A Study on the Petition for Revocation of the child return order on Article 117 of the Japanese Implementation Act of the Hague Child Abduction Convention – The legal nature of the Petition and practical guidelines for its application (summary)

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Article 117 of the Japanese Implementation Act of the Hague Child Abduction Convention (hereafter, JIA) admits the petition for the revocation of the final and conclusive child return order, when a later change of circumstances makes inappropriate to keep the return order valid. This revocation petition is required not by the Convention but founded as the original remedy measure of the JIA. The two Japanese Supreme Court decisions, the 2017 case and the 2020 case, also published case reviews on them are useful materials to check, how this petition practically works, what conditions are required for it, and how the legal nature and structure of this petition could be defined. For these concerns the following issues will be analyzed and examined.

1) What change of circumstances makes not appropriate to keep the child return order valid under article 117 JIA ?

In the 2017 case, the Supreme Court decided, under the fact that the father (the return order applicant) had lost the family house in US and lived with a woman in her house, satisfied one of the reasons for refusal of the child return provided in Article 28 JIA (Art,13 Convention). In this judgment, Judge Koike emphasized, in his conccurent opinion, that the ground for this decision is fundamentally based on the best interest of the child principle. as the altimate purpose of the Convention.

Here arises one question, which should work as the real criteria for determining the ground of revocation of the order ? Is it the each refusal causes of the child return provided in the statutes, as article 13 of the Convention, or the whole consideration on the best interest of child declared in the Preamble ? The answer which was sentenced in the judgment of the German Federal Cnstitutional Court is the latter, same as in the "Neulinger" judgment of the European Court of Human Rights.

Although at that time there was a strong opposite opinion critiizing the Neulinger judgment, but today the main stream of application and interpretation of the Convention

by the courts in the Civil Law countries as well as in the Common Law countries becomes to apply the child best interest as the total standard line. This change may be understood as one of the reflections of the change in the fundamental idea of the Convention, the "prompt return of the child" principle at the Convention drafting stage. This "prompt return of the child" principle has compelled to review with the fact that in most of the real cases the abductor is the mother because of the domestic violence by her husband.

The opinion of Judge Koike in the above mentioned 2017 decision seems also standing along with this stream.

2) When a child shows a clear refusal to return after the final and conclusive order, should it satisfy the requirement of the change in circumstances for the revocation petition?

In the 2020 case, the child refused to return to Russia and ran into the church for help just before the return compelling. After that the mother applied the revocation petition, and the first instance dismissed her petition because the child's refusal should not be qualified as a proper ground to revoke the return order. The court explained its reason that the child's intention should have been examined in the proceeding for the return order (in this case the return clause in the court authorized reconciliation agreement), so it should be claimed with the instant appeal against the return order, not by the revocation petition. This reasoning is exactly the same as the explanation in the guidebook, so called "Questions and Answers" edited by members of the bureaucratic office of the legislation committee.

A totally contradictory interpretation is found in a German judgment (OLG Hamburg 2014,06.25). In that case, a German father abducted his children from Canada to Germany, and their Canadian mother applied for the return order and won. But the return enforcement was stayed on the application till the final decision on the child custody by the Canadian court. After the final custody decision in Canada, the enforcement proceeding began again, but the children expressed their refusal to return to Canada, they have during the proceeding's stay period become accustomed to the German social environment and the life there. The court decided discretionally to stop the enforcement and revoked the return order because their return to Canada at that time was against the best interest of the child.

It seems clear that the German interpretation should be supported. Two fundamental misunderstandings could be pointed out on the basic premise of the Japanese interpretation and explanation. The first is the legal misunderstanding over the conclusiveness of the

return order. The explanation of the conclusiveness of the return order by the Japanese bureaucratic office stands on the analogical understanding of the judicial decision on the claim in the substantive private law. But the child return order on the Hague Child Abduction Convention is completely different from the private right in nature. There is no private right to return the child to the foreign country, but only the duty of the state, as the contracting state of the international convention, the duty of the state on the international public law. The second misunderstanding relates to determining the will of the child to refuse the return, this will of refusal is not a fact that arises at one time, but often, as the German case shows, the will of the child is growing with everyday life in the social environments.

