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ПРАВО И МЕЖДУНАРОДНЫЕ ОТНОШЕНИЯ

CONFLICT OF LAWS REGULATION OF THE INTERNATIONAL FAMILY RELATIONS IN THE RUSSIAN FEDERATION (LEGISLATION AND JURISPRUDENCE)

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Abstract. Russian conflict of laws rules that determine the choice of law applicable to marriage and family relations associated with foreign law and order came into force in 1995 and have been in effect for more than 25 years. Despite the fact that this problem has been studied in great detail in the Russian legal doctrine, the relevance of the analysis of conflict of laws rules set forth in the Family Code of the Russian Federation is by no means exhausted due to the large-scale reform of the rules of Private International Law in the Civil Code of the Russian Federation and the current legislative regulation of international family relations in other States. The article concludes that conflict of laws regulation of the international family relations in the Russian Federation adopted more than 25 years ago needs serious modernization. It is reasonable to carry out the corresponding updating in the following directions: maximum specification of the content of conflict of laws rules for the purpose of more differentiated regulation of the family relations; establishment of a complex and detailed system of the connecting factors aimed at correct determination of the law the most closely connected with the relation and decision-making; the expansion of possibility of choice of the applicable law to divorce and property relations; application of the law the most favorable for a child should become a dominating connecting factor.

Key words: Private International Law, the Family Code of the Russian Federation, marriage and family relations, conflict of laws regulation, autonomy of will of the parties, the most favorable law, the closest connection.

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КОЛЛИЗИОННОЕ РЕГУЛИРОВАНИЕ МЕЖДУНАРОДНЫХ СЕМЕЙНЫХ ОТНОШЕНИЙ В РОССИЙСКОЙ ФЕДЕРАЦИИ (ЗАКОНОДАТЕЛЬСТВО И СУДЕБНАЯ ПРАКТИКА)

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Аннотация. Российские коллизионные нормы, определяющие выбор права, которое применимо к брачным и семейным отношениям, связанным с иностранным правопорядком, вступили в силу в 1995 г. и действуют уже более 25 лет. Несмотря на то что эта проблема весьма подробно изучена в российской правовой доктрине, актуальность анализа коллизионных норм, изложенных в Семейном кодексе РФ, отнюдь не исчерпана в связи с масштабной реформой норм международного частного права в Гражданском кодексе РФ и действующем законодательном регулировании международных семейных отношений в других государствах. В статье делается вывод о том, что коллизионное регулирование международных семейных отношений в Российской Федерации, принятое более 25 лет назад, нуждается в серьезной модернизации. Целесообразно провести соответствующее обновление по следующим направлениям: максимальное уточнение содержания коллизионных норм с целью более дифференцированного регулирования семейных отношений; установление сложной и подробной системы привязок, направленных на правильное определение права, наиболее тесным образом связанного с регулируемым отношением; расширение возможности выбора применимого права к бракоразводным и имущественным отношениям; применение наиболее благоприятного для ребенка права должно стать доминирующей коллизионной привязкой.

Ключевые слова: международное частное право, Семейный кодекс РФ, брачные и семейные отношения, коллизионное регулирование, автономия воли сторон, наиболее благоприятное право, наиболее тесная связь.

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Настоящая статья подготовлена при поддержке правовой информационно-справочной системы «КонсультантПлюс». Все международные договоры Российской Федерации, нормативные правовые акты и судебная практика приводятся по данным «КонсультантПлюс».

Introduction

The need for legal regulation of such matters as family and child protection, marriage and dissolution thereof is not in doubt at the current level of development of human civilization. The existence of a well-developed legal system providing for efficient regulation of marriage and family relations is of vital importance for a healthy functioning society[1]. Marriage and family relations requiring application of a foreign legal order undergo rapid development. Such relations are traditionally associated with the object of private international law regulation. The complexity of such legal regulation is due to the fact that family relations with participation of foreigners are connected with two and more States, *i.e.,* with two or several legal systems which may differently resolve marriage and family issues. In this regard, the question of the applicable law is very important because depending on that choice the result may be different[2].

1. Legal background

The legal system of the Russian Federation (hereinafter – the RF) is based on the pluralistic private law concept. In this regard, the Russian private international law is codified in the inter-branch form, *i.e.*, the special section containing basic rules and institutes of the general and special parts of Private International Law is included into the general act of the civil law codification. The private international law rules contained in the Civil Code of the Russian Federation of 30 November 1994 (hereinafter – the Civil Code of the RF)[3] represent a complete system of the coordina-ted rules and apply to all private-law relations to fill the gaps in the branch regulation (Art. 6 "Application of the civil legislation by analogy" of the Civil Code of the RF; Art. 4(2) of the Family Code of the Russian Fe-deration of 29 December 1995, as of 13 July 2021 (hereinafter – the Family Code of the RF))[4]. Section VI of the third part of the Civil Code of the RF is the main source of the Russian Private International Law. At the same time, there are institutes of the special part of the Private International Law (first of all, conflict of laws rules of the International Family Law and the Private International Maritime Law) included as independent sections into the acts of special codifications. The rules of the international civil procedure law are contained in the acts of codification of the civil procedure law[5]. Be-

[1] See: *Fedoseeva G. Yu.* Брачно-семейные отношения как объект международного частного права Российской Федерации: дис. ... д-ра юрид. наук. М., 2007. С. 4 [Marriage and Family Relations as an Object of Private International Law of the Russian Federation: Thesis for a Doctor Degree. M., 2007. P. 4].

[2] See: *Marysheva N.I.* Семейные отношения с участием иностранцев: правовое регулирование в России. М., 1962 [The Family Relations with Participation of Foreigners: Legal Regulation in Russia. M., 1962].

[3] See: СЗ РФ (1994), No. 32, item 3301. Part Three of 18 March 2019. Section VI Private International Law (Art. 1186–1224).

[4] See: СЗ РФ (1996), No. 1, item 16.

[5] See: Code of Civil Procedure of the Russian Federation of November 14, 2002 // СЗ РФ (2002), No. 46, item 4532; Code of Arbitrazh Procedure of the Russian Federation of July 24, 2002 // СЗ РФ (2002), No. 30, item 3012.

sides there are plenty of special laws regulating selected private international law issues[6].

The principle of supremacy of international law is enshrined in the Constitution of the RF[7]: "The universally-recognized principles and rules of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If an international treaty of the Russian Federation establishes other rules than those provided for by law, the rules of the international treaty shall apply" (Art. 15(4)). However, the supremacy of international law is not absolute. The decisions of inter-state agencies taken on the basis of provisions of international treaties of the RF in interpretation thereof contradicting the Constitution of the RF shall not be subject to execution on the territory of Russia (Art. 79). The Constitutional Court of the RF is empowered in the procedure established by a federal constitutional law to resolve the problem of possibility to execute the decisions of international agencies taken on the basis of provisions of international treaties of the RF in interpretation thereof contradicting the Constitution of the RF (Art. 125(5.1(b))).

In accordance with the general constitutional norm, the rules of international treaties of the RF constitute a part of the Russian family law. Russia participates in a number of international treaties concerning the issues of marriage and family relations:

universal: the UN Convention on the Rights of the Child (November 20, 1989)[8]; the Hague Convention on the Civil Aspects of International Child Abduction (October 25, 1980)[9]; the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (May 29, 1993)[10]; the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (October 19, 1996)[11];

regional: the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (January 22, 1993)[12]; the European Convention on the Exercise of Children's Rights (ETS N160) (Strasbourg, January 25, 1996)[13];

bilateral: On Cooperation in Respect of Adoption (with Italy (2008), France (2011) and USA (2011))[14]; On Legal Assistance and Legal Relations in Civil, Family and Criminal Cases[15] (with Georgia (1995), Mali (2000)); On Cooperation and Legal Assistance in Civil and Other Matters[16] (with Algeria (1982), Poland (1996)) (such agreements, as well as consular conventions[17], contain certain unified conflict of laws rules of International Family Law).

2. Recognition and compulsory enforcement of foreign judgements on disputes arising out marriage and family relations

Recognition and compulsory enforcement of foreign judgements have a special importance for the effective protection of the rights and interests of family relations participants. Art. 409(1) of the Civil Procedure Code of the Russian Federation (hereinafter – the Civil Procedure Code of the RF) states that the decisions of foreign courts shall be recognized and enforced in the RF if it is stipulated in the international treaty of the RF. Russia participates in more than 30 international treaties where

[6] See: Federal Law No. 297-FL of November 3, 2015 "On Jurisdictional Immunities of a Foreign State and Property of a Foreign State in the Russian Federation" // СЗ РФ (2015), No. 45, item 6198.

