

e **[Research Article]**

Vietnam's Effective Enforcement of Handing Over of a Child in International Parental Child Abduction Cases: Acceding to the 1980 Hague Convention (1)

NGUYEN Thi Ngan*

Abstract

Vietnam is researching to accede to the 1980 *Hague Convention on Civil Aspects of International Child Abduction* to handle the increasing international parental child abduction (IPCA) cases. Through implementing the Convention, enforcement of handing over a child is a significant task for the abducted child's prompt return to their home country. Thus, contracting states, including Japan, have improved their rules to execute the return order. This article focuses on solutions for effectively enforcing handing over a child when a dispute arises in IPCA based on the Convention and Japan's experience, which does not presently exist in Vietnam.

Currently, Vietnam's enforcement of the handover of a child is prolonged and sometimes unenforceable due to legal and practical problems. This research analyses the compatibility of such enforcement in IPCA cases in Vietnam with international standards. By introducing the Guide to good practices under the Convention on enforcement issues, this research points out the gaps that Vietnam needs to improve in enforcing return orders.

This article finds from Japan's experience that Japan struggled with the enforcement issue after acceding to the Convention in 2014. Although it has amended some regulations of compulsory execution measures to address such difficulties, the enforcement is still challenging because of deficient execution measures and several obstacles in the return order procedure. As Vietnam prepares to accede to the Convention, Vietnam legislators should focus on the strengths of Japanese law and, simultaneously, consider how to avoid some of the problems Japan still faces in dealing with enforcement. Establishing an effective enforcement procedure with adequate coercive measures and ensuring efficiency in central authority and judicial stages are the essential solutions that the government of Vietnam should endeavor to enforce the child's handover in IPCA cases effectively.

* General Department of Civil Judgment Enforcement, Ministry of Justice, Vietnam.

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I. Introduction

International parental child abduction (IPCA) occurs when a parent (taking parent — TP) wrongfully removes a child from the child's home country (habitual residence) or retains a child in

another nation or state. Such action violates the rights of custody and access of the left-behind parent (LBP) and, more importantly, infringes on the child's best interests. If both related countries are members of the *Convention on the Civil Aspects of International Child Abduction* (the Convention),¹ the LBP can ask for help to return the child. According to the Convention and the *Guide to Good Practice under the 1980 Hague Convention, Part IV — Enforcement* (the Guide),² the return procedure has to be child-friendly and prompt because it directly affects the emotions, psychology, and physical health of the child. Although enforcement of the return order is essential and complicated,³ Article 2 of the Convention gives each state member the competence to stipulate its procedure.

As a state member of the Hague Conference on Private International Law (HCCH), Vietnam is researching to accede to the Convention because IPCA cases have happened more frequently.⁴ Yet Vietnam has no regulations to handle such issues. For example, in a case in 2016, administrative authorities received a judicial assistant request on the abducted children's return from the Australian Federal Police. However, they needed several months to define that Vietnam has no regulation for this request.⁵ In another case in 2011, the court in Vietnam confirmed its jurisdiction and granted custody to the Vietnamese mother. Despite the Vietnamese court's judgment, when the mother returned to the USA, she was caught and charged with three years imprisonment because of abducting her child and contempt of the American court.⁶ Remarkably, in a case in 2018, the problem went further to the execution stage. The French father abducted his daughter to France. The Vietnamese mother strived to win child custody in a French court in June 2016. The father then brought the girl back to Vietnam but kept hindering the mother from meeting the child. The enforcement agency executed the case based on the Ho Chi Minh city court's decision to recognize and enforce the French custody judgment. However, it lasted for five months due to the father's noncompliance. The father finally handed over the child in January 2019 but failed to surrender her passport.⁷ These recent cases reveal several critical legal problems that, if not addressed, could be problematic after Vietnam's signing on to the

¹ HCCH, *Convention of October 25, 1980*, entry into force on December 1, 1983, accessed October 10, 2019, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>

² Permanent Bureau of HCCH, "Guide to Good Practice under the 1980 Hague Convention, Part IV – Enforcement," accessed April 15, 2020, <https://assets.hcch.net/docs/49dc30cf-79cb-42ae-af36-dd2fc20bb11e.pdf> (hereinafter "The Guide").

³ The "enforcement" used in this article means "implementation by coercive measure," as same as "execution." The implementation of handing over the child "through voluntary compliance is therefore not considered as 'enforcement.'" (The Guide, para 11).

⁴ Until now the government of Vietnam has no official statistic.

