Marital agreement and cross-border divorce: a view from Russia

Until quite recently, a marital agreement and cross-border, family planning were not issues for Russian people. The Soviet Union époque, with lack of private property and prohibition to travel abroad, without the Government's consent, did not provide any place for a marital agreement, especially concluded by a couple with different citizenships.

Starting from the early 1990s, when the USSR ceased to exist, the first Russians who could publicly declare their wealth began to appear. Since then, cross-border marriages (including unions between Russians and citizens of so-called "capitalistic countries") have no longer been considered to be censured by society and the Russian Family legislation became more sophisticated. Thus, in 1994, adoption of the Russian Civil Code allowed changes to the regime of property acquired during marriage "under agreement of the spouses". However, that Civil Code edition did not specify what kind of agreement was meant. Later, the Russian parliament adopted also the Family Code that on March 1st, 1996 (date of entering into legal force) replaced the Soviet Code on marriages and families. It provided special rules for a marital agreement, as well as established conflict-of-law rules, if family relations include foreign jurisdictions.

Despite that, almost 25 years have passed from the moment when the Russians had the possibility to conclude marital agreements. There are still a lot of stereotypes in our culture: like considering that a marriage is not a place for any agreement, but a story about love. Nowadays, the situation is changing: more and more couples understand that a correctly drafted agreement is able to support the feelings, provide stability and confidence to each spouse and shall be treated, not as a trigger to divorce, but as a good instrument of family, property and succession planning.

Factors having impact on law applicable to asset relations of the spouses

When a couple, leading an international lifestyle, starts thinking about concluding a marital agreement, the first questions to answer are: in what jurisdiction the agreement shall be concluded, and what law shall be applied?

At first glance, the Russian conflict-of-law rules provide a very strict and clear solution: this is the law of the country where the spouses jointly reside: It shall be applied to their personal non-proprietary and property rights. If the spouses reside in the different states, they shall use the legislation of the country where they had their last joint residence. And, finally – if the spouses have never had joint place of residence, their personal non-proprietary and property rights and duties in the territory of Russia shall be regulated by Russian law. This is a basic rule that can be changed by a marital (pre-nuptial, nuptial) or alimony agreement, concluded between the spouses not having common citizenship, nor common place of residence.

If the spouses chose, in the marital agreement, the applicable law, the Russian court (in case of dispute between spouses or ex-spouses) normally respects the choice, even if, as per result, the Russian court shall apply foreign law for the case consideration. However, in practice, very often a marital agreement does not contain a proper choice of law clause, or is completely silent on this matter. Absence of proper law choice potentially creates uncertainty for international families, due to the following factors:

(i) Practical impossibility to determine the place of the spouses' residence, if they have centers of life interest in several countries (for example a family has estates that may be treated as family houses in two or more states and the spouses travel regularly between them due to, let say, the remote character of their work).

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(ii) Formal approach of the Russian courts that usually treat existence of registration at the place of living in Russia (formally called "*propiska*" being the inheritance from the Soviet Union, with its bureaucratic requirement that each Russian shall be "registered" somewhere) as presumption that a person with such Russian registration permanently resides in Russia, even if the family, in fact, relocated abroad many years ago.

(iii) And finally – by default, conflict between different jurisdictions involved due to different conflict-of-law regulation: imagine what a mix would be if a couple with Russian citizenship of both spouses celebrated their marriage in France, that was the country of their first residence and currently resides in Portugal, but both spouses have registration in Russia? The situation becomes more complicated if the spouses have two citizenships, which is allowed in some jurisdictions.

Forum appropriate for divorce and division of property located in Russia and abroad

In Russia, a person can obtain a divorce though court procedure, or in the Civil Registry Office. Marriage dissolution by Civil Registry Office is possible if spouses mutually agree on divorce and do not have underage children. Outside Russia, the functions of the Civil Registry Office are performed by the Russian Consulates. During marriage termination by the Civil registry Office, or in Russian Consulate abroad, only marriage termination is the issue in question. This means that the spouses, or ex-spouses, are free to divide the community property under mutual agreement (no court approval is required), or leave the assets after the divorce without division of the community property of (ex)spouses, or in case of dispute – to submit further claim to the court.

