

The Cross-Border Transfer of Cultural Assets in the European Union

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Abstract

Monuments and mementoes of cultural assets are taken very special care of by descendant heirs, as a form of national heritage. The Hague Convention of 1954 introduced regulations concerning the definition of a cultural asset. The Convention drawn up in Paris, in 1970, extended the scope of international legal protection in case of conflicts and armaments. It also extended notions which regulate the status of — e.g., rare collections. In 1976, the Convention signed in Paris clarified identification and definition of any kind of assets belonging to the countries which are the parties of the agreement, and determined their borders. The member states of the EU act pursuant to the regulations of the EU law and domestic law. After the accession to the Community, Poland adopted the EU law, which has to be direct and superior to domestic regulations. The EU and domestic legal regulations concerning the issue of the transfer of cultural assets — monuments within the Community and with third countries, are applicable to their export to other member states of the EU and within not regulated areas on the Community level, as well as to third countries.

Keywords: cultural assets, Hague Convention of 1954, national cultural heritage, monuments, Paris Convention of 1970, rare collections, Paris Convention of 1976, the European Union law, the office of Monument Conservator, turnover of cultural assets, the trade of works of art in the EU, Minister of Culture and National Heritage, Community Customs Code

The notion and classification of a cultural asset

The history of a human being, nation or country is connected with the creation of its own and often unique oeuvre, which is handed down to further generations. This oeuvre constitutes tangible proof of social activity. It often consists of objects used to achieve noble goals which are a part of the symbolism of nations and countries. We should remember that they are also everyday objects which show the conditions of everyday life of our ancestors. As a result, these consumable goods are a kind of message about the era of generations of our progenitors, forefathers and fathers. Their possession and maintenance in an appropriate state is the obligation of nations and countries.

Taking that into consideration, a legal order, which indicates the possibilities of international transfer of valuable objects connected with national history and identity, is being created. The problem of the protection of national heritage meets significant difficulties caused by problems with determining which objects are part of this heritage. Such issues are commonly described in legal acts as cultural assets. According to the rules of law-governed state, one should expect that the legislator will determine the scope of applicable legal regulations in a rational and precise way. . . . In my opinion, the lack of terminological discipline in a prescriptive regulation in the scope of a particular field causes negative results, such as weaker legal protection and the appearance of legal loopholes (Bernatek-Zaguła 2012).

The first legal regulations attempting to define this notion can be noticed in the Hague Convention of 14 May 1954.¹ The convention uses a notion of cultural asset which, after taking into

1. See: Konwencja o ochronie dóbr kulturalnych w razie konfliktu zbrojnego wraz z regulaminem wykonawczym

consideration its literal and functional interpretation, should be considered identical with cultural achievement (Zeidler 2007). According to this convention, movable and immovable goods which have great significance to national cultural heritage—e.g., monuments of architecture, art or history, either religious or secular, archaeological excavation sites, building complexes with historic or artistic significance, works of art, manuscripts, books and other objects with artistic, historical or archaeological significance, academic collections and collections of books, archive records or reproductions of the above mentioned objects,² buildings created to keep or exhibit movable cultural goods—e.g., museums, huge libraries, archive storehouses, shelters to keep movable cultural goods in the case of military conflict³ and centres, keeping the substantial part of the above mentioned goods, called historic centres, are considered to be cultural assets regardless of their origin or owner.⁴

One of the main regulations of the international law concerning the turnover of cultural assets is the Convention on measures attempting to forbid and protect illegal import, export and transfer of title to cultural assets, drawn up in Paris on 17 November 1970.⁵ The notion of cultural asset is one of the basic notions defined on its basis. It is an asset which is considered significant for archaeology, prehistory, literature, art or education, because of religious or secular reasons. In this sense, assets have been classified as rare collections or specimens in the field of zoology, botany, mineralogy and anatomy, objects having paleontological value; objects connected with history (e.g., the history of science and technology, history of military science and social history); objects connected with the life of leaders, thinkers, scientists, national artists and events which are important for the nation; objects obtained from excavations (both legally and illegally) and archaeological findings; elements obtained from demolished artistic or historical monuments; antiques that are more than 100 years old, such as inscriptions, coins and engraved seals; ethnological materials and objects having artistic value.⁶ What is more, the Convention rates the following objects: rare manuscripts and incunabulum, ancient books, documents and publications having special significance (e.g., historical, artistic, scientific or literary, such as single copies or collections); postage stamps, duty stamps and similar objects as single copies or collections and archives (e.g., record, photographic and film archives); furniture which is older than 100 years and ancient musical instruments, among cultural assets.⁷

