



**EN**

**GOVERNING COUNCIL**  
**96<sup>th</sup> session**  
**Rome, 10 – 12 May 2017**

UNIDROIT 2017  
C.D. (96) 9  
Original: French  
April 2017

**Item No. 10 on the agenda: International protection of cultural property**

**(a) Follow-up activities and promotion of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects**

**(b) Private art collections**

(prepared by the Secretariat)

<i>Summary</i>	<i>Report on follow-up activities and promotion of the 1995 UNIDROIT Convention and related instruments /</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the activities reported</i>
<i>Mandate</i>	<i>Work Programme 2017-2019</i>
<i>Priority</i>	<i>- Promotion 1995 Convention - High - Private art collections – Low</i>
<i>Related documents</i>	<i>Annual Report 2016 (C.D. (96) 2)</i>

**I. FOLLOW-UP ACTIVITIES AND PROMOTION OF THE 1995 UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

**A. STATUS OF THE CONVENTION**

1. The 1995 Convention entered into force in 1998 and on 1 May 2017 has 38 Contracting States. Tunisia is the latest State to accede to the Convention on 2 March 2017 (entry into force on 1 September 2017). Ghana, Laos and Morocco and have finalised their internal procedure of accession to the Convention, just as South Africa and Syria, and UNIDROIT is waiting for the deposit of their instruments of accession with the Italian Government. Other States are in the process of ratifying or acceding to the Convention (Benin, Botswana, Togo, ...).

## **B. UNIDROIT 90<sup>TH</sup> ANNIVERSARY CELEBRATIONS**

2. The celebrations of the 90<sup>th</sup> anniversary of UNIDROIT, and in particular the special session of the General Assembly held on 20 May 2016, provided an opportunity for participants to praise the contribution of UNIDROIT, beyond commercial law, in the fight against illicit traffic in cultural property through the 1995 Convention, a remarkable international instrument which in many ways has set the standard for the protection of cultural property. In particular, the Ambassador of Greece in Italy, indicated that “[e]ven if we could forget the rest of the enormous work of UNIDROIT, I think that these two contributions [the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the 2011 UNIDROIT-UNESCO Model Provisions on State Ownership of Undiscovered Cultural Objects] alone, would be enough to guarantee for ever our appreciation to UNIDROIT”.

## **C. FOLLOW-UP ACTIVITIES AND INSTITUTIONAL / ACADEMIC PARTNERSHIPS**

### *1. UNIDROIT, partner in the implementation of the UN Security Council Resolution 2199*

3. UNIDROIT continued its collaboration with the working group set up by UNESCO (mainly with INTERPOL, UNODC and WCO) for the implementation of Resolution 2199 of the UN Security Council adopted in February 2015, condemning the destruction cultural heritage in Iraq and Syria, and adopting binding measures to combat the smuggling of antiquities and cultural objects from these countries <sup>1</sup>. Likewise, the working group aims to implement UNSC Resolution 2253, in particular paragraph 24, which highlights the importance of developing strong relationships with the private sector in countering the financing of terrorism and calls upon Member States to engage with financial institutions and share information on terrorist financing risks. For more information, see Annual Report 2016 at p. 21 (UNIDROIT 2017 - C.D.(96) 2).

### *2. Establishment of an informal Ratification Task Force*

4. After a meeting held on 26 May 2016 at UN Headquarters in New York entitled “International law for the protection of the cultural heritage against illicit trafficking: presentation, issues and effective implementation”, organised at the initiative of the Group of francophone Ambassadors in New York with the International Organization of la Francophonie (OIF), UNESCO and the Permanent Missions of France and Tunisia to the United Nations at which the 1970 UNESCO and 1995 UNIDROIT Conventions were presented, the Permanent Missions of Cyprus and Italy co-organised another event in New York with UNIDROIT in 2017.

5. On 28 February 2017, a special event on “*Promoting and Strengthening the International Legal Framework for The Protection of Cultural Heritage – The 1995 Convention*” took place at UN Headquarters in New York. The Secretary General of UNIDROIT and the Senior Legal Officer in charge of the International Protection of Cultural Objects at UNIDROIT attended the meeting.

6. During the meeting, the fundamental role played by international conventions in the fight against illicit trafficking, notably the 1995 UNIDROIT Convention, was stressed. UNIDROIT and the Missions of Cyprus and Italy to the UN announced the establishment of an informal Ratification Task Force, upon joint planning of initiatives and related costs. This Task Force will be open to all States wishing to participate and aims at the promotion of the wider ratification of the 1995 UNIDROIT Convention. The Task Force will be coordinated by UNIDROIT, assisted by the future 1995 UNIDROIT Convention Academic Project (see below, para. 7-10), and should be convening on an annual basis in New York, in order to provide a platform for the exchange of views on issues such

---

<sup>1</sup> See “Report of the Secretary-General on the threat posed by ISIL (Da’esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat” (UNSC document S/2016/92, 29 January 2016) recognizing the role of UNIDROIT (para. 53).

as the state of ratifications of the 1995 UNIDROIT Convention, for the promotion of activities aimed at awareness, information and best practices sharing, and for training and education to assist on the accession, ratification and implementation of the 1995 UNIDROIT Convention.

#### *7. Creation of the 1995 UNIDROIT Convention Academic Project*

7. With a view to involve scholars and college students to raise awareness on instruments aiming at protecting cultural heritage from illicit conduct, UNIDROIT is about to launch the *1995 UNIDROIT Convention Academic Project* ("Academic Project"). The Academic Project will involve, in first instance, universities holding courses in the field of cultural heritage law or art law, which will be encouraged to hold courses in partnership with UNIDROIT to create an academic network.

