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LEGAL STATUS OF A MUSEUM DEPOSIT: SELECTED ISSUES

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Introduction

Next to museum exhibits, deposits constitute the most sizeable category of objects creating museum collections, and their role in museum operations cannot be overestimated.¹ The objects which are deposits do not only add to the museum collection, but also complement it, often leading to the recreation of the original whole and rebuilding of its integrity.² However, as museum practice demonstrates, deposits are a questionable category of a museum collection,³ nor free from litigation.⁴ It happens so, since the legal status of this group of objects is not entirely clear: it is defined neither in the Act on Museums⁵ nor in the implementing acts to the Act in question. The situation is all the more confusing, since when accepting different objects, museums conclude contracts which they interchangeably classify as: deposit, safekeeping, lending, or borrowing,⁶ while the British model of collection management: Spectrum standard⁷ does not distinguish between the above-mentioned situations, proposing a single procedure of 'an object entry'. Obviously, the way the parties name the contract they conclude has no binding force: what matters is its subject and content, namely what the parties commit themselves to do (what the service in question is), and what privileges and responsibilities result henceforth.⁸ Nonetheless, the adoption of an inappropriate qualification may yield unfavourable consequences to the museum (in the event of a conflict, when the object has been damaged, in the event of the necessity to breach the contract, or owing to the failure to fulfil the registering requirements). Thus, an institutionalized entity that a museum is should make sure that the above issues are precisely defined, and an adequate contract appropriate for the definite situations resulting from museum procedures is adopted. The aim of the paper is to identify the legal status of museum deposit, and to point to the correct use of a deposit structure in daily museum practice within the analysed regulations.⁹

De lege lata museum deposit

The legislator is not very extensive on museum deposit; neither does the law foresee many conveniences for deponents.¹⁰ There is no mention of deposit in the Act on Museums (AoM), and only in the Act's regulation on registering there is a mention of a 'deposit book'.¹¹ In other legal acts there is only a phrase relating to 'giving for safekeeping' or directly of 'depositing' (Art. 9.2 of the Act on the Restitution of Polish Cultural Assets, AoRPCA);¹² or of 'giving for deposit' (Art. 35.3 of the Act on the Protection of Cultural Property and Guardianship of Monuments¹³ with relation to archaeological heritage pieces; Art. 44 of the Act on National Archival Resources and State Archives¹⁴), and in one case there is even mention of a 'deposit contract' (Art. 12, AoRPCA). 'Deposits' are also mentioned in the context of the limitation of the access to the public sector information (see Art. 6.4.2 of the Act on Open Data and the Re-use of Public Sector Information).¹⁵ If attempting at this point at defining a museum deposit, we can assume that it is a moveable in museum's possession constituting part of the museum collection, which, however, is the property of a third party, and has been entered into the deposit book either on the grounds of a Civil Law contract (deposit contract) or pursuant to an administrative decision or a material-technical action of an authority (so-called official deposits).

Deposit as an element of a museum collection

The concept of a collection is a wide category encompassing both museum exhibits, and all the other objects amassed in a museum,¹⁶ including deposits. What are the henceforth derived consequences? Firstly, since a deposit forms part of the collection, it should harmonize with the museum's profile,¹⁷ defined in the museum's Charter, this implying

that the acceptance of an object as a deposit in a museum should remain in line with the policy of collection acquisition and therein described assumptions. Secondly, a museum should also be able to catalogue and study its deposits (Art. 2.2, AoM), preserve and conserve them (Arts. 2.4. and 5.4, AoM), provide access to them for educational and scientific purposes (Art. 2.8, AoM), and for visiting and use (Arts. 2.9 and 25.1, AoM). How do the above 'responsibilities' of museums towards the deposited objects refer to deposit contracts concluded between the museum and the deponents? In my view, they should be regarded as 'guidelines' for deposit contracts, and provide interpretative guidance: if an object ends up in a museum collection, the museum should be able to treat it in harmony with the legislator's stipulations. The object is not accepted 'for storage' for its safekeeping. There should be a contractually confirmed possibility for it, if a need arises, to become an element of a permanent exhibition, to be displayed in a temporary exhibition, to be studied or conserved. Obviously, this stand does not lead to the conclusion that the contracts not permitting the museum to do the above are invalid (Art. 58 of the Civil Code, CC), yet it can serve as an interpretative guidance for contract interpretation in case of doubt (Art. 65, CC). When elaborating the procedures for taking an object as deposit the guidelines should emphasize that deposit contracts should refer to the above-mentioned issues directly stipulated by the Act. This is the only means for museums to balance their expenditures resulting from storing and preserving an 'external' object. In view of the above, a museum is entitled to refuse as deposit an object whose owner would oppose to any of the aforementioned activities.

'Problems' caused by legal deposits

Apart from contracts concluded between a deponent and a museum (relation under civil law), a museum deposit may result from the activities of public administration organs (relation under administrative law). In museum practice such acquired objects are defined as 'legal deposits': they reach a museum upon a decision of an administrative organ (archaeological heritage pieces,¹⁸ heritage pieces secured upon the decision of a temporary seizure,¹⁹ found objects which are either heritage pieces or archival objects,²⁰ national cultural assets²¹), or as a result of the so-called material and technical activities (cultural assets recovered through restitution,²² cultural assets seized by customs authorities,²³ fossil remains of plants or animals of worth for science²⁴). In some cases museums can apply for the object's ownership transfer. Apart from the above regulations, giving for safekeeping can also result from a court decision based on rules of procedure (Art. 231.2 of The Code of Criminal Procedure, CCP) in relation to objects of scientific, artistic, or historical value which have been either turned in or found in the course of search (Art. 228, CCP).²⁵ When summing up all the grounds for transferring objects for safekeeping in museums scattered in different pieces of legislation, one can first of all notice the lack of uniformity in the applied terminology: the legislator speaks of a 'deposit contract' in one place, somewhere else of 'giving for safekeeping', and elsewhere of 'transferring' or 'depositing'. Secondly, it remains unknown (except for the case pointed to in AoRPCA) what the range

of rights the museum enjoys versus the deposited objects: can they be displayed, studied, conserved? Finally, thirdly, it is hard to unequivocally decide whether in the above-mentioned cases²⁶ we have to do with a relation under civil law of a contract of safekeeping, or more a relation under public law? As museum praxis demonstrates, museums subsequently conclude contracts regulating parties' rights and obligations. The question is whether the template for this kind of contracts can be found in the deposit contract described in Art. 12.3.2 of AoRPCA? Since only in one case: when cultural assets recovered through restitution by the Ministry of Culture and National Heritage, MCNH, have been entrusted to a cultural institution for care on the grounds of a deposit contract, the contract has been defined precisely: *The contract [...] can anticipate the commitment of a cultural institution or another unit of the public finance sector specializing in preservation of heritage pieces to store free of charge cultural assets and to conduct in its proper manner conservation works within the range agreed with and upon the authorization of the Ministry of Culture and National Heritage, as well as to assume the rights of a depositary to display and make available for public viewing the cultural asset and its image in compliance with the conditions as agreed with the Minister. We can deduce from the quoted phrasing that in this case we have to do with a 'bunch' of different contracts: a contract of safekeeping (free of charge), specific-task contract (conservation), lending agreement (displaying and making available for public viewing), and even a licence contract (when the object is a carrier of copyright). With regard to the latter it should be mentioned that the legislator did not apply here the structure pursuant to the letter of the law, since in the event of an object being subject to copyright, the entity entitled to decide on the use of the image of the deposit (work) registered in a different carrier will be the following: its author, heirs, or entities entitled to enjoy copyright. The above regulations should by no means be regarded as a statutory licence for the museum to make works available to the public. If a need arises, the use of the object's image may be based on the principle of the permissible use discussed in the further part of the article.*

Museum deposit contract

In the museum deposit contract the commitment on the part of a museum is safekeeping of a thing (custody), yet not in its 'pure' form, as happens in the storage contract (Art. 835ff, CC), but with the possible use of the thing (element of the lending contract) and its more long-lasting (than in the short-term lending for a purpose of a temporary exhibition) bonding to the museum which can study the object, and potentially conserve it. The consequences of this phrasing of the contract yield its mutual character: the museum (the depositary) is obliged to the care of the object in return for the possibility to use the object free of charge. The deponent is more of a lender here who when making the object available allows to have it included in the museum collection, at the same time being denounced the privileges typical of a deponent or lender, such as the possibility to have the object returned at the time of their convenience. We thus have to do with an innominate contract, similar to safekeeping and lending contracts, in which appropriate²⁷

rules applicable to innominate contracts should be adopted. The provisions of the return of goods (above-mentioned Art. 844.1, CC), the obligation to reimburse storer's storage expenses (Art. 842, CC), or related to the prohibition of the use of goods by the storer (Art. 839, CC), shall not apply here.

Deposit or lending?

