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Identifying Best Practice in Hague Convention cases.

UNDERTAKINGS IN HAGUE CONVENTION CASES

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INTRODUCTION

The aim of this paper is to define what is meant by undertakings and related orders, describe the circumstances in which they may be used, discuss how effective they are, whether their use should be encouraged, and if so, is their use authorised by the provisions of the Convention. Finally, standards for best practice are considered, with suggestions for achieving these standards.

WHAT ARE UNDERTAKINGS

The term 'undertaking' is understood to mean, at least in common law countries, a 'promise' or 'commitment' or 'assurance' given to a court by a person, to do or not do certain things. The 'undertaking' then has the force of a court order in the jurisdiction in which it is given.

In considering the practical use of undertakings in the context of Hague Convention proceedings, we need to look at a number of related mechanisms and orders: These include:

1. <u>a simple agreement</u> given to a court or Central Authority by the left behind parent to do or not do certain things to facilitate a child's return. The success of the agreement depends on the good faith of the parties and it is not enforceable in either jurisdiction.

2. conditions placed by the requested court on the return of children to a Convention Country. 'Conditions' are in effect, pre-conditions to be met by the left behind parent before the child will be returned. The Central Authorities can effectively assist in ensuring or providing proof that the conditions have been met. However, if the arrangements break down in the requesting/habitual residence country, the returning parent has no enforceable order to rely upon in that country (unless one condition is the making of safe harbour orders or mirror orders). One problem with conditions is that they can be made without consulting the left-behind parent and can sometimes be quite unreasonable.

3. undertakings given by the left behind parent to the requested court. It is well known that undertakings are only enforceable in the jurisdiction where they are made. It is not uncommon for the parent giving the undertakings to renege on them once the child is returned to the habitual residence country. If identical undertakings can be given in both jurisdictions, they effectively amount to mirror orders.

4. safe harbour orders are orders agreed to by the left behind parent to a court in the habitual residence or requesting country. Safe harbour orders can be distinguished from undertakings in that while both are enforceable in the jurisdiction where they are made, safe harbour orders are enforceable in the habitual residence country. Use of safe harbour orders would obviate the need for undertakings given to the requested court , if the legal system of the requesting/habitual residence country permits the making of such orders.

5. mirror orders (identical orders) made by the left behind parent in the courts of the requested country and the requesting country. This is the only category of orders that are enforceable and effective in both the requested country and the requesting country. The difficulty with this mechanism is that while orders may be made in the courts of the requested country, the legal system of the requesting/habitual residence country may not permit or facilitate the making of such orders.

6. consent orders are orders consented to or agreed to by both parents in the habitual residence country. They may be similar to safe harbour orders, although for safe harbour orders, the consent of the abducting parent is not necessarily required.

IN WHAT CIRCUMSTANCES ARE THESE ORDERS USED

A very thorough examination of the use of undertakings in Hague matters and their acceptance by courts in common law jurisdictions, was provided in Australia's paper on "Issues surrounding the safe return of children (and the custodial parent)" presented at the Common Law Judicial Conference on International Parental Child Abduction, Washington DC, 18-21 September 2000. A copy of that paper is attached. Danny Sandor, Senior Legal Associate to the Chief Justice, Family Court of Australia contributed a chapter on "Mirror orders, safe harbour orders & undertakings" in the Australian paper and I have drawn extensively on his work in preparing this paper. He identified the problem that undertakings attempt to overcome by referring to a comment of Kay J in his first instance Family Court of Australia decision in *McOwan v McOwan*[1]:

> *"Unless contracting States can feel reasonably assured that when children are returned under the Hague Convention, their welfare will be protected, there is a serious risk that the contracting States and Courts will become reluctant to order the return of children."*

This in a nutshell is the problem that undertakings and related mechanisms can address. If their use is adopted, within agreed limits, by all countries in the convention, to address the concerns of both the returning court and the returning parent, then it is more likely that return of a child will be ordered, in the spirit of the Convention.

