



The Global Pandemic as an Opportunity: Towards a Cutting-edge Legal 'App' for Online Art Trade

Tamás Szabados

ELTE Eötvös Loránd University, Budapest, szabados@ajk.elte.hu

Follow this and additional works at: <https://via.library.depaul.edu/jatip>



Part of the [Cultural Heritage Law Commons](#), and the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Tamás Szabados, The Global Pandemic as an Opportunity: Towards a Cutting-edge Legal 'App' for Online Art Trade, 31 DEPAUL J. OF ART, TECH. & INTELL. PROP. L. 64 (2022).

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

The Global Pandemic as an Opportunity: Towards a Cutting-edge Legal ‘App’ for Online Art Trade

Cover Page Footnote

Tamás Szabados* * Associate professor, ELTE Eötvös Loránd University, LL.M. (UCL), PhD. This is a slightly amended version of the author’s article submitted to the UNIDROIT COVID-19 Essay Competition that has been selected among the five winners.

THE GLOBAL PANDEMIC AS AN OPPORTUNITY: TOWARDS A CUTTING-EDGE LEGAL 'APP' FOR ONLINE ART TRADE

*Dr. Tamás Szabados**

Seleucia...

was stormed by the generals of Verus Cæsar, who carried the image of the Cumæan Apollo to Rome, and placed it in the temple of the Palatine Apollo But it is said that after this statue was carried off, and the city was burnt, the soldiers, searching the temple, found a narrow hole, and when this was opened in the hope of finding something of value in it, from some deep gulf ... issued a pestilence, loaded with the force of incurable disease, which ... polluted the whole world from the borders of Persia to the Rhine and Gaul with contagion and death. (Ammianus Marcellinus, The Roman History, Book XXIII. VI. 23-24; translated by C. D. Yonge)

I. Introduction

The Roman historian Ammianus Marcellinus gives the above account for the origin of a disease sweeping over the ancient world. Accordingly, the outrage against a sacred monument and the theft of a statue led to the outbreak of a devastating pandemic. Today, we know that pandemics do not spring up because of violence against art and holiness. Nevertheless, local and even more global epidemics, such as the COVID-19 pandemic, can undoubtedly put works of art in danger.

The still ongoing COVID-19 pandemic has not left the sphere of protecting cultural heritage untouched. Among the restrictive measures introduced by governments to tackle the coronavirus, almost all museums of the world have been closed, and some of them will probably never reopen.¹ Profiting from

* Dr. Tamás Szabados is an associate professor at ELTE Eötvös Loránd University. He received his L.L.M. at University College London and his PhD at ELTE Eötvös Loránd University. This is a slightly amended version of the author's article submitted to the UNIDROIT COVID-19 Essay Competition that has been selected among the five winners.

¹ ICOM, *Report – Museums, museum professionals and COVID-19* (26 May 2020), <https://icom.museum/en/news/museums-museum-professionals-and-covid-19-survey-results/>, 2-3; *UNESCO Report –*

2022] *THE GLOBAL PANDEMIC AS AN OPPORTUNITY* 65

the weakened security controls in museums, important works of art have been stolen. An oil painting by Vincent van Gogh, *The Parsonage Garden at Nuenen in Spring*, was stolen from the Singer Laren Museum in the Netherlands on 30 March 2020, on van Gogh's own birthday, during the closure of the museum due to the COVID-19 pandemic.² A 15th century copy of Leonardo's *Salvator Mundi* was stolen from the museum of the San Domenico Maggiore basilica in Naples.³ The priests did not even notice the theft of the painting from the site which was closed during the lockdown. Fortunately, this painting was quickly found by the police. Archaeological sites in remote places have been left without surveillance, providing an opportunity for illegal excavations.⁴ Most auction houses, galleries and antiquities shops closed temporarily. The arts trade has been compelled to move to online platforms, where stolen, illegally exported and forged works of art turn up increasingly often.

