

# BOOK REVIEWS

Andrzej Jakubowski\*

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## Art, Museums, and Cultural Heritage through the Lens of Private Law – Recent Publications by Polish Authors (2013-2016)

Iwona Gredka

*Ubezpieczenia dóbr kultury w muzeach i zbiorach prywatnych*

[Insurance of Cultural Goods in Museums and Private Collections]

ISBN 97883-242-2304-6

Universitas, Kraków 2013, pp. 264.

Paulina Gwoździewicz-Matan

*Umowa użyczenia muzealium w prawie prywatnym*

[Loan Contract of a Museum Object in Private Law]

ISBN 978-83-264-8137-6

Wolters Kluwer Business, Warszawa 2015, pp. 367.

Mara Wantuch-Thole

*Cultural Property in Cross-Border Litigation:*

*Turning Rights into Claims*

ISBN 978-3-11-035577-2

De Gruyter, Berlin – Munich – Boston 2015, pp. xx, 400.

Alicja Jagielska-Burduk, Wojciech Szafrąński and Łukasz Gawęł

*Mechanizmy prawne zarządzania dziedzictwem kultury*

[Legal Mechanisms in Cultural Heritage Management]

ISBN 978-83-7865-373-8

Wolters Kluwer, Wydawnictwo Uniwersytetu Gdańskiego

Warszawa – Gdańsk 2016, pp. 344.

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Cultural heritage law has become an expanding area of legal scholarship and legal education. In fact, it is today considered an established branch of legal studies, even if still young and marked by a number of uncertainties.<sup>1</sup> There are various reasons for this growing academic interest in the management and protection of cultural heritage. Perhaps it has best been explained as “the emergence of a new international conscience, rooted in the awareness that cultural heritage represents a holistic notion” which is deeply linked to “the identity of peoples” as well as to individual and collective human rights.<sup>2</sup> Therefore legal scholarship has gradually inclined towards the concept of cultural law, encompassing “[t]he core themes of linguistic and other cultural rights, cultural identity and differentiation, cultural heritage, traditional knowledge, sports, and religion” being “of fundamental importance to people around the world.”<sup>3</sup> Moreover, cultural exchange and the development of cultural industries have become a global cultural priority – an indispensable element of states’ cultural policies, including their cultural diplomacy, since the second half of the 20<sup>th</sup> century.<sup>4</sup> In this context, it is no surprise that different aspects of the national and international circulation of cultural materials have been subject to extensive analysis on the grounds of private law, including private international law.<sup>5</sup> This short review aims to present four recently published monographs by Polish authors dealing with distinct areas of legal research and the application and practice of law in matters of cultural life and cultural heritage management. They are: insurance and indemnity of cultural objects; art loan contracts; international litigation in art-related disputes; and management of cultural heritage objects.

The book by Iwona Gredka, a lecturer in private law and advocate running her own law firm in Katowice, is the fruit of extensive, meticulous research conducted by the author into the practice of insurance contracts relating to cultural objects owned by both state and non-state entities. In fact, this is the first Polish monograph entirely devoted to this topic. Its main objective is to explore the obscure issue of

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<sup>1</sup> A. Chechi, *Evaluating the Establishment of an International Cultural Heritage Court*, “Art, Antiquity and Law” 2013, Vol. 18, p. 32; A. Jakubowski, *A Constitutional Legal Order: Exploring the Role of the World Heritage Convention (1972)*, in: A. Jakubowski, K. Wierczyńska (eds.), *Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry*, Routledge, London – New York 2016, p. 185.

<sup>2</sup> S. Borelli, F. Lenzerini, *Foreword*, in: S. Borelli, F. Lenzerini (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, Nijhoff, Leiden – Boston 2012, pp. ix-x.

<sup>3</sup> J.A.R. Nafziger, R. Kirkwood Paterson, A. Dundes Renteln, *Cultural Law, International, Comparative, and Indigenous*, Cambridge University Press, New York 2010, intro.

<sup>4</sup> A.F. Vrdoljak, *International exchange and trade in cultural objects*, in: V. Vadi, B. de Witte (eds.), *Culture and international economic law*, Routledge, London – New York 2015, pp. 124-141.

<sup>5</sup> From the vast literature published in last five years it is worth mentioning four comprehensive monographs: N. van Woudenberg, *State immunity and cultural objects on loan*, Nijhoff, Leiden – Boston 2012; J.A.R. Nafziger, R. Kirkwood Paterson (eds.), *Handbook on the Law of Cultural Heritage and International Trade*, Edward Elgar, Cheltenham – Northampton 2014; J. Ulph, I. Smith, *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability*, Hart – Bloomsbury, Oxford – Portland 2012; Ch. Roodt, *Private International Law, Art and Cultural Heritage*, Edward Elgar, Cheltenham – Northampton 2015.

the insurance of movable cultural property in Poland and to discuss whether the insurance contracts currently in use provide real protection against potential risks to cultural objects. The book also endeavours to substantiate whether the established insurance relationships offer a just balance between the respective parties to insurance contracts. These questions are investigated from the positions of both an insuree and insured in the context of Polish (domestic) law and the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).<sup>6</sup> The analysis provided in this book is carried out on two levels. The first concerns the insurance of exhibits loaned by Polish museums for temporary exhibitions, both foreign and domestic. Secondly, it deals with the insurance of cultural objects in private collections.