⁵ Vietnam's Ministry of Justice (MoJ), *Ministerial Research: The 1980 Hague Convention: International Experience on Accession, Implementation, and Suggestions for Vietnam*, [Đề tài khoa học cấp Bộ: Công ước La Hay 1980: Kinh nghiệm quốc tế về gia nhập, thực thi và các đề xuất đối với Việt Nam], 2019: 122-123 (hereinafter "The Ministerial Research").

⁶ Ibid, 120-121.

⁷ Ibid, 121-122.

Convention. Therefore, completing Vietnam's laws on handing over a child is essential to implement the Convention effectively.

Japan provides a recent typical case of a country struggling to establish the enforcement mechanism, thereby offering scrutiny for Vietnam. Japan acceded to the Convention and enacted the *Act on Implementation of Convention on the Civil Aspects of International Child Abduction* (the Implementation Act) in 2014.⁸ This Act aims for the operation of the Convention in Japan, particularly establishing a new compulsory execution of the child's return. However, the practice of implementing the Act faced unexpected difficulties and new challenges in the enforcement procedures.⁹ In 2019, Japan partially amended the *Implementation Act* to overcome those obstacles and international criticism.¹⁰ This amendment illustrates the importance of the execution phase in implementing the Convention. Despite the improvement of the Act, compared with the Convention and the Guide, Japan still has many obstacles to overcome.

This article outlines Vietnam's background on enforcement of handing over of a child, considers what the Vietnamese legal system needs to improve to meet the requirements of the Convention and the Guide, and what Vietnam can learn from Japan's experience.

II. Vietnam's Background

1. Overview of case proceedings on handing over a child in Vietnam

Enforcement of handing over a child is the final step in resolving child custody disputes. This section briefly introduces the child custody case process. Next, it discusses the details of the execution procedure.

(1) Hearing on custody rights

⁸ Japan's Ministry of Foreign Affairs (MoFA), "Overview of the Hague Convention and related Japanese Legal Systems," last updated April 2, 2020, accessed May 1, 2021, https://www.mofa.go.jp/fp/hr_ha/page22e_000250.html.

⁹ Shuji Zushi, "Japan's 5-year Experience in Implementing the 1980 Hague Abduction Convention," *International Family Law Journal*, Issue 2 (2019): 82, accessed March 10, 2021, <https://www.mofa.go.jp/files/100059988.pdf> (hereinafter "Japan's Experience").

¹⁰ Japan's MoFA, "Overview of the Hague Convention;" Jiji and Kyodo, "U.S. Removes Japan from Blacklist of Countries not Complying with Hague Convention on Child Abduction, but 'Remains Highly Concerned,'" *The Japan Times*, May 13, 2019, accessed November 1, 2019, <https://www.japantimes.co.jp/news/2019/05/13/national/politics-diplomacy/u-s-removes-japan-list-countries-showing-noncompliance-hague-convention-child-abduction/>.

Under Vietnam's 2014 *Law on Marriage and Family (LMF)*,¹¹ the court will decide on custody based on the parents' condition. In principle, if the child is under 36 months, the mother will have custody rights unless she cannot afford to rear the child or otherwise agreed by the parents in the child's best interest (Art.81(3)). The non-custodial parent still has rights and obligations to care for, raise and educate the children, particularly visitation rights and giving alimony (Arts. 81(1), 82). For the child's best interest, if they are full seven years old or older, the court will listen to and consider their wish (Art.81(2)). A custody decree often simply awards custody to a parent and visitation to the other parent. The parties can appeal against the first instance judgment within 15 days from the decision being granted; the appellate court's determination is final and binding from the date of pronouncement (*Civil Procedure Code — CPC*, Arts. 273, 313(6)).¹² After divorce, the court can modify the custody decree in three situations: both parents agreed to petition for modification; either parent can petition if the custodial parent no longer has a good condition to take care of the child; and state authorities request to designate a guardian if both parents cannot rear the child (rule of *parens patriae*) (*LMF*, Art.84).

Articles 52 and 54 of the *LMF* encourage the parties to find an amicable solution. They can mediate at a grassroots mediation at the commune level. Mediators have prestige in the local community, are elected by households, and are recognized by the commune People's Committee president.¹³ They also can conciliate at judicial conciliation led by a judge before the trial. However, this conciliation is not mandatory because one party can request the court not to conciliate (*CPC*, Art.207(4)). In addition, from 2021, the parties can mediate at court-annexed mediation, which the *Law on Court-Annexed Mediation and Dialogue* regulates.¹⁴ Suppose the parties can reach an agreement in all dispute matters, including child custody, through either mediation or conciliation above-mentioned. In that case, the court will grant a decision on recognizing that agreement, which shall have the same effect as a final and binding judgment (*CPC*, Art.397).