Special rules adopted to react to crisis situations are not unknown in cultural heritage law. Interestingly, the 1954 Hague Convention, the first global convention on the protection of cultural heritage, was adopted to address a particular crisis situation: war.⁵ However, cultural property is endangered not only in armed conflicts, but also in the event of natural disasters and, as the current situation demonstrates, during pandemics, too. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership

Museum around the World in the Face of COVID-19 (UNESCO, Paris 2020) 12-3.

² Euronews, *Van Gogh painting stolen during Dutch museum's COVID-19 closure*, (30 March 2020), <https://www.euronews.com/2020/03/30/van-gogh-painting-stolen-during-dutch-museum-s-covid-19-closure>.

³ Artemagazine, *Ritrovato il Salvator Mundi napoletano. Era stato rubato ma nessuno se n'era accorto*, 19 January 2021, <http://www.artemagazine.it/attualita/item/12391-ritrovato-il-salvator-mundi-napoletano-era-stato-rubato-ma-non-nessuno-se-n-era-accorto>.

⁴ See Emily Sharpe, *Online antiquities smugglers are taking advantage of the coronavirus crisis*, *The Art Newspaper* (29 April 2020), www.theartnewspaper.com/news/increase-in-online-trade-of-illicit-antiquities-during-the-coronavirus-crisis, (On the increase in looting of archaeological sites during the COVID-19 pandemic).

⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (The Hague, 14 May 1954; 249 U.N.T.S 240 (1956)).

of Cultural Property contains a more general emergency provision that provides for the cooperation of the state parties and determines the measures that may be taken if the cultural patrimony of any of them is in jeopardy from the pillage of archaeological or ethnological materials due to clandestine excavations, natural disasters or conflicts.⁶

I will argue in this article that the current rules of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the UNIDROIT Convention) can significantly contribute to the prevention of the illicit traffic of cultural objects, even during an epidemic.⁷ However, the COVID-19 pandemic signals the advent of a new era, in which the online art trade can become dominant. UNIDROIT and its partner organisations have to consider the global health crisis as an opportunity to find adequate legal answers to the challenges of the growing online art trade. Therefore, using the language of informatics, a new application, a cutting-edge 'app', should be developed, we recommend here, in the form of non-binding principles or guidelines to address the peculiarities of online transactions.

II. The application of the UNIDROIT Convention to cultural objects stolen or illegally exported during the COVID-19 pandemic

It is true that stolen and illegally exported cultural objects can more easily find their way to the market during this pandemic. The problem of illicit trafficking, however, is not new; only the quantity of the affected cultural objects has increased. The UNIDROIT Convention gives a clear answer to this problem, irrespective of whether there is a pandemic or other crisis. Stolen cultural objects must be returned, even by a purchaser in good faith. Similarly, though subject to certain

⁶ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (Paris, 14 November 1970; 823 U.N.T.S. 231 (1972)) art 9; *See also* UNESCO, *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (UNESCO, Paris 1970) paras 105-9.

⁷ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995; 2421 U.N.T.S. 457 (2007)).

2022] *THE GLOBAL PANDEMIC AS AN OPPORTUNITY* 67

conditions, illegally exported cultural objects are to be returned, too. It must be noted here with regard to the increasing archaeological looting during the COVID-19 pandemic that, by virtue of the UNIDROIT Convention, stolen property also includes archaeological objects that have been unlawfully excavated, or lawfully excavated but unlawfully retained.⁸ As most often unlawfully excavated archaeological artefacts are taken out from the country of origin in breach of export legislation, even if their provenance from an illegal excavation is more difficult to prove, the state of origin can claim the return of the goods on the grounds of their illegal exportation.⁹ To establish the illegality of their export, it might be sufficient if the export certificate is missing.

