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Recent practice on marriage contracts in Ukraine: are there any alternatives?

Ukraine seems to be quite a friendly jurisdiction for entering into and exercising marriage contracts. However, there are plenty of issues to be taken into account before one can be assured that after entering into a marriage contract with one's spouse all pecuniary interests are protected.

This article addresses the main tips that will help individuals to choose the most efficient way to share their spouses' property and prevent long-lasting property disputes.

What is a marriage contract under Ukrainian law?

Ukrainian legislation and practice support the intention of spouses to govern their own relations. At the same time, this right is not absolute.

Preuptial agreement under foreign law versus the marriage contract under Ukrainian law?

Ukrainian law provides the option for couples who are already married or are going to be married in the near future to govern their property relations during the marriage at their own discretion. However, Ukrainian law recognises the notion of marriage contracts, unlike prenuptial agreements (prenups).

In contrast to prenups, which establish the property and financial rights of each spouse in the case of divorce,¹ marriage contracts regulate the property relations of the couple from the date of marriage. In particular, a prenup governs relations only if the couple divorces; if the marriage is not terminated, the prenup does not come into effect. On the other hand, a marriage contract is one of the sources for governing spouses' property relations in both cases: during their marriage or in the case of divorce.

It is worth saying that Ukrainian legislation recognises marriage contracts concluded abroad. Such contracts are enforceable in

Ukraine provided they do not contravene the mandatory rules of Ukrainian legislation.

In addition, marriage contracts in Ukraine have other peculiarities.

Who may enter into a marriage contract and when?

Only married couples or couples that have applied to the Civil Registry Office for the registration of a marriage may conclude a marriage contract. In other words, it is possible to enter into such an agreement at any time after officially becoming a bride and groom. However, under Ukrainian law the contract will become valid only after the official registration of marriage.

The parties may choose Ukrainian law as the law governing their marriage contract if Ukraine is:

- lex personalis of one of the spouses;
- the state where one of the spouses has a place of habitual residence; and
- the state where the immovable property is situated (the contract may cover respective immovable property).

What is the procedure of entering into a marriage contract in Ukraine?

It is not too complicated to enter into a marriage contract in Ukraine. Both parties have to appear before a Ukrainian notary public official and sign the contract in front of the official.

What issues may be and may not be addressed in the marriage contract?

The couple may govern only property relations

A marriage contract only deals with property relations, and specifies the property rights and duties of the couple as the spouses or parents. It is possible to prescribe arrangements for:

- the legal status of joint property;
- the order of property division in the case of marriage dissolution;
- the legal status of separate personal property;
- the use of personal or joint residential property, and so on; and
- determination of the date of beginning the co-residence period without marriage registration.²

It is prohibited to govern non-pecuniary relations of the parties and each provision that intends to govern such a relation is deemed to be invalid.

There is no exhaustive list of issues that may be addressed in the marriage contract

There is a general rule for governing private legal relations, including family relations: the person may do everything that is not prohibited by law. Enforcing this principle, the Supreme Court of Ukraine held that the parties do not have the right to govern their relations at their own discretion, only in limited cases when:

- there is an expressed prohibition in a civil legislative act;
- the prohibition is implied by a legislative act; and
- such an agreement contradicts the substance of the parties' relations.

For instance, the marriage contract may not narrow the scope of the child's rights established by the Family Code and it may not put one of the spouses in an extremely unfavourable material situation.

In other words, the marriage contract is valid if it does not contradict the mandatory rules of law and basic moral rules of society.³

Any property may be subject to a marriage contract

EXISTING OR FUTURE PROPERTY

The couple may agree on the fortune of the property that is already possessed by the couple or will be acquired in the future. It is not prohibited to prescribe the fortune of a house that has not been built yet.

PERSONAL OR JOINT PROPERTY

The couple may prescribe rules for joint or personal property as well as the regime of ownership: parties may change the ownership of a particular item from joint to personal and

vice versa. At the same time, it is prohibited to pass ownership rights for property that must be registered, in particular, immovable property. This rule leads us to the next important peculiarity.

The couple does not have the right to change the title for registered property, but may determine the legal regime of such property

It is crucial that a marriage contract under Ukrainian law may not include provisions on changing the title of the property that is to be registered, inter alia, immovable property.

For instance, one may not prescribe that 'after entering this contract the car owned by John becomes the property of Maria'. On the other hand, the provision 'the car registered to John's name is his personal property, but may be used by Maria' will be enforceable.

The general formula of Ukrainian legislation looks like 'each spouse has equal rights for all matrimonial property without determination of precise rights for each item'. However, it is possible to agree that a precise item is subject to personal ownership of one of the spouses or the spouses' joint property and to define the shares of each spouse in such an item. Even if in the future such a person changes his or her mind and claims such an agreement as invalid, Ukrainian courts tend to dismiss such a claim because 'another decision will be in contravention to the contract'.⁴

Thus, the parties may agree that precise property is the personal property of one of them despite the fact that it was bought during the marriage. But it is crucial that such property must be registered in the name of the person that owns the property.

The marriage contract may cover the fortune of the property acquired during the co-residence period prior to the marriage, if the couple was married later

This conclusion appears from the Ruling of the Supreme Court of Ukraine.⁵ In that case, the plaintiff tried, among other issues, to challenge the provisions of the marriage contract about the fortune of the flat purchased during the co-residence period before the official marriage registration. The Supreme Court of Ukraine held that 'the parties have a right to determine the legal regime of property acquired during their co-residence prior to the registration of marriage'.

The marriage contract may state the date of the beginning of the co-residence period before the marriage

The parties have the right to agree on the date that is to be considered as the starting point of the co-residence. From this point, all property is the joint property of the parties unless otherwise prescribed by the marriage contract.

