Treasure finds in Belgium. A brief summary of their historical background, current legal practice and changes to come.[1]

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Treasures are a popular subject in literature, because on the one hand they are normally connected to an interesting background story and on the other hand they evoke dreams of unearned and sudden fortune. These two problems are also interesting to analyse from a legal point of view, not only because the apparently ownerless treasure needs to be attributed to a new one but also because of the often-significant scientific value of the finds, that create public interest in its preservation and display.

The legal dimension to these problems can be solved in different ways. In Belgium an age-old system of solving problems related to treasure finds, rooted in Roman law, may soon be replaced by a new, wholly different approach. Whether this new approach, part of the reforms of Mr Koen Geens, Minister of Justice in the former federal government,[2] is capable of resolving some of the problems of the old system or whether it is simply likely to create new ones will be summarised in the following sections.

The traditional legal regime applicable to finds of treasure in most Europe is based on a legal concept known as 'Hadrian's Division'. This concept says that if treasure has been found accidentally, it belongs half to the finder and half to the owner of the land.[3] This concept has been modified in some European countries by administrative or supplementary civil laws. In Germany, for example, § 984 of the more than 100-year-old German Civil Code (Bürgerliches Gesetzbuch)[4] is theoretically still strictly based on the principle of Hadrian's Division. However, Article 73 of the German EGBGB (Introductory Law to the Civil Code) contains an enabling clause for the federal states to establish laws organising the treatment of treasure-finds differently. This clause is called "Schatzregal" or *ius regale* and all German federal states except Bavaria took the opportunity to create laws granting themselves ownership of more or less all treasure finds.[5] Therefore, the provisions made in § 984

[1] For more information read the full Article: Lucie Lambrecht / Zacharias Mawick: BREAKING NEW GROUND IN BELGIUM. How Legal Tradition Handles Treasure-Finds and Proposed Reforms. Analysis of the existing legal concept, its history and changes to come. in: Art Antiquity and Law (I 2019).

[2] Led by premier Mr Charles Michel. A new government is in formation following the 26 May 2019 elections.

[3] This solution is based on a decision made by Emperor Hadrian which was later confirmed in constitutions by the Emperors Leo and Zeno and was furthermore reported in the Historia Augusta and, in more detail, in the Institutions. However, this general rule has always been object to modification. Through German influence in medieval times, for example, the so called "Bergregal" or Ius Regale Montanorum found its way to legal practice in the territory of what is nowadays Belgium. The Ius Regale Montanorum was the right of ownership of untapped mineral resources, which belonged to one of the several feudal lords and not to the owner of the land.

[4] In development since 1881, it became effective on 1 Jan. 1900,

[5] § 15 Denkmalschutzgesetz (in the following: DschG) Schleswig-Holstein; § 13 DschG Mecklenburg-Vorpommern; § 18 DschG Niedersachsen; § 17 DschG Hamburg; § 19 DschG Bremen; § 12 DschG Brandenburg;

BGB are no longer of any importance in practice: Hadrian's Division has been largely substituted by *ius regale*.

In Belgium, for the time being, there is no such exception to the rule of the 'Hadrian's Division', codified in Article 716 of the Belgian Civil Code.[6] The various regional Heritage Decrees[7] do not lead to expropriation of finds, but merely lay down restrictions and obligations on the owner of archaeologically important finds (which is only one type of treasure). This compromise between pure Hadrian's Division and *ius regale* seems to satisfy all interests: the finder and the landowner share title to the treasure and public interest is satisfied by administrative laws assuring the preservation and research of the find.

To fully understand the legal treatment of treasures, a few words concerning the definition of treasure need to be said because they are the starting point of every legal qualification. In Belgium, treasure and neighbouring legal concepts are differentiated by the intention of the original owner of the object.[8] This leads to the following system of treasure, *res derelictae* and wreck (*épave / wrak*):

1. If the original owner intended to retain ownership by hiding or burying the object, the finder acquires title subject to the condition that the original owner remains unknown. If the latter reappears within 30 years (after which the finder gets undisputed title through prescription of 'usucapio', under Article 2225 of the Civil Code) and can prove his ownership, the finder must return the object. Article 716 applies (treasure).
2. If the original owner threw the object away in order to get rid of it, the object becomes *res derelictae* and the finder acquires full, unconditional title, provided the original owner's intention to divest himself of the object is sufficiently clear.

