Laying Claim to Long-Lost Art: The Hoge Raad of the Netherlands and the Question of Limitation Periods

JOOST BLOM*

1 THE FACTS

On 20 April 1990, C brought a painting to Christie's in Amsterdam for valuation. On 8 May 1991 the German Land (State) of Saxony obtained an order against Christie's enjoining them, on the ground of an assertion of Saxony's title, from parting with possession of the painting. The picture, *Landscape with Monastery*, by Jan van der Heyden, had been stolen in 1945 from the collection of the Gemäldegalerie in Dresden and was registered as a Kriegsverlust (war loss) of the gallery.[1] Saxony brought an action before the Rechtbank (trial court) of Amsterdam for delivery up of the painting and a declaration that Saxony, as successor in title to the owner of the painting in 1945, had the right to possession of the picture.

C deposed that he had purchased the painting in early April 1990, in Amsterdam, for 100,000 Dutch guilders (about U.S.$50,000) from Gennady Ilyin, a Russian-born sports doctor and boxing trainer who had emigrated to Finland in 1985. Ilyin declared that he had bought the picture from a cousin who had inherited it, via his mother, from his and Ilyin's grandmother. Ilyin said that the grandmother was already in possession of it in the early 1950s.

C argued that Saxony's claim to the painting was barred by lapse of time, that is, by the expiry of the relevant limitation period. The applicable limitations rule was, C said, that of Dutch law, as the law of the country in which the painting was situated. According to article 2004 of the pre-1992 Civil Code of the Netherlands,[2] a claim of title to movable property could not be invoked if more than thirty years had elapsed since the time when the claimant had involuntarily lost possession of the property to another. Saxony argued, on grounds to be discussed below, that the limitations issue fell to be decided not by Dutch law, but by Ger-

*Faculty of Law, University of British Columbia.

International Journal of Cultural Property, Vol 9, No. 1, 2000, pp. 138–150

FIGURE 1. JAN VAN DER HEYDEN, *LANDSCAPE WITH MONASTERY*. © SÄCHSISCHE LANDESBIBLIOTHEK, DRESDEN, GERMANY.

man law, under which it said its claim was not statute barred. It also argued in the alternative that if Dutch law did apply, article 2004 did not have the effect of barring its claim. Saxony's arguments were all rejected by the Rechtbank. Saxony's appeal to the Gerechtshof (Court of Appeal, abbreviated to Hof) of Amsterdam was dismissed, as was its further appeal in cassation to the Hoge Raad (High Court) of the Netherlands.[3]

2 THE CHOICE OF LAW RULE

2.1 THE *LEX REI SITAE* RULE

In the Hoge Raad, as well as in the courts below, the starting point for the analysis was the choice of law issue, that is, whether the Dutch or German limitation rule ought to be applied. The principle is well established in civil law systems of private international law (also called conflict of laws) that limitation statutes are to be characterized as substantive, not procedural, law. This is an essential distinction in private international law. A court always applies its own procedures, but the substantive rules by which the court determines the parties' rights may be drawn

https://doi.org/10.1017/S0940739100770950 Published online by Cambridge University Press

from foreign legal systems. Whether a party can invoke a foreign substantive legal rule depends upon so-called choice of law rules. These are found in the private international law system of each country, and they themselves differ from one system to another.[4] Given that Dutch private international law regards limitation laws as substantive, the question whether a court ought to apply the Dutch domestic limitation rule or a foreign limitation rule depends upon the relevant choice of law rule. Limitation rules terminate a right after a certain lapse of time. The natural choice of law rule to apply is therefore the one that applies to the right. There are distinct choice of law rules for adjudicating rights created by contract, rights arising from torts (civil wrongs, usually called delicts in civil law systems), and rights to property. Saxony's claim here was treated as a claim to a right of property in the painting.

The Dutch choice of law rule for deciding which country's law should be applied to a question of rights to tangible movable property (any physical property other than land) is one that is universal to all systems of private international law.[5] It goes by the Latin tag of the *lex rei sitae* (or *lex situs*) rule. The rule stipulates that questions of proprietary rights in a tangible movable are to be decided by the law of the country in which the property is situated at the relevant time.

The relevant time is that of the transaction on which a party bases its claim to the property. More precisely, it is the time of the transaction that, according to one party's argument, gave it rights to the property that supersede any rights claimed by the other party. Thus, if the issue is the effect that a particular transaction, such as a sale, had on the rights to that property, the relevant time is generally the time when the transaction was completed.[6] It is the law of the property's *situs* at that moment that determines whether the transaction vested a right of property in the alleged acquirer so as to displace the title of the previous owner.

