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PRIVATE ART COLLECTIONS - ORPHAN OBJECTS

**Exploratory Expert Group
2nd meeting (in presence and online)
Rome, 29-30 March 2023**

UNIDROIT 2023
S70B/Orphan objects/EEG/Doc. 4
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SUMMARY REPORT

I. Introductory remarks

1. Ms Schneider, Principal Legal Officer and Treaty Depositary at UNIDROIT, welcomed the participants (see the list in Annexe I) on behalf of the Secretary General and introduced new participants in the meeting. She also presented the Chairperson, Dr Sanchez-Cordero, member of the UNIDROIT Governing Council who welcomed also the participants.

2. It was also recalled that the UNIDROIT General Assembly, at its session in December 2022, following the recommendation of the Governing Council, agreed to bring the priority of the project from law to medium, also thanks to the human and financial support of the Fondation Gandur pour l'Art and the Art Law Centre of the University of Geneva.

II. Adoption of the draft agenda

3. The Chairperson introduced the draft agenda, indicating that it would begin with the reports of the two subgroups which already met in the preceding weeks. Ms Tassignon, Fondation Gandur pour l'Art, asked to present the report on collectors the following day.

4. The draft agenda as revised was adopted (see Annexe II).

III. Reports of subgroups

(a) Definition(s)

5. Professor Renold, moderator of the subgroup on definitions, presented the report of the meeting convened on 3rd March 2023¹ and recalled that the documents submitted to the meeting were (1) a note by Professor Frigo, (2) a proposal from the UNIDROIT Secretariat and (3) a draft proposal by the art trade.

¹ Exploratory Expert Group, Subgroup on definitions, Hybrid meeting Rome, 3 March 2022, UNIDROIT 2023 - S70B/Orphan objects/EEG/Doc. 3.

² He indicated that the aim of the meeting was to how to define orphan objects. Professor Renold thanked the participants for the work done and pointed out point 7 of the UNIDROIT document proposing two definitions as starting points. He then read the definition chosen by the subgroup after discussion:

*An orphan object is a movable cultural object, as defined in article 2 of the 1995 UNIDROIT Convention, which has totally or partially no documented and/or identifiable provenance” (e.g. no available or reliable archives or publications)
[“The place or country of origin, whether known or not, is not a criterion to determine whether an object is orphan.”].*

6. Professor Renold also read the definition proposed by the art market: *“An orphan cultural object is a Cultural Object that has been legally held, whether in private or public ownership for many years or even centuries, but does not have demonstrable evidence of licit origin, sufficient to satisfy current standards of acquisition or import”* of which only some elements were kept. He underlined that the chosen definition was a starting point and welcomed further discussion on this point within the Exploratory Expert Group.

7. The Chairperson expressed his gratitude to all participants of the subgroup and opened the floor. Professor Renold underlined that the subgroup put the emphasis – for practical reasons – on the terms *“orphan cultural object”*, but that there were other terms which should or could be defined. The Chairperson noted that it was a very acceptable definition as a starting point to be submitted to the participants of the Exploratory Expert Group.

8. A participant pointed out in the definition the reference to *“as defined in Article 2 of the 1995 UNIDROIT Convention”* and quoted this article’s definition of cultural objects and categories in the Annexe. She also mentioned the term *“of importance”* and asked who would define what was important, as an item important for a museum would not necessarily be important for the art market or even for archaeologists.

9. Another participant added that the list of objects covered by Article 2 of the 1995 UNIDROIT Convention was very wide and broad, and also included objects of low value. He highlighted the fact that these objects were not subject to any concern about provenance, as they had been usually moved from their countries of origin without any problem at the time, but that these objects of low value were coming under the broad definition of Article 2. He warned the group about a definition of orphan objects following Article 2, as most objects would not have any provenance in this case and would not be able to be sold on the market. He proposed to define which category of objects could be problematic and to narrow the definition of orphan objects on goods with a problem about selling them, those with a very high price, whose authenticity and licit origin is highly important. He warned the group against a too broad definition of orphan objects which could make any object fall under the definition.

10. The Chairperson stressed that the criterion for objects under Article 2 of the 1995 Convention was the cultural importance and not the economic value. He thanked the speakers for their very interesting remarks and indicated that whether the definition was too broad or not was an issue to further discussed.

² Exploratory Expert Group, Subgroup on definitions, Hybrid meeting Rome, 3 March UNIDROIT 2023 - 2022S70B/Orphan objects/EEG/Doc. 3, Annex II.

11. A participant underlined that the definition of the 1970 UNESCO Convention was speaking about “designated” items, and was addressed mainly to States, whereas the 1995 UNIDROIT Convention addressed both States and private owners. To her view, the definition of orphan objects should be wide because it would concern objects in private or public hands.

12. A participant noted that the main issue to be addressed was about orphan objects themselves and how to define them, whether they were in private or public hands. It was felt that objects were to be narrowed. She insisted that there were a lot of small items for which there was a trade but no documentation, like Roman oil lamps or mold-made Egyptian amulets. The purpose of the trade was to enable the movement of goods, especially those very small items for which we could not identify paperwork anymore. She expressed the need to narrow the definition on some objects, not only on those of States and museums quality, but also about the type of objects, in order to have practical results.

