PRAWO W DZIAŁANIU
SPRAWY CYWILNE
58/2024
DOI: 10.32041/pwd.5808

s. 244–262

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The institution of legacy with material effects (*legatum per vindicationem*) in selected jurisdictions (Italy, France, Spain and Greece)

Instytucja zapisu o skutku rzeczowym (legatum per vindicationem) w wybranych porządkach prawnych (Włochy, Francja, Hiszpania, Grecja)

Abstract

The inspiration for writing this article was the entry into force of the provisions introducing the institution of legacy by vindication into Polish inheritance law on 23 October 2011 under the act of 18 March 2011 amending the Civil Code and certain other acts. The aim of the research undertaken in this study is to try to locate, approximate and compare the succession institutions in force in legal systems of European countries (Italy, France, Spain and Greece) which are similar in their form to the institution of legacy with material effects (legatum per vindicationem).

Keywords: *disposition mortis causa, identity, transferable property rights, legatum per vindicationem, succession*

Streszczenie

Inspiracją do powstania artykułu stało się wejście w życie przepisów wprowadzających zapis windykacyjny do polskiego prawa spadkowego w dniu 23.10.2011 r. na mocy ustawy z 18.03.2011 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw. Celem badawczym podjętym w niniejszym opracowaniu jest próba odnalezienia, przybliżenia i porównania instytucji spadkowych obowiązujących w systemach prawnych państw europejskich (Włoch, Francji, Hiszpanii i Grecji), które są zbliżone w swym kształcie do zapisu o skutkach rzeczowych (legatum per vindicationem).

Słowa kluczowe: *rozporządzenie pośmiertne, określenie tożsamości, zbywalne prawa majątkowe, legatum per vindicationem, spadek*

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The manuscript was submitted by the author on: 13 December 2022; the manuscript was accepted for publication by the editorial board on: 2 February 2023.

1. Preliminary remarks

At the outset, it should be noted that the solutions adopted in the area of succession law in the internal legal systems of European countries can be grouped according to various criteria. However, the most general division seems to be the clearest one, i.e. a division into jurisdictions in which the institution of legacy by vindication exists and jurisdictions in which this institution is absent. One may also be tempted to conclude that the institution of legacy with material effects has been predominantly adopted in the countries of the Roman legal tradition. Among such countries, one would have to mention France (Article 1014 of the Code Napoléon), Spain (Article 882 of the Spanish Civil Code), Italy [Article 649 (2) of the Italian Civil Code], Greece (Article 1996 of the Greek Civil Code), Belgium (Article 1014 of the Belgian Civil Code), Luxembourg (Article 1014 of the Luxembourgish Civil Code), Portugal (Article 2249 of the Portuguese Civil Code), Romania, Hungary and Japan, certain countries of Central and South America [Argentina – Article 3766 of the Argentinian Civil Code; Chile – Article 1338 (1) of the Chilean Civil Code; Brazil – Article 1692 of the Brazilian Civil Code; Peru – Articles 735 and 769 of the Peruvian Civil Code, and Venezuela – Article 927 of the Venezuelan Civil Code], as well as the Canadian region of Quebec (Article 739 of the Quebec Civil Code)[1].

At the opposite end of the spectrum to the Romance countries is the legislation of the Germanic countries, which have not opted for the institution of legacy with material effects. This situation is particularly characteristic of Germany (§ 2174 in conjunction with § 1939 of *Bürgerliches Gesetzbuch*, hereinafter: "BGB"), Austria (§ 684 in conjunction with § 535 of *Allgemeines bürgerliches Gesetzbuch*), the Netherlands [Article 4:117 (1) of the Dutch Civil Code], Switzerland (Article 562 in conjunction with Article 484 *Zivilgesetzbuch*), Finland and Sweden, where only a legacy with obligatory effects (*legatum per damnationem*) occurs. It consists of a testator obliging an heir or legatee (hereinafter: "legacy") to provide a specific property benefit to a designated person. In contrast to the institution of legacy by vindication, the legatee (by damnation) does not acquire *ex lege* the asset to which the legacy relates upon the opening of the succession, but only a claim for performance against the heirs

[1] See L. Salomon, *The Acquisition of Possession in Legacies per vindicationem in Classical Roman Law and its Influence in the Modern Civil Codes*, "Roman Legal Tradition" 2006, Vol. 3, p. 65 et seq.; H. Lange, K. Kuchinke, *Erbrecht. Ein Lehrbuch*, München 2001, pp. 621–622; J. Górecki, *Zapis testamentowy w prawie kolizyjnym*, "Problemy Prawa Prywatnego Międzynarodowego" 2009, Vol. 5, pp. 132–133; J. Górecki, *Zapis windykacyjny – uwagi de lege ferenda* [in:] *Rozprawy z prawa prywatnego, prawa o notariacie i prawa europejskiego ofiarowane Panu Rejentowi Romualdowi Sztykowi*, E. Drozd, A. Oleszko, M. Pazdan (eds.), Kluczbork 2007, p. 130; A. Makowiec, *Zapis windykacyjny gospodarstwa rolnego*, Warszawa 2019, pp. 1–15; A. Makowiec, *Rozważania na temat zapisu windykacyjnego i wprowadzenia do polskiego systemu prawnego darowizny na wypadek śmierci*, "Przegląd Prawno-Ekonomiczny" 2014, Vol. 26, p. 46; A. Makowiec, *Korzenie zapisu windykacyjnego w prawie rzymskim, Правове життя: сучасний стан та перспективи розвитку*, [s.l. Ukraine] 2015, pp. 202–205; A. Makowiec, *Remarks on the object of specific bequest under Polish law*, "Ad Alta – Journal of Interdisciplinary Research" 2015, Vol. 5, Issue 2, pp. 43–48; P. Księżak, *Zapis windykacyjny*, Warszawa 2012, pp. 16–20; W. Borysiak, *Dziedziczenie. Konstrukcja prawna i ochrona*, Warszawa 2013, pp. 257–261.