[7] See: Constitution of the Russian Federation of December 12, 1993 with amendments approved in the course of the All-Russian voting on July 1, 2020 // СЗ РФ (2014), No. 30 (Part I), item 4202.

[8] See: Convention on the Rights of the Child (November 20, 1989), available at URL: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx. Ratified by the Resolution of the Supreme Council of the USSR of June 13, 1990, No. 1559-I.

[9] See: The Hague Convention on the Civil Aspects of International Child Abduction (October 25,1980), available at URL: https://www.hcch.net/en/instruments/conventions/full-text/?cid=24. Russia acceded with a reservation (Federal Law as of May 31, 2011, No. 102-FL). The Convention took effect for Russia on October 1, 2011.

[10] See: The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (May 29, 1993), available at URL: https://www.hcch.net/en/instruments/conventions/full-text/?cid=69. The Convention was signed on September 7, 2000, but has not been ratified.

[11] See: The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (October 19, 1996), available at URL: https://www.hcch.net/en/instruments/conventions/full-text/?cid=70. Russia acceded to the Convention on August 20, 2012, ratified on June 1, 2013.

[12] See: Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (January 22, 1993), available at URL: https://online.zakon.kz/Document/?doc_id=1039550#pos=1;-124

[13] See: European Convention on the Exercise of Children's Rights (ETS N160) (Strasbourg, 1996), available at URL: https://rm.coe.int/168007cdaf. Russia signed the convention on May 10, 2001, but has not ratified.

[14] See: The Treaty between the Russian Federation and the USA "On Cooperation in the Sphere of Adoption of Children" as of July 13, 2011 was terminated on January 1, 2013 in accordance with Art. 4(2) of Federal Law No. 272-ФЗ of December 28, 2012 "On the Measures Directed at the Persons Involved in Violations of Basic Human Rights and Freedoms, Rights and Freedoms of Citizens of the Russian Federation" // СЗ РФ (2012), No. 53(I), item 7597. The treaty with Israel was signed in Jerusalem on January 22, 2020, but has not been ratified yet. Available at "ConsultantPlus".

[15] See: As of December 31, 2020 Russia has entered into such agreements with 20 States

[16] See: As of December 31, 2020 Russia has entered into such agreements with 16 States.

[17] See: As of December 31, 2020 Russia has entered into such conventions with 81 States, for example, Ukraine (1993), Belgium (2004).

the mutual enforcement of judgements is directly provided. As a rule, there are no obstacles for such enforcement, if all the requirements specified in an international treaty are observed. Thus, the Supreme Court of the RF, confirming the possibility of compulsory enforcement of the Tarragona court decision (the Catalonian province) within the territory of Russia and referring to the Treaty on Legal Assistance in Civil Matters concluded between the USSR and the Kingdom of Spain (Madrid, 26 October 1990)[18], noted: "The judgement permitted compulsory enforcement within the territory of the RF of the foreign judgement on family matters with respect to the confirmation of the procedure of communication with a child and recovery of alimony for its maintenance shall remain unchanged as the decision is made by court on family matters of a foreign State in accordance with its competence, all the conditions provided for by the bilateral treaty are observed, there have been no breach of any legal provisions"[19].

In the absence of the international treaty the Russian courts of general jurisdiction (competent in all the disputes arising out of marriage and family relations) have the right to recognize and enforce a foreign judgement on the basis of the principle of reciprocity. However, in jurisprudence an unambiguous rigid postulate is dominating – the reciprocity shall be proved. At the same time there have not been worked out any clear parameters for proving the reciprocity. Thus, the Supreme Court of Tatarstan on refusing to satisfy a private complaint noted that no international treaty on mutual recognition and compulsory enforcement of judgements had been concluded between the RF and the USA, and the private claimant had not "presented reliable evidence that allowed to make an unambiguous conclusion that within the territory of the United States of America in the absence of the international treaty, only on the basis of principles of international courtesy and international reciprocity the decisions of Russian courts on an analogous category of cases were enforced". The private claimant stated that decisions of Russian courts had been recognized within the territory of the USA. It was proved by presentation of the Order of the District Court, Cook District, Case No. 2/24/-5 of September 10, 2015 which considered on merit the issue of validity of divorce committed in Russia and decided that the Russian divorce was valid. The Supreme Court of Tatarstan declared this argument unfounded and dismissed it, as there had not been presented a reliable evidence of recognition and enforcement on the territory of the United States of America of decisions of Russian courts on disputes arising out of division of property of spouses (including recovery of pension payments)[20].

Unfortunately, the custom to enforce foreign decisions in the absence of international treaty on the basis of the principles of reciprocity and international politeness is not enshrined in the practice of Russian courts of general jurisdiction (competent in family disputes). Some Russian authors claim that "in the absence of an international treaty concerning mutual recognition and enforcement of decisions of foreign courts it is allowed to use the principle of the international politeness by virtue of which the partner-countries have to treat each other with respect to laws and legal orders not allowing the application of double standards in resolution of similar disputes within territories of jurisdictions thereof"[21]. In support of such opinion there can be cited only one case when the act of the highest judicial authority ruled that "the absence of the international treaty on mutual recognition and enforcement of decisions of national courts is not the unconditional ground for refusal in enforcement of the decision of a foreign court and the corresponding request could be satisfied by the competent Russian court on the basis of reciprocity, if the foreign courts recognize Russian courts' decisions"[22].

Most of the Russian researchers noted that the courts of general jurisdiction treated the provisions of Art. 409 of the Civil Procedure Code of the RF literally (if there is no special agreement, there is no enforcement)[23]. Nowadays the legitimacy of refusal practice in the absence of the international treaty is confirmed by Ruling of the Constitutional Court of the RF of 17 July 2007, No. 575-O-O[24], that has become a precedent of the constitutional justice, is final and is not subject to appeal.

[18] See: The Treaty between the USSR and the Kingdom of Spain on legal assistance in civil matters of 26 October 26, 1990 was ratified in the Russian Federation by Federal Law No. 101-FL and entered into force July 23, 1997.

[19] See: Ruling of the Supreme Court of the RF of 16 February 2010, No. 5-G10-1.

[20] See: The Ruling of the Supreme Court of Tatarstan of April 29, 2019 on case 33-75/2019.

[21] *Smolenskij I.* Экзекватура – акт взаимности. Применять принцип международной вежливости // ЭЖ-Юрист. № 46. 2013. С. 5 [The exequatur – an act of reciprocity. To apply the principle of the international politeness // AZH-Yurist. 2013. No. 5. P. 5].

[22] The Decision of the Judicial Division for Civil Cases of the Supreme Court of the RF of June 7, 2002, No. 5-G02-64.

[23] See: *Kaisin D.V.* Доктрина международной вежливости и приведение в исполнение иностранных судебных решений в России // Закон. 2014. № 6. С. 152–160 [The Doctrine of Comity and Enforcement of Foreign Judgements in Russia // Law. 2014. No. 6. P. 152–160]; also see: Rulings of the Supreme Court of the RF of December 1, 2009, No. 4-G09-27 and of July 28, 2009, No. 38-G09-7.

[24] "In accordance with the meaning of this statement [Art. 409(1) of the Civil Procedure Code of the RF ... in case of absence of the international treaty with the State of the court that rendered a controversial decision, the decision does not generate any legal consequences within the territory of the RF..." (see: Ruling of the Constitutional Court of the Russian Federation of 17 July 2007, No. 575-O-O).

The decisions of foreign courts which do not require compulsory enforcement, and are subject to recognition only[25], as a rule, are recognized in Russia in the absence of the relevant international treaties. Formally the compliance with the provisions of Art. 409(1) of the Civil Procedure Code of the RF is also required, but the practice shows greater loyalty of the Russian enforcement officials. For example, in the Ruling of the Supreme Court of the RF № 5-KG12-92, it was noted that the divorce of the citizens of the RF registered by the Swiss court was recognized without further proceedings within the territory of the RF in the absence of the treaty on legal assistance in civil cases between the RF and Switzerland[26].

According to the general principle of supremacy of international law set forth in the Russian legislation, if the international treaty establishes other rules, than those provided for by the family legislation, the rules of the international treaty shall apply. The application of rules of international treaties in interpretation thereof contradicting the Constitution of the RF, fundamentals of legal order and morality shall not be allowed. Such contradiction can be established in the procedure provided for by a federal constitutional law (Family Code of the RF, Art. 6). First of all, the unified material-law and procedure rules shall apply; the conflict of laws regulation in this case has a subsidiary character.

