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Item No. 4 on the agenda: Ongoing legislative activities carried over from prior Work Programmes

(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 the progress made by the 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>	<u>UNIDROIT 2022 – A.G. (81) 9</u> ; <u>UNIDROIT 2024 – C.D. (103) 7</u> ; <u>UNIDROIT 2024 – Study LXXB – W.G.1 – Doc. 2</u> ; <u>UNIDROIT 2025 – Study LXXB – W.G.2 – Doc. 5</u>

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 103rd session of the Council in May 2024. It briefly recalls the background of the project (Section II), provides information on the Working Group, describing the ongoing discussion of the scope and content of the project (Section III), and proposes next steps for its development (Section IV).

II. BACKGROUND

2. Private Art Collections were included in the Work Programme of the triennium 2017-2019 following the recommendation of the Governing Council at its 95th Session and the resolution of the General Assembly at its 75th session (1 December 2016). The research and preparatory work conducted between 2017 and 2022 contributed to the General Assembly's decision to maintain the Private Art Collections project in the 2023-2025 Work Programme. In 2022, the UNIDROIT Secretariat identified orphan cultural objects – objects with no or incomplete provenance – 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.

3. It was decided that this project would be undertaken by UNIDROIT in partnership with the Art-Law Centre of the University of Geneva and with the financial support of the *Fondation Gandur pour l'Art*. In light of this, the project was upgraded to medium priority,¹ and the Secretariat was authorised to continue exploratory work and to convene a Working Group to develop a normative instrument. A more detailed background of the project (including the first session of the Working Group held in May 2024) can be found in the document on the Private Art Collections project submitted for the 103rd session of the Governing Council.²

III. THE ACTIVITY OF THE WORKING GROUP SINCE THE 103RD SESSION OF THE GOVERNING COUNCIL

A. Second session of Working Group (11-13 December 2024)

4. The second session of the Working Group was held in a hybrid format at the seat of UNIDROIT in Rome from 11 to 13 December 2024. Two new members were welcomed: Ms Patty Gerstenblith, Distinguished Research Professor and Director of the Center for Art, Museum and Cultural Heritage Law at DePaul University College of Law, and Ms Zhang Jianhong, Professor of Archives at the Palace Museum, in Beijing (China).

5. During this session, discussions focused on the various types of orphan cultural objects and the preliminary draft guidelines structured around key components: Definition, Applicable Law, Provenance, Due Diligence, Burden of Proof, and a possible “clearing” procedure for orphan objects.³

6. In light of the diverging views expressed at the Working Group over several topics, with special regard to the inclusion of a “clearing” procedure, Sub-groups were formed at the end of the session, mainly to discuss the different topics and work on advancing an alternative proposal as well as to refine the text of the black-letter rules and enhance the commentary.

B. Third session of Working Group (17-19 March 2025)

7. The third session of the Working Group took place in hybrid format from 17 to 19 March 2025. Discussions mainly focused on due diligence and provenance research for objects for which information was incomplete or non-existent, as well as on the rest of the drafting proposals for the Guidelines submitted by the Sub-groups formed after the second session of the Working Group (December 2024). Each Guideline had its own drafting Sub-group, composed of members and observers, according to their expertise.⁴

8. Some substantive issues covered during the session are presented here for discussion with the Governing Council.

1. “Orphan”, “unprovenanced” objects or “insufficiently provenanced”?

9. The very use of the concept “orphan object” was the object of a thorough discussion. Different perspectives on the expression “orphan cultural objects” were presented. On one hand, some

¹ [UNIDROIT 2022 – A.G. \(81\) 9](#), para. 56. The reason why the Project was only upgraded to medium priority – instead of high priority – notwithstanding the authorisation to convene a Working Group is because the cost of the project would be halved due to the envisaged cooperation with the *Fondation Gandur pour l'Art*.

² [UNIDROIT 2024 – C.D. \(103\) 7](#), paras 2-7.

³ [UNIDROIT 2025 – Study LXXB – W.G.2 – Doc. 5](#).

⁴ [UNIDROIT 2025 – Study LXXB – W.G.3 – Doc. 2](#).

participants were of the opinion that the term could lead to confusion, as it already had established meanings in other legal fields, such as “orphan works” in intellectual property law (works that are still protected by copyright, but with authors or other right holders who are not known or cannot be located) as well as in the field of archaeology (fragmentary archaeological objects), where the implications were fundamentally different from those being proposed here. For these reasons, the potential negative implications (at both the national and the international level) of introducing a new legal meaning for the concept were highlighted, and the terms “unprovenanced” or “undocumented” objects were proposed as alternatives, referring, by way of support, to the Code of Ethics of the International Council of Museums.⁵

10. Conversely, some participants expressed support for retaining the term “orphan objects” because of its strong potential to raise awareness about the importance of the issue at hand, with the possibility of using the terms “unprovenanced” or “undocumented” works in a subtitle. However, caution was urged against framing the issue too simplistically, as neither “provenanced” nor “unprovenanced” embodied the very complicated situation facing private collectors, dealers, and auction houses. Other experts proposed the use of “insufficiently provenanced”, as it would accurately reflect the types of objects under discussion, and would address fears that the use of the term “unprovenanced” would exclude objects with partial provenance. However, no legal convention or clear legal standard yet defines what constitutes a “sufficiently provenanced” object. The question remains open for discussion at the next Working Group session.

