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Legally protected cultural goods and bankruptcy proceedings

Prawnie chronione dobra kultury a postępowanie upadłościowe

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Abstrakt: Artykuł dotyczy ogólnych problemów prawnych związanych z celami prawnymi postępowania upadłościowego w związku z celami ochrony dziedzictwa kulturowego. Obydwa zagadnieniami zbudowane są przez zupełnie inne systemy wartości. Postępowanie upadłościowe ma na celu ochronę interesów majątkowych ograniczonej grupy ludzi, podczas gdy dziedzictwo kulturowe jest chronione dla obecnych i przyszłych pokoleń, bez względu na jego znaczenie handlowe. Niewypłacalność właściciela dóbr kultury jest problemem globalnym, ale krajowe przepisy dotyczące upadłości i przepisy dotyczące ochrony dziedzictwa kulturowego różnią się bardzo poważnie. Z tego powodu artykuł nie ogranicza się do żadnego konkretnego porządku prawnego. Omówiono kilka ważnych uniwersalnych kwestii: ograniczenia syndyka/zarządcy w zarządzaniu dobrami kultury będącymi częścią masy upadłości, status prawny dóbr kultury wyłączonych z masy upadłości, konsekwencje sprzedaży masy upadłości w przypadku braku tytułu własności masy upadłości.

Słowa kluczowe: bankructwo, niewypłacalność, syndyk/zarządca, dobra kultury, ochrona dziedzictwa kulturowego

Abstract: This paper deals with general problems of legal aims of bankruptcy proceedings in connection with the aims of heritage protection – issues built by completely different systems of values. Bankruptcy is designed for protecting pecuniary interest of a limited group of people, while cultural heritage is protected for present and future generations, despite its current commercial significance. In the global environment, bankruptcy of a cultural goods owner usually has a cross-border range but national bankruptcy legislations and laws devoted to heritage protection differ in very serious aspects. For this reason the paper is not

limited to any concrete legal order. There are discussed some important universal issues: limits for a trustee in managing cultural goods which are a part of bankruptcy estate, legal status of cultural goods excluded from bankruptcy estate, consequences of bankruptcy sale in the case of lack of bankrupt's ownership title.

Keywords: bankruptcy, insolvency, trustee, cultural goods, heritage protection

1. Introduction

Bankruptcy proceedings, involving liquidation of the bankrupt's assets, are aimed at maximizing satisfaction of the creditors.¹ In the bankruptcy proceedings, expenditure on maintaining assets should be limited and the obvious priority is to sell the bankrupt's estate quickly and profitably. Insolvency regulation on liquidation is dedicated to typical, common goods in commercial relations. However, the bankruptcy estate in some cases may include cultural objects which are subject to a special legal protection regime. This could be a matter of national and international law. *Prima facie* general purposes of liquidation of assets in the course of bankruptcy proceedings and general purposes of cultural objects protection may potentially remain on a collision course.

In the event of bankruptcy of a cultural institution or an owner of cultural goods there are to be distinguished two levels of legal problems. First, a platform for dealing with cultural goods. Secondly, a platform for dealing with other common property components, e.g. a museum building, which is not a protected monument, intellectual property rights, funds from donations, public subsidies, and ticket sales. In the latter case, standard bankruptcy rules apply.

It should be stressed that in internal law orders the bankruptcy ability² is – as a rule – not given to the State Treasury³ or to certain public law institutions, such as museums, galleries, etc., while a significant part of the cultural heritage is state property and public entities property, which are not in position to become a bankrupt.⁴ As a rule, museums⁵ with the most valuable collections

¹ R. Adamus, *Bankruptcy and Restructuring Law in Poland*, Societas et Iurisprudentia 2019, Vol. VII, issue 2, Trnava, Slovakia, p. 19, R. Adamus, *Likwidacja masy upadłości zagadnienia praktyczne*, Warszawa 2016, p. 17.

² The possibility of being subject to insolvency proceedings.

³ W. Klyta, „Upadłość państwa”, in: *Proces cywilny: nauka – kodyfikacja – praktyka: księga jubileuszowa dedykowana Profesorowi Feliksowi Zedlerowi*, Warszawa 2012, p. 753-766.