The analysis of the museum practice allows the conclusion that there are two types of 'lending':²⁸ short-term concluded in order to display the object in a temporary exhibition (lending contract) and a long-term one concluded in order to pass an object for safekeeping in a museum, with the object being simultaneously incorporated into the museum collection by entering it into the deposit book (a contract of museum deposit). It is likely that, possibly contrary to the statistics,²⁹ the analysis of the goal of contracts concluded by museums would lead to the conclusion that essentially there are more deposits in them than objects lent, however since deposits imply 'problems' (registering, studying), it is easier to classify them as objects lent? It would thus be justifiable to ask what differs the acquiring of an object for a temporary exhibition based on the lending contract from that acquired in compliance with the deposit contract? In the first case, the contract is concluded for a specified period of time, covering most usually several or some dozen months (for certain time before the launch of the exhibition, for the duration of the temporary exhibition, and shortly after it has finished). In the event of deposits objects are given to the museum for a longer period of time: several or some dozen years, or for an indefinite period.³⁰ Deposits become bonded with the institution in a durable manner: they are entered in the deposit book, and undergo cyclical controls. They form part of the museum collection, as distinct from the objects acquired (lent) for display in a temporary exhibition (currently the legislator does not stipulate that they have to be registered). As is observed in literature,³¹ the role of deposit should not be limited to the function of a storage of historic pieces in the conditions that secure them the best possible preservation. Museums should have a margin of liberty that would allow them to involve the objects they store in their statutory operations (collection), which has been already mentioned above.

Museum deposit versus copyright

In the situations when we have to do with deposits which are at the same time carriers of a work, there is a need to identify their copyright status³² It is recommendable for the deposit contract (or a separate licence agreement, or a copyright transfer agreement) to include a clause which would allow the use of the work in all the exploitation fields connected with displaying, digitizing, and the use of digitized images on-line.³³ Since there is no contractual

settlement of these issues, museums can use the works which they have in their collection only to a limited degree based on the provisions of permissible use (so-called statutory licences).³⁴ Let us point in this respect to the possibility (resulting from Art. 28 of the Act on Copyright and Related Rights, AoCRR)³⁵ to lend copies of the work that are in the museum collection, multiplying the works in order to complement, preserve, or protect the collection,³⁶ making them available for research or educational purposes through IT system terminals. Permissible use also covers advertising of an exhibition, i.e., dissemination of works displayed in collections available for public viewing, also in museum publications, catalogues, and publications released to advertise those works, within the boundaries justified by information dissemination (Art. 33³ of AoCRR). With respect to deposits this, however, means very limited rights.³⁷ An issue apart, discussed in detail elsewhere, is the use of the deposit's image as public sector information³⁸ in compliance with the Act on Open Data and Re-use of Public Sector Information.³⁹

Conclusion

It goes without saying that museum deposit is an institution permanently incorporated into museum operations, regardless of whether and how often the legislator uses the term directly or indirectly (providing legislation that relates to collections in general). Excluding the deposit from the AoM by the legislator, leaving only the deposit book as a 'formal' tool to classify collections without pointing to the range of museum operations with respect to that group of objects gives rise to many problems identified above. The analysis is not facilitated by the legislator as such who often makes incidental references to civil law, driven more by a current need than a coherent operation strategy. In consequence, acting without a correctly structured museum deposit contract, and merely on the grounds of a standard storage contract in compliance with CC may result in the fact that the range of museum's freedom in relation to some objects is so restricted that it contradicts the very museum mission. As seen from this perspective (bearing in mind the reservations made in the paper) the introduction of a deposit contract into AoRPCA, and pointing to its elements (although only with respect to a restricted group of objects recovered through restitution) may be seen in a broader perspective, and serve as a tool for the interpretation of the legal character of the institution of museum deposit. The adopted contract format should be decided upon in harmony with the goal which the museum follows admitting new objects, and bearing in mind the intended degree of object's 'bondage' to the given institution. In each single case the decision about accepting objects as deposits should be made taking the museum's interest into consideration, and it should comply with the policy of collection amassing.

Abstract: Looking at the issue of museum deposit from a purely 'normative' perspective, it can be concluded that the legal status of this group of objects is not clear. Therefore, a question should be asked about the features that

distinguish deposits from other objects, in particular those made available for presentation at an exhibition, preparation of an expert opinion or conservation (referred to in museum practice as 'borrowed' objects). Deposits have a stronger

'relationship' with the museum, in which they were entered in the deposit book, than objects only accepted for exhibition (lent by a third party), but this feature is not directly reflected in the applicable regulation. There is also no specific time limit in the regulations: how long can the 'ordinary' lending last, and when it would be appropriate to conclude a deposit agreement. The analysis of museum practice proves that museums use contracts interchangeably referred to as deposit, safekeeping, lending or borrowing. Adopting an incorrect

qualification may have certain consequences, and an institutionalized entity, such as a museum, should ensure that the above-mentioned issues are precisely defined and that they use appropriate contracts for specific situations. The considerations contained in the article are based on the applicable legal regulation and concern, inter alia, the consequences of treating the deposit as an element of museum collections, 'systematizing' the so-called official deposits and the use of the image of deposits.

