

TECHNICAL REPORT ON THE MODEL CLAUSES FOR THE LEGAL PURCHASE AND SALE OF CULTURAL ASSETS

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Purpose:

This Technical Report has been prepared under the *1995 UNIDROIT Convention Academic Project*, for the promotion of the legal and responsible trade of cultural objects in the international market.

For the purposes of this Technical Report, cultural objects shall be understood as those listed in the Annex to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, signed in Rome on June 24, 1995 (hereinafter referred to as the "**UNIDROIT Convention**"), to which the Kingdom of Spain is a party.

BACKGROUND AND PRELIMINARY QUESTIONS

Prior to the exposition of the model clauses for the legal sale and purchase of Cultural Objects, we must first point out that the reference to the UNIDROIT Convention by Spanish jurisprudence has certainly been scarce since the Instrument of Accession, published in the National State Gazette (Boletín Oficial del Estado) on October 16, 2002. Notwithstanding the foregoing, clear reference has been made to its undeniable interpretative value, even on those occasions in which, due to the circumstances of the legal proceedings, the UNIDROIT Convention was not directly applicable, as stated, for example, in the Judgment of the Provincial Court of Barcelona 4919/2008.

Without prejudice to the foregoing, and precisely in relation to what will be said below, we can bring up as the most relevant jurisprudential doctrine in the Kingdom of Spain, the Judgment of the National Audience (Audiencia Nacional) No. 3283/2016, dated July 21, 2016, regarding a claim of a commercial company of Dutch nationality in proceedings against the Kingdom of Spain, whose claim was (a) to assert its alleged condition of possessor in good faith of a Spanish Cultural Object, as well as (b) to require the mandatory compensation by the Kingdom of Spain, all based, among others, on Arts. 4 and 6 of the UNIDROIT Convention.

In this sense, the representation of the Kingdom of Spain, from a perspective assumed and in fact validated by the Contentious-Administrative Chamber of the National Audience (Audiencia Nacional), refers that, in relation to point (a), the possession in good faith is not presumed, but must be demonstrated in a factual manner and particularly through the diligence measures deployed during the acquisition operation, At the same time, in relation to point (b), it refers to the liability of the original seller, to

whom the Kingdom of Spain understands that the Dutch company must claim, since it was the latter who put on the market an active that could not be the object of commercial traffic, that is, of an *extra commercium* nature.

Thus, there is a key issue, if the buyer's verification had been truly diligent, it is certainly unlikely that the illegality of the operation would have been overlooked. Consequently, we can even speak of a reverse or negative presumption. That is, the good faith possessor will have to demonstrate how it is possible that, even with all the diligence referred to under Arts. 4 and 6 of the UNIDROIT Convention, he did not realize that the Cultural Objects for sale were in fact stolen or illegally exported from their country of origin.

This is not a trivial matter, since only in those cases in which good faith possession is proven would the affected party be entitled to a claim against the affected State. Precisely, according to the aforementioned Judgment of the National Audience (Audiencia Nacional), the representation of the Kingdom of Spain, under this same line of argument, points out that, notwithstanding the fact that the possession in good faith is not proven, the only possible way for the Dutch merchant is to try to claim the corresponding damages from the person who sold him the cultural object stolen or illegally exported from its country of origin.

Thus, good faith possession is understood in a restrictive sense and cannot be demonstrated merely on the basis of the inclusion of one of the model clauses described below. However, the inclusion of one of these model clauses can contribute to the judicial declaration of possession in good faith, while maintaining secondary interests such as (a) providing information on what documents should be required for a safe acquisition from a legal point of view and respectful of the UNIDROIT Convention and (b) forcing a greater diligence in this type of operations, even assuming economic penalties in the case of falsehood or inaccuracy.

The model clauses transcribed below have two different formats. A format (A) in which it is the seller who assumes the risk of diligent verification and a format (B) in which it is the buyer who assumes the risk of diligent verification.

There is no closed diligent verification format, notwithstanding which, a reasonable proposal that would allow to claim the status of good faith possessor, could involve the following elements, namely:

(a) Expert Report in relation to the Cultural Object, indicating that it was not originally stolen or illegally exported from its country of origin.

(b) Review of the International Council of Museums (ICOM) Red Lists of Endangered Cultural Objects and similar.

