

## Conference report: *The Art of Giving, Art Law and Philanthropy* Geneva, 17 October 2019

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This conference was the result of a collaboration between the Art Law Foundation (ALF), the Art-Law Centre (ALC) and the Centre for Philanthropy of the University of Geneva (GCP) and focused on the topic of cultural philanthropy with the participation of various speakers, theoreticians as much as practitioners, from different professional backgrounds. It was held with the generous support of the

Pictet Group Charitable Foundation. Professor Benedict Foëx (Dean of the University of Geneva Law School) kicked off the day by expressing his delight at finding art among philanthropy's beneficiaries as art addresses our emotions, our senses and contributes to our happiness. Stephany Malquarti (General Secretary of the Pictet Group Charitable Foundation) confirmed in turn that art creates an identity, stimulates reflection, and enables to open up to a mutating world. Culture therefore holds an important role in Pictet's philanthropic tradition, as well as in its efforts to expand an art collection tracing the Swiss art history since 1805. The commitment of the Pictet Group Charitable Foundation to cultural institutions and organisations over the years is undeniable. These introduction words launched the upcoming discussions of the conference divided into four parts composed of panels of topic experts.

### 1. Art Philanthropists

The first panel examined the motivations behind giving to the art sectors and was initiated by Professor David Sander, Head of the Swiss Center for Affective Sciences (CISA,

University of Geneva) whose researches try to uncover the underlying brain and cognitive mechanisms involved in the emotions leading to philanthropic and altruistic decision-making. Emotions are indeed often elicited by art and one emotion is particularly interesting in the field of cultural philanthropic decision-making: the feeling of "being moved" by art. Being moved is a positive emotion triggered by our own significant values and is described as "a warm feeling in the heart". This causal effect has still to be proved and is currently being studied at the CISA.

Professor Jan Blanc (Dean of the Faculty of Humanities, University of Geneva) continued with a presentation of the role of patrons in artists' careers throughout art history, in particular the relationship between the artist Johannes Vermeer and his patron Pieter Claesz Van Ruijven. There are two ways to associate an artist and a sponsor: whether the artist exchanges an artwork against an amount of money or, quite rarely, an artist benefits from a general protection by the patron (e.g.: a prince offers a position to the artist at his court with annual remuneration while the artist devotes most of his time and best artworks to the prince). In Vermeer's case, the second option applied, although his patron, Pieter Claesz Van Ruijven, was not a prince but a wealthy individual.

Professor Jan Blanc highlighted a connection between freedom and

coercion in this type of relationship. For an artist as Vermeer, freedom arose from the 200 florins he received every year and allowed him to live comfortably without having the pressure of having to work constantly to earn a living. In exchange, of course, he had to reserve the best artworks to his patron: it is the coercion aspect. The philanthropist, on his side, imposed himself a financial commitment. His freedom was however extended because his support to the artist increased his feeling of social influence by determining the fate of another life.

Dorothea Strauss (Head of the Corporate Social Responsibility division, La Mobilière) then took the floor, offering a company's point of view on cultural philanthropy and on how an art collection supports a company in fitting for the future. Collecting art and working closely with artists helps to shape the future and create a sustainable and responsible company. La Mobilière started the new Corporate Social Responsibility division six years ago in order to install philanthropic ideas in the daily business. Their collection, exhibitions and collaboration with artists is a meeting point to exchange ideas and start discussions on the future as art supports transformation, change, innovation and even digitalization of the world.

The audience had the chance of having two philanthropists and art collectors sharing their

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collecting experience with them. Grazyna Kulczyk (Head of Museum Susch, Engadin) first described her philanthropic journey. Born from social workers parents in Poland, she started collecting from artists during her law studies and after the fall of communism, she and her husband became successful entrepreneurs supporting arts. Her Swiss foundation (Art Stations Foundation CH) engages in experimental researches on contemporary art, exhibitions (including young artists who were not exhibited yet) and cultural education.

Her philosophy is to distribute 50% of her investments in business and 50% in arts. She thus created a business model supplying her artistic passions and philanthropy.

