ECJ on the interpretation of the European Succession Regulation in relation to cross-border declarations of waiver, Judgment of 2 June 2022, C-617/20 – T.N. et al. ./. E.G.

On 2 June 2022, the ECJ delivered its judgment in the case of T.N. et al. ./. E.G., C-617/20, on the interpretation of the ESR in relation to cross-border declarations of waiver of succession (on the facts of the case and AG Maciej Szpunar's Opinion in this case see our previous post).

The Court followed the AG's Opinion and concluded (para. 51) that

"*Articles 13 and 28 of Regulation No 650/2012 must be interpreted as meaning that a declaration concerning the waiver of succession made by an heir before a court of the Member State of his or her habitual residence is regarded as valid as to form in the case where the formal requirements applicable before that court have been complied with, without it being necessary, for the purposes of that validity, for that declaration to meet the formal requirements of the law applicable to the succession*".

This conclusion was based on a EU-law specific approach rather than by discussing, let alone resorting to, fundamental concepts of private international law (compare Question 1 by the referring national court, the Higher Regional Court of Bremen, Germany, on a potential application of the concept of substitution; compare the AG's considerations on characterisation of the issue as "substance" or "form", see Opinion, paras. 34 et seq.). Rather, the Court reformulates the question functionally (para. 32):

"*The present reference for a preliminary ruling concerns the conditions which must be satisfied in order for a declaration concerning the waiver of succession, within the meaning of Articles 13 and 28 of Regulation No 650/2012, made before*

the court of the State of the habitual residence of the party waiving succession, to be regarded as valid. In that regard, the referring court asks, in particular, whether and, if so, when and how such a declaration must be notified to the court having jurisdiction to rule on the succession".

Textual as well as systematic arguments (Article 13 as part of Chapter II, Article 28 as part of Chapter III of the ESR), paras. 36 et seq., supported by Recital 32 (simplification of procedures), para. 41, as well as the general effet utile of the ESR in light of Recital 7, para. 42, lead the Court to the result that

"*as the Advocate General stated in point 64 of his Opinion, compliance with the objective of Regulation No 650/2012, which is to enable heirs to make declarations concerning the waiver of succession in the Member State of their habitual residence, implies that those heirs are not required to take further formal actions before the courts of other Member States other than those provided for by the law of the Member State in which such a declaration is made, in order for such declarations to be regarded as valid*".

Whether this result occurs, technically speaking, as a substitution – and thus by a kind of "recognition", or as a matter of characterisation of the issue as "form", is not directly spelled out, but based on the general approval of the AG's approach, the latter is certainly more likely than the former.

Additionally, in furthering the effet utile, the Court adds on the issue of communication of and time limits for a waiver declared according to the conditions of the law of the habitual residence (paras. 49 et seq.) that compliance with "formal requirements" before the court of the habitual residence must suffice as long as the court seised with the succession "has become aware of the existence of that declaration". And the threshold for this awareness seems to be very low, but "in the absence of a uniform system in EU law providing for the communication of declarations" of the kind in question here, must be brought about by the declaring person (para. 48). As a further element of effet utile, this person is not bound by any formal requirements under the *lex successionis*, para. 48: "if those steps [by the declaring person] are not taken within the time limit prescribed by the law applicable to the succession, the validity of such a declaration cannot be called into question" (emphasis added). The only factual time limit therefore is that the court becomes aware before it takes its decision. Appeal, therefore, cannot be grounded directly on the fact that the court was not

made aware in time, even though the declaration had existed before the court's decision. Appeal may be available on other grounds and then the declaration may be introduced as a *novum*, if the *lex fori processualis* allows it.

Speaking of the *lex fori processualis*: As there is now an autonomous time limit, the question became irrelevant whether making the court aware of the declaration of waiver depends on any language requirements. In the concrete case, the persons declaring the waiver before a Dutch court, obviously in Dutch language, informed the German court first by submitting Dutch documents and only later with translations, but at any rate before the court's decision. Principally speaking, however, if the court's language is e.g. German, any kind of communication must be conducted in that language (see section 184 German *Gerichtsverfassungsgesetz*). In addition, according to the Court's decision, only "formal requirements of the law applicable to the succession" are irrelevant. The need for translations, however, is a matter of the *lex fori processualis.* It will be an interesting question of "language law" within the EU whether the effet utile of the ESR (and comparable regulations in other instruments) might overcome principal language requirements according to the *lex fori processualis*. And on a general level it may be allowed to state the obvious: questions of characterisation (and others of general PIL methodology) will never disappear.