(or against another legatee). In Germany, for example, the institution of legacy by damnation is regulated by § 2174 BGB, which provides that "the legacy establishes the right of the legatee to demand performance of the asset to which the legacy relates from the encumbered person"[2].

It should be emphasised that in the European countries indicated above it is not a matter of chance but a well-considered, analysed and consciously adopted solution to reject legacies by vindication. In German and Austrian doctrine, the question of introducing the institution of legacy by vindication into the law of succession was already widely discussed many years ago[3]. Among the arguments against the institution of legacy by vindication, in addition to the non-liability of the legatees for the debts under the succession, it was pointed out that it would not be compatible with the model adopted in Austria and Germany for the transfer of movable and immovable property (as) it would disrupt the structure of universal succession and would blur the distinction between heir and legatee[4]. In contrast, proponents argued that the effects of a legacy are consistent with the will of the testator[5]. The arguments cited years ago still remain valid and are repeated by representatives of German and Austrian doctrine even today to support the position in favour of not introducing legacies with material effects. It is argued that the legacy by vindication leads to a weakening of the position of the heirs vis-à-vis the legatees[6] and to a worsening of or even a threat to the position of the creditors under the succession[7]. The absence of legacies by vindication makes it easier to distinguish the position of heir from that of legatee[8]. It is also mentioned that the introduction of the legacy with material effects would result in a derogation from the principle that all the testator's rights, in case of doubt, pass as one to the heirs and not to persons outside that group[9].

The purpose of this paper, however, is not to delve into the legal solutions adopted in countries that have purposefully abandoned the introduction of the legacy with material effects, but to present the solutions of selected countries (Italy, France, Spain and Greece) under which the institution of legacy with material effects has been introduced and shaped.

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[2] § 2174 BGB: „*Durch das Vermächtnis wird für den Bedachten das Recht begründet, von dem Beschwerten die Leistung des vermachten Gegenstands zu fordern*".

[3] See W. Żukowski, *Projektowane wprowadzenie zapisu windykacyjnego do polskiego prawa spadkowego*, "Kwartalnik Prawa Prywatnego" 2010, Vol. 4, pp. 1040–1041, n. 10.

[4] W. Żukowski, *Projektowane*…, pp. 1040–1041.

[5] W. Żukowski, *Projektowane*…

[6] G. Schlichting [in:] *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 9. Erbrecht. §§ 1922–2385, §§ 27–35 BeurkG*, G. Schlichting (ed.), München 2004, p. 1129.

[7] K. Muscheler, *Universalsukzession und Vonselbsterwerb: Die rechtstechnischen Grundlagen des deutschen Erbrechts*, Tübingen 2002, p. 99 et seq.; G. Otte [in:] *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 5, Erbrecht: §§ 2064–2196 (Testament 1)*, G. Otte (ed.), Berlin 2003, pp. 644–645; H. Lange, K. Kuchinke, *Erbrecht. Ein Lehrbuch*, München 2001, p. 622; G. Schlichting [in:] *Münchener*…, p. 1129.

[8] See H. Lange, K. Kuchinke, *Erbrecht*…, p. 622.

[9] See W. Borysiak, *Dziedziczenie*…, p. 261.

2. Italy

2.1. Structure of a legacy

A legacy in Italian law differs from the establishment of an heir in that the legatee, unlike the heir, does not become the legal successor to the entire estate, but only obtains individual bequeathed assets out of the estate – a singular succession occurs. It appears, however, that in practice it is not easy to distinguish whether the testator wished to appoint an heir or to establish a legacy. The statutory regulation of Article 588 (2) of the Italian Civil Code does not provide a specific answer as to which criteria of demarcation should be considered in the case of an ambiguous will of the testator. Pursuant to Article 588 (1) of the Italian Civil Code, this does not depend on the terms chosen by the testator. As regards the question of whether it was the will of the testator to appoint an heir or a legatee, it must first be determined whether the testator, when making the disposition, intended to take into account his or her entire estate and thus, by listing certain assets, wished to create only the respective percentages (the so-called *istitutio ex re certa*)[10]. According to the prevailing view in Italian doctrine, in case of doubt, if the testator has disposed of particular assets from his or her estate in favour of particular persons, and if it is difficult to find a justification that the testator, by allocating the assets from his or her estate, wished to create the respective percentages in the inheritance, then it must be considered that he or she wished to establish a legacy[11]. Consequently – *a contrario* – if such arguments were found, it would have to be concluded that the testator was keen to appoint heirs rather than legatees[12]. This position is supported by the literal wording of Article 588 (1) of the Italian Civil Code, which indicates that the establishment of an heir only takes place in exceptional cases, namely when the testator's intention was to dispose of his or her estate in whole or in part. All other dispositions, and thus all dispositions which cannot be unequivocally classified as the appointment of an heir, are, within the meaning of Article 588 (1), second sentence of the Italian Civil Code, dispositions under a special title and are therefore to be regarded as a legacy[13].

It should be noted that in Italian succession law two types of legacies can be distinguished. The first one is a legacy with material effects concerning items belonging to the testator marked only as to identity, which are referred to in Article 649 (2) of the Italian Civil Code (*legato di specie*)[14]. Another is a legacy with obligatory effects, the object of which may be items marked as to specie or items not belonging to the testator (*legato di quantità*). It should also be added that the legacy with material effects is the rule in the Italian law.

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[10] See G.L.M. Ribolla, M. Minasola, *Institutio ex re certa o legato?*, Diritto Civile Contemporaneo 2015, No. 1, available at: http://dirittocivilecontemporaneo.com/2015/03/institutio-ex-re-certa-o-legato/ [accessed on: 23 October 2016].

[11] See J. Reiß, *Internationales Erbrecht Italien*, München 2014, p. 87.

[12] J. Reiß, *Internationales*…

[13] See G. Capozzi, *Successioni e Donazioni*, Milano 2009, p. 79.