2. Categorisation of “orphan objects”

11. The types of objects covered by the scope of the project and their categorisation are matters still under discussion. Concern was expressed regarding the scope of this categorisation and whether this instrument would apply indiscriminately to all cultural objects, as some cultural objects – especially sensitive categories such as archaeological and Indigenous objects – would require specific attention and care. It was highlighted that the criteria of the objects’ categorisation could be based on their financial value, their cultural value, or even their period in art history. No consensus has yet been reached concerning the inclusion (or not) of archaeological objects in this categorisation.

12. Moreover, it was apparent to the Working Group that the identification of the types of objects concerned would also frame the scope of provenance research and due diligence (*i.e.*, determination of the types of objects subject to provenance research, the proportionality of the research, persons qualified to conduct such research, and how far back in time this research should extend).

3. From a “clearing” procedure to a “publicising” procedure

13. The project initially focused on offering a response to the legal status, the circulation on the market, and the provenance research that orphan cultural objects should be subject to. This discussion addressed five key issues: their limited access and use; the risk of legal disputes; the loss of cultural memory; the barriers to preservation and conservation; and problems of restitution and historical reparation. Moreover, the project aimed to highlight the important difference between orphaned objects and objects with problematic provenance. A “clearing” procedure of orphan cultural objects was proposed in the first session of the Working Group, with the aim of allowing objects to obtain legal title after a certain period of time had passed without a claim having been presented. However, some participants pointed out that the “clearing” procedure might give the impression of “laundering” the acquisition of this type of objects and would negatively affect claimants’ rights and further potential claims, as this procedure could be imposed upon them.

⁵ Section 2.11 of the [ICOM Code of Ethics for Museums](#), 8 October 2004, states: “2.11 Repositories of Last Resort: Nothing in this Code of Ethics should prevent a museum from acting as an authorised repository for unprovenanced, illicitly collected or recovered specimens or objects from the territory over which it has lawful responsibility.”

14. Because of the lack of consensus on a “clearing” procedure, an alternative process emerged from the participants’ discussion: publicising objects with no or incomplete provenance on a specifically-designed online electronic platform. Through this mechanism, visibility of these objects would be provided to professionals of the sector as well as the general public, including the provision of additional provenance information, so that potential claimants would be made aware and could act according to their rights. Based on transparency and wide accessibility, this procedure would be one example of the exercise of provenance research and due diligence. The exact target audience of this procedure is still to be determined by the Working Group (*i.e.*, both private/public cultural institutions and private collectors, or only private collectors).

4. The structure of the procedure

15. The structure and form of the virtual platform listing orphan cultural objects was discussed, and several options were considered, including a database, a platform or a website, or a combination of the foregoing. The database would support the structured storage of large volumes of objects, organised through a grid of consistent fields and categories. In contrast, a platform or a website would host a limited number of objects directly posted in simpler formats. The platform option drew a lot of interest among the Working Group’s participants, and it was proposed that this platform could host a registry. Naturally, the technical form of the instrument was left fully open for discussion, and consultations would be held in order to determine the best IT option.

16. The Working Group discussed how UNIDROIT’s experience with registries in other fields⁶ might be useful (either a “notice-based” registry that would not involve vetting of the information presented for registration and without legal effect, or a formal registry with expert vetting, which could carry stronger legal implications as well as considerable costs). The discussion also touched upon the fact that the registry would need to be fee-based, but could be not-for-profit and financially self-sufficient. The possibility to include an international advisory committee to ensure enhanced integrity, credibility, and legitimacy of the platform hosting the registry was also envisaged.

5. The remaining key issues

17. The articulation of due diligence and provenance research has been the subject of multiple discussions, especially as to how these concepts are interlinked. This soft-law instrument aims to reflect that provenance research is a part of the exercise of due diligence. Article 4.4 of the 1995 UNIDROIT Convention is focused on acquisition and transaction and only partially refers to provenance research. In fact, it does cover aspects thereof, such as consultation of registers of stolen objects or other documentation, which relates to the process of provenance research.

18. The status of persons qualified to conduct provenance research has also been discussed – whether it should be a provenance researcher or a recognised expert in the field, and whether a non-exhaustive list of “official” provenance researchers should be incorporated in the Guidelines. The absence of an official definition of provenance researchers’ qualifications or an official methodology of provenance research reinforces the complexity of setting the obligation to conduct provenance research and how it should be performed. The proportionality of the necessity of conducting provenance research and its extent, with regard to the value of the object in question, was also a key issue debated, again without full consensus. Finally, how far the provenance research should go back in the object’s history and the possibility of validating the research were also underlined as important remaining key issues in setting best practices. Although good progress was made, the discussion on these topics remains open for further discussion in the next Working Group session and intersessional preparatory work.

⁶ [Best Practices in the Field of Electronic Registry Design and Operation](#), Cape Town Convention Academic Project, August 2021.

IV. PROPOSED NEXT STEPS

19. There was consensus that the Working Group would benefit from enhanced geographical diversity as well as from expertise in additional areas of work related to orphan/unprovenanced objects. Hence, Working Group members were requested to submit proposals of names of possible representatives of Indigenous communities as well as experienced provenance researchers.

20. Intersessional work is scheduled to take place within the Sub-groups in order to advance the development of the project. The Secretariat will also organise thematic workshops, such as on the methodology of provenance research, the status of provenance researchers, and the categorisation of objects, and new members will be invited to attend the workshop sessions.

21. It is proposed that the next session of the Working Group be held in November 2025 (dates to be determined).

V. ACTION TO BE TAKEN

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