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# THE LEGAL BASIS OF ART LENDING UNDER THE ENGLISH, FRENCH, GERMAN, AND POLISH LEGAL SYSTEMS A COMPARATIVE PERSPECTIVE[1]

Abstract

*This article discusses the issue of the contracts under which works of art are loaned with the purpose of being exhibited. It examines three legal regimes: German, French, and English. Even though the contracts that were analyzed in those systems all derive from the same tradition of the Roman concept of commodatum, there are differences in the regulations.*

*The first part of this paper describes the public law regulations in the field of art lending. It was necessary to determine how the movement of cultural goods is protected under German, French and English law. Further points present the private law regulations, especially the rights and obligations of the borrower and the lending museum as well as their responsibility in the case of a breach of the contract. Additionally, an outline of the Polish public law regulation is given in the last part of the paper.*

*The entire study is based on an analysis of the contracts that are used in routine museum practice. A comparison of the regulations of the three legal systems leads to the answer to the question of the legal nature of art loans.*

Keywords

*art loans – gratuitous loan for use – movement of artworks – exhibitions*

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1 This article is a modified version of one of the chapters of the doctoral thesis of the author entitled *Umowa użyczenia muzealium w prawie prywatnym* [*A Museum Loan Contract of an Object under Private Law*], which is available in the library at the Faculty of Law and Administration, University of Silesia, 2013.

# I. INTRODUCTION

Today, with the frequent movement of artworks, the question of the legal basis on which a cultural exchange is conducted is of great importance. Works of art often travel throughout the world to the delight of millions of visitors[2]. Because of their value, one might think that the contracts that cover them are complex and provide for every risk. On the contrary, the movement of art "is a field of activity where trust counts for more than legal safeguards. In this world things which are unique and beyond price face formidable hazards. They may do so in conditions of extreme informality, on the strength of little more than a handshake"[3]. This opinion, which was expressed by N. Palmer almost twenty years ago, is still relevant.

This article examines the legal basis for the movement of works of art under the English, German and French legal systems. Why those legal regimes? Firstly, they represent two different approaches to law – the continental one and common law. Secondly, these are the countries that excel in conducting cultural exchanges, not only because of their rich public collections, but also because of the legal mechanisms[4] that are in place in order to make the cultural exchanges less problematic. The result of the above-mentioned analysis may serve as an indication for the Polish legislator, as the regulation of art loans under the Polish law is ambiguous. It is described in the last part of the paper.

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2 This matter is, however, not without controversies. Every change of location is connected with the danger of the loss or destruction of the object, which creates ethical dilemmas. For some examples that illustrate the range of potential controversies, see N. Palmer, *Art Loans*, London: Kluwer Law International and International Bar Association 1997, pp. 5-10.

3 See Palmer, supra note 2, p. 1.

4 The countries that were analyzed have all enacted special protective laws that guarantee immunity from judicial seizure of art objects from overseas. The immunity from seizure was implemented into French law in 1994, into German law in 1997 and into British law ten years later, in 2007. Another legal instrument is a Government Indemnity Scheme, which allows the public access to objects, which might not otherwise be available, by providing borrowers with an alternative to the considerable cost of commercial insurance. This means that a museum, gallery, archive or library can arrange to borrow objects from non-national institutions and in the event of loss or damage, compensation will be paid to the owner by the Government. Therefore, the Government, rather than an insurance company, carries the risk. See more at: www.artscouncil.org.uk [last accessed: 5.08.2014].

The regulations that are focused on in this article are both public and private law regimes. As most of the objects fall into the category of cultural property[5], a special protective national legislation is applied. Therefore, the first task was to determine whether there are any references in the public law regulations that apply to the lending of cultural goods. Based on this determination, the second part of the article presents the results of an analysis of the standard terms of the contracts that are used in routine museum practice that deal with the private law perspective. The legal nature of art loans is the focus here. In each of the regimes that were analyzed, the construction of a loan derives from the Roman concept of *commodatum*[6]. The focus on this matter highlights two different approaches. While in the continental systems, it is covered by a contract that is regulated under §§ 598-606 of the *Bürgerliches Gesetzbuch* (BGB)[7] and Articles 1875-1891 of the French Civil Code (Fr. CC)[8], in the common law system this issue is not so easily resolved. It is generally described as *bailment*[9], which is a construction that has no legal equivalent under the continental systems. One of the landmark cases in the field of bailments is *Coggs v. Bernard*[10].

The paper also explores the rights and obligations of the parties and their responsibilities under the contract. These are not, of course, all of the legal issues that can arise in the contractual realm of lending art.

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5 An object of consideration which is characteristic – a museum object – will be referred to as cultural good or cultural property, as this term is common to all three of the legal systems (*Kulturgut*, *bien culturel*, *cultural property*).

6 R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Cape Town: Juta & Co. 2006, p. 188.

7 The law of 1.01.1980, amended on 2.01.2002. Source: juris, BGBl I 2002, 42, 2909; 2003, 738, FNA 400-2. Referred to hereinafter as BGB.

8 Hereinafter referred to as Fr. CC.

9 "Bailment stands at the point at which a contract, property and tort converge". N. Palmer, *Palmer on Bailment*, London: Sweet and Maxwell 2009, p. 1.

10 (1703) 2 Lord Raym 909, 92 ER 107. See D. Ibbetson, *Coggs v. Barnard (1703)*, [in:] C. Mitchell & E. Mitchell (eds.), *Landmark Cases in the Law of Contract*, Oxford: Hart Publishing 2008, pp. 1-22. "As to the second sort of bailment, viz. commodatum or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable". See also: *Brainbridge v. Firmstone* (1838) 8 Ad. & El. 743; 112 E.R. 1019; *Coughlin v. Collins* (C.A.) [1899] 1 Q.B. 145; *Blakemore v. Bristol and Exeter Railway Co.* (1858) 8 E. & B. 1035; 120 E.R. 385; *McCarthy v. Young* (1861) 6 H. N 329; 158 E.R. 136.

The contracts also cover copyright issues, jurisdiction, and the choice of the governing law for the contract; however, in order to limit the scope of the inquiry in this article, those aspects had to be excluded. Generally, the paper covers loans between museums, not those by private lenders, although of course these issues apply to the loans made by individuals as well.

## II. PUBLIC LAW REGULATIONS – GERMANY, FRANCE, AND ENGLAND

The main task of this part is to present the public law regulations that relate to art lending. One cannot, however, forget the fact that there is a set of non-binding recommendations on cultural exchanges that were formulated in the documents that were issued by international organizations like UNESCO[11], the International Council of Museums (ICOM)[12], or the Network of European Museum Organisations (NEMO)[13]. Their influence can not only be seen in the way the contract terms are formulated, but also in regulations at the national level[14].

French law has the broadest regulation on the principles of lending cultural property. The Heritage Code (*Code du patrimoine*)[15] is the fundamental act that is related to the protection of cultural heritage. In its book IV (*Prêts et Dépôts*)[16] it regulates in detail the lending of the cultural objects that are the property of the French National Museums. Those objects can be lent for temporary exhibitions that are organized in France or abroad by public or private institutions functioning

11 Recommendation concerning the International Exchange of Cultural Property, at http://portal.unesco.org/en/ev.php/, issued on 26.12.1976 [last accessed: 5.08.2014].

12 Code of Ethics for Museums; available online: icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf [last accessed: 5.08.2014].

13 See: a model contract of art loan recommended by NEMO at: http://www.nemo.org/topics-researches/standard-loan-agreement/ [last accessed: 5.08.2014].

14 More on this topic: P. Gwoździewicz-Matan, *Wypożyczenia dzieł sztuki – zalecenia międzynarodowe* [*Works of Art on Loan – International Recommendations*], Opolskie Studia Administracyjno-Prawne [Opole Legal and Administrative Studies] 2012, vol. X, no. 3, pp. 21-38.

15 Journal Officiel, 20.02.2004. Text of the law accessible *via*: www.legifrance.gouv.fr [last accessed: 5.08.2014].

16 See section 3: *Prêts et Dépôts* (Article L451-11).

as non-profit entities[17]. The decision as to whether to lend an object is made after a consultation with a special commission that determines the physical condition of the object and the safety requirements that must be met while it is in transport and while it is being exhibited. The objects are supervised by a qualified person. Every loss of or damage to the object must be immediately reported[18]. If the object is damaged, the borrower is obliged to cover the costs of the conservation; he also bears the duty to insure the objects[19]. Another act that refers to borrowed (*prêtes*) cultural goods is the law that introduces the concept of immunity from seizure of works of art that are on loan into the French legal system[20].

The English regulation of Lending and Borrowing of Pictures and Other Objects from the collections of museums is contained in the fifth chapter of the Museum and Galleries Act[21]. The Act specifies that objects from public institutions can be lent to a public or private exhibition in the UK or abroad[22]. However, this general clause is subject to certain requirements. First, special consideration should be given to a request for the loan of a relevant object for public exhibition[23]. Second, the following factors should be considered: the interests of students and other persons that will visit the Board's collection, the suitability of the prospective borrower, the purpose of the loan, the physical condition and degree of rarity of the relevant object and any risks to which it is likely

17 Article D423-6.

18 Article R451-28.

19 Article D423-8.

20 Law No. 94-679 of 8.08.1994. Article 61 of this law stipulates that the "[c]ultural property lent (*prêtés*) by the authorities of another country, a foreign public body or financial institution which are to be exhibited in France cannot be seized in the duration of the loan by the Republic of France or any other designated legal entity. The order issued by the Ministry of Culture and Ministry of Foreign Affairs determines for every exhibition the list of objects, the term of loan (*la durée du prêt* ) and the exhibition's organizers".

21 Law of 16.03.1992. Text available at: www.legislation.gov.uk [last accessed: 5.08.2014].

22 The National Gallery Board, the Tate Gallery Board or the National Portrait Gallery Board may lend any relevant object, pictures and other property which is vested in the Board and which is comprised in the objects. The Board's collection (whether the loan is for purposes of public exhibition or not and whether, under the terms of the loan, the relevant object is to remain in the United Kingdom or not) but the power conferred by this subsection is subject to the requirements of subsection (2) below.

23 See 5(2)(a) of the Museums and Galleries Act.

to be exposed[24]. Another English regulation that refers to art loans is the Tribunal, Courts and Enforcement Act (2007)[25]. This Act implements the institution of immunity from seizure of the objects temporarily exhibited in UK into English law[26].

There is no separate regulation for museums in German legislation. The Act on the Protection of Cultural Property (*Kulturgüterschutzgesetz*)[27] refers to exhibitions that are organized by museums only within the scope of the so-called "promise of the return" of the cultural property (*Rechtsverbindliche Rückgabezuzage*)[28]. However, the terms that are used in the Act such as *ausgeliehen* (lent) and *Verlieher* (lender) could serve as an indication as to what sort of contract is to be drawn up in this field of museums' activity. Another act, the Recommendation of the Minister of Culture, presents an example of a loan contract (*Musterleihvertag*)[29] that is recommended for German museums.

Bearing the abovementioned in mind, one can state that the legislation of the countries presented in this article refers to the concept of a loan. There are no separate regulations in private law concerning the contracts that are used in routine museum practice[30]. The second part of this paper is devoted to private law regulations. The issue of whether the standard

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24 See 5(2)(b).

25 Law of 19.07.2007. See Section 136 of the Tribunals, Courts and Enforcement Act 2007, Part 6 (Protection of Cultural Objects on Loan). Text available at: www.legislation.gov.uk [last accessed: 5.08.2014].

26 For more on the controversies that arose over this implementation see: G. Kleinknecht, A. O'Connell, *Immunity from Seizure Becomes Law in the United Kingdom*, American Bar Association Section of International Law 2008, vol. 1, no. 1. In the Polish literature on this subject see: P. Gwoździewicz, *Instytucja immunitetu jurysdykcyjnego w sprawach dotyczących wypożyczeń dzieł sztuki* [*Immunity from Seizure in Cases Concerning Art Loans*], [in:] W. Kowalski (ed.), K. Zalasińska (ed.), *Rynek sztuki. Aspekty prawne* [*Art Market. Legal Aspects*], Warszawa: Wolters Kluwer 2011, pp. 148-151.

27 Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung, 1.01.1975, amended 08.07.1999, in short: KultSchG, source: Juris, BGBI I 1999, 1754, FNA 224-2.

