 ISBN 978-951-53-3287-5

Henrietta Galambos and Frank Bergevoet

Prevention or Compensation? Alternatives to Insurance

Museums possess huge potential for the innovative use of collections. In order to be able to offer a rich variety of exhibitions to their public, museums often seek to borrow objects from museums abroad. This gives the public an opportunity to become acquainted with objects that would otherwise not be on show in their country. Museums that organise exhibitions by using loans have to deal with insuring these objects against risks of damage or loss. This can lead to considerable sums being spent on insurance premiums.

The risks can be covered in all sorts of ways. When this is done by using *commercial insurance*, expensive premiums have to be paid. Given the level of these premiums, museums are beginning to wonder whether such insurance coverage is sensible at all stages, particularly in light of increasing improvements in security systems in museums. In order to limit such premiums, museums sometimes switch from their commercially insuring parts of the loan process to sharing the liability for certain risks between the Lender and Borrower. This has led to the introduction of *shared liability agreements*. A third system for covering risks is a *state indemnity scheme*. This is a system under which the government supports the organisation of major exhibitions by taking on (part of) the risk liability from the organiser.

The two last mentioned systems, i.e. the state indemnity system and shared liability agreements, are reviewed in the present article. These are tools for dynamic development that reduce insurance costs and promote collections mobility.

STATE INDEMNITY

What is indemnity?

Indemnity is inextricably associated with museums, exhibitions, loan objects, and risk liability. Most European Union Member States have a state indemnity scheme. This means that the governments of the Member States decided to undertake the coverage of (part of) the risks related to exhibitions. If a borrowed museum object is damaged or lost during the course of an exhibition, the state guarantees compensation for (part of) the damage or loss. Indemnity is in fact the transfer of liability/risk from the borrowing museum to the state.

An indemnity guarantee significantly reduces the financial burdens of an exhibition, as the organiser of the exhibition does not need to take out insurance or only needs to take out limited risk insurance. Moreover, an indemnity guarantee provides the Lender with the certainty that it will receive compensation if anything were to happen to its property. This leads to reduced reticence in the lending of objects. Finally, an indemnity system contributes to raising museum standards, because the state will place certain requirements on the exhibition organiser.

Although there are criticisms levelled against this system, the claim reports published in the last European survey on indemnity schemes[1] speak for themselves: out of 5,605 applications accepted during the period 2003–2008 in 18 European States, the number of officially reported claims was seven. The total compensation paid was remarkably low as well, at only 79,981 euro.[2] These statistics suggest that insurers over-evaluate risks, which in turn leads to high insurance premiums. Furthermore, the statistics also suggest that it is absolutely worthwhile for a state to consider the introduction of an indemnity scheme, if it does not currently have one or, if an indemnity scheme is already established, to improve it for the sake of its widest possible acceptance.

The proper functioning of a scheme can be achieved best by

- clearly determining the responsibilities of the principal actors within the indemnity chain (i.e. the state, borrower, the lender, and shipper), and
- reducing the sources of risks to a minimum, while objects are under the control of any of the actors.

Indemnity, State aid, and European competition law

The founding treaties of the European Union describe state aid as an advantage in any form whatsoever that is conferred on a selective basis to undertakings by national public authorities.[3] A company that receives state aid obtains an advantage over its competitors. Therefore, Article 107 of the *Treaty on the Functioning of the European Union* (TFEU) generally prohibits state aid. However, in some circumstances, government intervention is necessary for a well-functioning and equitable economy. Consequently, the Treaty sums up a number of policy objectives for which state aid can be considered compatible.

Up until now, the European Commission's Directorate-General for Competition has assessed the compatibility of several state indemnity schemes under the provisions of Article 107(3) of the Treaty.[4] Based on these assessments, the Directorate-General has in each case decided that the reviewed indemnity scheme constituted state aid that is compatible with the internal market under the culture derogation of Article 107(3)(d) of the TFEU.

