

# Recent Developments in the Area of International Family Law in East Asia: Focus on International Divorce and Child Abduction

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## I. Introduction

Stepping into the 21th century, East Asia countries have seen dramatic changes in the legislation of private international law. Korea, Japan and China revised their former private international law rules and enacted new acts in 2001, 2007 and 2011 respectively (hereinafter as KPIL, JPIL and CPIL respectively).<sup>1</sup> I totally agree with Prof. Suk' suggestion, that in order to archive the long term goal for the unification or harmonization of the PIL rules in the Region, more practical approach at the moment would be for the PIL experts to engage in more in depth comparative analysis of the PILAs and their actual application by the courts in the Region. Thus, in my presentation, I will discuss the possibility of harmonization in dealing with international family matters in the Region, with emphasis on international divorce and child abduction, after conducting a comparative analysis of PIL rules as well as related practices in and out of courts.

## II. A Brief Survey of the PIL rules

In this part, a brief survey of the PIL rules and some related practices on

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<sup>1</sup> Taiwan has also enacted its new Private International Law Act, "Law Concerning the Application of Law for Civil Matters Involving Foreign Element", which has become effective as of May 26, 2011. However, because of the limitation on time and knowledge, I would like to limit the scope of this paper to the PIL rules of Japan, Korea and China (mainland).

international family matters will be given. As summarized in Table 1, high similarity in PIL rules can be observed between Japanese and Korean law, while Chinese law seems to be rich in originality.

Table 1<sup>2</sup>

		Japan	Korea	China
Personal law		nationality prior to habitual residence	nationality prior to habitual residence	habitual residence prior to nationality
<i>Renvoi</i>		○	○	×
Marriage	Material Validity	distributive application: <i>lex patriae</i> of each party	distributive application: <i>lex patriae</i> of each party	-cascade connecting principle: common personal law, <i>lex loci celebrationis</i> conditionally. -Marriage Registry in China always governed by Chinese substantive law.
	Formal Validity	-alternative conflict rule: <i>lex loci celebrationis</i> or <i>lex patriae</i> of either party -Japanese Clause	-alternative conflict rule: <i>lex loci celebrationis</i> or <i>lex patriae</i> of either party -Korean Clause	-alternative conflict rule: <i>lex loci celebrationis</i> or personal law of either party. -no Chinese Clause
Divorce		-cascade connecting principle: common personal law, most closely connected law -Japanese clause.	-cascade connecting principle: common personal law, most closely connected law -Korean clause.	(divorce by agreement) -cascade connecting principle: party autonomy to personal law of either party, common personal law, the law of the place where locates the Authority -Marriage Registry in China

<sup>2</sup> Shaded texts show the major differences between the PILs.

			always governed by Chinese substantive law
			(divorce through litigation): <i>lex fori</i>
Child Custody etc. in divorce case	cascade connecting principle: child's <i>lex patriae</i> if also that of either parent, law of child's habitual residence.	cascade connecting principle: child's <i>lex patriae</i> if also that of both parents, law of child's habitual residence.	<i>lex fori</i>

1. Personal Law and *Renvoi*

There exist great differences in the connecting factor determining the personal law of natural person between JPIL and KPIL on one side and CPIL on the other. In JPIL and KPIL, as many other civil law countries, nationality remains the primary connecting factor while habitual residence is the subsidiary one. To the contrary, CPIL uses nationality and habitual residence as connecting factors on the reversed order.<sup>3</sup>

Since habitual residence serves as the primary connecting factor for personal law, the definition of habitual residence in CPIL is extremely important. In its first Judicial Interpretation on the new CPIL, the Supreme People's Court of China (hereinafter as SPC) stipulated that the place where the party has continuously resided for more than one-year period of time and as the party's central place of life can be identified as the habitual residence, unless the party stays at the place solely for the purpose of medical treatment, dispatched work or official duty<sup>4</sup>.

The requirement of one-year continuous period of time is consistent with the provisions in the previous Judicial Interpretations of SPC on the application of General

<sup>3</sup> For the history of connecting factor determining personal law in CPIL, see Qisheng HE, Changes to Habitual Residence in China's *Lex Personalis*, Yearbook of Private International Law Vol. 14 (2012-2013) pp. 323-339.