Due to the fact that the number of rules establishing particular rights and obligations of the parties implemented into Russian law is insignificant, the conflict of laws regulation shall dominate in the international family relations. First of all, Russian law enforcement officials shall apply the uniform conflict of laws rules[27], the internal conflict of laws rules are subject to application in the issues not regulated by the international treaty. At the same time, as Russia has a very "modest" system of the relevant international treaties, Russian conflict of laws rules shall apply to the majority of disputes arising out of marriage and family relations with participation of foreigners.

3. Main institutions of Family Law of the Russian Federation

The Family Code of the RF[28] is the main regulation source of the international family relations. Section VII of the Family Code of the RF "Application of the family legislation to family relations with participation of foreign citizens and persons without citizenship" (Art. 156–167) establishes a detailed system of rules defining the law applicable to regulation of the principal issues of family relations. The rules of Section VII can be defined as special conflict of laws rules, which have a priority application with respect to the general conflict of laws regulation set forth in the Civil Code of the RF. At the same time the court applies the provisions of Section VI "Private International Law" of the Civil Code of the RF, if the rules regulating general provisions of conflict law are absent in the relevant special legal act[29].

The majority of connecting factors have bilateral character and assume the possibility of application of a foreign law. However, this regulation was adopted in 1995 and practically has not changed since then[30]. Meanwhile, for the last 25 years the regulation of the international family relations has undergone serious changes – the fact that is clearly demonstrated by the national codifications of Private International Law[31] and European Law[32]. The modern legislator considerably expands the limits of the autonomy of will of the parties in family and law relations with regard to the choice of applicable law, establishes special connecting factors for the relations of cohabitation and partnership, consolidates the detailed and differentiated rules of the choice of the law. So far, many conflict of laws rules of the Family Code of the RF have become outdated and do not correspond to the current trends of the legal regulation.

[25] In accordance with Art. 415 of the Civil Procedure Code of the RF the following decisions of foreign courts are subject to recognition without further proceedings: on the status of the citizen of the State, the court of which has rendered a decision; on dissolution or annulment of marriage between a Russian citizen and a foreign citizen if at the moment of consideration of the case at least one of spouses lived beyond the borders of the territory of the Russian Federation; on dissolution or annulment of marriage between Russian citizens if both spouses at the moment of consideration of the case lived abroad; in other cases provided for by federal law.

[26] See: Law Review of the Supreme Court of the Russian Federation for the first quarter of 2013 (confirmed by the Presidium of the Supreme Court of the RF of July 3, 2013.

[27] On the basis of the general principle of law *lex specialis derogat lex generalis* the rules of bilateral international treaties shall apply first, then – regional and after that the rules of universal international treaties.

[28] See: Family Code of the Russian Federation of December 29, 1995, No. 223-FL. As of July 2, 2021.

[29] See: Decree of the Plenum of the Supreme Court of the RF No. 24 of July 9, 2019 "On Application of the Rules of Private International Law by the Courts of the Russian Federation".

[30] Some amendments which did not affect conflict of laws regulation as it is were introduced: into Art. 160 – by Federal Law of No. 140-FL of November 15, 1997, into Art. 165 – by Federal Laws No. 94-FL of June 27, 1998, No. 101-FL of April 20, 2015 and No. 5-FL of February 4, 2021.

[31] See, e.g.: Law of the Netherlands of May 19, 2011 No. 272 "On the Adoption and Enactment of Book 10 "Private International Law" of the Civil Code of the Netherlands", available at URL: http://hbcomp.ru/about/law_library/3487/

[32] Council Regulation (EC) No 4/2009 of December 18, 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations; Council Regulation (EU) No 1259/2010 of December 20, 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation; Council Regulation (EU) 2016/1103 of June 24, 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

Besides, the Russian legislation demonstrates serious shortcomings of the inter-branch method of codification of the Private International Law: the purposes and problems of standard regulation of the international family relations are not provided in the Section VII of the Family Code of the RF, the concept of "foreign element" is not legalized, there are no models of general concepts of Private International Law. The enforcement authorities are constantly forced to address to the rules of the Civil Code of the RF (Art. 1186–1199) concerning qualification of the legal concepts, the interlocal and interpersonal conflict of laws, the *renvoi*, *etc.,* and regarding all the procedural issues – to the rules of the Civil Procedure Code of the RF. If the Russian legislator chose the way of adoption of a complex codification act on private international law matters[33], such problems would be avoided. The complex autonomous codification eliminates the "dispersion" of the rules regulating private international law relations in various normative sources, simplifies and optimizes legal proceedings.

3.1 Conclusion of Marriage

Article 156 of the Family Code of the RF establishes the rules of choice of the applicable law concerning the conclusion of "mixed"[34] marriages within the territory of the RF. Certain unilateral connecting factors are established for the form and procedure of conclusion of marriage (p. 1), and also for the circumstances, preventing conclusion thereof (p. 2). These issues are within the competence of the Russian legislation[35]. The cumulative conflict of laws rule shall apply to marriage conditions defined by the personal law (law of the State of citizenship) of each person entering into marriage at the moment of conclusion of marriage (p. 2). The personal law of apatride shall be the law of State in which this person has a permanent residence (p. 4)[36]. The personal law of the bipatride, having the citizenship of the RF, is considered to be Russian law. If the person obtains the citizenship of several foreign States, the legislation of one of these States shall apply in accordance with the choice of this person (p. 3). This rule is unique for the Russian regulation as it allows the choice of personal law at the request of the interested person, *i.e.,* the possibility of limited autonomy of will in determining the personal status is provided by law.

In accordance with the Russian doctrine if a citizen of a foreign State gets married within the territory of Russia, and the legislation of this foreign State establishes a wider list of circumstances preventing conclusion of marriage as compared with the list of circumstances preventing the conclusion of marriage given in Art. 14 of Family Code of the RF, then the legislation of the relevant State shall apply along with the requirements of Art. 14. If the foreign legislation does not allow marriage of this person, then such marriage cannot be concluded within the territory of the RF (even if no circumstances listed in Art. 14 of the Family Code of the RF exist)[37].

A foreign citizen or an apatride is obliged to prove the possibility to conclude a marriage without any restrictions[38] by relevant documents (for example, the references certified by notary or the consulate). The documents issued by relevant agencies of a foreign State and certifying the acts of civil status conducted under the laws of this State with regard to Russian or foreign citizens shall be recognized in Russia only if legalization is available[39]. A different procedure can be established by an international treaty of the RF. Thus, legalization is not required in the relations between the Member States of the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (1961)[40]. The Russian judicial practice established that the documents issued by a State agency or a State official shall be considered official documents, the documents on confirmation of the act of civil status shall be also considered official[41].

The Russian legislation does not require the legalization of the marriage concluded beyond the borders of the RF itself, but the documents confirming such a marriage shall be legalized. In the absence of such legalization the

[33] As in Switzerland, Hungary, Italy and many other States.

[34] "Mixed" or "foreign" marriages, i.e., the marriages in some way connected with legal orders of two or more States.

[35] The circumstances preventing marriage are specified in Art. 14 of the Family Code of the RF which consolidates the material rules of direct application: "The marriage shall not be concluded between: the persons if at least one of them is married and this marriage is registered, direct ascendants (parents and children, grandfather, grandmother and grandchildren), full and non-full relatives (sharing father or mother), brothers and sisters; adopter and adoptee; persons, if any of them is deemed by court to lack dispositive legal capacity due to mental disorder".

[36] It should be noted that the Russian family legislation uses only the concept of "permanent residence" implying the application of *lex domicilii.* The concept of "habitual residence" implying application of *lex habitationis* is absent in the Family Code of the RF, but is widely applied in jurisprudence. See, e.g.: Review of Judicial Practice of the Supreme Court of the RF. No. 3(2019), confirmed by the Presidium of the Supreme Court of the RF of November 27, 2019.

[37] See: Постатейный комментарий к Семейному кодексу Российской Федерации, Федеральному закону «Об опеке и попечительстве» и Федеральному закону «Об актах гражданского состояния» / под ред. П.В. Крашенинникова. М., 2012 [Article-by-article Commentary to the Family Code of the Russian Federation, Federal Law "On Guardianship and Trusteeship" and Federal Law "On the Acts of Civil Status" / ed. by P.V. Krasheninnikov. M., 2012].