¹¹ National Assembly of Vietnam (VNA), *Law No.52/2014/QH13*, June 19, 2014, accessed June 4, 2021, <https://thuvienphapluat.vn/van-ban/Quyen-dan-su/Luat-Hon-nhan-va-gia-dinh-2014-238640.aspx>.

Vietnam's People's Court system includes the Supreme People's Court, High People's Courts, Provincial People's Courts, District People's Courts, and military courts. See *Law on Organization of People's Courts* (No.62/2014/QH13), November 24, 2014, Article 3, accessed April 9, 2021, <https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Luat-to-chuc-Toa-an-nhan-dan-2014-259724.aspx>

¹² VNA, *Law No.92/2015/QH13*, November 25, 2015, accessed May 28, 2021, <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Bo-luat-to-tung-dan-su-2015-296861.aspx>.

¹³ VNA, *Law on Grassroots Mediation* (No.35/2013/QH13), June 20, 2013, Arts. 7, 8, accessed May 28, 2021, <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Luat-hoa-giai-o-co-so-nam-2013-197282.aspx>.

¹⁴ VNA, *Law No.58/2020/QH14*, June 16, 2020, accessed May 28, 2021, <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Luat-Hoa-giai-voi-thoi-tai-Toa-an-so-58-2020-QH14-395767.aspx>.

The custody decree is also a result of other proceedings. Upon request from a plaintiff or *ex officio*, the court can apply a provisional measure of handing over a child if the case's resolution involves the child with no guardian (*CPC*, Arts. 114(1), 115, 133-135).

(2) Enforcement of handing over a child

The General Department of Civil Judgment Enforcement (GDCJE), which belongs to the MoJ, is responsible for enforcing the civil judgments and decisions of the courts (*LCJE*, Art.54; *Decree No.62/2015/NĐ-CP*, Art.52).¹⁵ This department has CJE agencies (CJEAs) at provincial and district levels. A CJE enforces judgments of the same level court located in the same administrative territory, appellate judgments, and retrial or reviews decisions of the judgments of that court. In addition, a provincial-level CJE executes decisions of recognition and enforcement of foreign judgments, judgments involving overseas parties or assets, or requests for international judicial assistance for enforcement (*LCJE*, Art.35).

Enforcement of handing over a child follows the general CJE procedure prescribed in the *LCJE*. Article 120 of this law, for the first time in Vietnam, regulates compulsory measures in such cases.¹⁶ The *LCJE* encourages voluntary compliance; otherwise, the CJE enforces the judgment by coercive measures (Art.9). The CJE executes a handover of a child case upon the petition of a parent or *ex officio* (Art.36).

In the enforcement procedure, upon request, the custodial parent can file a petition to the CJE (Art.31). The district courts deal with most divorce cases, so the district-level CJEAs are usually the main actors. The statute of limitations for requesting judgment execution is five years from the date the judgment takes effect. Within five days of receiving the petition, the director of the CJE issues a decision on judgment enforcement upon a request and assigns an executor to implement this case (Arts. 31, 36). The non-custodial parent (the obligor) has ten days of voluntary compliance after receiving the decision (Art.45). If the obligor fails to hand over the child, the executor examines the child's situation to enforce (Art.44; *Decree 62/2015/NĐ-CP*, Art.9(1)). The executor must coordinate with local government and socio-political organizations to persuade the parent of compliance (Art.120(1)). The local people can be the president or judicial officer of the communal People's Committee, the

¹⁵ VNA, *Law No.26/2008/QH12*, November 11, 2008; amended and supplemented some articles by *Law No.64/2014/QH13*, November 25, 2014, accessed April 2, 2019, <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Van-ban-hop-nhat-12-VBHN-VPQH-2014-hop-nhat-Luat-thi-hanh-an-dan-su-264499.aspx>.

The Government of Vietnam, *Decree No.62/2015/NĐ-CP*, July 18, 2015; amended and supplemented some articles by *Decree No.33/2020/NĐ-CP*, March 17, 2020, accessed April 9, 2021, <https://thuvienphapluat.vn/van-ban/Trach-nhiem-hinh-su/Van-ban-hop-nhat-1357-VBHN-BTP-2020-Nghi-dinh-huong-dan-Luat-Thi-hanh-an-dan-su-443228.aspx>.

