

AG Maciej Szpunar on the interpretation of the ESR in relation to cross-border declarations of waiver of succession and on substitution and characterisation, Opinion of 20 January 2022, C-617/20 - T.N. et al. ./ E.G.

Yesterday, AG Maciej Szpunar delivered an Opinion (a French version is available, a German as well, not yet, however, an English one) that is of high relevance both to the practical application of the European Succession Regulation (ESR) as well as to issues of European choice of law methodology in relation to substitution and characterisation.

The case emerged from a preliminary reference by the German Higher Regional Court (Oberlandesgericht) Bremen of 11 November 2020 and involved the following facts:

The deceased person, a Dutch national, died in Bremen (habitual residence) on 21 May 2018. He left behind his widow (E.G.) and two descendants (T.N. and N.N.) of his formerly deceased brother. His widow applied by notarial deed of 21 January 2019 for the issuance of a joint certificate of inheritance to the Local Court of Bremen, attributing to her $\frac{3}{4}$ of the estate and $\frac{1}{8}$ to each of T.N. and N.N. The two descendants, however, having their habitual residence in the Netherlands, declared their waiver of succession before the Rechtbank Den Haag on 30 September 2019. In the proceedings before the Local Court of Bremen, T.N. and N.N. were heard, and by letter of 13 December 2019 in Dutch language they submitted copies of their declarations of waiver (as well in Dutch). The German court answered that it would not be able to take notice of these documents as

long as it would not receive a translation into German. The two descendants thereupon declared in German to the court by letter of 15 January 2020 that they had waived, properly registered with the Dutch court, and that under European law there would be no need for translation. By decision of 27 February 2020, the Local Court issued the certificate as applied for by the applicant, i.e. certifying T.N. and N.N. as co-heirs. The latter appealed against this decision and, on 30 June 2020 submitted colour copies of the deeds they had used in the Netherlands as well as German translations, on 17 August 2020 they submitted the original deeds. The Local Court referred the case to the Higher Regional Court Bremen and stated that it considers the time limit for waiver under section 1944 (1) German Civil Code of six weeks after gaining knowledge about the inheritance elapsed, as a declaration of waiver would have required timely submission of the original deeds.

Thereupon, the Higher Regional Court of Bremen, in essence, referred the question to the ECJ whether a waiver in the Member State of habitual residence of the heir other than the Member State of habitual residence of the deceased would be capable of replacing the waiver required by the applicable succession law by way of substitution or whether additional requirements exist, such as that the waiving heir informs, with a view to Recital 32 Sentence 2, the competent court in the Member State of habitual residence of the deceased and if so whether the official language of that court must be used and whether the original deeds must be used in order to comply with time limits under the applicable law.

AG Maciej Szpunar reframed this question (para. 34): According to his subtle analysis, the question should be whether Articles 13 and 28 ESR are, of course autonomously (see para. 50), to be interpreted to the effect that the requirement to declare a waiver before the competent court („*Nachlassgericht*“) must be characterised as a question of form rather than substance which would lead to the application of the law of the Member State of the waiving heirs on this point of form under Article 28 lit. b ESR. Whereas only if this question were to be characterised as a matter of substance, the question of substitution could at all be posed. It will not come as a surprise that with this point made, the result of the – careful and comprehensive – analysis of this issue of characterisation (paras. 45 – 69), including considerations on the effect utile of the ESR (para. 64), was that indeed the point must be considered as one of form. The consequence is that since the local form was complied with in the Netherlands, the waiver must be

held valid as of 30 September 2019 and as such still in time under the applicable succession law – a result that indeed facilitates cross-border succession cases in an important aspect as it is the overall objective of the ESR.

Remains the problem of how to ensure that the competent court takes notice of such a waiver (paras. 70 et seq.). This is the issue of Recital 32 Sentence 2: „Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession.“ However, as in the concrete case at hand the court definitively had knowledge about the waiver, the question was not relevant and thus remained expressly left open (para. 77). As it was expressly left open as irrelevant in the concrete case we may at least conclude that any kind of gaining knowledge must suffice. Then the only remaining question is what happens if the court did not gain any knowledge. From a practical point of view a party interested in bringing its waiver to the attention of the competent court, it seems that a letter (or even an email) to that court should suffice.

One last question. Could we not say: either it is “substance”, then Article 13 refers to the *lex causae* (German law) or it is “form”, then Article 28 refers to the same law (German law) under lit. a and then substitution comes up, or, alternatively, under lit. b, to the law for formal issues (Dutch law). And when further proceeding sub lit. a of Article 28, could not substitution provide for the same result, at least in this concrete case, than applying lit. b? If so, we might be tempted to add that two parallel avenues to the same result indicate quite reliably that the result must be the right one. It might have been for reasons of simplifying things that AG Maciej Szpunar did not fully map out these two avenues, all the more because substitution is a technique that is little explored on the level of the EU’s PIL. However, if even the referring national court directly asks about substitution, the ECJ should take the opportunity to give us a bit more insights on this classical concept of the general part of any PIL from the perspective of the EU’s conflicts of law methodology.

Let’s hope that the ECJ takes up the ball and discusses the theoretical connotations of this case on methodical questions of characterisation and substitution as precisely and subtly as it was done in the Opinion. The CoL community will certainly await the judgment with excitement.

Relevant provisions of the ESR

Article 13: Acceptance or waiver of the succession, of a legacy or of a reserved share

In addition to the court having jurisdiction to rule on the succession pursuant to this Regulation, the courts of the Member State of the habitual residence of any person who, under the law applicable to the succession, may make, before a court, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, shall have jurisdiction to receive such declarations where, under the law of that Member State, such declarations may be made before a court.

Article 28: Validity as to form of a declaration concerning acceptance or waiver

A declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declaration, shall be valid as to form where it meets the requirements of: (a) the law applicable to the succession pursuant to Article 21 or Article 22; or (b) the law of the State in which the person making the declaration has his habitual residence.

Recital 32:

In order to simplify the lives of heirs and legatees habitually resident in a Member State other than that in which the succession is being or will be dealt with, this Regulation should allow any person entitled under the law applicable to the succession to make declarations concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or concerning the limitation of his liability for the debts under the succession, to make such declarations in the form provided for by the law of the Member State of his habitual residence before the courts of that Member State. This should not preclude such declarations being made before other authorities in that Member State which are competent to receive declarations under national law. Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be

dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession