THE UNDERTAKER'S DILEMMA

ARE UNDERTAKINGS GIVEN TO A COURT IN ENGLAND AND WALES ENFORCEABLE IN THE KINGDOM OF SPAIN?

When resolving applications brought under the 1980 Hague Convention on the Abduction of Children, it has become customary for the High Court of England and Wales as the sending court to invite undertakings to be provided by the left behind parent.This is seen as a practical solution to regulate the parties pending the first inter partes hearing in the overseas court, which, of course, will be the only court with jurisdiction over the child.

The reason why such undertakings are "encouraged" by the English judiciary would appear to be twofold:

1. To counter any argument pursuant to Article 13b of Hague 1980 Convention that the child would be returning to an intolerable situation
2. When considering Article 11(4) BIIR:

   "A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."

In this article we respectfully suggest that in England and Wales it is all too common to use this tool without any serious consideration as to whether such undertakings would be enforceable overseas, in particular in the Kingdom of Spain. In many cases in which the

authors have been involved, it is quite clear that the English court is assuming that the undertakings are directly enforceable overseas and not just in England and Wales. This assumption has been made even where the person providing the undertaking has no intention of entering this jurisdiction and no assets here, thereby rendering any committal proceedings in this jurisdiction for a breach of English undertakings entirely nugatory. This argument was raised by one of the authors of this article in the recent High Court decision of

C v D [2013] EWHC 2989.

The reality is that most civil law systems have absolutely no concept of undertakings within their domestic matrimonial procedural law. English courts need to take this on board and not automatically assume that "Britain rules the waves"!

What help, if any therefore,can be gleaned from international instruments to assist in cross border direct enforcement of undertakings?

The undertakings sought against the left behind parent generally fall into the following general categories:

1. Not to remove the child from the returning party or not to take specific other steps in relation to the child itself for example attending a property or school - "child protection undertaking"
2. To pay monies either directly to the returning parent or to provide overseas accommodation – "money undertaking"
3. Not to assault or molest the returning parent – "domestic violence undertaking"

4. Not to pursue criminal prosecutions overseas against the returning parent – "prosecution undertaking"

In addition, an undertaking may be sought from the returning parent tolodge the child's passportwith a particular person or institution in the overseas jurisdiction – "passport undertaking".

According to the Oxford Dictionary an undertaking is a formal pledge or promise to do something.According to the Black´s Law Dictionary[1], an undertaking is:

"a promise, engagement, or stipulation. In a somewhat special sense, a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the court or the opposite party".

As English family lawyers know, under the new FPR 2010, any undertaking for the payment of money has effect as if it was an order made under Part 2 of the Matrimonial Causes Act 1973 and may be enforced as it was an order – see FPR 33.1(2) and PD 33 para 2.1. The further step which would need to be taken is the endorsement on the undertaking of a notice warning of the consequences of disobedience. The same happens when dealing with an enforcement of undertaking to do or abstain from doing any act other than the payment of money, albeit that the endorsement notice has a slightly different wording. Undertakings as to the payment of money are always problematic to enforce in any event given the requirements of the Debtors Acts.

Under English procedural law it is therefore clear that:

[1] See, *Black Law´s Dictionary, 9th Edition.*

1.- An undertaking is not an order.

2.- An undertaking can be enforced by an English court as if it were an order, with the necessary modifications.

So far so good, but the question arises when these undertakings aregiven before an English Judge in proceedings to return a child in an abduction case whether it is possible to enforce them directly in Spain? The answer is very far from straightforward and will depend to a large extent on the exact nature of the undertaking given.

In a recent Court of Appeal case, **Re Y** [2013] EWCA Civ 129, the Court of Appeal had to consider the enforceability of English undertakings in the Republic of Cyprus. Afather in England had given these undertakings to the English High Court in a fairly standard 1980 Hague abduction case. The undertakings given were clearly intended to counter any arguments by the mother under Article 13(b) that the child would otherwise be placed in an intolerable situation if it were returned to Cyprus.