¹⁶ The Standing Committee of VNA enacted three *Ordinances on CJE* in 1989, 1993, and 2004. These ordinances just briefly provided for the enforcement of the judgments on obligation for action or inaction.

staff in the communal Women's Union and Communist Youth Union whose jobs are related to child care and protection, the village leader, and even the teacher of the child.¹⁷ If the persuasion is successful, the executor takes the minutes of the voluntary handover of the child and closes the case. The CJEA would apply coercive measures if the persuasions failed. Article 120(2) of the *LCJE* provides three measures: pecuniary sanctions, physical removal of the child, and criminal charges.

Enforcement *ex officio* is a procedure when the CJEA executes a provisional measure of a handover of a child. The court immediately transfers the decision, and the CJEA instantly enacts the decision on judgment enforcement *ex officio* when receiving this decision (Arts. 28(3), 36(2)). The obligor does not have ten days to implement the handover voluntarily. Instead, the executor promptly examines the child's situation and applies the execution measures as prescribed in Article 120 of the *LCJE* within 24 hours from the time of receiving the enforcement decision (Arts. 44(1), 130(1)(a)). However, Article 120 emphasizes encouraging and persuading voluntary compliance; thus, enforcement *ex officio* essentially curtails the time to apply the execution measures.

The obligor and the child may move to another locality while the enforcement procedure is pending or happening. Then, the director of the executing CJEA will entrust the case to the CJEA where the child is staying within five working days from the date of getting ground of their new address, or immediately in case of executing the provisional measure (Arts. 55(1)(3), 130(2)).

2. Current problems of enforcement of handing over a child and their causes

With current regulations, the enforcement of handing over the child in Vietnam has some achievements. Several executors have successfully persuaded non-custodial parents to implement custody judgments voluntarily.¹⁸ On the contrary, several cases are unenforceable, prolonged, and cumbersome for four main reasons. They are failure to locate the child, impotent compulsory execution measures, judicial phase imperfection, and practical issues of the CJEA.

(1) The ineffectiveness of locating the child

The executor cannot locate the child if the non-custodial parent temporarily takes the child into hiding. Since Articles 38, 39(1) of the *LCJE* provide that the executor serves all decisions and notifications on enforcement to the parties, related people, and local government, the non-custodial

¹⁷ Vietnam's Judicial Academy, *Manual on CJE Professional Knowledge* [Giáo trình Nghiệp vụ Thi hành án dân sự], vol. 2 (Judicial Publishing House, 2016): 207.

¹⁸ Thi Mai Huong Nguyen, "Effectiveness of the Persuasion through an Enforcement of Handing over a Child Case in the CJEA of Quang Xuong District" [Hiệu quả công tác vận động, thuyết phục qua vụ việc cưỡng chế giao người chưa thành niên cho người được giao nuôi dưỡng ở THADS huyện Quảng Xương], July 19, 2019, accessed May 20, 2020, https://thads.moj.gov.vn/thanhhoa/noidung/tintuc/lists/nghiencuutraodoi/view_detail.aspx?itemid=20.

parent can simply be absent with the child at the appointed time and place. On the other hand, Article 39(2) of the *LCJE* regulates that the executor may not need to serve the notification of enforcement to prevent such evading. Nevertheless, in some cases, when the executor surprisingly came, the parent reacted aggressively to keep the child or ran away.¹⁹ Although the executor could apply administrative sanction against these violations, some non-custodial parents accepted to pay the fine rather than comply with the custody decrees.²⁰

Furthermore, the non-custodial parents may flee with the child when they predicted the result of court proceedings or understood that their partner would never let the child live with them. In such case, under Articles 44, 44a of the *LCJE* and Articles 9, 11 of the *Decree No.62/2015/ND-CP*, the CJEA issues a decision on unfeasible execution, publishes it on the CJEA's website and sends it to the communal People's Council where the parent lived before fleeing. The executor keeps seeking the parent and child at least once per year within two years before stopping tracking. When the executor, the custodial parent, or any third party can locate the parent and the child, the CJEA will restart the case. However, without the police's support, it is very difficult to find them. Unfortunately, the police restrain from intervening in the family matter except the cases involving criminal signs.

(2) The deficiency and ineffectiveness of compulsory execution measures

Even though Article 120 of the *LCJE* provides three coercive measures to enforce the handover of a child, they are inadequate and deficient. Besides, the order of priority for the physical removal of the child and criminal charges is not explicit.