[1] (1994) FLC ¶92-451at 80, 692.

As noted in definitions above, undertakings and conditions made in the jurisdiction ordering return will be of no effect unless an enforcement mechanism exists in the requesting country. Mr Sandor noted in his paper that the English Court of Appeal decision in *Re C (A Minor)(Abduction)*[2] approved the use of undertakings and subsequently, in *Re M (Abduction: Undertakings)*, [3] Butler-Sloss LJ explained the role of undertakings and conditions as an adjunct to ordering return in the following way:

> *"It is perhaps helpful to remind those engaged in Hague Convention applications about the position of undertakings or conditions attached to an Art 12 order to return. Such requirements are to make the return of the children easier and to provide for their necessities, such as a roof over the head, adequate maintenance, etc, until, and only until, the court of habitual residence can become seized of the proceedings brought in that jurisdiction...*
>
> *This court must be careful not in any way to usurp or to be thought to usurp the functions of the court of habitual residence. Equally, the requirements made in this country must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations... Undertakings have their place in the arrangements designed to smooth the return of and protect the child for the limited time before the foreign court takes over, but they must not be used by parties to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child."* [4]

This approach has generally been supported in the USA[5], Canada[6], Ireland[7] and New Zealand[8]. The opinion of the United States Central Authority (the Department of State) was that:

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2 [1989] 1 FLR 403 (CA).
3 [1995] 1 FLR 1021 (CA).
4 [1995] 1 FLR 1021 at 1024-5.
5 *Walsh v. Walsh* delivered on 25 July 2000, the United States Court of Appeals for the First Circuit
6 Thomson v Thomson (1994) 6 RFL (4th) 290
7 P v B (1995) 1 ILRM 201

"1. While undertakings are not necessary to the operation of the Convention, there are good arguments that their use can be consistent with the Convention. Undertakings are most clearly consistent with the Convention where they facilitate Article 12's objective of ensuring the return of abducted children "forthwith;" minimize the use of non-return orders based on Article 13; and do not undercut the provisions of Articles 16 and 19, which clearly contemplate that return proceedings under the Convention should be jurisdictional and that substantive issues relating to custody, including maintenance, should be left to the court in the child's place of habitual residence.

2. As a corollary to the above, undertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence, so that that jurisdiction can resolve the custody dispute. Undertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance." [9]

Use of conditions and undertakings is commonplace in Australian court orders in Hague matters since the amendment of Australia's implementing legislation – the (Family Law (Child Abduction Convention) Regulations – permitting the use of any condition "that the court considers appropriate to give effect to the Convention":(reg 15(1)(c)).

Undertakings are regularly sought by the Australian Central Authority when an abducting parent claims that the child faces a grave risk of harm if returned. Where the court or the Central Authority or the parent is concerned that the returning parent may be homeless, destitute, or at risk of violence, undertakings may also be sought to

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[8] *A v Central Authority for New Zealand*,[8] NZ Court of Appeal decision where the view was taken that there can be no power to attach conditions to an order under s 12 in the absence of a finding in favour of a defence under s 13.

[9] August 10 1995 Correspondence from Department of State "Annex B" to *The Hague Convention and the United States of America: Report on Hague Convention Operations*, Lord Chancellor's Child Abduction Unit Central Authority for England and Wales sourced from http://www.hiltonhouse.com.

address the welfare of the returning parent. In recent cases[10], undertakings have been given by the left behind parent that:

1. he will not enforce a temporary or interim or ex parte custody order until the matter is brought back before the courts of the habitual residence country;
2. Pending such hearing before the court, he will not attempt to remove the child from the mother except for periods of visitation as agreed between the parties or as ordered by the court;
3. He will provide maintenance to the mother and child in accordance with the order of the Greek court in Suit no. XX made on XX date, until any further order of the Greek court;
4. He will make a declaration pursuant to Greek law which will be enforceable pursuant thereto in the same terms as these undertakings to this court [in Australia].
5. He will provide one way air tickets for the respondent and child to return to X;

Examples of what may, in some circumstances, be considered unreasonable undertakings, are:

1. the left behind parent should vacate the matrimonial home for the returning wife and children;
2. the left behind parent should not institute criminal proceedings against the returning parent;
3. the left behind parent should pay for the long term education costs of the child.