[14] See M.G.C. Wiedemann, A. Wiedemann, *Italien* [in:] *Erbrecht in Europa*, R. Süß (ed.), Bonn 2015, p. 722.

2.2. Asset to which the legacy relates

It is an unquestionable expression of the autonomy of the testator's will that he or she can, within the limits of the law, make any value of property the asset to which the legacy relates. The statutory restrictions imposed on the testator within the framework of his or her testamentary freedom are found in several provisions specific to legacies, namely the Articles 651 to 670 of the Italian Civil Code.

Pursuant to Article 651 (1) of the Italian Civil Code, a legacy relating to an asset that did not belong to the testator at the time of his or her death is generally invalid, unless it is clear from the will or other written statement of the heir that he or she knew that the asset to which the legacy relates did not belong to him of her. In such a case, the person encumbered by the legacy should acquire the items indicated in the will and transfer their ownership to the legatee. If the bequeathed item, at the time the will was made, belonged to someone else, but at the time of the testator's death was owned by the testator, then, in accordance with Article 651 (2) of the Italian Civil Code, the legacy will be valid[15]. As stated in Article 654 of the Italian Civil Code, a legacy relating to an asset specified only as to specie and not belonging to the testator's estate at the time of his or her death will not be valid. Likewise, a legacy relating to an asset that already belongs to the legatee will not be valid (Article 657 of the Civil Code). Furthermore, according to the wording of Article 652 of the Italian Civil Code, a legacy relating to assets or rights which only in part belong to the testator is valid, but only in respect of the part in his or her possession. Pursuant to Article 658 of the Italian Civil Code, legacies relating to an asset which is a claim are only effective if the claim exists at the time of the opening of the succession. Under the Articles 665 and 666 of the Italian Civil Code, alternative legacies are permissible[16].

It should also be added that, pursuant to Article 668 of the Italian Civil Code, the legatee is obliged to bear the burdens incumbent on the object of the legacy. In the case of legacies for recurring performance, the commencement of the statutory performance obligation and the legatee's claim are governed by Article 670 of the Italian Civil Code.

If the order of a legacy relating to an asset marked as to identity takes place under a condition precedent, the acquisition of ownership only takes place when the condition is fulfilled. In this case, however, the legatee acquires the expectancy immediately[17]. However, if the recipient dies before the condition is fulfilled, a substitution (representation in succession) takes place pursuant to Article 476 (2) of the Italian Civil Code.

It should also be added that if the asset to which the legacy relates is an item marked as to specie, then at the time of the opening of the succession, a right of claim arises, which may be raised by the legatee or his or her heirs.

[15] M.G.C. Wiedemann, A. Wiedemann, *Italien* [in:] *Erbrecht*…
[16] M.G.C. Wiedemann, A. Wiedemann, *Italien* [in:] *Erbrecht*…
[17] See G. Capozzi, *Successioni*…, p. 1138.

2.3. Beneficiary of the legacy

Under Italian law, the legatee should have the capacity to inherit and must be appointed by the testator himself or herself or at least be identifiable, as indicated by the literal wording of Article 628 of the Italian Civil Code. It is not possible for the legatee to be appointed by third parties or by the encumbered person. It is also permissible, pursuant to Article 661 of the Italian Civil Code, for the heir to be at the same time the legatee (the so-called preference legacy, *prelegato*). It should be added that the acquisition of a preference legacy is independent of the acquisition of the succession.

If the asset to which the legacy relates has been bequeathed to a number of legatees and one of them is unwilling or unable to be a legatee, then, pursuant to Article 467 (2) of the Italian Civil Code, his or her representatives entitled to the succession shall take his or her place, provided that he or she was a relative capable of representation, unless a legacy relating to a usufruct or other personal right is involved. If there is no representative, an accrual takes place in accordance with the Articles 675 and 676 of the Italian Civil Code. If no accrual occurs, the share of the legatee falls to the encumbered party pursuant to Article 677 of the Italian Civil Code. In this case, the liabilities of the legatee are also transferred to the encumbered party pursuant to Article 677 (2) of the Italian Civil Code.

Unlike an inheritance, the acquisition of which requires an admission under Article 459 of the Italian Civil Code, in the case of a legacy relating to a specific item marked as to identity – *cosa determinata* – or a right vested in the testator, ownership passes to the legatee by operation of law. Pursuant to Article 649 (2) of the Italian Civil Code, the legacy occurs at the opening of the succession, irrespective of the power to waive it. This means that the legacy has material effects[18]. However, it should be emphasised that the transfer of ownership does not result in a simultaneous transfer of possession of the asset to which the legacy relates[19]. The legatee must first request the transfer of possession in accordance with Article 649 (3) of the Italian Civil Code[20].

Pursuant to Article 649 (1) of the Italian Civil Code, a legatee may waive the legacy at any time. The waiver of a legacy is a unilateral declaration of intent, which does not require acknowledgement of receipt by the addressee, by which the recipient renounces his or her right to the asset to which the legacy relates[21]. A waiver may be tacit or explicit and (is), in principle, without the requirement of a specific legal form. In this context, the question of whether the waiver of a legacy pursuant to Article 1350 (5) of the Italian Civil Code in the case of rights in land (ownership, usufruct, easement, and others), in accordance with Article 1350 (1) to (4) of the Italian Civil Code, are subject to the written form requirement, is of particular relevance for

[18] See M.G.C. Wiedemann, A. Wiedemann, *Italien* [in:] *Erbrecht*…, p. 722.
[19] See L. Salomon, *The Acquisition*…, p. 65 et seq.
[20] J. Reiß, *Internationales*…, p. 84.
[21] G. Capozzi, *Successioni*…, p. 634; M.G.C. Wiedemann, A. Wiedemann, *Italien* [in:] *Erbrecht*…, p. 722.

practical purposes[22]. The prevailing view, in particular that of the Court of Cassation, confirms in these cases the requirement of written form in accordance with Article 1350 of the Italian Civil Code[23]. The waiver of a legacy is irrevocable, but in the case of defects in the declaration of intent it is contestable. With regard to the grounds for contestation (duress, mistake, deceitful misrepresentation), Article 526 of the Italian Civil Code, which is applicable to the contestation of the waiver of a succession, applies by analogy[24].