First, the monetary sanction is not effective enough. It is an indirect enforcement measure to put the non-custodial parent under pressure to hand over the child. Practically, the executor is reluctant to apply it because of two reasons. One reason is the procedure to enact the sanction decision is demanding. The executor needs to enact a decision on the coercive execution of handing over a child and sends a notice of execution to the parents.²¹ These documents inform the time and place of the handover and warn the obligor about further coercive measures if they fail to comply.²² The executor may keep coordinating with local staff to persuade the parent of compliance. Suppose the obligor fails to hand over the child at the enforcement scene. In that case, the executor records the violation and

¹⁹ “Abducted the Child after Divorce” [“Bắt con” hậu ly hôn], November 17, 2014, accessed May 20, 2020, <https://zingnews.vn/bat-con-hau-ly-hon-post480379.html>.

²⁰ Hong Minh, “Concealing the Child after Divorce” [Hậu chia tay, mang con đi giấu], January 24, 2018, accessed May 20, 2020, <https://plo.vn/xa-hoi/hau-chia-tay-dem-con-di-giau-752436.html>.

²¹ Vietnam's MoJ, *Circular No.01/2016/TT-BTP*, February 1, 2016, Forms C39, D19, accessed March 1, 2020, <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Thong-tu-01-2016-TT-BTP-huong-dan-thuc-hien-thu-tuc-ve-quan-ly-hanh-chinh-bieu-mau-nghiep-vu-trong-thi-hanh-an-dan-su-302329.aspx>.

²² Ibid.

prepares a dossier of enforcement proceedings until the time of the violation.²³ Most handovers of child cases are at district-level CJEsAs, but the director of provincial-level CJEAs has the competence to enact the sanction decision.²⁴ Consequently, the executor and district-level CJEAs must promptly prepare and send the dossier since the time frame to issue the decision is just seven days from the date of making the record. Another reason is that the CJEAs enforce *ex officio* the fine, so in some cases, it is a burden to execute if the non-custodial parent is not willing or cannot afford to pay, even if it is just from 3–5 million Vietnamese dong (VND) (about \$130–\$215).²⁵ In other instances, some obligors accepted to pay monetary sanctions but did not hand over the child. Thus, this penalty is relatively powerless because of very detailed requirements, different authorities to enact the decision, difficulty in execution, and not very punitive.

Second, though the physical removal affects the child psychologically and physically, the *LCJE* does not provide how to execute this measure except for the following rules. The compulsory execution cannot happen during the night, from 10:00 p.m. to 6 a.m., on weekends, public holidays, and special occasions (Art.46(2)). The executor can request protection from the police, supervision from the procuracy, and coordination from the local government (Art.72). In practice, because of no particular regulation of physical removal of a child, the CJEAs implemented it under their discretion in very few cases.

Third, Article 380 of the *Penal Code* provides that a person may be sentenced to three months to two years in prison and may additionally be fined from 5–50 million VND (about \$215–\$2,157) for noncompliance with the judgment.²⁶ However, the application of criminal sanction against noncompliance with a custody decree has been rare and did not lead to the handover of the child in some cases. The reasons are that administrative sanction is a ground of the crime institution. Still, the CJEAs are reluctant to apply it, and the tendency not to criminalize civil relations, especially when a parent takes the child away. This hard measure may be strong enough to make some obligors hand

²³ Ibid, Form D49.

²⁴ Decree No.82/2020/ND-CP, Articles 64(3), 85(3).

²⁵ VNA, *Law on Handling Administrative Violations* (No.15/2012/QH13), June 20, 2012, Article 66(1); The Government of Vietnam, Decree No.82/2020/ND-CP, July 15, 2020, Articles 64(3), 85(3), accessed May 28, 2021, <https://thuvienphapluat.vn/van-ban/Vi-pham-hanh-chinh/Luat-xu-ly-vi-pham-hanh-chinh-2012-142766.aspx>, <https://thuvienphapluat.vn/van-ban/Doanh-nghiep/Nghi-dinh-82-2020-ND-CP-xu-phat-hanh-chinh-linh-vuc-hon-nhan-thi-hanh-an-pha-san-doanh-nghiep-392611.aspx>.

²⁶ VNA, *Law No.100/2015/QH13*, November 27, 2015, amended and supplemented by *Law No.12/2017/QH14*, June 20, 2017, accessed July 2, 2020, <https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Van-ban-hop-nhat-01-VBHN-VPQH-2017-Bo-luat-Hinh-su-363655.aspx>.

over the child. However, this crime is not so severe, and when the violated parents have a good record, the courts typically charge them with a suspended sentence.²⁷

Finally, Article 120 of the *LCJE* does not explicitly prioritize the physical removal of the child and the institution of criminal proceedings against noncompliance with a court judgment. Instead, the regulation simply puts an “or” between two coercive measures, giving the executor more discretion but somewhat creating controversy. The executor may request criminal charges first to punish the non-custodial parents for making them hand over the child. Practically, this option has three risks. First, the probability that the procuracy accepts prosecution is usually not high for two reasons mentioned in the preceding paragraph. Then, the child has integrated into the new environment with the non-custodial parent as the criminal proceedings often extend from the first to the appellate instances.