The State's standpoint

The state to which the liability for the loans is transferred must draw clear outlines for the scheme and set up a coherent and fair system of rules. In order to provide sufficient guarantees for the Lender, states often regulate their indemnity scheme by a formal Act of Law. This may cause a paradox because the legal framework has to be firm, while the content should remain flexible. When unexpected political, economic, etc. events occur, in turn influencing the risks covered by the scheme, it should be relatively easy for the state to adapt the scheme to the new conditions. The ideal form of setting up a state indemnity scheme would be, therefore, an Act that sets out the framework of state indemnity, which is supplemented by a regulation that is lower in the legal hierarchy and that can be made subject to quick modifications.

An interesting 'bypass' to this discrepancy between constantly changing circumstances and the requirement for stability in legal regulations is the 'Dutch solution'. The Dutch indemnity scheme is based on a combination of commercial insurance and a state guarantee. A specialised insurer establishes the form of the state indemnity, resulting in a scheme that is rather suitable for reacting to events affecting the risks that are to be covered.

When operating an indemnity scheme, it is of great importance to the state to get a clear view of the level of security and environmental conditions that museums and shippers can offer in order to reduce the possible risks of damage and loss to the objects. The state should seek assurances that these con-

Funds that do not need to be spent on insurance premiums can be used to improve the security of a loan object or to raise loan standards.

ditions are met before granting an indemnity. If a claim is lodged, the state should also require confirmation that these standards were complied with when the damage occurred.[5] A state-employed security adviser – as used in the United Kingdom and Sweden – may make further recommendations in individual cases.

According to the insurers' terminology, an 'all risks' coverage relates to any damage and loss except for that deriving from the excluded risks.[6] When setting up or revising the regulations of a state indemnity scheme, the state should not unreasonably exclude risks, but should only do so when a risk assessment requires such. The state should also try to provide coverage from the time of the removal of the work from the wall until its safe return to the same place or to the place indicated by the Lender ('nail-to-nail' coverage).

States should also consider as to whether they want to involve or exclude insurers from their scheme. In some countries, state indemnity exists only in combination with commercial insurance (e.g. France, the Netherlands). Others, such as the United Kingdom, claim as a general rule that no commercial insurance is to be purchased by public money because it weakens the purposes that the state indemnity aims to achieve.[7]

The Borrower's standpoint

In a state indemnity scheme, most of the burden of making the system work rests on the Borrower which, above all, has to act with due diligence throughout the entire process. The Borrower is, in fact, the party that has to obey the legal regulations and principles (including but not limited to the security and environmental requirements) that are established by the state indemnity scheme.

Even if the Borrower managed to obtain state indemnity for a loan, it is often confronted with accessory insurance costs, as indemnity schemes might exclude certain risks or intervals that the Lender nevertheless wants to see covered before agreeing to the requested loan. This means that the Borrower has to make reasonable and responsible decisions on agreeing to spend public money on supplementary commercial insurance coverage for specific, excluded risks or time intervals.

Once the parties agree on how state indemnity and/or commercial insurance apply, the Borrower and Lender need to solve the question of 'who is going to pay for those losses incurred from excluded risks?' If there are no provisions concerning this in the loan agreement, logically the general rules of non-insurance should apply. According to the last OMC survey,[8] in 93 per cent of the cases, the Borrower should pay for any damage incurred, which means that the Borrower's liability was considered more extensive than the insurer's liability.

The Lender's standpoint

Supplementary insurance coverage should only be requested by the Lender and provided by the Borrower if a risk assessment suggests such. The Lender should not oblige the Borrower to purchase supplementary commercial insurance for non-existing, or very unlikely, risks such as war risk in Europe. As it has been demonstrated above by the claim statistics, the Lender is deluded in thinking that the risks are reduced if the loan is insured against as many risks as possible.

A waiver of subrogation is a clause waiving claim – in the event of damage to an artwork or an object – against the organisers, curators, museum officials, official representatives of the Lender, transport companies, transit companies, and packaging companies, except in the case of wilful conduct and gross negligence.[9] There is an unfortunate tendency coming from Lenders overseas, as well as on the part of international shippers' organisations, to request the purchase of such a clause in favour of the Lender and shipper. Transport companies sometimes threaten to not provide the service if subrogation is not waived against them, and Lenders put pressure on Borrowers to buy complementary insurance coverage to protect themselves as well as their shipper.

It would not be ethically or legally appropriate to protect somebody that causes damage, by waiving the rightful interest of the state in seeking compensation from the institution or company that caused the respective damage.