3) In the case that the court of the requesting country has decided the abductor as the sole custodian of the child, should such a judicial decision satisfy the proper cause for revocation of the return order under Article 117 JIA?

In the 2020 case, there was one more issue, which possibly might be decided by the Supreme Court. That issue was that the Russian court, at which the divorce dispute of the parents had been pending, decided in its divorce decree the mother as the custodian of the child and admitted living in Japan with the child. This Russian decision was produced in the return order proceeding before the court of appeal by the respondent who asserted to dismiss the return order. The court of appeal denied the respondent's assertion because Article 23 JIA (Article 17 Convention) provides that "The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child" and in this case found nothing special to be taken account.

Here again the German judgment (OLG Frankfurt a.M, 26.4.2011) takes the totally different interpretation. It stated that the Convention stands on the fundamental principle of the priority jurisdiction of the requesting state on the issues relating to the custody on the merit (Article 16, 11), and this principle should be reflected in the application of Article 17 Convention. Based on this principle, the German Court of Appeal dismissed the application for the child return order by a Polish father. The case was that the Polish mother had moved to Germany with her children, but the father made the application for the return order based on the Convention, and the German first instance issued the return order. The mother appealed asserting that the Polish court had already decided to dismiss the application for the custody right by the father and admitted the mother as the sole

custodian. The Peres's Report explanation on Article 17 Convention stressed cautiousness to the foreign court decision in general, but, as mentioned above, especially the decision of the requesting state should be admitted because of the fundamental structure of the Convention. From this point, it is clear that the German interpretation should be adopted by applying Article 17 (Article 23 JIA).

From these analysis and examination, the following conclusions can be drawn.

· The Japanese court's decision or determination shown in the 2017 and 2020 cases are clearly different from the interpretation of the Convention by the courts of EU-countries and Common Law countries. As the main grounds for this difference, there could be raised two points. The first point is the change of the fundamental idea of the purpose of the Convention, from the "prompt return of the child" to the "best interest of child". This important change arose from the "Neulinger" judgment of ECHR, but this change could not be reflected on the legislation of JIA. The explanation of the practical guidebook "Questions and Answers" stands on the "prompt return fundamentalism". The opinion of Judge Koike in the above mentioned 2017 case stands along this international change.

· The second point, as above at 2) mentioned, is that the whole process of the decision and enforcement for the child return on the Convention in the JIA was designed just the same as the process for the private family matter. But the Convention is constructed very clearly as the cooperation between the contracting states to prevent international child abduction. The return of a child on the Convention, distinguished from the handover of the child in the family law, is the duty of the state on the international convention. But to decide this duty of the state, Germany ruled to apply the domestic discretional proceeding rules for family matters, and Japan legislated the special discretional proceeding rules which are almost the same as the domestic proceeding for family matters. As for the enforcement, in Germany the court proceeds discretionally on the official power, but in Japan it requires the application of the enforcement by the private person who has won the order, the same as the handover enforcement case in the private family cases. Thus, the Japanese implementation system of the Convention has been designed very near to the domestic family matters proceeding law so that there seems to happen some confusion in determining the state's duty to return the child to the country of the habitual residence on the Convention and personal matters to handover the child to the legitimate custodian.

· These circumstances and problems of the legislation of the JIA make the decision of the Japanese court on some articles of the Convention very different from the court deci-

sion by the other member states. Such differences could disturb the cooperative work of the Convention. But as seen in the cases of determining the habitual residence of the child in the Convention, the Japanese court decisions are correcting the habitual residence determination method with the information on the "Monasky" judgment of the US Supreme Court. Here it would be much sooner and smoother, if the network judge system works better also in Japan.