

**The Use of Undertakings in Cases Arising
Under the 1980 Hague Convention
on the Civil Aspects of International
Child Abduction**

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Introduction

The subject of undertakings frequently arises in connection with cases pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. In particular, undertakings come into play when an abducting parent claims that return will place the child at grave risk of psychological or physical harm. If this defense is established, the court may be asked to adopt certain undertakings to ameliorate risk so that the child may be safely returned. The court then has the discretion to consider these undertakings and determine whether or not to utilize them in lieu of ordering the child's return.

As originally implemented, an undertaking was merely a *nudum pactum* that suffered from a lack of enforceability if the promise to perform was to be fulfilled in the habitual residence. Since the 1980 Convention came into force, many U.S. courts have modified the process so that the measures to be adopted become preconditions of the child's return. The price for enhancing enforcement of conditions of return may be an increased delay in the actual return of children.

The decision first to employ undertakings and then determine their scope requires a fact-intensive inquiry. Is there evidence of child abuse or domestic violence? Is there international comity—will the other court uphold the undertakings? Are the proposed undertakings so extensive that the court becomes embroiled in questions more suitable for custody decisions? Is the parent able to fulfill the promised undertakings?

History and Development

Undertakings are official promises, concessions, or agreements given to a court. They are typically given in Hague Convention cases by the parent who has petitioned for the child's return. Generally, a parent's purpose for giving undertakings is to assure a court that in the event the court orders a child returned, certain conditions will be put into place (1) to allow the child to be returned despite the finding that such a return would subject the child to the grave risk defense and (2) to ease the child's transition back to the habitual residence. For example, a father who has petitioned for the return of his abducted child to Ireland promises or "undertakes" that he will move from the family residence in Dublin and allow mother and child to live there and that he will agree to a restraining order from an Irish court to stay away from the mother.

The judicial practice of using undertakings in connection with Hague Convention cases began in British courts,¹ where they are predominantly used in common-law jurisdictions.² Initially, undertakings consisted of bare promises to act or refrain from doing an act in connection with an order for return of a child. The promise could only be reduced to an enforceable order so long as the child or the parties remained in the United States. Once the child had been returned to the habitual residence, there could be no guarantee that the undertaking would be performed in the habitual residence. At best, the enforcement of a U.S. order abroad would be subject to the vagaries of comity as perceived by the foreign court.

The use of undertakings in U.S. courts has gained traction and has evolved since their introduction in the early 1990s. In contemporary practice, many undertakings are actually ordered as preconditions to the issuance or enforcement of an order for the return of the child.³ Reflecting this trend, some courts refer to these measures as “enforceable conditions,”⁴ and accept undertakings with “sufficient guarantees of performance.”⁵ Although the performance of the undertakings is thus more certain, there may be a corresponding delay in the return of the child because of the time required to perform the promised tasks beforehand.

The use of undertakings is not universal among signatory nations to the 1980 Hague Convention. Since the 1980 Convention does not refer to or authorize their use, many nations will neither recognize nor enforce undertakings accepted by a foreign court as a condition of return. At the Sixth Special Commission conducted at The Hague in 2011, the Commission Report noted that “in relation to voluntary undertakings, research to date showed that undertakings were commonly not respected where they were not enforceable or where there was no monitoring or follow-up after

1. *Danaipour v. McLarey*, 286 F.3d 1, 21 (1st Cir. 2002), citing to Paul R. Beaumont & P.E. McEleavy, *The Hague Convention on International Child Abduction* 156–59 & n.183 (1999).

2. United Kingdom, Northern Ireland, Canada, Australia, New Zealand, United States, Hong Kong. *See also Beaumont & McEleavy, supra*, 155–58.

3. Kathleen Ruckman, Deputy Director, Office of Children’s Issues, U.S. Department of State, *Analysis of U.S. Practice in Parental Child Abduction Cases* (2005), available at <http://go.usa.gov/3p6kp>; *see Krefter v. Wills*, 623 F. Supp. 2d 125, 138 (D. Mass. 2009) (payment of child support for three months before child’s return); *see also Jaet v. Siso*, No. 08–81232–Civ., 2009 WL 35270, at *8 (S.D. Fla. 2009) (“The return is conditioned on . . .”).

4. *Sabogal v. Velarde*, No. TDC–15–0448, 2015 WL 2452702, at *16 (D. Md. May 20, 2015).