28 See § 20 KultSchG.

29 *Musterleihvertag für eine befristete Leihe innerhalb der Bundesrepublik Deutschalnd (Empfelung der Kultursministerkonferenz vom 5.11.1976)*, [in:] *Sammlung der Beschlüsse der Ständigen Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland*, vol. V, no. 2122.

30 "*Besondere privatrechtliche Vorschriften, die sich mit Kulturgütern als Leihgaben befassen, existieren – soweit ersichtlich – in keiner Rechtsordnung*". See S. Boos, *Kulturgut als Genenstand des grenzüberschreitenden Leihverkehrs*, Berlin: Duncker & Humblot 2006, p. 98.

terms of the contracts that are in common use correspond with the type of contract that is mentioned in the public law regulations will be examined. The analysis is based on the contracts that are used in routine museum practice[31]. As lawsuits are rare in the field of the activity of museums, there are a few examples of verdicts in German courts in which the plaintiffs who were suing a museum were private individuals[32].

## III. GRATUITOUSNESS IN ROUTINE MUSEUM PRACTICE

The contract of loan is gratuitous in its nature. Both French and German civil codes explicitly specify that feature[33]. As there is no legal definition of gratuitousness, one must refer to the doctrine, even though this notion is interpreted differently in the legal systems that are being analyzed. According to German jurisprudence, use for the exclusive benefit of the borrower is only applicable when it is not connected with a reciprocal consideration[34]. However, not all of the considerations that are bound up with the right to use the object make a contract

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31 Among the contracts that were analyzed are those used by: Hamburger Kunsthalle, Städel Museum in Frankfurt, Schirn Kunsthalle in Frankfurt, Staatliche Museum in Berlin, Akademie der Künste in Berlin, Museum Folkwang in Essen, Centre Pompidou, Musée d'Orsay in Paris, the British Museum in London, the Victoria and Albert Museum in London, and the National Gallery in London. All of the contracts were made available thanks to the courtesy of the registrars of the museums.

32 See. e.g., the ruling of OLG Düsseldorf, Neue Juristische Wochenschrift 1990, 2000 and LG München I, ruling from 4.04.2008 – 23 O 6414/07 in: *Rechtsprechung. Rechtsbeziehungen bei Auftragswerk für temporäre Kunstausstellung*, Kunst und Recht 2009, no. 1, pp. 17-19. The rulings will be discussed in a later part of the paper.

33 See Article 1876 Fr. CC: "[t]his loan is essentially gratuitous" and § 598 BGB: "[b]y a gratuitous loan agreement, the lender of a thing is obliged to permit the borrower to use the item at no charge".

34 Thus Ch. Brors, [in:] B. Dauner-Lieb (ed.), W. Langen (ed.), *NomosKommentar BGB, BGB Schuldrecht,* t. II/I, issue 2, Baden-Baden: Dauner-Lieb 2012, p. 2851; M. Häublein, [in:] W. Krüger, H.P. Westermann (ed.), *Münchener Kommentar zum BGB*, Band 3, Schuldrecht, Besonderer Teil, München: C.H. Beck 2008, p. 2005. Some representatives of German doctrine represent the view that when the fee is not equivalent to the possibility of using the object, one might rather qualify this contract as a mixed loan (*gemischter Leihe*). Depending on the prevailing qualities, it shall be assessed in accordance with the regulations on a gratuitous loan or contract of hire. Thus U. von Jeinsen, [in:] M. Löwisch, *Staudingers Kommentar zum BGB,* Berlin: C.H. Beck 2005, § 598, no. 3; M. Fischer, *Die Unentgeltlichkeit im Zivilrecht,* Köln: Carl Heymanns Verlag KG 2002, p. 91.

non gratuitous[35]. The French doctrine represents a similar point of view – the lender cannot derive any benefit from the situation when he, in fact, does not need the object[36]. The duties of the borrower do not affect the gratuitous character of the contract. A few examples of these duties include the obligation to bear the ordinary costs of the maintenance of the object (Article 1880 Fr. CC), to replace any worn elements of the object or to insure the object[37]. Under English law gratuitousness is understood very narrowly – only when it is for the exclusive benefit of the borrower[38]. It is emphasized in the literature that the profit must be one-sided – the lender can derive no benefit, except for a situation in which any benefit is accidental or unintentional[39]. The above-mentioned remarks concerning the notion of gratuitousness are sometimes not easily interpreted in relation to art loans. To benefit from a loan may not always mean to get a specific charge. The lending museum can derive particular benefits from the act of lending, so the question arises – how to categorize this type of contract. It is necessary to verify whether the duties of the borrower do not distort the purely gratuitous character of the contract. Only some of the contracts that are concluded by German museums follow the model that is recommended in the *Musterleihvertrag* and have explicit conditions stating that no charge is to be paid[40]. None of the other contracts that were analyzed have such clauses. The lender's benefit can take many forms and they may be classified into the following groups: (1) when it is explicitly stated that a certain amount of money is to be charged, (2) when the borrower has to perform some duties that

35 See the ruling of OLG Düsseldorf, Neue Juristishe Wochenschrift 1990, 2000, on this subject, which is referred to in a later part of this paper.

36 Thus J. Huet, *Traité de Droit Civil Les Principaux Contrats Spéciaux*, Paris: LGDJ 1996, p. 811. A contract, under which a garage is made available to a rally driver in exchange for whcih the garage is going to be advertised on the rally car cannot be qualified as a gratuitous loan. Cour de Cassation assessed the advert as a reciprocal consideration. See: V. Civ. l ère, 9.05.1966, Bull. civ. I, no. 272.

37 See the ruling of CA Agen, 27.01.1987. Juris-Data Nr. 1987-040338. Citation after P. Haellmigk, *Die Leihe in der französischen, englischen und deutschen Rechtsordnung*, Osnabrück: V&R unipress Universitätverlag Osnabrück, 2009, p. 29.

38 "Use for exclusive benefit". Palmer, supra note 9, p. 664.

39 Palmer, supra note 9, p. 665. Ch. Chitty, *Chitty on Contracts*, London: Sweet&Maxwell 2004, p. 218.

40 See point 1 of the *Musterleihvertrag: "[d]er Verleiher überlasst dem Entleiher unentgeltlich die in der Anlage einzeln aufgeführten Gegenstände".*

are connected with the maintenance of the objects or (3) when the lender derives indirect benefits.

