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Ratification of the 1995 UNIDROIT Convention in Poland: Pipe dream or realistic prospect?

1. Introduction

Cultural objects have had a crucial meaning for mankind throughout history. Even nowadays, each nation is aware of the need to safeguard cultural property that is part of a common heritage. Cultural artefacts are widely considered not only to be a kind of manifestation of intellectual creativity, but also as having some specific attributes. Furthermore, those cultural goods have a certain aesthetic and spiritual value. Historically, spoliation of cultural objects and destruction of cultural property by enemies have been widespread in times of war. Such actions had several purposes; for instance spoliation meant taking property as trophies and had the aim of humiliating an enemy.¹ Even nowadays, we have to deal with the theft and illicit export of cultural goods. The 1995 UNIDROIT Convention on Stolen or Illicitly Exported Cultural Objects (hereinafter: the 1995 UNIDROIT Convention) provides some legal measures that are significant in relation to the restitution or return of cultural objects. This legal act is widely considered to be supplementary to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter: the 1970 UNESCO Convention). Poland ratified the latter convention on 31 January 1974. The aim of this article is, thus, to consider whether a ratification of the 1995 UNIDROIT Convention in Poland is a pipe dream or a realistic prospect. In order to give an answer to this question, the article focuses primarily on the significance of the 1995 UNIDROIT Convention in cultural heritage law. Further, it considers its scope of application (*ratione materiae*). Finally, it draws conclusions about the perspectives for the ratification of the 1995 UNIDROIT Convention in Poland.

¹ A. Taşdelen, *The Return of Cultural Artefacts*, Cham 2016, p. 1.

2. The significance of the 1995 UNIDROIT Convention for cultural heritage law

It is noteworthy that the 1995 UNIDROIT Convention entered into force on 1 July 1998. This was the first time that the International Institute for the Unification of Private Law (UNIDROIT) adopted a convention regarding cultural heritage issues.² The 1995 UNIDROIT Convention had the aim of harmonising the whole range of private law topics that had been already touched upon in the 1970 UNESCO Convention. The 1995 UNIDROIT Convention was also approved by UNESCO. Overall, the 1995 UNIDROIT Convention is widely considered to be a uniform law that was adopted in order to challenge weaknesses in the 1970 UNESCO Convention. Hence, the key issue concerns the need to simplify both the restitution of stolen cultural objects and the return of those cultural objects that have been found in the hands of private owners.³

The 1995 UNIDROIT Convention is widely considered to be complementary to the 1970 UNESCO Convention. The latter is recognised as the first international instrument setting forth provisions concerning the protection of cultural heritage. The 1970 UNESCO Convention includes measures that are indispensable in order to prevent and prohibit both the illicit import, export, and transfer of ownership of cultural goods. One could even outline the “three pillars” of the 1970 UNESCO Convention. Hence, the first pillar is based upon preventive measures pertaining to national legislation. Those measures have the aim of combatting illegal trafficking in cultural goods. The second pillar refers to the restitution of cultural properties and the third concerns cooperation in this field between state parties.⁴ Although the 1970 UNESCO Convention was the first such international instrument providing measures against illicit trafficking in cultural property, the international community realised the need to complement those provisions. Because of shortcomings in the 1970 UNESCO Convention, in particular the lack of solutions applicable to private law issues concerning the ownership of cultural property, UNESCO addressed a request to the International Institute for the Unification of Private Law (UNIDROIT) to prepare a draft of a parallel convention. As a result of this action, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was drafted and then opened for signature on 24 June 1995. The Convention came into force on 1 July 1998 and to date there are forty-eight contracting states.⁵

² L. Prott, “The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On”, *Revue de droit uniforme* 2009, vol. 14, issue 1–2, p. 215.

³ S. Vigneron, “Protecting Cultural Objects: Enforcing the Illicit Export of Foreign Cultural Objects” [in:] *Art, Cultural Heritage and the Market*, eds. V. Vadi, H. Schneider, Berlin – Heidelberg 2014, p. 127.

⁴ M. Schneider, “The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive”, *Santander Art and Culture Law Review* 2016, no. 2, pp. 150–151.

⁵ C. Forrest, “Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage”, *Melbourne Journal of International Law* 2003, vol. 4, p. 592 ff.; cf. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome 1995) – Status, <https://www.unidroit.org/status-cp> (accessed: 28.11.2020).