8. The Academic Project will take the form of an online platform of shared materials related to the 1995 UNIDROIT Convention, UNIDROIT/UNESCO Model Provisions on State Ownership of Undiscovered Cultural Objects and their synergy with other related instruments.

9. The Academic Project's main focus is to assist scholars, students, practicing lawyers, judges, other governments officials as well as art market players (such as museums, foundations, auction houses, dealers and collectors) by providing information about the 1995 UNIDROIT Convention, its undertones and fields of application. Universities would then use such information as a basis for academic activities (analysis, studies, research, etc.).

10. Periodic calls for papers will stimulate participation and research on generic topics falling within the scope of the 1995 UNIDROIT Convention. UNIDROIT will also be able to assess the legal impact of the UNIDROIT Convention in States parties to the Convention and States not yet party. National focal points will be formed to assist in matters relating to the national legal assessment of the Convention. Finally, recent studies and new case law could feed the discussions at the newly established Ratification Task Force on the 1995 UNIDROIT Convention which will meet annually in New York.

#### *8. UNIDROIT represented at the first G7 on Culture*

11. On 30-31 March 2017, UNIDROIT was honoured by the invitation to participate in the first G7 Culture meeting of the history of G7, held in Florence, under the Italian Presidency. UNIDROIT was invited in the double guise of speaker at the Meeting of Experts and observer at the Ministerial Session. The Ministerial Session, which was attended by UNIDROIT Deputy Secretary-General Professor Anna Veneziano, ended with the signature of the Florence Declaration <sup>2</sup>. The event gave a large-scale visibility to the current and past work carried out by UNIDROIT and its partners.

12. The Meeting of Experts on "The Protection of Cultural Heritage Rules, Practices, and Education" focused on three panels: international regulation of cultural property, protection procedures and education. During the first session, UNIDROIT emphasized the decisive role of the 1995 UNIDROIT Convention in the fight against illicit trafficking of cultural property. At the second session, UNIDROIT recalled the preventive and deterrent effect of the Convention against criminal financial activities whether related to terrorism or organised crime. The establishment of an informal Task Force for the ratification of the Convention during the New York meeting at the UN HQ was also recalled. The third session on education and methodology was the occasion to introduce the future 1995 UNIDROIT Convention Academic Project and its potential.

---

<sup>2</sup> [http://www.beniculturali.it/mibac/multimedia/MiBAC/documents/1490881236694\\_DECLARATION-Dichiarazione.pdf](http://www.beniculturali.it/mibac/multimedia/MiBAC/documents/1490881236694_DECLARATION-Dichiarazione.pdf)

9. *UNIDROIT, partner in the preparation of the future Council of Europe Convention on Offences relating to Cultural Property*

13. UNIDROIT was invited to attend, as an observer, the four meetings of the Committee on Offences relating to Cultural Property (PC-IBC) responsible for the elaboration of a new convention in criminal law, to replace the 1985 European Convention on Offences relating to Cultural Property which never entered into force (31 May – June 2016; 7-10 November 2016; 9-12 January 2017 and 20-24 February 2017). This Convention, prepared in the framework of the Organisation's action to fight terrorism and organised crime, is due to be formally adopted by the Council of Europe early May and open for signature in Nicosia (Cyprus) on 19 May during the 127<sup>th</sup> Session of the Council of Europe's Committee of Ministers.

14. As stated in the draft Explanatory Report, such a "Convention aims to build on instruments relating to cultural property such as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects in order to make sure that Convention is highly compatible with relevant existing international and supranational legally binding standards."

10. *Developing partnerships*

15. UNIDROIT is developing its cooperation with the *International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM)*, based in Rome, pursuant to the Memorandum of understanding signed in 2015. In particular, the ICCROM-ATHAR Regional Conservation Centre in Sharjah (United Arab Emirates) invited UNIDROIT to join a working group to identify the levers that will effectively enhance the protection of cultural heritage in the Arab countries and the ratification of the relevant international conventions.

16. UNIDROIT was invited to attend an Ad Hoc Working Group on International Repatriation organised in New York in June 2016 to explain how the provisions of the 1995 UNIDROIT Convention could assist in the development of a new international mechanism on the repatriation of ceremonial objects and human remains in the framework of the Expert Mechanism on the Rights of Indigenous Peoples established by the *Human Rights Council*. Representatives of the *International Indian Treaty Council (IITC)* attended the meeting and suggested to follow-up with UNESCO and UNIDROIT and the *Secretariat of the United Nations Permanent Forum on Indigenous Issues (UNPFII)*.

17. At its 90<sup>th</sup> regular session held in Rio de Janeiro (6 - 10 March 2017), the *Inter-American Juridical Committee (CJI)* – of which Mr José Antonio Moreno Rodríguez, member of the UNIDROIT Governing Council is a member – adopted a report on "Cultural Heritage Assets". This report analyses regional and universal legal instruments, proposes further development of national legislation and invites OAS member States to develop cooperation mechanisms to facilitate the implementation of existing instruments, in particular the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1976 Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador). It also proposes the development of "User's Guide" on implementing conventional and soft-law instruments, including the design of strategies for the recovery and restitution of cultural assets. The Resolution adopted (CJI/RES,233 (XCI-O/17) also "urge States that have still not ratified or adhered to the various treaties [...] to do so." UNIDROIT would strengthen its cooperation with the Organisation of American States (OAS) to enhance ratification of the 1995 UNIDROIT Convention.