13. Another participant added that the definition could be broad because requests of return and restitution would be filtered by requirements of national laws (definition of a cultural object, of an antiquity etc.).

14. It was also highlighted that the main question was more about the final purpose for the Exploratory Expert Group in providing a definition. As the subgroup on definition agreed that the aim was not to reach a potential legal definition used for a convention or an amendment to an existing convention, he proposed to be clear on that point and to work in order to add further tools and criteria for a more effective due diligence.

15. A participant thanked the subgroup for its work but questioned the use of the term “movable” as, from a museum point of view, an object was always movable. She also underlined that the reference to Article 2 of the 1995 UNIDROIT Convention was not adapted for a non-legal use, for example for museum professionals. In addition, she noticed that the word “publications” was too broad and could open the door to questions. She insisted that a clear and short definition was needed, in order to stay broad and make sub-divisions later.

16. Another participant came back on the issue of the purpose of elaborating a definition, whether the aim was to amend an existing convention or to produce a definition in the context of a soft law text, such as guidelines to provide guidance or assistance to those who have to implement existing conventions. She added that this purpose would guide the Exploratory Expert Group’s way of elaborating a definition.

17. The Secretariat replied to participant’s concerns about the purpose of providing a definition of orphan objects referring to §§ 5-6³ of the report of the subgroup and confirmed that the purpose was not to revise an existing convention nor to create a new convention. It was noted that the purpose, for example to create guidelines (maybe particularly on due diligence), had to be discussed within the group. It was also explained that the definition of the subgroup referred to Article 2 of 1995 UNIDROIT Convention but that it was only a possible solution as the Convention already defined “*cultural objects*”, and that it was acceptable to delete it or to put it into brackets. It was underlined that the participants of the subgroup did not have the same views on what was an orphan object, and thus it was really important to discuss the definition.

³ Exploratory Expert Group, Subgroup on definitions, Hybrid meeting Rome, 3 March 2023, UNIDROIT 2023 - S70B/Orphan objects/EEG/Doc. 3.

18. Professor Renold indicated that the reference to the UNIDROIT Convention was meant because the subgroup decided to work in the context of what had already been done, but also because the term cultural object had already been defined. Whereas it was indeed an extremely broad definition, he queried if at this stage it was not preferable to leave a broad definition, as the issue was really the regime of orphan objects. He also underlined that the term "*importance*" in the UNIDROIT Convention was not abstract but referred to the importance for certain specific fields and that the participants should dwell on the main issue, that was, once orphan objects were broadly defined, to provide subcategories with specific regimes. The latter would apply in essence to a certain number of important objects. Therefore, he proposed to come back to the definition once the regime was established.

19. A participant indicated that he considered orphan objects as objects without any history. He stressed that the problem with orphan objects was that there was no evidence that these objects had not been stolen, illegally exported or excavated etc. Thus, they were objects which were not covered by the 1995 UNIDROIT Convention. He proposed to take into account for the definition that these objects were not covered by the 1995 UNIDROIT Convention, and that one could not know where they came from or to whom they should be returned.

20. A representative of the art market recalled that the goal was not to limit the discussion on restitution and return, but that the trade was looking for a mechanism for these orphan objects to circulate more easily. It was also pointed out that museums required full provenance before acquisitions, but that other purchasers, with lower standards, could buy the same objects, which were not necessarily illicit. He asked for the Exploratory Expert Group to resolve the problems of objects who indeed had problems, e.g. objects that one could not sell because they had no paperwork (and thus museums could not buy them) but were not necessarily from illicit origin. He expressed the need to find a *line in the sand*, in order to solve the problems for the vast majority of orphan objects (antiques, jewellery, ceramics, books...) which are low value and small items, and for which provenance is not a problem.

21. The Chairperson concluded that the Exploratory Expert group did not want to modify the 1970 and 1995 Conventions. On the other hand, it was necessary to give specificities for orphan objects.

22. The Secretariat suggested to have a discussion – which was not meant only for restitution issues – on the part in brackets in the definition and decide what should stay in the square brackets.

23. Ms Tassignon indicated what are reliable archives while publications can be different and could be added as proofs. It was also explained why "*reliable*" was added in the definition by outlining that documentation can also be false. The Chairperson then asked the participants if it was necessary to have a definition of orphan objects and to have specificities. A participant agreed that "*reliable*" was an important part for the definition, but she was not sure that "*publication*" was a precise word. Another participant asked about the definition of "*provenance*" and she read the definition appearing in the Document provided by the trade including the major part of the footnotes ⁴. It was mentioned that the concept of provenance had two different meanings, one from a legal/ethical perspective and one from an historical/traditional perspective. Moreover, the expression "*chain of title or possession*" of the object had to be used, rather than simply its collecting history. It was reminded to the participants that there

⁴ "Provenance: The known collecting history of an object, either recorded in writing or anecdotal"; Footnote 4: "When the trade talks about "provenance", it refers to the collecting history of an object. Antiquities have been collected for hundreds of years, with some collections forming the basis of public museums; others have changed hands multiple times over the years and have potentially long collecting histories that unfortunately often have been lost [...]".

was a definition of provenance in the ICOM Code of Ethics for Museums⁵ and there was no need in her opinion to use “*example*”.