Undoubtedly, UNIDROIT has to continue its work to achieve a wider ratification of the Convention to address the issue of the illicit art trade at a global scale;¹⁰ however, it seems that the UNIDROIT Convention provides appropriate rules for protecting cultural objects during a pandemic without a need for its overhaul.¹¹ Casting a glance on the future, the question is rather how UNIDROIT can respond to the challenge of the expanding online art trade following the global health crisis.

III. The need for a new legal app for the online art trade

Although the UNIDROIT Convention seems to be sufficient to guarantee the restitution and return of cultural

⁸ UNIDROIT Convention art 3(2).

⁹ UNIDROIT Secretariat, Marina Schneider, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects : Explanatory Report*, 6 *Uniform Law Review* 476, 504 (2001); Spyridon Vrellis, *Les biens archéologiques et la Convention d'UNIDROIT (1995) sur les biens culturels volés ou illicitement exportés*, 20 *Uniform Law Review* 568, 575 (2015).

¹⁰ Marina Schneider, *The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive*, 2 *Santander Art and Culture Law Review* 162 (2016); See Lyndel Prott, *The UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects – Ten Years On*, 14 *Uniform Law Review* 215, 229-33, (2009) (On the question of ratification in detail).

¹¹ See Marina Schneider's contribution to the Online Expert Meeting on *Combating Illicit Trafficking of Cultural Property during COVID-19 – Illicit Excavations and Online Trade* held on 26 June 2020, www.youtube.com/watch?v=gbdkEXCVLhw&feature=youtu.be.

objects stolen or illegally exported even in times of crisis, the COVID-19 pandemic gives an opportunity to consider further steps to prevent illegal art trade. The nature of the art market has significantly changed since the adoption of the UNIDROIT Convention. Today, the internet provides an additional platform for art trading. Cultural objects are sold online by auction houses, galleries, dealers and the artists themselves and they may equally be found on various internet marketplaces. The COVID-19 pandemic gave a boost to online sales.¹² Art trading has not ceased during lockdown; it has simply moved to the online space. It is predicted that this switch to online platforms will bring an irreversible transformation of art trading.¹³ At the same time, the thriving online shops and auctions give a favourable environment for the sale of stolen and illegally exported cultural property as well as forgeries.

UNIDROIT has to adapt itself to this changed reality. Even a well-functioning operating system can be enhanced with additional applications. A cutting-edge app is undoubtedly necessary to adapt the international legal framework to the changing art trade that seems to be undergoing an online revolution, partly due to the COVID-19 pandemic. Following detailed preliminary studies, a non-binding set of principles or guidelines could be formulated on the online art trade. These could draw on the UNIDROIT Convention and the legislation of certain states, as well as non-binding codes of conduct. Consistency with international and regional instruments (e.g. EU consumer protection legislation) should be sought after.¹⁴ The significance of providing orientation for online transactions related to works of art is also confirmed by the activity of UNCITRAL, which adopted several instruments on electronic commerce.¹⁵

¹² Hiscox online art trade report 2020, www.hiscox.co.uk/online-art-trade-report, 2.

¹³ Hiscox online art trade report 2020, 7; see also Elena Sidorova, *The Cyber Turn of the Contemporary Art Market*, 8 *Arts* 84 (2019).

¹⁴ See Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64.

¹⁵ See The UNCITRAL Model Law on Electronic Commerce (1996).

2022] *THE GLOBAL PANDEMIC AS AN OPPORTUNITY* 69

On a general note, the instrument should in particular determine, the obligations of the parties specifically due to the peculiarities of cultural objects and the heterogeneity of the transactions.¹⁶ It should concentrate not only on sellers and buyers of cultural objects, but also on intermediaries, such as auction houses and art dealers. Without undertaking to elaborate all the details of the proposed principles of online art trading, three key features will be highlighted in this brief article.

