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PRIVATE ART COLLECTIONS - ORPHAN OBJECTS

UNIDROIT 2022

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Exploratory Expert Group

Online meeting

Geneva, 12 September 2022

SUMMARY REPORT

I. Background

1. The topic of private art collections was inserted as a low priority activity in the UNIDROIT 2017-2019 triennial Work Programme.¹ Since then, UNIDROIT has been gathering information and conducting research to better understand how the Institute might lend its expertise on the topic.² UNIDROIT has conducted various studies and has organised, hosted or participated in conferences in cooperation with partners of the 1995 UNIDROIT Convention Academic Project (UCAP).³ In particular, UNIDROIT organised a colloquium with the University of Geneva and the Fondation Gandur pour l'Art in Geneva on 4 and 5 February 2021, entitled "What prospects for 'orphan works'? Reflections on Cultural Goods without Provenance", which provided an opportunity for collectors, gallerists, lawyers, historians, archaeologists, academics, and museums to come together virtually and share their ideas and perspectives on the ever-growing debate around orphan objects. Conferences in 2022 included one on 'Due diligence, Digital Databases and Cultural Property Law and Policy' organised by the Harry Radzyner Law School of Reichman University in Herzliya in March (with a specific session on orphan objects), and a conference on 'Culture and Law' organised by the International Academy of Comparative Law and the Centro Mexicano de Derecho Uniforme, in April in Mexico City.

¹ Decision of the General Assembly taken at its 75th session on 1 December 2016 (see document UNIDROIT 2016 - A.G. (75) 8).

² "Private collections - Historical and legal perspectives": this introductory document examines the definition of public and private collections and collectors; a comparative analysis (France, Italy and the United States) of national legislation that bases the public protection of private collections on the concept of public interest; the status of private collections in European and international law; "The public interest in the protection of cultural heritage in private collections under United States law", the public interest in heritage preservation, the public interest and moral rights (California, Massachusetts, New York) and the public interest as justification for private collection protection legislation.

³ Two conferences were organised on the issue of private collections: (a) in 2017 on 'Private Collections: Historical and Legal Perspectives', 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. Professor Elina Moustaira prepared a document indicating private law aspects on which UNIDROIT's particular expertise would be of additional benefit in this field, which was submitted to the Governing Council in May 2017; (b) in 2019, a Conference organised by the University of Opole (UNESCO Chair in Cultural Property Law), the University of Gdansk and UNIDROIT in Gdansk devoted a specific session to "Private Collections: Historical and Legal Perspective" in which the very notion of collection (and the importance of integrity) was discussed, as well as the legal framework in Brazil, Germany, Spain, Northern Macedonia and Poland.

2. The UNIDROIT Secretariat has since identified the subject of orphan objects as one in need of transnational legislative attention. The need to work on a definition of orphan objects, the role of provenance, the legal status of orphan objects in art collections, and the definition of due diligence when acquiring orphan objects have all been earmarked as issues that could conform the scope of the project, which is very much in line with the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the "1995 UNIDROIT Convention"), in particular with regard to proof of due diligence and the role of databases, as well as time limitations of claims concerning orphan objects.

3. The Governing Council, at its 101st session in June 2022, supported the Secretariat's request to upgrade the priority of the project on Private Art Collections, subject to the identification of sufficient resources, and that the work would focus on orphan objects as part of the Institute's Work Programme for 2023-2025 within a reduced Working Group. It agreed to recommend the allocation of medium-priority status to the project to the General Assembly (81st session, Rome, 15 December 2022), noting the support of the Fondation Gandur pour l'Art and the Art-Law Centre of the University of Geneva.

4. On this basis, a first online meeting of an Exploratory Expert Group was therefore convened on 12 September 2022 for a preliminary discussion on the selected topics.

II. Introductory remarks

5. Ms Schneider, Principal Legal Officer and Treaty Depositary at UNIDROIT, welcomed the participants and introduced the subject of orphan cultural objects, as part of the Private Art Collections project on UNIDROIT's Work Programme. She gave a brief history of UNIDROIT's efforts regarding orphan cultural works and explained that the Exploratory working group would follow UNIDROIT's established practice, in that it would consist of a group of selected experts and chaired by a member of UNIDROIT's Governing Council, Dr Jorge Sánchez Cordero.