In order to guarantee a speedy settlement of succession rights, pursuant to Article 650 of the Italian Civil Code, anyone with an interest in the succession may request a judicial determination of the period during which the legatee is obliged to declare whether or not he or she will exercise his or her right to waive the legacy. If this declaration is not made within the prescribed period, the legatee loses his or her right to waive the legacy. Of particular relevance in the context of the issue under discussion is the regulation contained in Article 756 of the Italian Civil Code, which provides that legatees are generally not liable for the debts under the succession.

3. France

3.1. Preliminary remarks

Under French succession rules, an inheritance can only be acquired by law or by will. In a will, the testator cannot designate heirs, but only establish legacies. This means that any testamentary heir is a legatee. In French law, a distinction is made between three types of legacies: universal legacies (also known as general legacies), which cover movable or immovable property, legacies by general title and individual legacies, i.e. those which relate only to individual assets – legacies relating to specific assets. The differentiating criterion is not the effect of the legacy, but what part of the succession the heir transfers to the legatee. At this point, it is appropriate to focus on the approximation and analysis of the legacy by particular title, as it most closely resembles the legacy by vindication introduced into the Polish legal order.

3.2. Legacy by particular title

A legacy relating to specific assets – a legacy by particular title (*legs à titre particulier*) was standardised in Article 1010 (2) of the Code Napoléon. It designates any legacy which is neither a universal legacy nor a legacy by general title. It is in fact a legacy relating to one or more individual items, whereby it is legally irrelevant whether these items in terms of value represent only a small part of the succession or the entire estate.

[22] See J. Reiß, *Internationales*…, p. 85; M.G.C. Wiedemann, A. Wiedemann, *Italien* [in:] *Erbrecht*…, p. 723.
[23] Cass. 3.7.2000, No. 8878; Cass. 2.2.1995, No. 1261.
[24] G. Capozzi, *Successioni*…, p. 1149.

3.3. Structure of the legacy by particular title

The most important feature of a legacy by particular title is that ownership of the property to which the legacy relates passes to the legatee upon the death of the testator, i.e., a material effect occurs at that moment[25].

It should be noted that, insofar as there is no generic legacy or a legacy relating to items that are not part of the estate at the time of the testator's death, the automatic transfer of ownership of an item onto the legatee upon the death of the testator, does not simultaneously result in transfer of possession. Under French law, a legacy relating to specific assets is a legacy related to a claim for the release of the property to which the legacy relates. This means that, according to the regulation contained in Article 1014 of the Code Napoléon, the legatee acquires ownership of the item to which the legacy relates automatically but must request the transfer of possession and the release of the item[26]. A special legatee cannot come into possession of property by operation of law alone. The literature indicates that a "relative ownership" is created, as the legal effects – until the transfer of possession – arise only between the heir and the special legatee[27]. In the event that the heir does not wish to hand over the item to the legatee, the latter may enforce its release as if he or she were the owner by claiming *rei vindicatio*. In addition, it should be added that the testator may not release the legatee from his or her obligation to claim the release of the item[28]. If, on the other hand, the succession is insufficient to cover all its debts, the legacy's value must be reduced accordingly.

The difference with a universal legacy or a legacy by general title is that the person to whose benefit the legacy has been established may benefit from the bequeathed items from the date of their release and not from the date of the testator's death, unless the testator has made a different declaration of intent or has bequeathed cyclical benefits so as to secure means of subsistence (Article 1015 of the Code Napoléon).

3.4. Asset to which a legacy by particular title relates

Pursuant to Article 1021 of the Code Napoléon, unless there is generic legacy, the asset to which the legacy relates must be owned by the testator[29]. Indeed, Article 1021 of the Code Napoléon stipulates that a legacy relating to an item belonging to somebody else is invalid. It is irrelevant whether the testator knew that the item to which the legacy relates did not belong to him or her. Nor can it be overlooked that the French legislature has not introduced any limitation on the asset to which the legacy

[25] See K. Osajda, *Ustanowienie spadkobiercy w testamencie w systemach prawnych common law i civil law*, Warszawa 2009, p. 133.
[26] See J. Waszczuk-Napiórkowska, *Zapis windykacyjny w polskim prawie spadkowym*, Warszawa 2014, p. 119.
[27] See M. Ferid, H.J. Sonnenberger, *Das französische Zivilrecht, Band 3: Familienrecht, Erbrecht*, Heidelberg 1987, p. 561.
[28] See J. Waszczuk-Napiórkowska, *Zapis…*, p. 119.
[29] See F. Terré, Y. Lequette, *Les successions, les libéralités*, Paris 1997, p. 281; A.M. Leroyer, *Droit des successions*, Paris 2009, p. 190; C. Döbereiner, *Frankreich* [in:] *Erbrecht in Europa*, R. Süß (ed.), Bonn 2015, p. 521.

by particular title relates. No closed catalogue of such items has been introduced, and only in Article 1022 of the Code Napoléon the legislator has indicated how any doubts that may arise should be resolved. By virtue of this statute, when the asset is an item marked as to specie, the heir is not obliged to release it in the best specie, but neither may he or she deliver it in the worst specie. The approximate rule is a refinement of the general principle of French succession law expressed in Article 1246 of the Code Napoléon, stipulating that if the object of a debt is an item of a certain kind, the debtor does not have to release an item of the best kind, but neither can he discharge his obligation by releasing an item of the worst kind. It should also be mentioned that as a result of a legacy by vindication relating to items marked as to specie or money, the legatee only obtains a right of claim against the heir.