(1) A fee can be of a dual character. So-called administrative charges (*frais administratifs*, *Bearbeitungspauschale)* are stipulated in the majority of contracts. These are the costs that are connected with the preparation of the objects, i.e. framing, stalls, conservation, condition reports, and photos. The aim of this fee to cover the costs of preparation and cannot be described as a consideration.

One needs to distinguish a loan fee (*Leihgebühr*) from those administrative charges. This is a fee that is paid specifically for the possibility of the temporal use of the objects. It is sometimes stipulated as a certain amount of money or is expressed as a percentage of the value of the objects or specified as a part of the income earned from the entrance fees[41]. The loan fee serves as an equivalent for the possibility of exhibiting the objects and because it is directly bound to it, it is a reciprocal consideration. The loan fee can be very costly[42]. Without a doubt, this contract can be classified as one of hire[43]. However, there is a point of view in the literature that it is a contract *sui generis* that has features of a continual obligation[44]. The contract should stipulate precisely the purpose for charging the fee. In one of the German judgments in Munich, the court ruled that the payment of 25000 DM to a famous artist based on a contract for an artwork entitled *Engagement* included the honorarium and payment for the materials. However, the fact of exhibiting the object in the museum that was sued was based

41 As an example one can quote Article 3 point 5 of the Bulgaria-Coventry contract that stipulates that when an entrance fee is charged in Coventry, 20% of the income from the tickets should be entrusted to the Bulgarian lender. Example after Palmer, supra note 2, p. 35.

42 For example, during the ten years that the Barne's Collection was exhibited in Madrid, the Thyssen Foundation earned $5 mln. The same Collection made a profit of $7 mln while on displays in Tokyo and Paris. Citation after Palmer, supra note 2, p. 40. It cost $3 mln to arrange the paintings from the Guggenheim collection for the opening of one of the German museums. Example given by R. Kirchmaier; idem, [in:] K. Ebling, M. Schulze (eds.), *Kunstrecht,* München: C.H. Beck 2012, p. 307.

43 Kirchmaier, supra note 42, p. 306. Ben Uri, the museum of Jewish art in London qualifies this contract explicitly as one of hire. See point 2.1.: "hirer is required to pay punctually and without demand, deduction, counterclaim or set-off to Ben Uri all sums due from the hirer to Ben Uri under this agreement". Citation after Palmer, supra note 2, p. 35.

44 Haellmigk, supra note 37, p. 70.

on the so-called "*Gefälligkeitsverhältnis*" – a relationship of trust[45]. According to the commentary on the ruling, this contract was assessed as an atypical mixed contract with elements of both a work-for-hire agreement and a loan. The budget and the honorarium were determined to be remuneration for making the object, and not a fee that was charged for the possibility of exhibiting the object. The latter case would be, according to the court, a contract of hire.

It could be considered whether the prospect of a reciprocal loan in the future could be treated as a reciprocal consideration since this type of situation is not rare[46]. However, the sole promise or willingness to lend in the future cannot be interpreted as a reciprocal consideration[47], but one cannot exclude that it can be a source of profit for the lender.

(2) The second group consists of cases in which the borrower has to perform some duties that are bound up with the maintenance of the objects. These are connected with the safety of the mode of transport, the proper conditions for exhibiting the objects, insurance, couriers, etc. In the German literature these costs, which should be incurred by the borrower, are treated as the customary costs of maintaining the object that is being lent *(Erhaltungskosten)*[48] and do not have the character of consideration[49]. For instance, the cataloguing of an artist's works, their preparation for the exhibition and insurance cannot, according to the Higher Land Court in Düsseldorf (OLG), be qualified as a consideration[50]. There is, however, the opposing opinion –

45 See LG München I, the ruling from 4.04.2008 – 23 O 6414/07 in: *Rechtsprechung. Rechtsbeziehungen bei Auftragswerk für temporäre Kunstausstellung*, Kunst und Recht 2009, no. 1, p. 17-19.

46 See, e.g., the contract between the Dulwich Picture Gallery in Londynie and the Royal Castle in Warsaw. In § 2 it is stated that: "[t]he Royal Castle shall lend for use the exhibition (…) to the Dulwich Picture Gallery and the Dulwich Picture Gallery shall lend for use the exhibition (…) to the Royal Castle".

47 Thus Kirchmaier, supra note 42, p. 306.

48 § 601 BGB: (1) The borrower must bear the customary costs of maintaining the thing lent; in the case of the gratuitous loan of an animal, in particular, without limitation, the costs of feeding it.

49 Thus Kirchmaier, supra note 42, p. 306

50 See the ruling of OLG Düsseldorf, Neue Juristische Wochenschrift 1990, 2000.

if the borrower is to bear the costs of transportation, the maintenance of the object and insurance, it is in fact a contract of hire (§ 535 BGB)[51].

(3) The third group of cases refers to the indirect benefits that the lender may derive. This issue was raised in the English literature and mainly concerns private lenders, so it is of little importance when it comes to museums. Nevertheless, it is worth mentioning that the benefit can take many forms for private lenders. It may be social prestige, academic fulfillment, enhancement of value, restoration or conservation of the object, publicity, respectability, an activation of some limitation period, the prospect of a reciprocal loan, free storage and insurance[52].

To sum up this part, it is hardly possible to unambiguously determine whether the contracts that are concluded by museums are of a gratuitous character or not. Some of the contracts that were analyzed are very complex with a long list of the duties on the borrower's side. However, unless they are treated as an equivalent for the possibility of exhibiting the objects – the rent – one cannot categorize them as gratuitous. What type of costs are to be borne by the borrower and in what type of relationship to the lender's consideration are they should be examined on a case-by-case basis.

## IV. RIGHTS AND OBLIGATIONS OF THE PARTIES

In general, duties are imposed on the borrower in all of the contracts that were analyzed. Among the most common duties are: the duty of care, the duty of using the object in accordance with the contract, the duty to bear the necessary costs of the maintenance, and the duty to return the object. All of these will be analyzed in this part of the article.

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51 "*Muss der Entleiher über die Transport-, Erhaltungs- und Versicherungskosten hinaus ein Entgelt entrichten, so liegt Miete vor*". Thus H. Schack, *Kunst und Recht*, Köln: Carl Heymanns 2009, p. 335.

