

Archival protection by juridical means: the European and French cases

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Summary

The European idea since its inception has been based on free trade, developing in free circulation of individuals. Within this context, handling of cultural artifacts has been singled out by European law: archive export is controlled by Europe. The distinction between “national treasures” and cultural goods is here paramount. The acquisition procedure for archives is the great beneficiary of this, as the French case shows. Documents surfacing on the market which happen to be *de facto* national treasures (*i.e.* of public nature) are claimed by the State. Because of the law passed by French Parliament in 2008, which fosters claims, restitution has come to be a much debated issue in our field. This having been said, one should not lose sight of the fact that the regular purchases of record groups, or the donations thereof, constitute the major part of the State acquisition tools.

The number of financial transactions regarding manuscripts is increasing in Europe and in the world, as the price of archives is ever increasing: a letter written *in English* by Napoleon – a choice piece – recently reached more than 320 000 € on the Paris market (Osenat, Auction, 11 juin 2012). Moreover, we find more and more public archives on sale on the internet: quite an alarming phenomenon.

In Europe, cultural objects are very much protected, in a context of free trade and liberalization of exchanges for other goods. In this talk, I would like to explain how to use best European and national laws to protect archives:

- First by considering the European and French **laws about export controls** for archival preservation.
- Second, at a national scale, by taking into account **claims and restitutions** of public archives, to avoid the trafficking of archives.

- Third, and finally, French law gives many possibilities to enrich public archival groups, by purchasing private archives or by developing donations: with hindsight, which procedure has been the more efficient for acquisitions ?

I. Circulation of archives as “national treasures” or cultural objects

The article 34 of **the 1957 Treaty of Rome** suppressed all border restrictions between States members of the European Community, except in the field of « National Treasures » (art. 36).

The **Council Regulation of 9 December 1992** (modified by the Council Regulation 116-2009 of the 18 December 2008), on the export of cultural objects, enables States Members to control movements of cultural items at their borders. And this control is compulsory at the Community borders. It established 3 types of cultural items:

1. National Treasures: cultural items of high historic significance whose export would be a loss for the integrity of national heritage. National Treasures can be defined in French Laws as:

- archives which are in the public domain, because they are of public nature,
- listed documents as historical archives,
- private archives entered by purchase in the National Collections after being declared National Treasures by a Special Committee of the State. A measure offering privilege for the purchase by the State.

When the archive is a National Treasure it must not be exported.

2. Cultural Goods liable to export control: all other goods called cultural objects are classified within 14 categories specified in the Council Regulation of 1992 and controlled inside Europe, an optional control, and outside Europe, a compulsory control.

Within these 14 categories, cultural objects are classified according to financial value and period of creation. Under certain thresholds, cultural objects can thus be exchanged without limitations inside Europe. Above, exchanges are controlled.

For archives, category 12 has a very low threshold of 300 euros inside the EU and 0 euros outside Europe (for any price control is due). This very low threshold for archives is a way to find out if pieces are the object of illicit trafficking.

In each member State of the EU, internal law rules exports inside the Union. The European Council Regulation of 1992 was implemented very closely in French right by a law of 31 December 1992 and decree of 29 January 1993 :

In order to export archives outside Europe, two documents, so called “passports” are required: a certificate and a licence.

To export within Europe from France: a certificate only is necessary. When granted, the certificate of exportation is permanent and testifies that the archive is *not* a National Treasure.

3. Cultural objects free of any circulation control: they should not be National Treasures, and not fall within the 14 categories, *i.e.* be enclosed in a definite time span and of a certain financial value. Archives less than 50 years old and worth less than 300 € may travel freely inside Europe.

This distinction between National Treasures and Cultural Goods is a good juridical tool:

- For example, when an export request is asked for, the State must check whether the archive is stolen or not, for example if it bears official ink stamps. Consider the **private records of baron de Freycinet**. These are soon to be exported to Australia, and bear ink marks « Archives de Laage », the name of the castle where they were kept in a private family. Louis de Freycinet was Nicolas Baudin’s friend. Baudin, as is well known, was the explorer and cartographer who first charted the South Coast of Australia between 1801 and 1803. Cartographer Louis de Freycinet continued to edit the travel account of Baudin, and was the first to publish a complete map of Australia. The Freycinet family sold the archives 30 years ago and now an antique dealer has sold them to another bookseller in Australia. In the French Heritage Law (art. L. 212-29), the law about archives enables the State to ask for a digitization of the documents before giving the certificate of export, a way to preserve information instead of the original document.