(c) Original Export Certificate.

(d) Assumption of damages associated with the falsehood, inaccuracy or omission in the Diligent verification by the party who has been responsible for it, depending on the format (A) or (B) of the Model Clause.

In order that they may be useful to increase security in the trade of cultural objects, the proposed wording of the Model Clauses is as follows.

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**MODEL CLAUSE (A) FOR LEGAL SALE AND PURCHASE OF CULTURAL
PROPERTY**

In relation to the cultural object known under the name of _____ and physically represented in the form of _____, whose photograph is attached to this contract as **Annex I** (hereinafter the "**Cultural Object**") the Seller warrants to the Buyer that it has carried out, at the Buyer's express request, a diligent and professional verification of its origin and legal status (hereinafter the "**Diligent Verification**").

Thus, the Seller states that, from the aforementioned Diligent Verification, it is clear and uncontroverted that the Cultural Object, originally from the State of _____, is not subject to any trade restriction whatsoever, and particularly:

(a) That the Cultural Object was NOT originally stolen or in any way illegally removed or exported from the State of origin and consequently, is not subject to the provisions of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, done at Rome on June 24, 1995, or any other concordant International Treaty.

(b) That the Cultural Object is NOT included in any of the International Council of Museums (ICOM) Red Lists of Endangered Cultural Objects or any other similar or analogous list.

(c) That the Seller's title to the Cultural Object is lawful under the jurisdiction of the State of origin of the Cultural Object, in this case, _____, and that the Cultural Object is in no way being sought by the judicial or police authorities of that country.

Attached as **Annex II** is an Expert Certificate of origin and authenticity.

Attached as **Annex III**, is the Export Certificate.

The Buyer acquires the Cultural Object, for the price and other conditions foreseen in the present Contract in accordance with the confidence generated by the guarantees granted by the Seller in the Diligent Verification, thus manifesting its situation of **GOOD FAITH POSSESSOR**.

Likewise, the Buyer declares that it is an essential condition of the sale and purchase provided for in this Contract, the total accuracy of what is referred to in the Diligent Verification carried out by the Seller.

In the event of any falsehood, inaccuracy or fraudulent omission in relation to the aforementioned guarantees given by the Seller, the latter shall be liable for the damages caused, which the parties mutually agree in the amount of the value of _____, which must be paid on first request, by deposit in a bank account of its ownership that will be indicated for this purpose.

The Seller also guarantees to have a civil liability insurance issued by a first level bank, in sufficient amount to meet the fulfillment of its contractual obligations and particularly, the penalty referred to above.

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MODEL CLAUSE (B) FOR LEGAL PURCHASE AND SALE OF CULTURAL PROPERTY

In relation to the cultural object known under the name of _____ and physically represented under the form of _____, whose photograph is attached to the present contract as **Annex I** (hereinafter, the "**Cultural Object**") the Buyer guarantees that it has carried out, at its own risk, a diligent and professional verification of its origin and legal situation (hereinafter, the "**Diligent Verification**").

Thus, from the aforementioned Diligent Verification, carried out by the Buyer, it is clear and uncontroverted that the Cultural Object, originating from the State of _____, is not subject to any trade restriction whatsoever and in particular:

(a) That the Cultural Object was NOT originally stolen or in any way illegally removed or exported from the State of origin and consequently, is not subject to the provisions of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, done at Rome on June 24, 1995 or any other concordant International Treaty.

(b) That the Cultural Object is NOT included in any of the International Council of Museums (ICOM) Red Lists of Endangered Cultural Objects or any other similar or analogous list.

(c) That the Seller's title to the Cultural Object is lawful under the jurisdiction of the State of origin of the Cultural Object, in this case, _____, and that the Cultural Object is in no way being sought by the judicial or police authorities of that country.

Attached as **Annex II** is an Expert Certificate of origin and authenticity.

Attached as **Annex III**, is the Export Certificate.

The Buyer acquires the Cultural Object, for the price and other conditions provided for in this Contract, on the basis of the confidence generated by the Diligent Verification, carried out at its own risk and expense, thus manifesting its status of **GOOD FAITH POSSESSOR**.

Thus, the Seller is exempted from any liability associated with the veracity and/or accuracy of the information provided by the Diligent Verification carried out by the Buyer, at its sole risk and expense.