24. A participant went back to the proposed definition especially the part “*has totally or partially no documented or identified provenance*” by asking what would be a fully documented provenance since the implications could vary enormously. Another participant gave the example mentioned during the last meeting of the “*Head of a Barbarian*” that was excavated in Italy, unclear if before or after the establishing of Italian patrimony laws. Italy lost traces of the piece until the 1970s, when it reappeared in New York City at an auction. It was said that there were legal questions in this so she referred to the categories identified in the 1995 UNIDROIT Convention, that provenance was not necessarily time limited and that one should never seek for a perfect provenance.

25. A participant added that remembering the ICOM Code of Ethics for Museums was correct: due diligence was necessarily linked to the notion of provenance. Eventually there could be a general definition.

26. Professor Renold made an additional point connected to the second point in the notion that is in brackets of the definition proposed. This was discussed in the Expert Group and it was stated that “origin” was not a criterion because there were many other issues like the gaps in provenance. Origin - whether known or not - was not the problem.

27. The Chairperson repeated that the Exploratory Expert Group was not updating the international legal framework; it was also recommended to rely on domestic legislations; and it was suggested to have a broad definition but bearing in mind that some specificities should be considered for orphan objects. At this point it was necessary to talk about the role of provenance: the first approach was the legal one, the second one was the historical approach.

28. A participant from the trade explained the *draft proposal handed over to the subgroup on definitions from the art market perspective* which was distributed to the Expert Group stressing that it was perhaps necessary to be familiar with the art market and to demystify the art market. She recommended to have a look in the Antique Trade Gazette to gain a market overview in different countries. She pointed out the trade’s important role in protecting cultural objects and uncovering and preserving their provenance history and mentioned the problems in trading licit objects internationally due to overly prescriptive national regulations. She then explained what documentation according to her point of view a seller should provide to a buyer of antiquities, pointing out that no uniform standards according to due diligence exist, and that standards and expectation are evolving through time. She mentioned that a complete provenance history rarely exists for antique objects, especially for low value objects.

29. It was recalled to the Expert Group the preambles of the 1970 UNESCO Convention⁶ and the 1995 UNIDROIT Convention⁷ on the importance of interchange of cultural property.

⁵ ICOM Code of Ethics, available here: [ICOM-code-En-web.pdf](#).

⁶ “Considering that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations”.

⁷ “Conscious that this Convention will not by itself provide a solution to the problems raised by illicit trade, but that it initiates a process that will enhance international cultural co-operation and maintain a proper role for legal trading and inter-State agreements for cultural exchanges”.

(b) Collectors

30. Ms Tassignon presented the point of view of collectors, based on interviews conducted by Mr Gandur. At this stage, six French and Swiss collectors answered their inquiries, and she expressed the hope for other collectors to be heard in the future. Among the consulted collectors, there were active collectors, collectors and sellers, and collectors who inherited collections with no archives. Two conclusions had been made from this survey: (1) there was a need for transparency expressed on the art market side and from representatives of the source countries, (2) and there was a common need for a practical tool for orphan objects.

31. Ms Tassignon then summarised the position of the interviewed collectors on what they considered as key specific issues:

a. *The need of transparency on both sides:* Ms Tassignon highlighted the fact that some of the consulted collectors had *bona fide* collections, acquired in the 1980s-1990s, and were now afraid of seizure and therefore were avoiding exhibitions. They also feared the development of black market trade and regretted that source countries resort to "dishonest" methods to prevent the sale of cultural objects, even of items without evidence of an illicit provenance. Collectors were therefore asking for cooperation between different players and transparency from databases.

b. *The question of evidence:* the collectors had raised the issue of the objects purchased in good faith but that became orphan because of a pedigree that turns out to be false or a change of export regulation. According to them, the statements of owners should be accepted as proof and objects received by inheritance should be able to be brought in court to receive a declaration (admissible as proof).

c. *Limitation periods:* Ms Tassignon referred that collectors expressed the need for a clear 'line in the sand'. One collector indicated that since 2005, people were preserving the documentation about the objects acquired, and that it was not the case before.

d. *Databases:* the collectors reiterated the need to work with source countries. They also thought that the name of the custodian should not appear online on the databases but should be only disclosed to the database administrator. When the collector had fulfilled his duty of putting the object online, he/she should receive an official document, and the validity of the scientific information given by the custodian must be verified by the administrators.

e. *Restitution issues:* the collectors expressed that there were also works acquired in good faith but that were orphan objects because of pedigree that turns out to be false. Several collectors wanted to address the issue of restitution law and to whom to return to. The collectors also highlighted the need to fix a period for an object to go from grey zone to green zone, thus obtaining a legal status, in case there is no statute of limitation applicable regarding this object.

f. *Relative importance of objects:* some collectors drew attention to the fact that not all objects should be put on the same level, one idea being to mark the objects (by the administrator of databases for example) according to their importance, allowing the most valuable objects to emerge.

g. *The compensation of the good faith purchaser:* another point to which the collectors drew attention was the need for an ombudsman if it turned out that orphan works had to be returned. In any case, all insisted that the principle of good faith acquisition must be safeguarded and that if restitution was to take place, the source country must pay compensation to the good faith buyer.

