Case C-617/20

Request for a preliminary ruling

Date lodged:

20 November 2020

Referring court or tribunal:

Hanseatisches Oberlandesgericht in Bremen (Germany)

Date of the decision to refer:

11 November 2020

Applicant:

E.G.

Complainants:

T.N.

N.N.

Hanseatisches Oberlandesgericht in Bremen

[…]

Order

In the probate case concerning
W. N., who died on 21 May 2018 in Bremen,

the deceased

Parties concerned:

1. E. G., […] Bremen,

applicant

2. T. N., […] The Hague [Netherlands],

3. N. N., […] The Hague [Netherlands],

complainants

[…]

the Fifth Civil Chamber of the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen, Germany) […]

issued the following order on 11 November 2020: **[Or. 2]**

I. The proceedings are stayed in order to obtain a preliminary ruling from the Court of Justice of the European Union on the interpretation of Articles 13 and 28 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (EU Succession Regulation).

II. The Chamber refers the following questions on the interpretation of Articles 13 and 28 of the EU Succession Regulation to the Court of Justice of the European Union for a preliminary ruling pursuant to the second paragraph of Article 267 TFEU:

1. Does a declaration concerning the waiver of succession by an heir before the court of a Member State that has jurisdiction for the place of his or her habitual residence, which complies with the formal requirements applicable there, replace the declaration concerning the waiver of succession to be made before the court of another Member State that has jurisdiction to rule on the succession, in such a way that when that declaration is made, it is deemed to have been validly made (substitution)?

2. If Question 1 is to be answered in the negative:

In addition to making a declaration before the court that has jurisdiction for the place of habitual residence of the party waiving succession which complies with all formal requirements, is it necessary, in order for the declaration concerning the waiver of succession to be valid, that the latter inform the court that has jurisdiction to rule on the succession that the declaration concerning the waiver of succession has been made?

3. If Question 1 is to be answered in the negative and Question 2 in the affirmative:

a. Is it necessary that the court that has jurisdiction to rule on the succession be addressed in the official language of the location of that court in order for the declaration concerning the waiver of succession to be valid and, in particular, in order to comply with

the time limits applicable for making such declarations before that court?

b. Is it necessary that the court that has jurisdiction to rule on the succession receive the original documents drawn up in relation to the waiver by the court that has jurisdiction **[Or. 3]** for the place of habitual residence of the party waiving succession and a translation thereof in order for the declaration concerning the waiver of succession to be valid and, in particular, in order to comply with the time limits applicable for making such declarations before the court that has jurisdiction to rule on the succession?

III. Grounds:

1.

On 21 May 2018, the deceased, who was born on 4 January 1945 and was a Netherlands national, died in Bremen. The applicant is the widow of the deceased, and parties 2 and 3 are descendants of the deceased's brother, who predeceased him.

By a notarial deed dated 21 January 2019, the applicant applied for the issuance of a joint certificate of inheritance, according to which three quarters of the deceased's estate was to be inherited by the applicant and one eighth of the deceased's estate was to be inherited by each of the complainants by way of intestate succession. Since the applicant had difficulty producing the necessary documents for assessing the intestate succession, the Amtsgericht Bremen (Local Court, Bremen, Germany), having jurisdiction to rule on the succession ('the Probate Court'), first contacted the complainants by letter of 19 June 2019 and informed them about the application for a certificate of inheritance. At the same time, the Probate Court requested that certain more specific documents be provided. Subsequently, an email was received on 14 August 2019 from a Mr K, who stated that he had been instructed by the complainants to make enquiries concerning the status of the estate. In that regard, the Probate Court declared itself unable to respond to those enquiries and recommended that legal advice be sought. Initially, no further observations were submitted by the complainants. After the applicant had finally produced the necessary documents, the complainants were consulted by the Probate Court in a letter of 22 November 2019 about the application for a certificate of inheritance, a copy of which was sent to them. The complainants had previously submitted a declaration of waiver in respect of the deceased's estate at the rechtbank Den Haag (District Court, The Hague, Netherlands) on 13 September 2019, which was entered into the Register of Succession there on 30 September 2019. By letter of 13 December 2019 – written in Dutch – the complainants submitted copies of the documents drawn up in that regard by the District Court, The Hague, to the Probate Court. By letter of 3 January 2020, the Probate Court informed the complainants that letters and

documents that were not accompanied with a translation into German could not be processed. In that regard **[Or. 4]**, complainant 3 sent a letter dated 15 January 2020 (in German) in which it was claimed that the inheritance had been waived, that the declaration had been registered with a court in Dutch in accordance with EU law and that no translation was therefore required. However, the Probate Court referred to the fact that the documents had not been translated and to the time limits applicable to a declaration concerning the waiver of succession.