HOW EFFECTIVE ARE THESE ORDERS

In my view these arrangements have been very effective in securing the return of children in circumstances where the child may not have been returned if the "safety net" of undertakings, safe harbour orders or mirror orders had not been available. It is the view of the Australian Central Authority that a parent whose fear of harm to herself or her child is genuine, is entitled to whatever protection is available. A court

[10] P and Commonwealth Central Authority (Full Court of the Family Court, unreported

which contemplates returning a child is entitled to require certain steps to be taken to satisfy itself that proper care and protection is available, while upholding the objects of the Convention. The approach endorsed by the Full court of the Family Court in *P and Commonwealth Central Authority* was: "To ensure that the child is adequately protected, the Art 13b enquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of habitual residence."

Conditions

It is often a condition in return orders, at least in common law countries, that certain undertakings be given. So in that sense the discussion of undertakings below should include conditions.

In countries where it may not be possible to use or enforce undertakings, it is unlikely that the imposition of conditions would achieve the desired outcome.

Undertakings

As noted above, the mechanism of using undertakings and conditions as a means of protecting the welfare of a returning child (and parent) can only be effective of there are orders made or undertakings given in the jurisdiction to which the child is being returned

In his paper referred to above, Mr Sandor noted Kay J's observation in *McOwan and McOwan*[11] that:

> *"If undertakings are to be given it is important to make sure they can be enforced. There does not appear to be any existing mechanism by which the Court that extracts the undertaking can ensure that it is complied with. There does not appear to be any legal basis upon which the court of the State in which the child has been returned, can require compliance with an undertaking given to another Court."* [12]

decision, May 2000)

[11] (1994) FLC ¶92-451.

[12] (1994) FLC ¶92-451at 80,691.

Writing extra curially, his Honour suggested:

> *"One way to avoid this difficulty is for undertakings to be lodged in both the Court hearing the Convention application and a proper Court in the jurisdiction to which the child is to be returned in order to overcome enforcement difficulties. .... In* ***Re S (Child Abduction: Acquiescence)*** *[1998] 2 FLR 893, Sir Stephen Brown P recorded undertakings given by an American father to the English court to not harass the mother and to agree to a de novo custody hearing in California. He ordered that a copy of his reasons for judgment including those undertakings be provided to the Californian court."* [13]

A good example of Central Authority cooperation to implement undertakings arose in the a Greek case where a child in Australia was ordered to return to Greece. The mother's main defence was grave risk of harm due to father's alleged violence. The grave risk was not established. Johnston JR referred to Re F [a minor; rights of custody abroad] [1995] All ER 641 in which the English Court of Appeal made a rare concession that the grave risk exception was established.

Standard conditions (in Australian terms) were imposed requiring the applicant to pay for airfares, to provide funds for accommodation and living expenses on return etc. Two conditions were that the father not institute or support any criminal proceedings against the mother, and that the father support the institution of custody proceedings as soon as possible. The Greek CA advised that the father could not sign an undertaking in the form prepared for him by the Commonwealth Central Authority as Greek law did not provide for this process. Instead, on the advice of the Greek CA, the father made an "official statement" (like a statutory declaration) witnessed by a police officer by which he declared that he would not institute or support any criminal proceedings against the mother on her return to Greece, and that he would cooperate in the institution of custody proceedings without delay. The Greek CA advised that

[13] The Honourable Joseph Victor Kay *The Hague Convention – Order or Chaos? An update on a paper first delivered to a Family Law Conference in Adelaide in 1994*, paper presented at

this document was enforceable against the father in Greece. It was therefore preferable to an undertaking given to the Family Court in Australia.