32. The Chairperson thanked Ms Tassignon for her report on the key issues for private collectors, and opened the discussion. The Secretariat thanked Ms Tassignon and recalled that some issues among the concerns of collectors were directly linked to orphan objects. She underlined that the Exploratory Expert Group would not deal with some of the aforementioned issues like restitution and compensation, as the purpose of the meeting was not to modify the regime and existing rules on restitutions or on the compensation of good faith purchasers.

33. One participant asked what was intended by the marking of objects, and who could oversee this marking. It was answered that the administrator of the website on which the objects were put should be an expert and could maybe evaluate the importance of the objects.

34. A representative of the market reacted to the concern of some collectors about the date after which objects could be “cleaned”. She explained the current difficulty to have any documentation for objects going back forty or fifty years, and thus expressed the hope to find a mechanism to prevent such issues from occurring for future generations. As information about an object was often just stored with very valuable items, the majority of objects in private possession were not accompanied with a pedigree due to their low value. She expressed the fear that these objects would also not be documented in the future and that the same problem would thus reappear constantly. She proposed the idea of a rolling date to “clean” these objects.

IV. Round table discussion

(a) The role of provenance research

35. It was stressed that the topic of provenance research was relevant and should be a new academic discipline including different subjects in order to do proper research and that a methodology should be developed. A participant pointed out that not only archives but also communities were relevant in search for information of objects. It was important to find a solution for orphan objects, to prevent them of entering the black market. Another participant from the trade emphasized the need of making these objects visible, especially for research purposes. The Chairperson underlined that the main purpose of trying to develop a draft for orphan objects was to provide certitude in the handling of these objects, also to the art market, in order to preserve the objects for humankind.

36. It was noted that the museum world faced various challenges in the field of provenance research, for example regarding the international repatriation movement where sometimes overlapping claims from different Indigenous communities of the same territory existed, raising delicate questions in the handling of Indigenous communities remains and to who to return it.

37. Another participant reminded the participants that the ICOM Code of Ethics for Museums provided some indications for the handling of unprovenanced objects.

38. A participant recalled the 1998 Washington Principles, the 2009 Terezin Declaration, and the since established concept of provenance as identifying the chain of title or possession, which was very relevant in the work of Restitution Committees in the field of Nazi-looted objects. He raised the question of what could be learned from this case study, as in some countries not only Restitution Committees existed, but also Expert Committees, and also asked what could be taken out of it regarding the interaction with the art market.

39. A participant mentioned that according to her opinion, the efficiency of provenance research - especially in France - was considered to be weak because there was hardly no cooperation between experts and other people involved to work together on the criteria, the methodology, and the discipline of the provenance research. She reminded the participants that there were no identical criteria for looted art for example in France and in Germany. This is why she suggested that experts should look at provenance research in a new way. She emphasized the difficulties of deciding to whom an object can be returned or where an artifact must be legitimately located due to the lack of existing criteria. She went back specifically to orphan objects by underlining the necessity to share information with people interested in this kind of artifacts, stressing out that it is not possible to work on every single object. Eventually it was important to focus on the important ones in order to avoid them to disappear. She also remembered that there was no international committee that was currently working on this topic and pointed out the important role UNIDROIT had in this area.

40. A participant pointed out that an aim of provenance research was to clear the provenance of cultural objects. She reminded the participants that it was necessary to think about criteria that involved different disciplines.

41. The Chairperson summarized the different approaches to the topic and pointed out the need to narrow the definition in very precise terms and in a legal manner, so it could be agreed on an acceptable standard of provenance.

42. Ms Tassignon underlined the importance of provenance research, and pointed out that problems remained where provenance research was incomplete or gave no information at all.

43. A participant expressed consent even though there was always a sense of where and when these objects had been created. She said that if a researcher had an idea, where and when the objects was created, this could help to get information by communities or States where the objects originated from.

44. A participant suggested to categorize objects to then define different level of due diligence for these categories in order to move on in the discussion.

45. A participant from the trade questioned a couple of points: ICOM's rules were advising museums against the display of unprovenanced material, so they remained hidden; and ICOM could come up with a solution on how to collaborate with owners of cultural property in this regard. Combining the know-how and knowledge of the actors was seen as fundamental and breaking down the barriers between these worlds could be an advantage.