52 See Palmer, supra note 2, p. 22.

## 1. DUTIES OF THE BORROWER

### A. The duty of care

There is no explicit reference to the duty of care under German law. However, it can be derived indirectly[53] as one of the reasons for terminating a contract when the borrower uses the object in a manner that breaches the contract, in particular, without limitation, by transferring its use to a third party without authorization, or in a manner that jeopardizes the object by neglecting the care that he owes (§ 605 passage 2 BGB). Under Article 1880 of the Fr. CC, the borrower (*emprunteur*) is bound to watch like a good father of a family (*en bon père de famille*) over the security and preservation of the object that is lent. He cannot make use of it except for the purpose determined by its nature or by agreement. The proper care of the chattel is also required under English law[54].

What makes art loans different from loans in general is the unique object, a cultural good that needs to be handled in a certain manner. Therefore, the contracts cover much more than a general statement of the duty of care, to name a few: the conditions of its exposition (humidity, light levels, temperature), protection, and transportation. It is sometimes stipulated that if the employees of the lender notice that the environment does not fulfill the conditions that are stipulated in the contract, the objects can be reclaimed[55].

### B. The duty to use the object in accordance with the contract

The duty to use the object in accordance with the contract is explicitly regulated in § 603 BGB[56], Article 1180 Fr. CC[57], and under English law

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53 Thus Haellmigk, supra note 37, p. 82.

54 J. Story, *Commentaries on the law of bailments* (Reprint), ed. VIII, Boston 1870, citation after: Palmer, supra note 9, p. 692.

55 See: the British Museum, the Victoria and Albert Museum.

56 The borrower may not make any use of the thing lent other than to use in conformity with the contract. He is not entitled to transfer the use of the thing to a third party without permission from the lender ("*[d]er Entleiher darf von der geliehenen Sache keinen anderen als den vertragsmäßigen Gebrauch machen. Er ist ohne die Erlaubnis des Verleihers nicht berechtigt, den Gebrauch der Sache einem Dritten zu überlassen*").

by the case *Coggs v. Bernard*. If it is not stipulated in another way, the borrower commits himself to using the object in accordance with the nature or aim in which it was given to him. The purpose of use (to present the object at the exhibition, in the time and place defined) is stated in the introductory statements of the contracts that were analyzed[58].

The question of whether there is a duty to exhibit arises in case of art loans. The sole obligation to display the objects at an exhibition does not change the character of the contract[59]. There is a view in the German doctrine that the borrower is not obliged to use the object[60]. The contracts that were analyzed do not explicitly stipulate the duty to exhibit[61] although there are cases in which the borrowing museum reserves the right to withdraw the object from the exhibition[62] or to decide whether the object will be displayed at all[63]. This is of huge importance

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57 *Le créancier peut, avant que la condition soit accomplie, exercer tous les actes conservatoires de son droit.*

58 See, e.g., point 2 of *Musterleihvertrag für eine befristete Leihe innerhalb der Bundesrepublik Deutschland*, hereinafter referred to as: *Musterleihvertrag* BRD; Hamburger Kunsthalle Leihvertrag, sentence 1; Museum Folkwang Essen § 1 point 2 states that the objects are made available only to be presented at the exhibition (name of the exhibition); § 1 Schirn Kunstahlle Frankfurt; the name of the exhibition is given on the cover of the contract template that is used by the British Museum and the Victoria and Albert Museum. „*Dieser bezeichnete Zweck ist mit Ausstellungsbezeichnung, -ort, -dauer, Leihdauer und Veranstalterbezeichnung hinreichend konkretisiert. Eine Veränderung des Verwahrungsortes der Exponate bedarf der schriftlichen Genehmigung des Verleihers*". Thus M.M. Franz, *Zivilrechtliche Probleme des Kulturgüeraustausches*, Frankfurt am Main: Lang 1996, p. 39.

59 I. Kühl, *Der Internationale Leihverkehr der Museen*, Köln: Lang 2004, p. 52.

60 W. Weidenkaff, [in:] *Palandt Bürgerliches Gesetzbuch*, München: C.H. Beck 2011, p. 886; U. von Jeinsen, [in:] *Staudingers Kommentar zum BGB,* Berlin: C.H. Beck 2005, § 598, no. 13.

61 Except for the English museums for which it is explicitly stipulated that the loaned objects be exhibited publicly. See point 4.1. British Museum terms and conditions of loan. This stipulation reflects the statutory clause: The Trustees of the British Museum may lend for public exhibition. See point 4 British Museum Act. See also point 2.1. the Victoria and Albert Museum.

62 See point 3 of the Southampton City Art Gallery contract, which concerns objects that are accepted for the exhibition, the so-called in-loan terms: "[l]ent objects shall remain in the possession of the Borrower and/or other organizations participating in the exhibition in question for the time specified on the face of this loan agreement, but may be withdrawn from exhibition at any time by the director or trustees of the exhibiting organization". Citation after Palmer, supra note 2, p. 114, footnote 119.

63 In this matter examples of the American in-loan forms can be quoted. See point 2 of the contract used by the J. Paul Getty Museum: "[i]t rests with the discretion of the Borrower as to whether or for how long objects lent to it shall be exhibited

to private lenders "(…) who (sometimes with friends) cross continents to view a favoured work only to find it dropped from display"[64]. If the object was not exhibited publicly, the lender could use the right to withdraw the object[65]. The duty to exhibit is of importance under English law and depends on whether the borrower made this kind of promise[66], which has a binding effect and is legally enforceable since each of the parties offers a consideration – the borrower has the right to use the object in exchange for which the lender gets the promise his object will be displayed[67].

Another question that is connected with the right to use the object is whether the borrower can give the object to a third party to use. According to the BGB, this is a particular case of breach of the contract[68], as the borrower is not entitled to transfer the use of the object to a third party without permission from the lender. There is no explicit regulation concerning this matter under the French Civil Code. There is a view in the literature that Article 1180 Fr. CC does not exclude the possibility of giving the object to a third party. An opposing opinion was expressed in French jurisprudence[69]. The relationship between the parties is based on trust, and therefore the act of giving the object to a third party breaches this trust. The opinion of a purely personal tie between the parties was also presented in some old English rulings. For instance, the right to ride a horse was treated as purely personal[70]. This tendency has changed recently, however. The point has been made that the benefit of the borrower can be dependent on the possibility of giving the object to another person[71]. However, it is prohibited in the majority of the contracts that were analyzed. What is questionable, however, is the fact that the contracts that are used by French museums

to the public". Guggenheim Museum stipulates its right to withdraw the displayed objects at any time. Thus Palmer, supra note 2, p. 114.

