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GOVERNING COUNCIL
102nd session
Rome, 10-12 May 2023

UNIDROIT 2023
C.D. (102) 10
Original: French
April 2023

Item No. 5 on the agenda: Ongoing legislative activities carried over from the 2020-2022 Work Programme

(d) Private art collections

(prepared by the Secretariat)

<i>Summary</i>	<i>Report on activities relating to private art collections</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the activities carried out on the project</i>
<i>Mandate</i>	<i>Work Programme 2020-2022 and 2023-2025</i>
<i>Priority level</i>	<i>Medium</i>
<i>Related documents</i>	<i>UNIDROIT 2022 - C.D. (101) 21</i> ; <i>UNIDROIT 2022 - A.G. (81) 9</i>

I. INTRODUCTION

1. The purpose of this document is to update the members of the Governing Council on the development of the project on private art collections since the 101st session of the Council in June 2022. It briefly recalls the background of the project (Section II) and provides information on the work conducted so far (Section III), as well as a brief description of the anticipated next steps (Section IV).

II. BACKGROUND

2. 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, and participated in conferences

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

² Research has been conducted on (i) the definition of public and private collections and collectors; (ii) 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; (iii) the status of private collections in European and international law; and (iv) the public interest in the protection of cultural heritage in private collections under United States law (California, Massachusetts, New York), and the public interest as justification for private collection protection legislation.

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.

3. The UNIDROIT Secretariat has 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 shape 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.

4. The Governing Council, at its 101st session (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 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.

III. ACTIVITIES UNDERTAKEN SINCE THE 101ST SESSION OF THE GOVERNING COUNCIL

A. MoU with the Art-Law Centre of the University of Geneva and the *Fondation Gandur pour l'Art*

5. As the support of the Governing Council to upgrade the priority of the project was subject to the identification of sufficient resources, the UNIDROIT Secretariat signed in December 2022 a Memorandum of Understanding (MoU) with two partners, the Art-Law Centre of the University of Geneva (ALC) and the *Fondation Gandur pour l'Art* (FGA).

6. The MoU underlines the three institutions' common interest in the legal and ethical issues connected to orphan objects, and aims at providing a general framework for the collaboration of ALC and FGA in the implementation of the UNIDROIT project connected to the legal and ethical status of orphan cultural objects. Under this MoU, UNIDROIT will provide the funding for the organisation of at least one working group meeting per year in Rome; the ALC will, following the University of Geneva's

³ Two conferences have been 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 the 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 in Gdansk organised by the University of Opole (UNESCO Chair in Cultural Property Law), the University of Gdansk, and UNIDROIT 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 frameworks in Brazil, Germany, Spain, Northern Macedonia, and Poland.

requirements, make a teaching assistant available to work part-time on the project; and the FGA will provide funding of a certain sum per year for the project, which will cover costs of meetings and publications.

B. Meetings of the Exploratory Expert Group

(a) First meeting of the Exploratory Expert Group (12 September 2022)

7. The UNIDROIT Secretariat, having identified the subject of orphan objects as the focus of the project, and waiting for the General Assembly to upgrade the project in order to secure funding, an Exploratory Expert Group⁴ was convened on 12 September 2022 for a preliminary discussion on selected topics. The meeting was held in a hybrid format, in Geneva and online.⁵

8. The composition of the Exploratory Expert Group followed UNIDROIT's established practice, being a group of selected experts chaired by a member of UNIDROIT's Governing Council (here, Dr Jorge Sánchez Cordero). The purpose of the meeting was to initiate a discussion among legal experts, and also representatives of the art market and the museum community, on a certain number of selected relevant issues (including, *inter alia*, the scope of the project, definitions, the role of provenance research, the legal status of orphan works in art collections - private or public -, the due diligence required when acquiring an orphan work, issues of proof, and the role of databases).

9. The Exploratory Expert Group also decided that informal subgroups on definitions, collectors, and the art market should meet to discuss certain issues in further depth in advance of a further meeting. In particular, they would work on explaining how they currently address the problem of orphan cultural objects, for the benefit of all the members of the Exploratory Expert Group.