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§ 12 DschG Sachsen-Anhalt; § 3 DschG Berlin; § 17 DschG Nordrhein-Westfalen; § 25 DschG Sachsen; § 17 DschG Thüringen; § 24 DschG Hessen; § 20 DschG Rheinland-Pfalz; § 23 DschG Baden-Württemberg; § 14 DschG Saarland.

[6] In French/Dutch: „*La propriété d'un trésor appartient à celui qui le trouve dans son propre fonds : si le trésor est trouvé dans le fonds d'autrui, il appartient pour moitié à celui qui l'a découvert, et pour l'autre moitié au propriétaire du fonds.*
Le trésor est toute chose cachée ou enfouie sur laquelle personne ne peut justifier sa propriété, et qui est découverte par le pur effet du hasard." / *„De eigendom van een schat behoort aan wie hem in zijn eigen erf vindt; wordt de schat in eens anders erf gevonden, dan behoort hij voor de ene helft toe aan de vinder en voor de andere helft aan de eigenaar van het erf.*
Een schat is iedere verborgen of bedolven zaak waarop niemand zijn recht van eigendom kan bewijzen en die door louter toeval ontdekt wordt."

[7] E.g. the Flemish Immovable Heritage Decree, applicable in the Flemish region.

[8] As Sophie Boufflette puts it in her penetrating article about the complex Belgian system of treasures and similar concepts: *"*La *dissimulation [as a requirement of a treasure] doit-elle en outre être volontaire? La volonté, encore et toujours. Notion omniprésente en cette matière, elle semble être la clé de bien des énigmes. C'est elle [...] qui permet de distinguer un trésor d'une chose abandonnée ou d'une épave.*" Sophie Boufflette: 'À l'attention des propriétaires distraits ou négligents. Le sort des objets trouvés au regard du droit des biens' ('Warning to Forgetful or Negligent Owners. The Fate of Lost and Found Objects in the Law of Property'), (2008) Revue Générale de Droit Civil Belge / Tijdschrift voor Belgisch Burgerlijk Recht, pp. 157-164. Trans.: "Is it necessary [as a requirement of treasure] that the concealment should have been intentional? Intention, time and again. An ever-present concept in this area, it seems to be the key to many puzzles. It is intention which allows us to make a distinction between treasure on the one hand and abandoned property or a wreck on the other."

3. If the original owner intended to retain ownership but lost the object, it is considered an *épave* in French, or *wrak* in Dutch, which literally translated, means 'wreck', revealing its nautical origin, but now applied in the broader sense. The discovery of a 'wreck' is governed by the Act of 30th December 1975.[9] This states that the finder of an *épave/wrak* needs to bring the object to the municipality where it will be stored for six months for the owner to collect it. After this period of time, the municipality will gain ownership of the object.

However, this long-established system may soon be substituted by a new one. In the proposed Article 3.74 of the new Belgian Civil Code[10] the historically-established Hadrian's Division is still used: the finder acquires title if he finds the object in his own ground. Otherwise, ownership is split between the owner of the ground or the container in which the object is found and the finder. However, this ancient system is now overhauled. In addition to the already existing requirement that the item has to be found by chance, the finder acquires title only if:

1. He is entitled by a personal or real right to use of the ground / container, which is the case if he rented the ground or the container in which the treasure is found,[11] and
2. He has respected the provisions laid down in Article 3.73, which are
   a) that he made serious efforts to find the owner (§ 1, 1st sentence)
   b) that he reports the find to a municipality ('commune') within the seven days following the discovery (§ 1, 2nd sentence).

The above-mentioned old system of definitions used to differentiate between *res derelictae* and treasure, which mainly depend on the intention of the original owner, is now based on objective criteria: the finder needs to make serious efforts[12] to find the original owner and he needs to report the find to the municipality. With regard to the ways in which title to finds may be acquired, Article 3.74 § 1 states that the original owner of a found object remains the owner and can regain ownership by addressing himself to the municipality. If he does not do so within five years of the date of the find, the finder acquires title to the object provided he informed the municipality within the prescribed seven-day limit. Otherwise, the municipality will gain ownership of the find.

The advantage of the new regime is obvious, since it is easier to simply follow the mechanisms of reporting to the municipality, wait a period of time and then gain secure ownership. But, without going into further technical details, we would like to highlight some problems of these reforms.