6. Ms Schneider also explained that the purpose of this meeting was to initiate a discussion among legal experts, but also persons representing the art market and the museum community on a certain number of selected relevant issues. Upon confirmation of the upgrade of the project by the General Assembly, the composition of the Working Group would be finalised and opened to observers, in order to gather as much input as possible.

7. Mr Gandur, Chairman Founder of the Fondation Gandur pour l'Art, recalled the aptness of discussing orphan cultural objects in light of their large impact on collectors, museums, and even States. He believed the discussion could help both private and public collections and emphasised the importance of due diligence to be exercised by collectors.

8. Mr Renold, Director of the Art-Law Centre of the University of Geneva, welcomed the participants to the Exploratory Expert Group and expressed the hope that much would be achieved during this meeting and in the future sessions to come. He recalled the University of Geneva's vested interest in the topic, which was perfectly in line with the activities of its UNESCO Chair on international cultural heritage law.

9. Dr Sánchez Cordero welcomed and thanked the participants for their attendance. He recalled that he proposed the topic of private art collections to the UNIDROIT Governing Council ⁴ and was happy that it had recommended that the General Assembly of UNIDROIT upgrade the priority allocated to the project, as the topic of orphan cultural objects had the potential to be very important for the international community.

10. Upon invitation of the Chair, the participants at the meeting set up under the auspices of UNIDROIT made a round of presentations (see the list of participants in Annexe I below).

II. Adoption of the draft agenda

11. The Exploratory Expert Group adopted the agenda as proposed (see Annexe II below).

III. Round table discussion

(a) The definition of orphan works

12. The first question at stake was to examine whether the terms “orphan” and “works” were appropriate or whether any other terms would be preferable.

13. It was indicated that the term “orphan” could be confusing as it is used in copyright law to refer to works that have no identifiable copyright holder. Some participants expressed the concern that “orphan” (*orfanelli* in Italian) could be used in both Italian and American law as an archaeological term of art referring to fragments of an antiquity. The term *orfanelli* was also used in the Statement of Facts of the agreement between the District Attorney of New York and the US dealer Michael Steinhard.

14. As an alternative to the term “orphan”, it was suggested that the term “unprovenanced” or “of unknown provenance” be used. Some participants agreed that distinguishing between orphan works in cultural property and intellectual property is necessary, as they were not the same, but thought the term “unprovenanced” was too specific – meaning that there is no information on the origins of the object – while the concern was that “orphan” may also include a certain “black hole” in time or in geography that might indicate theft or illicit exportation.

15. The Exploratory Expert Group also looked at the notion of “cultural objects” and what it meant in the present context, remembering that the discussion was to pay attention both to major and minor works and collectors/collections. The need for specificity regarding what kinds of objects were to be addressed was underlined.

16. It was maintained that the goal was not to limit the discussion to any particular type of object at this stage, but instead to focus on “cultural” as the uniting criterion. The term “cultural” comprised both archaeological objects and modern objects (paintings or other items) for the time being, while it was agreed that the definition could be refined at a later stage, with several sub-categories.

⁴ See document [UNIDROIT 2016 - 75th session A.G. \(75\) 3 corr](#) at page 14.

17. A consensus was found on the preferred term “*cultural objects*”, as it was in line with the 1995 UNIDROIT Convention and EU Directive 2014/60/EU.⁵ It was also pointed out that “property” was broader than the term “object” and should therefore be avoided. In French the term “property” would be translated as “*bien*” and would involve a discussion on ownership rights, whereas the term “object” was more neutral.

18. Participants in the Exploratory Expert Group also agreed on the use of a term that could be understood by other disciplines: “unprovenanced cultural objects” would translate to other contexts such as geography and history. Some agreed that it was best to opt for a simpler formulation so that art market stakeholders would understand the issue. The term “orphan object” was generally understood by the art market, while “unprovenanced cultural object” was more nuanced, as provenance was a complicated issue. In any event, all agreed that providing a clear definition would reassure collectors, museums, dealers, and auctioneers when putting objects lacking provenance on the market.