Cultural assets as a material and tangible sign of the nation's history create national heritage. The notion of cultural heritage, which is crucial for the construction of legal regulations determining rules and manner of transfer of cultural assets in international turnover, was specified in the Convention signed in Paris on 16 November 1976 concerning protection of world cultural and natural heritage.⁸

By this notion, the Convention understands objects made by humans, both ancient and modern, in the form of monuments: works of architecture; works of monumental sculpture and painting; elements and buildings having archaeological character; inscriptions, caves and groups of such elements having special common value for historical, artistic or scientific reasons; groups of separate or connected buildings having unique common historical, artistic or scientific value because of their

do tej Konwencji oraz Protokół o ochronie dóbr kulturalnych w razie konfliktu zbrojnego, podpisane w Hadze dnia 14 maja 1954 r. DzU z 1957 r. nr 46 poz. 212.

2. See: Konwencja o ochronie dóbr... Art. 1 pkt a.

3. Ibidem, Art. 1 pkt b.

4. Ibidem, Art. 1 pkt c.

5. See: Konwencja dotycząca środków zmierzających do zakazu i zapobieganiu nielegalnemu przywozowi, wywozowi i przenoszeniu własności dóbr kultury, sporządzona w Paryżu dnia 17 listopada 1970 r. DzU z 1974 r. nr 20 poz. 106.

6. Assets having artistic value are pictures, paintings and drawings, which are entirely hand-made, on any undercoat and with any material (except for industrial drawings and industrial goods with hand-made decorations), original statues and sculptures made of any material; originals of etchings, prints and lithographs; originals of artistic sets and installations made of any material.

7. See: Konwencja dotycząca środków...

8. See: Konwencja w sprawie ochrony światowego dziedzictwa kulturalnego i naturalnego, przyjęta w Paryżu dnia 16 listopada 1972 r. przez Konferencję Generalną Organizacji Narodów Zjednoczonych dla Wychowania, Nauki i Kultury na jej siedemnastej sesji. DzU z 1976 r. nr 32 poz. 190.

architecture, uniformity and combining with landscape and historical places: works of human or joint works of human and nature; zones and archaeological excavation sites having unique common value for historical, aesthetic, ethnological or anthropological reasons.

The Convention indicated that the states of Convention, where the abovementioned objects are located, are responsible for identifying, defining and determining the borders of any of these objects (Bernatek-Zagula 2012).

International regulations, creating the number of states which are their parties, have general form and provide a minimal level of the legal regulations on a particular issue. According to the Roman rule *pacta sunt servanda*, countries which are the parties of the rule can be obliged to introduce proper regulations, considering provisions of international agreements, to the domestic legal order.

The rules of legislation in the European Union have led to the establishment, according to adopted principles, of two legal systems—European Union law and domestic law.⁹ These systems are created according to the rules of primacy and proportion of the European Union law applicable in all the member states. These rules cause the necessity of legal regulation on the EU level in the case where the given issue concerns the interest of the European Union as a whole, and the interest of particular member states. Proper regulations of the European Union law in the scope of transfer of cultural assets, in which they have been precisely defined, have been adopted according to this imperative.¹⁰

The abovementioned precision is not a persiflage according to the definition of cultural asset from the EU directive, because it is not included there. One quotes only functional interpretation, indicating that cultural assets are the objects which serve specific purpose. They include archaeological objects which are older than 100 years old, obtained from excavations and land or underwater discoveries, archaeological areas, archaeological collections; elements which are older than 100 years old which were the integral part of artistic, historical or religious monuments and then became divided; hand-made pictures and paintings, created with any materials or techniques; hand-made watercolours, gouaches and pastels created with any materials; hand-made mosaic created with any materials; hand-made drawings created with any materials or techniques; original figures, prints, serigraphs, lithographs with proper boards and original posters.¹¹