If the spouses have minor children, or either spouse does not agree, the only way to obtain a divorce is applying through the court procedure. A Russian court is competent to issue a divorce order if either spouse is a Russian citizen, or resides in Russia, regardless of the citizenship, or residence, of the other spouse, or place of marriage registration. Moreover, Russian courts have exclusive competence, if both spouses have permanent residence in Russia. As for property claims, the Russian court has authority to separate spouses' community property, if a defendant owns assets in Russia, or resides (has registration) here. Besides, under current court practice, the Russian court is entitled to determine the spouses' shares in community property objects located outside Russia, f. e. in *Ivanova vs. Ivanov*, *Fadeeva vs. Lukin*[1] the Supreme Court of the Russian Federation stated that:

"… The Claimant's demands are not the claims about the rights on immovable property, the claims aimed at changing the regime of the community property of the spouses. So, the conclusion that the plaintiff was entitled to divide the property exclusively in a competent court of a foreign country at the location of the immovable property is wrong. The Civil Procedural Code of the Russian Federation does not state that a claim on division of the community property of the spouses (the citizens of the Russian Federation) located in a foreign country is an exclusive competence of foreign courts…"

The spouses are entitled to choose to apply to the court with the application of marriage termination only and leave the assets, acquired during marriage, in the community property after the divorce (like it performs during marriage termination in the Civil Registry Office if the (ex)spouses have not terminated the community property under mutual agreement) or to submit claims for property division, for determination of the children's place of residence, or for alimony claims, simultaneously with the divorce claim. Also, it is important to note that the Russian court will not consider any property matter

[1] *Ivanova vs. Ivanov* (Ruling of the Supreme Court of the Russian Federation of 18.09.2018 N 4-КГ18-76), *Fadeeva vs. Lukin* (Ruling of the Supreme Court of the Russian Federation of 04.12.2018 N 78-КГ18-67).

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on its merits, nor determine with whom the children should live, nor request financial disclosure about spouses' assets, under the court's own initiative, if the respective claims, or requests are not demanded. In practice, for international cross-border family cases, this leads to attempts (often successful), of one spouse with Russian citizenship, to obtain a divorce order though very quick and straight forward procedure in Russian court, while it is in the interests of the other spouse to apply for a divorce at the country of the spouses' habitual residence (for example in London), but where the procedure may take a longer time. To prevent such attempts, Russian legislation provides the obligation of the Russian court to terminate the proceedings, if a foreign court was the first who started to hear a similar claim, or has already issued a decision that can be recognized and enforced in Russia. But often, the Russian courts ignore this rule and continue the hearing, even if the judge has been informed about previously-started divorce procedure in a foreign court, with Russian nationals' involvement. The usual arguments of the judges are that: the jurisdiction in question does not have an international treaty with Russia on enforcement of judgements, or the spouses have registration in Russia that is treated per se as place of their residence and leads, from the Russian courts' point of view, to the exclusivity of the Russian forum.

If a Russian court considers itself competent to consider the case, the consideration shall be regulated under Russian procedural rules, but under material family law applicable to the couple (i.e. the law of their place of residence, or the law chosen in the marital agreement). If a foreign material law is applied, the Russian court shall use it in compliance with the official construction, application practices and doctrine in the relevant foreign state. To do this, the court may ask the Russian Ministry of Justice for assistance and clarification (usually this procedure is very time consuming and ineffective), or to expect that the parties of the proceedings present documents, legal opinions confirming the content of foreign law norms (this is a preferable approach in practice). If at all possible measures were taken, but the content of foreign law norms could not be established within a reasonable term, or when it was in contradiction with the public policy of the Russian Federation, the court applies the Russian material law. To avoid this situation, it is important that a marital agreement provides for a choice of not only the applicable law, but also a choice of forum for dispute resolution (the forum chosen by the agreement shall not contradict the exclusive competence of the Russian courts) and that both choices shall be complementary with each other.

General principles of property division between the spouses if no marital agreement is concluded and the Russian material law is applied

Russian family and civil legislation identifies the following types of the property regime: the community, shared and personal (separate) property regimes.

Under general principal of the Russian Family law, if otherwise is not provided by an agreement between spouses, all assets acquired during the marriage, under counterclaim transactions, are considered as community property of the spouses, irrespective of which spouse is registered as owner, or who paid for the asset. The property owned by any spouse before marriage registration, or received by a spouse during the marriage as a gift, or by way of inheritance, is that spouse's personal property.

Besides, the Russian courts treat as personal property the assets acquired during the marriage but at the personal fund of one spouse (for examples, if the money spent for such property acquisition were earned by the spouses before marriage registration). The spouse who pretends that particular property acquired during marriage to be considered as his, or her, personal property under the mentioned ground, shall prove the asset acquisition at personal expense. This is, in practice, difficult to do if, for example, the asset was paid for in cash or out of funds from a bank account, in which both personal and family (community) money were held. Obviously, this court practice leads to instability of civil

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turnover and unpredictability for both spouses and third persons (for example, for a proposed purchaser of respective property) whether the asset is personal or community property, whether a spouse has authority to dispose the asset, without consent of the other spouse, as the answer depends on whether the source of funds is traceable. To solve this issue, a group of Russian parliamentarians and practicing lawyers submitted, for consideration of the State Duma of the Russian Federation (the Russian Parliament), a draft law for amending the Family Code. According to this Draft Law, any income received by any spouse during the marriage (irrespectively whether the source of income is personal property of any spouse) and any property bought during the marriage (irrespectively the source of expenses or funds for acquisition) will be considered as community property, if the spouses do not agree otherwise, in a marital agreement.