19. The Chairperson indicated that the general consensus was that a preliminary use of “*orphan cultural object*” sufficed for the time being, as the term balanced specificity and inclusiveness, and that the discussion would move forward using that term, noting that it was too early to have a final definition, and that one definition of “orphan cultural object” might not be sufficient. It was suggested that different elements be identified to make up the definition, with the idea being that if an object met one or more of these elements, it could be considered as an orphan cultural object.

20. *It was decided that a subgroup on the definition would be set up to discuss and come up with proposals for the next meeting.*

(b) The role of provenance research

21. The discussion was introduced indicating that provenance research was an essential phase in the fulfilment of the duty of due diligence to which sellers and buyers were⁶. The participants were invited to reflect on several questions: who should carry out provenance research and whether it should be done by an official body; which solutions should be considered should the search for provenance lead nowhere and one was faced with a true orphan work; and whether orphan objects should receive an official status, or something similar to a “refugee passport”?

22. The discussion revealed that there were two main types of orphan works: (1) objects with no archives, whose former presence in collections must yet be proven; and (2) objects with archives that turn out to be inauthentic and thus become orphans, placing their owners in a difficult situation.

23. All the participants agreed that transparency was critical, particularly on questions of provenance research, and especially on the absence or paucity of archives. A participant stressed that it was not so much about who was conducting provenance research, but how the information could be verified or scrutinised, and suggested that databases were key as they made the information public. Another participant emphasised this need, and specifically suggested that for those in the trade, having a way to

⁵ Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast)

⁶ See, in particular, Article 4(4) of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

acknowledge a grey area without opening themselves up to seizure or negative publicity would be necessary.

24. A reflection on a methodology also appeared to be necessary. Protocols were to be established in a manner adapted to the various holders of orphan objects, all of whom have their own specificities: museums, private collectors, dealers, auctioneers, etc., and therefore a procedure must be found to make these orphan objects publicly accessible.

25. A representative of the trade emphasised the need to distinguish between objects of major and lesser importance, as there were many of the latter on the market and in collections, and a dealer could not spend the same amount of time researching an exceptional object with no archives as on common amulets, for instance. One participant argued that some objects were sacred and sensitive to indigenous people, and should not ideally be accessible to everyone. For objects that had archives, but where the authenticity of the archives provided still had to be verified, a need was identified to allow access to the documents and to know how to verify the information provided. Another point on which the experts were unanimous was that it was necessary to work with source countries and communities of origin, and to envisage simple and practical methods of access to the works. A participant also pointed out that provenance research was not easy, and that sometimes public display or disclosure could be difficult for cultural items that were not meant for public consumption, such as sacred objects, being either sensitive or otherwise subject to privileged access.

26. While underscoring that participation in an orphan works database should be on a voluntary basis, it was also argued that collectors, and indeed anyone holding orphan cultural property, should participate in this endeavour. A subsidiary question would be how to reach them.

27. As to the question relating to a "passport" to be issued for orphan works once due diligence has been carried out, some participants questioned the validity of such a document in a criminal or civil court in case of evidence revealing the inauthenticity of the archives at the time such a passport was issued. One participant asked who would be in charge of issuing such a passport and what the status of these objects would be, indicating that the solution would depend on who was in possession of the orphan object (museum, collectors, dealers, auctioneers). She pointed out that any solution would need a procedure or process that kept the object at the disposal of multiple people, and that the solution would depend on who is in possession of the object.

28. All participants agreed on the challenge posed by the widely differentiated methodology and criteria when it came to establishing provenance, with no agreed standard of relevant proof. What was deemed a "clean" object today and what kind of proof was needed for due diligence were not clear cut, and thus the need to create a framework for provenance was seconded.