The Court of Appeal took the view that essentially there was no issue as to the enforceability in Cyprus of the undertakings given to the English High Court as the 1996 Hague Convention would deal with this issue. It is respectfully submitted that this must be wrong for a number of reasons. Not only is it doubtful that the 1996 Hague Convention would apply to this situation at all rather than Brussels II Revised, but in addition, there was no real consideration of Cypriot domestic law on the issue.For reasons not mentioned in the Judgment, one of the parties invoked the 1996 Hague Convention rather than Brussels II Revised. The Court of Appeal was therefore

considering the enforceability of the undertakings pursuant to article 23 of the 1996 Hague Convention, in particular chapter 4 which is headed: “Recognition and enforcement”.

LJ Thorpe stated the following:

> “*In my judgment “measures” is plainly to be construed broadly rather than narrowly. For a common law jurisdiction such as England and Wales, to say that undertakings are not to be classed as measures would be erroneous and devoid of practical sense. Those who negotiated this Convention would by the date of its arrival have been very familiar with the wide use of undertakings amongst the 40 or perhaps 50 jurisdictions that were operating the 1980 Convention.*”

This seems a rather surprising and undiplomatic comment given that it is clearly for each jurisdiction to decide upon its own interpretation of international conventions. It goes without saying that the UK courts would consider themselves masters of their own destiny when it comes to interpreting international conventions albeit they may take judicial notice of the decisions of other jurisdictions. Whilst it is no doubt correct that in relation to EU Conventions, the UK courts must abide by the rulings of the ECJ, that is quite different to one Member State insisting that another Member State adopts a particular interpretation of an international convention.

As to which international instrument was considered, it is surprising that 1996 Hague Convention was given this precedence given that BIIR Article 61, paragraph 1, provides that:

"*Relation with the Hague Convention of 19 October 1996 .....As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:*

(a) *where the child concerned has his or her habitual residence on the territory of a Member State."*

Article 62 of BIIR clarifies that of course the 1996 Hague Convention shall continue to have effect on "*matters not governed*" by BIIR. There is no explanation within the judgment as to why it is considered that in this case that it would not be BIIR which would be the starting point in terms of recognition of undertakings rather than 1996 Hague Convention.

In the authors' view it is far from clear that it is the 1996Hague Convention which should have been applied but rather thatBIIR should have applied, but this article considers various international instruments as well as Spanish domestic law in any event.See the further comment on the issue of which international instrument should have been used in this case in Family Law Week "Before the Flood" by Duncan Ranton.

Below we consider BIIR, 1996 Hague Convention and the Maintenance Regulation in relation to the enforcement of undertakings in Spain.

Brussels II Revised

BIIR provides a system for the recognition of judgments in matrimonial matters and matters of parental responsibility made in other Member States at Chapter II "Recognition and Enforcement".

Paragraph 5 of the Preamble to BIIR sets out in terms that BIIR covers "*all decisions on parental responsibility, including measures for the protection of the child*". Clearly the remit of BIIR is limited and cannot cover all of the undertakings identified above.

Whilst most issues of child protection are likely to come within the "child protection undertakings" identified above, it is strongly contended that the remaining issues identified above on which undertakings are sought could not possibly come within BIIR.

When considering the enforceability of an undertaking in relation to the payment of maintenance or provision of accommodation the "money undertaking", this of course is specifically excluded from BIIR - see paragraph 11 of the preamble to BIIR and Article 1(e) BIIR`.

Equally BIIR could not cover issues of domestic violence to the parent - the"domestic violence undertakings" - as BIIR is concerned with the child's protection, not that of adults.In addition, paragraph 10 of the Preamble lists a number of more general issues which might affect a child including criminal offences committed by children which are also not covered by BIIR. No doubt this is the very reason why the EU is presently consulting on when the new

cross border measures to protect victims of domestic violence will be coming into force – see the draft Regulation on the Mutual Recognition of Protection Measures in Civil Matters [COM 2011/276].

A returning parent would therefore be wholly reliant on the overseas criminal justice system. Whilst of course assaults will no doubt be penalized in most other jurisdictions, and in particular in Spain which has some of the most stringent domestic violence legislation in the world, the non-molestation aspects of an undertaking may well not constitute criminal offences leaving a returning parent very vulnerable indeed.