It is noteworthy that both the 1970 UNESCO Convention and the 1995 UNIDROIT Convention have the aim to curb the illicit trade in cultural goods. Both of these conventions are non-retroactive; thus, they are applicable only between State Parties. Furthermore, both conventions consist of regulations regarding objects of illicit provenance, that is, as a result of theft or illicit export.⁶

The 1995 UNIDROIT Convention, as a new instrument, not only underpins the provisions included in the 1970 UNESCO Convention, but also supplements them. Therefore, this convention contains some minimum legal rules and measures applicable in relation to the restitution or return of cultural goods. Both – the 1970 Convention and the 1995 UNIDROIT Convention are, simultaneously, compatible with and complementary to each other.⁷ Hence, the 1995 UNIDROIT Convention has the aim of dealing with the weaknesses of the 1970 UNESCO Convention in relation to the restitution of cultural objects. In both its scope and provisions, the 1995 UNIDROIT Convention is clear and transparent. It consists of rules and principles applicable in relation to the restitution or return of cultural objects that have been stolen or illegally exported. Overall, this convention was adopted in order to reduce illegal trafficking in cultural objects in the future. All these international instruments aim to influence the conduct of all participants in the art market.⁸ In comparison with the 1970 UNESCO Convention, the 1995 UNIDROIT Convention pays substantial attention to the recovery phase, providing some uniform rules and conditions concerning both restitution claims relating to stolen cultural objects and return claims relating to illegally exported cultural objects.⁹

One must note that the 1995 UNIDROIT Convention contains two essential principles that are of some significance from the perspective of cultural heritage law. The first is the principle of restitution of stolen cultural objects, and the second is the principle of the return of cultural objects that have been illicitly exported. Nonetheless, it should be stressed that both principles are controversial and, consequently, constitute challenging legal issues.¹⁰ The restitution of cultural objects should be understood as a process of handing back cultural objects in the event of spoliation during wartime or of theft. The restitution of cultural goods is a result of an unlawful situation. Return, however, may relate to a piece of cultural property removed by a colonial power or to something that has been illicitly exported.¹¹

⁶ UNESCO and UNIDROIT – Cooperation in the Fight Against Illicit Traffic in Cultural Property, Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 2005, UNESCO Headquarters, Paris, p. 1, <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/information%20note.pdf> (accessed: 26.11.2020).

⁷ The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – an overview, <https://www.unidroit.org/overviecp/english> (accessed: 28.11.2020).

⁸ M. Schneider, "The 1995 UNIDROIT Convention...", p. 154.

⁹ UNESCO and UNIDROIT – Cooperation..., p. 3.

¹⁰ W.W. Kowalski, "Droga do Konwencji UNIDROIT z 1995 roku oraz jej podstawowe rozwiązania", *Santander Art and Culture Law Review* 2015, no. 1, p. 68.

¹¹ M. Cornu, M.A. Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution", *International Journal of Cultural Property* 2010, vol. 17, p. 2.

3. The 1995 UNIDROIT Convention: Scope of application

It is noteworthy that both the 1970 UNESCO Convention and the 1995 UNIDROIT Convention contains the same definition of cultural property, including the categories of cultural objects that they seek to protect. Hence, these two conventions can work together. This means that each country can ratify both conventions to guarantee better and more complex protection of cultural objects against unlawful actions. In fact, the 1995 UNIDROIT Convention is complementary to the 1970 UNESCO Convention. However, even if these two international treaties adopt the same categories of cultural objects, there is a significant difference in the way in which they apply them. Pursuant to the provisions of the 1970 UNESCO Convention, the state is required to “designate” which cultural objects should be returned. In other words, the 1970 UNESCO Convention provides some legal measures applicable in the event of cultural objects being stolen from a museum, a religious or secular public monument, or any other institution having documentation of such objects in their inventories.

On the other hand, the 1970 UNESCO Convention does not contain any provisions applicable in the event of cultural objects that are not included in public inventories being the subject of unlawful actions. In other words, the procedure of restitution or return of cultural objects belonging to private owners is much more complicated, because they are not “designated” by the State. This loophole has been filled by the 1995 UNIDROIT Convention. As a result, private owners also have a right to take legal measures in order to retrieve cultural objects. Despite the fact that those cultural objects are neither registered nor “designated” as such by the State, but are part of private collections, are held in private homes, or any kind of religious building, or are held in private collections or by traditional communities, the 1995 UNIDROIT Convention provides some legal measures in order to claim back those cultural objects.¹² Furthermore, cultural goods that have been excavated, either unlawfully or even lawfully, but retained contrary to law, are assumed to be stolen (art. 3(2) of the 1995 UNIDROIT Convention). In comparison with the 1970 UNESCO Convention, the 1995 UNIDROIT Convention applies equally to archaeological artefacts that have been taken from excavations. Hence, the 1995 UNIDROIT Convention makes up for the shortcomings of the earlier Convention.¹³