64 Ibidem, p. 113.

65 Argument from § 604 Abs. 2 sentence 2. Thus Kirchmaier, supra note 42, p. 305.

66 Palmer, supra note 2, p. 113.

67 "In short, the loan becomes a contract"; ibidem.

68 See § 603 sentence 2 BGB.

69 See Haellmigk, supra note 37, s. 90.

70 See *Bringloe v. Morrice* 1676, I Mod. 210. Citation after Palmer, supra note 9, p. 113.

71 See *Canoys v. Scurr* 1840, 9 C. & P. 383, citation after Palmer, ibidem.

do not include such provisions and bearing in mind the above-mentioned vagueness in French CC, it seems to be necessary to regulate this issue precisely in contracts. One can find stipulations that prohibit giving the object to a third party in English and German contracts[72]. In German contracts *Weiterverleihung* is prohibited, which means that the object may not be given to use gratuitously[73]. This can also be questionable, as there are no stipulations that prohibit charging for the use of the object.

### *C. The duty to cover the costs of use*

Coverage of costs of use is one of the fundamental stipulations that are made in art loan contracts. As a rule, the borrower is the party that covers the costs. Contracts differ in the way that they regulate this issue. A general statement is formulated in some of them, while others precisely define what expenditures must be borne by the borrower. The German, French and English legal systems distinguish between normal and extraordinary costs of use. However, in the contracts that were analyzed, there is no such distinction, with the exception of one case of the German *Musterleihvertrag*. Under the term normal costs, it is understood that the costs of the maintenance of the substance of the object and the restoration of damage are covered. Other clauses refer to the costs of transportation and insurance, which may suggest that they are not considered to be normal costs, and that the burden of covering them lies on the borrower. However, this is not without controversy. According to an opinion expressed in the literature, the costs of transportation and insurance – as they are connected with the use

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72 Point 14 of the Victoria and Albert Museum: "[n]either Party shall assign, transfer or sub-let any of its rights or obligations under the loan agreement without the prior written consent of the other party, which shall not be unreasonably withheld". See also point 5.2. the British Museum Loan Agreement: "borrower shall not sell, assign, let, pledge, charge or otherwise encumber the Objects or any interest therein". See also § 4 of the Dulwich Picture Gallery: "[t]he Parties to this Agreement shall make use of works of art constituting the parts of the respective exhibitions only for the purpose of this Agreement stipulated in the § 1 and shall not have the right to lend them for use to any third person nor to charge or to sell them or proceed with them in another manner which is contrary to this Agreement".

73 See point 2 sentence 2 Muserleihvertrag BRD.

by the borrower – will be considered to be normal costs of use[74]. There is, however, an opposing opinion that states that those costs influence the gratuitous character of the contract and therefore it should be categorized as a contract of hire[75].

It is justified to refer again to the above-mentioned judicial decision of the court in Munich[76]. After having analyzed the facts of the case, the concept of a contract of hire was rejected because § 535 BGB places the duty of the maintenance of the object on the hirer[77]. It was in accordance with the interest of the parties to specify that the borrowing museum covers the costs during the display (§ 601 BGB)[78]. The problem may arise when the contract does not regulate the question of the costs that are connected with the conservation of the object or the preparation to exhibit and the lender demands that they be returned.

### *D. The duty to return*

The question of return is precisely regulated in the contracts. The place of return is usually the seat of the lender or the next borrowing venue[79]. The costs of transportation are to be covered by the borrower, and it is also usual to specify which transportation company will organize the transport. The objects are transported in the presence of the museum couriers, and sometimes they are additionally convoyed. When the lending museum is English, the conditions of transport must comply with the Government Indemnity Transport Conditions[80] and are controlled according to that document.

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74 Thus Kühl, supra note 59, p. 50; Franz, supra note 58, p. 40.

75 Schack, supra note 51, p. 335.

76 See the above-mentioned ruling of the OLG in Munich 4.04.2008.

77 § 535 sentence 2 BGB: "*[d]er Vermieter hat die Mietsache dem Mieter in einem zum vertragsgemäßen Gebrauch geeigneten Zustand zu überlassen und sie während der Mietzeit in diesem Zustand zu erhalten*".

78 Thus B. Raue, *Haftung von Museen für den Verlust von Kunstwerke*, Kunst und Recht 2009, no. 1, p. 16.

79 The Victoria and Albert Museum.

80 Point 4.2/3 the Victoria and Albert Museum. These are the conditions required by the National Heritage Act 1980, which regulates the state guarantees for the loss or destruction of the object belonging to a public institution and presented on a display.

The term of a contract is definite[81]. German and French contracts precisely define when the contract can be terminated prematurely: when the borrower uses the object in a manner that is contrary to the contract or the objects are exposed to risk.

### 2. *Duties of the lender*

The scope of lender's duties differs in the legislations that were analyzed and is bound up with the legal nature of the contract – whether it is a real contract (French law) or consensual (German law) or whether a gratuitous loan is not perceived as a contract at all (English law). In the contracts that were analyzed there was no stipulation which would directly put on the lender the duty to deliver the object. It stems indirectly from the initial clauses. In The German *Musterleihvertrag* it is stipulated that the lender entrusts to the borrower free of charge the objects mentioned in the enclosure. In the French contracts there is a stipulation "to give the object to the borrower's disposal".

According to the German BGB the lender permits (*gestatten*) the undisturbed use of the object by the borrower. The lender has to tolerate (*pati*, *Duldungspfliht*) the use of the borrower. Under the French law (Article 1899 Fr. CC) this duty lasts till the borrower makes use of the thing. There is no such rule under British law – if the lender does not have the duty to deliver the thing, much less has he the duty to endure the use of the borrower and can demand the return of the object at any time.

In the event of breach of the duties of the borrower, the lender is able to recall the object prematurely. We find this rule in the majority of contracts that were analyzed. There are examples of contracts in which the right to premature return was stipulated independently of any breach of the duties[82]. It is important to note that while under German law the lender is not able to recall the object prematurely (without, of course,

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81 Even the simple model contracts indicate the date of return. See, e.g., Leihschein Akademie der Kunste in Berlin.

