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**Item No. 4 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 the Private Art Collections project</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the activities carried out by the Secretariat and progress made by the recently established Working Group</i>
<i>Mandate</i>	<i>Work Programmes 2020-2022 and 2023-2025</i>
<i>Priority level</i>	<i>Medium</i>
<i>Related documents</i>	<a href="#">UNIDROIT 2022 – C.D. (101) 21</a> ; <a href="#">UNIDROIT 2022 – A.G. (81) 9</a> ; <a href="#">UNIDROIT 2023 – C.D. (102) 25</a> ; <a href="#">UNIDROIT 2023 – A.G. (82) 11</a>

**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 102<sup>nd</sup> session of the Council in May 2023. It briefly recalls the background of the project (Section II), provides information on the recently established Working Group (Section III), describes the proposed scope and content of the project (Section IV), and proposes next steps for the development of the project (Section V).

**II. BACKGROUND**

2. The UNIDROIT General Assembly initially approved work in the area of Private Art Collections for the 2017-2019 triennial Work Programme.<sup>1</sup> Since then, research has been conducted in the following thematic areas: (i) definition of public and private collections and collectors; (ii) comparative analysis of national legislation (France, Italy and the United States of America) basing the public protection of private collections on the concept of public interest; (iii) status of private collections in European and international law; (iv) public interest in the protection of cultural heritage in private collections under United States law (California, Massachusetts, New York); and

<sup>1</sup> See [UNIDROIT 2016 – A.G. \(75\) 8](#), following a proposal by the Permanent Mission of Mexico to the International Organisations with Seat in Rome transmitted to the UNIDROIT Secretariat.

(v) private collections in Mexico and Colombia. Additionally, over the past several years, UNIDROIT has hosted and participated in a number of conferences,<sup>2</sup> as well as coordinated studies<sup>3</sup> to further clarify the private law aspects on which UNIDROIT's particular expertise would be of additional benefit in this field.

3. The UNIDROIT Secretariat identified orphan cultural objects as one topic in particular 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 UNIDROIT Private Art Collections project. The above-mentioned topics are 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 so-called orphan objects, in other words cultural property with no proven provenance or with significant gaps in provenance, are the source of many legal, ethical, archaeological and historical questions. The questions that would merit further consideration in the project would, among others, include what should be done with works without archives, especially when their holders wish to sell or lend them. Not infrequently collectors and dealers prefer to avoid potential problems by resorting to more discreet solutions, primarily private sales, which encourage the clandestine market and result in a lack of transparency, detrimental to the preservation of objects and the industry as a whole.

5. The research conducted between 2017 and 2022 contributed towards the General Assembly's decision to maintain the Private Art Collections project in the 2023-2025 Work Programme. It was decided that this project would be undertaken by UNIDROIT with the financial support of the *Fondation Gandur pour l'Art* and in partnership with the Art-Law Centre of the University of Geneva.<sup>4</sup>

6. Following this decision, an Exploratory Expert Group<sup>5</sup> was established to delve into the complexities surrounding orphan cultural objects. Among the issues discussed by the Exploratory

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<sup>2</sup> A number of conferences were organised by UNIDROIT in cooperation with partners of the 1995 UNIDROIT Convention Academic Project ([UCAP](#)). For example, in March 2017, UNIDROIT hosted a conference in Rome with the International Society of Research on Art and Cultural Heritage Law (ISCHAL), the *Institut des sciences sociales du politique* (CNRS-ENS Cachan-Université Paris-Nanterre), and the BonelliErede law firm on "[Private collections - Historical and legal approaches](#)". In 2019, a conference organised by the University of Opole (UNESCO Chair in Cultural Property Law), the University of Gdansk, and UNIDROIT devoted a specific session to Private Art Collections 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. In February 2021, UNIDROIT organised a colloquium with the University of Geneva and the *Fondation Gandur pour l'Art* in Geneva, entitled "[What prospects for 'orphan works'? Reflections on cultural goods with no provenance](#)". 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 and a conference on "Culture and Law" organised by the International Academy of Comparative Law and the *Centro Mexicano de Derecho Uniforme* in Mexico City.

<sup>3</sup> Professor Elina Moustaira (Professor of Comparative Law, National and Kapodistrian University of Athens) prepared a study which was submitted to the UNIDROIT Governing Council in 2017 ([UNIDROIT 2017 – C.D. \(96\) 9](#), Annexe II, p.10).

<sup>4</sup> [UNIDROIT 2022 – A.G. \(81\) 9](#), para. 56.

<sup>5</sup> The Exploratory Expert Group was composed of: Ms Sophie Delepierre (Head of Heritage Protection Department, International Council of Museums); 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 Herskovitch (*Avocate à la Cour*, Paris); Ms Joanna van der Lande (Chair, Antiquities Dealers' 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 Papatthanassiou (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, University of Geneva, UNESCO Chair in International Law on the Protection of Cultural Property, and Director of Art-Law Centre of the University

Working Group were (i) questions related to definitions, such as whether the term “orphan work” was suitable or whether an alternative to the term “orphan” should be used (e.g., “unprovenanced”, “of unknown provenance”, “object with problematic provenance”); or (ii) the link between due diligence and provenance (Article 4 of the 1995 UNIDROIT Convention). The summary reports of the meetings held by the Exploratory Expert Group and information on all the other topics discussed are available on the Private Art Collections project’s dedicated [webpage](#).

7. During the last session of the Governing Council, the Secretariat presented the Memorandum of Understanding (MoU) that was signed with the Art-Law Centre of the University of Geneva and the *Fondation Gandur pour l’Art*, and experts of the Exploratory Expert Group further explained that one of the goals of the project was to enhance legal certainty in the market by defining the concept of orphan objects and also by defining – to the extent possible – their legal regime, in particular in connection with the diligence of the owner.<sup>6</sup>

### III. THE WORKING GROUP

#### A. Composition

8. The Working Group on Private Art Collections is chaired by Governing Council Member Dr Jorge Sánchez Cordero and is for the time being composed of eight members,<sup>7</sup> as well as institutional observers, such as UNESCO, the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), the International Council of Museums (ICOM), *Conseil des Maisons de Vente* (CMV), the International Confederation of Art and Antique Dealers’ Associations (CINOA), and the Canadian Museum of History.

9. The *Fondation Gandur pour l’Art* and the Art-Law Centre of the University of Geneva are partners in the project and are represented in the Working Group by Ms Isabelle Tassignon and Professor Marc-André Renold, respectively.

#### B. First session of Working Group (2-3 May 2024)

10. The first session of the Working Group is scheduled to take place on 2 and 3 May 2024, the week before the 103<sup>rd</sup> session of the UNIDROIT Governing Council. It is expected that around 20 participants will join the first session. Among the topics that will be discussed are (i) the relationship of the Private Art Collections project with existing international initiatives; (ii) the scope of the project; (iii) the content of the project; (iv) case studies which illustrate the difficulties encountered with orphan objects; (v) the development of guidelines and procedures which would enable possible claims related to orphan objects and which would enhance confidence and integrity within the art market; and (vi) cross-cutting topics with the 1995 UNIDROIT Convention.

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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 and Chairperson of the International Cultural Property Society).

<sup>6</sup> [UNIDROIT 2023 – C.D. \(102\) 25](#).

<sup>7</sup> The Working Group is composed of the following members: Ms Corinne Hershkovitch, Lawyer, France; Mr Keun-Gwan Lee, Professor, Republic of Korea; Mr Amnon Lehavi, Professor, Israel; Mr Till Vere-Hodge, Barrister-at-Law, United Kingdom; Mr Eric Cottier, former magistrate, Switzerland; Ms Joanna van der Lande, Antiquities Dealers’ Association, United Kingdom; and Mr Marcilio Toscano Franca Filho, Professor (Federal University of Paraíba), Brazil.

#### **IV. SCOPE AND CONTENT OF THE PROJECT**

11. The project will focus on orphan cultural objects and key issues associated with these assets, which may include: (i) their limited access and use; (ii) the risk of legal disputes; (iii) loss of cultural memory; (iv) barriers to preservation and conservation; and (v) problems of restitution and historical reparation.

12. Acknowledging the pivotal role of provenance research in the fulfilment of the due diligence, the scope of the project will be to draft guidelines for “satisfactory provenance”. Two types of orphan works will be taken into account:

- objects with no archives, of which the former presence in collections has yet to be proven; and
- objects with archives that turn out to be inauthentic and thus become orphans, placing their owners/holders in a difficult situation.

13. It is therefore understood that doubtful provenance is an obstacle to the objects’ circulation. The subtlety is to distinguish between orphaned objects and objects with problematic provenance. It is envisaged that the analysis will start with orphan objects, and after it will be extended to objects with problematic provenance.

14. The 1995 UNIDROIT Convention refers to due diligence at the time of acquisition, and it places the responsibility (the burden of proof) on buyers. In this framework, the Working Group can delineate responsibilities and the importance of due diligence, proposing a nuanced approach that categorises the different actors involved based on their expertise and type of involvement in the art market. Additionally, central to the reflection is the objective of enhancing the circulation of cultural objects on the market by addressing provenance concerns, while also emphasising the need for fair and equitable solutions inspired by established models such as the 1998 [Washington Principles on Nazi-Confiscated Art](#).

#### **V. PROPOSED NEXT STEPS**

15. It is proposed that one more session of the Working Group be held in 2024. The dates for the second session of the Working Group are still to be determined. Intersessional work, including through the constitution of thematic sub-groups, may also be established to advance the development of the project.

#### **VI. ACTION TO BE TAKEN**

16. *The Governing Council is invited to take note of the activities carried out by the Secretariat and progress made by the recently established Working Group.*