18. In 2015, the *UNIDROIT Foundation* decided to include the subject of cultural property among the projects and activities to be funded. It is currently seeking, in coordination with UNIDROIT, for a specific project relating to the art market which would sustain the institutional efforts of the Organisation.

#### **D. SEMINARS, CONFERENCES, WORKSHOPS**

19. The UNIDROIT Secretariat has received a considerable number of requests in the last years for information and assistance on the 1995 Convention and on the UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects, particularly because of the dramatic situation related to destruction and looting of cultural heritage in the Middle East. UNIDROIT has participated in a series of national and regional seminars on the subject after which it was recommended that States become parties to the 1995 Convention. See the list of meetings in 2016 in the Annual Report, CD (96) 2, pp. 22-23.

20. Among the conferences, seminars and workshops UNIDROIT was invited to participate in the first months of 2017, the following can be noted:

- On January 13, 2017, Anna Veneziano, Deputy Secretary General of UNIDROIT, took part in a Colloquium entitled "Initiatives to strengthen international capacities for the protection of cultural property and the prevention of illicit trafficking in cultural goods – the Council of Europe Convention on Offences relating to Cultural Property", organised by the Council of Europe in Strasbourg. The Secretary General of the Council of Europe, the Director General of UNESCO, the Minister of Foreign Affairs of Cyprus, the Prosecutor of the International Criminal Court and the Director General of Syrian Antiquities and museums were present on this occasion;

- On 8-9 February 2017, UNIDROIT took part in the two-day conference: "Law Enforcement Authorities and Expertise Competent in the Field of Cultural Goods". The meeting aimed to take forward actions listed under the EU CULTNET mandate to increase effectiveness of prevention and combating crime against cultural goods on a number of levels, in line with the Work Programme set out for the year 2017 and within the framework of the Council of the European Union;

- International Coordination Meeting on the Cultural Heritage in the Liberated Areas of Iraq held at UNESCO HQ, Paris, on 23-24 February 2017;

- INTERPOL's forum "Unity For Security", held in Abu Dhabi (28-30 March 2017) and organised in partnership with the United Arab Emirates and the INTERPOL Foundation for a Safer World (Panel on cultural objects);

- Workshop on the ethics of collections and fight against illicit traffic of cultural heritage in the GCC, organised by UNESCO and the Tourism and Culture Authority of the UAE, in Abu Dhabi (UAE) from 2 to 4 April 2017 (bringing together representatives of culture authorities from the GCC, public and private museums, collectors and auction houses as well as experts from institutions such as UNESCO, INTERPOL, WCO-OMD, ICOM, UNODC).

21. UNIDROIT also welcomed national delegations in Rome, or visited government officials to exchange views and experiences in light of legislative developments in the field of cultural property and assist in the process of future accession to the 1995 UNIDROIT Convention, such as:

- on 15 August 2016, the Secretary General visited Mozambique and met Mr Silva A. Dunduro, Minister of Culture and Tourism to discuss the accession to the 1995 UNIDROIT Convention, together with other UNESCO culture conventions;

- a delegation headed by Ms Dace Melbārde, Minister of Culture of Latvia, accompanied by H.E. Mr Artis Bērtulis, Ambassador of Latvia to Italy, Ms Vita Cīrule, Head, Minister's Office, Mr Juris Dambis, Head, State Inspection of Protection of the Cultural Heritage, Ministry of Culture, Ms Baiba Broka, Head of Administration and Rector's Office, University of Latvia (Member of the

UNIDROIT Governing Council), Ms Baiba Moļņika, Secretary General, Latvian National Commission for the UNESCO and Ms Dace Arakeljana, Counsellor of the Embassy of Latvia to Italy (20 October 2016);

- a delegation headed by Ms Elira Kokona, Secretary-General of the Ministry of Culture of Albania accompanied by Ms Ledia Mirakaj, representative of the Ministry of Culture at the Albanian Embassy in Rome (25 November 2016);

- Ms Marina Schneider, UNIDROIT Senior Legal Officer, was received, on 9 February 2017 in Valletta, by Hon. Dr. Owen Bonnici, Minister for Justice, Culture and Local Government of Malta, Dr. Peter Grech, Attorney General, Ms Catherine Tabone, Director-Culture and Mr Nathaniel Cutajar, Superintendence of Cultural Heritage to discuss the possible accession of Malta to the 1995 UNIDROIT Convention.

## **II. PRIVATE ART COLLECTIONS**

### **A. THE PROPOSAL**

22. By Note Verbale dated 16 October 2015, the Permanent Mission of Mexico to the Rome-based International Organisations transmitted to the Secretariat a document containing a proposal to insert work on legal issues related to private art collections in the Work Programme 2017-2019 of the Organisation which built upon UNIDROIT's successful work in the cultural property field (see [Annex 1](#) to document C.D. (95) 13 rev. for the proposal and [Addendum 1](#) to document UNIDROIT 2016 – C.D. (95) 13 Add. for the justification).