82 See § 3 of Kunstsammlung Nordrheim-Westafallen and fragment (f) of National Portrait Gallery.

the cases of breach of contract)[83], under English law the lender is entitled to take the object back whenever he wishes. Therefore, the issue of withdrawal of the object is of importance when the contract is governed by English law[84].

Additionally, some contracts regulate the right of the lenders' workers to have access to the objects during the exhibition. This control is to verify the conditions in which the objects are stored, especially climatic conditions and protection[85].

### 3. *Responsibility of the parties*

References to the responsibility of the borrower are rare in the contracts that were analyzed. The French contracts do not formulate any specific stipulations concerning the responsibility of the parties, and therefore the general rules from the French CC are applied. English contracts do not specify what the liability of the borrower is (whether he is responsible for least or ordinary neglect), although English law is clear in this matter. Sometimes contracts exclude the responsibility for *vis maior*[86]. German museums regulate the responsibility of the borrower in every contract. It is not limited only to intentional acts (*Vershuldensprinzip*), but also makes the borrower responsible for accidental acts, e.g., destruction, damage, any change

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83 For example, § 2 of the Schirn Kunsthalle Frankfurt contract: "*[d]er Verleiher hat Anspruch auf vorzeitige Rückgabe wenn ein wichtiger Grund vorliegt. Als wichtiger Grund gilt insbesondere eigener Bedarf des Verleihers sowie der verletztung der vertraglichen Bestimmungen durch den Entleiher*".

84 See, e.g., the Warsaw-Dulwich exhibition agreement 1992.

85 See, e.g., point 4.6 of the British Museum contract: "[t]he Borrower covenants, warrants and agrees that it shall in relation to the Borrower's venue permit the museum or any person duly authorized by the Museum at all times upon the Museum giving at least 48 hours' prior notice to inspect and examine the Objects at the Borrower's venue and the environmental conditions of the spaces in which the Objects will be held thereat and the security arrangements for the Exhibition".

86 See point 18.1: "[n]either party shall be liable to the other by reason of any failure or delay in performing its obligations under the loan agreement which is due to Force Majeure, where there is no practicable means available to the party concerned to avoid such failure or delay".

in the structure of the object, or if it is lost[87]. There is, however, a stipulation in one of the contracts where the responsibility of the borrower is excluded in cases of the deliberate or gross negligence of the lender or his workers[88]. As a result, the borrower is responsible for the negligence of the lender, which is important when we realize that, e.g., the preparation for transport is in the competence of the lender.

A common practice of museums is to insure the objects from nail to nail (*von Nagel zu Nagel*, *clou à clou),* the costs of which are covered by the borrower[89]. Alternative forms of insurance are the government insurance schemes, which are becoming more and more popular in museums throughout the world.

None of the contracts that were analyzed regulates the lender's liability. Depending on the regulation, the lender may be responsible for the non-delivery of the objects or if the loaned object has defects of which the lender knew, but concealed them[90]. In general, it is assumed that the lender has no liability as he is the party that derives no benefits from the contract.

## V. POLISH REGULATION – AN OUTLINE

This part is an outline of Polish regulation in the field of art lending. Similarly, as in the above-mentioned jurisdictions, the public law regulation influences the way the contracts are concluded. However,

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87 See, e.g., § 8 of the Schirn Kunsthalle Frankfurt contract: "*[d]er Entleiher haftet für alle Schäden, die dadurch entstechen, dass die Leihgabe während der Dauer der Leihe von Standort zu Standort oder infolge der Leihe zerstört, beschädigt oder verändert wird oder abhandenkommt (…)"*; § 3 of the contract Staatliche Museen zu Berlin.

88 See point 5 of the Hamburger Kunsthalle contract.

89 See point 6 (Risk and Insurance) of the British Museum contract: "[t]he Borrower shall: arrange for the Objects to be insured throughout the Term either by a Government Indemnity or by another indemnity acceptable to the Museum or shall arrange for the Objects to be insured with a reputable insurance company approved by the Museum to the value agreed with the Museum and in either case comply with Sub-Clause 6.2. below".

90 Under German law, the liability is stipulated only within the limits of the negative contractual interest.

the analyzed regulation is vague and one cannot say straightforwardly how to classify the contract named by the Polish legislator *wypożyczenie*[91].

There are several acts concerning the analyzed matter. The first and the most important is the Museums Act (*Ustawa o muzeach)*[92]. Its Article 25 states that:

1. A museum shall charge fees for the preparation and sharing of collections for purposes other than visits, in particular for copying, reproducing of photographing, preparing for loan, and loaning collection items.
2. The amounts of fees specified in paragraph 1 shall be determined by the museum director. In justified cases, the museum director may set a reduced fee or exempt from fee.
3. No fees shall be charged for loans of exhibits among domestic museums and, subject to reciprocity, among museums seated in Member States of the European Union, Swiss Confederation, and member states of the European Free Trade Association – parties to the Agreement on the European Economic Area[93].

The exhibits can be moved outside the area of the museum only for certain purposes which are specified in Article 29 of the Museum Act:

1. Exhibits may be moved outside the area of the museum in which they have been entered in the inventory:
    1) upon consent of the museum director in the event of:
        a. loan to other museums,
        b. the need for maintenance, research or assurance of safety,
        c. display at exhibitions,
    2) upon consent of an entity specified in Article 5(1), and the director, in instances enumerated in item 1 if the movement does not affect negatively the museum's statutory activity.
2. The Minister responsible for culture and protection of the national heritage shall define, by way of a regulation, the terms, manner

91 "*Wypożyczenie*" is translated hereinafter as "loan", however it is not an exact translation. The term "*Wypożyczenie*" is not known to the Polish Civil Code.

92 Museums Act of 21.11.1996, Dziennik Ustaw [Journal of Laws] 1997, No. 5, item 24 with amendments.

93 See Article 25 of Museums Act.

> and procedure of exhibits' movement, with special regard to the terms and manner of movement, storage at the new site and preparation of scientific and conservation documentation for the exhibits.