[38] See: Appellate Ruling of the Supreme Court of the Republic of Sakha (Yakutia) of July 30, 2014 in case No. 33-2594/14; Appellate Ruling of the Murmansk Region Court of October 23, 2013 in case No. 33-3650.

[39] See: Appellate Decision of the Moscow City Court of March 4, 2015, No. 33-6736.

[40] See: The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (October 5, 1961), available at URL: https://www.hcch.net/en/instruments/conventions/full-text/?cid=41 Russia ratified the Convention on September 4, 1991.

[41] See: Appellate Decision of the Moscow District Court of 21 April 2014 in the case No 33-7575/2014.

registration of marriage shall be considered not proved[42]. This approach can be treated as generally accepted in the Russian judicial practice: "on December 30, 2014 in New York the US citizen F.V.D. and citizen of the Russian Federation (at present – F.E.S.) concluded a marriage. This marriage performed in the USA was not legalized in the procedure established by law and in this connection, there are no grounds for recognition thereof on the territory of the Russian Federation. Thus, the fact of marriage is of no legal importance and therefore cannot produce any legal effects in the said case[43].

The procedure of filing by Russian citizens of information on the documents issued by the competent agencies of foreign States in confirmation of the acts of civil status performed beyond the borders of the territory of the RF is determined in Federal Law "On the Acts of Civil Status"[44] and Decree of the Government of the RF of October 4, 2018, No. 1193[45]. The absence of timely legalization of documents on entering into marriage relations abroad may entail negative consequences in case of arising of a court dispute between the spouses.

Thus, Russian citizens (the plaintiff and defendant) got married on the territory of the USA and then returned to Russia, where they lived jointly and acquired various property. As time passed their personal relations deteriorated considerably and the plaintiff filed a suit on division of joint property of spouses. The certificate on marriage was not legalized on the territory of the RF; the defendant contested the fact of registration of the marriage. The plaintiff submitted to the court the apostille of the marriage certificate, however, there was a serious mistake in the translation of the apostille into Russian. The apostille had the following inscription: "The apostille is invalid for use on the territory of the United States, their territories and possessions"[46]. The interpreter understood it as referring to the marriage certificate and translated as "invalidity of the document beyond the borders of the territories and possessions of the USA". Despite the fact that the plaintiff submitted to the court the evidence proving the mistake in the translation of the apostille, the courts of the first, appellate and cassational instances did not accepted her arguments and decided that "in the marriage certificate submitted by the plaintiff there was an inscription on invalidity of this document beyond the borders of the territories and possessions of the United States of America... considering that the defendant disputed the fact of registration of marriage ... the court came to the conclusion that the registration of marriage was not proved"[47]. The plaintiff lost the case as the court ruled that the evidence of arising of the joint property of the spouses had not been presented.

The marriages concluded outside the RF are recognized in Russia if (Art. 158):

marriages between Russian citizens, Russian and foreign citizens or apatrides comply with the requirements of the legislation of the State within the territory of which they are concluded. This bilateral conflict of laws rule is supplemented with a connecting factor – the circumstances preventing the marriage are imperatively subordinated to Russian law;

marriages between foreign citizens comply with the requirements of the legislation of the place of conclusion thereof. Both the absence and the presence of obstacles in accordance with Art. 14 of the Family Code of the RF shall not be the condition of recognition of these marriages. The marriages recognized by foreign legal orders regardless of the fact of the state registration thereof shall be subject to recognition in Russia[48]. Thus, if formally polygamous and genderless marriages are recognized in the State of conclusion thereof, they shall be recognized in the Russian Federation. At the same time the Russian doctrine also provides for the use of the concept of public order for non-recognition of such marriages[49].

[42] See: Appellate Ruling of the Moscow City Court of March 4, 2015, No. 33-6736.

[43] See: Appellate Ruling of the Supreme Court of the Republic of Tatarstan of December 10, 2015, Case No. 33a-17492/2015.

[44] See: Federal Law of November 15, 1997, No. 143-FL "On the Acts of Civil Status". As of July 2, 2021.

[45] See: Decree of the Government of the RF of October 4, 2018, No. 1193 "On confirmation of the rules for filing by the citizen of the Russian Federation with regard to whom the competent agency of a foreign State under the laws of the relevant foreign State the registration of the act of the civil status has been performed, and also in the case if such registration has been performed with regard to his minor child, being a citizen of the Russian Federation, or with regard to a citizen of the Russian Federation under 18 years of age or a citizen of the Russian Federation limited in dispositive legal capacity, the legal representative of whom this citizen of the Russian Federation is, of information on the fact of such registration to the Agency of Registration of Acts of Civil Status of the Russian Federation or the Consulate Institution of the Russian Federation located beyond the territory of the Russian Federation and inclusion of the information on the documents issued by the competent agencies of foreign States in confirmation of acts of civil status performed beyond the territory of the Russian Federation under the laws of the relevant foreign States with regard to the citizens of the Russian Federation, to the Unified State Register of Registration of Acts of Civil Status".

[46] Such inscription can be found on official letterheads of apostille in the USA, e.g.: "This Apostille is not valid for use anywhere within the United States of America, its territories or possessions" (California), "Not for use within the United States of America" (Texas).

[47] See: Ruling of the Fourth Cassational Court of General Jurisdiction of January 28, 2020, No. 88-1369/2020 on case No. 2-1500/2019.

[48] See: *Ul'bashev A. Kh.* Общее учение о личных правах. М., 2019 [General Doctrine on Personal Rights. M., 2019].

[49] See: *Kanashevsky V.A.* Вопросы публичного порядка и квалификации при регулировании семейных отношений, осложненных иностранным элементом // Журнал росс. права. 2018. № 5 [The Issues of Public Order and Qualification in Regulation of Family Relations with a Foreign Element // Journal of Russian law. 2018. No. 5].

Invalidity of foreign marriages concluded both within the territory of the RF and beyond the borders thereof shall be determined by the legislation which applied to the conclusion of marriage in accordance with Art. 156 and 158 of the Family Code of the RF (Art. 159). Therefore, the grounds for invalidity of marriage can be determined both by Russian and foreign law. The choice of the applicable law "depends only on one factor: the legislation of which State applied to the conclusion of the marriage. Thus, the legislation of different States may provide for different grounds for invalidity of marriage"[50].

Thus, the upper court dismissed the arguments of the appellate petition on invalidity of marriage based on the fact that the Korabelsky District Court of the city of Nikolaev of the Republic of Ukraine did not receive the agreement to marriage of the minor citizen of the RF E.A.B. The court noted that in accordance with the legislation of the Russian Federation and pursuant to Art. 13 of the Family Code of the RF the agreement to conclusion of marriage shall be given by the agencies of the local self-government at the place of residence of the persons entering into marriage, however, according to the legislation of Ukraine the agreement shall be given by the court. Thus, on the territory of Ukraine the agreement of the agencies of the local self-government or absence thereof shall have no legal significance in resolution of the issue of permission to enter into marriage[51].

3.2 Divorce

The divorce within the territory of the RF shall be governed by Russian law (Art. 160 of the Family Code of the RF). This binding unilateral conflict of laws rule shall apply in any case, and it is does not matter which element of the marriage is connected with the foreign legal order (Art. 160(1) of the Family Code of the RF). The Russian citizen (even living outside the RF on a permanent basis) shall have the right to dissolve marriage in the Russian court, even with a spouse living outside the RF and regardless of the spouse's nationality (Art. 160(2) of the Family Code of the RF). Foreign citizens on the territory of the RF shall have the right to dissolve marriage in the Russian Agency of Registration of Acts of Civil Status (hereinafter – the ZAGS), if: 1) one of the spouses lives in the RF or 2) the marriage to be dissolved was concluded within the territory of the RF according to the form and procedure stated in Art. 156(1) of the Family Code of the RF[52]. Thus, according to the practice the marriages with foreigners even in the absence of minor children and property disputes are dissolved by the court. This can be regarded as a prevailing judicial custom.

The exclusive application of Russian law is obviously the most favorable situation for the Russian citizens who decided to dissolve a foreign marriage on the territory of the RF as they are familiar with Russian law and it is not difficult for them to determine the content thereof. The judges also prefer application of Russian law. Russian courts have a wealth of experience in consideration of such cases and the "geography" of these proceedings is wide enough. For example, one of the Moscow courts dissolved the marriage of Russian citizen D. with a citizen of Jordan concluded at a sharia court of Bani Obeyd (Irbid, Jordan)[53].