Keywords: deposit, safekeeping, collection policy, long-term loans.

Endnotes

- ¹ On the possibilities of entrusting collections to museums as provided for in legal regulations see I. Gredka-Ligarska, P. Gwoździewicz-Matan, 'Przekazywanie kolekcji na rzecz muzeów na podstawie czynności prawnych inter vivos oraz mortis causa', *Cenne, Bezcenne, Utracone*, 3 (2019), 1-19. Museum deposit has also been presented as one of the mechanisms of managing cultural heritage. See A. Jagielska-Burduk, in: *Mechanizmy prawne zarządzania dziedzictwem kultury*, ed. by A. Jagielska-Burduk, Warszawa 2016, p. 121.
- ² This is what happened when the collection of the Katowice Archdiocese was deposited with the Silesian Museum in 2013. See <https://muzeumslaskie.pl/aktualnosci/podpisanie-umowy-na-przekazanie-depozytu-archidiecezji-katowickiej-do-muzeum-slaskiego/> [Accessed: 10 May 2022].
- ³ The issue has been pointed to in literature. See N. Fyderek, 'Depozyt muzealny – zarys problematyki prawnej', in *Kolekcje i zbiory muzealne. Problematyka prawna*, ed. by P. Stec, P.P. Maniurka, Opole 2015, pp. 227–240. In the context of the practice of 'making money on deposits', namely putting up for sale objects previously being museum deposits, see, e.g., J. Miliszkiewicz, 'Depozyty z muzeów bardziej pożądane przez kolekcjonerów', *Rzeczpospolita*, 8 August 2020, <https://pieniadze.rp.pl/portfel-inwestycyjny/art17464991-depozyty-z-muzeow-bardziej-pozadane-przez-kolekcjonerow> [Accessed: 26 April 2022]. As for the legal qualification of the contract see I. Gredka-Ligarska, P. Gwoździewicz-Matan, W. Kowalski, *Umowy w działalności muzeów. Prawo cywilne. Prawo autorskie*, Gdańsk 2019, pp. 123-133; P. Gwoździewicz-Matan, *Umowa użyczenia muzealium w prawie prywatnym*, Warszawa 2015, pp. 282-286.
- ⁴ The example of a 'litigious' deposit can be found in the cardboard design for the stained glass *Christ Crucified* by Stanisław Wyspiański at the National Museum in Cracow. The artist's granddaughter claimed the return of the cardboard forming part of the deposit entrusted to the Museum. See the sentence of the Administrative Court in Cracow of 2 July 2021. I ACa 369/20.
- ⁵ Act on Museums of 21 November 1996, Journal of Laws 2022 Item 385, (below AoM).
- ⁶ It is often the case that the phrase 'purpose of the lending deposit' is used as the subject of the contract.
- ⁷ See <https://nimoz.pl/baza-wiedzy/zarzadzanie-zbiorami/spectrum> [Accessed: 26 April 2022].
- ⁸ See Art. 65.2 of the Civil Code and the sentences: of the Supreme Court of 25 November 2010, I CSK 703/09; of the Administrative Court in Gdańsk of 8 April 2016, III AUa 1964/15.
- ⁹ As for registering, see 'Wzory dokumentów ewidencyjnych', Warszawa 2021, <https://www.nimoz.pl/files//articles/284/2.%20Wzory%20dokumentow%20ewidencyjnych.pdf>. [Accessed: 10 May 2022]. See also A. Barbasiewicz, *Ustawa o muzeach. Komentarz*, Warszawa 2021.
- ¹⁰ See Art. 57 of the no longer valid Act on the Preservation of Cultural Goods and Museums of 1962, Journal of Laws 10 (1962), Item 48. Currently all we can find is tax exemption for the heir in the event of inheriting a piece of heritage which *has been lent to a museum for scientific purposes or for displaying for a period no shorter than 2 years* (Art. 4 of the Act of 28 July 1983 on Tax on Inheritance and Donations). This regulation actually applies to a deposit contract, since only such a contract is concluded in order to enter the object into the collection for a longer period.
- ¹¹ See Arts. 1, 3, 11 of the Ordinance of the Minister of Culture of 30 August 2004 on the range, format, and means of inventorying heritage pieces in museums. Journal of Laws 2004, Item 202, No. 2073.
- ¹² Act of 25 May 2017 on the Restitution of Polish Cultural Assets, Journal of Laws 2019, Item 1591(below AoRPCA).
- ¹³ Act of 23 July 2003 on the Protection of Cultural Property and Guardianship of Monuments, Journal of Laws 2021, Item 710 (below AoPCPGM).
- ¹⁴ Act of July 14, 1983 on the national archival and archival resource, Journal of Laws of 1983, No. 2020, item 164 (below: u.z.a.).
- ¹⁵ Act of 11 August 2021 on Open Data and Re-use of Public Sector Information, Journal of Laws 2021, Item 1641 (below: AoODaRPSI)
- ¹⁶ See reasons for the amendment to the Act on Museums (document No. 1598). See also K. Zalaśńska, 'Pojęcie muzealiów w prawie ochrony dziedzictwa kultury', in: *Prawo muzeów*, ed. by K. Zeidler, J. Włodarski, Warszawa 2008, pp. 24-26.
- ¹⁷ See Art. 6.3.2, AoM. See also: K. Zalaśńska, *Muzea publiczne. Studium administracyjnoprawne*, Warszawa 2013, p. 121.
- ¹⁸ Art. 35.3, Act on the Protection of Cultural Property and Guardianship of Monuments.
- ¹⁹ On the role of the Voivodeship Conservator of Monuments in respective cases see A. Jagielska-Burduk, in: *Mechanizmy...*, p. 120.
- ²⁰ Art. 24 of the Act of 20 February 2015 on Found Property (below AoFP) (2015; Item 397).
- ²¹ Art. 9. 2, AoRPCA.
- ²² Art. 12.3, AoRPCA.
- ²³ Art. 31.7 of the Customs Law Act of 19 March 2004 (below: CLA) (Journal of Laws 2021, Item 1856).
- ²⁴ Art. 122, Act on Nature Conservation.
- ²⁵ See Resolution of the Supreme Court of 9 February 2007 (III CZP 161/06): *legal relation (...) is characterized by a co-occurrence of both elements of private law and public ones.*
- ²⁶ See endnote 25.
- ²⁷ It consists in the possibility to apply the regulation unchanged, with modifications, or in the impossibility to apply it. See J. Nowacki, '„Odpowiednie” stosowanie przepisów prawa', in: idem, *Studia z teorii prawa*, Kraków 2003, p. 455.