By order of 27 February 2020, the Probate Court established the facts necessary for issuing the certificate of inheritance in accordance with Paragraph 352e(1) of the Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Law on proceedings in family matters and in matters of non-contentious jurisdiction; 'the FamFG'). That decision, which was notified to the complainants on 6 March 2020, was contested by both of them by letter of 19 March 2020 (received on 27 March 2020), in which they also requested an extension of the time limit for further substantiation. On 30 July 2020, the complainants then filed colour copies of the documents drawn up by the District Court, The Hague, and a translation thereof. Following a further objection by the Probate Court, criticising the fact that the original versions of the documents were missing, the original documents were received by the Probate Court on 17 August 2020. By order of 2 September 2020, the Probate Court rejected the complaint and referred the proceedings to the Chamber for a decision. As grounds, the Probate Court stated that the complainants were (joint) heirs of the deceased, because they had missed the deadline for waiving succession. Neither merely indicating that the declaration concerning the waiver of succession had taken place before the Netherlands court nor the provision of copies was sufficient for the waiver to be valid; receipt of the original documents was all that would suffice, and those were submitted to the Probate Court only after the six-month period for waiving succession had expired.

2.

The appeal brought by the complainants is available under Paragraph 58(1) of the FamFG and is admissible under Paragraphs 59(1), 61(1) and 63(1) of the FamFG. It is therefore necessary to examine the substance of whether the waiver occurred in good time.

a. As the complainants are not resident in Germany, and the deceased was a Netherlands national, the provisions of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the **[Or. 5]** creation of a European Certificate of Succession (EU Succession Regulation) apply to the succession. Under those provisions, the Probate Court in Bremen, as the court in whose district the deceased had his habitual residence at the time of death, has jurisdiction to rule on the succession (Article 4 of the EU Succession Regulation). Furthermore, the rules of

German substantive law apply, in principle, to the succession, since the habitual residence of the deceased at the time of death is also relevant in that regard (Article 21(1) of the EU Succession Regulation). However, contrary to the view of the Probate Court, the question of the validity of the waiver of succession is not determined solely by Paragraph 1945 of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'). Rather, with regard to a waiver of succession, the EU Succession Regulation stipulates special rules for jurisdiction and form in Articles 13 and 28:

Pursuant to Article 13 of the EU Succession Regulation, in addition to the court that has jurisdiction to rule on the succession pursuant to Article 4 of the EU Succession Regulation, the courts of the Member State of the habitual residence of the person waiving succession also has jurisdiction to receive a declaration concerning the waiver of succession; there is concurrent jurisdiction […] [evidence in national legal academic writing]. It is provisions of Netherlands law which govern which court has territorial jurisdiction over the person waiving succession, those provisions being autonomous in that regard, and, since the complainants are resident in The Hague, it seems likely that the District Court, The Hague, is the court with territorial jurisdiction; no evidence to the contrary has been presented or is apparent. In addition, Article 28(b) provides that the form of the declaration concerning the waiver of succession is determined by the provisions of law of the place of habitual residence of the person making the declaration.

b. However, the question is whether the mere making of a declaration concerning the waiver of succession before the court where the person making the declaration has his or her habitual residence constitutes a valid waiver before the court ruling on the succession, which is referred to as substitution (that being concordant with prevailing opinion […]) [evidence in legal academic writing and case-law]. The opposing viewpoint requires that the declaration be referred properly to the court ruling on the succession […] **[Or. 6]** […] or, in any case, notification thereof […] [evidence in legal academic writing].

A counter argument may be based on recital 32 of the Regulation, which states accordingly, inter alia, that persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court which is ruling on the succession of the existence of such declarations within any time limit set by the law applicable to the succession. It could be inferred therefrom that the legislature assumed that a declaration concerning the waiver of succession made to the court in the declarant's habitual place of residence should produce legal effects only after having been notified to the court ruling on the succession. It could particularly be argued in that regard that Article 13 of the EU Succession Regulation, unlike, for example, Paragraph 344(7) of the FamFG, does not provide for any obligation on the court in the declarant's habitual place of residence to inform the court ruling on the

succession that a declaration concerning the waiver of succession has been made.

c. Thus, the outcome of the proceedings, namely the question of whether the complainants waived the succession in good time, depends on the interpretation of Articles [13] and 28 of the EU Succession Regulation.

