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An Inconvenient Truth: The Danger of Using Undertakings in International Cases*

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SUMMARY
Analysis of whether the practice in England and Wales courts of litigants giving promises to the English court – not to the other litigant – "undertakings"- would be recognised in other jurisdictions. Given the global position of England and Wales, there are many cases involving overseas issues and this is a mechanism used very frequently in the hope that it will lead to direct enforcement overseas. The author considers that this needs to be reconsidered as the reality in other jurisdictions suggests there would be serious problems of enforcement, not least as most other jurisdictions do not utilise „undertakings".

Key words: undertaking, England, cross border, enforcement, international, judicial comity, promise, recognition

Undertakings are a very curious beast, and a beast, rather like hedgehogs, really only known in the British Isles. Ask overseas lawyers whether they have anything similar, and the answer will invariably be no. Try googling for translations of "undertaking" in French, Spanish, German, Japanese etc and you will come up instead with terms which roughly equate to "legal agreement". As will become apparent,

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such translations clearly miss the whole point of an undertaking which is that it is a promise given to the English court – not to the other party – which the English court is empowered to enforce as it can an order.

Overseas lawyers, asked whether their jurisdictions would be likely to enforce undertakings, will in turn question why English lawyers so frequently resort to their use rather than to orders. The answer would appear to be for our convenience, speed, cost or because the subject matter simply does not come within the jurisdiction of the court for the purposes of making an order.

According to the *Oxford English Dictionary* an undertaking is a formal pledge or promise to do something. According to *Black's Law Dictionary, 9th Edition*, 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."*

Undertakings are clearly worth the paper that they are written on only if they have some chance of being enforced. It is in international cases that the problems most commonly arise. Many abduction cases, for example, are "resolved" on the basis that the left behind parent provides a long list of undertakings for a "soft landing" by the other parent. These might include undertakings for the payment of monies, non-molestation or not to pursue a criminal prosecution overseas. Equally, financial remedy cases may also settle on terms include various undertakings given by one of the parties, for example, to transfer a particular overseas property or to pay outgoings on the overseas property.

Essentially there are two possibilities when an undertaking has been breached and the contemnor is overseas:

(A) The English court deals with the breach,

(B) The overseas court deals with the breach.

SCENARIO A: THE ENGLISH COURT DEALS WITH THE BREACH

The starting point for enforcement in England is that the English court's powers under common law and the Contempt of Court Act 1981[1] at section 14. These are supported by CPR 81[2] which has helpfully brought together all of the procedural rules. These rules apply to undertakings as they do to orders, save for

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[1] Contempt of Court Act 1981, section 14, http://www.legislation.gov.uk/ukpga/1981/49/section/14 (dostęp: 12.03.2019 r.).

[2] Civil Procedure Rules, PART 81 – Applications and Proceedings in Relation to Contempt of Court, https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-81-applications-and-proceedings-in-relation-to-contempt-of-court (dostęp: 12.03.2019 r.).

some additional procedural requirements in relation to notification of the court's powers. These powers provide the following possible sanctions for breach of an undertaking:

(a) Prison

(b) Fine

(c) Sequestration of assets.

I shall now deal with each of these powers of the English court in turn in the context of a contemnor who is overseas, clearly a prison sentence will have no teeth unless the contemnor is extradited back to this jurisdiction. However, the real problem with this is that a breach of an undertaking is a civil contempt not a criminal contempt and therefore would not be a criminal offence in the UK – let alone elsewhere. Pursuant to the Supreme Court case of R v O'Brien[3], there seems to be no scope at all for extradition, whether within the EU or otherwise, on the basis of a breach of an undertaking. O'Brien was a case where there had been an extradition from the USA in relation to a "boiler room" fraud. Once the Defendant had been returned to the UK the Serious Fraud Office sought to pursue contempt of court proceedings in addition to the fraud proceedings. The contempt of court was based upon the defendant's failure to obey a restraint order made against him under the Proceeds of Crime Act 2002. The defendant had fled the UK and the English court had subsequently held that he was in contempt of court and issued a warrant for his arrest as well as adjourning the imposition of a penalty. The Supreme Court emphasised at paragraphs 22 onwards that all extradition – whether in relation to the EU or otherwise – is on the basis of a criminal offence having been committed in the UK. Paragraph 37 of the judgment states as follows:

"*37. There is a distinction long recognised in English law between "civil contempt", ie conduct which is not in itself a crime but which is punishable by the court in order to ensure that its orders are observed, and "criminal contempt". Among modern authorities, the distinction was explained in general terms in Home Office v Harman [1983] 1 AC 280 (in particular by Lord Scarman at p 310) and Attorney General v Times Newspapers Ltd [1992] 1 AC 191 (in particular by Lord Oliver at pp 217-218).*

38. Breach of an order made (or undertaking obtained) in the course of legal proceedings may result in punishment of the person against whom the order was made (or from whom the undertaking was obtained) as a form of contempt. As Lord Oliver observed in Attorney General v Times Newspapers Ltd, although the

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[3] R v O'Brien, The Supreme Court, 2 April 2014, [2014] UKSC 23, https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0143_Judgment.pdf (dostęp: 12.03.2019 r.).

intention with which the person acted will be relevant to the question of penalty, the liability is strict in the sense that all that is required to be proved is the service of the order and the subsequent doing by the party bound of that which was prohibited (or failure to do that which was ordered). However, a contempt of that kind does not constitute a criminal offence. Although the penalty contains a punitive element, its primary purpose is to make the order of the court effective. A person who commits this type of contempt does not acquire a criminal record."

Given that in any event many overseas jurisdictions would view with total disbelief the concept that a litigant could be imprisoned for not obeying a civil order, none of this should come as any surprise to English lawyers or judges. Extradition requests [save in the case of the EU in relation to specific offences which do not include contempt] are always discretionary and rely upon the principle of "dual criminality", namely that there will be a refusal if the act does not constitute an offence in the overseas state as well as the UK.

Mr Justice Mostyn in the ongoing litigation in the case of Al-Baker[4] recently encountered this very issue when he had to reverse his decision to issue a European Arrest Warrant on the basis that the husband had breached various orders for disclosure. Initially at the October 2015 hearing, the Judge did indeed accede to the submissions made that he could request a EAW on the back of the custodial sentence he had imposed for the contempt of court. However, at a later hearing reported as [2015] EWHC 3725[5] the judge reversed his decision as he realised, on the basis of O'Brien above, that in fact no extradition was possible for civil contempt custodial orders.

Of course, enforcing a fine or the sequestration of assets where all the assets are overseas is also going to be very complicated, if not impossible, given that it would not be a litigant but the court which would be pursuing the debt. There would, no doubt, also be public policy considerations raised in the overseas courts as they would be being asked to execute a judgment that would never have been made in their own jurisdictions.

In conclusion, if the defendant and his assets are outside of this jurisdiction, the English courts are likely to be totally powerless in enforcing an undertaking [or for that matter an order]. So, what of the powers of overseas' courts to enforce undertakings?

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4 Al-Baker v Al-Baker, Royal Courts of Justice 27th October 2015, NCN: [2015] EWHC 3229 (Fam), http://www.bailii.org/ew/cases/EWHC/Fam/2015/3229.html (dostęp: 12.03.2019 r.).

5 Al-Baker v Al-Baker, Royal Courts of Justice 14th December 2015, NCN: [2015] EWHC 3725 (Fam), http://www.bailii.org/ew/cases/EWHC/Fam/2015/3725.html (dostęp: 12.03.2019 r.).

SCENARIO B: THE OVERSEAS COURT DEALS WITH THE BREACH

A practice seems to have developed in the English courts whereby courts at all levels assume that undertakings are indeed enforceable overseas. An example is the case of *Re M (Child:Abduction Undertakings)* [1995] 1 FLR 1021 in which Butler-Sloss LJ stated:

> "*Judges in one country are entitled and bound to assume that the Courts and welfare services of the other country will all take the same serious view of a failure to honour undertakings given to a Court (of any jurisdiction)"*

Many academic commentators have criticised this "*judicial fiction*" in which the English judiciary appears to believe that the rest of the world will do as its demands[6]. For good or bad the UK simply does not rule the waves any more [if it ever did] and this assumption is simply not a reflection of the reality in 2016. A more realistic approach by the courts in England would be that unless they have evidence that the undertaking is indeed enforceable overseas, they should assume that it is not. Furthermore, the author's experience is that both the High Court and the Court of Appeal have regularly turned down requests for expert evidence on this very issue.

The Courts in some instances have sought to rely upon various different international instruments to support their stance as to the enforcement of undertakings. The author challenges all readers of this article to identify one international instrument where the word "undertaking" is even mentioned. The author has considered the main Hague instruments and also EU Regulations likely to be of use to family lawyers.

In the Court of Appeal case of Re Y (Abduction: Undertakings Given for Return of Child)[7], the Court of Appeal had to consider the enforceability of English undertakings in the Republic of Cyprus. A father 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 Art 13(b) that the child would otherwise be placed in an intolerable situation if she 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 not clear how this decision can be correct. Not only is it doubtful that the 1996 Hague Convention, rather than Brussels II Revised, would apply

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[6] see K. Trimmings, *Child Abduction within the European Union*, (Hart Publishing) 2013.

[7] Royal Courts of Justice Strand, London, WC2A 2LL, 22nd January 2013, NCN: [2013] EWCA Civ 129, [2013] 2 FLR 649, http://www.bailii.org/ew/cases/EWCA/Civ/2013/129.html (dostęp: 12.03.2019 r.).

to this situation at all but, in addition, there was no real consideration of Cypriot domestic law. Art 23 of the 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".

LJ Thorpe, when considering Article 23 of the Hague Convention 1996, 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."

These comments seem to miss the point. It is irrelevant to the issue of enforcement of an undertaking overseas whether the UK views the term "*measures*" as encompassing an undertaking. What is relevant is whether the overseas jurisdiction shares our view. How could anyone know whether at the time that the Convention was negotiated, the other jurisdictions knew about the use of undertakings here? There is certainly no comment to such effect in the background documents to the 1996 Hague Convention. In fact in the Lagarde Explanatory Report from 1998 at paragraph 120, there is a suggestion that the *"measures"* are in fact limited to decisions made by an authority which arguably might exclude undertakings. Can an undertaking really be a *"measure taken by the authority"* when in reality there is minimal involvement by a judge save for a residual power to refuse to accept an undertaking.

The Australian judges in the recent case of *Cape v Cape* [2013] Fam CAFC 114 were certainly aware of the difficulties in assuming the overseas enforcement of undertakings in relation to a leave to remove from Australia to Germany. Whilst both jurisdictions are parties to the 1996 Hague Convention, the Australian court was unwilling to assume that an undertaking given by the mother to return the child to Australia would in fact be capable of being registered as a "measure" under this Convention. Quite sensibly, on appeal they insisted on an order being made instead. Another fall back for overseas enforcement of certain types of undertakings might be Brussels II Revised[8] [BIIR] which again makes no mention of undertakings.

Art 21 states that a '*judgment*' shall be recognised in other Member States without any special procedure being required. The preamble to BIIR at para 22 states that:

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[8] COUNCIL REGULATION (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Official Journal of the European Union, 23.12.2003, L 338/1.

'… 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.'

BIIR Art 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.'

Possibly therefore BIIR Art 46 might allow a suitable undertaking [ie whose subject matter comes within BIIR] to be enforced overseas either as:

(i) An authentic instrument – this is defined by the European Commission: *'a document recording a legal act or fact whose authenticity is certified by a public authority'.*

(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.

The EU Maintenance Regulation[9] (MR) also makes no mention of undertakings although it makes it clear at Art 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'

How though would an overseas judge or lawyer unfamiliar with undertakings have any way of knowing whether or not an undertaking is capable of enforcement in England or was an authentic instrument? Even the lack of any judicial signature on the undertaking document would immediately arouse suspicion as to just what status this document could have overseas. It is clear that to stand any chance of enforcing an undertaking overseas an expert report on English law would have to be served with the undertaking, stating that it is an authentic instrument and/or an enforceable agreement. English lawyers cannot simply expect overseas judges and lawyers to accept without more the status of an undertaking.