A. Extending the due diligence requirement regarding online transactions

The UNIDROIT Convention provides for a possessor who has to return a stolen cultural object to be compensated on the condition that (s)he exercised due diligence when acquiring the object.¹⁷ To determine whether the possessor exercised due diligence, the circumstances of the acquisition must be examined, including the character of the parties, the price paid, whether the possessor consulted any register of stolen cultural objects, and any other relevant information and documentation, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.¹⁸

It is worth recalling that in the course of the negotiations leading to the adoption of the UNIDROIT Convention, one of the most debated questions was the inclusion of the due diligence requirement and the compensation of the *bona fide* buyer.¹⁹ Even authors who welcomed the adoption of the

¹⁶ Online art trade may involve business-to-business, business-to-consumer, consumer-to-consumer and even consumer-to-business transactions.

¹⁷ UNIDROIT Convention art 4(1); See Janet Ulph, *Exercising Due Diligence in Art Transactions*, 3 *Journal Art, Antiquity & Law* 323, 339-41 (1998) (On the due diligence requirement contained in the UNIDROIT Convention).

¹⁸ UNIDROIT Convention art 4(4). It is suggested that the same factors must be examined in relation to the compensation of the possessor who acquired an illegally exported cultural object, even though Article 6 of the UNIDROIT Convention does not mention the term 'due diligence.' Lyndel V. Prott, *Commentary on the UNIDROIT Convention* (Institute of Art and Law, Leicester 1997) 64.

¹⁹ See Alper Taşdelen, *The Return of Cultural Artefacts* (Springer, Cham 2016) 128; Prott *supra* note 18, at 41-42. More recently objections have

Convention found that the UNIDROIT Convention could have been more specific as to the content of due diligence.²⁰ The due diligence requirement raises a series of questions even regarding conventional transactions. It is doubtful whether the same standard should be applied when it is about a unique and very expensive painting or an antique coin which is abundant and cheap. What should be considered as a low price that should raise suspicion on the part of the buyer is not clear either.²¹ Furthermore, the Convention and its Explanatory Report do not refer to any concrete art law register (e.g. Art Loss Register, Interpol Stolen Works of Art Database, ICOM Red Lists) the consultation of which is required to meet the due diligence standard.²²

Despite the scale of online transactions, law has so far not been adapted to the changing face of the arts trade. In the Basic Actions concerning Cultural Objects being offered for Sale over the Internet, UNESCO, INTERPOL and ICOM encouraged internet sales platforms to post a disclaimer on all their cultural objects sales pages, advising buyers to check the licit provenance of the object and the seller's legal title.²³ By this, the organisations adopting the Basic actions have essentially tried to encourage buyers to comply with the due diligence requirement set out by the UNIDROIT Convention. Experience shows, however, that this disclaimer has been rarely used on internet sites.²⁴ Although the text of the UNIDROIT Convention and its Explanatory Report give some guidance on

been formulated regarding the concept of good faith acquisition of stolen or illegally exported cultural objects. See Spyridon Vrellis, *Questions on Protection of Cultural Heritage* 82 *Collection of Papers Faculty of Law, Niš* 37, 56-7 (2019).

²⁰ Derek Fincham, *Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities*, 37 *Syracuse J. of Int'l L. and Com.* 145, 182 (2010).

²¹ See *Encyclopedia of Global Archaeology* 2d *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995)* 7450, 7453 (2014).

²² *Id.* at 7453.

²³ UNESCO, INTERPOL, ICOM, *Basic Actions concerning Cultural Objects being offered for Sale over the Internet*, https://en.unesco.org/sites/default/files/basic-actions-cultural-objects-for-sale_en.pdf.

²⁴ Lauren Dundler, "Still covered in sand. looked very old."—*Legal Obligations in the Internet Market for Antiquities*, 2 *Heritage* 2311, 2326 (2019).