In relation to undertakings not to assist in a prosecution overseas, the Treaty on the Functioning of the European Union has a whole Chapter [4] on Judicial Cooperation in Criminal Matters so encouragement being given by English Judges to litigants not to co-operate in overseas criminal proceedings might be seen as rather surprising….

Furthermore, in relation to these undertakings given not to commence, pursue or support overseas criminal proceedings, in Spain this would raise serious issues of public policy. All decisions as to the enforceability of overseas orders are subject to public policy exemptions and the consensus view of the Spanish lawyers and judges with whom we have spoken is that such an undertaking would clearly fail such a test, not least as it purports to restrict the Spanish criminal justice institutions.

Turning now to the child protection undertakings which could come within BIIR, Article 21 which states that a "*judgment*" shall be recognised in other Member States without any special procedure being required.Unsurprisingly, there is nothing in BIIR expressly about undertakings being recognised by other jurisdictions – this reflects the fact that in civil law jurisdictions, which are the vast majority of the Member States, undertakings simply are not used.

The preamble to BIIR at paragraph 22 states in terms that:
"authentic instruments and agreements between
parties that are enforceable in one Member State should be treated as equivalent to "judgments" for the purpose of the application of the rules on recognition and enforcement."

In addition BIIR Article 46 provides:

> "*Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments."*

Arguably therefore, BIIR Article 46 might therefore provide the answer to enforcement of a child protection undertaking, if an English undertaking is either:

(i) an authentic instrument – the European Commission has a Justice glossary which defines this term as follows:
"*a document recording a legal act or fact whose authenticity is certified by a public authority*". An

undertaking could presumably come within this definition

(ii) an agreement enforceable in the Member State in which it was concluded - whilst this could be case, it would not be enforceable in England without further steps being taken

In conclusion, a child protection undertaking would seem therefore to be capable of enforcement pursuant to Articles 21 and 46 of BIIR. However, the reality on the ground pursuant to the domestic law of an overseas jurisdiction may well be rather different.

The concensus amongst senior Spanish judges and lawyers is that even considering Article 46, without specific expert advice on the issue from an English lawyer, a Spanish judicial authority is likely to find it very difficult to appreciate that an undertaking should be recognised in the same way as a judgment. In particular, without more, how would a Spanish judge or lawyer who are unfamiliar with undertakings, have any way of knowing whether or not an undertaking is capable of enforcement in England?Even the lack of any judicial signature on the undertaking document would immediately arouse suspicion as to just what status this document could have.

In order to avoid such problems, consideration should be given to obtaining a expert report on English law to serve with the undertaking, stating that it is an authentic instrument and/or an enforceable agreement within Article 46 BIIR. English lawyers cannot simply expect overseas lawyers to accept without more than

an undertaking would come within Article 46 BIIR as the document is clearly not an order of the court and is in an unknown form.

The most likely outcome is that an undertaking on its own would be considered in Spain as a "formal agreement" made before a Judge. This would result in the undertakings being of course relevant to proceedings applying the old Roman principle "*venire contra factum proprium non valet*", nobody may dispute what he previously acknowledged, which is related to other Roman law principle "*Pacta sunt servanda",*meaning that a person making a promise is bound by his/her word.

An acknowledgment that the undertaking is relevant and has evidential value is, of course, not the same as enforcing the direct recognition of the undertaking by operation of law.

1996 Hague Convention

Turning now to the 1996 Hague Convention, this Convention is entirely focused on the protection of children including the recognition and enforcement of measures of protection between Contracting States.

As set out above, the 1996 Hague Convention could only be relevant to the enforcement of an undertaking in the Kingdom of Spain if the subject matter was not governed by BIIR. Given the comprehensive system that exists within BIIR for the recognition of judgments, authentic instruments and enforceable agreements, there is surely minimal scope for such an argument. Further, the Hague 1996 Convention is even more restricted in its subject area than BIIR, so it

clearly could not be used to enforce anything but child protection undertakings.