The waiver of subrogation clause is highly discouraged for two reasons:

- it is expected that all the actors in a loan process will act with the utmost responsibility 'nail-to-nail', and not with the intention that the person who is responsible will be held harmless as to whatever damage occurs, and
- the premium for this single risk costs about 30 per cent of the entire insurance premium that has to be paid, even if state indemnity is otherwise accepted.

Indemnity is not about providing money, it is rather about reducing risk. For the proper functioning of the system, all the stakeholders need to be motivated so that no damage is caused during the time that the artwork, or an object, is under their control.

Outgoing indemnity is absolutely an excellent tool for enhancing collections mobility by promoting national cultural heritage abroad. It also makes it possible for states without a scheme to organise good exhibitions by benefiting from the Lender's outgoing indemnity coverage. In Europe, only four countries provide state indemnity coverage for outgoing loans. Finland, for example, provided such coverage for outgoing exhibitions to Kumu Art Museum (Estonia), Kadrirog Art Museum (Estonia), and the National Art Museum of China in Peking.

SHARED LIABILITY SYSTEMS

Research indicates that insurance costs contribute to approximately 15 per cent of the budget of those major art exhibitions that use foreign loans.[10] Therefore, it is no surprise that museums look for opportunities to reduce the costs of insurance premiums. In many cases, this is done through using the indemnity scheme. However, the government does not always guarantee 100 per cent compensation for damage, theft, or loss of value. Practically every indemnity scheme has exclusions for specific risks, periods, types of loans, or types of museums. In addition, in 2010 seven of the 27 EU Member States did not have an indemnity scheme. If no indemnity scheme exists or there are risk exclusions within a specific scheme, a shared liability agreement may provide a solution.

Shared liability is an agreement between two museums with the objective of sharing liability as far as possible in respect of specific risks that are involved in loan transactions. The Borrower and Lender have agreed on the fact that the Borrower has a certain freedom in deciding whether or not he wants to insure its share of the liability. This implies a reciprocal relationship between the Lender and Borrower that is based on trust. These museums consider one another as equal partners that use comparable standards with regard to the organisation of exhibitions. The two parties are also in agreement that museum objects, by definition, are irreplaceable and are not a part of economic trading (*extra comercium*).

The permanent collections in most large regional and national museums are not insured. They are well protected and excellently cared for. Since the objects are, in many cases, irreplaceable, they cannot be, by definition, valued in terms of money. In the event of theft or loss, the region or the state assumes the loss of an object. If a museum does not insure its permanent collection when it is on its own premises, why should it want the same objects to be insured when on loan to another museum? If the Borrower applies the same professional standards as the Lender, there is in fact no difference regarding the situation at the Lender's premises. In such cases, an all in insurance does not seem necessary or appropriated.

Supporters of shared liability systems point to the reduction in costs that the systems involve. Funds that do not need to be spent on insurance premiums can be used to improve the security of a loan object or to raise loan standards. Moreover, an attitude that focuses on prevention is expected more from a museum than a concentration on reparation by paying high insurance premiums.

In view of this, the Lender may agree with the Borrower that the latter is not obliged to insure the works of art or other objects against all possible risks. Thus, it is possible, for example, to dispense with an insurance obligation in respect of loss in value, total loss, or damage caused by acts of war or nuclear disasters. Another possibility is to not oblige the Borrower to insure a long-term loan. The Lender may also decide to dispense with an insurance obligation from the moment that its property has arrived at the Borrower's premises. The Lender will dispense with this insurance obligation because it:

– knows that the Borrower will handle the loaned objects carefully using the same professional principles that it uses itself,
– helps the Borrower to limit the exhibition costs,
– knows that the agreement is reciprocal and that it will itself benefit from this agreement when organising a temporary exhibition,
  and

– realises that traditional insurance provides no security and offers no guarantee against damage or loss (or loss of market value). Insurance is only financial compensation, which cannot 'cure' the irretrievable loss or damage that an object has suffered.