<sup>4</sup> Art. 15 of the Interpretation (1) concerning Some Issues of Application of the Act of the PRC on the Law Applicable to Foreign-Related Civil Relations. This Interpretation was promulgated on 28 December 2012 and came into force on 7 January 2013.

Principles of the Civil Law and the Civil Procedure Act.<sup>5</sup> However, the wording of “can be identified” and the usage of notion of “central place of life” can be reasonably understood as that the SPC reserved certain flexibility to the determination of habitual residence.<sup>6</sup>

As regards to *renvoi*, CPIL for the first time in Chinese legislation clearly and completely denied *renvoi*.<sup>7</sup> On the contrary, JPIC accepts *renvoi* in certain situations such as marriage and succession.<sup>8</sup> KPIL accepts *renvoi* in an even wide way.<sup>9</sup>

Therefore, there exists difference between JPIL and KPIL on one side, and CPIL on the other as regard to the admission of *renvoi*. This difference is welcomed however, since it may lead to the harmony of decisions between the principle of nationality of JPIL/KPIL and the principle of habitual residence of CPIL as the primary connecting factor determining personal law.<sup>10</sup>

## 2. Marriage

Both JPIL and KPIL establish the so-called distributive application to the material validity of marriage: each of the parties shall comply with the requirements laid down by his and her own *lex patriae*.<sup>11</sup> As to the formal validity of marriage, the PILs of both countries provide that a marriage is valid regarding its form when it complies with the formal requirements under either *lex loci celebrationis* or *lex patriae* of either party.<sup>12</sup> It shall be noted that the above alternative conflict rules of Japan and Korea are subject to an exception that are usually called “Japanese Clause” / “Korean Clause”: when one

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<sup>5</sup> Art. 9 of the Opinions on the Application of the General Principles of the Civil Law of the PRC and Art. 5 of the Opinions on the Application of the Civil Procedure Act of the PRC.

<sup>6</sup> For more discussions on the determination of habitual residence under CPIL, see, HUANG Renting, A Study on the New Chinese Private International Law Act (written in Japanese), Tezukayama Law Review No.22 (2011) pp. 82-83.

<sup>7</sup> Art. 9 of CPIL.

<sup>8</sup> Art. 41 of JPIL.

<sup>9</sup> Art. 9 of KPIL.

<sup>10</sup> See, Jun Yokoyama, *Renvoi in Japanese Private International Law*, in K.Boele-Woelki, T. Einhorn, D. Girsberger & S. Symeonides (Eds.), *Convergence and Divergence in Private International Law - Liber Amicorum Kurt Siehr* (Boom Eleven International, 2010) pp 117-118.

<sup>11</sup> Art. 24 (1) of JPIL and Art. 36 (1) of KPIL.

<sup>12</sup> Art. 24 (2) and (3) of JPIL and Art. 36 (2) of KPIL.

of the parties is a Japanese/Korean national, and the marriage is celebrated in Japan /Korea, the marriage is valid regarding its form only when it complies with the formal requirements under Japanese/Korean substantive law rules.<sup>13</sup> The purpose of this exception is to ensure that every change of status of Japanese/Korean nationals is registered in the family registry.

As regards to the material validity of marriage, CPIL introduces a relatively complicated choice-of-law rule. The material validity is admitted if the marriage complies with the law of the common habitual residence of both parties; in the absence of such a law, the common *lex patriae*, and absent such a law, then *lex loci celebrationis* provided that the marriage is celebrated in the place where either party has his/her habitual residence or nationality.<sup>14</sup> It is worth noting that either the material or the formal validity of a marriage registered in the Marriage Registry of China is always governed by the substantive law rules of China.<sup>15</sup> The complicated choice-of-law rule introduced above applies only when an issue on the material validity of a marriage celebrated abroad or a marriage celebrated in China by a form other than the Chinese marriage registry has been raised before a Chinese court.<sup>16</sup>

As to the formal validity, CPIL establishes an alternative conflict rule which includes *lex loci celebrationis*, the law of habitual residence and *lex patriae* of either party.<sup>17</sup> Unlike JPIL and KPIL, a Chinese Clause is unknown to CPIL, which means a marriage celebrated in China between a Chinese national and a foreigner by a foreign form can be formally valid. The system of Marriage Registry does not cause any obstacle to the form of international marriage under CPIL.