46. The Chairperson said that a minimum consensus on what provenance meant was needed in order to draft a definition. He asked to try to find out if the working group could get elements in order to arrive to certainty in legal documents and to propose in a later stage a kind of common ground that could be considered in this group. The two persons invited to work on this expressed consent with the previously said pointing out that it would be necessary to narrow down the research to important orphan objects.

47. Another participant agreed that provenance research for orphan cultural objects was more difficult than provenance research in general. Provenance research should in this regard be adapted. There was a need to focus on the important objects. The discussion should focus on the question of what an important object is and find criteria.

48. A participant from the art market recommended reading the White Paper on U.S. law by William Pearlstein⁸ especially when it came to cultural significance and its meaning. She read some parts of the document.

49. Another participant from the trade recalled the Ivory Act 2018 in the U.K.⁹ and explained the provisions and explanations in the guidelines/consultation¹⁰, and highlighted the problem of determining what was significant.

50. A participant referred to the priorities within the Repatriation Policy¹¹ from the Canadian Museum of History and noted that it might be useful. The Repatriation Policy prioritizes the return of human remains, grave goods, objects for ceremonial or ritual nature, and more.

51. A participant recalled the problem of defining orphan objects especially when looking at national policies or national patrimony laws.

(b) Legal status

52. The group did not refer to this point explicitly, but the topic was transversally discussed during the session. Ms Schneider stressed however that the aim of the project was not to *clean* any object tainted by illicitness, but that this point was linked to the purpose of the group, as some participants would like to put emphasis on “freeing” the orphan objects, for them to be more attractive to transactions, or for publications and research purposes.

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

53. The Chairperson reminded the importance of the due diligence mechanism, a very useful principle of UNIDROIT for stakeholders in the market. He proposed to incorporate due diligence in the reflections about orphan objects. Professor Renold agreed on speaking of due diligence in this field. He then added that Article 4(4) of 1995 UNIDROIT Convention gave a definition of due diligence on stolen objects. He raised the issue of the possible transposition of this definition of due diligence on orphan objects. Ms Schneider recalled that the Article 4(4) was not a proper definition but gave criteria to determine due diligence. The Chairperson expressed the need to think about unified criteria of due diligence on orphan objects, in order to develop one’s understanding of due diligence for orphan objects.

54. A representative of the art market stressed that he understood that objects were deemed orphan after due diligence was performed and nothing was found, without meaning the objects were necessarily illicit. However, this situation could lead to problems for the purchaser, for example it would be difficult for him to sell the item to museums because of ICOM’s requirements on due diligence to establish full provenance of the object since its discovery or origin. In his perspective, an object was orphan if museums would not acquire it because of its lack of full documentation.

⁸ William Pearlstein, *White Paper: A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, *Cardozo Arts & Entertainment Law Journal*; 2014, 32, 2.

⁹ <https://www.legislation.gov.uk/ukpga/2018/30/contents/enacted>

¹⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1017266/implementing-ivory-act-2018-summary-of-responses-government-response.pdf

¹¹ <https://www.historymuseum.ca/wp-content/uploads/2015/09/REPATRIATION-POLICY.pdf>

55. Regarding the definition of due diligence, Article 10 of the Directive 2014/60/EU¹² was then pointed out by a participant. Thus, it was indicated that the Directive was only about illegal export and not about theft, taking the definition in the UNIDROIT Convention on illegal export.

56. A participant from the trade expressed concern on the question of objects' importance, as less valuable items rarely had documentation compared to high value items. The question of how much time should be spent on provenance research for low value items was raised. Another participant agreed, and added that there were different levels of due diligence and importance of objects.

57. Professor Renold explained that among the list of criteria of due diligence of article 4(4) of the 1995 UNIDROIT Convention, "*the price paid*" to acquire the object was mentioned. If the item was low value, the level of due diligence would be different. One participant from the trade expressed her interpretation of Article 4(4) as this article was less about the value of the object *per se* but more about the circumstances of the acquisition, an unnatural price for an item being a red flag trigger for the purchaser.

58. An idea was then proposed by a participant to take the definition of UNIDROIT but to change the expression "characters of the person" by "features of the objects", reflecting previously raised concerns about due diligence. Another participant suggested the possibility for the group to propose a definition separate from UNIDROIT or UNESCO. She wanted the group to address low value cultural property as these objects were sometimes difficult to sell or to move freely from one country to another.

59. A participant pointed out her experience on artefacts becoming orphan objects because of the owner's lack of knowledge on their objects and their importance. She expressed that there should be no difference between due diligence for orphan objects and for normal objects, and that the Exploratory Expert Group should not define another type of due diligence for orphan objects at this stage. She also expressed the difficulty to define orphan objects as long as due diligence was not carried out. Another participant underlined that the due diligence should be carried out according to the object and its circumstances, independently of this object being orphan or not.

60. A participant from the museum sector added her perspective that orphan objects were existing because due diligence had been conducted and nothing was found. She then recalled that in ICOM, the same behaviour of due diligence was expected on all objects, independently of their value. It was explained that in the field of illicit trafficking of cultural property, the mass of little low value items encompassed the majority of the trafficked art.