23. At the 95<sup>th</sup> session of the Governing Council (Rome, 18-20 May 2016), Mr Sánchez Cordero offered further explanation on the Mexican proposal regarding cultural property and private art collections and indicated that the time had come to create international norms which would allow States to choose which cultural objects from private art collections should be protected. He then suggested three elements to show that this issue relating to the protection of cultural property was private in nature: (a) the emergence of several recent cases involving privately-held cultural property; (b) recent legislation that protected and preserved national, cultural items; and (c) adjudications which involved contracts between public museums and private art collections. In concluding, Mr Sánchez Cordero further encouraged the Council to take into account Security Council Resolution 2199 and endorse the Mexican proposal.

24. The Governing Council decided to recommend that this topic be included in the UNIDROIT Work Programme for the 2017-2019 triennium and the General Assembly endorsed such recommendation at its 75<sup>th</sup> session (Rome, 1 December 2016) and assigned it a low level of priority.

### **B. THE CONFERENCE**

25. As indicated by the Secretary General at the 75<sup>th</sup> session of the General Assembly, UNIDROIT is continuing to consider the project to identify the private law aspects that fall within its mandate (see document A.G. (75) 8, report, para. 34). UNIDROIT therefore proposed to host in Rome, on 16 and 17 March 2017, a conference on *Private Collections: Historical and Legal Perspectives* (see the programme in Annex I hereto) and to invite Professor Elina Moustaira, professor of comparative law at the School of Law of the National and Kapodistrian University of Athens,<sup>3</sup> to make a

---

<sup>3</sup> Professor Moustaira is the author of a book which had been the source of inspiration of the proposal to insert the subject of private art collections in the UNIDROIT Work Programme. *Art Collections, Private and Public: A comparative Legal Study*. Springer. Cham Heidelberg New York Dordrecht London. 2015.

presentation. The Conference was co-organised with the International Society of Research and Cultural Heritage Law (ISCHAL), the Institut des sciences sociales du politique (CNRS-ENS Cachan-Université Paris-Nanterre) and BonelliErede law firm.<sup>4</sup>

### **C. THE STUDY**

26. UNIDROIT asked Professor Moustaira to prepare, on the basis of her presentation at the Conference, a document indicating private law aspects on which UNIDROIT's particular expertise would be of additional benefit in this field.

27. At the conference, Professor Moustaira illustrated problems and solutions regarding private collections in domestic laws. In the document she prepared for the Governing Council<sup>5</sup> (see Annex II hereto), she addresses some themes of particular interest concerning private art collections such as (a) the designation of categories of cultural objects acquirable by private collectors; (b) the right of disposal of artworks in possession of an art collector under a certain municipal law; (c) liability of art collectors for loss, damages or destruction of cultural property forming part of their collections; (d) the sale of part or the entire content of an art collection; (e) export permission of items belonging to an art collection, (f) possible avoidance of secrecy and anonymity in the art world; (g) the limits of the protection of art collections in case of suits/arrests, immunity from seizure status; and (h) provenance's investigations at the time of the acquisition of cultural items.

### **D. FURTHER STEPS**

28. UNIDROIT would wish to reserve its position on the issues relating to private art collections and enquire further in order to make sure that any work would be highly compatible with its mandate and with the provisions of the 1995 UNIDROIT Convention and other relevant work and instrument in its field.

29. UNIDROIT also suggests, while launching the aforementioned Academic Project, to insert the subject of private art collections to gather more material.

## **III. ACTION TO BE TAKEN**

30. *The Governing Council is invited to take note of (a) the follow-up activities and promotion of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and (b) of the further work to be done on private art collections.*

---

<sup>4</sup> The Conference was sponsored by the Università degli Studi di Milano, the Art-Law Centre of Geneva, the Institut d'études de droit public (IEDP) and the Institut Droit Ethique Patrimoine (IDEP) of the Université Paris-Saclay.

<sup>5</sup> The conclusions of the study reflect the opinion of Professor Moustaira and do not imply at this stage endorsement by the Secretariat.

## ANNEXE I



# Private Collections

## Historical and Legal Perspectives

Volkswagen Bugatti Type 35B. Collection Schlumpf, Cité de l'automobile, Mulhouse, France. Don riparte (GFDL ou CC-BY-SA 3.0). Source : Wikimedia Commons.

**16-17 March 2017**

**Rome**

**UNIDROIT - Via Panisperna, 28**

**Conference organised by UNIDROIT, ISCHAL, the Institut des sciences sociales du politique (CNRS-ENS Cachan-Université Paris-Nanterre) and BonelliErede**

Sponsored by the Università degli Studi di Milano, the Art-Law Centre of Geneva, IEDP and IDEP of the Université Paris-Saclay.



**BonelliErede**



UNIVERSITÀ  
DEGLI STUDI  
DI MILANO



UNIVERSITÉ  
DE GENÈVE  
FACULTÉ DE DROIT  
Centre du droit de l'art



# Private Collections

16 March 2017

## 9h Welcome

Manlio FRIGO, professor at the University of Milan, attorney, Milan (of counsel at BonelliErede, Focus Team Art and Cultural Property)  
 Jérôme FROMAGEAU, president of ISCHAL  
 Jorge SÁNCHEZ CORDERO, member of UNIDROIT Governing Council, professor, director of the Mexican Center of Uniform Law  
 Marina SCHNEIDER, Senior legal officer, UNIDROIT

## The constitution of private collections

Chaired and introduced by Jorge SÁNCHEZ CORDERO

### 9h30 The history of private collections

Patrick MICHEL, professor at the Université de Lille and École du Louvre

### 10h A comparison of private/public collecting

Antoinette MIAGET-DOMINICÉ, senior lecturer at the University of Lucerne law faculty