Professor Doctor Peter Nobel (Attorney-at-law, Nobel & Hug, Zürich) then set the target to discover what purpose should be given to a philanthropist's collection. He started by confirming that there is no right answer to this question. Not all art collectors are philanthropists and they mainly start collecting in order to please their own personal fascination, not mankind. He presented some artworks of his remarkable collection called "Press Art" he started forty years ago before giving a balanced perspective on art collecting. Supporting artists by buying their artworks and extending a collection is of course fascinating. An art collection represents nevertheless also a burden: not only because of

the costs related to maintaining the collection but mainly because of the decision regarding the fate of the collection after the collector's death. A collector is confronted to many options: donating the collection to a museum (notwithstanding their limited budget), creating a foundation (despite the disappearance of the original wishes of the founder after some decades and the continuous financial needs), or auctioning a part of it. He concluded his speech and this panel by this magnificent sentence on an important purpose of a philanthropist's collection: "The collection might survive but not the collector".

### **Giving to Museums**

Professor Luc Thévenoz (Head of the Centre for Banking and Financial Law, University of Geneva) launched the second panel by introducing the legal considerations which should be taken into account when concluding donation and loan contracts with museums, a frequent example of cultural philanthropy. It is important to distinguish donation during the lifetime of the donor (a written contract between the donor and the museum), from the donation which takes effect upon the death of the donor (provisions governing testamentary dispositions established in a testament or inheritance agreement). In both cases, the law does not require the donor to provide guarantees (e.g. good condition of the artwork, authenticity, provenance,

absence of rights of third parties) and it is the donee's responsibility to exercise due diligence and carry out the necessary controls before accepting the donation.

Provisos that the institution will have to fulfill in a short or long term may also be attached to the donation (e.g. obligation to exhibit, prohibition to alienate, indication of the donor, loan for temporary exhibitions, etc.). However, as Etienne Jeandin (Notary, Jeandin & Defacqz, Geneva) explained later during the conference, these provisos have to remain lawful, non-vexatious or meaningless (e.g. is it reasonable to require a museum to assign permanently an entire room to a collection for 120 years?). The failure to perform these provisos may result in a revocation of the donation or a legal action. What is important to note is that in the case of provisos made in the context of a testament or inheritance agreement, any interested party can act to demand their execution (unlike in the case of the donation during lifetime). One other possibility could be to prosecute in illegitimate enrichment the person to whom an object has been bequeathed (a work of art for example) with a sum of money to maintain it but who does not spend this money in this determined purpose.

Finally, a donation can have serious financial consequences for a museum (e.g. costs of conservation, restoration, supervision, insurance, etc.) but also

reputational consequences, hence the importance of a well-established governance regarding acceptance of donations, bequests and successions.

Regarding loans or deposits of artworks, a collector and an institution should always carefully negotiate the terms of the agreement: in a loan contract, the borrower's interest is the preponderant element, while in a deposit contract the depositary's interest will be more significant. Particular care must be taken to decide on the duration of the contract: an unlimited term could become a hidden form of donation.

Bernard Fibicher (Director of MCBA, Musée Cantonal des beaux-arts, Lausanne) and Tobia Bezzola (Director of MASILugano, Museo d'Arte della Svizzera Italiana, Lugano) then gave their point of view on the practice as museum directors. Due to the lack of budget for new acquisitions, the main source of enrichment of a museum is derived from donations and bequests. This dependency on art collectors leads museums and public authorities to build extensions or new buildings subsequent to the pressure of collectors who require the construction of a space dedicated to their collection as a condition of their donation. These promised gifts, accompanied by such strict conditions, can unveil unpleasant surprises for museums, especially when the collector finally decides, despite the construction of a dedicated space, to

not respect his promise of donating his collection to the museum. The status of promised gifts, in particular if they are not in writing, is not regulated in Swiss law and cannot lead to any enforcement action. A meaningful expression of Tobia Bezzola has to be mentioned in this context: “It is collectors collecting museums”.