It is important to note that, in Russia, only officially-registered marriage leads to formation of the community property. Thus, if a man and a woman, or same-sex couple, co-habit without official marriage registration, any property acquired by either of them will be considered as personal property of the individual registered as owner, or as shared property, if both co-habitants participated in acquisition and/or are registered as owners.

The marriages between Russian citizens, or between Russian and foreign citizens, registered abroad are recognized in Russia as valid, if there are no circumstances being in contradiction to the general Russian family law rules and principals. Thus, the Family Code prohibits a marriage between close relatives, or adoptive parent and child (even if the child is full age), or marriage of the couple when one of the spouses-to-be is already married, or recognized to be incapacitated by the court, due to a mental disorder. The marriages between two foreign persons concluded in a foreign country are recognized in Russia, if such marriage complies with the law of the place of registration.

If the spouses did not conclude a marital agreement for establishment of a separate property regime for all property, they can divide community property by mutual agreement, or by application to the court, both during the marriage, or after marriage termination. After the divorce, the term of limitation for property division, though court procedure, is three years, but it starts, not from the moment of divorce, but when the spouse, whose rights were violated, received information about the violation. So, in practice, the regime of community property may exist for an unlimited period of time.

As of today, it is allowed to claim for a division all community property, or particular piece, while leaving other ones in community property. The particular assets, which spouses would like to divide, shall be directly identified in the claim submitted to the court. And this rule, in combination with absence of requirement of full financial disclosure, before the court, to be made by each spouses (as it exists in, for example, in England) may lead to violation of the rights of an economically-weak spouse, as such spouse is not able to claim for the division of particular assets, if such spouse does not have enough information for identification of the assets in the application. And despite that, in theory, the assets, not being asked for division, remain in the community property of both spouses, irrespective of who is the registered owner, in practice the ex-spouse, being the registered owner, has full rights and discretions relating to the assets, especially if they locate outside of Russia.

This situation is going to be changed after adoption of the above-mentioned Draft Law, according to which, the court will be entitled to separate the share of each spouse in all community property, even if all community property was not specifically listed in the claim. This will help, not only to protect the other (ex)spouse, but also to reduce the number of cases, when spouses apply to the court several times, with claims on the division of different assets.

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The spouses' shares, in the community property, are assumed equal (50:50). The court is entitled to transfer the particular items indicated in the claim to the personal property of one spouse, with compensation to be paid in favor of the other, or to determine that the spouses in shares own all items claimed for division. The latter variant, being the simplest to the court, but extremely formalistic, leads to further disputes between co-owners of the shared property (instead of community property) who are initially in the conflict (divorce). Besides, the law provides the court with the authority to divide the property unequally, for the benefits of the children born from the marriage and/or the benefits of a spouse (if the other spouse did not receive income for an unacceptable reason or spent the community property to the detriment of the family's interests). But, in practice, the Russian courts rarely use this authority. That is why a spouse, who receives information that the other spouse disposed the community property, without his/her consent, often claims for invalidation of such transactions, instead of claiming for the remaining property division in unequal shares.

Russian civil legislation does not have a concept of trusts or beneficiary ownership, in the meaning that such definitions have in foreign jurisdictions. Thus, if the community property was transferred to foreign trusts and foundations, or ownership is structured though a foreign nominee, it is very difficult to divide such assets in the Russian court and prove that the assets are actually owned by the spouses and not the third parties or nominees. For example, after the divorce of the Russian oligarch Vladimir Potanin, his wife Natalya (the marriage lasted approx. 30 years) claimed the division of the Vladimir's main business asset– the shares of PJSC "Mining and Metallurgical Company "NORILSK NICKEL" and the assets of Interros International Investments Limited. The Russian courts[2] refused Natalia to satisfy of her claim, as nominees were considered by the courts as real owners of the assets:

"…The court correctly concluded that the community property acquired by spouses during marriage and being subject to division according to the provisions of the Family legislation of the Russian Federation, does not include the assets held on ownership right by third persons and not by either spouse…

…

The court correctly did not take into account the arguments of the claimant regarding recognition of the rights of the beneficial ownership on the disputed shares, as these beneficial rights can not be considered as "property" in meaning of both the Russian civil law (the art. 128 of the Civil code) and the Russian family law (para. 2 of art. 34 of the Family Code), and in particular can not be recognized as the property to be divided between the spouses (art. 38 of the Family code).

…

Arguments of appeal claim that this dispute would have been solved considering the definition of "beneficiary ownership" …. and the court would have been applied the norms of foreign (Cyprus) law regulated trust relations, can not be taken into account as neither Family legislation of the Russian Federation …. nor Civil legislation of the Russian Federation do not know the concept of "beneficiary ownership" and disregard the legal significance of this definition".