10. It was finally recalled that, following UNIDROIT's working methods, the final form of the work and the type of instrument would be discussed at a later stage, seeking to achieve efficacy and usefulness for the parties concerned in orphan cultural objects, all of it subject to the approval of UNIDROIT's Governing Council.

(b) Subgroup meeting on definitions (3 March 2023)

11. Pursuant to the decision made at the first meeting of the Exploratory Expert Group on 12 September 2022, an informal subgroup met in Rome at the seat of UNIDROIT (and online) on 3 March 2023, moderated by Prof. Marc-André Renold (Art-Law Centre, University of Geneva), to discuss the issue of the definition of "orphan objects", as all agreed that providing a clear definition would reassure collectors, museums, dealers, and auctioneers when handling objects lacking provenance.

⁴ 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 and Academic Director, G City Real Estate Institute, Harry Radzyner Law School, Reichman University (IDC Herzliya); Mr Vincent Négri, Researcher at *l'Institut des Sciences sociales du Politique* (ENS Paris-Saclay) and Deputy Director of the Graduate School *Humanités-Sciences du Patrimoine*, *Université Paris-Saclay*; Ms Artemis Papanthassiou, 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, and Director of 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; and Ms Ana Vrdoljak, Professor, Law Faculty, University of Technology, Sydney, Australia, and Chairperson of the International Cultural Property Society.

⁵ See Summary Report, [UNIDROIT 2022 – S70B/Orphan objects/EEG/Doc. 2](#).

12. At the end of the discussion on 12 September 2022, the general consensus was that a preliminary use of the term “*orphan cultural object*” (in line with the 1995 UNIDROIT Convention⁶ and EU Directive 2014/60/EU⁷) sufficed for the time being, as the term balanced specificity and inclusiveness. It was nevertheless suggested that different elements needed to be identified in order to draft the definition, so that only objects having one or more of said elements could be considered as an orphan cultural object for the purposes of the instrument.

13. The goal of this meeting was to come up with one or two alternative definitions. Proposals were offered by some participants as well as by the Secretariat. In conclusion, the subgroup agreed on a text to submit for discussion to the next meeting. It also discussed whether other terms of the definition should be also defined, such as “archives” or “documented provenance”. It was stressed that the Explanatory Report of the 1995 UNIDROIT Convention should be used as a reference for definitions which had potentially already been made.⁸

(c) Second meeting of the Exploratory Expert Group (29-30 March 2023)

14. The second meeting of the Exploratory Expert Group met in Rome (and online) on 29 and 30 March 2023. It discussed the proposed definition submitted by the subgroup as well as the reports presented by two groups of stakeholders.

15. The first report was the result of interviews with collectors conducted by Mr Jean Claude Gandur, Chairman Founder of the *Fondation Gandur pour l'Art*, and the second report contained a point of view of the art market. They both explained the difficulties they face with orphan objects in their collections (in publishing, in putting on the market for transactions, etc.) and their suggestions on how to respond. A long discussion on the issue of provenance research for orphan objects also took place.

IV. FUTURE STEPS

16. Now that the project has obtained a higher priority in the Work Programme of UNIDROIT, and that the Exploratory Expert Group has worked on the scope and collected relevant information for the project, it is time for a full Working Group to be formed. The Secretariat is working to define the composition of the Working Group, including both experts and observers.

17. The first meeting of the Working Group is scheduled for autumn 2023. In the meantime, the Secretariat is continuing to provide support to the members of the Exploratory Expert Group for the organisation of intersessional work.

V. ACTION TO BE TAKEN

18. *The Governing Council is invited to take note of the activities undertaken by the Secretariat on the project on private art collections.*

⁶ [UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects](#), adopted on 24 June 1995.

⁷ [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).

⁸ See Summary Report, UNIDROIT 2022 – S70B/Orphan objects/EEG/Doc. 3.