Sometimes the name of the donor can as well pose embarrassing image transfer challenges to the institution (e.g. three works of art donated by Mussolini to the MCBA had to be exhibited with an important contextualisation file to not damage the museum’s reputation or raise complaints in the public).

The deaccession of inventoried objects from institutions’ collections for the purpose of alienation or transfer has also been the subject of debate and controversy over the past few years, as in the case of the Berkshire Museum in Pittsfield, Massachusetts sanctioned by the Association of Art Museums Directors for having sold 22 works for \$ 53 million to raise funds for the museum. Although museums need to update their collections and fight against private collectors with broader financial resources (and without any public cultural policy pressure), similar arguments to those of the Recommendations about the alienation of objects of collection published in 2018 by the Association of Swiss Museums (AMS) based on the International

Council of Museums (ICOM) Code of Ethics were formulated against this deaccession behavior: destruction of the trust of other institutions, destruction of the trust of donors and potential donors and disrespect of a museum’s responsibility to render important works of art accessible to the public. Deaccession is no longer violating a bilateral contract between donee and donor but is an act involving a third party whose role is becoming more and more crucial with time: the public.

### **Philanthropic structures**

One of the main decisions of a philanthropist or art collector’s life is to choose a sustainable structure for the future of his collection or philanthropic wishes. While the choice of giving a collection to a museum can be significantly impacted by the legal structure of the museum, its location and the loss of control on the collection once it has been donated to the museum, setting up a foundation to assign the assets enables the founder to provide the structure with a specific purpose, governance rules and his vision for the future of his collection(s). Arnaud Cywie (Attorney-at-law, Partner, Borel & Barbey, Geneva) compared the main structures on the market, taking into account the specificities for art: illiquidity of the artworks and cashflow issues, difficulty to estimate their value, costs of conservation and transportation, etc. An analyse of the tax aspects of such structures

by Xavier Oberson (Professor at the University of Geneva, Attorney-at-law, Partner, Oberson Abels, Geneva) enlightened the possibilities offered to philanthropists.

#### 1. The Swiss Foundation

The Swiss foundation is a legal entity frequently used for cultural philanthropy. However, the purpose given to the foundation is key in order to obtain the authorisation of the supervisory authority which verifies every year that the assets are still allocated as defined by the founder, even after his death.

Foundations with a public interest purpose may benefit from a profit and capital tax exemption (article 56 lit. g Loi fédérale sur l’impôt federal direct) provided that they fulfill cumulative conditions which are currently analysed more and more severely by the tax authorities. Among them, founders should be aware that the allocation of the assets (e.g. the art collection) to a foundation is irrevocable and they will not be able to recover them anymore. Therefore, the decision of creating a foundation has to be wisely and carefully considered.

The founder’s allocations and donors’ gifts to the foundation are not considered as a taxable income. The donors, on their side, may deduct from their income tax gifts to tax-exempt entities as long as both parties are

residing in Switzerland but not the gifts to foreign based tax-exempt entities (existing gap in international tax law).

A non-tax-exempt foundation would be subject to federal (4.25% rate) and cantonal (various rates) profit tax and to cantonal capital tax. As foundations do not create a huge benefice amount, this status would not be problematic if it was not for the donors’ gifts status. A gift to a non-tax-exempt foundation could indeed be considered as a gift or inheritance between third parties, resulting in a 54% tax rate. Consequently, the foundation would lose donors’ gifts.

Finally, the distributions beneficiaries receive from foundations are regarded as income and trying to make them appear as gifts is controversial in the practice. The circle of beneficiaries has to remain large if the foundation wants to keep its public interest purpose (e.g. an artist should not use the foundation as a promotion mean for his own career).

A charitable foundation could however hold some bank assets and an even second foundation (e.g. a museum) using the bank assets and their income to obtain sufficient funds without losing its tax exemption. Commercial and public interest activities can thus be mixed.

A financial pitfall that many foundations could avoid but are often

confronted to concerns VAT: buying abroad a service to be performed in Switzerland and exceeding CHF 10'000 per year would force the foundation to be subject to VAT.