- ²⁸ I consciously do not use the term 'borrowing'. See in detail P. Gwoździewicz-Matan, *Umowa użyczenia...*, pp. 162-163.
- ²⁹ According to the statistics in museums there are more objects 'borrowed' than deposits. See *Muzea w 2019 r. Statystyka Muzeów*, NIMOS Study, p. 31. <https://nimos.pl/files/publications/72/RAPORT-Muzea-w-2019.pdf> [Accessed: 10 May 2022].
- ³⁰ *Standard Spectrum 5.0.* recommends for deposit contracts not to be concluded for indefinite period; instead, the recommendation is for them to be concluded for 5/10 years, and then to possibly prolong the contract. See also M. Dreła, 'Ustalanie prawa własności muzealiów w zasobach publicznych oraz o stosowaniu regulacji prawnych dotyczących likwidacji niepodjętych depozytów przez muzea', in: *Kultura w praktyce: zagadnienia prawne*, Vol. 3, ed. by A. Jagielska-Burduk, W. Szafranski, Poznań 2014, pp. 65-81.
- ³¹ See N. Fyderek, op. cit.
- ³² On copyright in the contracts applied in museums see I. Gredka-Ligarska, P. Gwoździewicz-Matan, W. Kowalski, *Umowy...*, pp. 187ff.
- ³³ *Ibidem*, p. 193.
- ³⁴ Statutory licences can be used when the actions are not aimed at generating direct or indirect profit.
- ³⁵ Act of February 4, 1994, Journal of Laws No. 2022, item 655 (below: author's pr.).
- ³⁶ This right partially corresponds with the provisions of Art. 6 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market. See also Art. 25a AoM, which, however, does not include deposits in its range.
- ³⁷ Art. 32, AoCRR allowing a public display of a work of fine arts is applicable only to the works that are property of the museum.
- ³⁸ See P. Gwoździewicz-Matan, in Z. Cieślak, I. Gredka-Ligarska, P. Gwoździewicz-Matan, I. Lipowicz, A. Matan, K. Zeidler, *Ustawa o muzeach. Komentarz*, (Warszawa: Lex. 2021), commentary on Art. 29 of AoM.
- ³⁹ The Act implements Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and re-use of public sector information. Official Journal of the EU L 172 of 26 June 2019, p. 56.

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