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*The return of illicitly exported cultural objects
- The implementation of the 2014/60 Directive
in France and the UK*



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BRIEF OVERVIEW OF THE 1993 AND 2014 DIRECTIVES

NEWS

France and Britain prepare for battle over Joan of Arc's ring

Jewel sold in UK for £300,000 last month has left the country—but did it have an export licence?

by MARTIN BAILEY | 16 March 2016



Joan of Arc's ring was sold by TimeLine Auctions for £297,600.00

TOPICS

News Heritage Auctions
Art exports

Sotheby's EST. 1744

THE PILKINGTON COLLECTION
CHINESE ART
HONG KONG AUCTION 6 APRIL



The Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (15 March 1993)

- Implementation in most if not all European countries
 - § France: decree later codified in the Cultural Heritage Code
 - § UK: Return of Cultural Objects Regulations 1994 (SI 1994/501)
 - Authority is the Department of Media, Culture and Sport
- Poor success:
 - § between 2008-2013
 - 22 returns but amicable out of court settlements
 - article 5 return: 2 (the Czech Republic returned 10 statues to Austria) + 3 on going + 2 refused or cancelled
- Reasons:
 - § objects resurface after 20-30 years
 - § only national treasures listed in the annex of the directive are covered
 - § poor cooperation (identifying the authority in charge, reporting the information, transferring the information, acting by the State...)
- New directive proposed in 2013
 - § Proposal for a new Directive COM(2013) 311
 - § Adopted 15 May 2014: Directive 2014/60

Directive 2014/60 on the return of cultural objects unlawfully removed from the territory of a Member State

● Process

§ Object illegally exported after entry into force: 1 January 1993 (art.14)

§ Cultural objects classified by the Member State as national treasures: object that possesses artistic, historic or archaeological value under national legislation or administrative procedures (art. 1 and 2) **removes requirement that the object should be classified as a national treasure within the categories referred to in the Annex, particularly as age and/or financial threshold**

§ State should check that the object is a cultural object within the meaning of the Directive within **2 6** months (art. 5(3))

§ Action by the State against the possessor of the object

- Legal action before court in the requested Member State (art. 6)
- Compensation of good faith purchaser (burden of proof on the possessor) and final question of ownership according to the law of the requesting state (after the return of the object) (art. 10)
- Time limitation: **4 3** years from knowledge in maximum of 30 years (or 75 if public collection) (art. 8)
- Costs: requesting state (expenses and fair compensation) (art. 10)

§ Proceedings in the state of origin according to national law (civil and criminal proceedings possible) ie theft, ownership... (art. 16)

● NEW:

§ Definition of 'due care and attention' and burden of proof on the possessor (art. 9)

§ Improve cooperation by allowing states to use the Internet Market Information System (art. 4) which aims to facilitate information exchange between relevant authorities (watch the video, http://ec.europa.eu/internal_market/imi-net/index_en.htm)

IMPLEMENTATION OF THE DIRECTIVE IN FRENCH LAW AND ENGLISH LAW

GB: UK implementation: Return of Cultural Objects (Amendment) Regulations SI
2015/1926

France: Cultural Heritage Code

No difficulties

	Directive	FRANCE		ENGLAND	
		Old section	New section	SI 1994	SI 2015
Updating vocabulary and references		<ul style="list-style-type: none"> - European Economic Community EEC - Regulation 3911/92 of 9/12/1992 - Art. 30 TUE - Member State 	<ul style="list-style-type: none"> - European Union (EEC to EU) - Regulation 116/2009 of 18/12/2008 - Art. 36 TFUE - competent central authority of the requesting MS 	Reference to Directive 1993/7 References to Article 1 for definition of CO	<ul style="list-style-type: none"> - update reference to the Directive 2014/60 - Competent authorities of the MS
Extension of time limit to verify provenance	Article 5(3)	L112-5: two months and reference to Member State	L112-5: six months and reference to the	Reg 3(5): 2	Reg 3(5): 6
	Article 8-A	L112-5: one year (precautionary measure to protect the object)	L112-5: three years (precautionary measure to protect the object)	Reg 4	Reg 4(3)
Extension of time limit to claim		L112-10: one year (return)	L112-10: three years (return)	Reg 6(6)(a): 1 year	Reg 6(6)(a): 3 years
Competent central authority		R112-3 : Office central de lutte contre le trafic des biens culturels	OCBC + Ministère de la culture	DCMS	DCMS
IMI			Delayed implementation R 121-27		IMI regulation 1024/2012; no further need to implement this, already done

Difficulties

	DIRECTIVE	FRANCE		UK	
		Old	New	Old	New
Definition of national treasure	article 1 and article 2-1	L112-2 CO in France from another MS	Abrogation of criteria of age, value, ownership...		Change reference to article 1 to article 2 of the Directive re definition of CO Delete reference to annex in reg 2(3) Omit the schedule that implemented the Annex Waverley criteria
		L112-11 in another MS from France	Reference to L111-1 new definition of national treasure and L112-12 abrogated		
Due diligence	Article 10	L112-8	L112-8: buyer	Reg 7(2) the court 'is satisfied that the possessor exercised due care and attention in acquiring the object.'	Reg 7(2): 'the possessor demonstrates that' and new Reg 7(2A): implements art. 10