2022] *THE GLOBAL PANDEMIC AS AN OPPORTUNITY* 71

the content of the due diligence requirement, they were not tailored to online transactions. Online transactions cannot be treated on the same footing as traditional ones. The online art market was accurately described by an author of a blog post as a due diligence minefield.²⁵ Online platforms give the buyer less chance to check whether the goods offered for sale are not stolen or illegally exported. This is more so true during a pandemic lockdown. Even in the conventional settings of the art trade, provenance is often missing or if provided, it is incomplete.²⁶ This is all the more so with goods offered for sale on the internet.²⁷

The peculiarities of online transactions can be addressed by extending the due diligence requirement to sellers and intermediaries. The UNIDROIT Convention deals with the due diligence obligation only from the perspective of compensation and imposes a due diligence requirement on the purchaser as in this context. This does not mean, however, that other actors in the art market should not act in good faith and exercise some due diligence.

Statistics demonstrate that sellers have a financial incentive to provide provenance, because cultural objects with provenance are more likely to be sold.²⁸ In some countries, such as in Germany and Switzerland, a due diligence obligation is imposed on the seller to ascertain whether the goods offered for sale were not stolen, excavated, imported or exported illegally.²⁹

²⁵ Maria Xernou, *Boosted by the pandemic, the online art market remains a KYC and due diligence minefield*, The FCPA Blog, (Dec. 1, 2020), <https://fcpublog.com/2020/12/01/boosted-by-the-pandemic-the-online-art-market-remains-a-kyc-and-due-diligence-minefield/>.

²⁶ Dundler, *supra* note 24, at 2315-24; Oya Topçuoğlu and Tasha Vorderstrasse, *Small Finds, Big Values: Cylinder Seals and Coins from Iraq and Syria on the Online Market*, 26 Int'l J. of Cultural Prop. 239, 245 (2019).

²⁷ Neil Brodie, *How to Control the Internet Market in Antiquities? The Need for Regulation and Monitoring*, Antiquities Coalition, Policy Brief, No. 3., July 2017, <https://thinktank.theantiquitiescoalition.org/how-to-control-the-internet-market-in-antiquities-the-need-for-regulation-and-monitoring/>.

²⁸ Emily Fay, *Virtual Artifacts: eBay, Antiquities, and Authenticity*, 27 J. of Contemp. Crim. Just. 449, 457 (2011).

²⁹ Germany: *Kulturgutschutzgesetz* (KGSG) vom 31. Juli 2016 (BGBl. I S. 1914) art 41; Switzerland: *Bundesgesetz über den internationalen*

A distinction can be made between professional dealers and non-professional sellers in terms of their due diligence obligations. A higher due diligence requirement could be imposed on professionals who put art objects on the market, as in German and Swiss law.³⁰ The higher standard of due diligence could be applicable only to specified cultural goods that exceed a certain value and age threshold.³¹ Even non-professional sellers could be expected to provide documentation of the origin and provenance of the goods above a certain financial threshold, offered for sale and their compliance with relevant export and important legislation or to check the relevant registers of stolen works of art before the sale.

Nevertheless, in the case of online sales, the role of intermediaries, including dealers and auction houses, is crucial. Most often, auction catalogues and websites do not include the identity of the seller, and this is not disclosed to potential buyers by the auction houses. As such, this renders it impossible in practice to comply with the purchaser's due diligence obligation under the UNIDROIT Convention, to take the character of the seller into account.³² Trust is placed on the intermediary, not only by the seller, but also by the purchaser.³³ Intermediaries are often better placed in terms of skills and experience, human and financial resources to ascertain whether goods offered for sale are not stolen or illegally exported. This might be the reason that, under German and Swiss law, the higher due diligence

Kulturgütertransfer (Kulturgütertransfergesetz, KGTG) vom 20. Juni 2003 art 16.

³⁰ KGSG art 42; KGTG art 16.

³¹ Such a solution exists in German law. See KGSG, art 42 (2)-(3) and art 43.

³² Neil Brodie, *Auction Houses and the Antiquities Trade*, 63, 70, (2014), <https://traffickingculture.org/app/uploads/2015/06/Brodie-2014-Auction-Houses.pdf>.