It should be noted that an asset to which a French legacy by special title relates may also be a right of claim, a discharge of debt, a collection of items or a collective item[30]. A testator can establish a legacy relating not only to one valuable painting, but also to the whole collection of paintings in his or her flat. French law also allows for the legacies relating to money. The regulation contained in Article 1018 of the Code Napoléon expresses the principle that the item must be released with its appurtenances and in the condition in which it was at the time of the testator's death. This means that if the item was improved between the time the will was written and the testator's death, any improvements to the item to which the legacy relates will fall to the legatee. The same will also apply in the event of deterioration of the item during this period of time. If the item was sold, lost or destroyed, the legatee is not entitled to a claim for payment of its value or a claim for compensation for the resulting damage. On the other hand, if the item has been destroyed after the opening of the succession through the fault of the person obliged to release the legacy, he or she is obliged to make good the resulting damage. The wording of Article 1020 of the Code Napoléon refers to the situation of mortgaging an immovable property to which a legacy relates in the period before or after the will was made. In such a case, the heir does not have to release the immovable property free of mortgage unless the testator has expressly imposed such an obligation onto him or her. The regulation contained in Article 1019 of the Code Napoléon applies to the issue of enlargement of immovable property. It resolves the issue that new acquisitions, even if directly adjacent to the immovable property in question, attached to it, do not constitute the asset to which the legacy relates if the testator has not expressly indicated this. The situation is different, however, with beautifications and buildings erected on land to which a legacy relates – they pass to the legatee along with the landed property.

With regard to the liability of a legatee for the debts under the succession, as is clear from Article 1024 of the Code Napoléon, a legatee by particular title, unlike a general legatee and a legatee established by general title, is not liable for such debts[31]. However, there are two exceptions to this rule. The first one holds when the

[30] See J. Waszczuk-Napiórkowska, *Zapis*…, pp. 116–117.
[31] See C. Döbereiner, *Frankreich* [in:] *Erbrecht*…, p. 521.

property to which the legacy relates is mortgaged. The second one holds when the legacy exceeds the disposable portion of the succession – in which case the legacy is reduced proportionally.

4. Spain

4.1. Preliminary remarks

It should be pointed out that there are seven different succession regimes in Spain. The regulations relating to testamentary dispositions have their origin in the common rules of civil law, which are contained in the Civil Code of 1889 (hereinafter: "Spanish Civil Code"), and in the regional or special rules that are adopted by the autonomous communities with powers to legislate on civil law (Galicia, the Basque Country, Navarra, Aragon, Catalonia and the Balearic Islands). The regional or special regimes (*derechos forales o especiales*) provide for separate rules on testamentary dispositions that are specific to each of these regions. Due to the framework of the study, mainly the provisions contained in the Spanish Civil Code will be analysed.

4.2. The institution of legacy in Spanish law

It should be noted that the object of this analysis will be the provisions contained in the Spanish Civil Code. Under Spanish law, the legatee is the legal successor of the testator in relation to individual items (singular succession). This follows directly from the wording of Article 660 of the Spanish Civil Code, which provides that an heir inherits under a general title and a legatee under a special title. Also with the establishment of a percentage of the succession, it can be assumed that this is a legacy (a testamentary legacy corresponding to a percentage of the succession)[32]. In the reverse situation, i.e. with the benefit consisting of a single item, this can be treated as the establishment of an heir and not as a legacy[33]. In order to be able to distinguish between the establishment of an heir and of a legacy, it is necessary to establish what the will of the testator was. It is interesting to note that Spanish law allows a legacy to be established conditionally, as well as it may be accompanied by an instruction.

Although the person encumbered by the legacy is usually the heir[34], according to Article 858 of the Spanish Civil Code, the testator may encumber both the heir and the legatees with the obligation to fulfil the instructions and the legacy (so-called sub-legacy). It should be added that in the case of more than one heir, in the absence of any other provision by the testator, the heirs are liable for the execution of the legacy according to their shares in the succession[35]. If, on the other hand, the testator

[32] J.-H. Frank, *Internationales Erbrecht Spanien*, München 2014, p. 121.
[33] J.-H. Frank, *Internationales*…
[34] J.-H. Frank, *Internationales*…
[35] Article 859(2) of the Spanish Civil Code states: "If the testator does not name any of the heirs, then all the heirs will be encumbered with the legacy in proportion to their respective succession shares".

encumbers one of the heirs with the legacy, then only he or she will be obliged to fulfil it. A legatee will only be liable for a legacy up to the amount it represents [Article 858 (2) of the Spanish Civil Code].

The Spanish Civil Code indicates that a legacy may relate to both items and rights. This means that the testator has a high degree of testamentary freedom, as the asset to which the legacy relates has been defined very broadly. It should be noted that these can be both items marked as to identity belonging to the testator and items of another person, items marked as to specie, such as money, as well as, for example, periodic benefits, maintenance payments or educational expenses. A legacy may also consist in the discharge of debt. In addition, the Spanish Civil Code regulates legacies relating to right of claim and legacies in discharge of debt (Articles 870, 871, 872, 873 of the Spanish Civil Code), alternate legacies (Article 874 of the Spanish Civil Code) and legacies relating to pensions or recurring benefits (Article 880 as well as Article 879 of the Spanish Civil Code).

In Spanish succession law, with a view to the effects produced by a legacy, a distinction can be made between a legacy with material effects (Article 882 of the Spanish Civil Code) and a legacy with purely obligatory effects.

4.3. Legacy by vindication in Spanish law

When looking for an institution in Spanish law similar in form to the Polish institution of legacy by vindication, attention should be paid to Article 882 of the Spanish Civil Code. Indeed, pursuant to Article 882 (1) of the Spanish Civil Code, where the asset is specified as to identity and belongs to the testator, the legatee acquires from the testator the asset granted to him or her directly at the time of the opening of the succession – which amounts to a legacy by vindication[36]. In such a case, the acquisition also includes the benefits of the property that accrued before death and which have not yet been used [Article 882 (1) of the Spanish Civil Code]. From that point onwards, the legatee by vindication bears the risk of the item to which the legacy relates. He also bears the damages in the event of the loss or deterioration of the item, but also with regard to the benefits by way of a *mejora*[37].