### 3. Divorce

#### (a) Applicable Law

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<sup>13</sup> Art. 24 (3) of JPIL and Art. 36 (2) of KPIL.

<sup>14</sup> Art. 21 of CPIL.

<sup>15</sup> *See*, the Supreme People's Court of China, 4th Civil Bench (Eds.), *Understanding and Application of the Act of the PRC on the Law Applicable to Foreign-Related Civil Relations* (published in Chinese), (China Legal Publishing House), p 160.

<sup>16</sup> For more details, *See*, HUANG Renting, *A Note on the International Family Law of China* (written in Japanese), *Tezukayama Law Review* No. 24 (forthcoming).

<sup>17</sup> Art. 22 of CPIL.

JPIL and KPIL have similar choice-of-law rule in determining the law applicable to divorce.<sup>18</sup> Both article 27 of JPIL and Article 39 of KPIL adopted the so-called "cascade connecting principle" as well as Japanese/Korean Clause. The former provides that divorce is governed first by the common *lex patriae* of the spouses, absent such a law, the law of the common habitual residence of the spouses, and in absence of such a law, then the law of the place with which the spouses are most closely connected. The latter, which is more important in practices, subjects a divorce to Japanese/Korean law when one of the spouse is Japanese/Korean national and has his/her habitual residence in Japan/Korea.

CPIL is differential in this regard again. It is differential in that divorce by agreement and divorce through litigation are given different choice-of-law rules. For divorce through litigation, the *lex fori* rule is retained.<sup>19</sup> While for divorce by agreement, a unique cascade connecting principle is employed.<sup>20</sup> It allows the spouses to choose the law applicable to their divorce while the range of laws that the spouses have a right to choose is restricted to the personal law of either party. Failing such a choice, the common personal law of the spouses, if any, shall be applicable. In absence of such a common personal law, the law of the place where the authority that deals with the divorce matters locates shall be applicable. This rule seems to be quite flexible and favor the validity of a divorce by agreement in the surface. It should be noted however, that the above rule does not apply to a divorce by agreement using the Marriage Registry system of China, which shall always be governed by the substantive law rules of China.<sup>21</sup> Rather, the above rule is favorable for a divorce by agreement made outside the Chinese Marriage Registry system to be recognized as valid in China.

(b) Child Custody etc.

In JPIL and KPIL, the question as to whom parental responsibility, rights of custody and rights of access is attributed after the divorce is not governed by the law

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<sup>18</sup> Art. 27 of JPIL. Art. 37 of KPIL.

<sup>19</sup> Art. 27 of CPIL.

<sup>20</sup> Art. 26 of CPIL.

<sup>21</sup> See, HUANG *supra* note 15, p 162.

applicable to divorce. It is characterized as an issue that shall be governed by the law applicable to the parent and child relationship. Both PILs designates the applicable law in the form of cascade and apply *lex patriae* of the child in the first place. The rules are slightly different in that under JPIL, the child's *lex patriae* shall apply if it is also the *lex patriae* of either of his/her parents,<sup>22</sup> while under KPIL. it shall apply if it is also the *lex patriae* of both of his/her parents.<sup>23</sup> In absence of such a law, both JPIL and KIPL designate the law of the child's habitual residence.

In CPIL, it is not quite clear which choice-of-law rule shall apply to the issues of child custody etc arise in a divorce case. One may argue Article 30 of CPIL on the guardianship shall apply. This article adopts the more favorable rule, provides that guardianship is governed by the law of the habitual residence or *lex patriae* of any party, which better protects the rights and interests of the person under custody. However it is doubtful whether Chinese courts are capable and ready to evaluate different laws so as to choose the more favorable one to the person under custody. On the other hand, although Article 27 of CPIL on divorce through litigation does not give the scope of *lex causae*, it has been the court practice since the era of old PIL rules to deem the issue of Child Custody etc arise in the litigation of divorce as an issue of the effect of divorce which shall be governed by *lex fori*.<sup>24</sup> Obviously *lex fori* is easy for the court to apply and it is difficult to expect dramatic changes in court practice.