In Polish regulations the notion of cultural asset has been defined in the act adopted at the beginning of the 1960s, which is no longer legally binding. According to that act, a cultural asset is a movable or immovable object, ancient or modern, which is significant to heritage and cultural development for historical, scientific or artistic reasons.¹² In the present legal regulations the notion of cultural asset has been narrowed to a monument. According to a view adopted in a doctrine, there are cultural assets which are not monuments (e.g., recent work of a living and acknowledged artist). The relation between a cultural asset and a monument is the following: not every cultural asset is a monument but every monument is a cultural asset (Pruszyński 2002).

According to the present legal regulation—the act on the protection and care of monuments,¹³ cultural assets have not been defined, whereas the legal definition of monuments, which may be immovable or movable, their parts or groups, created by humans, connected with their activity or being an evidence of a past era or event and their preservation is important to the public interest for historical, artistic or scientific reasons. The monuments have been divided into immovable monuments, movable monuments and archaeological monuments.¹⁴

9. The rule of autonomy means that the European Union law is independent of the internal law of member states. Despite the fact that it becomes its part, it still has an independence and identity (Wójtowicz 2003).

10. See: Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods, p. 1–7.

11. See: Annex I to Council Regulation (EC) No 116/2009... Categories of cultural objects covered by Article 1 (it consists of fifteen groups of objects, which after meeting specific requirements are considered to be cultural assets)

12. See: Ustawa z dnia 15 lutego 1962 r. o ochronie dóbr kultury, Art. 2. DzU z 1962 r. nr 10 poz. 48 as amended.

13. See: Ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami. DzU z 2003 r. nr 162 poz. 1568 as amended.

14. An immovable monument is a real property, its part or a complex of real properties. A movable monument is a movable thing, its part or a complex of movable things. An archeological monument is an immovable monument, which is a surface, underground or underwater remains of the existence or activity of human being. It consists of

In the main legal act — the constitution; legislator uses a notion of cultural asset and indicates the obligations of public authorities to provide common and equal access to them and the protection of natural heritage, including their turnover with other countries. It has been explicitly stated in the first chapter of the Constitution by indicating that the Republic of Poland creates conditions to provide common and equal access to cultural assets, which is the source of identity of the Polish nation, its existence and development.¹⁵

1 Legal basis regulating the turnover of cultural assets with third countries

In Polish regulations concerning trade with foreign countries, the ban on transport of monuments to foreign countries was introduced shortly after World War II, by the decree of 1 March 1946 on registration and ban on transport of works of fine arts and objects having artistic, historical or cultural value. Its purpose was to save objects which originated in the national collection of cultural heritage. Rationing of cultural asset turnover with foreign countries, which actually was a ban, was established in 1962 by the act on the protection of cultural assets.

Similar solutions are included in the present act on the protection of monuments of 2003. Rationing with the possibility of permanent export of monuments to foreign countries is kept in the act. Cultural assets — monuments can be transported to foreign countries permanently (they can be transported to the member states of EU or third countries) when their transport will not cause damage to the cultural heritage of the Polish nation.

Permission for temporary transport of monuments has the form of open rationing. The notion of open rationing is adopted by the author because of the small range of possibilities to decline permission by the proper state body — Provincial Monument Conservator or the Director General of the National Library of Poland. Permission for temporary transport is granted after considering the condition of a monument, which is the only factor taken into account. Obviously, the permission for temporary transport of a monument to foreign countries should be denied if the conditions of its cross-border transfer affect its form.¹⁶

Polish accession to the European Union caused the adoption of joint legal regulations with their directness and primacy over domestic regulations. *Acquis communautaire* in the field of protection of cultural assets included legally binding international agreements, in which European Communities — the European Union were a party. It concerns the abovementioned Convention on measures aiming to ban and prevent illegal import, transport and transfer of title to cultural assets, signed in 1970 in Paris;¹⁷ regulations of the European Union law; the directive of the Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods¹⁸ and the directive of the Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State¹⁹ and the Commission Regulation (EEC) No 752/93 of 30 March 1993 laying down provisions for the implementation of Council Regulation (EEC) No 3911/92 on the export of cultural goods.²⁰ Domestic regulations — e.g., quoted act on the protection and care of monuments and the directive of the Minister of Culture of 19 April 2004 on the export of monuments and object having features of monuments to foreign countries, conferred viability to the regulations of the European Union law.²¹

cultural accumulations and their products or remains. It may also be a movable monument which is such a product.