### 10h30 The collection as a source of knowledge / the scientific collector

Michel VAN PRAET, general heritage curator

## 11h Break

### 11h15 The history of the forming of art collections in Italy

Guido GUERZONI, professor at the Bocconi University of Milan

### 11h45 National laws on private collections: problems and solutions

Eleni MOUSTAIRA, professor at the University of Athens

## 12h15 Discussion

## The public protection of private collections

Chaired by Marina SCHNEIDER

### 14h The notion of private collections, views from Italy and France

Mathilde ROELUNGER, attorney, Paris  
 Manlio FRIGO

### 14h45 Protection under domestic law : France, Italy, Switzerland

Marie CORNU, director of research, CNRS  
 Manlio FRIGO

Marc-André RENOU, professor at the University of Geneva, director of the Art-Law Centre

### 15h30 Collectors and deontology

Vincent NÉGRÉ, researcher, CNRS

### 16h Round table on institutional instruments (foundation, trust, waqf)

Chaired by Véronique MAGNIER, professor at the Université Paris Saclay, director of the IDEP

Giovanna FORLANELLI ROVATI, vice-president of the Fondazione Luigi Rovati, Monza

Jean-Claude GANDUR, president of the Fondation Gandur pour l'Art, Geneva

17 March 2017

## Promotion and accessibility of collections

Chaired by Manlio FRIGO

### 9h The access of the public to private collections (loans, deposits, opening to the public)

Marc-André RENOU

### 9h30 The interaction of private collections with the private sector (corporate foundations, bank collections)

Italian law : Silvia STABILE, attorney, Milan (of counsel at BonelliErede, Focus Team Art and Cultural Property)  
 French law : Géraldine GOFFAUX, professor at the Université d'Orléans

### 10h15 The enrichment of public collections through ownership transfer (donations, bequests)

Apolline SANS, Art market master, École du Louvre

## 10h45 Break

### 11h15 Private archives or archives in private hands: their protection, modalities of their acquisition and their entry into public collections

Stéphane DUROU, professor at the Université Paris Saclay

### 11h30 Scientific communication on the archaeological and ethnological collections of the Gandur Art Foundation

Isabelle TASSIGNON, curator, Archaeology collection

### 12h Does French taxation encourage the access to private collections?

Armelle VERJAT, PHD in law

### 12h30 Italian taxation

Riccardo USARDINI, attorney, Milan (partner at BonelliErede)

## ANNEXE II

## PRIVATE ART COLLECTIONS

Study for the UNIDROIT Governing Council  
(96<sup>th</sup> session, Rome, 10-12 May 2017)

*Elina N. Moustaira*  
*Professor of Comparative Law,*  
*School of Law, National and Kapodistrian University of Athens*

**A. Which cultural objects may be acquired by private collectors**

According to the legal regime of many countries (usually, the so-called “culturally rich” countries), cultural objects created before a certain (different for each country) date cannot be acquired by private persons [or entities] and become parts of [their own] private collections. There may be some exceptions to this rule: private persons [or entities] may possess, under certain circumstances, such cultural objects; in that case, these objects are still considered State’s property and may not be exported or lent abroad, without a State’s permission.

The requirements for such an export or loan could be studied and perhaps harmonized (*in form of either a Convention or Principles*), in order that the collectors, in whichever country, be certain about the procedure that they should follow.

Several categories of cultural objects could be referred/categorized, depending on the legal regime of the various countries. The outcome of such a categorization would be the axis of the above work.

Even States which do not prohibit the acquisition of cultural objects of a certain period by private persons [or entities] may have rules that discern “simple” cultural objects from “significant for the State” cultural objects and set stricter requirements for the acquisition of the latter.

The same could perhaps be said for certain items of modern and contemporary art – one could imagine that certain artworks could be considered as “significant for the State”, for various (for example, religious) reasons.

A study of these different categories may be made and, according to the results, an homogenization of the requirements and the preferable procedures be pursued – always respecting the different legal mentalities of the various States and offering more alternatives that the States could choose to adopt.

**B. Powers of Collectors: would these powers be extended that far, so that the collectors could destroy their collections’ items?**

In civil-law countries such as France, owners of artworks that are considered significant parts of the cultural heritage of the country, may have an implied legal duty to maintain the integrity of the work, whereas in common-law countries like the USA and the United Kingdom, personal property rights often are a hurdle to any obligation to protect an artwork (moral rights aside). In theory, a US owner of a rare Picasso could set it on fire, if desired<sup>1</sup>.

In USA, most serious collectors of significant works of art like to consider themselves to be custodians of the art works they possess, taking care of these treasures for future generations. It is argued that, investment value aside, the obligation to care for important works of art is rather an ethical one<sup>2</sup>. This is not always the case, though<sup>3</sup>.

---

<sup>1</sup> E. Moustaira, “Art Collections, Private and Public: A Comparative Legal Study”, Springer, 2015.

<sup>2</sup> M. Rozell, “The Art Collector’s Handbook. A Guide to Collection Management and Care”, Lund Humphries in association with Sotheby’s Institute of Art, 2014, p. 145.

Until fairly recently, in USA, collectors' rights were not at all "threatened" by artists' rights. The so called *droit moral*, that is, the artists' continuing interest in their work, was not easy to be accepted by U.S. legal mentality, legal culture<sup>4</sup>.