## 2. The trust

The foundation is a quite rigid structure compared to a trust which is not a legal entity as such but a flexible contractual relationship which can be simply binding a founder, a trustee and a beneficiary or complexified with many parties, advising committees (e.g. scientific committee, art committee, etc.) or third parties (e.g. a protector or protector board which can advise the trustee, change him or approve the decisions he takes). Swiss trustees can act as main parties and administer the assets for the beneficiaries.

It is essential for the philanthropist to distinguish between two types of trusts as the choice will have important consequences on the collection and on the taxability of the structure. On one hand, the revocable trust can be revoked at any time, the assets reverting to the founder when the trust is liquidated. On the other hand, in the irrevocable trust, the founder will never be able to get his assets (e.g. his collection) back once it is in place in the structure and that a discretionary power is given to administrate the collection. As the taxation depends on this distinction, Xavier Oberson recommended to have a discussion with the tax authorities

before creating the trust in order to avoid unpleasant surprises (e.g.: in Geneva, in an irrevocable trust, if the beneficiaries are family members plus a third party, the tax rate of the most remoted party compared to the settlor, i.e. the third party in our example, will apply, i.e. 54%). Moreover, for the trust to be recognized by the tax authorities the settlor must have completely and irrevocably relinquished his assets in favor of the trustee. The latter will hold them on behalf of the beneficiaries who can only have expectations and not asserted rights to any distribution.

The trust is a sustainable structure for a long period of time as trusts can be set up for decades or centuries (depending of the jurisdictions). However, no Swiss trust law is in force at the moment. A project is being prepared but this could lead to a long procedure as some cantons are opposed to it.

## 3. Non-Swiss Foundations

Foreign entities can be tempting for philanthropists. The Lichtenstein foundation for instance is a legal entity whose board is managing some assets but not always for charitable purposes. The STAK, a tax attractive foundation structure in the Netherlands, allows to differentiate the economic right of the founder and the legal property of the collection of the owner. Finally, in the United States, the donor-advised fund is a charitable giving vehicle administered

by a public charity created to manage donations on behalf of individuals or organisations. Tax-attractive, this structure offers many advantages (e.g. the assets do not have to be liquid).

Nonetheless, the qualification of such entities in Switzerland by the tax authorities (assimilation to Swiss entities depending on their form and structure) in order to determine their tax treatment could be problematic. The main criteria is the legal and effective entitlement to dispose of the assets. If the founder retains control over the assets or the foundation, the foundation is considered as a “controlled family foundation” and is treated as transparent: no gift tax on the transferred assets and distributions to beneficiaries are qualified as donations (gift tax). On the contrary, if the founder has effectively relinquished the transferred assets, the so-called “non-controlled family foundation” will be considered as an independent legal entity and any contribution may be regarded as a gift and taxed in consequence.

### **Art foundations**

Art foundations are often created to manage an artist's estate, a collection or to pursue charitable activities in the arts sectors. Succession law is an inseparable element to consider when creating a foundation. In order to properly plan a succession, Etienne Jeandin (Notary, Jeandin & Defacqz,

Geneva) wisely insisted on preparing a precise testament as many provisions could impact the fate of a collection or foundation (e.g. choice of the applicable law to the succession, institution of a heir, designation of legatees, or attribution of a usufruct of a painting). A foundation is the living witness of the will of its testator and a tool for the survival of his wishes. The founder should therefore create his foundation during his lifetime in order to imprint his brand and his will, while specifying in a testament how the foundation should function after this death to pursue its precise mission endowed by his founder.

The founder may appoint a testamentary executor who will perform his will after his death and may decide of the statutes of the foundation, the composition of the board and implement the foundation. The mandatory control by the supervisory authority each year will regulate this full power potential given to the testamentary executor. The supervisory authority would also be able to verify that the asset allocation as defined by the founder is still respected or that the foundation's bodies function properly and to take extraordinary measures (e.g. sanctions, appointment of a commissioner). An example illustrates how important it is to plan precisely the purpose and functioning of a foundation in advance: a modification of the statutes must be proposed by the board, approved by the supervisory

authority and is only possible after ten years of existence, on the condition that it has previously been provided for this possibility in the statutes.