15. See: Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. uchwalona przez Zgromadzenie Narodowe w dniu 2 kwietnia 1997 r., przyjęta przez Naród w referendum konstytucyjnym w dniu 25 maja 1997 r., podpisana przez Prezydenta Rzeczypospolitej Polskiej w dniu 16 lipca 1997 r. Art. 6 pkt. 1. DzU z 1997 nr 78 poz. 483 as amended.

16. The decision to allow for transport of monuments (for permanent or temporary transport) is an administrative decision. It means that, according to the rules of procedure before the bodies of public administration, a person who is the subject of the decision has the right to appeal to a higher authority. See: Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego. DzU z 1960 r. nr 30 poz. 168 as amended.

17. See: Konwencja dotycząca środków... DzU z 1974 r. nr 20 poz. 106.

18. Dz.U. L 395 z 31.12.1992, as amended.

19. Dz.U. L 74 z 27.3.1993 as amended.

20. Dz.U. L 77 z 31.3.1993 as amended.

21. See: Rozporządzenie Ministra Kultury z dnia 19 kwietnia 2004 r. w sprawie wywozu zabytków i przedmiotów

Regulations of this domestic act and directive are applicable to the export of monuments from Poland to other member states of the EU and, within the scope which is not determined by the EU regulations, to the third countries.²²

In the light of applicable legal regulations which create conditions for the turnover of cultural assets—monuments, it is true that their turnover is fully licensed.²³ In the case of export of movable objects having features of a monument from Poland to third countries, one has to obtain permission. It is granted by the Minister of Culture and National Heritage or by the Provincial Monument Conservator, depending on the purpose of export. In the adopted system of export permissions within the European Union, permissions have been divided into three groups: standard permissions, special open permissions and general open permissions.²⁴

Permission may be granted for permanent or temporary export of a cultural asset from the European Union. It consists of three copies: form no. 1 which is a motion for permission, form no. 2 for the owner of a cultural asset and form no. 3 which is returned to the issuing body. The first copy is kept by the issuing body while the other are returned to the owner of export permission or his authorized representative. In Poland, standard permissions are called single permissions to export a monument to foreign countries. They are issued by the Minister of Culture and National Heritage on forms, which are made according to the pattern of the EU directive. Permission for library materials is issued by the Director of the National Library of Poland (Paczuski 2005).

In the case of transport of a cultural asset across the border, where customs control takes place, the proper Customs Bureau for given declaration provides that entries in export application or, where applicable, in ATA ticket²⁵ correspond to entries in export permission and that reference to export permission in point 44 (code E012) of export application or the stub of an ATA ticket are signed. After filling in point 23 in copies 2 and 3 of the permission, the Customs Bureau authorized to accept export application (the Bureau where export transactions are carried out and export permissions are presented) returns the form for the owner of permission to a declaring person or his authorized representative. The permission form, which is returned to the issuing body, has to be sent to the Customs Bureau in the point of departure from the Community (the last bureau before leaving the Community) with shipment. The Customs Bureau of export stamps a seal in point 26 of the permission form (copies 2 and 3) and returns it to the issuing body (Tymińska 2008).

In the case of failure to bring cultural assets exported on the basis of standard permission for temporary export, the body of customs administration is obliged to immediately notify the Provincial Monument Conservator.

General open permission is the form of multiple permission issued for temporary export of cultural assets which are a part of a permanent collection of museums or other institutions. They can be issued for museums or other institutions, in order to provide temporary export of any objects, which are part of their permanent collection and can be temporarily exported from the Community to third countries for exhibition purposes. The permission is presented to the customs bodies with written export application. It is also available in other cases, in order to present it on demand with cultural assets during an inspection. The expiry date of permission is 5 years from the day of issue. In Poland, the permission is defined as multiple general permission for temporary export of a monument to foreign countries and it is issued by the Provincial Monument Conservator. The permission for library materials is issued by the Director of the National Library of Poland (Witkowski 2008).

o cechach zabytków za granicę. DzU z 2004 r. nr 84 poz. 789 as amended.