At some point, in the late 1970s and 80s, this mentality changed. USA had acquired new wealth and power after the World War II and Abstract Expressionists had "transferred" the center of the Western art world from Paris to New York. These facts had contributed to the rise of the cultural importance of American art. Almost a natural consequence of this was that the U.S. decided to enact statutes consecrating the "moral rights", both at the federal and state level, mostly following the European civil law model(s)<sup>5</sup>.

Furthermore, there were some States that also granted to the artist a right against destruction, mutilation, alteration of his/her work. California, first (California Civil Code, sec. 989) and Massachusetts, following California (Massachusetts Statutes, chap. 231, sec. 85S) have gone even further and in their laws expressly command private owners (collectors) to preserve works of art for the benefit of public.

Copyright law – and especially the part concerning visual artists – is, by all means, a hot issue in common law countries. Some scholars, opposite to its strictness, contend that its originality requirements rely on a romantic conception of a genius creator<sup>6</sup>. Nevertheless, there are scholars in the opposite, romantic-bias camp<sup>7</sup>.

As it is pointed out, a bit harshly, "The copyright laws of both the United States and the United Kingdom explicitly agree on at least one doctrine: When law and art chance a meeting, they should do their best to avoid each other"<sup>8</sup>. Both countries' courts try to remain aesthetically neutral. There are several reasons for that and the fact that judges lack special knowledge about art is not the least of them<sup>9</sup>.

The differences between the various laws could be thoroughly studied and, even though these differences could not [easily] disappear, since they are the reflection of certain legal mentalities, one could insist on working on a model/principles/common rules about the rights and the obligations of the art collectors.

### **C. W(sh)ould collectors be considered liable for cultural objects of their collections that would be damaged or destroyed?**

This issue is somewhat related to the previous one, nevertheless the bigger question is whether the collection should be protected as a whole, in which case the collector would be considered liable for its deterioration due to the damaging or destruction of parts of it.

In such a case, should the "measure" be strict liability [of the collector] or not? In case the damaging or the destruction of the cultural object was the result of someone else's fault, should there be a joint liability of his/hers and of the collector's? What would be the rights of the collector towards the person(s) reliable for the damage or destruction?

<sup>3</sup> See *J. Costonis*, Casting Light on Cultural Property (Book Review), 98 *Michigan Law Review* 1837, 1847 (2000), reviewing the book of *Joseph Sax*, "Playing Darts ..." (see next footnote): "Many [collectors] see themselves as stewards, self-obligated to protect the art and even to loan it out for public viewing from time to time. Were all collectors similarly inclined, Sax would eschew a formal legal regime mandating periodic display of their master works. Not all collectors, however, are so inclined."

<sup>4</sup> *J.L. Sax*, "Playing Darts with a Rembrandt. Public and Private Rights in Cultural Treasures", The University of Michigan Press, Ann Arbor 1999, p. 21.

<sup>5</sup> *J.H. Merryman*, The Refrigerator of Bernard Buffet, 27 *Hastings Law Journal* 1023, 1042 (1976), was asking: "Given the cultural importance of American art, should our law be modified in such a way as to protect the integrity of works of art? I believe that the answer to that question is clearly 'yes.'"

<sup>6</sup> *A. Barron*, Copyright Law and the Claims of Art, 4 *Intellectual Property Quarterly* 368 (2002).

<sup>7</sup> *J. Ginsburg*, The Concept of Authorship in Comparative Copyright Law, 52 *DePaul Law Review* 1063 (2003).

<sup>8</sup> *C. Fenzel*, Still Life with "Spark" and "Sweat": The Copyrightability of Contemporary Art in the United States and the United Kingdom, 24 *Arizona Journal of International & Comparative Law* 541, 546 (2007).

<sup>9</sup> *C.H. Farley*, Judging Art, 79 *Tulane Law Review* 805, 815-819 (2005).

Would it be enough to refer to the existing national rules of the various countries [which differ between them, sometimes substantially], or could some model rules be created, especially for private art collections?

#### **D. Selling parts of a collection or the whole of it**

This is a difficult and delicate issue, for various reasons. The obvious one is that a collection of cultural objects has an accumulated worth as a unity, something that would be disappeared in case of “dispersion” of the objects that constitute it.

Solutions to the problems would differ, since each State, obviously, follows a certain cultural politics, depending on the values that it considers most important; “the term cultural politics and its meaning is heavily conditioned by the historic and politic context into which it is developed, having as result a big variety of aims and institutional forms<sup>10</sup>, the comparison of which is very difficult”<sup>11</sup>. One should not interfere there.

A significant step, though, would be the creation of national [electronic] registries of art collections/collections of cultural objects and/or of the collections’ items. The requirement for a collection to be registered as such, in order to be protected as a whole, could only fortify any attempt to set rules about selling collections.

The creation of an international electronic registry could also be an option to work on.

Given the fact that often collectors need money to purchase other artworks (although “real” collectors do not want to sell, since their desire of collecting/accumulating does not “permit” them to do it), rules about the [perhaps strict] conditions that should be met in order for such a sale to be permitted could be set, so that the collections’ protection remains a priority.

#### **E. Export permission: When, how, of which cultural objects**

As it was mentioned above, in many cases private collectors have to get a State’s export permission in order either to sell items of their collections or to lend them for some exposition abroad, or [even more difficult] to present the whole collection or parts of it, in galleries or museums abroad.

In the first case, when the outcome is not certain or the procedure takes much time, the collectors may lose a unique chance to sell items of their collections – for example, when they would be offered for sale at an auction abroad, which is programmed at a certain date.