⁴ It is a general opinion. In some legal orders institutions of culture such as museums, art galleries, etc. are entitled to use some kinds of insolvency proceedings. As Philadelphia Inquirer announced on 5 March 2020 The National Museum of American Jewish History in Philadelphia had filed for bankruptcy protection under Chapter 9 of the U.S. Bankruptcy Code <https://www.inquirer.com/opinion/editorials/jewish-museum-philadelphia-bankruptcy-cultural-organizations-money-challenges-20200305.html>

⁵ W. Kowalski, *Pojęcie i zakres własności intelektualnej muzeów*, in: *Kolekcje i zbiory muzealne: problematyka prawna*, Opole 2015, p. 165-185.

are created as public law bodies and they receive public financial support. National goods of culture of great historical value are excluded from the trade (*res extra commercio*). However, museums can be erected and maintained by private associations⁶ and persons. Important collections of cultural goods are very often inherited by persons with potential bankruptcy ability and they hold a private-owned status. Single items and whole collections of cultural goods are traded.⁷ Currently, the trend of investing in works of art by entrepreneurs is more and more noticeable.⁸ Investment in works of art is a way of money thesaurization. This paper will apply to some crucial aspects of bankruptcy proceedings of persons and entities who have bankruptcy ability and at the same time who are the private owners⁹ or holders of legally protected cultural property. The discussed problem is connected with corporate bankruptcy and with consumer bankruptcy¹⁰ of natural persons as well.

National legal orders regarding the protection of cultural property and bankruptcy regulations differ in many aspects. Thus the purpose of this study is not conducting a closer analysis of a specific legal order, but rather a general presentation of issues at the interface between the protection of cultural goods and bankruptcy proceedings.

2. Primacy of protection of cultural goods over protection of the creditors' interests

What should be the main and directional principle for resolving any possible collisions in the above-mentioned matter? It should be appropriate to start by presenting the social functions of bankruptcy law and cultural heritage protection law.

⁶ P. Stec, K. Dziewulska, *Status prawny muzeów kościelnych*, in: M. Jankowska, P. Gwoździec-Matan, P. Stec (editors), *Własność intelektualna a dobra kultury*, Warszawa 2020, p. 633-646.

⁷ P. Stec., *Kolekcja jako przedmiot obrotu cywilnoprawnego*, in: P. Stec, P. Maniurka (editors), *Kolekcje i zbiory muzealne. Problematyka prawna*, Opole 2015, p. 79-95; P. Stec, *Odpowiedzialność domu aukcyjnego za wady fizyczne dzieła sztuki*, *Przegląd Prawa Handlowego* 11/1997, p. 9-15; P. Stec, *Ochrona prawna nabywcy na licytacji*, *Art&Business* 12/1999; P. Stec, *25 lat rynku sztuki w Polsce z perspektywy prawnika*, *Santander Art and Culture Law Review* 1/2016 (2), p. 135-142.

⁸ R. Benedikter, *Privatisation of Italian Cultural Heritage*, *International Journal of Heritage Studies* Vol. 10, No. 4, September 2004, p. 369-389; R. Mamarbachi, M. Day, G. Favato, *Art as an alternative investment asset*, *SSRN Electronic Journal*, March 2008, p. 2; P. Stec, *Komercjalizacja muzealiów*, *Muzealnictwo*, Vol. 47, 2006, p. 214-223.

⁹ E. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, *Chicago Journal of International Law* 213 (2007), p. 213; R. O'Keefe, E. Peron, T. Musayew, G. Ferrari, *Protection of Cultural Property*, Military Manual, Italy San Remo 2016, p. 4.

¹⁰ R. Adamus *Consumer arrangement under Bankruptcy Law Act in Poland*, *Sociopolitical Sciences*, Moscow No. 6/2019, p. 76-81; R. Adamus, *Importance of payment morality in the Polish bankruptcy law*, *Journal of Business Law and Ethics*, New York, December 2019, Vol. 7, No. 1&2, p. 9-15.

Bankruptcy law is intended mainly to protect the economic (pecuniary) interests of only a limited group of people – countable creditors of the bankrupt. It should be stressed that insolvency law is about protecting particular financial interests. Creditors participating in commercial games bear a typical ordinary risk of economic loss. Financial interests are not eternal. On the contrary, pecuniary claims in the course of time could be terminated (expired). In some circumstances pecuniary claims could be cancelled by a relevant ruling of the court.¹¹ In reorganization proceedings, the majority of creditors may decide about reduction of their claims. One of the UNCITRAL's documents stipulates that “participants in insolvency proceedings should have strong incentives to achieve the maximum value for assets, as this will facilitate higher distributions to creditors as a whole and reduce the burden of insolvency. The achievement of this goal is often furthered by achieving a balance of the risks allocated between the parties involved in insolvency proceedings.”¹²

When it comes to *ratio legis* of protection of cultural objects, it is about protecting the lasting interests of entire present communities and even future generations (an uncountable number of people).¹³ Moreover, protection of non-pecuniary interests is at stake: protection is of a universal cultural value.¹⁴

The legal protection of cultural goods has its source in national legislation (administrative law, civil law, criminal law) and international agreements and conventions. It is a legal duty of states, public bodies and individuals as well. This protection has different intensities, in particular depending on the type of cultural asset and its uncontested artistic or historic value (it is important *praetium commune* not individual *praetium singularis*).¹⁵ Historical background is very important for the shape of national legislation (plunder of national cultural goods as a result of wars, nationalization of cultural goods, etc.). Many kinds of common cultural goods are unprotected at all. Not every country fife or clay ocarina deserves a special legal treatment. As mentioned above the legal protection of cultural goods is provided on different levels: international and national (internal).¹⁶ Here, the following documents should be listed: UNIDROIT

¹¹ R. Adamus, *Debt relief thorough creditors' repayment plan in Poland*, Economic problems and legal practice, Moscow no. 6/2019, p. 130-136; R. Adamus, *Modes of debt relief for consumers in Poland*, Economic problems and legal practice, Moscow No. 6/2019, p. 137-142.