It seems that Art. 160 of the Family Code of the RF provides for a one-dimensional and rigid approach to determination of the law applicable to divorce. This approach to conflict of laws regulation was enshrined in the Russian conflict of laws regulation in 1995, and nowadays seems a legal anachronism. The mandatory submission of divorce to Russian law does not correspond to the current trends of regulation of such relations; this approach represents an outdated model which has been already rejected by other legislators. The main purpose of the modern legal regulation is the most effective protection of human rights and fundamental freedoms. It can be achieved to the fullest extent by extending the right of the parties to choose the applicable law. With regard to the issues of divorce it is necessary to provide for at least a limited autonomy of will for the parties as it has been done, for example, by the European legislator[54].

3.3 Personal non-property and property rights and duties

The procedure of choice of law applicable to personal non-property and property rights and duties of spouses is determined in Art. 161(1) of the Family Code of the RF by a complicated subordinated alternative conflict of laws rule: primarily the legislation of a State on the territory of which the spouses have a joint place

[50] Постатейный комментарий к Семейному кодексу Российской Федерации, Федеральному закону «Об опеке и попечительстве» и Федеральному закону «Об актах гражданского состояния» / под ред. П.В. Крашенинникова [Article-by-article Commentary to the Family Code of the Russian Federation, Federal Law "On Guardianship and Trusteeship" and Federal Law "On the Acts of Civil Status" / ed. by P.V. Krasheninnikov].

[51] See: Appellate Ruling of the Moscow City Court of April 8, 2019 on Case No. 33-10419.

[52] See: Постатейный комментарий к Семейному кодексу Российской Федерации, Федеральному закону «Об опеке и попечительстве» и Федеральному закону «Об актах гражданского состояния» / под ред. П.В. Крашенинникова [Article-by-article Commentary to the Family Code of the Russian Federation, Federal Law "On Guardianship and Trusteeship" and Federal Law "On the Acts of Civil Status" / ed. by P.V. Krasheninnikov].

[53] See: The dissolution of marriage with a citizen of Jordan concluded at the sharia court of Bani Obeyd. Available at URL: https://www.planeta-zakona.ru/blog/rastorzhenie-braka-s-grazhdaninom-iordanii-zaklyuchyennogo-v-shariatskom-sude-bani-obeyd.html/ (30.05.2021).

[54] See: Art. 5 Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

of residence shall apply, in case of absence there of – the legislation of a State on the territory of which they had the last joint place of residence. The personal non-property and property rights and duties of the spouses who did not have a joint place of residence within the territory of the RF shall be governed by Russian law. It is seemed that such model of conflict of laws regulation also needs modernization.

Firstly, the rules of the choice of law for the personal and property relations of spouses should be divided and stated in separate conflict of laws rules. In spite of the fact that the national legislator, mainly, provides for identical connecting factors for these relations, the rules of the choice of applicable law have to be more differentiated and detailed. It simplifies the enforcement of law and increases the predictability of court decisions. This approach was received by the national legislator[55] a long time ago and is dominating in all modern codifications of Private International Law[56].

Secondly, the laws of common nationality of spouses and the place of marriage conclusion remain widespread and correct connecting factors in family relations. There is no need to refuse from these rules of the choice of applicable law, even despite the growing number of multinational marriages and close connection of spouses with the law of their last place of residence. It is possible to construct a situation, rather typical for the modern world: the spouses are Turkish citizens and had the last joint place of residence within the territory of Germany, then one of them moved to Russia. The reason is not clear, but in accordance with the Russian legislator, in this case the family relations should be governed by German law instead of the Turkish one. In such cases the court shall analyze all foreign elements of the relationship and reveal the closest connecting factor for this situation. The complicated subordinated alternative conflict of laws rule providing for a possibility of wide choice of applicable law and limited autonomy of will of the parties corresponds to this purpose best of all (at the choice of the parties – the law of joint residence / the last place of joint residence / nationality of spouses / place of marriage conclusion)[57].

Thirdly, compulsory submission of personal and property relations of the spouses, who did not have a joint place of residence, to Russian law seems illogical. It is clear, that in this case the Russian legislator meant the Russian citizens appealing to the Russian court with a claim to the spouse who is living abroad. Presumably Russian citizens are familiar with the rules of Russian Family Law and foreign Family Law is less favorable for them, than the law of the RF. In practice this legislative presumption is not justified and does not correspond to the real situation. In similar cases it is also necessary to determine the law which is most closely connected with the certain relation. Russian law should apply as a subsidiary connecting factor of the second degree (at the choice of the parties – the law of common nationality / place of marriage conclusion / Russian law).

It is established in Art. 161(2) of the Family Code of the RF that in conclusion of a marriage contract or an agreement on payment of the mutual alimony, the spouses, not having common nationality or joint place of residence, are free to choose the applicable law to determine their rights and obligations in marriage contract and agreement on payment of alimony. In accordance with the Russian doctrine, "having established the general provision on the applicable law to the relations of spouses, Art. 16 (2) of the Family Code of the RF set forth the possibility of derogation from it as the spouses have the right to choose the law applicable to relations thereof. Contrary to the general rule of the applicable law of the State of citizenship of spouses or joint place of residence (Art. 161(1) of the Family Code of the RF) the spouses received the opportunity to refer the property relations to a different legal order, expressing their choice in a marriage contract"[58]. However, it unambiguously follows from Art. 161(2) that the marriage contract[59] concluded within the territory of the RF shall be governed by Russian law, provided that the spouses have common citizenship and common domicile. Consequently, the parties do not have any autonomy of will. Apparently, this statement needs further interpretation.

In accordance with the content of the rule the choice of applicable law for a marriage contract occurs only if the spouses do not have common nationality or joint place of residence. Respectively, if the spouses are citizens of one State, they cannot choose the applicable law (even if they are not citizens of Russia and after marriage intend to move to another country). Apparently, the legislator addresses this rule only to Russian citizens

[55] See, e.g.: Law on Private International Law of Austria (1978) (§ 18, 19). All legislative acts of foreign States translated into the Russian language are cited from Website: Academic-scientifical group "Modern Construction of Private International Law". The National Research University Higher School of Economics, available at URL: http://pravo.hse.ru/intprilaw/ (15.05.2021).

[56] See: Law of Montenegro of December 30, 2013 "On Private International Law" (Art. 80, 82), available at URL: https://pravo.hse.ru/data/2016/02/22/1139768416/%D0%A7%D0%B5%D1%80%D0%BD%D0%BE%D0%B3%D0%BE%D1%80%D0%B8%D1%8F%202013.pdf

[57] See, e.g.: Law of the Dominican Republic of December 18, 2014 "On Private International Law" (Art. 42, 43), available at URL: https://pravo.hse.ru/data/2017/12/06/1161312635/%D0%94%D0%BE%D0%BC.%20%D0%A0%D0%B5%D1%81%D0%BF.%20%D0%97%D0%B0%D0%BA%D0%BE%D0%BD%20%D0%BE%20%D0%9C%D0%A7%D0%9F.pdf

[58] *Marysheva N.I., Muratova O.V.* Брачный договор в международном частном праве: правовое регулирование в России и ЕС // Журнал росс. права. 2014. № 6. С. 101–111 [The Marriage Contract in Private International Law: Legal Regulation in Russia and the EU // Journal of Russian law. 2014. No. 6. P. 101–111].

[59] For the purposes of this article the terms "marriage contract" and "agreement on mutual payment of alimony" shall be replaced by one term – "marriage contract".

and presumes that the citizens of other States within the territory of the RF will get married in consular agencies of their own States, ignoring Russian agencies of marriage registration. The basis for such a presumption remains unclear, as according to the Russian legislation, foreign citizens within the territory of the RF have the right to get married in a general order, *i.e.*, in the Agency of Registration of Acts of Civil Status (ZAGS). Foreign citizens (especially, from the countries that earlier were a part of the USSR, for example, citizens of Ukraine, Armenia, Tajikistan) often get married in Russia, and then move to the country of their nationality. Thus, their marriage contract signed within the territory of the RF shall be governed only by Russian law.

If one of the spouses (or both) is bipatride, but one of his/her citizenship is Russian (as well as the other spouse), then the choice of law is also impossible as the personal law of such person is Russian law[60]. Let us consider an example from practice: a Russian citizen marries a bipatride (with Russian and Israeli citizenship), and spouses are going to live in Israel. In this case, the spouses also cannot freely choose the law applicable to their marriage contract, as Russian law is applied *a priori*. There is a similar solution in the legislation of other States, but application of the local law to the marriage contract between a citizen of the State and bipatride who has local nationality among others, is possible only if the parties have not chosen the applicable law[61].