Harmonized rules for such procedures could be created and date-limits be set, for such a procedure to be concluded and a decision, positive or negative, to be made.

In the second and third case, sometimes this procedure takes much time and the risks are high for the collectors who would want to proceed fast, so that the collection [or items of it] may travel safely and without any hurdles, and that the costs for it may not be immensely augmented.

Again, precise rules could be set about, so that there may not be any doubt about the appropriateness of them or the transparency of the procedure.

#### **F. Art Auctions – Art Sales – Art Authentication**

Secrecy and anonymity in the art world can be reckless and may be blamed for many scandals in this world and for contributing to Money-Laundering. Art Market is criticized for lacking security and transparency<sup>12</sup>.

<sup>10</sup> M.M. Zamorano/J. Rius Ulldemolins/R. Klein, ¿Hacia un modelo sudamericano de política cultural? Singularidades y convergencias en Uruguay, Paraguay y Chile en el siglo XXI, *Revista Europea de Estudios Latinoamericanos y del Caribe* 96 (2014) 5, 6.

<sup>11</sup> E. Moustaira, “Art Collections, Private and Public: A Comparative Legal Study”, Springer, 2015, p. 15.

<sup>12</sup> A.L. Bandle, “The Sale of Misattributed Artworks and Antiques at Auction”, Edward Elgar, 2016, 336.

A notorious example is that of the Knoedler gallery in New York, 165 years in business. Collectors paid about \$80 million to purchase unknown “masterpieces”, brought to market by a Long Island art dealer. The “masterworks”, allegedly come from a mystery collector, had in fact been created by a forger in his Queens garage.

Concerns about anonymity were intensified last years, when the Panama Papers were released, which gave many details about the use of corporate veils to conceal ownership, avoid taxes and enable crime. Christie’s said, last February, that its policy has been strengthened during the last months, and that it now requires agents who want to sell works through the auction house to tell the name of the owner they represent.

The situation is far from simple. Veils have been and are being used to obscure ownership of arts. Even when big cases become notorious, like that of Rybolovlev v. Bouvier, over matters that include the money from the Sotheby’s sale, secrecy is still being defended. Other cases are also famous/notorious, like that of the seizure of “Hannibal”, an \$8 million painting by Jean-Michel Basquiat brought into the U.S. by Edemar Cid Ferreira, a jailed ex-Brazilian banker who converted some of his laundered money into a massive art collection”. At the time he moved the painting into USA, he claimed that it was worth \$100<sup>13</sup>.

So far, efforts to reduce anonymity in art sales have had no result. In 2012, a New York appeals court ruled that auction houses had the obligation to let buyers know the identity of sellers. But the decision was overturned on appeal<sup>14</sup>.

As far as art authentication is concerned, the situation in USA is the following: At the beginning and during the first half of the 20<sup>th</sup> century, auction houses acted as intermediaries between sellers and purchasers and disclaimed all representations and warranties to the works they auctioned. In only a few cases, courts awarded purchasers rescission of contract based on fraud claims.

In 1966, New York enacted legislation on the creation and negation of express warranties in the sale of fine art. In 1968, the legislation limited the application of the warranties to sales by art merchants to non-merchants and further restricted the power to negate such warranties.

In 1973, Sotheby’s offered for the first time warranty to clients. In 1977, Christie’s did the same. Nowadays, both auction houses extend their limited warranties for 5 years from the date of the relevant auction, while the UCC warranty extends 4 years. These warranties refer only to the work’s authorship and not to physical condition or provenance<sup>15</sup>.

People working in the big, international, auction houses argue that they have to deal with multiple problems. In Sotheby’s, there is a department exclusively dedicated to legal problems and trying to set procedures and rules that would respond to the rules of each country as well as to the rules of the international treaties. These procedures and rules refer to the contracts of intermediation, to the certification of artworks, to the percentage due to the artists, on the transactions of their artworks, to the possibility of certain States to acquire or “notify” artworks considered as significant national cultural heritage, etc.

Sotheby’s has 40 offices all over the world and 8 *selling locations*: London, New York, Paris, Amsterdam, Hong Kong, Milan, Geneva, Zurich. People working in Sotheby’s believe that clear and uniform rules for each of these instances, would be necessary in order to assure the absolute respect of the laws and to guarantee the maxima transparency of the whole operation<sup>16</sup>.

Could secrecy and anonymity in the art world be avoided? How should that happen? What sort of measures could be taken, in national and international level?

---

<sup>13</sup> S. Rubinfeld, Art World’s Response to Money-Laundering Concerns Draws Critics, *The Wall Street Journal*, Feb. 27, 2017.

<sup>14</sup> G. Bowley & W.K. Rashbaum, “Has the Art Market Become an Unwitting Partner in Crime?”, *The New York Times*, Feb. 19, 2017.

<sup>15</sup> J.B. Prowda, “Visual Arts and the Law. A Handbook for Professionals”, 2013, 208.

<sup>16</sup> C. Dwek, Norme necessarie e norme inefficienti nella pratica di una casa d’aste internazionale, in: G. Ajani/A. Donati (eds.) *I diritti dell’arte contemporanea*, Umberto Allemandi & Co., Torino 2011, 109.

Would existing rules in national legislations be capable of dealing with the above issues or should perhaps rules/principles be created, concerning for example the adjudication of damages in case the collector has acquired fake works of art, based on experts' opinions?