Despite the direct acquisition of the asset to which the legacy relates upon the opening of the succession, under Article 885 of the Spanish Civil Code the legatee may not seize the asset himself or herself, but must require the heir or executor of the will to release it and transfer possession, provided that the heir or executor is entitled to do so[38]. Such a regulation makes the heirs check first whether the legacy will fall through or whether it will have to be reduced (because, for example,

[36] See A. Steinmetz, E. Huzel, R.G. Alcázar, *Spanien* [in:] *Erbrecht in Europa*, R. Süß (ed.), Bonn 2015, p. 1311.
[37] The *mejora* is an institution of succession law involving the accrual of the inheritance of one heir with regards to others. A *mejora* constitutes one third of the actual legitime (*legitima*) and can be disposed of in any way.
[38] See in more detail L. Salomon, *The Acquisition*…, p. 65 et seq.; A. Steinmetz, E. Huzel, R.G. Alcázar, *Spanien* [in:] *Erbrecht*…, p. 1311.

the inheritance will not be sufficient to execute all the legacies) or whether the right of the heir entitled to the legitime will not be affected thereby. The release and transfer of possession of the asset to the legatee in some cases is not necessary. Among the exceptions to the rule contained in Article 885 of the Spanish Civil Code, situations should be identified where the testator has authorised the legatee to take possession of the asset and there are no heirs entitled to a legitime. Furthermore, this will be a case where the entire inheritance has been distributed by way of legacies and no executor of the will has been appointed. Neither will a transfer of possession be necessary in the case of a sub-legacy made in favour of the sole heir or when the legacy consists of the universal use of the estate and the legatee is already in possession of the asset to which the legacy relates.

The liability of the legatee for the testator's debts is in principle non-existent in Spanish law. However, the legatee only obtains the asset to which the legacy relates if there is still something left over after the debts under the succession have been paid by the heirs. As stipulated in Article 891 of the Spanish Civil Code, if the testator has distributed his entire estate by way of legacies, then the legatees are liable for all debts and burdens relating to the estate in proportion to their share, unless the testator has provided otherwise. The crucial point is that pursuant to Article 858 (2) of the Spanish Civil Code, a legatee is always liable only up to the value of his or her own (share in the) legacy.

5. Greece

5.1. Preliminary remarks

In the Greek legal order, the testator's disposition of property is only possible by means of a will (Articles 1710 and 1712 of the Greek Civil Code). In a will, the testator may appoint heirs or establish legacies. A legacy is involved if the testator bequeaths property benefits to a designated person without appointing him or her as their heir (Article 1714 of the Greek Civil Code)[39]. The main difference between a legacy and appointing an heir is that only one or a few assets may be bequeathed and, in the former case, there is no universal succession. In this case, the person in whose favour the legacy is established, in accordance with the rule of interpretation of Article 1800 (2) of the Greek Civil Code, is a legatee even if he or she is named as an heir. However, if the bequeathed property constitutes the whole or a major part of the estate, interpretation may lead to the conclusion that the legatee is to be treated as an heir despite being named an legatee in the will[40]. Deciding whether we are dealing with a legatee or an heir is particularly important, as the heir becomes the owner of the assets that are part of the estate upon the opening of the succession, unlike the legatee, who usually (only in exceptional cases does a so-called legacy with

[39] D. Stamatiadis, S. Tsantinis, *Griechenland* [in:] *Erbrecht in Europa*, R. Süß (ed.), Bonn 2015, p. 564.
[40] See Article 1800 § 1 of the Greek Civil Code.

a claim for release occur as defined in Article 1996 of the Greek Civil Code – this kind of a legacy has material effects) only acquires a mandatory claim for the execution of the legacy by the encumbered person[41]. Moreover, a legatee, unlike an heir, is not liable for the debts under the succession. Instead, liabilities relating to legacies are among the debts under the succession, for which the heir is liable.

Under Greek law, an asset to which a legacy relates can be constituted by property benefits and by all (performances) of an obligatory nature. These include any kind of improvement in the financial situation of the person in whose benefit the legacy is established, yet even in this case no enrichment is necessary. Therefore, the asset to which the legacy relates may, for example, be the waiver of an objection or the assertion of a claim (e.g., repayment of a loan granted to the person in whose favour the legacy is established) or the recognition of a right. In addition, a testamentary legacy may take the form of a cyclical benefit (e.g., maintenance, annuity), a claim, a perpetual usufruct right, etc. If the testator has bequeathed the entirety of his or her claims, the legacy covers, in case of doubt, only the pecuniary claims. However, pursuant to Article 1992 of the Greek Civil Code, it does not cover other claims, such as the balance of a bank account, bearer securities or shares in banks or savings banks. A legacy may also relate to a claim for surrender against the seller of an item that has been acquired with reservation of title, after payment has been made[42].

It should be added that, in case of doubt, a legacy relating to an item of property also includes its appurtenances that existed at the time of the testator's death [Article 1982 (2) of the Greek Civil Code]. The Areopagus (Supreme Civil and Criminal Court of Greece) has indicated that this provision applies only to a legacy relating to an asset that is an item marked as to identity, not to a legacy relating to an asset that is an item marked as to specie[43]. In addition, the legacy, in case of doubt, also includes a claim for damages due to the impairment of the bequeathed property [Article 1982 (2) of the Greek Civil Code].

At this point, the example should be recalled that was used by H.-P. Schömmer and A. Kosmidis in their book "*Internationales Erbrecht. Griechenland*": "K specifies in his will that his passenger car is to be bequeathed to his nephew A. The day before his death, a truck severely damaged the properly parked car. A also obtained, with the death of the testator, a right to compensation, which he can claim against the perpetrator of the damage"[44].