One of the better-known examples of shared liability is the agreement between the Netherlands and Belgium with regard to the *Rijksmuseum aan de Scheldt* (Rijksmuseum on the Scheldt). Because of the major renovation that the Rijksmuseum of Amsterdam has been undergoing since 2003, the Rijksmuseum launched the idea of housing groups of works in various museums in the Netherlands. The Royal Museum for Fine Arts (KMSKA), Antwerp was invited by the Rijksmuseum to join this project and to temporarily house a collection of works from the Rijksmuseum on the banks of the River Scheldt. From 9 October 2004 until 31 December 2007, no less than 33 sixteenth and seventeenth-century paintings from the Rijksmuseum of Amsterdam were on show in the galleries of the Royal Museum for Fine Arts. The exhibition was entitled *Rijksmuseum on the Scheldt: masterpieces from the treasure-house of the Netherlands*. Both museums agreed not to insure the loans during their stay at the premises of the KMSKA, and only the transport of the works had to be insured.

Shared liability is very rarely used at the international level, however. This has to do with the widespread Pavlovian reflex among museums to insure all loans 'nail-to-nail'. It gives museums a false feeling of security. The coverage of risks in the museum world is traditionally left to insurers and very rarely is the question raised of whether an all in-insurance is necessary or even sensible. Why not carry out a risk analysis for the journey and the period of stay of a loan and then decide if and what kind of insurance is needed?

Legal and statutory restrictions are another reason as to why shared liability is hardly ever used up until now in connection with international loans. In some EU Member States, works of art are not allowed to leave the country uninsured. This is the case, for example, in Hungary and Romania. In other countries, such as Germany, museum statutes make shared liability impossible. In the UK, museum trustees have such a large personal responsibility for the care of loan objects that they will not easily decide to give up the obligation to insure loans.

The lack of knowledge about shared liability is another reason for reticence. There are still a few museums that have international experience with this phenomenon. There are only a few schemes, and there are no statistics available to demonstrate what the risks are and what advantages the schemes offer. In addition, there are no detailed protocols setting out the party that is liable, the cases in which it is liable, or the part of the risk for which it is liable. Further work needs to be carried out on this point.

While frequent use is made of a form of shared liability within national borders, museums do not (yet) dare risk doing this on an international basis. The fact that shared liability is frequently used within the borders of many EU Member States is an important reason to explore whether this is also possible at the international level.

The most elaborate shared liability schemes are those in the Netherlands and Belgium (Flanders). These schemes contain the following main points:

– The Borrower is responsible for misplacing an object entirely (going missing, theft, or total loss) during its transportation to and from the Lender (all risks insurance is, therefore, obligatory for transport operations between the museums in the Flemish agreement).
– The Borrower is at all times responsible for any damage to an object that can be repaired (to a maximum of 500,000 euro per object in the Flemish agreement).
– No compensation for a loss of market value due to damage incurred to the object.
– No compensation in the case of loss caused by the theft, disappearance, or complete destruction of the object. It goes without saying that the Borrower is obliged to make all reasonable efforts to preserve the object and, if it goes missing or is stolen, to recover it.

Shared liability is mostly applied within the circle of regional and national museums, which – as a general rule – do not insure their collections. Municipal collections, on the other hand, are often insured.[11]

CONCLUDING REMARKS

The community of museums is an important depositary of keeping universal cultural heritage. As Museums act in trust of the society, they are responsible for granting access to the widest possible public. This aim must be a common objective for museums all around the world. Collections mobility is considered to be a highly efficient tool for distributing common knowledge of our cultural heritage. For nearly ten years already, various levels of professionals from the cultural sector have worked together in Europe to minimalise the legal, financial, and administrative obstacles from the increasingly more dynamic exchange of cultural goods in Europe. We truly believe that there are still many new ways to discover within this domain, in which new approaches will attract further developments in the various aspects of collections mobility.

Henrietta Galambos works as the Head of the Legal and Registrars' Department at the Museum of Fine Arts (Budapest). She is co-chair of the state indemnity/insurance/non-insurance working group, which is a subgroup of the European Union's OMC working group on the Mobility of Collections. In addition, she is a board member of the ICOM National Committee and founder of the Hungarian Registrars' Group.