29. The Chair proposed that what qualified as provenance be discussed in a subgroup for the next meeting, with the intention of finding something workable for all jurisdictions, suggesting that the standards and parameters for the authenticity of provenance should be the focus. *It was agreed that this topic needed further discussion and could be the focus of a subgroup, along with due diligence.*

(c) *The legal status of orphan works in art collections, private or public*

30. The discussion on this point began with a participant's suggestion that, like for human orphans, orphan cultural objects should be subject to an appointed trustee or guardian entrusted to make decisions on those objects. Expanding on this idea, one could posit that a good faith possessor could

continue to possess the object but would need a trustee to dispose of it. The trustee might be a representative from the place of origin, among others, and there would be a co-ownership of sorts formed to make decisions for items, with the idea of distinguishing between possession of an object and decision-making for it. One could hope that this would encourage scholarship without the emphasis on profit. This idea was received with favour and elicited discussion among the members of the Exploratory Expert Group.

31. The question of whether or not this would be voluntary was raised, because for many collectors buying such objects was a form of wealth-building, meaning they were not in the position to just let the objects go after spending large quantities of money. Furthermore, if the trust system was only meant for the most valuable items, then how to (or who) would determine the value would also need to be established.

32. It was felt the trust system should be mandatory if an object entered the market. Some commented that the trust system could be problematic for property rights and legal jurisdictions, and that to deny rights to a legal owner of objects was difficult. Simplicity and workability were deemed key to a successful solution.

33. Some participants asked who would be the ultimate possessor of an object if a trust were created among different countries, and what would happen if they disagreed on actions to be taken over the property, especially if there were more than one entity or country managing the trust. Others felt the trust proposal had too many layers to result in the free circulation of orphan objects.

34. In addition, the term “no provenance” would need a clear definition, as some participants envisioned many objects with large gaps in their provenance.

35. Regarding legal implementation, some participants suggested guidelines or the composition of a model law for States to follow and queried how such a procedure could be made mandatory. Would it be through a new international convention or a model law for States to follow?

36. Some felt that a model law could be a workable method, as it had a very strong *soft law* impact. Having a model law could be a good way of addressing this issue without creating rules that would make countries reluctant to collaborate. It was highlighted that UNIDROIT would be the perfect organisation to set up such a document.

37. For some, the idea of creating a joint trust would be interesting. They recalled the example of the international ALIPH trust fund which aimed to protect cultural property in conflict zones. It was suggested that it could serve as a model, but that international support was necessary. ALIPH’s Board is made up of States and private persons but also institutions.

38. A question was then raised on whether orphan cultural objects were problematic for public collections. The Group considered the case of the two Syrian antiquities that had been seized by the French police and held by a French museum awaiting restitution, as well as the question of who would receive the money their exhibition generated. While it was agreed that this too was an issue, it was held that various jurisdictions differed on how they handle public and private collections. It was also queried whether or not these Syrian antiquities were to be considered orphan objects.

39. Finally, the Group highlighted that not all cultural objects were destined for museums, and that allowing orphan cultural objects to circulate on the market legally could be a way of suppressing “bad” behaviour.

(d) The due diligence required when acquiring an orphan work

40. The discussion was introduced recalling that the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the 1995 UNIDROIT Convention) introduced certain criteria of due diligence, intentionally not left to jurisdictions, but that for orphan objects the Exploratory Expert Group needed to be more specific.

41. A participant shared that guidelines existed for trade, but they were appropriate to circumstances, object, and person, and if at some point, even with due diligence, no more information was to be found; she suggested creating a checklist with questions.

42. Another participant asked how parties could be bound to follow the due diligence rules without model laws or a convention and suggested that guidelines with best practices would be appropriate for a responsible art market, citing both the 1995 UNIDROIT Convention and recent EU Directives that defined due diligence. Several others agreed on the elaboration of guidelines accompanied by different examples, which would be helpful for all categories of possessors. Another participant stressed that the transparency a big (anonymous) database, accessible to everyone, could provide might be the answer.