¹² UNCITRAL *Legislative Guide on Insolvency Law*, New York 2015, p. 10.

¹³ K. Papaioannou, *The International Law on the Protection of Cultural Heritage*, International E-Journal of Advances in Social Sciences, Vol. III, Issue 7, April 2017, p. 258.

¹⁴ D. Fincham, *Blood Antiquities Convention as a Paradigm for Cultural Property Crime Reduction*, Cardozo Arts & Entertainment, Vol. 37: 2, p. 300.

¹⁵ W. Kowalski, *Monuments value as a criterion under national and international laws*, in: *Heritage value assessment systems – the problems and the current state of research*, Lublin 2015, p. 109-132.

¹⁶ F. Franconi, *Public and Private in the International Protection of Global Cultural Goods*, The European Journal of International Law Vol. 23 No. 3 (2012), p. 720; J.H. Merryman, *Two Ways of*

Convention on Stolen or Illegally Exported Cultural Objects, adopted on 24 June 1995, UNESCO Convention on illicit traffic of cultural property adopted in 1970, UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage adopted 16 November 1972.

Cultural goods subject to legal protection are identified in different ways. This purpose can serve the general definition (general clause) of cultural goods. This can be done through an entry in the appropriate register, including the register kept for lost cultural goods.

In addition it should be reminded that, in some cases, the provisions of the insolvency law allow special treatment for certain components of the bankrupt's estate, e.g. when the estate includes assets that are significant from the point of view of state defense.¹⁷ In other words, the special status of some assets of the bankruptcy estate forces their special treatment in the case of insolvency.

Considering the problem (1) of the subjective scope of beneficiaries of cultural property protection and beneficiaries of bankruptcy proceedings, (2) the type of interest being protected, (3) social significance, (4) the rank of the legal act introducing protection, the following conclusions can be made: bankruptcy authorities (including a trustee, a judge – commissioner and bankruptcy court) should generally respect all the restrictions arising from applicable provisions relating to cultural objects; in a situation where there are legally protected cultural goods in the bankruptcy estate, it should be recognized that the bankruptcy authorities should, on their own initiative, take all the necessary steps to treat these goods properly, in accordance with authoritative provisions of public and civil law. Legal regulations often introduce certain provisions limiting the ownership right of cultural goods. Limits may concern all attributes of the ownership right.

The discussed problem could be illustrated with the case of the Detroit Institute of Arts.¹⁸ The City of Detroit, as the owner of one of the largest municipally-owned museums in the United States (the Detroit Institute of Arts), with an art collection valued at more than one billion dollars, filed for bankruptcy protection proceedings with an estimated 18 billion dollars debt. The procedure of bankruptcy protection involves demonstrating insolvency and a desire to

Thinking About Cultural Property, The American Journal of International Law, Vol. 80, No. 4 (Oct., 1986), p. 831-853; L. Casini, "Italian Hours": *The globalization of cultural property law*, International Journal of Constitutional Law, Volume 9, Issue 2, April 2011, p. 369.

¹⁷ R. Adamus, *Zagadnienie praw własności intelektualnej przedsiębiorców przemysłu zbrojeniowego w postępowaniu upadłościowym*, in: *Własność intelektualna w prawie upadłościowym i naprawczym*, M. Załucki (editor), Warszawa 2012, p. 13-27.

¹⁸ L. Stolongo, *Muses in Bankruptcy Court: a look at US arts and cultural institutions finding themselves in bankruptcy and out*. <https://itsartlaw.org/2014/03/28/muses-in-bankruptcy-court-a-look-at-us-arts-and-cultural-institutions-finding-themselves-in-bankruptcy-and-out/> accessed: 10.03.2020.

effect a plan of debt adjustment, and negotiating, attempting to negotiate, or establishing the impracticality of negotiating, in good faith with creditors holding the majority of interest in claims. The City of Detroit considered a concept of selling out the collection of the Detroit Institute of Arts. All pieces of art were acquired with funds provided by Detroit. Creditors generally opted for selling the collection. The Detroit Institute of Arts immediately started public fundraising in order to avoid selling out the collection. It was made an agreement to transfer the ownership of the museum to a nonprofit organization to avoid the threat of selling out goods of culture to cover municipal debts.

In the case of insolvency there arise questions of how to protect cultural goods of a responsible owner, how to maintain unharmed cultural goods during bankruptcy proceedings and how to ensure purchasing cultural goods from the bankruptcy estate by a responsible institution.