1. The introduction of what appears to be objectivity is qualified by the fact that the key characteristic of all cases is the existence or lack of ownership. If there is no owner, the finder will immediately acquire title (Article 3.74 § 2). The problem is that all objects had an

[9] in French/Dutch: *"Loi concernant les biens trouvés en dehors des propriétés privées ou mis sur la voie publique en exécution de jugements d'expulsion / Wet betreffende de goederen, buiten particuliere eigendommen gevonden of op de openbare weg geplaatst ter uitvoering van vonnissen tot uitzetting*.".

[10] The part of the Civil Code treating matters of property law was approved by the previous Government on 25 October 2018. Since 5 November 2018, the text has been available at www.lachambre.be, although the proposal is now obsolete pending the formation of a new government since the 26 May 2019 elections. As for now there is no certainty that the proposal will ever be reintroduced in this form.

[11] In French/Dutch: "titulaire d'un droit personnel ou réel d'usage / een persoonlijk of zakelijk gebruiksrecht".

[12] It also remains opaque, what is to be understood as "seriously" (French: "raisonnablement" or Dutch: "redelijkerwijze"), but at least in this case future case law will provide the necessary criteria.

owner at some point. A tightly knit legal network of ownership attribution on national and international level generally prevents that objects might lack an (original) owner. If an object, against all odds, falls through this network and therefore lacks an original owner, then how can the finder possibly know about this situation? In practice he would not even be aware of the facts and much less of their legal interpretation. Hence, the five-year limitation period established by Article 3.74 § 1 would apply as the secure way to gain ownership and, following this train of thoughts, Article 3.74 § 2 appears to be redundant.

2. If the legislator, on the other hand, is referring to those cases in which the original owner has clearly abandoned the object, then the question has to be asked if it really was his intention to relinquish ownership. If again the original owner's intention is decisive for the legal consequences, then the problem regarding the lack of objectivity has merely been transferred to the legal requirement of lack of ownership codified in Article 3.74 § 2.
3. According to Art. 2279 of the current Civil Code, the possessor acquires immediate title if he is in good faith, meaning that he has all reason to believe that possession of the object was transferred to him by someone who had good title.[13] If the person is in good faith but the object has been stolen or lost, he acquires unconditional title if the original owner does not reclaim his property within three years. A person in bad faith can acquire title only through usucapio after 30 years (Article 2225 old Civil Code; Article 3.27 new Civil Code). Article 3.74 § 1 of the new Civil Code seems to create a third kind of 'faith' or belief somewhere between good and bad faith, because the finder, even if he is in good faith, does not acquire title immediately or after three years, but after five years only. It has to be asked if this differentiation is justifiable, because if good or bad faith is the only mechanism to allow the new attribution of ownership after a certain timespan or another, what is it then that is so different between the finder of an object and the buyer of an object with regard to their good or bad faith?
4. The administrative burden will put additional economic pressure on the municipalities, which are already notoriously underfinanced. It will also keep many people from reporting their finds at all, making even the most efficient legal system redundant.

Treasure finds are surely one of the more exotic parts of legal practice, but they are also sufficiently fascinating for the general public to be in constant focus of media and literature. The legal treatment of treasures is deeply rooted in local traditions and the principle of Hadrian's Division remains the most important solution for the re-attribution of ownership of suddenly and fortuitously found valuable objects in Belgium and most other European countries. This exemplifies not only the antiquity of the problem but also the widespread acceptance, throughout the ages, of the principle that ownership of a treasure should be divided between owner of the land in which the object is found and the finder. Although at this stage it is uncertain, this principle might soon change drastically in Belgium. The reformers of the new Belgian Civil Code project may have the positive intention to protect (cultural) heritage by changing the mechanisms of ownership attribution and redirecting its circulation to the municipality, where it can easily be registered. Under certain circumstances, the municipality can even gain ownership this way. However noble the intention to protect cultural heritage may be, it can also be achieved by establishing obligations towards its

[13] Article 3.28 mirrors current Art. 2279 and following of the Civil Code relating to the possession of chattels, which enacted the old adage: "*possession vaut titre*".

finder, hence making an attribution of property to the municipality unnecessary. Their intentions to simplify the existing and admittedly complex legal system of treasure finds are in vain if they substitute it with another complex legal system, presumably not simpler to handle in practice than the old one. In both cases, acceptable solutions will depend on a reasonable assessment in the particular circumstances of the case, so why not keep the old system and the associated long-established and accepted case-law?