In short, as illustrated in Table 1, CPIL is quite distinct from JPIL and KPIL in regards to family matters, while JPIL and KPIL are similar to each other. It is my thought that unification or harmonization of PIL rules on family matters in the Region is hardly probable. However, this does not necessarily mean harmonization of any kind is unachievable. Some examinations will be given next to show whether these differences in PILs have caused difficulties for recognizing the validity of marriage and divorce mutually.

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<sup>22</sup> Art. 32 of JPIL.

<sup>23</sup> Art. 45 of KPIL.

<sup>24</sup> See, HUANG *supra* note 15, p 204.

### III. Recognition of the Validity of Marriage and Divorce by Agreement

#### 1. Recognition of the Validity of Marriage

PILs of the Region share the same approach on the recognition of the validity of marriage celebrated abroad: a marriage, no matter celebrated at home or abroad, is valid if it fulfills the conditions set forth by the *lex causae* that designated by the PIL rules.

Since all of the three PILs adopt the alternative conflict rule which favors the formal validity of marriage, a marriage celebrated in Country A can be easily recognized as valid in form.

As for the material validity, the choice-of-law rules of JPIL and KPIL are almost the same, which leads to same *lex causae*. Therefore, one could say a marriage validly celebrated in Japan shall be recognized as valid in Korea, and vice versa.

The situation is slightly complicated between China-Japan and China-Korea. Table 2 shows how a typical international marriage celebrated in Japan/China involving Chinese/Japanese nationals shall be recognized in the opposite country. As to the situation between China-Korea, it is reasonable to suppose it the same as that between China-Japan.

Table 2

	A marriage registered in Japan between Japanese-Chinese or Chinese-Chinese		A marriage registered in China between Japanese-Chinese <sup>25</sup>
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<sup>25</sup> It is not easy for two Japanese nationals to celebrate their marriage through Marriage Registry of China and practically they are suppose to register their marriage either in Japan or before the Japanese consular in China. For details in this regard, see, HUANG Renting, *The Practice of International Family Law in China with Relation to Japan* (written in Japanese), *Japanese Yearbook of Private International Law* No. 9 (2007), pp163-164.

<p><i>Lex causae</i> under JPIL</p> <p>-For the Japanese party, <u>Japanese law</u> (<i>lex patriae</i>)</p> <p>-For the Chinese party who habitual resides in Japan, Japanese law (<i>Renvoi</i>)</p>	<p><i>Lex causae</i> under CPIL</p> <p><u>Chinese law</u> (Marriage Registry always governed by Chinese law)</p>
<p><i>Lex causae</i> under CPIL for recognition</p> <p><u>Japanese law</u> (common habitual residence) ⇒Valid in China</p>	<p><i>Lex causae</i> under JPIL for recognition</p> <p>-For the Chinese party, <u>Chinese law</u> (<i>lex patriae</i>)</p> <p>-For the Japanese party, <u>Japanese law</u></p> <p>⇒Valid in Japan since requirements under Chinese law are stricter than those of Japanese law<sup>26</sup></p>

## 2. Recognition of the Validity of Divorce by Agreement

Since divorce by agreement is permitted under the substantive law rules of Japan, Korea and China, basically the applicable law issue shall not arise as long as the spouses reached their mutual consent to divorce.

However, special attention needs to be paid to divorce by agreement between Korean nationals living in Japan. While it is the requirement of the substantive law rules of Korea that the consent of the spouses needs to be confirmed before a family court, KPIL deems it a substantive requirement rather than a formal one. Therefore, if two Korean nationals registered their divorce at the family registry in Japan, that divorce will not be recognized as valid in Korea since it does not fulfill the substantive requirements set forth by *lex causae*, i.e. Korean law as the common *lex patriae* of the spouses. In order to ensure the divorce by agreement be valid both in Korea and in Japan, the Korean spouses who live in Japan need to have their consent of divorce be confirmed by a Korean consular in Japan as the substitute for the Korean family court.<sup>27</sup>

<sup>26</sup> For instance, Chinese substantive law rules are stricter than that of Japan in marriageable age and consanguineous marriage. Marriage Law of China, Art. 6 and 7, Civil Code of Japan, Art. 731 and 734.