France: a new definition of national treasure

Article L111-1 code du patrimoine

Sont des trésors nationaux :

1° Les biens appartenant aux collections des musées de France ;

2° Les archives publiques, au sens de l'article L. 211-4, ainsi que les biens classés comme archives historiques en application du livre II ;

3° Les biens classés au titre des monuments historiques en application du livre VI ;

4° Les autres biens faisant partie du domaine public mobilier, au sens de l'article L. 2112-1 du code général de la propriété des personnes publiques ;

5° Les autres biens présentant un intérêt majeur pour le patrimoine national au point de vue de l'histoire, de l'art ou de l'archéologie



Editing and style

Museum artefacts



No change

Archives



Stand alone category

Registered artefacts



No change

Other public goods



New category: all objects that have a historical, scientific, archaeological, technical interest and that belong to public entities

Potential national treasures



No change

Due diligence through the back door?

- Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State

§ Article 10: 'Where return of the object is ordered, the competent court in the requested Member State shall award the possessor fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object.

§ In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances'

Wording of articles 4 and 6 of the UNIDROIT convention

'a reasonable person': the subjective test of honesty becomes an objective test of diligence?

Due diligence and good faith in French law

- Civil code v Cultural Heritage Code
- Section 2274: good faith is presumed
 - § Good faith: definition
 - § Bad faith proved by claimant/original owner
 - § Question of fact: price paid, quality of the object, means of payment, character of the parties, place of sale, use of database...
- Section L112-8: due care and attention but '*possesseur de bonne foi qui a exercé la diligence requise*'
 - § Due diligence proved by possessor
 - § Question of fact: character of the parties, price paid, database
- Narrow remit of section L112-8 CHC?
 - § Specialia generalibus derogant

Due diligence and good faith in English law

- Definition

- § Section 4 Limitation Act 1980 'If anyone purchases the stolen chattel in good faith' but no definition

- § section 61(3) SGA 1979 'A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not'

- § J. Ulph: 'a good faith purchaser must be subjectively honest'

- Experience of the purchaser, haste of the purchase, suspicion, price paid, value of the object

- Burden of proof

- § The defendant must prove his good faith: a difficult task

- § Nicole de Préval v Adrian Alan Ltd (24 January 1997) (Arden J)

- Expert buyer: higher standard of honesty

- § Kurtha v Marks [2008] EWCH 336

- para. 140: 'A dealer in valuable works of art who pays in large amounts of cash, keeps no records, and asks no questions as to provenance of his supplier, exposes himself, and those who buy from him, to other very serious risks.'

A step towards
due diligence?

- SI 2015/1926; reg 7(2)(A): due diligence

After Brexit



Export licences in practice: 2015/16

CATEGORY	NUMBER	VALUE in £ (≈)
applications (one application may cover several items)	10,585 (71,731 items)	
Objects assessed by an expert and no national importance (exported)	34,999	1.48 bn
licences granted because the item was imported in the UK less than 50 years ago	30,541	8 bn
below the UK limit or temporary export	3,501	3.98 bn
Items found to be of national importance and considered by the committee	25 (incl. 3 did not meet the criteria)	0,117 bn (117m)
Item withdrawn	5	
Items bought by public or private institutions	9	0.007 bn (or 7m)
Items not bought and subsequently exported	6	0.037 bn (or 37.5 m)

TOTAL of items exported	71,722	13.497 bn
TOTAL of items not exported	5	0.007 bn

Customs control

- Recent example in the UK: forfeiture if misdeclaration
 - § Section 167 (1) customs and Excise Management Act 1979
 - § Section 139: gives authority to customs to seize goods that can be forfeited under any section of this act
 - § HMRC v Al Qassas Westminster Magistrates Court 01/09/2015 (unreported)
- Forfeiture if seized by Customs during transit (from 1 to 3 seizures every year):
 - § Section 4 Dealing in Cultural Objects (Offences) Act 2003 (border control since 01/2004)
 - § Restitutions to Greece: a rare Roman coin HM Revenue & Customs, Annual Report 2005-2006, (Cm 6983, 2006), 38.
 - § Restitution to Iran: 100 objects from Jiroft seized at Heathrow, HM Revenue & Customs, Annual Report 2004-2005, (Cm 6691, 2005), 49.
 - § No information after 2010

<http://www.ial.uk.com/uk-customs-seizure-of-looted-libyan-stature/picture-of-libyan-stature/>



Section 167 general offences: untrue declaration

- (1) If any person either knowingly or recklessly—
- (a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or an officer, any declaration, notice, certificate or other document whatsoever; or
- (b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer,
- being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, he shall be guilty of an offence under this subsection and may be [arrested]; and any goods in relation to which the document or statement was made shall be liable to forfeiture.