(e) Issues of proof

43. It was agreed to skip this point of the agenda and to continue discussing databases.

(f) The role of databases

44. The Exploratory Expert Group was invited to discuss whether a database for orphan objects would be a suitable tool and whether such objects would then be deposited in a virtual or a physical place, and to examine the possible role of such a database. The discussion started on the creation of a database, but participants stressed that various pitfalls must be avoided; among these, the most dangerous was that this database could become a simple means of laundering objects from illicit excavations. Objects that were not known to source countries because they had been illicitly excavated could thus end up in this database, awaiting a certificate/passport. All participants agreed that in order to be effective, such a database must be public and accessible to everyone.

45. While all participants agreed that digital databases were an essential tool for the presentation of orphan works, the main issue was the anonymity of the depositor. It was thought that transparency and anonymity could not be reconciled without risking misuse of the database. The participants were both in favour of full transparency of documents and material for the objects on any database, but were not sure about releasing certain information publicly, such as the name of the possessor of the orphan object and its location.

46. The representatives of the art world insisted that participation in this database be voluntary, and that only the database manager had access to the depositor’s name — and therefore that the depositor’s

name was not visible to the public. On the issues of depositor anonymity and voluntary deposit, it was suggested that the ICOM guidelines and Code of Ethics should be followed.

47. The question of the involvement of source countries in the consultation of this database was also paramount, while bearing in mind that this system should not be turned against diligent collectors.

48. A participant suggested to draw inspiration from the German Lost Art Database of the German Art Lost Foundation⁷ with a monitoring entity and a classification of objects in two databases (missing and found objects): a first database with “orphan” works (deposited here in institutions) and for which one sought archives or former owners and a second database with requests for objects submitted by families who used to own objects that had disappeared.

49. A participant put the question as to what would happen after an object was inserted in the database and was not claimed, wondering whether there should be some kind of amnesty or a presumption after three or five years on the database without any claim, or the reversal of the burden of proof on the owner. Another asked who would be bound by the “amnesty”, what would happen if new evidence emerged, and whether this amnesty would remove uncertainty completely or only for a certain period of time.

50. Several participants cautioned against outright immunity, which would put the possessors of orphan objects in a better position than holders of objects with provenance, and briefly discussed the doctrine of laches as a possible mechanism. A participant objected, indicating that the doctrine was an equitable doctrine but that the underlying principle was that of *nemo dat quod non habet*, and pointing out that creating a presumption in favour of the possessor was going in the opposite direction of the 1995 UNIDROIT Convention.

51. A representative of the art market argued that orphan status should not expose the dealer who participated in the database to seizures or negative publicity, either.

52. Participants also discussed the need for an international procedure and agreement to “clean” the provenance, allowing the object to circulate on the market, validated by an international organisation issuing a certificate (for example UNESCO or UNIDROIT). There was also a proposal of public exhibition of the most valuable orphan objects, including community experts who would be in charge of dealing with the claim process.

53. A participant questioned whether such a system might backfire for diligent collectors if countries of origin with little to no evidence asked for restitution. One participant suggested that countries of origin must provide evidence of wrongdoing, and another pointed out that there were often presumptions of State ownership and the burden was on the possessor to show lack of wrongdoing. This would be difficult for orphan objects, because if the owner were in possession of such information, then the object would not be an orphan and not on the database. The participants briefly discussed the sensitivity and differing perspectives surrounding the issue and agreed that the solution must be accepted internationally in order to move forward.

54. A participant expressed concern about the functionality of a database which, from her perspective, had been proposed for a long time. An interesting question was how to behave in front of

⁷ <https://www.lostart.de/en>

an orphan cultural object, and both the museums' perspective and codes of ethics could help contribute to the debate.

(g) *The return and restitution claims relating to orphan works* and (h) *Limitation periods*

55. The Exploratory Expert Group did not discuss these issues specifically, as they were addressed tangentially in other sections.

V. Procedure for future work and timetable

56. It was decided that a summary report of the meeting would be prepared and circulated among the participants.

57. Pursuant to the decision taken at the meeting, informal subgroups would meet to discuss the relevant issues in further depth in advance of the next meeting of the Exploratory Expert Group. In particular, the subgroups on museums, collectors and art market agreed to work on explaining how they currently address the problem of orphan cultural objects, for the benefit of all the members of the working group. Each subgroup could also, if they so wished, comment on the various ideas put forward at the current meeting.