Article 1983 (1) of the Greek Civil Code stipulates that if an asset to which a legacy relates belonging to the succession has been encumbered prior to the opening of the succession, in case of doubt, the person obliged to release it must be deemed not to be obliged to release the asset of its encumbrance. This situation was illustrated by H.-P. Schömmer and A. Kosmidis, using the following example: "K appoints E as

[41] This is a testamentary legacy obliging the heir to transfer a specific right to the legatee, which is regulated in Article 1995 of the Greek Civil Code.
[42] See Article 1984 (3) of the Greek Civil Code.
[43] Areopag 2237/1981, NoB. Bd. LA' 664.
[44] H.-P. Schömmer, A. Kosmidis, *Internationales Erbrecht. Griechenland*, München 2007, p. 224.

heir and bequeaths a movable property to V. The heir B is encumbered by a legacy to the benefit of V. However, a mortgage on the property is registered in favour of bank T as security for a loan taken by K. The mortgage is an encumbrance on the property, and B is not generally obliged to liquidate the encumbrance. The testator K could, however, oblige in his will the encumbered B to liquidate the encumbrance"[45].

The wording of Article 1974 of the Greek Civil Code provides for a purposive legacy. It stipulates that the testator may leave it to the encumbered person or a third party to designate the bequeathed item on the basis of fairness, provided that he or she has specified the purpose of the legacy. In Article 1973 of the Greek Civil Code, on the other hand, the Greek legislature has established an elective legacy. Under it, the testator may bequeath to the legatee one of several assets and leave the choice to a third party. If the same asset is bequeathed to multiple persons, the rules of interpretation of Articles 1802–1806 of the Greek Civil Code apply, as indicated by the wording of Article 1975 of the Greek Civil Code.

If one of the legatees is unable or unwilling to accept the legacy before or after the testator's death, his or her share equally increases the shares of the other legatees[46]. If several persons have been bequeathed the same portion, the increase in the portion of the legacy shall take place first between them (Article 1976, third sentence, of the Greek Civil Code). However, an increase in the portion of the legacy occurs only if the testator has not specified a substitute legatee, to whom Articles 1810 to 1812 of the Greek Civil Code apply[47]. The portion that has fallen to one legatee by increasing the portion of the legacy applies as a special legacy[48]. The regulation contained in Article 1981 of the Greek Civil Code provides that if the testator has excluded the possibility of increasing a portion of the legacy, the resignation or death of one of the several persons appointed in the legacy to obtain the same item causes that portion of the legacy to pass to the encumbered person.

A subordinate legacy can also be distinguished, where the legatee himself or herself can be encumbered with a legacy (Article 1967 of the Greek Civil Code). This type of legacy is best illustrated by the following example: "K decrees in his will as follows: 'the heir is my wife F. I bequeath my valuable collection of paintings to my nephew N the moment he turns 25. The three portraits that are part of this collection are instead to be given to my cousin C"[49]. N is therefore obliged to fulfil the subordinate legacy to C when he himself will be entitled to claim from F the legacy transferred to him, i.e. on his 25th birthday (Article 2005 of the Greek Civil Code). The legatee may refuse to fulfil the subordinate legacy in the event that his legacy is insufficient to fulfil the legacy[50]. The same applies in accordance with Article 2006 (2) of the Greek Civil Code, if pursuant to Article 1979 of the Greek Civil Code, the legatee is replaced by

[45] H.-P. Schömmer, A. Kosmidis, *Internationales…*
[46] See Article 1976 first sentence of the Greek Civil Code.
[47] See Article 2008 of the Greek Civil Code.
[48] See Article 1977 of the Greek Civil Code.
[49] See H.-P. Schömmer, A. Kosmidis, *Internationales…*, p. 233–234.
[50] See Article 2006 (1) of the Greek Civil Code.

another person. Direct acquisition as in a legacy with a claim for release is excluded in the case of a subordinate legacy, since pursuant to Article 1996, first sentence of the Greek Civil Code only the heir can be encumbered.

It is reported that the most common legacies in practice are those by way of which a specific amount of money or a specific item is transferred[51]. In the case of pecuniary legacies, it is advisable to specify that the amounts are to be reduced accordingly if, at the time of the testator's death, the total pecuniary inheritance is less than that at the time the will was written. Pecuniary legacies may be indexed for inflation. Particularly in the case of land, it should be specified whether the legatee is to take over the registered encumbrances of the land or not (see Article 1983 of the Greek Civil Code), as well as who bears the costs of fulfilling the legacy (court and notary costs).

5.2. Legacy with material effects in Greek law

Pursuant to Article 1996, first sentence of the Greek Civil Code, if the encumbrance is on the heir and the asset to which the legacy relates is a specific item or a claim belonging to the heir, then the bequeathed item or claim passes, unless otherwise provided, immediately on the death of the testator directly to the legatee by law. The person in whose benefit the legacy is established thus acquires ownership of the property on the death of the testator. It should be noted that ownership also passes without the need for an actual transfer of property rights. However, in order to acquire ownership of land or another right *in rem* (mortgage debt, usufruct, easement), an additional entry in the land register is required[52]. If a debtor has surrendered an item to the testator before his death and the item is still part of the estate, then, in case of doubt, the item shall be deemed to have been bequeathed (Article 1888, first sentence, of the Greek Civil Code). If a claim concerned the repayment of an amount of money, according to the interpretation of Article 1888, second sentence of the Greek Civil Code, in case of doubt, the corresponding pecuniary sum shall be deemed to have been bequeathed even if the sum is not part of the estate. If the testator has bequeathed all of his claims, then, according to Article 1992 of the Greek Civil Code, the legacy covers only pecuniary claims, but not other claims, ownership securities or investments in financial institutions. The wording of Article 1933 of the Greek Civil Code indicates that if the testator has bequeathed his debts to the legatee, the encumbered party is, in case of doubt, obliged to pay the debt, without the possibility of invoking a condition, term or objection. Article 1996, second sentence of the Greek Civil Code refers to the situation where a legacy relates to the release of an encumbrance *in rem* or of an obligation vis-à-vis the testator, in which case the release shall take place immediately and in accordance with the law, in favour of the legatee. Such encumbrances lapse on the death of the beneficiary. If the

[51] See H.-P. Schömmer, A. Kosmidis, *Internationales…*, p. 231.
[52] See Articles 1198 and 1193 of the Greek Civil Code.

object of the legacy is a specific claim, then, on the death of the testator, the legacy by vindication shall have the same effect as the transfer of the claim[53].

