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The Swiss connection

David Wilson and Julie Wynne analyse Swiss divorce case Rybolovlev v Rybolovlev, *which has implications for assets held abroad*

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'The Federal Supreme Court considered that, for interim measures in the context of divorce proceedings, the Swiss judge may apply Swiss law instead of the foreign law applicable to the merits.'

On 26 April 2012, the Swiss Federal Supreme Court rendered a decision on trusts and matrimonial property regime, *Rybolovlev v Rybolovlev*. In summary, it held that assets settled by one Swiss-resident spouse into trust to place them beyond the other spouse's reach could be attached in the scope of a Swiss divorce to guarantee the former spouse's share in the marital property and that Swiss courts had jurisdiction to order interim measures over assets held abroad.

Facts

The spouses, Mr Dmitri Rybolovlev and Mrs Elena Rybolovleva, both Russian citizens, were married in Russia in 1987. They did not enter into a marital agreement. They have been resident in Geneva since 1995. Mr R has a considerable fortune, acquired through his professional activity subsequent to the marriage.

In April 2005, Mr R submitted a draft postnuptial agreement to his wife based on the Swiss rules governing the ordinary matrimonial property regime of contribution to marital property, but containing a number of exceptions detrimental to his wife, permitted by Swiss law but subject to agreement between the spouses. Mrs R refused to sign this agreement.

In June 2005, Mr R created two irrevocable trusts governed by Cyprus law (the trusts), to which he transferred, for no consideration, the shares he held in various companies.

The principal beneficiaries of the trusts were Mr R, together with his daughters, to the exclusion of his wife. In his letters of wishes, Mr R mentioned that if his wife was not a potential beneficiary of the trusts, it was because she would be a substantial beneficiary under his will. Mr R was also appointed as protector of these trusts. According to the trust deeds, Mr R retains the powers to appoint or remove the trustees, to add or exclude beneficiaries, and to nominate a 'special company'.

According to Mr R, he created the trusts in order to place certain assets beyond the reach of foreign attachment orders; this was a way of protecting his assets by transferring them to a third party, while retaining certain management powers over those assets. In particular, Mr R wanted to protect himself from the Russian government, which had reopened its investigation in order to obtain compensation regarding an environmental accident that took place in 2006 in a mine belonging to a company he indirectly owned.

Between 29 and 31 December 2008, Mrs R brought five legal actions, in the British Virgin Islands (BVI), London, Singapore, Cyprus and the USA respectively, for the attachment of assets directly or indirectly owned by her husband. The various courts made freezing injunctions against Mr R and the companies of which he was the beneficial owner, prohibiting them from moving their assets abroad, disposing of them or reducing the value thereof.

In December 2008, Mrs R entered a divorce petition in the Court of First Instance in Geneva, requesting *inter alia* for the liquidation of the matrimonial

property regime. Furthermore, she brought proceedings against her husband, seeking an order for the provisional attachment of various paintings; furniture; yacht; real estate property owned by Mr R, directly or indirectly, through offshore companies; the bank accounts held by Mr R, and/or of which he is the beneficial owner; and the shares in 48 companies. Mrs R further asked the court, in particular, to issue an injunction against Mr R preventing him, until a final and enforceable judgment on the merits concerning the liquidation of the matrimonial property and assets, from disposing in any way, directly or indirectly, of the assets described above, held in his own name or indirectly. If granted the injunction was to be extended to the companies themselves and their directors and executives.

In August 2009, the Court of First Instance rejected Mrs R's application for provisional attachment, considering that the claimant had not proved the existence of a serious and imminent risk of disappearance of the matrimonial assets and that the assets were owned by Mr R.

In March 2010, following the appeal of Mrs R, the Geneva Court of Appeal ordered the provisional attachment of some assets (paintings, furniture, yacht, real estate, bank accounts and shares) held directly by her husband or indirectly through offshore companies or trusts.

Mr R appealed to the Swiss Federal Supreme Court against this order.

Analysis

The case deals with interim measures over assets held in trust in the context of the liquidation of a Swiss matrimonial property regime. We will analyse the judgment of the Swiss Federal Supreme Court and highlight the lessons practitioners can learn from this decision.

Beforehand, as a limit to this decision's real extent, it is important to point out that, as the challenged decision concerns interim measures, the appellant could only claim the violation of his constitutional rights (Article 98 of the Swiss Federal Court Act (LTF)), and the Federal Supreme Court was limited to examining whether the law was applied arbitrarily (Article 106 para 2 LTF).