5. *Mauvais v. Herisse*, 772 F.3d 6, 16 n.2 (1st Cir. 2014) (citing *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000)).

return. It suggested discussion on how undertakings should be employed and how undertakings and/or conditions to return could be made enforceable.”⁶

U.S. courts have the authority and discretion to consider and grant an offer of undertakings.⁷ Whether individual undertakings can be constructed so as to validly address the risks involved is a fact-intensive determination.⁸ Ultimately, protecting the child is the paramount issue.⁹

Use Where Article 13(b) Defense is Established

Undertakings are usually considered in cases involving the grave risk defense under Article 13(b).¹⁰ In response to the 13(b) defense, a petitioning parent may offer an undertaking “to alleviate specific dangers that might otherwise justify denial of return.”¹¹ The party offering the undertakings bears the burden of proof on the effectiveness of the measures proposed.¹² Clearly, one reason for a parent to offer undertakings is self-interest, since undertakings are one of the measures that a court might consider as an alternative to an outright denial of a return petition.¹³

In *Walsh v. Walsh*,¹⁴ the First Circuit analyzed the purpose for considering undertakings where a “grave risk” defense was established.

The undertakings approach allows courts to conduct an evaluation of the placement options and legal safeguards in the country of habitual residence to preserve the child’s safety while the courts of that country have the opportunity to determine custody of the children within the physical boundaries of their ju-

6. Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1–10 June 2011), ¶ 115.

7. *Baran v. Beaty*, 526 F.3d 1340, 1349 (11th Cir. 2008) quoting *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007) (“Once the district court determines that the grave risk threshold is met, only then is the court vested by the Convention with the discretion to refuse to order return Given the intensely fact-bound nature of the inquiry, district courts should be allowed adequate discretion.”)); *Krefter*, 623 F. Supp. 2d at 137–38.

8. *Turner v. Frowein*, 752 A.2d 955 (Conn. 2000).

9. *Danaipour*, 286 F.3d at 26.

10. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 97 (entered into force on Dec. 1, 1983) (“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that . . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”).

11. *Blondin v. Dubois (Blondin II)*, 238 F.3d 153, 159 n.8 (2d Cir. 2001).

12. *Simcox*, 511 F.3d at 606.

13. *Blondin*, 189 F.3d at 248; *Walsh*, 221 F.3d at 219.

14. 221 F.3d at 219.

risdiction. Given the strong presumption that a child should be returned, many courts, both here and in other countries, have determined that the reception of undertakings best allows for the achievement of the goals set out in the Convention while, at the same time, protecting children from exposure to grave risk of harm.¹⁵

Examples. Courts have entertained and accepted undertakings on a broad range of issues. However, measures facilitating a child's return should not usurp the function of the courts of the habitual residence in determining the ultimate disposition of the custody case, the adoption of a parenting plan, or provisions for support and maintenance. Examples of undertakings ordered by U.S. courts include

- paying airfare back to the habitual residence for children and the abducting parent¹⁶
- paying for temporary lodging¹⁷
- directing a party to request that all pending criminal charges in the habitual residence be dropped against the abducting parent¹⁸
- paying three months' child support before the child's return¹⁹
- making efforts to schedule court proceedings forthwith in the habitual residence²⁰
- renting an apartment in the habitual residence for six months²¹
- granting temporary custody of the child to the abducting parent until habitual residence courts make a custody determination²²
- ordering that the left-behind parent receive frequent visitation with the child upon return²³
- ordering that the left-behind parent vacate a temporary custody order resulting from the child's abduction²⁴

15. *Id.*

16. 78 F. Supp. 2d at 289 (S.D.N.Y. 2000).

17. *Id.* at 289.

18. *Tabacchi v. Harrison*, No. 99 C 4130, 2000 WL 190576 (N.D. Ill. 2000); *In re D.D.*, 440 F. Supp. 2d 1283, 1300 (M.D. Fla. 2006).

19. *Krefter*, 623 F. Supp. 2d at 138.

20. *Id.*

21. *Rial v. Rijo*, No. 1:10-cv-01578-RJH, 2010 WL 1643995, at *3 (S.D.N.Y. 2010).

22. *Habrzyk v. Habrzyk*, 775 F. Supp. 2d 1054, 1070 (N.D. Ill. 2011).

23. *Id.*

24. *Sabogal*, No. TDC-15-0448, 2015 WL 2452702, at *20.

Child abuse and domestic violence cases. Although findings of child abuse or domestic violence fall within the ambit of Article 13(b), courts have approached the use of undertakings in these cases with caution and some skepticism.²⁵ The Sixth Circuit, in *Simcox, supra*, pointed to the decisions of other courts to support the reasons for a heightened degree of reticence.