In relation to restitution or return, a claim “may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States”, according to art. 8(1) of the 1995 UNIDROIT Convention; furthermore “the parties may agree to submit the dispute to

¹² L.V. Prott, “UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects”, *Uniform Law Review* 1996, vol. 1, p. 62; cf. P.L. d’Epinay, “Une avancée du droit international: la Convention de Rome d’Unidroit sur les biens culturels volés ou illicitement exportés”, *Uniform Law Review* 1996, vol. 1, pp. 40–58.

¹³ M. Schneider, “The 1995 UNIDROIT Convention...”, pp. 154–155.

any court or other competent authority or to arbitration". In other words, compared to the 1970 UNESCO Convention, the 1995 UNIDROIT Convention stipulates that restitution or return claims should be heard by the court or any other authority competent in view of the location of such a cultural object. It is worth stressing that if both parties agree and come to a consensus, there is also a possibility of submitting such a dispute to another court or, even, instead of a court of choosing arbitration.¹⁴

Moreover, it is noteworthy that, according to the 1995 UNIDROIT Convention, either a State Party or an individual or a legal entity that is an owner of stolen cultural objects can claim restitution. A State Party is entitled to claim restitution, however, in the case of those cultural goods that have been illicitly exported.¹⁵

Finally, it should be stressed that the 1995 UNIDROIT Convention is a much more recent and articulated instrument compared to the 1970 UNESCO Convention. Therefore, this convention should be considered as a tool to prevent possible abuse in relation to what is called the presumed good faith acquisition of cultural objects. Taking this notion into account, the 1995 UNIDROIT Convention stipulates that the possessor of a stolen cultural object is entitled to receive "a fair and reasonable compensation". There are, however, two conditions that must be met in order to obtain such compensation. The first condition requires that "the possessor neither knew nor ought reasonably to have known that the object was stolen". The second refers to the proof confirming what is called "due diligence when acquiring the object" (art. 4(1) of the 1995 UNIDROIT Convention).

While assessing the due diligence of the possessor, attention should be paid to the whole range of the circumstances related to the acquisition of the cultural objects involved. This means that there is a need to examine "the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances" (art. 4(4) of the 1995 UNIDROIT Convention).

Moreover, according to art. 6(1) of the 1995 UNIDROIT Convention, a fair and reasonable compensation should be also paid to the possessor in the case of illicitly exported cultural goods. This provision stipulates the same conditions as mentioned above to receive such compensation. Nonetheless, while assessing whether "the possessor knew or ought to have known about the illicit export of cultural good", attention should be paid to the circumstances of the acquisition, that is, for example, "the absence of an export certificate required under the law of the requesting State" (art. 6(2) of the 1995 UNIDROIT Convention). Apart from compensation, the 1995 UNIDROIT Convention contains some other alternative solutions provided in art. 6(3). Hence, "instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may decide: (a) to retain ownership

¹⁴ UNESCO and UNIDROIT – Cooperation..., p. 4.

¹⁵ *Ibidem*, p. 4.

of the object; or (b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees”.

Finally, it is worth mentioning the time limit specified by the 1995 UNIDROIT Convention to claim restitution of cultural goods. Pursuant to art. 3, “any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft”. A statutory time limitation of three years seems to be a relatively short time.¹⁶

To sum up, “in light of the foregoing, there can be no doubt that the 1995 UNIDROIT Convention can be an effective instrument for protecting the national cultural heritage of states against the loss of movable components through illegal exports. However, in order for it to be effective, the Convention needs to be ratified by the greatest possible number of countries”¹⁷.

4. Perspectives on ratification of the 1995 UNIDROIT Convention in Poland

It is worth stressing that Poland has recently taken measures in order to ratify another convention, namely the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. As of now, both the Sejm (the lower house of the Polish Parliament) and the Senate (the upper house of the Polish Parliament) have expressed their consent and will to ratify this Convention. Certainly, such an event will be a cornerstone in the protection of cultural heritage located underwater. Taking this into account, Poland should also consider the ratification of the 1995 UNIDROIT Convention. Polish experts and researchers on cultural heritage have already repeatedly expressed their view that this Convention should be ratified. From this perspective, it is worth referring to two International Conferences on Cultural Heritage Protection, “Ratification and Implementation of the 1995 UNIDROIT Convention in Poland” and “Private Collections: Historical and Legal Perspective”, both held at the University of Gdańsk on 6–7 June 2019.¹⁸ Nonetheless, despite the supportive attitude of academic experts, the Polish Government has not taken decisive measures to achieve such a goal. However, there

¹⁶ Z. Veres, “The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention”, *Santa Clara Journal of International Law* 2014, vol. 12, issue 2, p. 106.