61. Another participant approved that due diligence was a combination of criteria (Article 4(4) of the 1995 UNIDROIT Convention or Article 10 of EU Directive 2014/60/EU); provenance checks helped to find out if the object was orphan. He agreed that an object was orphan once the due diligence had been conducted, due diligence being related to behaviour.

62. The Chairperson summarised the general consensus among the participants. Firstly, it was agreed that the topic of due diligence should be discussed regarding orphan objects. Secondly, the group could discuss different kinds of due diligence depending on the value and the circumstances of the objects, and thus specific criteria could be developed for orphan objects.

¹² [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) Directive 2014/60/EU.

63. The representatives of the art market asked whether or not the same level of due diligence would have been required for different types of objects, whether it was acceptable or not to work on different levels of due diligence, and what level of due diligence was especially acceptable for items with few individual features. Ms Schneider recalled that Article 4(4) of the 1995 UNIDROIT Convention was not addressing one single level of due diligence for all objects but differed depending on the circumstances as due diligence was more a behaviour including searching and asking questions.

64. One participant circled back to the definition of UNIDROIT on due diligence, explaining the importance to have one definition of due diligence but stressing, on the other way, that the same standard was not applied for different types of objects in practice. The definition could be the same but regarding the last sentence of article 4(4) of 1995 UNIDROIT Convention saying “[...] whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances”, in practice collectors would use different criteria for different types of objects.

65. One participant from the trade pointed out that due diligence was an effort, in trying to find out information, without necessarily producing any result. She expressed concern about the expectations for purchasers to search stolen art databases for low value items, as it was not practical and not feasible. She insisted on the need for consensus on that issue and asked for this reflection to be added to the discussions. Professor Renold agreed and reminded that the meeting’s aim was to decide the subjects for the Exploratory Expert Group to work more on. Thus, it was agreed to continue the work on that point.

(d) Issues of proof

66. The Chairperson introduced the issue on proof, giving the floor to Ms Tassignon who recalled the collectors’ point of view on proof. The statement of reputable owners should be taken as proof, if they were well-known collectors or if the item was inherited from well-known collectors. Ms Schneider indicated that these elements would in any case be taken as an element of proof but expressed her concerns about taking it as a rule, as it was complicated to know which level of reputation could be legally required.

67. For representatives of the art market, any element should be acceptable as circumstances to be part of proof. One of the participants raised the issue of the objects which did not have sufficient documentation to be sold at certain places anymore, but were not illegally on the market, being already in circulation for a lot of years. She asked for a mechanism to promote transparency, in order to facilitate the collectors to state honestly the circumstances of the purchase of the object without the fear of a seizure. She thus gave examples of objects that had been bought in good faith but whose seller did not have a good reputation anymore according to today’s standards.

68. The Chairperson referred to the charge of proof and the carrier of this burden according to the 1995 UNIDROIT Convention. Collectors should prove that they had carried out due diligence. Ms Schneider added that this mechanism was working in terms of restitution.

(e) Databases

69. The Chairperson introduced the topic of the role of databases, explaining that the main concern was privacy. It was discussed whether or not it could be an obligation for an owner to put his orphan objects on a database, and whether or not it could show the owner’s name and the circumstances of the acquisition, as it was clearly against the concept of privacy in private law.

70. The representatives of the art market gave their point of view on this issue and indicated that databases should not disclose the owner's name, as it would be a risk for the owner to be targeted for theft. Information should be uploaded by a third party, a respected organisation, for example UNESCO, without putting any information about current localisation. Previous ownerships or localisations could be inserted. The participant added that there should be a mechanism of verification, to check if the owner was trying to clear an illicit provenance. Furthermore, she noted that if there was no claim on the orphan object after a certain period, the object should be cleared and available for sale. However, she expressed the need for clear parameters in regard to such claims. It was pointed out that databases were however very hard to manage, and that many obstacles had to be overcome.

71. Ms Tassignon underlined that databases were the easiest way to show the orphan objects, and queried what other way could be adopted to avoid these orphan objects to remain hidden. It was discussed if every dealer or collector who wished to publish could do this on his own database or whether the databases should be more organised. To Ms Tassignon, having different websites for different collectors would be difficult, a big database should be a better solution. There would be a duty of collectors to put the objects on this website, encouraging private collectors to show these orphan objects. Another participant added that, in any case, putting these orphan objects on their own website would be a loss of anonymity for collectors.

72. A participant raised the issue of the future of objects on the database. Ms Tassignon replied that some source countries could thus claim these objects, and that if not, the researchers could use these objects for research and studies. A participant asked whether the sale of these objects could be made possible after some time on the database, for them not to remain indefinitely online. Another participant recalled the equitable doctrine of laches used in New-York: if no one claimed an object after some amount of time on the database, the orphan object could be sold. A participant from the trade expressed the concern that an orphan object would stay an orphan even if the sale was made possible after some time on the database. Although he was in favour of the idea to implement a database, he wanted the purpose of the database to be clear, to find a mechanism to make these orphan objects buyable by museums.

