

IAFL Symposium Tokyo May 29 Session 4

Enforcement of Japanese Divorce, Custody and Child Support Orders—from Japanese law  
perspective

Makiko Mizuuchi

I Applicable law for divorce and child custody

1 Divorce

Article 27 of the Japanese Law “Act on General Rules for Application of Laws” governs the application of divorce.

Article 27 stipulates that “*Article 25 shall apply mutatis mutandis to divorce; provided, however, that if either husband or wife is a Japanese national who has habitual residence in Japan, their divorce shall be governed by Japanese law.*”

Article 25 of the above Act governs the application of marriage.

Article 25 stipulates that “*The effect of a marriage shall be governed by the national law of the husband and wife if their national law is the same, or where that is not the case, by the law of the habitual residence of the husband and wife if their law of the habitual residence is the same, or where neither of these is the case, by the law of the place most closely connected with the husband and wife.*”

2 Custody

Article 32 of the Act governs the application of legal relationship between parents and child.

Article 32 stipulates that “*the legal relationship between parents and their child shall be governed by the child's national law if it is the same as the national law of either the father or mother (in cases where one parent has died or is unknown, the national law of the other parent), or in other cases by the law of the child's habitual residence.*”

3 National law

Article 38 of the above Act governs the application of national law.

Article 38(s1) stipulates that “*Where a party concerned has two or more nationalities, the*

*party's national law shall be the law of the country of his/her nationality where he/she has habitual residence, or, the law of the country with which the party is most closely connected if there is no such country of his/her nationality where the party has habitual residence; provided, however, that if one of those nationalities is Japanese, Japanese law shall be the party's national law."*

Article 38(3) stipulates that *"Where a party concerned has nationality in a country where different laws are applied in different regions, his/her national law shall be the law designated in accordance with the rules of the country (in the absence of such rules, the law of the region with which the party is most closely connected)."*

#### 4 Child support

Article 2 of "Act on the Law Applicable to the Obligation of Support" governs child support.

Article 2(1) stipulates that *"The obligation of support shall be governed by the law of the habitual residence of the support obligee; provided, however, that if the support obligee is unable, under the law of his/her habitual residence, to obtain support from the support obligor, the law of their common nationality shall govern."*

Article 2(1) stipulates that *"If the support obligee is unable, under the law applicable pursuant to the provisions of the preceding paragraph, to obtain support from the support obligor, the obligation of support shall be governed by Japanese law."*

## II Divorce

As for divorce cases, making a petition for the conciliation is usually required prior to filing a suit.

In Japan, parties can divorce by consent if an agreement is reached. In this context, the consent refers to the agreement by both parties to notify municipal offices of their intent to divorce.

## III Custody/parental authority

Under Japanese law, if parents divorce, either a father or a mother holds parental authority over a child (*Article 819, Civil Code*). There is no concept of joint parental authority in relation to a child. Only one parent has sole parental authority over a child.

If the parties are unable to reach an agreement on which parent holds parental

authority over a child, the court can determine which parent holds authority.

In Japan, parental authority includes both legal and physical custodies. Parental authority includes various parental rights. Article 820 of the Civil Code stipulates that “a person who exercises parental authority holds the right, and bears the duty, to care for and educate the child.”

#### IV Visitation/Access/Contact

##### 1 Determination of visitation

Visitation is determined by the agreement of the parents if they divorce by agreement (*Article 766(1), Civil Code*). Under Japanese law, couples can divorce by agreement (*Article 763, Civil Code*).

If agreement has not been made, or cannot be made, visitation must be determined by the family court (*Article 766(2), Civil Code*). The family court usually encourages the parents to agree on the issue of visitation in order to realize the visitation.

##### 2 Welfare of the child

The general principle of the "welfare of the child" is valued by the family court when the court makes decisions on visitation.

The family court encourages the visitation between the non-custodial parent and the child especially from the perspective of sound child development.

##### 3 Court procedure for visitation

In practice, a father, or mother who would like to visit a child makes a petition for visitation conciliation proceedings.

If agreement on visitation has not been made, or cannot be made, the procedure will move on to the adjudication proceedings where the family court decides whether or not to order a visitation.