Standing to appeal

To have standing to appeal, it is necessary, according to Article 76 of the LTF, that that the appellant has a legal interest, in particular that the party has been materially prejudiced by the decision, ie that the decision challenged had affected their legal position, had been detrimental to them from a legal point of view and that they had therefore a self-interest in having the judgment modified. Hence, a debtor is not considered to be affected by the attachment of assets belonging to third parties and has, in consequence, no right to appeal to challenge that order.

In its decision, the Federal Supreme Court, while acknowledging Mr R's standing to appeal against the interim orders that concern the assets held formally in his name, denied the standing to appeal for the interim orders that concern the assets in the name of third parties, companies or trustees. Yet, the court left open the issue of standing to appeal in the scope of provisional measures when the dispute concerns the ownership of the disputed assets.

Under the ordinary matrimonial property regime, the court can, upon request, subject the disposal of certain matrimonial assets to the other spouse's consent.

Swiss matrimonial property regime and marital agreement

Both parties, Russian citizens, were married without entering into a prenuptial agreement. As they are domiciled in Geneva, their divorce, the matrimonial property regime

and its liquidation, and the effects of their marriage are governed by Swiss law (Article 61 para 1, 54 lit a and Article 48 para I of the Swiss Private International Law Act (SPILA); Article 59, 51 lit b and 46 SPILA).

Having not entered into any pre-/post-nuptial agreement, the spouses are subject to the ordinary matrimonial property regime of contribution to marital property of the Swiss Civil Code (CC), the so-called 'community of accrued gains' (*participation aux acquêts*), whereby Mrs R has a right to half of the benefit of her spouse's marital property.

Restriction of the power to dispose of assets

Under the ordinary matrimonial property regime, the court can, upon request, subject the disposal of certain matrimonial assets to the other spouse's consent, to the extent necessary for ensuring the family's material conditions or the fulfilment of pecuniary obligations (Article 178 CC). This provision applies by analogy to interim measures in the context of a divorce and allows the judge to order appropriate conservative measures to avoid that one spouse, by disposing of their assets voluntarily, becoming incapable of fulfilling their matrimonial pecuniary obligations in favour of their spouse, obligations resulting from the effects of marriage (maintenance obligation) or fromthe matrimonial property regime (right to a share of their spouse's profits, compensation to matrimonial joint estate).

The necessity of these measures exists in particular when there are serious tensions between the spouses, due to the sizeable risk of malicious acts from one of the spouse. The range of measures that can be ordered include, in particular, the freezing of assets with banks, insurance companies, other financial institutions or third parties, and the lodging of some assets with third parties.

Marital agreement

Had the spouses concluded a marital agreement – which is fully binding in Switzerland – Mrs R would not have been entitled to any part of her husband's property.

In the context of the liquidation of the matrimonial property regime, the spouses' property claims refer to all the matrimonial assets, regardless of their location.

Under Swiss law, upon conclusion of a marital agreement, spouses can choose the matrimonial property regime of separation of property, whereby each spouse administers and enjoys the benefits of their own property alone and has full power to dispose of it (Article 247ff CC). Each spouses' assets remain theirs, and there is therefore no property to be divided between the spouses upon divorce. In consequence, each spouse is free to dispose of their assets and transfer them into trust without the other spouse's consent (subject to the Swiss inheritance rules).

To avoid any uncertainty in case of liquidation of the matrimonial property regime, and to any issues with assets transferred into trust, it is advisable to recommend that the settlor analyses their matrimonial property regime and to suggest that they conclude a pre-/post-nuptial agreement.

Jurisdiction of Swiss courts to limit the power of disposal of assets located abroad

The Geneva Court of Appeal prohibited Mr R from disposing of his assets and ordered the attachment of assets held directly or indirectly by him.

In the context of the liquidation of the matrimonial property regime, the spouses' property claims refer to all the matrimonial assets, regardless of their location. Therefore, according to the Federal Supreme Court, it was not untenable to consider that the prohibition to dispose of assets (an ad personam measure) applies to assets located abroad, failing which the protection of Article 178 CC would be very limited.

On the other hand, the attachment (an *in rem* measure) constitutes a conservative measure aiming to ensure that the prohibition to dispose of assets remains effective and that no third parties can acquire these assets. Therefore, it was not untenable to admit that, at the current stage of the interim measures, the attachment of assets situated abroad can be ordered.

The Federal Supreme Court also recognised, in accordance with the decision of the Geneva Court of Appeal, that the former case law – which held that the Swiss judge did not have jurisdiction to order conservative measures that would have to be enforced abroad when the assets were not located in Switzerland – should be abandoned. Indeed, this former case law strayed from the fundamental principle, accepted in Switzerland and abroad (including under the Lugano Convention), further to which the judge, on the merits, has also jurisdiction to order conservative measures, even when the latter must be enforced outside territorial jurisdiction.