In summary, in the case of a legacy with material effects, the bequeathed object is immediately and, by operation of law, directly acquired by the legatee, provided that the conditions set out in Article 1996, first sentence of the Greek Civil Code are met. The aforementioned provision stipulates that, firstly, the person encumbered by a legacy must be the heir or successor heir, i.e. he or she cannot be a subordinate or successor legatee. Secondly, the asset to which the legacy relates must be a specific item or an individually designated right vested in the testator. This means that it cannot be an acquisition of rights *in rem* as defined in the Articles 1973 and 1974 of the Greek Civil Code. Thirdly, the asset to which the legacy relates must belong to the testator, i.e., it cannot be an acquisition of rights *in rem* as defined in Articles 1984 and 1985 of the Greek Civil Code. Fourthly, there may not be any other provisions of the testator in this respect.

In the case of a legacy with a claim for release (a legacy with material effects), the person in whose favour the legacy is established acquires the asset, pursuant to Article 1996, first sentence of the Greek Civil Code, immediately and directly in accordance with the law. The asset to which the legacy relates does not have to be included in the estate or the property of the heir first. This means that the legatees are not liable for the debts under the succession.

6. Concluding remarks

Turning to the conclusions to be drawn from our analysis of the relevant succession regulations contained in the internal legal systems of the selected European countries, it should first be pointed out that each jurisdiction has developed, for its own needs, completely autonomous solutions of succession law which are, undeniably, the legacy of centuries of legal tradition.

However, in an attempt to summarise the research conducted on the institution resembling the legacy with material effects in the selected European countries, it should be pointed out that the adopted norms are truly diverse, and only the structural core is common. This core consists in the fact that a testator may include in his will a provision that a specific asset (right) will pass with material effect (*ex lege*) upon his death to a person designated by him. Furthermore, the legatee acquires only the right bequeathed to him or her upon the death of the testator and does not, at the same time, enter into the testator's other rights and obligations. This entails that there is no universal succession but a singular succession, i.e., the legatee is the legal successor by special title. As is clear from the research, a legacy may be established, without restrictions, in any form of will permissible in the relevant jurisdiction.

Moreover, in the analysed legal cases, the legatee is not liable for the debts under the succession. However, a certain nuance apparent in Spanish succession law

[53] See J. Górecki, *Zapis…* [in:] *Rozprawy…*, p. 131.

should be pointed out. It is reported that, under Spanish law, the liability of a legatee for the debts of the estate is essentially non-existent. However, as discussed above, despite the direct acquisition of the asset to which the legacy relates upon the opening of the estate, pursuant to Article 885 of the Spanish Civil Code, the legatee may not seize the asset to which the legacy relates himself or herself but must demand from the heir or executor of the will its release and transfer of possession. Such a regulation makes the heirs check first whether the legacy will not fall through or whether it will not have to be reduced (because, for example, the inheritance will not be sufficient to execute all the legacies) or whether the right of the heir entitled to the legitime will not be affected thereby. Moreover, the legatee only obtains the asset to which the legacy relates if there is still something left over after the debts under the succession have been paid by the heirs or the executor of the will. As stated in Article 891 of the Spanish Civil Code, if the testator has distributed his entire estate by way of legacies, then the legatees are liable for all debts and burdens relating to the estate in proportion to their share, unless the testator has provided otherwise. The crucial point is that pursuant to Article 858 (2) of the Spanish Civil Code, a legatee is always liable only up to the value of his or her own (share in the) legacy. It should also be mentioned that Article 887 of the Spanish Civil Code regulates the order in which specific legacies should be exercised when the estate proves insufficient to cover them all.

Such a rule in effect leads to similar consequences as in the case of a legatee being liable for the debts under the succession. In Spanish law, the legatee is not assured of obtaining the asset bequeathed to him, as the creditors of the estate must be satisfied first. It should also be mentioned that in French law, although in principle the legatee under a special title is not liable for the debts under the succession, the legacy may be reduced at the request of the necessary heirs if it exceeds the disposable portion of the succession.

Usually, a legacy by vindication is the rule in the legal orders that have been studied. The situation is, however, different in Greece, where the legacy by vindication only fulfils a supplementary function in relation to the legacy by damnation. Furthermore, as a general rule, a legacy with material effects may only relate to property marked as to identity belonging to the testator. This is precisely the case in Italy and Spain. A comparable situation exists in Greece, as the item to which a legacy by vindication relates must be a specific item or claim individually marked, belonging to the testator. In France, on the other hand, while the asset to which the legacy relates under a special title must be the property of the testator, the French legislature has not introduced any limitation or closed catalogue regarding such assets. It should also be added that as a result of a legacy by vindication relating to items marked as to specie or money, in French law, the legatee only obtains a right of claim against the heir.

Attention should also be drawn to a critical issue concerning the transfer of the item to which the legacy by vindication relates to the legatee. Although the legatee acquires ownership of the item bequeathed to him or her on the death of the testator, he or she does not, as was the case in Roman law, acquire possession of that

item. Indeed, the possession must only be transferred from the person encumbered by the legacy as a result of a fitting request from the legatee. This solution exists in the Spanish, Italian and French legal systems. The situation is different in Greece, where possession and ownership of the bequeathed asset pass simultaneously to the legatee at the opening of the succession. However, in order to acquire ownership of land or another right *in rem* (mortgage debt, usufruct, easement), an additional entry in the land register is required.

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