Mirror orders

Mirror orders, or identical orders made in both the requested and the habitual residence jurisdiction, may be favoured as a way of overcoming the problems associated with the lack of enforceability of undertakings in the habitual residence country. Mirror orders have an advantage over safe harbour orders in that the requested court can set the scope of the orders to be made in the habitual residence jurisdiction before the requested court is satisfied as to the protection offered to the returning parent and child.

In Re P (A Child : Mirror Orders),[14] Singer J in the Family Division of the High Court of Justice dealt with a request to make mirror orders for contact after a United States court had refused an application pursuant to the Convention to return a child removed by the mother. As noted by Mr Sandor from that judgment of Singer J, an important issue to consider is whether the making of a mirror order is consistent with the Court's powers and jurisdiction when a child may be neither habitually resident in the jurisdiction nor present in the jurisdiction at the time the order is sought.[15] (However, in a return case, that jurisdiction issue may not arise.) In the case in question, Singer J concluded that he could and should make the order sought and observed that:

> *"As it happens, for some years now, more often of course in unreported but not infrequently in reported cases, Family Division judges and judges of the Court of Appeal have advocated in appropriate cases that the parties before them, where contact or a move to live abroad is in contemplation, should provide precisely that form of cordon sanitaire in that foreign jurisdiction which in this case the parties would seek to create here for their child.*

New York University U.S.A, September 1999, sourced from http://www.familycourt.gov.au/papers/html/kay.html

[14] [2000] 1 FLR 435.

[15] In respect of proceedings in Australia see ss69C and 69E *Family Law Act* 1975 (Cth).

Thus, England's judges have invited parties to go off and get mirror orders or their non-common law equivalents in Chile, Canada, Denmark, the Sudan, Bangladesh, Egypt and even in Saudi Arabia." [16]

"Then there is the category of case, of which this one is typical, where a foreign court is making provision for contact to take place in another jurisdiction, in this case England. In that category of case it is important that there should be the possibility for orders to be made in advance of and against the arrival of the child so that the parties and the foreign court may have confidence that if either of them seeks to take advantage of the presence of the child in the contact jurisdiction, the court there will not lend itself to any such attempt.

The classic anxiety is of course that, the child having come for contact with the parent in England for a limited period, the parent in England either attempts to remove the child to a third country and to keep the child there, or refuses at the end of the contact to allow the child to return to his country of residence. Armed with a consent order already made in the English jurisdiction, an English judge would virtually inevitably order return first and investigation of the merits in the residence jurisdiction." [17]

The English courts have endorsed the use of mirror orders when considering the return of a child. In *Re RB (Abduction: Children's Objections)*,[18] Thorpe LJ (with whom Butler Sloss LJ agreed) said:

"Once the primary jurisdiction is established then mirror orders in the other and the effective use of the Convention gives the opportunity for collaborative judicial function." [19]

Mr Sandor also discussed the more recent first instance Family Court of Australia decision by Lindenmayer J in *Director-General Department of Families, Youth and*

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[16] [2000] 1 FLR 435 at 439.
[17] [2000] 1 FLR 435 at 441.
[18] [1998] 1 FLR 422.

Hobbs[20] which is the only reported illustration of the use of mirror orders by an Australian court in ordering the return of a child under the Convention. The father, who had initiated the Convention proceedings in respect of his daughter, was permitted by his Honour to file an affidavit that contained a range of undertakings as to:

- The father not instituting or supporting any criminal or civil charges associated with the removal;
- The father withdrawing pending charges;
- The father paying the costs of the child's return airfare;
- The child remaining in the care of the respondent mother, should she accompany the child back to the Republic of South Africa until the High Court of South Africa directs otherwise or alternatively that he would personally accompany the child on the return trip and would care for the child until otherwise directed.
- The father instituting proceedings in respect of the child within 48 hours of return and pending such proceedings, the respective right of the parents to be governed by their prior settlement agreement; and
- The father obtaining and paying for private educational tuition for the child to maintain her current standard.