3. Cultural objects and the applicable law

As a rule ownership and other rights *in rem* are under the law of the country in which their subject is located (*lex rei sitae*).¹⁹ Thus, the location of the subject of property and other rights *in rem* is the criterion by which the proper legal order is determined. Adopting, as a link, the location of the subject of rights (*situs rei*) for the general norm indicating the material statute is a solution widely accepted in many legal orders.²⁰ *Situs rei* may determine a concrete national law order or international law if the state where cultural goods are located is a party to international convention protecting heritage. At the same time – as a rule – the law of the country of the opening of insolvency proceedings shall determine in particular the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings (Article 7 sec. 2b Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings).²¹ *Lex concursus* therefore determines

¹⁹ B. Akermans, E. Ramaekers, *Lex Rei Sitae in Perspective: National Developments of a Common Rule?*, Maastricht European Private Law Institute Working Paper No. 2012/14; B. Laukemann, 'Die *lex rei sitae* in der Europäischen Erbrechtsverordnung – Inhalt, Schranken und Funktion', Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law Working Paper Series MPILux Working Paper 2 (2014), available at: www.mpi.lu, accessed: 10.03.2020.

²⁰ J. Kosik, *Zagadnienia prawa rzeczowego w prawie prywatnym międzynarodowym z 1965r.*, Acta Universitatis Wratislaviensis No 332, Prawo LVII, Warszawa–Wrocław 1976, p. 30; J. Gołaczyński, *Jurysdykcja w sprawach dotyczących praw rzeczowych oraz statut rzeczowy w prawie wspólnotowym na przykładzie prawa upadłościowego*, Prawo 308, 2009, p. 162.

²¹ B. Wessels, *The Changing Landscape of Cross-border Insolvency Law in Europe*, *Juridica International* XII/2007 p. 117; E. Oprea, *The Law Applicable to Transaction Avoidance in Cross-Border*

which assets are included in the bankruptcy estate, however, as a rule, the legal status of the item as cultural goods is determined by the law of the place where the item is located (generally *lex concursus* determines all the effects of the **insolvency** proceedings, both procedural and substantive, on the persons and legal relations).

The legal regulations introducing the principles of protection of cultural goods and the sanctions applied usually define the subject of protection. Thus, there are many legal definitions of cultural objects²² on the international and national level. Each of them is important because they determine the concrete scope of legal protection. “Cultural goods” in Point 3 of the preamble of Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods²³ are understood as “a part of cultural heritage and are often of major cultural, artistic, historical and scientific importance. Cultural heritage constitutes one of the basic elements of civilisation having, inter alia, a symbolic value, and forming part of the cultural memory of humankind. It enriches the cultural life of all peoples and unites people through shared memory, knowledge and development of civilization.” Under Article 2 of the UNIDROIT Convention on stolen or illegally exported cultural objects (Rome, 24 June 1995) “cultural objects are those which, on religious or secular grounds, are of importance to archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention”. Some most valuable cultural goods are put in special registers on the international and local level.²⁴

Non-physical or intangible goods of cultural property²⁵ as a rule cannot be a part of bankruptcy estate (unless they can be subject to rights, including property rights, and have property value).

The components of the bankruptcy estate may be cultural goods that are both movable²⁶ and immovable (real estate). Movable cultural objects may include in

Insolvency Proceedings, in: V. Lazic, S. Stuij (editors) *Recasting the Insolvency Regulation*. Short Studies in Private International Law. T.M.C. Asser Press, The Hague 2020.

²² K. Papaioannou, *The international...*, p. 258; R. McCain, *Defining Cultural and Artistic Goods*, in: V.A. Ginsburgh, D. Throsby, (editors), *Handbook of the Economics of Art and Culture*, 2006, p. 147-167.

²³ Official Journal of the European Union dated on 7.6.2019 L 151/6.

²⁴ The National Heritage List for England (NHLE) is the official register of all nationally protected historic buildings and sites in England – listed buildings, scheduled monuments, protected wrecks, registered parks and gardens, and battlefields.

²⁵ C.A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, *Journal of Intellectual Property Law*, March 1994, p. 298.

²⁶ A. Jagielska-Burduk, *Zabytek ruchomy*, Warszawa 2011, p. 9.

particular: works of fine arts, artistic crafts and applied arts, numismatic items, historical souvenirs (especially military items, banners, seals, badges, medals), technical devices (in particular, means of transport and machines and tools providing material culture, characteristic of old and new forms of economy, documenting the level of science and civilization development), library materials, incunabula, manuscripts, maps, music scores, musical instruments, folk art and handicraft products and other ethnographic objects, etc. Cultural goods which are legally protected can be linked in with religion.²⁷

A special kind of cultural objects are exhibits. Exhibits are usually defined as movable and immovable property of a museum which are entered in the inventory of museum exhibits. In principle, exhibits are a national heritage and usually have the legal status *res extra commercio*. However, under certain conditions exhibits can sometimes be traded. State and local government museums can make exchanges, sale or donation of museum exhibits, after obtaining the relevant permission of the competent authority.