58. The members of the Exploratory Expert Group would participate in the following subgroups and involve other persons of their profession in the discussions:

- Definition of orphan cultural object: Mr Renold, Mr Frigo, Ms Papathanassiou and Ms Giardini
- Museums: Ms Roby, Ms Delepierre and Ms Phelps
- Collectors: Mr Gandur and Ms Tassignon
- Provenance Research and Due Diligence: Ms Hershkovitch, Ms Giardini and Ms Schneider
- Databases: Mr Lehavi and Ms van der Lande
- Art market: Ms van der Lande

59. It was finally recalled that, following UNIDROIT's working methods, the final form of the work will be decided at a later stage and will seek to achieve efficacy and usefulness for the parties concerned in orphan cultural objects, subject to the approval of UNIDROIT's Governing Council and, ultimately, its General Assembly.

VI. Next meeting

60. The second meeting of the Exploratory Expert Group was tentatively scheduled for March 2023 in Rome.

ANNEXE I**LIST OF PARTICIPANTS**

(alphabetical order)

Mr Jorge Sánchez Cordero, Director of the Mexican Center of Uniform Law; Vice President of the International Academy of Comparative Law; Professor; Notary public; Mexico; Member of the Governing Council of UNIDROIT (*Chairperson*)

Ms Sophie Delepierre, Head of Heritage Protection Department, International Council of Museums (ICOM)

Mr Manlio Frigo, Professor of international law, Università degli Studi di Milano, Milan

Mr Jean Claude Gandur, Chairman Founder, Fondation Gandur pour l'Art, Geneva

Ms Giuditta Giardini, Lawyer and consultant, Antiquities Trafficking Unit, Manhattan District Attorney's Office

Ms Corinne Hershkovitch, Avocate à la Cour, Paris

Ms Joanna van der Lande, Chair Antiquities Dealer's Association, United Kingdom

Mr Amnon Lehavi, Atara Kaufman Professor of Law, Academic Director, G City Real Estate Institute, Harry Radzyner Law School, Reichman University (IDC Herzliya)

Mr Vincent Négri, Chercheur à l'Institut des Sciences sociales du Politique (ENS Paris-Saclay), Directeur-adjoint, Graduate School 'Humanités-Sciences du Patrimoine', Université Paris-Saclay

Ms Artemis Papathanasiou, Senior Legal Adviser at the Ministry of Foreign Affairs, Greece, and Coordinator of the UNGA Resolutions on the Return and Restitution of cultural property to their countries of origin

Mr Marc-André Renold, Professor at the University of Geneva, UNESCO Chair in international law on the protection of cultural property, Director Art-Law Centre of the University of Geneva

Ms Nadja Roby, Director, Policy and Government Relations, Indigenous Portfolio, Canadian Museum of History

Ms Isabelle Tassignon, Curator, Archaeology and Ethnology Collections, Fondation Gandur pour l'Art, Geneva

Ms Ana Vrdoljak, Professor, Law Faculty, University of Technology, Sydney, Australia, Chairperson of the International Cultural Property Society

Ms Marina Schneider, Principal Legal Officer and Treaty Depositary, UNIDROIT

Marie-Page Phelps, former Registrar in a museum in the USA

Morgane Desboeuf, Art-Law Centre of the University of Geneva

ANNEXE II**AGENDA**

1. Introductory remarks
 - UNIDROIT
 - Fondation Gandur pour l'Art
 - Art-Law Centre of the University of Geneva
2. Presentation of the members of the Exploratory Expert Group
3. Adoption of the draft agenda
4. Round table discussion on
 - (a) The definition of orphan works
 - (b) The role of provenance research
 - (c) The legal status of orphan works in art collections, private or public
 - (d) The due diligence required when acquiring an orphan work
 - (e) Issues of proof
 - (f) The role of databases
 - (g) The return and restitution claims relating to orphan works
 - (h) Limitation periods.
5. Procedure for future work and timetable
6. Next meeting
7. Other business