The father deposed that he consented to those undertakings being incorporated into "mirror orders" to be granted by both the Family Court of Australia and the High Court of South Africa. Lindenmayer J made orders for the return of the child which would become operative *"conditional upon"* the father first filing the undertakings in the South African court and then filing in the Family Court of Australia an affidavit attesting to his having done so.[21]

Mr Sandor noted that the United States Central Authority view in 1995 was that it did not support a return order being made conditional upon safe harbour orders being obtained in the other jurisdiction[22] It would assist other countries to know if this is still the US view..

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[19] [1998] 1 FLR 422 at 427.
[20] [2000] FLC ¶93-007.
[21] [2000] FLC ¶93-007 at 87,178.
[22] August 10 1995 Correspondence from Department of State "Annex B" to *The Hague Convention and the United States of America: Report on Hague Convention Operations*, Lord

Recognition and enforcement of custody orders

It is a concern to countries like Australia, (and possibly other countries outside Europe) that our European colleagues may have little sympathy for the problems raised in this discussion about the use of conditions, undertakings and mirror orders. Most European countries are parties to the Council of Europe Convention, otherwise known as the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children. For some Europeans, it may be simpler, quicker and easier to pursue a remedy through this Convention than through the Child Abduction Convention. In addition, Europeans may rely on the Brussels II Convention (Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters) which also regulates the recognition and enforcement of judgments in child custody matters. These remedies are not available to many Abduction Convention members. In fact, for Australian parents, the Child Abduction Convention is the only remedy, apart from private litigation, to seek the return of or contact with a wrongfully removed child.

Australia has bilateral agreements with a small number of countries (Austria, Switzerland, Papua New Guinea, New Zealand and many States of the United States of America) for the registration of custody orders. Statutory arrangements for registration of orders as between certain jurisdictions create another avenue for mirror orders to be established by registration. The office of the Australian Central Authority is the receiving agency for registration of foreign orders, but it is not responsible for any enforcement action on behalf of the parent in the other country.

Problems in the enforcement of orders

As noted above, the inability to enforce undertakings in the habitual residence jurisdiction severely limits their effectiveness as a means of reassuring the requested court that the child's and parent's welfare will be protected on their return.

Chancellor's Child Abduction Unit Central Authority for England and Wales sourced from

This problem is well illustrated in the case of *Townsend v Director General, Department of Families Youth and Community Care* (1999) FLC 92-842, where two children were wrongfully removed by the mother from the US in May 1997. An application for return was made by the father in September 1998, over 12 months after removal. The trial judge found that the father had acquiesced to the children remaining in Australia, but that the mother had failed to establish that the children were established in their new environment. The judge exercised his discretion to order the return of the children. Mother appealed but the appeal was dismissed.

As part of the arrangements to return, the father gave various undertakings to the Family Court that -

1. he agrees to a stay of any orders in the US relating to custody of the children and will not remove the children from the mother until custody issues are determined by US courts;
2. he ensures the issues of custody are determined without delay;
3. he supports the mother's application to US immigration authorities to return and remain in US at least till custody issues are determined;
4. he pays return airfares of mother and children;
5. he pays for initial living and accommodation expenses for mother and children

When the mother and children arrived at LA airport, she was arrested and detained and the children were removed from her and placed in the father's care. It appeared then that contrary to the undertakings given to the Australian court, the father at the same time was obtaining an injunction and urgent ex parte custody orders from a court in Texas where he was by then living.

The children then remained with the father for about 10-15 days until a pendente lite hearing for temporary custody orders was held, after which it seems that the children would remain with the mother until the next interim hearing (about another 10 days). In response to our concerns that the father had breached the undertakings, an opinion from the father's US attorney asserted that as the father was entitled to a temporary

restraining order because of the possibility that the mother would flee once in the US, and there was compliance with the Australian undertakings as she would have custody of the children leading up to the interim hearing (although the children were removed from the mother for the first 10-15 days).

