_ha/page22e_000249.html

Japan Legal Support Center: “the Hague Abduction Convention”
http://www.houterasu.or.jp/en/hague/index.html

Courts In Japan (Supreme Court of Japan): Explanation for those who want to file a petition for return of child under Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
http://www.courts.go.jp/tokyo-f/saiban/hague/hague_english/index.html
Ibid: Tokyo Family Court: Implementing act of the Hague Convention site — Explanations for plaintiffs and respondents. Forms to submit. (In Japanese)
http://www.courts.go.jp/tokyo-f/saiban/hague/index.html

Information for Mediation regarding Agreement on the Return of Child and Parents’ Access to Child Conducted by the Dispute Resolution Center of the Tokyo Bar Association
http://www.toben.or.jp/english/committies/hague-adr.html

Tokyo Bar Association: ハーグ条約対応弁護士紹介窓口 [only in Japanese, this is different from Lawyer Referral Service of JFBA]
http://www.toben.or.jp/news/2014/04/post-187.html

Yuuko Ueki (staff of the research room on justice in House of Councillors of The National Diet of Japan), *Implementing Act of the Hague Convention* 345 Rippou to Chousa 113-124, Oct 2013 (ハーグ条約を実施するための国内法の整備― 国際的な子の奪取の民事上の側面に関する条約の実施に関する法律 ―法務委員会調査室 植木 祐子) 立法と調査 2013.10 No.345(参議院事務局企画調整室編集・発行) 113-124頁

http://www.sangiin.go.jp/japanese/annai/chousa/rippou_chousa/backnumber/2013pdf/20131001113.pdf

Ryouta Kaji (staff of the research room on foreign affairs and defense in House of Councillors of The National Diet of Japan), Discussions in the Diet on the *Ratification of the the Hague Convention* 343 Rippou to Chousa 23-36, Aug 2013
日本のハーグ条約締結をめぐる国会論議― 条約に対する基本的認識、外務省・在外公館の役割等を中心に ― 前外交防衛委員会調査室 加地 良太 立法と調査 2013.8 No.343 23-36ページ
http://www.sangiin.go.jp/japanese/annai/chousa/rippou_chousa/backnumber/2013pdf/20130801023.pdf

Appendix B: FAQ

1. Is a Japanese Bengosi barrister or solicitor ?

Bengosi can work both inside and outside of a court. He or she is a barrister and solicitor in English legal system. They are just like a lawyer in American legal system.

2. How many *Bengosi* lawyers are there in Japane ?

There are 35 094 *Bengoshi* lawyers in Japan on 1 June 2014 as repoted by Japan Federation of Bar Association[1].

3. How many Judges are working in family courts in Japan. How many cases are they handling every year.

They got 857 237 cases, finished 853 604 cases, left 110 332 unfinished cases in 2012[2]. These numbers includes relatively small (thought to be small) cases, such as changing the name of a child after divorce and waivering all the rights of an heir.

In local area most of family court judges are handling also civil cases and criminal cases.[3] The supreme court has 15 judges. There are 1 782 judges, 1 000 assistant judges and 806 summary court judges in lower courts in 2010.[4]

4. What do you think the virtues of Japanese judges are ?

They are very polite, punctual and do everything perfectly without any errors.

5. What are the characteristics of Japanese lawyers are ?

Attorney Act § 2 requires them to be highly cultivated and have a noble character.

6. Facts on domestic violence policy in japan.

The number of protective orders issued by Japanese courts in 2012 was 2482. Most governmental shelters are facilities of *Fujinsoudanjo* which shall be provided by prefecture governments to protect and rehabilitate woman who is likely to prostitute herself[5]. Private organizations of 110 (the number which governments knows) were administering shelters in 2013 [6] and Half of the prefectures were supporting the private shelters in 2011[7].

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1 http://www.nichibenren.or.jp/jfba_info/membership/about.html

2 http://www.courts.go.jp/sihotokei/nenpo/pdf/B24DKAJ01.pdf

3 I couldn't find the number of the family court judges in the report by the Supremue Court of Japan "GUIDE to the FAMILY COURT of JAPAN 2013" [the title is as is] http://www.courts.go.jp/english/vcms_lf/20130807-1.pdf

4 Overview of the Judicial System in Japan http://www.courts.go.jp/english/judicial_sys/overview_of/overview/index.html

5 Preventing Prostituting Act Article 34 (1)(2). These words are used in this act.

6 http://www.gender.go.jp/e-vaw/soudankikan/05.html

7 http://www.gender.go.jp/e-vaw/chousa/pdf/2011houkoku_2.pdf in http://www.gender.go.jp/e-vaw/chousa/2011houkoku.html

7. Your favorite cases ?

The Tokyo High Court (appellate court) on 6 Oct 2006 (No. Tokyo High Court Heisei 18 (Ra) 1337, reported by Westlaw Japan, Justice Minami, Andou and Ikuno) reversed and ordered a father who took and moved his daughter (3rd grade of a elementary school) on 8 May 2006 to return her to a mother (petition on 17 May 2006, then appelant) who had been taking care of her, ruling that when parents who had parental authority jointly were living separately and a child had been taken care of by a parent, the other who took and moved the child without a consent from Kawaguti-CIty, Saitama-Ken to Hadano-City, Kanagawa-Ken should be ordered to return the child to the caring parent who filed a petition for temporary restraining order prior to adjudication soon after the removal, unless returning would cause serious damage to the health of the child or make it unable for the child to get compulsory education or cause other intolerable problem for the child and that it is proper to decide which parent should take care of the child in the proceeding on merits after returning the child.

The Tokyo High Court (appellate court) on 18 Dec 2008 (No. Tokyo High Court Heisei 20 (Ra) 1919, reported by 61-7 Kateisaiabnsho Geppo (monthly report of family courts) 59, Justice Sonobe, Hirabayashi and Kokai) also reversed and ordered a mother who took and moved her son (3 years old) to return him to a father (appelant) who had been taking care of him, ruling that when parents who had parental authority jointly were living separately and a child had been taken care of by a parent, the other who took and moved the child without a consent should be ordered to return the child to the caring parent who filed a petition for temporary restraining order prior to adjudication soon after the removal, unless returning would cause serious damage to the health of the child or make it unable for the child to get sufficient care or cause other intolerable problem for the interest of the child and that it is proper to decide which parent should take care of the child in the proceeding on merits after returning the child.