Lastly, the founder should be careful about the parts legally reserved to his heirs in the succession when donations are planned in his testament (the donees are liable to legal prosecution if the donor exceeded the parts) but also for donations performed during his lifetime since the donations are reintegrated into his estate after his death to calculate the parts. Etienne Jeandin advised to establish an inheritance agreement during lifetime. This conventional testament enables to associate the heirs with the planning of the succession. This allows, for instance, the heirs to give up a portion of their legally reserved parts if they are affected by the donation of a collection to a museum or the creation of a foundation.

Dominique Favre (Director of the Autorités de Surveillance LPP et fondations de Suisse occidentale, Lausanne), thanks to his wide experience, used four examples to point out the role of the supervisory authority and some elements an artist should take into consideration when creating his foundation. Firstly, transferring artworks or assets to a foundation is an irrevocable decision and he will not be able to recover his artworks or use them as he wishes anymore. An artist should carefully distinguish between his own

assets and those of the foundation which has its own existence.

Secondly, a foundation and an art collection involve costs. An artist may cover the costs while he is alive but he has to plan how they should be assumed after his death to ensure the foundation's survival. If the Board is not willing to take them in charge, it could lead to the dissolution of the foundation. Dominique Favre even recommended to realise a 3-year business plan when a foundation is created to avoid these negative effects.

The third example showed that an inheritance agreement is a strong strategic decision to plan the future of a foundation. In this case, the founders decided in an inheritance agreement that their fortune would go to the foundation after both their deaths. One heir contested this resolution after their deaths but without success as the clear will of the founders had been formalised in the inheritance agreement. However, the supervisory authority had to take some measures to safeguard the assets of the foundation during the litigation (e.g. appointment of a commissioner, prohibition to loan the artworks abroad).

Finally, the supervisory authority may have a role of liquidator as in the last case presented: the authority had to organise and manage the liquidation of a foundation following the health problems of the founder. The role and

importance of the supervisory authority should not be underestimated.

The conference was closed by the intervention of two foundations. Yann Hendgen (Artistic Director, Foundation Zao Wou-Ki, Geneva) presented the missions of this foundation created during the lifetime of the artist, now presided by the artist's widow. The Zao Wou-Ki foundation is not the owner of the artist's rights, nor the collection but maintains and develops the reputation of the artist, manages the artist's archives to complete his work (e.g. publishing of a catalogue raisonné), participates in the publication of books about the artist, collaborates or acts as a curator for exhibitions organised on the artist but also tracks the fake artworks by delivering certificates of authenticity for his work which of course has an impact on the art market.

Catherine Othenin-Girard (Board member of the foundation Leenaards and chairman of its cultural committee, Lausanne) introduced us to the work of the Foundation Leenaards, in particular, how the foundation supports emerging artists in their careers, and which operational and strategic considerations need to be taken into account when managing such a foundation. The objectives being to stimulate an original and qualitative creation as well as to reinforce the social role of the cultural institutions,

the foundation serves as a guarantee and supports financially cultural projects of associations and institutions, awards prizes and distributes cultural scholarships in visual arts, literature, music and performing arts. A strategic report is published every five years to verify that the work of the foundation is always in phase with its original missions. While these missions can often be forgotten over generations for other foundations, the foundation Leenaards' governance system has remained effective, transparent and faithful to its values since its creation in 1980.

## Conclusion

Choosing the right sustainable structure for philanthropic purposes in the arts is a difficult choice which will mainly depend on the personality of the philanthropist and his will for the future. Emotions, prestige, ego, altruism, legal considerations, relationships, and personal goals are a few examples of the leading reasons guiding the philanthropist throughout his life, his artistic passions and philanthropic journey. The remaining issues raised during this symposium and the ongoing debates reveal various challenges lying ahead of the academic and professional actors of the cultural philanthropy. This engaging conference should probably be the first of many more to come.