I understand that in Texas the mother was successful in having the matter remitted to California where she obtained custody of the children and permission to relocate to Australia. It appears that the court was influenced in its decision by the apparent breach of undertakings by the father.

A less dramatic example arose in a Dutch case where 2 children aged 4 and 2 were returned to Australia from the Netherlands by a Dutch Appeal Court decision of 5/8/99. The matter was listed in the Family Court for 19/8/99. The Dutch court ordered the children to return and if the mother accompanied them, they should remain with her. After the return order was made, the father was asked by the Netherlands Central Authority to make arrangements for accommodation, and that he not enforce an interim residence order on the children's return, and that he agree not to prosecute the mother for child abduction once back in Australia. These were negotiated arrangements not undertakings. The father agreed to the arrangements and reneged on the first 2 on the children's return.

Mr Sandor illustrates this problem with an Irish case, _*In the Matter of EP (An Infant); P v P*_,[23] where a child was brought by her mother from Italy to Ireland. The judge ordered the return of the child subject to undertakings by both parents to the High Court of Ireland and upon advice that the Italian court had varied its interim custody order and granted custody to the mother. After the child's return, the father failed to abide by his undertakings and the Italian court removed the child from the custody of both parents and placed her in an institution, with minimal access to her mother and father. This Order was apparently based on a report from the Social Services.[24] The case highlights the problems arising when the courts of the habitual residence country are not informed promptly of decisions made in the requested country, and the

[23] 18 October 1988 sourced from Lexis.

confusion caused by a lack of knowledge of the law and procedures of other Convention countries, when undertakings are being sought and given. These problems are exacerbated when Central Authorities are communicating information in different languages and delays occur while documents are translated.

SHOULD THE USE OF THESE ORDERS BE ENCOURAGED

The social context in which the Convention operates has changed with time. It is now accepted and well documented that the situation that the Child Abduction Convention sought to address when it was first developed in the 1980s was the situation of child abduction by aggrieved fathers following their unsuccessful custody disputes. That situation is now reversed and the majority of abducting parents are mothers, usually wishing to return to their families and country of origin after the breakdown on an 'international marriage' or to flee domestic violence[25]. This trend is consistent with divorce statistics in Australia that show that approximately 70% of divorces are initiated by women.

The interpretation of the Convention should adapt and evolve with these changed circumstances to provide a commensurate flexibility in the accepted and available mechanisms to achieve the Convention's objectives.

It was the view of an experienced Hague abduction attorney in California that with the current trend to criminalize child abduction by parents that the trauma for the children following arrest of a returning parent could be avoided if orders were made requiring any charges to be dropped. Proof thereof by the prosecuting authorities in the US, federal and state (both Federal and State charges can be prosecuted, separately) prior to a return, it would soften a very hard blow to children and abducting parents.

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[24] At a hearing on 10 February 1998 *inter alia* to enforce the father's undertakings, the trial Judge first discovered that on 13 January 1998, the father had been charged in Italy with offences in connection with the sexual abuse of the child.

[25] See Beaumont, P and McEleavy, P: The Hague Convention on International Child Abduction. Oxford, OUP, 1999; Kaye, M: The Hague Convention and the flight from domestic violence: how women and children are being returned by coach and four. *International Journal of Law, Policy and the Family,* August 1999, pp. 191-212

It was the view of the California attorney that undertakings given to the court in the requested jurisdiction should be registered in the other jurisdiction prior to the return of a child, otherwise they are unenforceable. If the undertakings are necessary, they can be registered rather promptly in the United States if they are called "stipulations and orders", which are required to be registered in the United States.

The undertakings should be registered in the appropriate US State Family Court, so that there is an order in place upon the return, and which is enforceable if there is a breach of those orders. The appropriate jurisdiction in the US is the state where the parties resided prior to the children's removal.

Another relevant issue is the presumption, both in the Convention preamble and accepted in most common law countries, that the courts of the habitual residence country, in making a decision about custody and access, will observe the principle that the best interests of the child are paramount. How that principle is to be observed or upheld is not usually a matter for investigation by the requested court. . There are cases where perhaps it should be investigated, and a decision made on whether the expanded use of undertakings and related orders will assist in securing a safe return.