³³ Deborah A. DeMott, *Artful Good Faith: An Essay on Law, Custom, and Intermediaries in Art Markets*, 62 Duke L. J. 607, 612-13 (2012); See Brenna Adler, *The International Art Auction Industry: Has Competition Tarnished Its Finish*, 23 Northwestern J. of Int'l L. & Bus. 433 (2003) (On the legal duties of auction houses); Stuart Bennett, *Fine Art Auctions and the Law: A Reassessment in the Aftermath of Cristallina*, 16 Columbia-VLA J. L. & Arts 257 (1992); Jorge Contreras, *The Art Auctioneer: Duties and Assumptions*, 16 Hastings Com. & Ent. L. J. 717 (1991); Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 Wm. & Mary L. Rev. 501 (1987-1988).

2022] *THE GLOBAL PANDEMIC AS AN OPPORTUNITY* 73

requirement imposed on professionals who put art objects on the market applies also to auctioneers and dealers acting on behalf of consignors.³⁴

The objective of preventing the trade in stolen or illegally exported cultural goods also requires intermediaries to act with due diligence when they are involved in selling cultural objects. Even from the auctioneer's duty to give all relevant information to their principal, it may be inferred as an obligation to check the consigned goods in terms of title and conformity with export and import laws. Intermediaries could be obliged to admit listings by a seller when the latter provides documentation on the provenance and legal export of the cultural goods concerned in accordance with the applicable domestic and international legal provisions. Such documentation can appear as a photo attached to the lot. Beyond a certain value threshold, the auction website operator, the auctioneer or the dealer should check the information provided before admitting the object for sale. It may be noted that a requirement that the seller has to upload documentation proving the title and the observance of legal provisions is applied by eBay, though with significant differences in various countries as to the goods protected and the precise formulation of the restrictions.³⁵

B. Transactions tainted by illegality

The principles have to determine the legal consequences of transactions related to stolen or illegally exported cultural objects. Provision 5 of the UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural

³⁴ KGSG art 42; KGTG art 16.

³⁵ Jennifer-Anglim Kreder and Jason Nintrup, *Antiquity Meets the Modern Age: eBay's Potential Criminal Liability for Counterfeit and Stolen International Antiquity Sales*, 5 J. of L., Tech. & the Internet 143 (2014) (On the different eBay policies); Brodie *supra* note 27, at 9-12; *See also Artifacts and cave formations policy*, www.ebay.com/help/policies/prohibited-restricted-items/artifacts-cave-formations-policy?id=4282, (on the eBay.com website); *Grundsatz zu archäologischen Funden*, www.ebay.de/help/policies/prohibited-restricted-items/grundsatz-zu-archologischen-funden?id=4282, (on the German eBay website); *Grundsatz zu archäologischen Funden*, www.ebay.ch/pages/help/policies/artifacts.html, (on the Swiss eBay website).

Objects could be used as a pattern that lays down that the transfer of ownership of a cultural object deemed to be stolen is null and void, unless it can be established that the transferor had a valid title to the object at the time of the transfer.³⁶ The German *Kulturgutschutzgesetz* contains a more general provision. Accordingly, putting stolen, illegally exported or imported or illegally excavated cultural goods on the market is prohibited.³⁷ Contracts entered into with such a purpose are null and void. Whoever put cultural goods on the market in breach of the above prohibition is liable for damages and has to compensate the costs of a buyer, unless the person who put the cultural goods on the market is not responsible for the breach. A similar rule on the invalidity of transactions tainted by illegality should be also incorporated into the principles on online art trading. When the goods have been already transferred to the purchaser, they have to be returned in accordance with the UNIDROIT Convention but, depending on the circumstances, a good faith possessor may receive compensation and recover its loss and costs incurred.

