ECJ, judgment of 9 September 2021, C-422/20 – RK ./. CR, on the interpretation of jurisdictional provisions of the European Succession Regulation (ESR)

Further to CoL's posts on recent case law of the ECJ last week, we allow ourselves to draw CoL readers' attention to the judgment of the ECJ of 9 September 2021, C-422/20 – RK ./. CR, on the interpretation of jurisdictional provisions of the European Succession Regulation (ESR), upon reference by the Higher Regional Court (*Oberlandesgericht*) of Cologne, Germany. Neither the ECJ's judgment, nor AG Maciej Szpunar's Opinion of 8 July 2021 is yet available in English translation. The following summary draws on the original German texts.

The referring national court asked (1) whether it is required, for a declaration of lack of jurisdiction by the court previously seised as provided for in Article 7(a) ESR, that the latter court expressly declines jurisdiction, or whether an implicit declaration suffices if it is clear by interpretation that that court has in fact declined jurisdiction? The national court further asked (2) whether the court of a Member State whose jurisdiction is to emerge from a declaration of lack of jurisdiction by another Member State court is entitled to examine whether the conditions for such a declaration were in fact fulfilled. In particular, the referring court asked (a) whether the second court may examine whether the testator validly chose the applicable law in accordance with Article 22 ESR, whether (b) a request for a declaration of lack of jurisdiction, as required by Article 6(a) ESR has been brought by one of the parties in the first proceedings, and (c) whether the first court correctly assessed that the courts of the Member State of the chosen law are better placed to rule on the succession. In a last question, the referring court asked (3) whether Articles 6(a) and 7(a) ESR are applicable if the testator has not made an express or implied choice of law in a testamentary disposition before 17 August 2015 but the law applicable to the succession may be inferred from Article 83(4) ESR.

The ECJ held that (1) no express declaration of lack of jurisdiction is required under Article 6(a) ESR, as long as the first court's intention can be clearly inferred from its decision, that (2) the second court has no competence to review the first court's declaration of lack of jurisdiction and (3) that Articles 6(a) and 7(a) ESR remain applicable if the applicable law may only be inferred from Article 83(4) ESR.

As to the first question, the Court made clear that certain differences in the Spanish language version of the ESR in Article 6(a) – "abstenerse de conocer" (in translation something like: "abstain from assuming jurisdiction") – on which the Spanish first court had relied – are of no relevance for the autonomous interpretation of the ESR, to be exercised acccording to general and well established principles in light of all of its language versions and its objectives (para. 30). These do not require any particular form for a declaration under Article 6(a), and requiring such a form would jeopardize the objective of the ESR as laid down in Recital 27 Sentence 1, i.e. "to ensure that the authority dealing with the succession will, in most situations, be applying its own law".

In relation the second question, the Court made reference to AG Spzunar's Opinion (para. 39) and confirmed the latter's finding that no second review may take place of the first court's decision under Article 6(a) ESR (paras. 40 et seq.), not least because such as decision is a "decision" in the sense of Article 3(1) (g) ESR that falls within the scope of Chapter IV of the ESR on the recognition of decisions of the courts of other Member States (para. 42). The Court concludes that the first court's decision under Article 6(a) ESR is binding for the second court both in its result – declaration of lack of jurisdiction – as well as in relation to its underlying findings about the conditions that Article 6(a) ESR requires. In the latter respect the Court made expressly reference to its earlier judgment of 15 November 2012, C-456/11 – Gothaer Versicherung, which means that its notion of a European res iudicata developed there is to be extended to the type of conditions found fulfilled by the first court here: "Any other interpretation would jeopardize the principles of mutual recognition and mutual trust on which the system of the ESR grounds" (para. 45, translation is my one).

For answering the third question the Court explained that Article 83(4) ESR contains a presumption of a choice of law by the testator that is to be attributed the same effects as a choice of law directly undertaken under the ESR (para. 53).