On the other hand, if spouses have different nationalities, but they take the joint residence within the territory of the RF, they also cannot choose the law applicable to their marriage contract (even if they intend to change matrimonial domicile in the near future). Similar situations also arise constantly: the citizens of the different States (for example, Moldova and Belarus) permanently residing in Russia get married and after some time go abroad on the basis of permanent residence. Nevertheless, their marriage contract shall be automatically governed only by Russian law.

At the same time the Russian legislator provides for an unlimited autonomy of will to the parties of the marriage contract not having the common nationality or domicile. If these persons conclude a marriage contract within the territory of the RF, they can choose the law of any country, even if it is not connected with their relationship. We need to recognize that the unlimited will of the parties is the best connecting factor for the choice of applicable law to the marriage contract[62]. Application to marriage contract of the autonomy of will as one of the basic principles of modern private international law follows from the fundamental statement of Civil Law, *i.e.*, the principle of freedom of contract[63]. The marriage contract has all the features of the civil contract (but possesses a specific subject structure as the parties thereof are in family relations[64]) and extension to it of the principle of autonomy of will, fundamental for civil contracts, is quite reasonable.

However, the vast majority of modern national codifications of Private International Law enshrines the limited will of the parties as the regulation of family relations has a strong public-law component. At the same time spouses have rather wide choice: the law of a State which citizen is one of spouses; the law of a State in which one of the spouses has habitual place of residence; the law of a State in which they intend to have joint habitual residence[65]. The similar solution is proposed by the European legislator[66]. These models can be used for modernization of the Russian legislation.

3.4 Institute of the marriage contract

The institute of marriage contract was included for the first time into Russian law in 1995 in the Family Code of the RF. Until then this institute was unknown to the legislation of the RF. The approach established by the legislator of Czechoslovakia[67] in 1963 was used as a model for the Russian conflict of laws rules. At the same time, in the first half of the 1990th much more flexible rules of the choice of applicable law to marriage contracts were developed in other European States[68]. Obviously, in connection with novelty and lack of practice in relations under the marriage contract, in 1995 the Russian legislator received not the best conflict of

[60] See: Art. 1195(2), Civil Code of the RF; Art. 156(3), Family Code of the RF.

[61] See: Art. 43 of Book 10 "Private International Law of the Civil Code of the Netherlands" (2011).

[62] This approach is enshrined, see, e.g.: Art. 32, Code of Private International Law of Panama (2015).

[63] See: *Marysheva N.I., Muratova O.V.* Op cit. P. 101–111.

[64] See: *Myskin A.V.* Брачный договор в системе российского частного права. М., 2012 [The marriage contract in the system of Russian Private Law. M., 2012].

[65] See, e.g.: Art. 2.590, Civil Code of Romania (2009); Art 82, Law on Private International Law of Montenegro (2013).

[66] See: Art. 22 Council Regulation (EU) 2016/1103 of 24 June, 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

[67] See: Law on Private International Law of Czechoslovakia (§ 21, 49) (1963): "(1) Personal and property rights of the spouses shall be regulated by the law of a State of the nationality thereof. If the spouses are citizens of different States, their relations shall be regulated by the Czechoslovakian law. (2) Agreement of the spouses with regard to regulation of their property rights shall be considered taking into account the legal order applied to property relations of the spouses at the time the agreement was achieved". At present the law applicable to a marriage contract shall be determined in accordance with the limited autonomy of will of the parties (Law on Private International Law of the Czeck Republic (§ 49) (2012)).

[68] See: Law on Private International Law of Switzerland (1987) (Art. 52); Law of Romania (1992) "As applied to regulation of Private International Law".

laws models. However, over the past years since pretty extensive enforcement practice has been accumulated[69], and it clearly demonstrates the necessity of modification of the current conflict of laws regulation. At present the rule of Art. 161(1) needs innovation.

Article 161(2) of the Family Code of the RF states that if the spouses (having different nationalities or different matrimonial domicile) have not chosen the applicable law, the provisions of Art. 161(1) apply to the marriage contract (*i.e.*, the law of joint residence / the law of the last joint residence / Russian law). The Russian legislator set forth the exclusively territorial approach and refused to consider the personal law of the spouses. The practice shows that such a decision leads to violation of rights of the parties of the marriage contract. The following example is given in the Russian literature: the citizen of the RF A. Vakhman and the citizen of Venezuela Angela Zurbano got married in Russia in 1993. The marriage contract was not concluded. In 2001 the spouses moved to Venezuela where they live so far. In 2004 they appealed to the Russian consulate in Venezuela to certify their marriage contract providing for the regime of separate property on all property of spouses.

In accordance with Art. 161(1) of the Family Code of the RF the legislation of Venezuela – the State within the territory of which the spouses have the joint residence – shall apply to property rights and duties of the spouses. In Venezuela the change of the legal regime of the property of spouses after registration of marriage is forbidden (Civil Code of Venezuela (Art. 144)). Therefore, in this case the conclusion of the marriage contract between spouses and its certification by the Russian consulate in Venezuela was impossible[70].

Unfortunately, the institute of marriage contract has not been widely disseminated in Russia so far. As a rule, Russian citizens tacitly opt for a legal regime of common property of spouses. The overwhelming majority of marriage and family disputes are the disputes on division of the joint property which are often connected with inheritance disputes. It is important to take into consideration that the Russian procedural law does not refer the demand on division of the joint property of spouses (citizens of the RF) located within the territory of foreign States, to the exclusive competence of foreign courts. Such demands shall be regulated by the general jurisdiction rules established by the Civil Procedure Code of the RF (Chapter 3), if not provided otherwise by an international treaty. Thus, Russian courts shall proceed and consider on merits the suits on division of foreign immovable property acquired through marriage as such demands shall not be "the suits on the rights to immovable property, but are directed to changing the regime of common property of spouses[71].

The possibility of consideration of the dispute on the foreign immovable property being a part of the spouses' property by the court of the place of residence (nationality) of one or both spouses is a standard fact of contemporary legal reality, the best way of determination of the competent court on family disputes[72]. However, an unconditional postulate that all the suits on local immovable property shall be within the sole competence of local courts is still dominating in the legislation of many States[73]. In this connection some lawyers note the problems that may arise in the Russian judicial practice in case of enforcement of judgements on division of foreign immovable property: "The decision on the issues of immovable property located within the territory of the above-mentioned States [Montenegro, Bosnia and Hercegovina] is related to the exclusive jurisdiction and competence of the courts of these sovereign States and is regulated by the national legislation of these foreign States. In this connection the enforcement of court decision in this part will be impossible, as on the territory of the said foreign States the decisions of Russian courts rendered with regard to immovable property located on the territory of such States are not recognized"[74].

The connecting factors of Art. 161 of the Family Code of the RF shall be more differentiated and detailed. At the time of adoption of the Family Code of the RF the Hague Convention on the Law Applicable to Matrimonial Property Regimes (1978) containing detailed regulation of this institute was already in force. Conflict of laws models of this Convention are demanded by many modern national codifications of private international law; the direct references to the convention are set forth in the legislation of the Netherlands[75]. In spite of the fact that Russia does not participate in this Convention, the approaches to the choice of applicable law offered by it can be implemented into the Russian legislation.

[69] See: Настольная книга нотариуса: в 4 т. / под ред. И.Г. Медведева. Международное частное право, уголовное право и процесс в нотариальной деятельности (т. 4). М., 2015 [Notary's Book: in 4 vols. / ed. by I.G. Medvedev. Private International Law and Procedure in the Notarial Practice (vol. 4). M., 2015].

[70] See: ibid.

[71] See: Обзор судебной практики Верховного Суда Российской Федерации. 2019. № 3 [Law Review of the Supreme Court of the RF, 2019, No. 3].

[72] See, e.g.: Art. 5, 6 Council Regulation (EU) 2016/1103 of June 24, 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

[73] See, e.g.: Art. 461, Civil Procedure Code of the Republic of Moldova of May 30, 2003, No. 225-XV (as of February 12, 2021; Art. 77, Law of Ukraine No. 2798-IV of June 23, 2005 "On Private International Law", as of October 3, 2019.

[74] See: Appellate Ruling of the Moscow City Court of June 16, 2020, Case No. 33-15364/20.

[75] See: Art. 42, 43, Civil Code of the Netherlands, Book 10.