4. Limits for the owner of legally protected cultural goods

Ownership (*dominium, prioprietas*)²⁸ is the widest, basic right in property, allowing the owner to use and dispose of the property with the exclusion of other persons (*ius disponendi*), under which the owner enjoys maximum rights over the property. A sign of using property is the right to hold property (*ius possidendi*), use (*ius utendi*), receive benefits and other income from things (*ius fruendi*) and the factual disposal of property (*ius abutendi*) including processing, changing and even destruction. In turn, the regulation means the right to dispose of property (e.g. transfer, waiver or disposition in the event of death) and to encumber property by establishing, e.g. a pledge, mortgage or by carrying out actions – obligations regarding property with obligatory effects, i.e., lease, rental, loan. These rights do not constitute the limits of the right to property, which is defined by the applicable legislation. As a rule, owner's right does not expire over time. The property right of legally protected cultural goods is subject to some restrictions in the public interest.²⁹

Ownership (*dominium, prioprietas*) must be distinguished from possession (*possesio*). Ownership therefore determines the legal status. Possession is only

²⁷ P. Stec *Prawo kościelnych dóbr kultury – niedocenione pole badawcze*, in: K. Dola, E. Mateja (editors.), *Imago – vox demonstrans*, Opole 2018, p. 437-448.

²⁸ Roman law influenced both common law and continental law: P. Stein, *The influence of Roman Law on the common law*, <https://openaccess.leidenuniv.nl/bitstream/handle/1887/36630/240.pdf?sequence=1>, accessed: 10.03.2020; H. Hausmaniger, R. Gamauf, *Casebook zum römischen Sachenrecht*, Wien 2003. Thus, the essence of the ownership could be described using development of Roman law.

²⁹ K. Zeidler, *Prawo ochrony dziedzictwa kultury* Warszawa 2007, p. 231.

a factual state, so the possessor has physical power over property, but that power does not mean that he has the legal title to property.

In the case of bankruptcy – as a general rule – the bankrupt (the owner) is limited in exercising their owner's rights. Management over bankrupt's assets is the exclusive duty of the trustee. The Regulation of 20 May 2015 on insolvency proceedings applies to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed.

Cultural goods could be a part of bankrupt's estate. In such a case an appointed trustee should take a proper care of them and respect limits established by the law. A trustee should insure cultural goods against possible risks. A quite serious problem in practice is a proper valuation of a "priceless" item for insurance purposes.

4.1. Limits concerning *ius possidendi*

Ownership gives the right to hold property (*ius possidendi*). However, the owner of cultural goods can be limited in exercising this competence. Cultural goods – on the basis of law or on that of a private agreement – could be exhibited for public viewing in the museum. The trustee appointed by the bankruptcy court could be deprived of holding assets belonging to the bankrupt as well.

Cultural goods belonging to private individuals who have the owner's title to them may be kept in the museum's deposit. Thus, the owner of a cultural object (bankrupt) may not be its actual holder on the day when bankruptcy was opened. Two questions arise in these circumstances. First, what is the impact of the owner's bankruptcy on the deposit agreement and the deposit based on the provisions of the law? It seems that a deposit agreement with a museum, the subject of which are cultural goods, cannot be treated as a typical lend term-agreement (*commodatum*). However, the solution to this dilemma depends on the concrete shape of the proper law and the content of the agreement. Nevertheless, the special subject of the agreement should always be taken into consideration. It seems that a deposit based on provisions of law is binding for the trustee and the other bankruptcy authorities. Secondly, there is the following question: can a trustee sell to a third party a piece of cultural goods which is held by a museum? The answer to this question should be in the affirmative. It is possible to transfer the owner's rights for the buyer of a thing which is held by the third person. *Traditio corporalis* – which is about giving a thing away from hand to hand – is only one of the forms of transfer of possession.

4.2. Limits concerning *ius abutendi*

The right to factual disposal of property is the next attribute of the owner. The owner of a legally protected cultural object cannot destroy it, damage or make changes to it. On the contrary, the owner is usually obliged to secure in a special manner a legally protected cultural object against damage, destruction, loss or theft. This means an obligation to bear the costs of maintaining the assets, including specialist maintenance, protection, etc. Cultural goods should be subject to proper care and protection.³⁰ Possession of cultural objects usually involves their conservation, restoration and conducting construction works if necessary. Persons with legal title to the monument, resulting from ownership, are particularly obliged to finance conservation, restoration and construction works at the monument.