22. Third countries are the countries who are not members of the European Union

23. In the case of export it is a system of permission. In the case of import it is an obligation to have a proper export permission issued by competent authorities of the country of export.

24. The permission form is presented in printed or electronic form, in one of more official languages of the European Union. Printed permission forms are issued on blue prints, which are specially secured.

25. It is a shipping and guarantee document, which is at the same time a customs declaration of goods exported to fairs or exhibitions. The holder of this document is not obliged to present financial security. Competent authorities in a member state, where the permission is presented, may require a translation to an official language or one of the official languages of the member state. The costs of translation are paid by the owner of permission.

In the case of the transport of a monument granted the abovementioned permission, the proper Customs Bureau to accept export applications provides compliance of the declared objects with a register of the cultural assets specified in the customs export application. The register of exported cultural assets has to be drawn up on paper with the name of the institution. Each site of the register has to be signed by one of the members of the institutions listed by name in permission. Each page of the register is stamped by the seal of the institution, which is identical to the seal on the permission. Reference to the permission has to be placed in point 44 of the SAD document²⁶ (code E012). The original permission is added to the SAD card no. 3 and it is included in shipment when it leaves the joint customs area. It is the permission for multiple export, thus the original permission has to be kept by the owner to be used when the next opportunity occurs. The photocopy of the permission, with confirmed conformity to the original, has to be added to SAD card no. 1. Special open permission is a form of multiple permission and can be issued for temporary export of some cultural assets. It can be issued for a specific person or organization for practical or exhibition purposes. The cultural asset, specified in the permission, has to be owned or legally possessed by a specific person or organization which uses or exhibits the asset. The expiry date of the permission is 5 years from the date of issue.

The permission for temporary export of a monument outside the European Union is a multiple individual permission issued by the Provincial Monument Conservator. The permission for library materials is issued by the Director of the National Library of Poland. The proper Customs Bureau to accept export application provides that the presented objects have been determined in the permission for export. Reference to the permission has to be placed in point 44 of JDA SAD (code E012). The original permission is added to JDA SAD Card no. 3 and is included in the shipment when it leaves the customs area of the Community. It is a permission for multiple export, thus the original permission has to be kept by the owner to be used when the next opportunity occurs. The photocopy of permission, with confirmed conformity to the original, has to be added to 1 SAD card (Tymińska 2008).

2 Rules concerning the export of movable monuments from Poland to other member states of the European Union

Union and domestic legal regulations concerning the transfer of cultural assets—monuments in turnover within the Community and with third countries are applicable to their export to other member states of the European Union and in the unregulated area on the community level, as well as to third countries. In the case of the export of a cultural asset—monument to other member states of the European Union the permission is issued, depending on the purpose of the export, by the Minister of Culture and National Heritage or by the Provincial Monument Conservator. The permission for library collections is issued by the Director of the National Library of Poland. Rules and procedures concerning the transfer of monuments on the territory of the European Union have been introduced on the level of domestic regulations. Proper bodies of public administration issue proper permissions for their export to other member states. Permission can be issued only when it does not cause damage of cultural heritage.

The act on the protection and care of monuments introduced four types of permissions which allow for the export of monuments from Poland to other member states of the European Union. Permissions are issued on the basis of a properly filled out application which includes personal data of the applicant, precise and professional features of the exported object with accurate description and justified realization of the planned export (e.g., exhibition, museum presentation). Granting a permission depends on fulfilment of statutory requirements by the potential exported object. Monuments can be temporarily exported from Poland if their conditions are satisfied and the person who possesses the monument guarantees that it will not be damaged and it will be brought back to Poland before the expiry date of permission. After the examination of such circumstances, export from Poland to other member state may occur on the basis of:

²⁶. Formalized document, which enables one to file a customs declaration in written form, used in the case of transfer of goods in trade quantities.