- Public documents can be found in private hands thanks to requests of certificates and licences, for example, this contract signed in Paris the 13 January 1866 between Giuseppe Verdi and the French administration for his opera, *Don Carlos*. We learned about this archive by way of a request for exportation. The certificate to export could not be delivered because this contract is a document of the public domain, which should have been

kept in the archives of the House of the Empereur on which depended the Opera Theatre in 1866.

The National Archives keep the file describing the order for this opera : two copies of the contract were signed, one is now kept in the house of Verdi in Busseto near Parma, and the other should have been kept by the administration of the House of the Empereur, but was not, for an unknown reason. So the State refused to deliver the certificate of export and had the document back for the National Archive.

The main drawback for archives in this legislation is the threshold problem – the point at which a certificate is needed: the low financial threshold increases the number of requests of certificates each year:

2010 : 250 requests ;

2011 : 650 requests just for certificats inside Europe.

Licences of exportation are delivered for private archives: for example, in **Louis Vuitton collections** you can find many archives (designs for perfume bottles, for trunks). If the Louis Vuitton firm wishes to lend archives or plans to a foreign country, it is required to ask for a temporary exportation and the State has to control the return on the national territory at the end of the exhibition. For public documents of National Collections, the same temporary licence is delivered for cultural and historical purposes like exhibitions.

II. Claims and Restitutions

If these laws about movements of cultural objects are not complied with, an offence of theft or illicit trafficking can be established and testified to authorities. Claims can be made.

The **1970 Unesco convention** ratified by France is only related to States. If the record is claimed by a State upon a private individual, this convention does not apply.

To avoid these problems, and to enhance international cooperation, Unesco asked Unidroit, the International Institute for the Unification of private law, to prepare a **Convention on stolen and illegally exported cultural objects**, adopted in **1995 (Rome, 24 June 1995)**.

In this Convention, States put the stress on a common processing of the restitutions and accepted that claims for restitutions should be directly processed by National Courts. All citizens fall into the remit of this convention – not only States.

Furthermore, this Convention divides objects between stolen ones and unlawfully exported ones and affects all the cultural objects not only those which are described in classified aids or inventories of our National Collections.

The archive claimed should be on the territory of the State which ratified this Convention. French Parliament has not yet ratified the Convention. It could be used only for a stolen or illegally exported archive after the bringing into force of the Convention.

Consider, for example, the manuscript of the novel *One hundred twenty days of Sodome*, by the Marquis de Sade. This document is now preserved at the Bodmer Foundation (Cologne, Switzerland), but the former French owner has lodged a complaint with the Swiss State, claiming the document was stolen and had illegally left France. In fact, Switzerland had recognized the Unesco Convention only in 1995 and this record was stolen and sold in 1982 to a Swiss citizen, so this law can't be retroactive to 1982. Switzerland actually thinks that the purchase was valid, as done in good faith relating to Swiss laws and protects the present holder. A solution can be found if the French litigant would accept to give up his complaint with financial compensation.

For restitution inside Europe, the **European Directive 93-7 of 15 March 1993** is a very convenient measure in support of internal market policy. The directive provides for cooperation mechanisms and a procedure for returning national treasures when these have left the territory of a Member State unlawfully. Restitution has to be done with respect to the laws of the requesting State. In France the competent authority is the National Office against trafficking of cultural objects, linked to the Interior Ministry.

The European Directive **15 March 1993** is efficient because as soon as an archive has left the national territory in violation of circulation's laws, the French State can ask for its restitution (through the National Office against trafficking of cultural objects), leaving the problem of property for another court and time. The issue of the property can be solved at a later stage.

This Directive enables the competent Court in the requested State to award financial compensations for the possessor, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object.