**G. Protection of collections in case of suits/arrests – immunity – w(sh)ould it be unlimited or not?**

The Cultural Heritage Committee of the International Law Association (ILA), had worked on these issues, concluding with a Draft Convention. At the General Assembly in Washington DC, in 2014, the Committee's Resolution had been approved and, accordingly, the annexed Draft Convention had been adopted. The work of the Committee and of course the Draft Convention could be a guide for dealing with these issues.

Most necessary w(c)ould be the following articles of the Draft Convention:

**Article 1: Scope**

*Without prejudice to Article 5, this Convention provides for immunity from suit and immunity from seizure of cultural objects which are temporarily present in a receiving State for cultural, educational or scientific purposes, unless:*

- a) *the cultural object is placed or intended to be placed on sale; or*
- b) *the cultural object is owned, possessed or otherwise controlled by the receiving State or a physical or legal person resident in the receiving State.*

**Article 3: Immunity from seizure**

*Without prejudice to Article 5, cultural objects which are temporarily present in a receiving State for cultural, educational or scientific purposes shall enjoy immunity from seizure in that State. No order that prevents or may prevent the return of the cultural object to the sending State shall be issued in the receiving State.*

**Article 4: Immunity from suit**

1. *Without prejudice to Article 5, the temporary presence of the cultural objects in the receiving State for cultural, educational or scientific purposes shall not form the basis for any legal process in the receiving State.*
2. *A judgment or award rendered by a court or tribunal in the receiving State in violation of paragraph 1 shall not be recognized or given effect in any State Party.*
3. *A State Party may, at the time of signature, ratification, acceptance or approval of, or accession to, the present Convention, declare that it does not consider itself bound by paragraph 1 or 2 of this Article.*
4. *Any State Party that has made a declaration in accordance with paragraph 3 may at any time withdraw that declaration by notification to the depositary.*

**Article 5: Exception for immunity from seizure or suit**

*Immunity from seizure or suit does not apply in cases where the receiving State is bound by conflicting obligations under international or regional law.*

**Article 7: Due diligence**

*Prior to the temporary presence of cultural objects in the receiving State for cultural, educational or scientific purposes, the receiving State and the sending State shall, jointly or separately, ensure that all due diligence is carried out to determine or confirm the provenance of the object, at least in compliance with the standards required by the International Council of Museums (ICOM).*

## **H. Cultural Objects' provenance – The Ethics of acquiring Arts and Antiquities**

The importance of artworks' provenance documentation is uncontested<sup>17</sup>. All the countries should have or try to create systems that would prevent suspect or clearly illicit acquisitions of artworks<sup>18</sup>. Private collectors may not plead innocence when the circumstances of artworks' acquisitions are not so clear<sup>19</sup>. And they are not clear when the artworks' provenance is not documented<sup>20</sup>.

Collectors should refuse to buy antiquities for the provenance of which they would not have enough or any information. If they did that, the illicit trade in antiquities would be diminished<sup>21</sup>.

Especially the Internet market in antiquities of unknown provenance is unfortunately flourishing, either because customers/buyers are ignorant or because they are indifferent. As it is pointed out, "the experience of eBay U.S.A. shows that in the absence of effective oversight self-regulation is likely to fail, and concerned public or professional bodies need to step forward and respond to the challenge".

eBay should be monitored regularly, non-domestic antiquities should be accompanied by an image of valid export documentation, otherwise be removed from the market, and criminals should be convicted.

The 1995 UNIDROIT Convention has already dealt these issues. It could serve as guidance for the would-be works concerning specifically the private collections. Of course specific issues/details might come up, which c(w)ould be worked on.

## **I. What c(sh)ould be done**

The aim could be the creation of either an international convention, unifying rules concerning the collections and the collectors or Principles that could be the model to be followed by the national legislations or even a Recommendation to national legislators. All alternatives have advantages, the second and third alternatives being easier to achieve/adopt.

As a first step, a working group could be set, that would work on the issues to be handled and the procedures to be followed. The above mentioned issues could be the beginning of its works. According to the conclusions of that working group, UNIDROIT would decide which path would be the most appropriate to follow.

In such a working group, obviously not only representatives of States could participate, but also representatives of art-related associations, professional or scientific, national or international, as well as representatives of international organizations, i.e. UNESCO, ICOM, etc.

\*

\* \*

---

<sup>17</sup> J.A. Levine, The Importance of Provenance Documentation in the Market for Ancient Art and Artifacts: The Future of the Market May Depend on Documenting the Past, 19 *DePaul Journal of Art, Technology & Intellectual Property Law* 219 (2009).

<sup>18</sup> J.A. Kreder, The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities, 64 *University of Miami Law Review* 997 (2010).

<sup>19</sup> "Looting will only come to a halt when collectors refuse to purchase unprovenanced material", S. Lundén, TV review: NRK (Norway), *Skriftsamleren* [The Manuscript Collector], *Culture Without Context* 16 (2005).

<sup>20</sup> L.M. Kaye, Provenance Research: Litigation and the Responsibility of Museums, in: *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce* (J.A.R. Nafziger/A.M. Nicgorski, eds.), Martinus Nijhoff Publishers, Leiden 2009, p. 405.

<sup>21</sup> M. Kersel, The lure of the artefact? The effects of acquiring eastern Mediterranean material culture, in: A.B. Knapp & P. Van Dommelen (eds) *The Cambridge Prehistory of the Bronze and Iron Age Mediterranean*, Cambridge University Press, 2015, 367, 375.