Articles 162–164 of the Family Code of the RF establish conflict of laws regulation of relations between parents and children[76]. The applicable law is defined as follows:

1. Law of a State of nationality of the child by birth – establishment and challenge of paternity (maternity) (Art. 162); rights and duties of parents and children, including the obligation of parents with regard to children maintenance in the absence of joint residence (Art. 163).

2. Law of a State of nationality of the person applying for alimony in the absence of joint residence (Art. 164).

3. Law of the joint residence – rights and duties of parents and children, including the obligation of parents with regard to children maintenance (Art. 163); the alimony obligations of adult children with regard to parents and alimony obligations of other family members (Art. 164).

4. Law of a State within the territory of which the child permanently lives – upon the demand of the claimant to the alimony obligations and to other relations between parents and children (Art. 163).

5. Russian law – the procedure of establishment and challenge of paternity (maternity) within the territory of the RF (Art. 162).

The connecting factors consider both territorial and exterritorial elements in relationship between parents and children. The purpose of such legislative decision is the maximum protection of interests of the child, *i.e.*, complying with the principle of protection of the weaker party in relations. However, now the established regulation seems too laconic, and the list of connecting factors – too narrow[77]. For the most effective protection of interests of children in each separate case the law enforcement official is obliged to define the law which is the most closely connected with the relation considering the child's interests. The main conflict of laws principle for the relations with participation of children should be the *lex benignitatis*, in any case, such law always needs to be revealed, and the decision shall not contradict the mandatory rules thereof.

As for the maintenance relations, there is even a term – "international maintenance law"[78] in the literature as this aspect is regulated in great detail at the international level. The unified conflict of laws rules are set forth in the Hague Convention on the Law Applicable to Maintenance Obligations towards Children (1956), the Hague Convention on the Law Applicable to Maintenance Obligations (1973), the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance and the Protocol (2007). These agreements contain the detailed rules of applicable laws to the maintenance relations. Although Russia does not participate in any of these conventions, it would have to be necessary to bring the rules of Art. 164 of the Family Code of the RF into conformity with the international regulation accepted in the majority of European States.

3.5 International adoption

Conflict aspects of international adoption are regulated in Art. 165 of the Family Code of the RF. Adoption and cancellation thereof within the territory of the RF by foreign citizens of the child of Russian nationality are regulated by law of a State of the adoptive parent. If the adoptive parent is an apatride, the law of a State in which this person has a permanent residence at the time of filing the application for adoption or cancellation thereof shall apply. Adoption of children – citizens of the RF by foreign citizens or apatrides being in matrimonial relations with Russian citizens, is governed by Russian law. Another procedure can be provided by the international treaty of the RF. If the adoption of a child – a foreign citizen takes place within the territory of the RF and performed by Russian citizens, it is necessary to receive the consent of the legitimate representative of the child, of the child and the competent authority of a State of the nationality of the child (Art. 165(1)).

If as a result of adoption, the rights of the child established by Russian law and international treaties of the RF can be violated, the adoption cannot be performed irrespective of nationality of the adoptive parent, and the adoption performed is subject to cancellation in the court procedure (Art. 165(2)). The protection of rights and legitimate interests of children – citizens of the RF adopted by foreign citizens or apatrides outside the RF is effectuated within the limits provided for by the International Law, by consular agencies of the RF which keep a record of such children till they reach the age of majority. Another regulation can be provided for by the international treaty of the RF (Art. 165 (3)).

Adoption of the child – the Russian citizen – living outside the RF can be performed by a competent agency of a State of the nationality of the adoptive parent. Such adoption is recognized in the RF on condition of obtaining a preliminary permission to adoption of the Russian agency of executive authority within the territory of which the child or his parents lived before going beyond the borders of the territory of Russia (Art. 165(4)).

The connecting factors established by the Russian legislator concerning the issues of adoption are generally accepted in the majority of States of the world[79]. However, the provisions of Art. 165 are not formulated

[76] See: Art. 162. Establishment and challenge of paternity (maternity); Art. 163. Rights and duties of parents and children; Art. 164. Alimony obligations of adult children and other family members.

[77] See, e.g.: Art. 92–99, Civil Code of the Netherlands, Book 10 "Private International Law".

[78] *Koch H., Magnus U., Winkler von Mohrenfels P.* Международное частное право и сравнительное правоведение. М., 2001 [Private International Law and Comparative Jurisprudence. M., 2001].

[79] See: Art. 422, Law of Ukraine "On Private International Law" of June 23, 2005, No. 2709-IV, as of June 19, 2020.

accurately enough, in particular, such factors as the personal law of a child and the law of competent authority should be understood from the content of the rule as they are not named directly. Besides, in modern conditions the criteria of determination of applicable law in this sphere shall be more detailed, the scope of the relevant conflict of laws rules – more differentiated, and *lex benignitatis* shall become the main conflict of laws principle as the most favorable law for a child. The legislation of Belgium with regard to international adoption can be taken as an example[80] for further modernization of Russian law in this sphere.

The provisions of Art. 165 of the Family Code of the RF have been amended to much greater extent than any other legislation in the sphere of family international relations – seven amendments have been made to this article of the Family Code of the RF (1995) from the moment of its entry into force till the present time[81]. At the same time these changes have not affected conflict approaches in any way. All the amendments aimed at the achievement of maximum effect in the direct protection of interests of the child in family relations. The direct references to Art. 124–133 of the Family Code of the RF which contain overriding mandatory rules of Russian law are enshrined in Art. 165(1). These provisions have to be always observed irrespective of the applicable law determined in accordance with conflict of laws factors of Article 165 of the Family Code of the RF.

The international adoption is one of the most urgent, complicated and painful problems in the Private International Law. Further elaboration on this aspect is not the subject of this research, but summary information is given below. The number of adoptions of Russian children by foreigners constantly decreases and the yearly decrease is a steady trend. In 2019 the courts of the first instance considered 203 cases on international adoption with delivery of judgement (53.1% less than in 2016 (433 cases) and 20.7% less than in 2018 (256 cases). In 2019 202 cases were considered with satisfaction of claim and one – with refusal. Citizens of Italy adopted Russian children most frequently in 2019 (64.8% of cases considered with satisfaction of claim)[82].

Russia participates in two bilateral international treaties on cooperation in adoption of children: with the Republic of Italy (Moscow, November 6, 2008) and with the French Republic (Moscow, November 18, 2011). The basis of these treaties is constituted by the rules of the Hague Convention on Protection of Children and Cooperation in the International Adoption (1993) signed by Russia, but not ratified. Both treaties have uniform content, form and structure. The principle of compliance with the best interests of the child and the principle of subsidiarity, according to which the States have to take measures for education of the child in a native family and the international adoption is possible in the absence of a suitable form of arrangement of adoption in a State of origin, are set forth therein. As an additional guarantee of protection of the rights of the adopted child within the territory of the host State, the regulation on preservation by the child of the nationality of a State of origin and obtaining by the child of the second nationality of the host State is provided for. The issue of applicable law to the procedure of adoption in both treaties is resolved equally: the law of a State of origin of the child shall apply. The procedure of adoption shall be carried out only with assistance of authorized agencies of the host State.

On January 22, 2020 in Jerusalem the RF and Israel signed the Treaty of Cooperation in the Sphere of Adoption of Children. By its content and structure this document is in no way different from the analogous treaties between the RF and Italy or France. The main connecting factor is the law of a State of origin of the child. Although the treaty was signed not long ago and has not entered into force yet, the Russian courts consider a lot of cases on adoption of Russian children by citizens of Israel. The decisions on satisfaction of claims on adoption were taken in 2019 by the court of the Jewish Autonomous Region, regional courts of Krasnoyarsk and Leningrad[83].

Until the end of 2012 the Treaty between the RF and the USA on Cooperation in Adoption of Children was in force (Moscow, June 13, 2011). However, according to Federal Law of December 28, 2012 "On Measures of the Impact on Persons Involved in Violations of the Fundamental Rights and Freedoms of a Human Being, Rights and Freedoms of Citizens of the RF" since January 1, 2013 this treaty was terminated. According to Art. 4(1) of the above-mentioned Federal Law the adoption of children by citizens of the USA and the activities of non-profit organizations and representations thereof on selection and transfer of the children – citizens of the RF for adoption by citizens of the USA was forbidden[84].