The book contains five chapters. The first two are of an introductory nature, aimed at familiarising the reader with the basic terminology concerning the legal protection of cultural heritage and defining the main risks covered by insurance contracts. These chapters probably constitute the weakest and least analytical parts of the monograph, although they also contain several interesting sections. For instance, the working definition of “collection” proposed by the author, seen against the legal notion as enshrined by the Act on the Protection and Guardianship of Monuments (APGM)<sup>7</sup> and legal doctrine, provides some important critical insights into the legal management of larger ensembles of cultural objects. The statistics concerning crimes against cultural heritage are also very interesting, substantiating the level of risk to be taken into account by insurers.

Chapters three and four, relating to museum insurance practice, are undoubtedly the most significant and innovative sections of the monograph. Gredka goes beyond the analysis *de lege lata* to offer very convincing critical conclusions *de lege ferenda*. In particular, she proposes amendments to the Polish Museum Act<sup>8</sup> which would help to avoid the negative effects of the so-called “recovered property” clause, included as a standard practice in insurance contracts between museums and insurance companies. This clause, typical for most property insurance contracts, states that upon payment of compensation to the insured for the lost (usually stolen) property, the insurer acquires ownership of the lost object once it is recovered. This clearly may have serious consequences for the insured museum. Gredka postulates that such clauses could not be enforced against cultural objects owned by public museums. Another novel feature of the book refers to the discussion, offered in chapter five, of insurance contracts concluded with private collectors. The author analyses the practice of insurance companies in Poland, particularly concentrating on the contractual freedom of the parties to such contracts.

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<sup>6</sup> OJ L 177, 4.07.2008, p. 6.

<sup>7</sup> Ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami (consolidated version), Dz. U. 2014, item 1446, as amended.

<sup>8</sup> Ustawa z dnia 21 listopada 1996 r. o muzeach (consolidated version), Dz. U. 2012, item 987, as amended.

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The practical focus of the monograph and its clear structure makes it an important reference book for a diverse audience: museum curators, private collectors, legal practitioners, organizers of art exhibitions, and insurance companies.

The second publication under review, the monograph by Paulina Gwoździe-wicz-Matan, Assistant Professor at the Faculty of Law and Administration of the University of Silesia in Katowice, also deals with the topic of museum exchange. It discusses the private law aspects of contracts concerning museum objects loaned for exhibition purposes. Methodologically, the book offers a very sophisticated analysis. Museum loans are treated as a hybrid contractual relationship, containing elements of various contracts defined in the Polish Civil Code.<sup>9</sup> The author explores the relationship between the museums which offer their collections to other entities (mostly museums) to be presented at public exhibitions, examining a variety of contracts concluded in the practice of both Polish and selected foreign museums. In particular, she analyses the legal nature of such contracts, the rights and obligations of the parties, and the potential liability for non-performance or improper performance of a loan contract. After explaining the general international legal and policy framework for museum exchanges (including the issues of immunity from seizure), she offers an interesting comparative analysis of museum loan contracts under German, French and English laws. Next she discusses the hybrid nature of the museum loan contract in relation to the general regime of contractual obligations under Polish private law. She then shifts the analysis to the area of intellectual property law, dealing with the issues of breaches of copyright and of the moral rights of authors during the presentation of their works on public display. Problems relating to insurance and state indemnities for museum objects on loan are also discussed. Next the author provides a highly interesting examination of private international law aspects of cross-border museum exchanges. The book concludes with a few remarks *de lege ferenda* concerning the amendment to Polish Museum Act, aimed at facilitating cultural exchange and the organisation of exhibitions. In this regard she suggests that the status of private museums and the exhibition of their collections ought to be comprehensively regulated, since these entities carry out important social functions in enforcing constitutional rights to access to culture and cultural heritage.

Overall, Gwoździe-wicz-Matan's monograph provides a very thoughtful theoretical discussion on the legal nature of museum loan contracts. It is however a pity that the book does not contain an appendix with a sample model contract or contracts. Such an additional section might enrich the book's theoretical discussion by offering a most welcomed practical dimension.

While the first two publications under review deal with museum exchanges, the book by Mara Wantuch-Thole, published in 2015 by De Gruyter Cultural

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<sup>9</sup> Consolidated version available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640160093> [accessed: 20.12.2016].

Property Studies, offers a comparative investigation into the cross-border (international) enforcement of claims initiated by states to recover misappropriated or illicitly displaced cultural objects, thus referring to core problems of international art trade. The author was born in Poland and studied law in Heidelberg, Hamburg, London, and Berlin. She holds a Master Degree (LL.M.) from King's College London and a PhD from King's College and Humboldt University in Berlin. She currently practices law in Berlin and teaches art law at the Free University of Berlin.