- single permission for permanent export of a monument to foreign countries,
- single permission for temporary export of a monument to foreign countries,
- multiple individual permission for temporary export of a monument to foreign countries,
- multiple general permission for temporary export of a monument to foreign countries.

Single permissions for permanent export to foreign countries are issued by the Minister of Culture and National Heritage. Before the issue, he consults a commission composed of specialists in the particular field of monuments protection. The export based on such permission can be realized within 12 months from the date of issue.²⁷

Single permissions for temporary export to foreign countries, multiple general permissions for temporary export to foreign countries and multiple individual permissions for temporary export to foreign countries are issued upon the request of a natural person, administrative unit or museum by proper body of public administration—the Provincial Monument Conservator. Within fourteen days from return of a monument to Poland, the owner of the permission is obliged to notify the issuing body.

Domestic regulations specify not only conditions and procedures of granting permissions for export of monuments, but also determine objects which are not liable for this obligation. It concerns the export to member states of the European Union but also outside the EU. The following objects are mentioned in the regulations:

- monuments which are not entered into register and are not older than 55 years old
- monuments, which are technology objects, not entered into register and not older than 25 years old
- monuments brought from foreign countries, which are covered by temporary clearance according to the regulations of the Community Customs Code
- monuments brought from foreign countries by the people who enjoy diplomatic privileges or immunities, including monuments brought in order to furnish diplomatic missions or consular offices
- works of living artists
- library materials created after 31 December 1948 (Witkowski 2011)

Domestic regulations specify not only conditions and procedures of granting permissions for the export of cultural assets, but also determine objects which are not liable for this obligation. It concerns the export within the European Union but also outside the EU. The following objects are mentioned in the regulations: monuments which are not entered into register and are not older than 55 years old; monuments, which are technology objects, not entered into register and not older than 25 years old; monuments brought from foreign countries, which are covered by economic temporary clearance according to the regulations of the Community Customs Code; monuments brought from foreign countries by the people who enjoy diplomatic privileges or immunities, including monuments brought in order to furnish diplomatic missions or consular offices; works of living artists and library materials created after 31 December 1948.

It is necessary to point out that crime against monuments – works of art, has become a leading field of transnational (international) organized crime in many countries and in the international space, apart from drug crime, weapons trade and slave trade (Witkowski 2008). At the end of the 1960s, the term art-drain (on the pattern of brain-drain) was created. It describes drainage of works of art which is a more and more common phenomenon. In other words, it describes international trade of works of art which have been stolen and smuggled abroad. It results in robbing financially weaker countries of works of art by richer countries. As a result, it is necessary to focus on restitution of monuments exported illegally from a member state to other member state, while presenting regulations concerning the protection of cultural assets in turnover with third countries. The steps which lead to finding, securing and enabling a country to regain this monument are taken upon the request of a member state. Illegal export of a monument is the export which has

27. It is worth mentioning that people interested in obtaining a permission for permanent export of monuments, which were created before 1949, to foreign countries, either on a common customs area or outside this area, are obliged to obtain a valuation of the expert and pay 25% of its value for the benefit of the State Treasury. The possibility of permanent export is provided only for people having ownership title to exported objects.

violated applicable regulations in the scope of the protection of monuments in a particular member state. Restitution proceedings can be conducted in the case of monuments which belong to the following categories:

- archaeological monuments which are older than 100 years old
- original paintings, made with any technique and on any material, which are older than 50 years, their value is higher than EUR 150 000 and are created by late artists
- original watercolours, gouaches and pastels made on any material, which are older than 50 years, their value is higher than EUR 30 000 and are created by late artists
- single books or books which are the part of collection, which are older than 100 years and their value is higher than EUR 50 000

The issue of supervision over the transfer of national cultural assets having artistic, historical or archaeological value in the international turnover of goods, concerns only conditions and realization of procedures of their export. The character of objects is not relevant; they can be monuments, works of art or cultural assets. Regulations concerning turnover of cultural assets—monuments are not applicable to import of goods from third countries to a common customs area. By analogy, the obligation to present export permission from an export country with customs import application is applicable. It is the requirement which enables legal export (with customs procedure) of a cultural asset—monument (Kuś 2008).

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