

## **Promoting the use of Mediation in Resolution of disputes over the Ownership of objects in Museum Collections: Statement by the President of ICOM Alissandra Cummins**

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For many years the International Council of Museums (ICOM) has insisted that museums and their staff must take great care to ensure that additions to their collections are always both legal and ethical. Since the adoption of the 1970 ICOM Recommendation on the Ethics of Acquisitions museums have been advised that "there must be a full, clear and satisfactory documentation in relation to the origin of any object to be acquired".

The ICOM Code of professional ethics, the new version of which is entitled the *ICOM Code of Ethics for Museums* (ICOM, 2006), first adopted in 1986 and binding as a condition of membership in ICOM, strengthened this provision. ICOM now requires acquisitions (including gifts and loans) to be supported by positive evidence of legal ownership and title. Equally, museums must take all reasonable steps to ensure that their previous history does not include illegal acquisition (including e.g. unauthorised excavation or collection) or transfer (e.g. smuggling) contrary to the laws of the country of origin or of any intermediate country through which they have transited.

However, it is a fact that even museums following these principles and rules most carefully, with regard to their collections, can face claims for the return of objects or whole collections from individuals, organisations (such as places of worship or other museums), or from governments, on the grounds that the museum holding the object is not the legal owner of it. It may, for example, be argued that a former generation of staff and trustees had applied less strict acquisition rules to those applicable today, or that the true facts about the earlier history and provenance of an object were either not known to, or perhaps even deliberately concealed or falsified, by a former owner or dealer. There is a lot of evidence of such problems in relation to works of art and other objects allegedly acquired by confiscation or forced sale from Holocaust victims and others affected by war or occupation, and which have eventually found their way into museums.

Increasingly, such ownership disputes seem to be ending up in long and extremely expensive legal actions. Apart from anything else, these can present serious difficulties in terms of evidence, especially if the key events in the claimed theft, forced sale or confiscation, illegal export or other wrongful act took place very many years previously, and indeed the statutes of limitations of many countries may make it difficult or even impossible to get access to the courts in relation to matters that happened perhaps many decades ago.

Since at least its 1983 (London) General Conference, it has been the policy of ICOM to encourage the amicable resolution of disputes regarding the ownership of objects in museum collections that allegedly were stolen or illegally exported from the country of origin, settling such disputes where possible through voluntary settlement procedures rather than through lengthy and expensive litigation (or through political deals between governments with little or no museum involvement).

ICOM's Legal Affairs and Properties Committee, chaired by Professor Patrick Boylan (United Kingdom) has a wide-ranging membership of leading figures from both museums and the law. It has been considering practical ways in which ICOM might revitalise the established policy of seeking voluntary settlements to such disputes, and to encourage and help equally both museums and those making claims against them to pursue more

informal mediation as an alternative to court actions. We have been greatly assisted in this work by one of our members, Professor Marilyn Phelan, Paul Whitfield Horn, Professor of Law at the Texas Tech University, and a leading international authority on museum and cultural property law. Following initial drafts and discussions earlier in 2004, the Legal Affairs Committee co-sponsored a half-day session on the issues during the ICOM General Conference held in Seoul, Republic of Korea, in October 2004. Following further consultations and revision, the Legal Affairs Committee's recommendations were adopted by the ICOM Executive Council at its December 2005 meeting.

The details of any particular effort at mediation will, as always in such cases, be a matter for the parties to the dispute to agree between themselves. ICOM itself would not be a party or otherwise involved either legally or financially. However, ICOM will be prepared to offer both detailed guidance on procedures that the parties to a dispute might adopt, and also will, on request, propose to the parties the names of two or more independent experts with relevant specialisations whom the parties might consider appointing as mediators to advise on the merits of each side's case. However, mediation - already well established in many legal areas - is always voluntary, and if either or both of the parties to a dispute reject it they can still seek a legal remedy through the courts.

The role of a person (or panel) appointed to facilitate a mediation will be to encourage and assist the parties in reaching a settlement of their dispute, but the mediator(s) may not compel or coerce the parties to enter into a settlement agreement. In particular a mediator may not impose his or her own judgment on the issues for that of the parties. Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may not be disclosed to anyone other than the parties involved. Following the approval of the new policy by the Executive Council, the Legal Affairs Committee will shortly finalise the text of a guidance paper on the recommended procedure (in order to ensure in particular that these cover the requirements and practices of the legal systems of both common law (e.g. USA and Commonwealth) and civil law/Roman law countries.

I am very pleased to repeat and reinforce ICOM's hope that disputes over the ownership of objects in museum collections can, in many cases at least be resolved by private negotiation, perhaps with the help of mediation as now proposed. I am sure that this important development will be widely welcomed as potentially very practical help both for museums and indeed for those seeking to make claims against them, especially people of relatively limited means who may not be able to even consider a potentially very expensive international law suit. ICOM looks forward to being able to offer practical assistance and advice on mediation as an alternative to court proceedings, in accordance with the new policy.

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