[80] See: Art. 66–72, Law of Belgium of June 16, 2004 "On the Code of Private International Law", available at URL: http://pravo.hse.ru/intprilaw/doc/041801

[81] See: Federal Laws of June 27, 1998, No. 94-FL; of April 20, No. 101-FL; of February 4, 2021, No. 5-FL.

[82] See: Review of Practice of Consideration in 2019 by Regional and Equal Courts of Cases on Adoption of Children by Foreign Citizens or Persons without Citizenship, as well as Citizens of the Russian Federation Permanently Residing beyond the Territory of the Russian Federation, approved by the Presidium of the Supreme Court of the RF of 8 July, 2020.

[83] See: ibid.

[84] In accordance with this rule, the Altay District Court refused to accept the claim of the US citizen on adoption of a minor citizen of the RF (see: ibid).

4. Establishment of the content of rules of Family Law and restriction of their use

Section VII of the Family Code of the RF ends with provisions of Art. 166 "Establishment of the content of rules of foreign Family Law" and Art. 167 "Restriction of application of rules of foreign Family Law". In principle the provisions on the fundamental institutions of the General Part of Private International law as applied to regulation of international family relations should open an appropriate section. It would be much more logical. On the contrary, the Russian legislator in doing so finishes the conflict of laws regulation of Family Law. Such a solution seems to be a structural mistake of legislative technique which could have been easily avoided.

In accordance with Art. 166 applying the rules of foreign Family Law, the Russian competent agencies shall establish the content of these rules according to their official interpretation, the practice of application and the doctrine of the relevant foreign State. The court shall be obliged to determine, if the rule is in force, how it is interpreted in the light of the legislation and practice of a foreign State, analyze it in comparison with other concepts of the relevant legal system, determine its meaning taking into consideration a different legal terminology[85].

For the purpose of establishment of the content of rules of foreign family law the law-enforcement official may address for assistance and explanations to the Ministry of Justice of the RF and other competent agencies or to engage experts. Edict of the President of the RF of October 13, 2004, No. 1313 established the powers of the Ministry of Justice of the RF on interaction with agencies of the state power of foreign States and international organizations and the exchange of information with foreign States. The court has the right to offer the interested persons to submit the documents legalized in the established procedure and confirming the content of the rules of foreign Family Law to which they refer in substantiation of demands and objections thereof[86]. The interested persons have the right at their own initiative to submit the documents confirming the content of the rules of foreign Family Law to which they refer in justification of their demands or objections and otherwise to assist the law enforcement officials in establishment of the content of a foreign Family Law. If the content of the rules of a foreign Family Law, despite all the measures taken, has not been established, the Russian legislation shall apply.

The following data shall be referred to the information on the content of the rules of foreign law: texts of legal acts, links to the sources of publication of foreign legal acts, opinions on the content of the rules of foreign law prepared by the persons having special knowledge in the said sphere (experts). The opinion on the content of the rules of foreign law prepared by an expert shall not be an expert opinion in the sense of the procedural legislation, and the rules on designation of the expert opinion shall not be extended to such opinions. The court has a right to appoint an expert (Russian of foreign citizen), having special knowledge in the sphere of foreign law. This fact may be confirmed by his / her academic research papers or practice in the sphere of foreign law. The expertise may also be assigned to an educational or research institution with the structural subdivisions engaged in foreign law studies[87].

According to Art. 166 a duty of establishment of the content of rules of foreign law is assigned to the law enforcement officials. The parties are entitled to, but are not obliged to participate in this process. The practice, however, shows that the Russian courts, generally apply foreign law, if the parties at their own initiative are engaged in establishment of the content of its rules. Without assistance of the parties basically the dispute is considered on the basis of Russian law.

The expert's opinion is the most efficient and common way to determine the content of foreign law in the Russian judicial procedure. Thus, the court was supplied with "The Legal Opinion of the Expert on the Issues of Application and Establishment of the Content of the Rules of the French Law" prepared by an assistant professor of the Chair of Civil Law, Procedure and Private International Law of the Russian University of Peoples' Friendship. On the basis of the opinion the court determined and applied to disputable relations the rules of French material law and ruled that the author's right to works of art has a personal character and shall not be subject to regime of common property of spouses[88].

Restriction on application of the rules of foreign Family Law (the public order clause – Art. 167) applies in case such application does not contradict the fundamentals of legal order (public order) of the RF. In this case the Russian legislation shall apply. The absence of the rules or legal institutions in the Russian legislation analogous to the rules or institutions of the applicable foreign law as it is shall not be the ground for application of the public order clause[89].

[85] See: Report of the results of generalization of the practice of consideration by the courts of the Perm Region of cross-border disputes affecting the interests of minor children for the period of 2016–2018 (confirmed by the Presidium of the Perm Regional Court). March 29, 2019.

[86] See: Decree of the Plenum of the Supreme Court of the RF of April 20, 2006, No. 8 (as of December 17, 2013) "On Application by the Courts of the Legislation in Consideration of Cases on Adoption of Children".

[87] See: Decree of the Plenum of the Supreme Court of the RF of June 27, 2017, No. 23 "On Consideration by Arbitrazh Courts of Cases on Economic Disputes Arising out of Relations with a Foreign Element".

[88] See: Ruling of the Second Cassational Court of General Jurisdiction of August 20, 2020 on Case No. 88-10948/2020, 2-322/2019.

[89] See: Decree of the Plenum of the Supreme Court of the RF of June 7, 2019, No. 24 "On Application of the Rules of Private International Law by the Courts of the Russian Federation".

Russian judicial practice does not contain the examples of refusal in application of foreign Family Law for the reason of contradiction of application thereof to the public order; the rule of Art. 167 turned to be inapplicable. The possible reasons for this are the following: unfortunate wording of the rule; insignificant number of cross-border family disputes considered by Russian courts; lack of will thereof to apply foreign law; lack of the clear position of the Supreme Court of the RF with regard to application of the public order clause in family disputes[90].

The text of Art. 167 of the Family Code of the RF clearly demonstrates the most serious shortcoming of inter-branch method of codification of Private International Law – different definitions of the same institutes, important for this sphere. The main source of Private International Law of the RF is Section VI of Part 3 of the Civil Code of the RF "Private International Law". Art. 1193 of the Civil Code of the RF sets forth a different content of the public order clause – the rule of the foreign law in exceptional cases does not apply, if the consequences of application thereof would obviously contradict the fundamentals of the legal order (public order) of the RF, taking into account character of the relations complicated by a foreign element. The li-teral interpretation of the text of Art. 167 of the Family Code of the RF leads to the conclusion that in the family relations the public order clause can be applied by no means in exceptional cases, the consequences of application of the rule of foreign Family Law shall not contradict the public order, and it is also optional to consider the character of the relations complicated by a foreign element.

Perhaps in application of foreign Family Law rules, it is necessary to estimate more carefully the content and consequences of application thereof, than in application of the rules of Civil Law. The rules of family legislation to a large extent have a public-law component, and the law enforcement official is obliged to consider it. However, the wording of Art. 1193 of the Civil Code of the RF seems to be much more successful and corresponding to the current trends of development of the international family relations. The text of Art. 167 of the Family Code of the RF shall be brought into compliance with the general wording of the clause on the public order provided for in the civil legislation.

[90] See: *Voitovich E.P.* Оговорка о публичном порядке как основание отказа в применении иностранного семейного права // Право. Журнал ВШЭ. 2020. № 3. С. 26–39 [The Public Order Clause as a Ground for Refusal in Application of Foreign Family Law // Law. Journal of the Higher School of Economics. 2020. No. 3. P. 26–39].

Conclusion

The conflict of laws regulation of international family relations in the RF was adopted more than 25 years ago and needs serious modernization. It is reasonable to carry out the corresponding updating in the following directions:

1. The maximum specification of content of conflict of laws rules for the purpose of more differentiated regulation of family relations.

2. The establishment of a more diverse and detailed system of the connecting factors aimed at the most correct determination of the law which is most closely connected with the relation and the decision-making which is most answering to the concrete facts of the case.

3. The expansion of possibility of choice of the applicable law by the parties themselves in the issues concerning divorce and property relations.

4. In all matters connected with the children, the application of the law the most favorable for a child shall become a dominating connecting factor.

5. The specific nature of conflict of laws regulation of international family relations presupposes the specificity of general categories of Private International Law. Section VII of the Family Code of the RF shall be supplemented with the general rules specially transformed considering the peculiarities of the subject of regulation: the rules of resolution of interlocal and interpersonal conflicts, preliminary and side issues (so numerous in this sphere), conflict of qualifications and back reference.

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