Many courts and commentators have advocated the use of undertakings in order to “accommodate [both] the interest in the child’s welfare [and] the interests of the country of the child’s habitual residence.” (citations omitted).... The same courts, however, have viewed undertakings much more skeptically in cases involving an abusive spouse. See *Van De Sande*, 431 F.3d at 572 (“[I]n cases of abuse, the balance may shift against [undertakings].”); *Danaipour*, 286 F.3d at 26 (“Where substantial allegations are made and a credible threat exists, a court should be particularly wary about using potentially unenforceable undertakings to try to protect the child.”); see also *Baran*, 479 F.Supp.2d at 1273 (declining to adopt undertakings where there was “abundant, credible evidence before the Court that [petitioner] is a violent and abusive man....”). A particular problem with undertakings-especially in situations involving domestic violence is the difficulty of their enforcement. See *Danaipour*, 286 F.3d at 23 (expressing “serious concerns about whether undertakings or safe harbor orders that go beyond the conditions of return are enforceable in the home country”) Clearly, then, undertakings are not appropriate in all cases, and a court “must recognize the limits on its authority and must focus on the particular situation of the child in question in order to determine if the undertakings will suffice to protect the child.” *Danaipour*, 286 F.3d at 21. *Id.* at 606.

Given that undertakings are most appropriate when they are used to restore the child to the *status quo ante*, the goal of protecting the child is not served if it is established that the status quo amounted to one where domestic violence or child abuse was occurring.²⁶ The policy of the State Department²⁷ on cases involving child abuse recognizes the potential ineffectiveness of undertakings in this situation.

25. *Simcox*, 511 F.3d at 606; *Baran*, 526 F.3d at 1351.

26. *Van de Sande v. Van De Sande* 4531 F.3d 567, 572 (7th Cir 2005); cf. Sabogal, No. TDC-15-0448, 2015 WL 2452702, at *19 (finding that because the degree of violence was not extreme and the parties maintained separate residences in the habitual residence, the child could be safely returned if undertakings were in place).

27. The policies of the U.S. Department of State are accorded great weight on questions involving the interpretation of the Convention. See the discussion *infra*, at page 6.

If the requested state court is presented with unequivocal evidence that return would cause the child a “grave risk” of physical or psychological harm, however, then it would seem less appropriate for the court to enter extensive undertakings than to deny the return request. The development of extensive undertakings in such a context would embroil the court in the merits of the underlying custody issues and would tend to dilute the force of the Article 13(b) exception.²⁸

The dynamics of the domestic violence may demonstrate that the victim remains at risk because of a demonstrated pattern of noncompliance with restraining orders,²⁹ persistent violence despite the presence of police,³⁰ or the difficulty of enforcing undertakings that are directed toward violence prevention.³¹

Use Where Grave Risk Defense is not Established

Some courts will condition return of the child upon an undertaking despite the absence of a grave risk defense.³² One of the first cases to endorse the use of undertakings was the Third Circuit’s decision in *Feder v. Evans-Feder*.³³ In that case the court did not find a grave risk defense under Article 13(b) but nevertheless ordered remand of the case and authorized undertakings to ensure that the child did not suffer any short-term harm as a result of his return. The court relied upon British precedent to find that the use of undertakings was appropriate.³⁴

In *Nixon v. Nixon*,³⁵ the district court ordered undertakings after concluding that a prolonged separation of a child from the mother would be detrimental and the mother would not be able to obtain a place to live in the habitual residence without the father’s financial support. Similarly, another court ordered undertakings where it found that the family was in a “desperate financial situation,” noting that there was no finding of an Article 13(b) grave risk defense.³⁶

28. *Danaipour*, 286 F.3d at 25.

29. *Walsh*, 221 F.3d at 221.

30. *Acosta v. Acosta*, 725 F.3d 868 (8th Cir. 2013).

31. *Simcox*, 511 F.3d at 607–08.

32. *Tabacchi v. Harrison*, No. 99 C 4130, 2000 WL 190576, at *16 (N.D. Ill. 2000); *Rial v. Rijo*, No. 1:10-cv-01578-RJH, 2010 WL 1643995, at *3 (S.D.N.Y. 2010).

33. *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995).

34. *Id.* at 226 (citing to *Re O*, 2 FLR 349 (U.K. Fam. 1994)). *See also* A v. Central Auth. for New Zealand, [1996] 2 NZFLR 517 (N.Z. 1996) (noting that it is “reasonably clear” that there is no power to “attach conditions” to a return order “in the absence of finding in favour of a defence under [article] 13”).

35. *Nixon v. Nixon*, 862 F. Supp. 2d 1168, 1180–81 (N.M. 2011).

36. *Wilchynski v. Wilchynski*, No. 3:10-CV-63-FKB, 210 WL 1068070, at *9 (S.D. Miss. 2010).