Consider, for example, **the Pétain archives** about the French State during World War II. The documents were illegally exported after a claim of public property by the State during a public auction in 2008. The auctioneer refused to stop the auction; the documents were then exported by the actual owner in Luxembourg. The Central Office against trafficking of cultural objects asked for restitution in the competent Court of the State of Luxembourg, in accordance with the Directive 93-7.

In France, the State often claims public archives which are in the private domain: our law about archives (15 July 2008) is very large with this acception.

It is not contradictory for the French State to claim from private hands papers of Maréchal Pétain, Chief of French State during WWII, and instigator of a policy of collaboration with the Nazis, and at the same time to claim those of General De Gaulle, chief of the Resistance, the latter declared rebel by the former. It seems fair to claim simultaneously these papers in the field of history and justice – after all, De Gaulle was accepted by Great Britain as Chief of State in exile.

III. Acquisitions and enrichment of national collections

Recently, a law about auctions in France (law 2011-850 of the 20 July 2011) in adaptation of European laws (Directive 2006/123/CE) has given more transparency and new possibilities to buy archives for the State as for any individual:

- **After-sales** are easier: to buy an item after an auction sale, when it was bought in (the reserve being not reached) is not limited by the low pre-sale estimate or by the last bid (under which it was not possible to purchase before this law). Everyone can negotiate a price with the seller through the auctioneer, providing a written mandate by the seller. It is a very convenient way to negotiate archives at a good price.
- Before this law, the auctioneer could only sell at auction, now he can also sell by mutual agreement called **private treaty sales**. Antique dealers are allowed to sell at auction once

registered and with the required credentials. The two worlds of auctioneers and antique dealers are not divided as in the past.

To declare “National Treasure” a private record, prevents its exportation during 30 months. It gives priority to the State during this time to acquire the archive. This measure is implemented by a State Committee for National Treasures which selects the most relevant cultural archive and gives them the status of National Treasure. Just two private records were declared Tresor National in France and purchased by the State since the law passed : in 1998, a manuscript of Turenne was prevented from going out of France and acquired by the State by the mean of law on National Treasure. The archive is the *Mémoires* (214 fol., 1659-1660) of Turenne, a great general of kings Louis XIII and Louis XIV. The second archive declared National Treasure is the archive of the Turgot family which was declared National Treasures in march 2011 and is still in the process of being purchased. The National Treasure gives advantages on corporate tax to firms when they give money to acquire the archive: a reduction of 90 % of corporate tax is possible if a company helps the State to acquire a National Treasure. This procedure does not oblige the State to buy: the archive can be sold freely to a private person but has to remain on the national territory.

Listed archives as historical archives: to put archives on the Statutory List of Historical Archives, by a Ministry decision, prevents exportation and protects documents against unauthorized change, against theft and any damage without limit of time. Those listed archives remain in private hands, like buildings of the Statutory list of historical Monuments. 54 records groups were listed from 1940 to 2012 in France. But that device does not affect the ownership of the archive: the main drawback of this measure is that it is possible for the owner to sell it as a whole or to cut it into pieces to sell it, providing each document remain on the national territory.

Offers in lieu of inheritance tax: a law of 31 December 1968 originating with Malraux, first minister of Culture in France, enables individuals to make offers in lieu of inheritance tax, in lieu of wealth tax and in lieu of donation tax. The State may acquire the archive if its value is considered as equivalent to the price of those taxes. Since 1968, 21 records group were acquired by this way, always of the major interest for history. For example, archives of Lavoisier for the Science Academy or Murat Archives.

In conclusion, this talk should not lessen the great generosity of benefactors in France as we count 56 donations and 7 deposits at the National Archive just for 2011, free from any financial transaction.

But in a context of globalization, archives are also involved and threatened, but they can also be indirectly protected when they are of great worth. It is necessary for the archivist nowadays to use in the best way possible all the juridical tools at the European or national level to enhance the public as the private archives and protect them. It is not useful to impede the private market on archive or the private heritage, but to cope with it to encourage donations or means of acquisitions in favour of the State.