C. Authenticity of cultural objects

The UNIDROIT Convention contributes to preventing commerce in stolen or illegally exported cultural objects by imposing a strict due diligence requirement on buyers; however, it does not address another stubborn problem, namely the sale of counterfeits.³⁸ In the case of online transactions, even more during pandemic lockdowns, the buyer is less able to check the authenticity of the goods offered. The terms and conditions used by auctioneers, dealers and online marketplaces often contain obscure rules on breach of warranty, which intend to exclude liability.

³⁶ UNESCO-UNIDROIT Expert Committee on State Ownership of Cultural Heritage, Model Provisions on State Ownership of Undiscovered Cultural Objects, 2011.

³⁷ KGSG art 40; BGH, Urteil vom 22.06.1972 – II ZR 113/70, (This is in line with court practice establishing the invalidity of contracts related to illegal export).

³⁸ See Anne Laure Bandle, *Fake or Fortune? Art Authentication Rules in the Art Market and at Court*, 22 Int'l J. of Cultural Prop. 379 (2015); Gregory Day, *Explaining the Art Market's Thefts, Frauds, and Forgeries (And Why the Art Market Does not Seem to Care)*, 16 Vand. J. of Ent. & Tech. L. 457, 478-484 (2014).

2022] *THE GLOBAL PANDEMIC AS AN OPPORTUNITY* 75

The principles should provide that the goods must be in conformity with the description and image appearing on the website. Moreover, the due diligence requirement could also be extended to authenticity. This would not be an unprecedented solution. The Code of Ethics of the Art Dealers Association of America also provides for the obligation of dealers to exercise due diligence in verifying the authenticity of works of art that they offer for sale.³⁹ Above a certain value, the seller could be also required to provide some document proving that the object is authentic. The seller should reimburse the purchase price and compensation should be envisaged for all loss suffered by the purchaser if the goods proved to be simple fake.

IV. Final remarks

International organisations responsible for the protection of cultural heritage, such as UNIDROIT, have to consider the pandemic as an opportunity and face the challenges posed by online art trade, which received momentum due to the epidemic. It has been stated that ‘the expanding Internet market has had a destructive effect on the world’s archaeological and cultural heritage’.⁴⁰ To counter this, it is suggested that a new cutting-edge legal app should complement the UNIDROIT Convention: non-binding principles on online art trade. In principle, the UNIDROIT Convention focuses on the recovery phase and thereby represents an *ex-post* approach by ordering the return of stolen and illegally exported cultural objects. The proposed principles on online art trade could promote lawful trafficking by an *ex-ante* non-binding regulatory approach, focusing on the transaction phase.

The difficulties around the adoption of binding international treaties and their ratification point towards soft law solutions. Even though the envisaged norms would not have legally binding force, the principles could contribute to the

³⁹ Code of Ethics and Professional Practices of the Art Dealers Association of America, I. A. (2).

⁴⁰ Countering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World’s Heritage 1st *The Internet Market in Antiquities* 11, 12 (2015).

evolving *lex culturalis*⁴¹ and could operate as narrative norms guiding the conduct of the actors in the international art market.⁴² Moreover, the principles could also serve as a model for creating hard law rules on online art trade at domestic and international level in the future. As Professor Spyridon Vrellis noted, the UNIDROIT Convention is an '*acquis culturel*', which can constitute a point of departure for further initiatives.⁴³ The proposed app would definitely be such a further step.

⁴¹ Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (OUP, Oxford 2014); Alessandro Chechi, *When Private International Law Meets Cultural Heritage Law*, 19 *Yearbook of Private Int'l L.* 269, 290-93 (2017/2018); Jorge Sánchez Cordero, *La construcción de un nuevo orden cultural internacional*, 41 *Boletín Mexicano de Derecho Comparado* 385 (2008).

⁴² Brill, Leiden, *Collected Courses of the Hague Academy of International Law* – Vol. 375 1,9 (2015) (Citing Erik Jayme, *Narrative Norms in Private International Law – The Example of Art Law*); Erik Jayme, *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 *Vand. J. of Transnat'l L.* 928, 943 (2005).

⁴³ Vrellis *supra* note 9, at 581.