Most importantly, if the obligor is found guilty with a suspended sentence, the *CJEA* still has to enforce the handover of the child. Another choice for the executor is to apply physical removal of the child first. This option may quickly resolve the handover of the child. If it succeeded, the criminal proceedings might not be necessary anymore because such enforcement’s principal goal is handing over the child, not the punishment on the parent. Nevertheless, due to vague regulation, this choice may lead to criticism that such coercion is rough or the executor should apply deterrent measures against the violated parent rather than directly release the child.

(3) The causes originated from the judicial stage

The qualities in judicial decision-making directly affect the effectiveness of enforcement of handing over a child, precisely the rationality of assessing children’s opinions. Moreover, the court can modify a custody order in some circumstances, which may impact the enforcement of the original judgment.

In child custody cases, difficult enforcement may arise due to children’s objections because the court proceedings and enforcement procedures are lengthy. Furthermore, the non-custodial parent brainwashed the child’s mind about the other parent, or the period without contact between the child and the custodial parent was too long. However, the most crucial reason is that the court did not hear the child’s voice adequately. The judge may directly hear the child’s wishes if they are fully seven years old, but the decision must be based on the child’s interests to assign the primary parent (the *CPC*, Art.208(3)). Collecting the child’s intention must be child-friendly, suitable for their psychology, age,

²⁷ As of December 15, 2022, the Supreme People’s Court has published 1,044,687 judgments and decisions of all level Courts on its website <https://congboanan.toaan.gov.vn/>. Nevertheless, just 14 sentences are on the crime of noncompliance with the judgment; of 14 cases, five cases are about the handover of a child.

and maturity level, and ensure minors' rights, legitimate interests, and personal secrets.²⁸ A proper way is that the judge can invite the child to a waiting room in the family and juvenile court office and talk with them in person.²⁹ However, not every child is ready to reveal his or her true thoughts, and not every judge has the skills to make the children speak their minds. Consequently, there were cases even the children said that they wanted to live with this parent, and the other parent agreed to let them go, however, the children refused to go in the enforcement stage.³⁰ The children were under pressure from their parents' disputes; thus, their actions contradicted their testimony. The court failed to investigate all aspects of the child's situation. If the judge has more support from a psychologist, the children may share their thoughts with the court, then resolving child custody disputes may be more reasonable and enforceable.

Moreover, the law does not require the court to investigate the child's intention if they are too small. Instead, the court may refer to the opinions of the local government and consult with the teacher in kindergarten or the family's neighbors about each parent's care for the child. Then the court examines the child's best interests and decides on custody. Nevertheless, the decision may not be what the children wanted, and they strongly rejected or pushed the custodial parent away.³¹ Therefore, even if the children are under seven years old, the court should have an adequate method to understand their intention rather than just based on other people's arguments.

Another significant aspect of the judicial stage is the misuse of the modification of the original custody decrees, which may lead to a stay of execution. The modification petition is an extraordinary legal challenge against the final and binding judgment in a custody case. Generally, modifying the custody order is necessary when the custodial parent and the child's lives change. Until the child is 18 years old, the court can decide this matter in line with the child's best interests. However, the non-custodial parent may exploit the regulation of modification to impede the enforcement of the original judgment. In the enforcement proceedings, the non-custodial parent, who has not complied with the

²⁸ The CPC, Art.208(3); LMF, Arts. 55, 81(2); Supreme People's Court, *Official Dispatch No.01/2017/GĐ-TANDTC*, April 7, 2017, Section IV(26), accessed May 2, 2020, <https://thuvienphapluat.vn/van-ban/Trach-nhiem-hinh-su/Van-ban-01-2017-GD-TANDTC-giai-dap-van-de-nghiep-vu-345378.aspx>.

²⁹ The 2014 *Law on Organization of People's Courts* introduces the family and juvenile court as a specialized court to better protect the child's rights in civil and criminal proceedings.

The Supreme People's Court, *Official Dispatch No.13/TANDTC-PC*, February 24, 2020, accessed May 25, 2021, <https://www.toaan.gov.vn/webcenter/portal/tatc/chi-tiet-chi-dao-dieu-hanh?dDocName=TAND103857>.