<sup>27</sup> 韓国大法院戸籍例規 668 号、韓国戸籍法施行規則 88 条 1 項、および平成 16 年 9 月 8 日

In addition, these practices may not be observed in China since the Korean spouses living in China usually cannot register their divorce at the Marriage Registry of China. This is because only those who registered their marriage at the Marriage Registry of China can register their divorce at the same.<sup>28</sup>

So far I have examined the mutual recognition of marriage and divorce by agreement in the Region. Except for the practices on the divorce between Korean spouses who live in Japan, one could say that despite the differences in PIL rules that I have introduced in Part I, the mutual recognition of marriage and divorce by agreement involving nationals of these three countries has been achieved. Next I will turn to issues on divorce through litigation and child abduction.

#### IV. Recognition of Divorce Judgment

##### 1. Conditions of Recognition

The conditions of recognition for foreign divorce judgment are similar in the surface. Every of the three countries recognizes foreign divorce judgment under the following five conditions: (1) final judgment, (2) grounds for jurisdiction, (3) service of process, (4) public order and (5) reciprocity.<sup>29</sup> The content and construction of each condition might differ with each country however, which leads to opposite outcomes. This is particularly true in relation to jurisdiction matters and reciprocity.

##### 2. Jurisdiction over divorce

Jurisdictional requirement for recognition of foreign judgment, which is called

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付け日本法務省民事局民事第一課補佐官事務連絡参照。

<sup>28</sup> Art. 12 of the Marriage Registry Regulations of China.

<sup>29</sup> Art. 118 and Art. 217 of the Code of Civil Procedure of Japan and Korea respectively. For China, Art. 282 of the Civil Procedure Act and two SPC' judicial interpretations. The first interpretation is the SPC's Regulations on Procedural Issues Concerning the Application by a Chinese Citizen on Recognition of Foreign Divorce Judgment, which was promulgated on 5 July 1991. The second one is the SPC's Regulations on Some Issues Concerning the Acceptance by the People's Courts of Applications for Recognition of Foreign Divorce Judgment, which was promulgated on 1 March 2000.

"indirect jurisdiction", is closely related to the issue of international jurisdiction. Japanese and Korean law are said to have adopted the so-called 'mirror-image' rule which tests the jurisdictional ground of domestic courts and foreign courts with the same criteria.

Table 3 shows the jurisdictional grounds over divorce cases in the three countries.

Table 3

Japan	Korea	China
defendant's domicile	defendant's domicile	defendant's domicile
-Defendant was missing, or plaintiff was deserted by the defendant: plaintiff's domicile	-Defendant was missing, or plaintiff was deserted by the defendant: plaintiff's domicile	-Chinese plaintiff v. foreign defendant: plaintiff's domicile
		-Chinese spouses permanently settled abroad (華僑) : emergency jurisdiction
		-Chinese spouses living but not permanently settled abroad: jurisdiction based on nationality

It can be seen from the above table that every country has adopted the principle of '*actor sequitur forum rei*'. As to the exceptions to the above principle, situations differ with each country.

(a) China

The grounds of jurisdiction over divorce cases in Chinese law are most specific and extensive among these three countries. Article 23 of the Civil Procedure Act of China provides a jurisdictional ground based on plaintiff's domicile regarding litigation on personal status against a person who has no domicile in China. It has been observed however, that Chinese courts are hesitate to apply this rule to a divorce litigation

between foreign spouses.<sup>30</sup>

Other jurisdictional rules can be found in the SPC's interpretation, the SPC's Opinions on the Application of the Civil Procedure Act. Article 13 and 14 of the Opinion stipulate that the divorce litigation between Chinese spouses permanently settled abroad shall be heard in a Chinese court if the foreign court denies jurisdiction on grounds that the such a litigation shall be heard in the court of the place where the marriage was celebrated or where the parties have their nationality. These rules can be understood as setting forth the emergency jurisdiction based on nationality.

Article 15 and 16 provide that the divorce litigation between Chinese spouses who have not both permanently settled abroad shall be heard in the Chinese court of the place where either party has or had his/her domicile. These rules can be understood as setting forth jurisdiction based on nationality.