A trustee should keep cultural goods in proper conditions against any kind of destruction: because of humidity, dryness, fire. etc. Anti-theft protection is essential as well. In the case of expiry of necessary contracts because of bankruptcy a trustee should immediately renew them. Preserving legally protected cultural goods is a public duty. If it is necessary, a trustee should cover all necessary costs from bankruptcy estate even with harm to the creditors' interests. However, in such a case a trustee probably could demand a repayment from public funds.

It is possible to perform – by competent authorities – inspections of some cultural objects. Proper authorities are usually entitled to access the property if there is reasonable suspicion of destruction or damage to the cultural objects on the premises. Their duty could be assessment of the condition, preservation and protection of the cultural objects or checking compliance of all actions taken at monuments with the scope or the conditions set out in the issued decisions or other authority rulings and approved documentation.

Bankruptcy has a cross-border dimension. The effects of bankruptcy may conflict with the institution of legal protection of movable property of historical, artistic or scientific loans borrowed from abroad for a temporary exhibition organized on territory of the country granting legal protection. In some cases the owner of cultural goods could not be allowed to change the place of keeping of cultural goods of previous consent of special authority.

The national legislator may provide that one may apply for a targeted subsidy from the state or local government budget for co-financing conservation, restoration or construction works at some cultural goods. Grants for co-financing conservation, restoration or other works on cultural goods could be granted to the bankruptcy authority. A trustee should take advantage of all such possibilities in order to reduce the costs of keeping cultural goods from bankruptcy estate.

³⁰ J. Brudnicki, *Prawna opieka nad zabytkami – wybrane aspekty*, http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-e69a5f03-5faa-4122-8ccf-8ff101ec8f96/c/Ochrona_Zabytkow_2014_n2_s049-072.pdf, p. 49, accessed: 10.03.2020.

4.3. Limits concerning *ius utendi*

Depending on the kind of cultural goods, it is possible to use them but under certain conditions. In some cases cultural goods are not intended for common use. They can only be exhibited.

It is very often forbidden to carry out conservation works, restoration, construction and other activities that could lead to violation of the substance or a change in the appearance of the given monument.³¹

Owners of cultural objects are usually obliged by law to provide conditions for scientific research and documentation of the cultural object. It limits the possible use of the owner.

Utility of the immovable monument may involve creation of documentation specifying the condition of the immovable monument and the possibilities of its adaptation, including historical functions and values of this monument.³² There are frequently established bans and restrictions regarding carrying industrial, agricultural or commercial activities.

4.4. Limits concerning *ius fruendi*

The entity running a museum may charge fees for admission to it. However, individual regulations may introduce some restrictions or exemptions, e.g. that on one day of the week admission to permanent museum exhibitions is free. Sometimes the legislator imposes the obligation to apply certain concessions to particular categories of people. Similarly, the entity running the museum may charge fees for sharing museum images with the use of IT data carriers. Legal regulations may introduce a solution according to which direct access to images of museum exhibits by electronic means is free.

4.5. Limits concerning *ius disponendi*

National legislation grants museum operators priority of buying cultural goods.³³ Some museums may have pre-emptive rights to purchase from entities conducting activity consisting in offering cultural goods for sale within a specified period from the date of notification by the museum of the intention of purchase.³⁴

³¹ M. Sabaciński, *Kilka uwag o realizacji przepisów ochrony zabytków. Problemy praktyczne*, Acta Universitatis Wratislaviensis No. 3445, Przegląd Prawa i Administracji LXXXIX, Wrocław 2012 p. 39.

³² K. Zalaśńska, *Prawna ochrona zabytków nieruchomych w Polsce*, Warszawa 2016.

³³ A. Jagielska-Burduk, D. Markowski, *Wybrane zagadnienia dotyczące sposobów nabywania własności dzieł sztuki i zabytków przez muzea*, Acta Universitatis Nicolai Copernici, Zabytkoznawstwo i Konserwatorstwo XLIV, Toruń 2013, p. 531.

³⁴ W. Szafranski, *Regulaminy aukcyjne na polskim rynku sztuki*, in: W. Kowalski, K. Zalaśńska (editors), *Rynek dzieł sztuki*, Warszawa 2011, p. 79; P. Stec, *Szczególne uprawnienia muzeów rejestrowanych w zakresie obrotu dziełami sztuki*, Muzealnictwo 2005, No. 6, p. 182.

Such an entity may go bankrupt. This problem may be regulated differently. The following model can be pointed out: in the case of exercising the right of priority, the acquisition by a museum followed by the price at the time of notification of the intention of purchase. Some museums may have a pre-emption right auctioned off. The declaration regarding exercising the right of pre-emption should be submitted by the museum immediately after the auction, not later, however, than until the end of the entire auction. The law may provide that sales made in breach of the right of priority shall be invalid. Finally, permanent export abroad of some objects of culture requires acceptance on the part of proper authority.³⁵

5. The concept of exclusion of some types of cultural goods of bankruptcy estate

In some legal orders there is in force a theory of exclusion of certain cultural goods of crucial value from the bankruptcy estate. A movable property subject to legal protection – pursuant to the relevant legal provisions – may not be subject to attachment for securing in civil and administrative proceedings, enforcement in judicial and administrative enforcement proceedings, attachment in order to secure property penalties, penal measures and claims for damages in criminal proceedings.