According to the court, the possibility of requesting, for expediency's sake, a provisional or conservative measure directly from the foreign judge where the measure must be enforced, even though such judge will not have jurisdiction to judge the claim's merits, does not imply an exclusive forum. The urgent measure can always be ordered by the judge on the merits, but the claimant would then have to obtain its *exequatur* in the jurisdiction of enforcement. Realistically, the Federal Supreme Court leaves the issue of foreign enforcement open.

Durchgriff doctrine: application of Swiss law

In general, the Durchgriff doctrine (piercing the corporate veil doctrine) is governed by the law governing the entity at play (ATF 128 III 346).

However, the Federal Supreme Court considered that, for interim measures in the context of divorce proceedings, the Swiss judge may apply Swiss law instead of the foreign law applicable to the merits, by analogy with Article 62 para 2 SPILA.

According to case law, a corporation must be treated as a separate legal person and this principle should be followed, unless it is improperly invoked in the case at hand. To ignore the corporation's legal personality, there should be a genuine abuse of rights, the use of a corporation that is manifestly contrary to the purpose thereof or abusive, or which violates third parties' legitimate interests.

In the field of attachments, the conservative measure restraining a spouse to dispose of their assets based on Article 178 CC apply in principle only to assets belonging to the spouse, respectively to the debtor, and not to assets owned by third parties. However, the Federal Supreme Court held that the principles based on the Durchgriff doctrine should also apply by analogy to the attachment of assets ordered pursuant to Article 178 CC and authorise in specific circumstances the attachment of assets owned by third parties. For instance, if a creditor wants to obtain the attachment of assets held in the name of a third party and if it seems likely that the debtor is hiding behind the legal personality of legal entities to shirk their obligations, these entities must be disregarded and the attachment ordered. Accordingly, the Federal Supreme Court considered that it is not arbitrary to apply Durchgriff doctrine to a foreign trust if the Swiss resident settlor has retained extensive powers of management, if they are the trust's primary beneficiary and if the trust is merely a tool in their hands.

In consequence, the Federal Supreme Court followed the Geneva Court of Appeal's opinion, which held that the trusts' settling and the transfer without consideration of all the companies belonging to Mr R's marital property, only one month after Mrs R refused to sign a matrimonial agreement, indicates that Mr R tried to obtain, by roundabout means, the result which would have been obtained through the conclusion of a marital agreement. The court considered that Mr R's intent to remove these assets from his spouse was all the more obvious that she was expressly excluded from the class of beneficiaries of the trusts, which only included Mr R and his daughters. Moreover, the fact that Mrs R would benefit under her spouse's will was not established and that the expectation of inheritance was anyway too uncertain, as a will is revocable. Furthermore, the court considered that Mr R's argument – that he settled the trusts to place his assets beyond the reach of certain competitors – was irrelevant and that his sole reason for settling the trusts was to render their attachment by Mrs R more difficult. By setting up a complex structure, Mr R made it more difficult to identify and recover the assets necessary to settle the matrimonial claim.

In these circumstances, the Federal Supreme Court considered that Mrs R has sufficiently shown that the assets settled in trust continued to belong economically to her husband, who managed them and who was their primary beneficiary. It concluded that it is therefore possible to ignore the fact that the trust assets do not belong formally to Mr R but to the trustees, and therefore to order an attachment of the assets held by trustees.

According to the court, the transfer of jointly acquired assets to a trust by a spouse in circumstances allowing the application of Article 208 CC and subsequently Article 220 CC would in addition account for an abuse of right if the right to attach – by way of conservative measures – the assets that secure the spouse's claim to a share of their spouse's marital property is denied.

Lessons to be learned

Along with their wealth planning, Swiss resident spouses should consider concluding a Swiss marital agreement. Indeed, Switzerland is one of the countries with the most secure and liberal legislation with regards to marital agreements: spouses can choose among the law of the state in which they are both domiciled or will be domiciled following the wedding or the law of the state of which one of the spouses is a citizen (Article 52 para 2 SPILA). The choice of law is possible in Switzerland pre- or even post-nuptially, even retroactively to the date of the wedding, to avoid piecemeal application of other foreign matrimonial laws. And finally, contrary to the UK system, these agreements are fully binding on Swiss courts, which enjoy no discretion to construe or amend them.

In addition, one should remember that it is very important to be prudent with the timing of the transfer of assets into trust and not to reserve too many powers to the settlor – and possibly include the spouse in the class of beneficiaries of the discretionary trust – if one wants to avoid that their spouse easily challenge the validity of the trust and of the transfer of the assets into trust. ■

By setting up a complex structure, Mr R made it more difficult to identify and recover the assets necessary to settle the matrimonial claim.