On the other hand, when in 2017 Natalya Potanina applied[3] to the Constitutional Court of the Russian Federation, the Court ordered that the norms of Russian Family legislation "*do not contain a closed list of the community property of spouses but only determines criteria …. that allow to determine which assets are the community property…*" This Ruling of the Constitutional Court means that in theory the

[2] *Potanin vs. Potanina* (the Appeal Decision of the Moscow City Court dated January 22, 2016 No. 33-2311).
[3] The Ruling of the Constitutional Court of the Russian Federation dated July 18, 2017 No. 1656-O.

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beneficiary rights can be subject to division between spouses. Supreme Court also confirmed this in the case Dubin vs Sergeeva[4] where the court agreed *"…determination of a beneficial owner is a legally significant circumstance…"*

The marital agreement, the provisions and limitations

To avoid the judicial procedure of community property division, with its uncertainty regarding applicable law, competent court and difficulties in dividing the assets, owned though foreign structures and nominees, the spouses or spouses-to be are allowed to conclude a marital agreement. Besides this, a marital agreement is often used for estate planning, or protection of the assets from third parties' claims, (of course, if the agreement is concluded properly and timely, as the spouses' creditors may have a possibility to challenge the agreement, in some situations).

The Russian law provides that the marital agreement can be concluded both before, and after, marriage registration: there are no any requirements for the term within which the future spouses shall conclude the agreement before marriage, like exist in England. The only formality, for the spouses to have the agreement concluded, is the requirement of notary certification. No formal financial disclosure, nor independent legal advice are formally needed. However, in practice they are preferable, if there is any risk that later a spouse might dispute the concluded agreement (see below).

Generally, the spouses are not limited to making any provisions related to asset relations in the marital agreement: to establish a regime of community, shared or separate property on all property, particular items, or on property acquired before marriage registration, to provide the maintenance clause for each other. The Russian courts and the state authorities usually follow provisions of the concluded marital agreement (including the agreement under foreign law, if the spouses properly chose the respective foreign law and the agreement does not contradict Russian public policy) during consideration of the claim for property division, or during registration of ownership rights. However, a spouse may challenge the marital agreement, if it does not comply with the law. Thus, under the Family Code, neither spouse shall be put in an extremely unfavorable position in comparison to the other spouse; in particular, any spouse cannot be deprived from all the property or significant share of the community property.

However, it is worth noting that, if the Draft Law is adopted in its current edition, the "extremely unfavorable position", as the ground for invalidation of the marital agreement, will be removed from the Family Code.

Besides, it is possible to invalidate the marital agreement under the common grounds for invalidation of any civil transaction such as fraud, misconception, or incapacity of a spouse, when concluding the agreement, etc. In practice this means that a spouse, who considers his, or her, rights violated by the agreement, can make attempts to prove that she, or he, was not given explanations of the legal impact of the concluded agreement, did not understand that under the agreement a significant piece of community property was, or is to be, transferred to the other spouse. To mitigate such risks, we recommend our clients, despite the absence of such duties, to disclose the assets in the agreement in as much detail as possible (especially if the agreement is concluded long after marriage registration and the spouses have already acquired property, when and since they were married) and to arrange an independent legal advice for both spouses.

And finally, it is prohibited by the Family Code, to establish the rights and obligations of the spouses towards the children in a marital agreement (e.g. alimony obligations, determination of the place of

[4] Dubin vs Sergeeva (the Ruling of the Supreme Court of the Russian federation dated July 07, 2015 No 5-KG15-34

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children's living, etc.) or restrict the capacity of the spouses/one of them, restrict the right of applying to the court, regulate personal non-property rights of the spouses. For example, in case *Safaryan vs. Karapetyan*[5], the court invalidated the marital agreement, which, among other provisions, stated, "*in case of a marriage dissolution at initiative of S. or as a result of his improper behavior (marital infidelity, drunkenness, hooligan actions etc) the community property of the spouses shall be the personal property of K*".

Conclusion

To sum up, marital agreements in Russia are effective instruments of family and property planning, as they allow spouses to manage the financial side of their personal, family and business life. By using a marital agreement, a couple settles property issues, without application to the court, which may be a time and cost-consuming procedure, with sometimes unpredictable outcomes, especially for families with international lifestyles. We believe that cultural barriers regarding marital agreements as "a trigger to divorce" will be soon overcome in Russian society. Looking at our practice, we can say that nowadays, marital agreements are more about trust between the spouses, than "divorce planning".

[5] *Safaryan vs. Karapetyan* (the Ruling of the Supreme Court of the Russian Federation dated 20.12.2016 No. 5-КГ16-174).

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