In this context of considering a role for undertakings and related orders, it should be remembered that the meaning of "wrongful" in "wrongful removal" is not a moral judgment, but refers to a breach of rights of custody. It should also be remembered that in the emotional situation of a marriage breakdown, a lack of rational judgment should not be surprising. An abducting parent who displays this lack of judgment should not necessarily be treated as a criminal who deserves the severest punishment.

This forum should consider whether the use of undertakings and related orders could and should be encouraged in all jurisdictions. If that is impractical or not permitted by legal systems of many countries, we should consider whether fuller, more specific and widely promoted implementation of the 1997 resolution concerning Article 7(h) would minimise the need for undertakings, mirror orders or safe harbour orders.

The forum should also consider what other approach could be adopted in situations where the requesting country lacks the legal framework to implement or enforce undertakings or related orders.

IS THE USE OF UNDERTAKINGS AUTHORISED BY THE CONVENTION

I believe it is generally understood that the Convention, like any international instrument requiring multilateral support, sets out a broad and general framework of standards and obligations for parties' adherence. How those standards are met and obligations fulfilled, is left to the internal legal and administrative system of each country. For example, it was made very clear by a number of countries at the 1997 Special Commission meeting that their Central Authorities had neither the powers nor the resources to implement an expanded set of obligations under Article 7h.

Australia, on the other hand, having implemented the Convention through specific regulations rather than adopting the text of the Convention into legislation, is able to amend those regulations to expand the powers and responsibilities of the Central Authority and the courts as necessary.

Convention text

It may be argued that the Preamble, objects and Article 7 obligations are sufficiently general to allow parties to utilise whatever legal or administrative mechanisms are available to achieve the objects of the Convention:

The Preamble states that:

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the **harmful effects** of their wrongful removal or retention and to **establish procedures** to ensure **their prompt**

return to the State of their habitual residence, as well as to secure protection for rights of access,

Article 3

The removal or the retention of a child is to be considered **wrongful** where—

a it is in **breach of rights of custody** attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Article 7 requires Central Authorities to cooperate and promote cooperation. In particular clauses (b), (d), (f), (h) and (i) are relevant to this discussion:

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures—

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b **to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;**

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d **to exchange, where desirable, information relating to the social background of the child;**

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f **to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;**

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h **to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;**

i **to keep each other informed with respect to the operation of this Convention and, as fare as possible, to eliminate any obstacles to its application.**

Special Commission meeting at The Hague in 1997

In March 1997, at the Special Commission meeting, Australia, the United Kingdom and other countries jointly sponsored a resolution that Contracting States to the Convention "accept that Central Authorities have an obligation under Article 7(h) to protect the welfare of children upon return". The meeting adopted the resolution, subject to certain qualifications relating to the constraints imposed on Central Authorities under the legal and welfare systems of each country.

The acceptance of the resolution was important as abducting parents often raise arguments that they face harm or an intolerable situation (by which they often mean no accommodation, no financial support, no access to legal aid, domestic violence) if they return with children to foreign countries.

At the least, this additional responsibility requires the Central Authority for each country to provide information about services relating to social security, legal aid, emergency accommodation, or domestic violence protection which are available in the city or area to which the abducting parent is asked to return with the children.

In Australia it is accepted that the obligation also involves, where necessary, a Central Authority in commencing proceedings in the courts to ensure the protection of the

welfare of children (eg. to enforce an undertaking by the left behind to provide accommodation or financial support for the child an other parent).

The effect of the 1997 resolution is that Convention parties have adopted a principle to apply in interpreting or upholding their Convention obligations under Article 7(h). It is not an amendment or protocol to the Convention and there is no compulsion on parties to carry out the additional obligations. The 1997 meeting did not reach agreement on how this obligation would be put into practice. This could be examined for further action.