Frank Bergevoet is a programme manager for Museometry (a new field of research that deals with the facts and figures on the management of museum collections) at the Netherlands Institute for Cultural Heritage in Amsterdam and for the European funded Collections Mobility 2.0 project. He has an MA in Art History from the University of Leiden and is an expert on university collections, disposal, indemnity schemes and shared liability agreements.

ENDNOTES

1 OMC Working Group on Mobility of Collections 2008–2010 (2010) 'Report of the Subgroup on State indemnity and reduced liability schemes', unpublished report, Damage reports, 64.

2 Exchange rate March 2010.

3 Official Journal of the European Union (2008) *Treaty on the Functioning of the European Union*, Article 107, C 115/91. Online. Available HTTP: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF> (accessed 23 March 2010).

4 European Commission, Directorate-General Competition, Policy area: State aid, Case numbers: *Czech Republic:* NN43/2007. Bibliography: Official Journal of the European Union (2008) Authorisation for State aid pursuant to Articles 87 and 88 of the EC Treaty. Cases where the Commission raises no objections, 2008/C 195/01. Online. Available HTTP: < http://ec.europa.eu/competition/state_aid/register/ii/doc/NN-43-2007-WLWL-en-30.04.2008.pd> (accessed 23 March 2010); *Austria:* NN50/2007. Bibliography: Official Journal of the European Union (2008) Authorisation for State aid pursuant to Articles 87 and 88 of the EC Treaty. Cases where the Commission raises no objections, 2007/C 308/03. Online. Available HTTP: < http://ec.europa.eu/competition/state_aid/register/ii/doc/NN-50-2007-WLWL-en-10.10.2007.pdf> (accessed 23 March 2010); and NN 661/2009. Bibliography: Online. Available HTTP: < http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/181&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 23 March 2010); *Hungary*: NN27/2009. Bibliography: Official Journal of the European Union (2008) Authorisation for State aid pursuant to Articles 87 and 88 of the EC Treaty. Cases where the Commission raises no objections, 2009/C 206/01. Online. Available HTTP: < http://ec.europa.eu/competition/state_aid/register/ii/doc/NN-27-2009-WLWL-en-13.07.2009.pdf> (accessed 23 March 2010).

5 UK Department for Culture, Media and Sport (2004) '*Government Indemnity Scheme. Guidelines for National Institution*', 16. Online. Available HTTP: <http://www.culture.gov.uk/images/publications/GISGUIDELINESWORDVERSION316March.pdf> (accessed 23 March 2010).

6 International Risk Management Institute (2000–2010) *Glossary of Insurance & Risk Management Terms*. Online. Available HTTP: <http://www.irmi.com/online/insurance-glossary/terms/a/all-risks-coverage.aspx> (accessed 23 March 2010).

7 However to secure important loans, commercial insurance can be bought in the UK but with severe restrictions: the purchase must meet 'value for money' criteria. The only case specified in the GIS Guidelines for buying supplementary insurance coverage is when 'top-up' insurance needs to be bought due to a disagreement over valuation. UK Museums, Libraries and Archives Council (2005) '*Government Indemnity Scheme. Guidelines for National Institutions*'. Online. Available HTTP: <http://www.mla.gov.uk/what/cultural/objects/~/media/Files/pdf/2005/gis_guidelines_nationals> (accessed 23 March 2010).

8 OMC Working Group on Mobility of Collections 2008–2010 (2010) 'Report of the Subgroup on State indemnity and reduced liability schemes', unpublished report, Part 3 Report on shared liability schemes, 38.

9 Gross negligence (luxuria) is a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons, property, or both. Wilful conduct is conduct that is reasonably considered to cause injury. Farlex (2010) *The free dictionary*. Online. Available HTTP: <http://legal-dictionary.thefreedictionary.com/Gross+negligence> (accessed 23 March 2010).

10 This figure is based on research that was carried out in the Netherlands. It relates to the costs that a provider of a loan object has to pay in premiums for commercial insurance. No account has been taken in this of a no-claim bonus, the prospect of which is held out by many insurers if no damage or loss is claimed after the end of the exhibition.

11 This seems to be particularly due to the closeness between the local authority (the owner of the collection) and the citizens. When an incident takes place, it seems to be difficult for local authorities to explain to citizens why damaged or lost objects are not financial compensated.