73. The Chairperson said that, at this point, there were many perspectives on the issue of databases and the effects of this database. He indicated that the general minimum consensus at this stage was firstly that databases were important for orphan objects, but secondly that there were concerns about how to manage these databases.

74. A participant expressed her doubts about the idea that after an amount of time an object should be cleared. She also added that, even if she agreed in theory with the idea of a database, she wanted to highlight the complexity and the practical need of funds to implement and monitor a database. She raised the issue of the future of the objects put in the database known, and of who should be in charge of monitoring such a database and taking care of requests of restitution of objects in the database.

75. The consensus found at this stage was that databases were an important tool to consider for orphan objects and that the effects of databases had to be developed at further stages. Professor Renold concluded that it was difficult to come to a consensus on that point, some participants saw databases as complicated to set up. He proposed to continue thinking about databases, but to decide whether they were a part of the solution or not later.

(f) The return and restitution claims relating to orphan works

76. It was agreed that there was no need to revise the existing conventions. Actually, if an object, orphan or not, had been stolen or illegally exported, the existing mechanisms of the 1970 or 1995 Conventions would apply for States parties and could be used to return them.

77. A participant agreed that not all orphan objects needed to be returned, but only some categories of objects that were defined in the conventions. She expressed her wish to clarify which orphan object should be returned and underlined that the expectations were not to return them unless for specific reasons.

78. The participants agreed that there was already a legal framework for restitutions and returns and that lots of orphan objects were not illegally exported or stolen. A participant from the trade added that if an orphan object had been identified to be stolen or illegally exported, information existed about the object, and therefore it was not an orphan object anymore. Some of the participants then questioned the use of the word "*orphan*" to depict the object in that case, and Professor Renold proposed the expression "*partially*" orphan to be preferred in that case, as some information was already known about the object.

79. The Exploratory Working Group reached the consensus that it would not be appropriate to put the issues of restitution and return in the orphan objects discussions, as these issues were already covered by the 1970 and 1995 instruments.

80. The Chairperson then summarised the consensus of the participants on the point. All agreed that it was not necessary for the group to work on objects that are claimed for restitution or return and that already fall under the framework of the 1970 UNESCO and 1995 UNIDROIT Conventions, as legal tools were already existing.

(g) Limitation periods

81. The Chairperson introduced the topic on limitation periods by mentioning the provisions of the 1995 UNIDROIT Convention. Ms Schneider explained that the 1995 UNIDROIT Convention had limitation periods but relating to returns and restitutions. She underlined that the limitation periods addressed by the Exploratory Expert Group would be related to the possible creation of a database, and to the period during which an object should be on the database. Professor Renold also expressed the need for the determination of a clear period of time in case of the publication of the orphan object.

82. A participant asked whether under the 1995 UNIDROIT Convention, the appearance of an object on the database of orphan objects would count as being covered by the sentence "*the possessor neither knew nor ought reasonably to have known*" in Article 4.1¹³. Ms Schneider replied that within the context of the Convention, it would depend on whether this platform was known, the answer would also depend on the parties' status, as a professional should be aware of the database's existence.

¹³ Article 4(1) of the 1995 UNIDROIT Convention: "The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object."

83. A participant then raised the question of whether there was some kind of due diligence for the dispossessed owner to check on an orphan objects database during the limitation period. It was indicated that good behaviour must be all chain's responsibility: the purchaser had to ask, but the victim had to report for thefts and look for the stolen object.

84. A participant from the trade inquired how long an item should be on this "platform" before it would be safe to sell or to move on. As it would depend on how well-known the platform was, on the purpose of this database, and under which authority this platform would be, she proposed that the platform could be managed by an international organisation. She expressed concerns that there would still be conflicts with national laws and their definition of cultural property. She indicated that it should be the potential claimants' duty to look at this platform.

85. Another participant from the trade added that after a certain period, museums could be more willing to acquire these orphan objects, to take the risk even if there was no provenance, as there would probably be no ownership claims anymore.

86. A participant from the trade proposed the use of another term than the legal term "*limitation periods*", which could be confused with limitation periods in different countries under different circumstances and different legal jurisdictions, as it was not a legal process which was dealt with here. Professor Renold proposed the term "*duration*" and suggested that the group could continue to work on that issue. It was then concluded that all participants agreed that limitations periods were a topic to consider in the discussions.

87. A question was raised concerning the work to be done on the categorisation of objects for the purpose of provenance, whether there should be work on parameters to evaluate the level and the kind of provenance expected for cultural property and which categories of cultural property, because the level of importance of an object was a key element before determining if the object was orphan or not. It was indicated that the reflection was going back to the definition of an orphan object, and that in front of a cultural object it was necessary to carry out due diligence. The provenance research carried out would at some stage determine whether the object had to be considered as an orphan object or not.

88. The Chairperson concluded by saying that the main question was the importance of orphan objects in different perspectives. He underlined that all the issues were intertwined. To define the importance of an orphan object it was necessary to evaluate the circumstances of due diligence. The question was also how to evaluate if an object was orphan, and this could be achieved by establishing fixed criteria to evaluate the importance of orphan objects. Thus, it would be possible for the group to move forward and to evaluate due diligence and the circumstances, depending on the cultural importance of the orphan object.