Comparing BIIR Article 1 [Scope of BIIR] with 1996 Hague Articles 3 and 4, the specific issues of child protection which are covered by each of the instruments are virtually identical. The authors have not been able to think of any matters which would not therefore be governed by BIIR in relation to child protection undertakings.

Be that as it may, Article 23 of 1996 Hague Convention provides:

"*The measures taken by the authorities of a Contracting State shall be recognised by operation of Law in all other Contracting States*".

For the purposes of the 1996 Hague Convention, the key question is whether an undertaking could possibly be a "measure taken by the authority" when in reality it is a formal promise made by one party to a Judge. Whilst it is correct that an English Judge does not have to accept an undertaking from a party, this is the limit of the judicial involvement in the giving of an undertaking. Many overseas Judges would simply not accept that an undertaking could possibly be a measure taken by the authority ie the court. Spanish lawyers and judges whose views have been canvassed have all been of the view that direct enforcement of an English undertaking pursuant to Article 23 1996 Hague would be virtually impossible.

Maintenance Regulation

Given that neither BIIR nor certainly 1996 Hague Convention could be used to deal with undertakings as to maintenance, what of the Maintenance Regulation 4/2009- could this be used instead to enforce an undertaking in relation to maintenance?

The Maintenance Regulation does not mention undertakings although it makes it clear at Article 48 that:

"Court settlements and authentic instruments which are enforceable in the Member State of origin shall be recognised in another member State and enforceable there in the same way as decisions, in accordance with Chapter IV"

MR Article 2 does define both court settlements and authentic instrumentsand it would seem to be the case that a money undertaking could indeed be classified as a "court settlement" or "authentic instrument". If this is correct then an undertaking to pay monies could indeed be enforced pursuant to MR Article 23 onwards.

The difficulty might come if, pursuant to Articles 3 and 4 dealing with habitual residence etc, jurisdiction for maintenance could not lie in England. It is worth remembering that whilst the spouses could choose their court in relation to maintenance obligations, this does not apply to child maintenance – see Article 4(3). Therefore, in relation to an undertaking to pay money, careful consideration must be given to the jurisdictional basis of the agreement, particularly where the parents were not married and there the financial support could not be said to be spousal maintenance.

Conceivably though, a money undertaking could be enforced under MR.

Passports

In England and Wales undertakings given by solicitors to hold passports to the order of the court or the parties are viewed extremely seriously. This is no doubt not just due to the regulatory

requirements upon solicitors under their Code of Conduct but also specific rules such as those under the County Courts Rules Order 29 rule 3 which provide in terms that a solicitor giving an undertaking can be committed for its breach. Furthermore, a committal against a solicitor can effectively be commenced by the court rather than the party itself – see CCR Order 29 r 2.

In Spain, however, Spanish abogados under their Code of Conduct owe no duty to the courts in Spain and certainly owe no duty to the English courts. It is therefore not appropriate for a Spanish abogado to be chosen to hold a passport without further written agreements with that abogado. The concensus view amongst Spanish lawyers is that they would refuse to hold a passport, particularly to the order of the English court, and no-one had ever been asked to do so.

As to whether the Spanish courts might hold a passport, this is a possibility although unlikely in the context of the Spanish court itself not having made any injunctive order preventing the child being removed from the Spanish jurisdiction.

Of course, practitioners should bear in mind that in any event, Spanish nationals can now travel within most of the EU, save for the UK, on their ID cards, so clearly this not only passports would need to be lodged.

As a conclusion, as between England and Spain we have many EU and non EU legal instruments to protect orders and decisions given by eachother's courts. All of these international instruments rely on

the principles of mutual recognition, however, there is simply a limit as to how far these instruments can be stretched.

To minimise the possibility of the non enforcement of undertakings abroad, and therefore the provision of wholly unrealistic protective measures, where possible orders should instead be made by the English courts. If this is not possible, practitioners need to consider exactly how the undertaking would be enforceable.

Please note that all references to England and the English should include Wales and the Welsh which were omitted for the sake of brevity.

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