³⁰ "Mother Tired of Child Custody Because of Unsuccessful Execution: The Procuracy Spoke out" [Vụ mẹ mòn mỏi đòi con vì thi hành án không thành: Viện kiểm sát lên tiếng], June 20, 2018, accessed January 15, 2021, <https://phunuvietnam.vn/vu-me-mon-moi-doi-con-vi-thi-hanh-an-khong-thanh-vien-kiem-sat-len-tieng-44243.htm>.

³¹ Trung Dang, "Abandoned the Child then Suddenly Returned to Gain the Custody" [Bỏ con rồi bất ngờ trở về giành quyền nuôi con], January 1, 2018, accessed January 15, 2021, <https://plo.vn/xa-hoi/bo-con-roi-bat-ngo-tro-ve-gianh-quyen-nuoi-con-748339.html>

custody order and still retained the child, may request the court to change the primary carer. Because the *CPC* and the *LMF* do not have any particular regulation to restrict this situation, some courts accepted the obligor's request and tried the case to change the primary carer. However, some other courts suspended the case because the original judgment had not been implemented.

Regarding the *LCJE*, it does not have any regulation of stay of execution based on the ground that the court accepts the petition to modify a custody decree. In practice, the CJEsAs have different decisions, which lead to controversial situations. Some CJEsAs continuously tried to enforce the handing over of the child and applied compulsory execution measures; then, the plaintiff complained that the court was considering modifying the custody. Other CJEsAs usually postpone the enforcement to wait for the result of the court's work, so the custodial parent insisted that the original decree was final and binding and needed to be enforced. If the CJEA tries hard to execute, but later the court reverses the original judgment, the enforcement is in vain and harmful to the child. Therefore, the GDCJE favors a stay of execution, considering the child's best interest.³²

Whether the court heard or terminated the modification case was correct or incorrect, and the fact that the CJEA postponed or kept enforcing the handover of the child was reasonable or unreasonable, a petition of modification will affect the ongoing enforcement procedures of the original custody decrees. Accordingly, the relevant laws lack strict grounds for modifying the custody decree and the impact of the court's work on enforcing the original decision if the case is enforced.

(4) Little incentive for the enforcement agencies

With the belief that the coercion execution badly affects the child, the executors usually refrain from using compulsory measures and persuade the non-custodial parent to hand over the child. Therefore, some cases have lasted years or become unenforceable because the child has integrated with the new life and refused to live with the custodial parent, or some obligors even took the child somewhere else that nobody knows.

Additionally, several reasons led to the little incentive to keep executing the handover cases. First, although executors spend much effort to examine, coordinate, persuade, and implement these cases, a finished case is counted as a small result, which reduces their motivation. Concretely, a successful handover of the child case is calculated as one case and just 1,000 VND, and this work has no single statistic. However, if the executor finished one monetary case and recovered one million VND for the

³² GDCJE, *Official Dispatch No.3982/TCTHADS-GQKNTC*, November 2, 2017, accessed November 20, 2020, https://dichvucong.gov.vn/pfiles/10701/24157/3982_Bo_Tu_phap_PAKN_cua_ba_Vu_Thi_Nhi_2644081117132351.pdf

judgment owner, the statistical report calculates it as one case and one million VND.³³ Next, because the pressure on fulfilling the goals of monetary cases is enormous, the executors have to pay more attention to executing the judgment debt. On average, an executor has to enforce more than 200 cases each year, and the values ranged from 35 billion VND in 2016 to 64 billion VND in 2020.³⁴ Furthermore, enforcement of the handover of the children has no execution fee, while in judgment debt cases, the fee usually is accounted for 3% of the recovered value.³⁵

3. The international standard under the Convention's goals

The previous sections have attempted to analyze the obstacles in enforcing the handing over of a child. To accede to the Convention, the government of Vietnam inherently needs to improve legislation under the Convention and the Guide's requirements to address those limitations. Article 11 of *the Convention* stipulates that the judicial and administrative authorities of the member state in which the child is brought or is retained shall act expeditiously in proceedings for the child's return. The Special Commission on the Practical Operation of the Convention has frequently updated the recommendations for efficient enforcement,³⁶ which cover three stages in return procedures: the central authority (CA), the judicial, and the enforcement phases.³⁷

First, at the CA phase, the contracting state will designate an organ as its CA to cooperate with and promote cooperation amongst the competent authorities in the State to secure the child's prompt return (*the Convention*, Art.7). The CA should have the capacity to rapidly act upon the return request, such as promptly locate the child, prevent taking the child into hiding or removing to another country. Then, it can encourage the parties to have a mediation or other form of voluntary settlement. However, at the same time, it can initiate court proceedings, or if the amicable resolution fails, it will instantly start court proceedings.³⁸

³³ Vietnam's MoJ, *Circular No.06/2019/TT-BTP*, November 12, 2019, Form 05/TK-THA, Explanatory, item 5, accessed May 28, 2021, <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Thong-tu-06-2019-TT-BTP-Che-do-bao-cao-thong-ke-thi-hanh-an-dan-su-thi-hanh-an-hanh-chinh-429213.aspx>.