Cultural goods excluded from the bankruptcy estate should be kept by the bankrupt himself. In the case of lack of funds the bankrupt should immediately transfer cultural goods to a responsible institution. Besides, at the end of bankruptcy proceedings the insolvent entity is to be dissolved. It seems that national legal orders should provide provisions which allow museums to take over cultural goods excluded from the bankruptcy estate. If there is no such legislation, transfer of cultural goods can be based on a contract.

6. Cultural goods in the factual possession of the bankrupt to which the third party holds the legal title

The bankruptcy trustee takes over all components of the debtor's property, which may include items for which there are *rei vindication* claims of third parties.³⁶ The bankrupt could be a holder of items with no legal title to them.

³⁵ P. Stec, *Kontrola eksportu dóbr kultury w prawie francuskim*, *Ochrona Zabytków* 2/1997, p. 110-115.

³⁶ P. Stec, *Odszkodowanie z tytułu zwrotu dobra kultury w konwencji UNESCO z 1970 r., konwencji UNIDROIT z 1995 r. oraz dyrektywie 93/7/EWG*, in: J. Pisuliński, P. Tereszkiwicz, F. Zoll (editors), *Rozprawy z prawa cywilnego, własności intelektualnej i prawa prywatnego międzynarodowego*. Księga pamiątkowa dedykowana Profesorowi Bogusławowi Gawlikowi, Warszawa 2012, p. 247-268; P. Stec, *Postępowanie w sprawach zwrotu dóbr kultury wywiezionych nielegalnie z terytorium państwa człon-*

Bankruptcy authorities should hand over cultural goods that are subject to release. This applies to, e.g. a treasury when it was found (*inventio thesauri*) by the bankrupt if the applicable law provides that the ownership of such a treasury is acquired by the state.³⁷ This applies to works of art subject to recovery. Cultural goods could have been subject to war plunder³⁸ and for those reasons should be returned to the proper owner or his successors. Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012³⁹ ensures the physical return of the cultural objects to the Member State from whose territory those objects have been unlawfully removed, irrespective of the property rights applying to such objects. Thus, the trustee should return stolen goods.⁴⁰

7. The concept of pre-emption rights in the case of bankruptcy proceedings

The concept of pre-emption rights of most valuable cultural goods in the case of bankruptcy proceedings or similar enforcement proceedings against the owner of cultural goods should be promoted. Pre-emption rights should cover the collection as a whole (primacy of purchasing the whole collection) and every single item of the collection. Pre-emption rights should be given for a national museum or other museums. Pre-emption rights should concern cultural goods located on the territory of the state, where a national museum (or another museum) is seated provided that such a location does not violate any rules (in particular concerning illegal cross-border transfer). In the case of an illegal transfer of cultural goods pre-emption rights should be granted to an institution from the state of origin of the cultural goods. Such pre-emption rights should be introduced on the international law level.

kowskiego Unii Europejskiej – zagadnienia wybrane, in: K. Zeidler (editor), *Prawo ochrony zabytków*, Warszawa – Gdańsk 2014, p. 395-406.

³⁷ J.M. Kleeberg, *The Law and Practice Regarding Coin Finds, Treasure Trove Law in the United States*, <http://www.muenzgeschichte.ch/downloads/laws-usa.pdf> Accessed: 10.03.2020.

³⁸ W. Kowalski, *Tytuł prawny Polski do zabytków wywiezionych z Wrocławia pod koniec i po zakończeniu II Wojny Światowej*, Acta Universitatis Wratislaviensis No. 3440, Przegląd Prawa i Administracji LXXXVIII Wrocław 2012, p. 57; R. Sasin, *Odzyskiwanie dzieł sztuki*, Kontrola Państwowa 2017, No. 6, p. 92; P. Stec, *Problem likwidacji skutków II wojny światowej w zakresie dóbr kultury i archiwaliów w stosunkach polsko-niemieckich w świetle Traktatu o dobrym sąsiedztwie i przyjaznej współpracy*, in: W. Góralski (editor), *Przełom i wyzwanie. XX lat polsko-niemieckiego traktatu o dobrym sąsiedztwie i przyjaznej współpracy, 1991-2011*, Warszawa 2011, p. 393-417; P. Stec, *Zwrot dóbr kultury wywiezionych bezprawnie z terytorium UE*, *Prawo Europejskie w Praktyce* 7-8/2010.

³⁹ Official Journal of the European Union L 159/1.

⁴⁰ A. Grajewski, *Odzyskiwanie skradzionych dóbr kultury po latach od ich kradzieży*, Acta Universitatis Lodziensis, Folia Iuridica 8/2018, p. 35.