In her book she identifies and categorises sovereign rights in cultural property, and discusses the legal mechanisms of enforcement of these rights in foreign courts. Accordingly, she offers a comparative analysis of national public and private law with respect to title to cultural objects. The author also investigates the justiciability of claims to misappropriated or displaced cultural property stemming from the provisions of international treaties in force, and refers to the rules of private international law and case law in the United Kingdom, the USA, Germany, and Switzerland.

One of the most interesting features of the book is its “cold-minded”, purely technical approach to the topic of counteracting illicit international trade in cultural material. It does not adhere to any regulatory or policy conceptualisations toward fighting the traffic in “black” or “tainted” cultural property. Instead she recalls three main concepts on how react to such practices: restrictive national laws; the “free market-approach”, promoting licit trade to counter the black market; and the “demand-reduction approach”, which consists of reducing the demand for unlawfully obtained cultural material by placing liability for the purchase of such items on buyers; and then she proceeds to focus on the practical enforcement of states' rights to their lost cultural property in foreign courts/forums. This practical objective drives the entire analysis offered in the book, substantiated by a very extensive, comparative examination of relevant case law from various jurisdictions. This makes the book truly engaging and fascinating. Undoubtedly the content of chapters five and six, dealing with the private international law dimension of claims relating to cultural property, offers extremely interesting insights into the problems associated with cross-border litigation. Wantuch-Thole acknowledges that the uniform rules for the recovery of cultural property in foreign courts provided by the 1995 UNIDROIT Convention<sup>10</sup> will probably not be adopted anytime soon by the major market states, nor will domestic legislation widely replace the *lex situs* rule with *lex originis* in determining the law applicable to foreign cultural material. In this context, she convincingly advocates the idea of a “positive public policy” test, which ought to be applied in cases involving a state's claim for the return of misappropriated or illicitly displaced cultural objects. In other words, with respect to claims by a foreign state to a cultural object, the general rules on conflicts of laws should always be assessed in light of an international policy consideration to protect cul-

<sup>10</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 34 ILM 1322.

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tural heritage from the threats of illicit trade and illicit archaeological excavations. In this regard, Wantuch-Thole's monograph constitutes an important voice in the current debate on the standardisation of rules applicable in cross-border litigation concerning cultural heritage objects.

The final book under review is authored by two lawyers who are also members of the Editorial Board of the "Santander Art and Culture Law Review" – Alicja Jagielska-Burduk (University of Kazimierz Wielki in Bydgoszcz) and Wojciech Szafrąński (Adam Mickiewicz University in Poznań) – in collaboration with Łukasz Gaweł, Assistant Professor in cultural studies at the Institute of Culture, Jagiellonian University and Vice-Director of the National Museum in Krakow. The analysis offered in this book is not limited to the realm of private law only. Instead it adopts a much broader perspective, according to which cultural heritage constitutes a common value that ought to be managed through different legal mechanisms beyond the traditional private-public law division, for the benefit of all (individual and collective) stakeholders. In this regard, the book seems to follow the conceptualisation of cultural heritage adopted by the Council of Europe's Framework Convention on the Value of Cultural Heritage for Society (Faro Convention).<sup>11</sup> It is probably the first monograph published in Polish adhering to such a holistic approach to legal regulation in cultural heritage matters.

The major drawback of the book lies in its lack of a most-needed theoretical introductory chapter which would explain and substantiate such an important conceptual background to the entire analysis. In fact, the first clarifications on the relationship between the management and legal protection of cultural heritage are to be found only at the end of the first part of the book. However, apart from this drawback the analysis offered by the authors is very well-structured and convincing. It is divided into three major parts: 1) management of cultural heritage; 2) law in managing cultural heritage; and 3) cultural heritage, economy and law.

The first part defines and explains the nature of the issues surrounding the management of cultural heritage, identifying the major policy goals and categories of stakeholders. The second part, definitely the most interesting one, endeavours to explore the role of legal regulation in the sphere of cultural heritage. The authors acknowledge that legal instruments and institutions in the domain of cultural heritage are predominantly characterised by a top-down approach. Moreover, the legal regulatory framework is profoundly fragmented. As a result, cultural heritage issues are governed by methodologically differentiated areas of legal regulation, often marked by a lack of harmony between various norm-systems and institutions. In this regard, the authors (Jagielska-Burduk and Szafrąński) analyse different areas of regulation, with particular focus on private-law institutions, both delineating and substantiating the *sui generis* nature of cultural heritage and the specific nature

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<sup>11</sup> 27 October 2005, CETS No. 199.

of rights and interests attached to it, inherently connected with the identity of people. They thus propose a deliberative approach to the legal management of cultural heritage, in which various voices and rights are heard and considered. A similar argumentation is also presented in the last part of the book, dealing with the reconciliation of the diverse interests of the market, cultural industries, and private and public interests vested in cultural heritage. These theoretical considerations are based on an extensive investigation into the legal practice of various Polish courts, organs of public administration, cultural heritage institutions, and natural and legal persons. Such a broad analysis allows the authors to offer interesting and well-substantiated conclusions as to the desired directions in the development of Polish cultural heritage policy and law. As a result, the book should be compulsory reading for public officials in cultural heritage institutions. It could also constitute an important source of information for representatives of non-governmental organisations active in the domain of culture and cultural life.