89. A participant from the trade read the definition of due diligence of the ICOM Code of Ethics for Museums: "*Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item since discovery or production.*"¹⁴ She gave her point of view of this definition, explaining that to her, the bar was set very high to have an object with clear provenance and not orphan according to this definition. She noticed that in the group's works, setting a lower bar would be in contradiction with the museums'

¹⁴ Point 2.3 of ICOM Code of Ethics, available here: [ICOM-code-En-web.pdf](#).

standards of acquisition. Thus, she expressed that further interaction between the museum and the commercial sector should be taken into account.

90. A participant from the museum field expressed her surprise to hear that museum standards were too high on provenance questions. She recalled the aim of a Code of Ethics: to be a code of standards and to drive its members in the right way concerning acquisitions of objects. ICOM wanted to push its members for a complete due diligence and provenance search, but the right realisation of this purpose would depend on the circumstances, as not as much time could be spent for little items, but the bare minimum should be done for any item. She concluded by stating that she would be glad to work with the art market and to share their ways.

91. Another participant emphasised that this discussion about orphan objects had a real purpose. She explained that orphan objects were very important for many fields like art history, and must be cleaned. However, above all she felt that the aim of talking about orphan objects was to find a way to keep these objects in the picture and allow them to remain accessible to everybody.

92. A participant from the trade expressed once again her wish to cooperate with museums for this subject of orphan objects. She expressed her regret at what she considered a lack of talking from the museums, and their fear of the trade, as they would need help at this stage for the object's background. She wished the bridge between museums and trade to be crossed and to encourage the conversations between trade and museums.

V. Composition of the future Working Group, procedure for future work and timetable

93. The Chairperson noted that the composition of the Working Group had to be established, subject to the decision of the Governing Council of UNIDROIT, and expressed the need to incorporate Asia, Islamic countries, the United States of America, etc. into the composition of the Working Group.

94. The Secretariat also stressed that the Working Group will be composed of full members (possibly not more than 10) as well as observers to bring the largest possible expertise to the work. The Secretariat would nominate the members and participants were invited to make proposals. It was also indicated that the formal Working Group would probably not meet before the end of 2023 or early 2024.

V. Other business

95. No other issue was raised and the Chairperson thanked all the participants for their active participation in the meeting, in person or online, and closed the session.

ANNEXE I

List of participants

- **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) (online)
- **Ms Sophie Delepierre**, Head of Heritage Protection Department, International Council of Museums (ICOM) (online)
- **Mr Mark Dodgson**, International Confederation of Art & Antique Dealer Associations (CINOA), Secretary General of the British Antique Dealers' Association (BADA), United Kingdom (in presence)
- **Mr Manlio Frigo**, Professor of international law, Università degli Studi di Milano, Milan (online)
- **Ms Giuditta Giardini**, Lawyer and consultant, Antiquities Trafficking Unit, Manhattan District Attorney's Office (in presence)
- **Ms Corinne Hershkovitch**, Avocate à la Cour, Paris (online)
- **Ms Joanna van der Lande**, Chair Antiquities Dealers Association, United Kingdom (in presence)
- **Mr Amnon Lehavi**, Atara Kaufman Professor of Law, Academic Director, G City Real Estate Institute, Harry Radzyner Law School, Reichman University (IDC Herzliya) (in presence)
- **Mr John Moses**, Director, Policy and Government Relations, Indigenous Portfolio, Canadian Museum of History (online)
- **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 (online)
- **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 (online)
- **Ms Marie-Page Phelps**, former Registrar in a museum in the USA (online)
- **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 (in presence)
- **Ms Isabelle Tassignon**, Curator, Archaeology and Ethnology Collections, Fondation Gandur pour l'Art, Geneva (in presence)
- **Ms Ana Vrdoljak**, Professor, Law Faculty, University of Technology, Sydney, Australia, Chairperson of the International Cultural Property Society (online)
- **Ms Marina Schneider**, Principal Legal Officer and Treaty Depositary, UNIDROIT (in presence)
- **Ms Priscila Pereira de Andrade**, Principal Legal Officer, UNIDROIT (in presence)

- **Lorenzo Venezia**, UNIDROIT intern (in presence)
- **Salomé Pluvinage**, UNIDROIT intern (in presence).

ANNEXE II**AGENDA**

1. Introductory remarks
2. Adoption of the draft agenda
3. Reports of subgroup(s)
 - (a) Definition(s)
 - (b) Collectors
4. Round table discussion on
 - (a) The role of provenance research
 - (b) The legal status of orphan works in art collections, private or public
 - (c) The due diligence required when acquiring an orphan work
 - (d) Issues of proof
 - (e) Databases
 - (f) The return and restitution claims relating to orphan works
 - (g) Limitation periods
5. Composition of the future Working Group, procedure for future work and timetable
6. Other business