As the substantive German law applicable here under Article 21 of the EU Succession Regulation does not require explicit acceptance of succession (Paragraph 1942 of the BGB – principle of automatic inheritance […] [reference to legal academic writing]), the complainants became joint heirs if they failed to waive the succession within the time limit (Paragraph 1943 of the BGB). The deadline for waiving succession is, in principle, six weeks, which begins to run from the date on which the heir becomes aware of the devolution and the reason for his or her entitlement (Paragraph 1944(1) of the BGB). Where, as in this case, the heir resides abroad, the deadline for waiving succession is six months (Paragraph 1944(3) of the BGB). The heir is deemed to be aware of the succession if he or she knows the devolution of the estate has taken place pursuant to Paragraph 1942 of the BGB. He or she must thus have had reliable knowledge of the relevant circumstances on the basis of which he or she could be expected to act. The deadline for issuing a waiver of succession does not begin to run on the basis of deemed knowledge or even culpable ignorance. The relevant circumstance of which the heir must be aware is the death. Furthermore, in the case of intestate succession **[Or. 7]**, as is the case here, the familial relationship giving rise to the status of heir (including life partnership) and the absence or disappearance of the previous heirs are relevant. The Chamber considers it doubtful that the request from the Probate Court on 19 June 2019 provided the complainants with the necessary – reliable – knowledge of the succession. First, the application for a certificate of inheritance from which the complainants' entitlement arose (intestate succession) was not attached to that letter. Second, the request for documents by the Probate Court demonstrated that the investigations into the intestate succession had not yet been completed. In addition, the complainants, who are Netherlands nationals, are not required by law to be aware of the German rules on legal succession, especially since the present case concerned intestate succession of the second degree (Paragraph 1925 of the BGB). The Probate Court itself did not assume, when calculating the deadline, that the complainants had already obtained the knowledge necessary under Paragraph 1944 of the BGB through receipt of that request. The Chamber shares that view. However, the complainants had that knowledge by 13 September 2019 at the latest, because they declared their waiver of succession on that date before the District Court, The Hague, which implies that they considered themselves to be heirs.

(1) If one accepts the clear prevailing opinion, which is that a substitution of the declaration concerning the waiver of succession occurs, that

declaration was already valid when it was made before the District Court, The Hague, on 13 September 2019. The statutory time limit under Paragraph 1944(3) of the BGB was observed, and the complainants have not become heirs.

(2) By contrast, assuming that complete substitution has not taken place in the light of recital 32, the validity of the waiver may also depend on when the Probate Court in Bremen (the court ruling on the succession) became aware that such a declaration had been made. However, the question then arises as to the formal requirements necessary to render the waiver valid:

(a) If it is sufficient merely to inform the court ruling on the succession – even, where relevant, in the native language of the party declaring the waiver – then the waiver declared on 13 December 2019 is valid and therefore was made within the time limit. The same applies if one is required to supply mere copies of documents drawn up by the court of the declarant's habitual place of residence **[Or. 8]** when the declaration concerning the waiver of the succession was made. If that is the case, it is for the court ruling on the succession to obtain confirmation by making further enquiries with the court in the other Member State (Paragraph 26 of the FamFG).

(b) If, in light of the law applicable in the place of the court ruling on the succession (Article 21(1) of the EU Succession Regulation), it is required that information about the declaration be provided in German (Paragraph 184 of the Gerichtsverfassungsgesetz (Law on the organisation of the courts; 'the GVG')), that took place in the form of the complainants' letter of 15 January 2020, and that was also within the time limit for making the declaration of waiver of succession. Here, again, the court ruling on the succession was itself obliged to obtain the necessary confirmation (in the form of documents) from the court of the Member State.

(c) However, if it is assumed, as the Probate Court did, that, notwithstanding Article 13 of the EU Succession Regulation, a valid declaration concerning the waiver of succession requires that the original documents concerning the waiver drawn up by the court of the Member State with a certified translation in the language of the court ruling on the succession be provided to the latter court, then that took place only in August 2020 and the declaration was made out of time. However, it should be noted that such an interpretation would do little to achieve the simplification in European legal relations sought by the regulation, since, if that is the case, the person concerned may

immediately declare the waiver before the court ruling on the succession.

[…]

[Signatures]

[…] [Authenticated copy]