In *Kufner v. Kufner*,³⁷ the First Circuit affirmed the trial court's imposition of undertakings commanding the father to obtain a dismissal of criminal charges against the mother in the habitual residence, to promptly obtain medical care for the child upon return, and to allow the mother reasonable access to the child until the courts of the habitual residence could act.³⁸ The circuit court also noted that where undertakings are ordered and there is no finding of grave risk of harm, the propriety of the undertakings may be reviewed to determine whether they are consistent with the principles of international comity.³⁹ The Third Special Commission on the operation of the 1980 Convention in 1997 observed that where undertakings are (1) limited in scope to the protection of the child for a limited time and (2) allow the child to be returned sooner, the undertakings should be valid on the basis of comity.⁴⁰

This position was underscored at the Fifth Special Commission by the conclusion that

courts in many jurisdictions regard the use of orders with varying names, e.g., stipulations, conditions, undertakings, as a useful tool to facilitate arrangements for return. Such orders, limited in scope and duration, addressing short-term issues and remaining in effect only until such time as a court in the country to which the child is returned has taken the measures required by the situation, are in keeping with the spirit of the 1980 Convention.⁴¹

Considerations in the Use of Undertakings

State Department interpretation. The U.S. Department of State is the central authority designated by Congress to assist with the implementation and functioning of the 1980 Convention. As such, the department's interpretation of the provisions of the Convention is accorded great weight by the courts.⁴²

37. *Kufner v. Kufner*, 519 F.3d 33 (1st Cir. 2008).

38. *Id.* at 41.

39. *Id.* See also Sabogal, No. TDC-15-0448, 2015 WL 2452702, at *19 (noting that a return with undertakings would likely advance international comity further than a simple denial of the return petition).

40. Report of the Third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child abduction (17-21 March 1997), ¶ 64.

41. Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction . . . (30 October-9 November 2006), ¶ 1.8.1

42. *Danaipour*, 286 F.3d at 22. See also *Abbott v. Abbott*, 560 U.S. 1 (2010).

The State Department recognizes the existence of undertakings as potentially important mechanisms⁴³ but submits that their use should

- be limited in scope⁴⁴
- facilitate the prompt return of the child
- help minimize the issue of non-return orders based on the grave risk defense
- respect the autonomy of the courts of the habitual residence by not preempting decisions on the substantive issues of custody, support, and maintenance

The department has provided examples of undertakings that are appropriate, such as “an agreement that the abducting parents return to the country of habitual residence with the child; assignment of costs for the return flight; and interim custody until a court in the country of habitual residence can arrive at a decision.”⁴⁵

Authority of foreign courts. The use of undertakings that condition the return of a child upon the issuance of an order by a foreign court can be problematic.⁴⁶ In this situation the request for enforcement may be coercive⁴⁷ and may inappropriately condition the return of the child upon a decision of the courts of the habitual residence.⁴⁸ Some orders may be beyond the powers of a foreign court to issue. This problem is frequently encountered where a country with a common law system deals with a country having a civil law system or Islamic, rabbinical, or other religion-based courts. Additionally, some foreign court systems are unable to enforce orders by contempt or other convenient methods. In other countries, enforcing court orders may require filing a separate lawsuit.

43. Kathleen Ruckman, U.S. Department of State, *Undertakings as Convention Practice: The U.S. Perspective* (2005), <http://go.usa.gov/3p6kP> (last visited Mar. 24, 2016).

44. “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 the 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.” Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Dep’t of State, to Michael Nicholls, Lord Chancellor’s Dep’t, Child Abduction Unit, United Kingdom (Aug. 10, 1995)

45. *Danaipour*, 286 F.3d at 22 (citing to legal memorandum attached to Brown letter at note 44, *supra*).

46. Sabogal, No. TDC–15–0448, 2015 WL 2452702 (D. Md. 2015).

47. *Danaipour*, 286 F.3d at 23.

48. *Id.* at 23 (citing the *Explanatory Report* by E. Perez-Vera, Hague Conference on Private International Law, *Actes et documents de la Quatorzieme session*, vol. III, 1980, p. 426).

Other problem areas. Undertakings that require the participation or cooperation of the abducting parent present difficult issues of enforcement. In *Maurizio R. v. L.C.*,⁴⁹ the trial court ordered undertakings that required the cooperation of the abducting parent. This ruling empowered the abductor to prevent the child's return simply by refusing to perform the undertakings. This possibility was deemed untenable by the appellate court, and the lower court's order was reversed.⁵⁰

Where an undertaking is beyond the control of a party to perform, it cannot be enforced as a condition of return.⁵¹ Additionally, "a court cannot require a parent to return to the country,⁵² nor can it require a foreign court or jurisdiction to enter a new order to enforce the undertakings."⁵³

Promises to have criminal proceedings dismissed against the abducting parent in the habitual residence have been noted in many cases.⁵⁴ Whether and to what extent a left-behind parent may influence the criminal proceedings depends on whether that parent actually has the power to have the proceedings dismissed or simply has the right to request prosecuting authorities to dismiss the case. Undertakings that require dismissal may be inappropriate if the parent giving the undertaking lacks the power or authority to obtain dismissal of criminal charges.

Alternatives to Undertakings: Mirror Image and Safe Harbor Orders

Some courts consider mirror image orders and safe harbor orders as alternatives to undertakings. A mirror image order is one that is identical in its provisions to the order made by the U.S. court hearing the Hague Convention case. When the court in

49. 201 Cal. App. 4th 616 (2011).

50. *But see* *Habrzyk v. Habrzyk*, 775 F. Supp. 2d 1054, 1070 (N.D. Ill. 2011) (noting that the undertakings ordered required the abductor's cooperation and expressed hopes that the cooperation would be "forthcoming").

51. *Id.*

52. *Simcox*, 511 F.3d at 610.

53. *Sabogal*, No. TDC-15-0448, 2015 WL 2452702, at *16 (citing *Simcox*, 511 F.3d at 610 (finding undertakings flawed because the mother cannot be forced to return and there were doubts as to the father's willingness to abide by the undertakings)); *Danaipour*, 286 F.3d at 25 (concluding, in a case with credible sexual abuse allegations, that the district court had no authority to order a forensic evaluation in Sweden or to order the Swedish courts to consider the evaluation in the custody dispute).

54. *Kufner*, 480 F. Supp. 2d at 516; *Sabogal*, No. TDC-15-0448, 2015 WL 2452702, at 20; *Tabacchi*, No. 99 C 4130, 2000 WL 190576; *Lieberman*, No. 07-cv-02415-WYD-BNB, 2008 WL 2357692 (D. Colo. 2008) (refusing to stay order of return or issue undertaking requiring dismissal of criminal case); *Jaet*, No. 08-81232-CIV, 2009 WL 35270 (S.D. Fla. 2009).

the habitual residence enters the identical order, it becomes enforceable in that jurisdiction as well as in the United States.⁵⁵

The entry of a mirror image order in the habitual residence court recognizes that there is an existing case in which to file the order and secure a judge's consent to sign the order. If no such case exists, it will be necessary to commence one, resulting in a probable delay in the child's return. Additionally, the order must be one that a court in the habitual residence is comfortable issuing.⁵⁶ Differences in legal systems may require that the orders be tailored to meet the processes and practices of the foreign court.⁵⁷

Safe harbor orders are secured from the courts of the habitual residence that set forth the safeguards necessary to allow the U.S. court to make an order of return.⁵⁸ Typically, these orders are consented to by both parties, and counsel for one or both of the parties arrange to issue the order in the foreign jurisdiction. When that order is in place, the U.S. court may order the child's return based on establishment of a "safe harbor" for the child and perhaps for one parent as well. Courts have, however, expressed "serious concerns about whether undertakings or safe harbor orders that go beyond the conditions of return are enforceable in the home country."⁵⁹

Conclusion

Observing the mandate of the Hague Convention to return children wrongfully removed or retained to their habitual residence, courts remain focused on the "safe" and expeditious return of children. Undertakings, conditional orders, and mirror image and safe harbor orders are tools available to courts. These tools must be applied with due regard for international comity, leaving custody determinations to the courts of the habitual residence and protecting the interests of the children involved until that court can act.⁶⁰

55. See, e.g., *Grammes v. Grammes*, No. Civ.A. 02-7664, 2003 WL 22518715 (E.D. Pa. 2003) (mirror image order entered in Pennsylvania at request of Canadian court).

56. See, e.g., *Danaipour*, 286 F.3d at 23-24 (foreign court not familiar with the concept).

57. *Baran*, 526 F.3d at 1349 (citing Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1076 (2005) (courts in common-law countries have been willing to enter mirror image orders and safe harbor orders).

58. The State Department has suggested the use of safe harbor orders as an alternative to undertakings. *Danaipour*, 286 F.3d at 22.

59. *Simcox*, 511 F.3d at 606 (citing *Danaipour*, 286 F.3d at 23).

60. *Skolnick v. Wainer*, No. 3:13cv1420 (JBA), 2014 WL 1513997, at *9 (D. Conn. 2014).