(b) Japan

In 1964, the Grand Bench of Supreme Court in a divorce case between foreign spouses held that as actor sequitur be the principle, under certain circumstances such as the plaintiff was deserted by the defendant or the defendant was missing, Japanese courts should be allowed to have jurisdiction based on the plaintiff's domicile since the strict adherence to the principle might bring intolerable consequences for the plaintiff.<sup>31</sup>

This exceptional rule to the principle has been followed by inferior courts for a long period until 1996 when the 2nd Panel of the Supreme Court had another opportunity to rule on the jurisdictional issue over divorce. In a judgment favoring the jurisdiction of Japanese court, Supreme Court held that the principle of actor sequitur would not prevent the court from taking account of the legal and factual obstacles that the principle might cause to the plaintiff.<sup>32</sup>

Although both favoring the jurisdiction of Japan, the reasoning in the 1996 case is different from the 1964 one, and the Supreme Court itself distinguished the latter case

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<sup>30</sup> See, HUANG *supra* note 25, pp175-178.

<sup>31</sup> Supreme Court, Grand Bench Judgment of 25 March 1964, *minshu* Vol. 18, No. 3, p 486.

<sup>32</sup> Supreme Court, 2nd Panel Judgment of 24 June 1996, *minshu* Vol. 50, No. 7, p 1451.

from the former one in its judgment. However, the Court did not point out what were the distinguishing material facts in the two cases, which makes it controversial on the relation of these two cases. At any rate, one cannot say the 1964 Grand Bench's judgment has been abandoned by the 1996 2nd Panel's judgment. It is appropriated to consider the 1964 judgment remains the leading case on the issue of divorce jurisdiction.

(c) Korea

The court practices are said to be similar to the 1964 judgment of Japan, especially in case between foreign spouses. On the other hand, there are observations that courts exercised jurisdiction under some relatively flexible grounds in divorce cases in which at least one party is Korean. For instance, in cases between Korean plaintiff who lives in Korea and foreign defendant who lives abroad, inferior courts trend to exercise jurisdiction if there is neither property claims nor child custody issues and the purpose of the action is solely the dissolution of marriage.<sup>33</sup>

(d) Summary

It seems that in the laws of every country in the Region exist certain exceptions to the principle of *actor sequitur forum rei*. The Chinese law goes furthest among the three countries so as that a Chinese plaintiff, who might not even have domicile in China at the time of the action, can easily seek for divorce in a Chinese court against a defendant who lives abroad. This kind of jurisdiction based on nationality is unlikely to win support in Japan for the time being.<sup>34</sup>

Sharing a 'white list' of jurisdictional grounds upon which a divorce judgment can be recognized is preferable for the sake of the parties. However, there remains ambiguity on the jurisdictional rules over divorce in Japan and Korea. It is my opinion that a goal of making such a list or something like might be possibly achieved only after

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<sup>33</sup> 「人事訴訟事件等についての国際裁判管轄に関する外国法制等の調査研究報告書」(商事法務 HP) 285-286 頁(金汶淑) 参照。

<sup>34</sup> 「人事訴訟事件等についての国際裁判管轄法制研究会」研究会資料 2 (商事法務 HP) 3 頁参照。

Japan and Korea have made their own rules clear enough.

### 3. Reciprocity

Another problem needs to be resolved is reciprocity. This problem mainly occurs between China on one hand, and Japan/Korea on the other.

Under the Chinese law, reciprocity is not required for recognition of foreign divorce judgment on its part of dissolution of marriage.<sup>35</sup> Thus, reciprocity issues do not arise in this part against Japan and Korea.

For the recognition of the other parts in a divorce judgment, e.g., division of property and child custody, reciprocity is required.<sup>36</sup> Furthermore, the reciprocity requirement under Chinese law is stricter than that in Japan and Korea law. It is so hard to be satisfied that has actually blocked Japanese judgments from being recognized in China.

In a Japanese Supreme Court judgment, the reciprocity is regarded as existent between Japan and a foreign country when that country is ready to recognize Japanese equivalent judgment under the conditions not different from those in Japanese law in important points.<sup>37</sup> Similar Supreme Court judgment exists in Korea either.<sup>38</sup> Unlike the liberal approach taken in the neighborhood, reciprocity in Chinese law is construed as "factual reciprocity" which must be endorsed by treaty or precedents. There is a Chinese judgment refused to recognize a Japanese money judgment on the ground, among others, that there was no reciprocity between China and Japan.<sup>39</sup> The approach taken by the Chinese inferior court was confirmed as correct by the SPC. In response, on one occasion a Japanese court refused the recognition of a Chinese Judgment on the same ground.<sup>40</sup>

Obviously, this is a problem that shall be resolved on the Chinese side. Most

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<sup>35</sup> Art. 12 and 13 of the SPC' interpretation in 1991, *supra* note 29.