¹⁷ W.W. Kowalski, “Ratification of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, in Light of Directive 2014/60/UE on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State: The Perspective of Poland”, *Santander Art and Culture Law Review* 2016, no. 2, p. 174.

¹⁸ K. Zeidler, J. Stepnowska, “International Conferences on Cultural Heritage Protection: ‘Ratification and Implementation of the 1995 UNIDROIT Convention in Poland’ and ‘Private Collections: Historical and Legal Perspective’, 6-7 June 2019, Faculty of Law and Administration, University of Gdańsk, Poland”, *International Journal of Cultural Property* 2020, vol. 27, pp. 151–155.

is certainly a consensus among the majority of scholars concerning the necessity to ratify this Convention. Besides, such a ratification would ensure a holistic approach to protecting cultural heritage in Poland. Unfortunately, no actions have been taken thus far to make ratification possible.

The fact that Poland is on its way to ratifying the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage should be seen as a good prognosis for the future. Bearing in mind this new trend, we look forward to the ratification of the 1995 UNIDROIT Convention as a final step in building a complex system of cultural heritage protection in Poland.

5. Conclusions

The 1995 UNIDROIT Convention supplements the provisions of the 1970 UNESCO Convention. It should be stressed that this convention was adopted in order to compensate for weaknesses and shortcomings of the UNESCO Convention. Twenty-five years after its adoption, there is still a relatively small and, thus, unsatisfactory number of State Parties to this Convention. In the light of the foregoing, it is noteworthy that Poland has not ratified the 1995 UNIDROIT Convention thus far. With a view to having a complex cultural heritage protection system, Poland should increase its efforts to ratify the 1995 UNIDROIT Convention in the future. Bearing in mind recent achievements, I believe that the voice of experts on cultural heritage law will be heard by the authorities and that Poland will become a State Party to the 1995 UNIDROIT Convention soon.

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Summary

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Ratification of the 1995 UNIDROIT Convention in Poland: Pipe dream or realistic prospect?

The 1995 UNIDROIT Convention on Stolen or Illicitly Exported Cultural Objects complements the provisions included in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Although the 1995 UNIDROIT Convention was adopted twenty-five years ago, Poland has not ratified it thus far. Hence, the aim of this article is to answer the question as to whether a ratification of the 1995 UNIDROIT Convention in Poland is a pipe dream or a realistic prospect. In the light of the foregoing, this article outlines the significance of the 1995 UNIDROIT Convention for cultural heritage law and presents its scope of application. Finally, it draws conclusions about the perspectives for the ratification of the 1995 UNIDROIT Convention in Poland.

Keywords: cultural object, illicit export, theft, ratification, 1995 UNIDROIT Convention

Streszczenie

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Ratyfikacja konwencji UNIDROIT z 1995 r. – mrzonka czy realna perspektywa?

Konwencja UNIDROIT w sprawie skradzionych lub nielegalnie wywiezionych dóbr kultury z 1995 r. uzupełnia postanowienia zawarte w Konwencji UNESCO dotyczącej środków zmierzają-

cych do zakazu i zapobiegania nielegalnemu przywozowi, wywozowi i przenoszeniu własności dóbr kultury z 1970 r. Pomimo że Konwencja UNIDROIT z 1995 r. została uchwalona dwadzieścia pięć lat temu, Polska nie ratyfikowała jej do tej pory. Celem niniejszego artykułu jest zatem odpowiedź na pytanie, czy ratyfikacja przez Polskę konwencji UNIDROIT z 1995 r. jest mronką czy realną perspektywą. Tym samym w niniejszym artykule przedstawiono znaczenie oraz zakres stosowania konwencji UNIDROIT z 1995 r. z punktu widzenia prawa dziedzictwa kultury. W konkluzji sformułowano wnioski dotyczące perspektyw ratyfikacji wspomnianej konwencji przez Polskę.

Słowa kluczowe: dobro kultury, nielegalny eksport, kradzież, ratyfikacja, konwencja UNIDROIT z 1995 r.