BEST PRACTICE

Singer J of the Family Division of the High Court of Justice in Re O (Child Abduction: Undertakings) [1994] 2 FLR 349 made these observations on the best practice of undertakings:

> *"In a case where the Court finds, as I have here, that an Article 13(b) grave risk would be established unless alleviated by undertakings offered or required, and honoured or enforced, it is reasonable . . . for this Court to consider whether the undertakings will be adequately enforceable in the requesting State.*
>
> *The best practice where such issues arise would be for general information concerning its available processes of enforcement of undertakings to be requested from the Central Authority of the home State pursuant to the provisions of Article 7(e), and consistent with the relaxation upon the reception of evidence as the foreign law which Article 14 provides. However if as here, sufficient information cannot be derived from that source then it may well be necessary to direct the parties to file expert evidence in the more conventional manner*
>
> *If in relation to any particular Contracting State that process revealed the absence of machinery adequate to give backing to undertakings the observance of which the English Court relied upon to relieve the children of*

risk of an intolerable situation, then it would be relevant to consider whether the parent proffering the undertakings genuinely intended to honour them."

Singer J had suggested:

"... there may be some scope for developing probably on a bi-lateral basis at least to start with, communication and discussion between Central Authorities so that each may have the opportunity of explaining and, it may be, justifying the approach their domestic Courts take to issues which commonly arise in Convention cases. Such an issue may well be these Courts use of undertakings designed to smooth the speedy passage home and to the door of the proper Court of children who should never have been taken from its jurisdiction. By such discussions and the exchange of views and information it may be that comity would be strengthened, and an understanding achieved that neither country wishes to cause any offence to the Courts of the other, nor to seek to interfere with or to influence what that Court then does.

Moreover, it may well be that if such opportunity for the exchange of views does assist to promote co-operation, it should be possible in an appropriate case for the Central Authority of the requested State to liaise with its counterpart in the requesting State to put in place measures agreed by the parties or reasonably required as a proper pre-condition of return."

It is suggested that the criteria for best practice in the use of undertakings and related orders should cover the following issues:

1. Agreed limits or duration of operation

- Undertakings and related orders should only have effect until the court of habitual residence can become seized of the proceedings brought in that jurisdiction*;*
- The requested Court must be careful not in any way to usurp or be thought to usurp the functions of the court of habitual residence.

2. Agreed scope of operation

Undertakings which achieve the following objects should be accepted:

- make the return of the children easier;
- provide for the necessities, such as accommodation, adequate maintenance, etc;
- provide for the safety or welfare of the returning child and parent;

But not undertakings which are:

- so elaborate that their implementation might become bogged down in protracted hearings and investigations...
- used by parties to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child."
- for the long term education, long term maintenance of the child, and long term visitation arrangements;
- Query whether undertakings, mirror orders or safe harbour orders should only be used where the "grave risk" exceptions are found to be made out.

3. Made effective and enforceable

- Mirror orders appear to be the most effective and enforceable mechanism;
- Mirror orders have the advantage that terms of the order can be dictated to some extent by the requested court;
- Safe harbour orders are also effective and enforceable in the habitual residence country.

4. Agreement between Central Authorities and Courts that their use is legitimate

- Undertakings and related orders are a legitimate mechanism to achieve the objects of the Convention while recognising and adapting to social change.

5. Consultation between Central Authorities before undertakings made

- There should be consultation as to the reasonableness of undertakings;
- An unusual case may require agreement on undertakings outside the norm;

CONCLUSION

As in all our work, cooperation and communication between central authorities is essential if undertakings and related orders are to be used appropriately and effectively to achieve the objects of the Convention. We need to build good working relationships with foreign agencies in order to develop trust and reduce national tensions in our work. We need to acquire knowledge and understanding of other legal and administrative systems so that we can avoid procedural delays by ensuring all documentation is sent in the appropriate form. We need to know what actions are possible within the legal and administrative framework of the other jurisdiction to avoid placing unreasonable demands on the other Central Authority.