<sup>36</sup> Article 282 of the Civil Procedure Act of China.

<sup>37</sup> Supreme Court Judgment of 7 June 1983, *minshu* Vol. 37, No. 5, p 611.

<sup>38</sup> Supreme Court Judgment of 25 June 2009. (韓国大法院 2009年6月25日宣告 2009タ22952 判決)

<sup>39</sup> Dalian Intermediate people's Court Decision of 5 November 1994.

<sup>40</sup> Osaka High Court Judgment of 9 April 2003.

desirable is for the Chinese law to take a more liberal approach on the construction of reciprocity. In present, the Chinese courts are well aware that Chinese judgments are not easily recognized abroad and as a result courts intentionally avoid delivering divorce judgments that are in need of recognition in a foreign country. For instance, when granting judgment on maintenance, Chinese courts prefer a lump-sum payment against payment by installments.<sup>41</sup> It might motivate the Chinese courts to abandon their strict construction on the reciprocity if they realize that they will have to render judgment that needs to be enforced abroad so as to protect the best interest of the parties.

## V. Child Custody in Divorce Case and Child Abduction

Korea has become a contracting member of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter as the Convention). It is believed that Japan will become a member in the near future. Practices in accordance with the Convention can be expected in the two countries. Next I will introduce the practices in Chinese courts concerning the issues of child custody in a divorce case and child abduction. These practices are not limited to international cases, and are mainly based on my interview to judges and lawyer in China. They includes a judge from a basic level people's court in Shanghai, who is in charge of the first instance of divorce cases, a judge from an intermediate people's court in Shanghai, who is in charge of the appealed divorce cases as well as petitions for recognition of foreign divorce judgments, and a lawyer in family law who practiced in Beijing and Shanghai. After doing so, I will evaluate the meaning of the Convention on China.

### 1. Practices on Child Custody in a Divorce Case in China<sup>42</sup>

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<sup>41</sup> *See*, HUANG *supra* note 25, p183.

<sup>42</sup> In a domestic divorce case, the court will generally determine the supporting parent with whom the minor shall live, and the maintenance due from the other parent (Art. 37 of the Marriage Act). Both parents have the custody of the minor even after divorce (Art. 16 of the General Principles of the Civil Law, Art. 36 of the Marriage Act).

(a) Jurisdiction

As considered to be an issue of the effect of the divorce, child custody is subsidiary to the jurisdiction over the divorce. The location of the minor is irrelevant in terms of the jurisdiction issue.

(b) Conciliation by the Judge

As in Japan and Korea, conciliation proceedings are obliged in a personal status litigation, such as divorce, before moving to the adjudication proceedings action. This is called the "conciliation first principle". Besides, parties are free to re-open the conciliation and reach their consents throughout the whole proceedings of the action.

The conciliation proceedings are usually conducted by the Single Judge or, in case of Panel, the Judge in charge of the case. For those complicated cases, the conciliation might be conducted by the Chief Judge or even by the Panel when it is considered appropriate.

In conducting the proceedings of the conciliation, judges might take different approaches to different cases. In some cases, the judge might consider it appropriate to guide and facilitate the discussion between the parties helping them to work out voluntary settlement, while in the others, the judge might find it necessary to get the real intention out of each party so as to propose potential solutions. In the latter case, the behavior of the party will not be deemed as an evidence or confession anyhow in the adjudication proceedings afterwards.

Although it is said that the SPC recommends the judge to conduct the conciliation proceedings with the presence of every party instead of discussing with the parties separately, there are needs in practices since the judge might find it helpful and necessary to talk with the parties separately in order to encourage him/her to speak out.