The next crucial aspect is about the valuation of cultural goods for the purpose of exercising pre-emption rights.

8. *Bona fide* of a purchaser of cultural goods from the bankruptcy estate

A bankruptcy sale is based on the concept of expiration of mortgages, pledges, register pledges and other burdens on the subject of the sale. What are the results of selling by a trustee of cultural goods to which the bankrupt had no legal title? There is a generally accepted rule *nemo in alium plus iuris transfere potest quam ipse habet*. However, the law accepts some exclusions. *Bona fide* of the purchaser was a subject of regulation in Roman law⁴¹ which influenced the *common law* system and continental law system as well. *Common law* generally accepts the rule that an innocent (unconscious) party that purchases property without notice of any other party's claim to the title of that property gains the ownership title upon due inspections which ought reasonably to have been made.⁴² Continental law introduces similar solutions.⁴³

It should be beyond any doubt that a purchaser of cultural goods is obliged to be diligent and cautious while checking the authenticity of the purchased item and its source, and in particular verifying that the seller has the right to dispose of it.⁴⁴

In this aspect there are crucial legal consequences of creating national and international registers of cultural goods. There are generally two categories of them.⁴⁵ Firstly, in many countries there are *sui generis* preventive registers as an important legal form of monuments protection (*ex ante* protection). They are created to prevent an illegal circulation of cultural goods or damage during a war, therefore they play a particularly significant role in countries affected

⁴¹ M. Chłamtacz, *O nabyciu owoców przez posiadacza w dobrej wierze w klasycznym prawie rzymskim z uwzględnieniem prawa cywilnego austriackiego i niemieckiego*, Lwów 1903, p. 52.

⁴² F.A. Whitney, *Value and the Doctrine of Bona Fide Purchase*, St. John's Law Review, Vol. VII, 1933 No. 2, p. 181.

⁴³ G. Dari-Mattaci, C. Guerriero, *Law and Culture: A Theory of Comparative Variation in Bona Fide Purchase Rules*, Amsterdam Law School Legal Studies Research Paper No. 2014-57, Amsterdam Center for Law & Economics Working Paper, Paper No. 2014-04.

⁴⁴ W. Kowalski, *Nabycie własności dzieła sztuki od nieuprawnionego*, Kraków 2004, p. 233-248; K. Żalasińska, *Dobra wiara jako przesłanka ochrony nabywców kradzionych dzieł sztuki*, Palestra 2010, No. 5/6, p. 45-46.

⁴⁵ A. Lizak, *Prawne aspekty utworzenia rejestru utraconych dóbr kultury*, Przegląd Prawniczy Uniwersytetu Warszawskiego, Year XVI, No. 1/2017, p. 117; K. Górniak, *Szczególna ochrona własności w ramach Rejestru Utraconych Dóbr Kultury*, Transformacje Prawa Prywatnego No. 2/2018, p. 5; B. Gadecki, *Nowe regulacje dotyczące problematyki zabytków w związku z wejściem w życie ustawy o rzeczach znalezionych*, Ius Novum 2016, No. 4, p. 186.

by armed conflicts. They are not always run by the country authorities themselves, but are often a product of international experts.⁴⁶ Secondly, the role of registers in which goods already lost have been entered is different. In such a case protection seems to be a follow-up and the register itself is intended to be a helpful tool in the recovery process of lost heritage (*ex post* protection). Very often, these types of registers (made available to relevant institutions, e.g. museums, auction houses, the police) are mainly informative.⁴⁷ The public content of such registers should exclude *bona fide* of the purchaser.

However, some legal orders introduce a solution that no one, even if the conditions of the existence of good faith and prerequisites for the passage of time are met, can purchase cultural property from an unauthorized seller.⁴⁸ Another important civil law solution is to exclude the limitation period for recovery claims against cultural goods entered in the register.⁴⁹

Results of a bankruptcy sale are designed by proper *lex concursus*. Nevertheless, it is not possible to omit legal limits of purchasing cultural goods from an untitled person by a sale from the bankruptcy estate.

Conclusions

It should be beyond any doubt that protection of cultural heritage should have primacy over protection of pecuniary interests of creditors. Insolvency of the holder or that of the owner of cultural goods are not daily cases. However, they do happen in practice. Direct bankruptcy legislations evade this matter, although proper interpretation of the existing law allows giving priority to the protection of cultural goods. A trustee (bankruptcy authority) should not be a machine aimed at simple selling out the bankruptcy estate. On the contrary, liquidation of the bankruptcy estate should not infringe on either international or national heritage protection law. From this point of view an academic discussion seems to be necessary. This paper – due to its limited size – can only indicate the most important issues.

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⁴⁶ A. Lizak, *Prawne...*, p. 117.

⁴⁷ *Ibidem*.

⁴⁸ *Ibidem*, p. 128-129.

⁴⁹ *Ibidem*, p. 141.

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