Finally, in relation to undertakings not to assist in a prosecution overseas, the Treaty on the Functioning of the European Union[10] has a whole Chapter (4: Arts

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[9] COUNCIL REGULATION (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Official Journal of the European Union, 10.1.2009, L 7/1.

[10] Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, 26.10.2012, C 326/47.

82 to 86) on Judicial Cooperation in Criminal Matters. The author finds it ironic, to say the least, that English judges are therefore regularly encouraging litigants not to co-operate in overseas criminal proceedings within the EU. This whole issue must raise some very serious issues of public policy and it is very doubtful that anyone has ever even attempted to enforce such an unattractive undertaking.

In conclusion, Jane Austen famously said that:

"It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife".

(The author doubts this is currently true even with a cast iron prenup in place.) However, what is definitely not universally acknowledged as a truth is that English undertakings are easily enforceable in international cases. So practitioners should stop and think prior to accepting undertakings in such cases as the inconvenient truth is that they are likely to be totally unenforceable.

Thanks to David Truex for the Australian references.

Please note that all references to England include Wales.

Niewygodna prawda: Niebezpieczeństwo korzystania z przyrzeczeń w sprawach międzynarodowych

STRESZCZENIE

Analiza czy praktyka sądów Anglii i Walii wobec stron postępowania składających przyrzeczenia sądowi (nie innej stronie) – tzw. undertakings będzie uznawana w innych jurysdykcjach. Mając na względzie globalną pozycję Anglii i Walii i pojawiające się kwestie związane z zagadnieniami o charakterze międzynarodowym omawianego mechanizmu używa się w nadziei , że będzie on bezpośrednio wykonalny za granicą. Autorka stwierdza, że jest to jednak wątpliwe. Analiza praktyki sądów zagranicznych prowadzi do wniosku, że wykonywanie tych przyrzeczeń nastręcza poważnych trudności, zaś w większość jurysdykcji te przyrzeczenia nie są znane.

Słowa kluczowe: przyrzeczenie, Anglia, transgraniczny, egzekwowanie, międzynarodowy, zasada respektowania orzeczeń, zobowiązanie, uznanie

General form of undertaking

Name of court	
Claim No.	
Claimant's Ref.	
Defendant's Ref.	

Between _____ **Claimant Applicant Petitioner**

and _____ **Defendant Respondent**

This form is to be used only for an undertaking not for an injunction

On the day of [19][20] (1)

Seal

[appeared in person] [was represented by Solicitor / Counsel]

and gave an undertaking to the Court promising (2)

And to be bound by these promises until (3)

The Court explained to (1)

the meaning of his undertaking and the consequences of failing to keep his promises,

And the Court accepted his undertaking (4) [and *if so ordered* directed that

(1) should sign the statement overleaf].

And (enter name of Judge) **ordered** that (5)

(1) Name of the person giving undertaking

(2) Set out terms of undertaking

(3) Give the date and time or event when the undertaking will expire

(4) The judge may direct that the party who gives the undertaking shall personally sign the statement overleaf

(5) Set out any other directions given by the court

(6) Address of the person giving undertaking

Dated

To (1)

of (6)

Important Notice

- If you do not comply with your promises to the court you may be held to be in contempt of court and imprisoned or fined, or your assets may be seized.
- If you do not understand anything in this document you should go to a Solicitor, Legal Advice Centre or a Citizens' Advice Bureau

The Court Office at

is open from 10 am to 4 pm. When corresponding with the court, address all forms and letters to the Court Manager and quote the claim number.

N117 General form of undertaking (10.12)

The Court may direct that the party who gives the undertaking shall personally sign the statement below.

Statement

I understand the undertaking that I have given, and that if I break any of my promises to the Court I may be fined, my assets seized or I may sent to prison for contempt of court.

Signed

To be completed by the Court

Delivered

- ☐ By posting on:
- ☐ By hand on:
- ☐ Through solicitor on:

Officer:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/688401/n117-eng.pdf