³⁴ For example, the average number of cases and value in 2022 that each executor has to solve was: in Ben Tre: 382 cases, 43 billion VND; in Binh Duong: 345 cases, 114 billion VND; in Long An: 341 cases, 106 billion VND; in Ho Chi Minh City: 335 jobs, 436 billion VND; in Can Tho: 334 cases, 118 billion VND. Etc (Vietnam's Government, *Report on Judgment Enforcement 2022*)

³⁵ Vietnam's Ministry of Finance, *Circular No.216/2016/TT-BTC*, November 10, 2016, Articles 2, 4, accessed May 28, 2021, <https://thuvienphapluat.vn/van-ban/Thue-Phi-Le-Phi/Thong-tu-216-2016-TT-BTC-muc-thu-che-do-thu-nop-quan-ly-su-dung-phi-thi-hanh-an-dan-su-295121.aspx>

³⁶ HCCH, *The Convention*, Special Commission Meetings, accessed April 1, 2021, <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=57&cid=24>.

³⁷ The Special Commission of the 1980 Hague Convention, "Premilinary Document No 10 A of August 2017," The Seventh Meeting, accessed April 12, 2021, <https://assets.hcch.net/docs/7c88af92-e59b-4787-9e48-1823434e6201.pdf>.

³⁸ *Ibid*; HCCH, "The Guide," principles 1.1-1.4, 5.1.

Second, at the judicial phase, the court must promptly grant a final and binding return order and ensure its enforceability. The concentration of jurisdiction with specialized judges is a feature of “speedy proceedings and more coherent case law.”³⁹ The contracting party should have legislation or procedural rules to ensure expeditious return proceedings from the first to final instances with limited legal challenges against the return order.⁴⁰ The court should consider the age and maturity of children to listen to them at the beginning of the proceedings.⁴¹ In all but exceptional circumstances, the return order should require the child's immediate return.⁴² The order should be detailed and specific and include cascading options as a prediction of the enforcement phase to avoid losing time when the TP fails to follow the return order.⁴³

Third, at the enforcement phase, the state member should have a range of coercive measures to apply appropriately in the individual case. In most contracting parties’ jurisdictions, three types exist: contempt of court or coercive enforcement measures. They are pecuniary fines, imprisonment of the TP, and physical removal of the child from the TP by executors.⁴⁴ These measures are applied to the TP whenever the order is final and binding and the TP fails to comply voluntarily.⁴⁵ The Guide emphasized the ruling of the European Court of Human Rights that:

“[I]t is not sufficient to provide for what the court called “indirect and exceptional” means of coercion, e.g., a fine imposed upon the abducting parent, his or her imprisonment, or the institution of criminal proceedings – in particular where these measures require steps to be taken by the applicant. Instead, the law should also provide for the direct implementation of the return order (i.e., the physical return of the child to the applicant or the State of habitual residence) by State organs.”⁴⁶

The executor needs to care whether the LBP has not contacted the child for a long time; they need to psychologically prepare for both the LBP and the child before the handover.⁴⁷ The Guide also noted the avoidance or limitation of additional conditions, requirements, and administrative burdens

³⁹ Ibid, para 20; HCCH, “The Guide,” principle 2.1

⁴⁰ Ibid; HCCH, “The Guide,” principle 2.2-2.8.

⁴¹ HCCH, “The Guide,” para 100.

⁴² Ibid, principle 4.1.

⁴³ Ibid, paras 78, 86-87.

⁴⁴ Ibid, paras 23-24.

⁴⁵ Ibid, paras 25-26, 28, 58.

⁴⁶ Ibid, para 25.

⁴⁷ Ibid, para 25.

for enforcing a return order through coercive measures.⁴⁸ The executor should serve the orders or decisions upon the respondent when beginning the enforcement procedure to prevent absconding.⁴⁹

(To be continued)

⁴⁸ Ibid, principles 1.6, 1.7.

⁴⁹ Ibid, principle 1.8.