The judge will talk with the minor exclusively when in need of confirming his/her intention in determination of the parent with whom the minor shall live. The judge does not necessarily have the talk in the building of the court; sometimes the judge might try to find a place more comfortable or relaxable for the minor, typically somewhere at the

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school. An experienced judge will not only simply ask the straight question that with whom the minor is willing to live, but also ask various questions on the daily life of the minor so as to read his/her thought through the dialogue.

So far I have presented the result of my interview on the practices of conciliation in a divorce case in Shanghai and Beijing. It seems to me that conciliations in China is rather similar to mediation in western countries than conciliation in Japan.

(c) Substantive law

As discussed at II.3.(b), the issues of child custody etc. are considered as the effect of divorce which shall be governed by *lex fori*, i.e. Chinese substantive law.

- Supporter of the minor<sup>43</sup>

According to article 36 of the Marriage Law, a breast-fed infant shall live with the mother after divorce in principle, and the supporter of a weaned child shall be determined in light of the rights and interests of the child as well as the actual conditions of both parents. In court practices, the supporter of the minor after divorce is determined under the following rules:

- if the minor is 2 years old or younger, the supporter shall be the mother,
- if the minor is 10 years old or older, the intention of the minor shall be respected,
- if the minor is 2~10 years old, the supporter shall be determined under a synthetic judgment in light of (1)maintenance of the status quo, (2)comparison of the ability of support including income, health, closeness of the minor with family members of each parent, the parent's interest of living with a child.<sup>44</sup> The factor of parent's interest of living with a child means consideration on the fertility of either parent and the existence of any other child. This factor normally favors the mother because of the physiological reason.

On the other hand, the nationality of the parent and the thought of avoiding

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<sup>43</sup> See, *supra* note 42.

<sup>44</sup> Article 1~4 of the SPC's Opinions of 3 November 1993 Concerning Issues of the Support of Child in Divorce Cases.

separation of brothers seem to have little impact on the judgment. It is said that there is no preference given to parents who have a Chinese nationality.

- Access to the Child

According to article 38 of the Marriage Law, the parent other than the supporter has the right of access to the child, and it is the obligation of the supporter to cooperate. In practices, visits are arranged normally twice per month, and 12 to 24 hours each time.

(d) Enforcement

Enforcement remains the major unsolved problem. In practices, courts rely heavily on the voluntary performance of the parties regarding a judgment on child custody and access to the child. Although there are measures of indirect compulsory execution such as fine and detention,<sup>45</sup> courts rarely resort to these measures. Conciliation is more preferred in order to have a peaceful settlement.

However, since the compulsory execution measures do not function effectively, when foreseeing difficulties in enforcement judges trend to give priority to the maintenance of status quo and avoid delivering judgment that needs enforcement.

(e) Is the Convention Acceptable to China?

Should China be a contracting country of the Convention, a brand new cooperation on international family matters shall be born within this Region. The problem is then, whether the Convention is acceptable to China.

If the practices of conciliation discussed above represents a standard approach that a Chinese judge takes, it is fair to say conciliation in China is neutral and reliable. Also, the practices under the substantive law rules on the determination of supporter is not discriminatory to foreign parents. These are the aspects that compatible with the Convention.

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<sup>45</sup> Art. 115 of the Civil Procedure Act prescribes fine up to 100,000 RMB and detention up to 15 days.

On the other hand, the Chinese law is sustaining problems of enforcement, which might cause China to hesitate in joining in the Convention. But if we change our way of thinking, the accession to the Convention could be regarded as an opportunity for China to promote efficiency and reliability of the enforcement measures, no matter whether the case is within the scope of the Convention or not.

In any event, the accession of countries in the Region to the Convention shall give China a great opportunity of evaluating the appropriateness of its accession. Attentions need to be paid to the future operation under the Convention in Korea and Japan.

## VI. Final Remarks

Sharing common PIL rules might not necessarily be the only option to achieve harmonization. Taking into account of the differences between CPIL and JPIL or KPIL in family matters, it seems to be more practical to promote mutual recognition of foreign divorce judgment and provide steady resolutions to child abduction first. In this paper I have given a preliminary examination and suggested what has been done and what needs to be done for each country. There are also other important issues such as collection of evidences abroad on matrimony property for the purpose of division in a divorce case, recognition and enforcement of foreign maintenance judgments. I would be glad to undertake such a research task as my next step.