The Supreme Court of Ukraine held that there are no reasons to prohibit parties to agree on the date of the beginning of their co-residence period in the contract because it does not contravene the mandatory rules of law.⁶

The marriage contract may not place one spouse in an 'extremely unfavourable material position'

'Extremely unfavourable material position' means that the question for the court is whether the spouse has been placed by a marriage contract in a position that is significantly less favourable than the position he or she would have enjoyed under the general rules of Ukrainian legislation. According to these rules, all property obtained during the marriage is going to be divided between the spouses in equal shares: 50/50.

Therefore, it is vital that provisions of a marriage contract comply with the principle that 'each party eats what he or she kills', which means that each spouse owns property acquired himself or herself during the marriage. For instance, everybody gets consideration individually from the contract that he or she is party to; assets acquired during the marriage that are subject to mandatory registration (ie, houses, land plots and cars) are owned by the spouse in whose name these assets (movable or immovable) have been registered.

The burden of proving the extremely unfavourable material position rests on the party that claims to be in the aforementioned position. The Supreme Court of Ukraine stated that this term is evaluative and must be proved by the party that invokes it.⁷

Is the marriage contract an ideal solution for governing matrimonial relations?

We outlined the main issues that relate to entering into marriage contracts in Ukraine. This information may help lawyers to draft an enforceable contract in the course of recent court practice. However, it is worth

saying that marriage contracts are still not too widespread in Ukraine. Despite significant professional focus on marriage contracts, they are not the best option for governing property relations between spouses. There are many reasons for this:

- moral ill-preparedness of couples to regulate pecuniary relations because it may tie up relations;
- there is always a risk that the other party will file a claim with the court demanding it to find a marriage contract invalid because it places this party in an extremely unfavourable material position; even if the claimant fails to prove its allegations, the court proceedings may last for years;
- the notary or other authority may obtain information on the existence of a marriage contract only after the voluntary disclosure by one party;
- the marriage contract is not a document that evidences a title for goods, unlike a certificate of ownership or agreement on the division of spouses' property; and
- the marriage contract may determine the spouses' shares in joint property; however, for the real division of property, the couple needs to obtain a court decision or enter into an agreement on the transfer of the property from one spouse to another, which is called the agreement on property division.

We would like to consider the agreement on property division as one of the optimal solutions to govern legal relations of the spouses.

Agreement on the division of spouses' property

In contrast to a marriage contract, the agreement on the division of spouses' property is a document on transferring a title. This means that if someone contests or disclaims a party's property right to some estate, the party may present the aforementioned agreement as proof of the party's ownership. Moreover, unlike marriage contracts, it is possible to transfer the property rights for immovables under the agreement on the division of spouses' property.

Why is this so? With the best will in the world, it is not possible for a notary to check whether a particular person has been party to a marriage contract because that contract is not registered. In addition, any information from such an agreement is not included in any official state registers.

Thus, the notary may take into account the terms of the marriage contract only if the

parties voluntarily inform him or her about it. Meanwhile, the agreement on the division of spouses' property, as well as other agreements on transferring a property title, do not have any chance to be hidden from the notary and public. All transfers of property under such agreements are reflected in the State Registers, while the agreement itself is the property title document. However, the agreement on property division could only deal with existing but not future property.

Thus, if a party wants to divide property formally and univocally, to be sure that the property cannot be claimed by the other spouse, or his or her successors, it is better to choose the agreement on the division of spouses' property rather than a marriage contract. The spouses may also opt for entering into a marriage contract and after that, conclude the agreement on the division of property.

Conclusion

Marriage contracts are recognised and enforceable under Ukrainian law. Recent court practice supports spouses' decisions for governing their relations, unlike common rules. This article addressed some tips for making the decision to enter into a marriage contract more acknowledged. On the other hand, we suggest that the agreement on the division of spouses' property is one of the most effective alternative ways to determine spouses' pecuniary relations if the parties are seeking the ultimate decision.

Notes

- 1 Prenuptial agreements, available at: <http://family.findlaw.com/marriage/prenuptial-agreements.html>.
- 2 The Supreme Court of Ukraine, ruling dated 28 January 2015, No 6-23011c143a, Verdictum database.
- 3 Ibid.
- 4 The Appeal Court of Kiev, the Order dated 4 March 2015, No 22-11/796/3320/2015, Verdictum database (upheld by the Ruling of High Court for Civil and Criminal issues dated 18 May 2015).
- 5 See n2, above.
- 6 Ibid.
- 7 Ibid.

Proposals for a Brussels Iia recast Council Regulation

The proposal

On 30 June 2016, the European Commission published a proposal ('the Proposal'), which was described as a recast of Council Regulation (EC) No 2201/2003. This regulation is generally known to English family lawyers as Brussels II Revised, but is referred to in the Proposal as Brussels Iia. The intention is that the proposed new regulation will replace the present Brussels Iia. The proposal follows on from an earlier consultation, on the basis of which a lengthy impact assessment was prepared.

The context

The publication of the Proposal came less than one week after the United Kingdom

referendum. The UK government has not yet committed to opting into the negotiations over the Proposal. The timing is problematic. The new Justice Secretary has no background in or experience of law. There is a new ministerial team, who are in the process of finding their feet. There have been savage cuts in the budget of the Ministry of Justice (MoJ) over some years that are continuing. The MoJ was fully occupied before the referendum with prison reform, court reform and the day-to-day running of the civil and criminal justice systems. The result of the referendum has created a huge new workload for the MoJ, as for all other ministries.

On 27 July 2016, the MoJ initiated a consultation on whether the UK should

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