In the above-mentioned articles the Museums Act refers to "*wypożyczenie*", however the language used by the legislator is far from precise. The term "*wypożyczanie*" used in the Museums Act is not known to the Polish Civil Code[94]. It may be wrongly associated with "loan" (*pożyczka*), the contract regulated in Article 720-724 Pol. CC or gratuitous loan for use in Article 710-719 of Pol. CC. "*Wypożyczenie*" is translated hereinafter as "loan" however it is not an exact translation. It was necessary to check whether the legislator intended to formulate a new contract unknown to the civil code, and what *essentialia negotii* it is supposed to have.

As stated in Article 25 of the Museums Act "*wypożyczanie*" can be both gratuitous and non-gratuitous. What may be surprising is that the principle is that the lending is non-gratuitous. Two exceptions can be mentioned: a fee is not charged between domestic museums and – in cases of foreign museums – only when it is reciprocal. In the justification for this amendment one reads that the aim of such regulation was "to strengthen the cooperation and cultural Exchange between Polish museums and museums of the categories mentioned in the Article 25". The analysis of the practice shows that in fact the exception becomes the rule.

The reference to what the contract should stipulate, one finds in the Regulation of the Minister of Culture and National Heritage of 15 May 2008 on the terms, manner and procedure of transfer of museum exhibits[95]. Its § 2 states that: "[b]efore moving exhibits outside the area of the museum, the director of the museum and the entity receiving the exhibits, hereinafter referred to as the «parties», shall specify, in particular, by way of written agreement: the aim of the movement, the place of destination, the period for which the exhibits are moved,

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94 Civil Code of 23.04.1964, Dziennik Ustaw [Journal of Laws] 1964, No. 16, item 93 with amendments. Hereinafter referred to as Pol. CC.

95 Dziennik Ustaw [Journal of Laws of the Republic of Poland] 2008, No. 91, item 569.

the requirements for transport, the requirements for storage, and prepare a list of exhibits along with their visual documentation".

Another regulation refers to the scope, forms and the way museum objects should be recorded[96]. According to its § 8 "1. Exhibits shared outside the premises of the museum must be furnished with visual documentation and written consent for sharing issued by the museum director. 2. The museum director shall give consent upon hearing the opinion of the substantive employee taking care of the premises and conservator of the collections".

Another act worth mentioning in the field of art lending is the Act of 8 May 1997 on Guaranties and Sureties Provided by the State Treasury and Certain Other Juridical Persons[97]. Its chapter 5 refers to state indemnity schemes. Its Article 23 states that: "1. The Council of Ministers may, on the motion of the minister responsible for culture and national heritage, on behalf of the State Treasury, provide non-residents with guarantees of indemnification for destruction, damage, or theft of uninsured exhibits owned or lawfully possessed by these persons if the exhibits are parts of an artistic exhibition organized in the Republic of Poland and their aggregate value exceeds EUR 500000. 2. The guarantee shall be issued at the request of the organizer of the exhibition". The stipulation that the value of the exhibits exceeds 500000 Euro makes this institution impractical. In the foreign regulations no amount of money is mentioned or the threshold is much lower.

The Regulation of the Council of Ministers of 8 June 2012 concerning applications for guarantee or surety and the procedure of issuing guarantees and sureties by the State Treasury[98] specifies what the application should include. These are: 1) general information on the organizer of the exhibition; 2) specification of the place and time of the organized exhibition; 3) justification of purposefulness of organizing the exhibition; 4) information on the reasons for the non-insurance of the exhibits. The application for guarantee of indemnification

96 Regulation Concerning the Records of Relics in Museums, Dziennik Ustaw [Journal of Laws] 2004, No. 202, item 2073.

97 Dziennik Ustaw [Journal of Laws] 2003, No. 174, item 1689.

98 Dziennik Ustaw [Journal of Laws] 2012, item 675.

for destroyed, damaged, or stolen exhibits shall be enclosed with the copies of: 1) a detailed list of exhibits including specification of their value; 2) a detailed description of the means and conditions of protecting the exhibits during transportation and at the site of the exhibition; 3) an opinion of the National Institute for Museum and Public Collections concerning the means and conditions mentioned in item 2; 4) the draft agreement for loan of the exhibits[99].

The decree issued on the basis of the above-mentioned Act stipulates the requirements which should be met. Among them there is a draft of the contract ("*umowa wypożyczenia*"). It is the regulation where the contract is "named", as if it was a nominate contract. However, the analysis leads to the conclusion that there is no separate type of contract under Polish law devoted especially to museum practice. The elements which should be stipulated in every contract concluded before the objects are moved serve only as an indication as to what this contract should mention. These are only indications on the way the objects can be used (in what place, time, manner etc.). However, when the contract does not stipulate the features like the place, time and manner of the exhibition one can refer to the supplemental role of Article 56 of the Pol. CC[100].

To conclude, there is no consequence in the legislator's concept as to the gratuitous and non-gratuitous type of contract. In fact, there are two types of contractual obligations which can be classified as the gratuitous loan for use (*użyczenie*) and the contract of hire (*najem*). However, in practice, the contract for hire is very rare, as museums do not stipulate fees for lending museum objects. It can be recommended to replace the ambiguous notion "*wypożyczenie*" with the gratuitous loan for use (*użyczenie*). It would be in tune with the documents and recommendations of museums organizations where cultural exchange between museums is not dependent on fees, as the sole process of organizing an exhibition is costly.

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99 See § 6 of the Regulation of the Council of Ministers of 8.06.2012 Concerning Applications for Guarantee or Surety and the Procedure of Issuing Guarantees and Sureties by the State Treasury.

100 See Article 56 of Pol. CC.

## VI. Conclusions

Bearing in mind the fact that the contracts that are used in routine museum practice vary from simple forms to very detailed ones, one can generalize that the legal relation between a museum and the organizer of the exhibition closely resembles a loan contract. There is no doubt that when a fee is stipulated and it is related to the possibility of exhibiting the objects, then it is a non-gratuitous, two-sided, equivalent contract, i.e. a contract of hire. Such cases are, however, very rare. The costs of transport and insurance cannot be treated as a reciprocal consideration. The potential benefits of the lender do not influence the legal nature of the contract either.

The observed practice of museums is in accordance with the model of making cultural property available free of charge, which is recommended by museum organizations internationally. It is stressed that charging fees – in the light of the very high costs of organizing the exhibition – could limit cultural exchange, which is undesirable with a view to the fact that interest in artworks that are on the move is still increasing.