2.2 INVOCATION OF A LIMITATION RULE: THE LAW OF THE *SITUS* AT WHICH TIME?

In this case, however, the issue presented itself in an interesting way. C's defence rested not on the validity of the transaction by which he had acquired the property, but merely on Saxony's assertion of title being statute barred. In such a case, should a court apply the law of the country in which the property was situated at the time the present defendant acquired it? Or should it apply the law of the country in which the property was situated at the time the true owner first raised a claim against the defendant? The question did not have to be resolved in this case, because the *situs* of the property at both times was in the Netherlands. Still, the point is worth considering for a moment. Although it has seldom been discussed,[7] it goes to the heart of the rationale for the *lex rei sitae* rule.

The rule is usually seen as being justified by two considerations.[8] One is that, by its corporeal nature, tangible property is necessarily subject to the control of

the legal system of the place where it is located. The other is that the rule allows the parties to a transaction, as well as third parties, to determine with relative certainty the proprietary rights that flow from the transaction. No alternative rule—such as one based on the residence of the parties, or the place where they happen to be at the time of the transaction—would serve this purpose nearly as well.

Now, the corollary of the premise, that property rights should be predictable with certainty, is that they should not be subject to change by the mere fact that the property is moved from one jurisdiction to another. Thus, in most systems of private international law, a removal of the property to a new country, after a transaction that confers rights to property on a transferee, does not alter the transferee's rights. The rights conferred on the transferee according to the old *lex rei sitae* continue to exist. They do not change or disappear just because the new *lex situs* has different rules about the proprietary consequences of a transaction such as the one that took place when the property was in the first country.[9]

The problem raised by the present case is that an extinctive limitation period,[10] such as the thirty-year rule in article 2004 of the old Dutch Civil Code, is, at first blush, not one of the proprietary rights that flow from the transaction by which an item of property is acquired. It seems a little strange to regard it as a right that the transferee of property acquires at the time of the transfer—a kind of built-in future defence against an eventual claim by an earlier owner. It is tempting to see it, rather, as an inherent limit to the earlier owner's claim, a limit that presents itself as an issue only when the owner's claim is first made. On this line of thinking, it is the *situs* of the property at this time, not the time of the earlier transaction, that may plausibly be taken as the relevant jurisdiction. The courts in this case clearly assumed so. Their language indicates that they applied Dutch law, not on the ground that the painting had been in the Netherlands when C bought it, but on the ground that it was in the Netherlands when Saxony first asserted its claim to possession.[11]

Despite this apparent judicial acceptance of it, there are problems with having a distinct choice of law rule for the question of whether an extinctive limitation period bars the true owner's claim. The premise of such a rule is that the issue is sui generis. It is not to be grouped with the proprietary rights that stem from a transfer. It is more closely linked to the legal system of the jurisdiction in which the property is situated when the true owner makes a claim against the transferee. There is much to be said for rejecting this dichotomy, from both a theoretical and a practical standpoint.

As a matter of principle, to apply the law of the property's *situs* at the time the true owner makes its claim is tantamount to classifying the limitation rule as one of procedure. It treats it as part of the legal rules governing the enforcement, as opposed to the creation, of property rights. This runs counter to the general approach by which limitation rules are classified, not as procedural, but as substan-

tive.[12] As a practical matter, to apply the law of the *situs* at the time a claim is made would mean that the true owner's ability to assert its rights could disappear and reappear as the property moves from a country in which the limitation period has run out to a country in which it has not. The question of title could be reopened each time the property moved across a border. On the whole, it would seem preferable to fix the limitation period for the true owner's claim against a transferee by reference to the *lex situs* at the time of the transfer, no matter where the property later ends up. Against that transferee, the true owner's position would be determined once and for all by a single legal system. Freedom from claims more than thirty years old, or whatever the limitation period is, would be treated as part of the rights secured to the transferee by virtue of the *lex rei sitae* at the time of the transfer.

In its recent report on the proposed codification of the Dutch private international law relating to rights to goods,[13] the Netherlands' State Commission on Private International Law supports this view. It proposes a rule that would say, "The legal consequences of the acquisition of an item of property from a person without title are governed by the law of the country in whose territory the property was situated at the time of the transfer."[14] The underlying principle, according to the commission, is that the law that governs the legal validity of a transfer of property rights should also extend to the sanctions for any legal deficiencies in the transfer. If property is acquired while it is situated outside the Netherlands but afterwards brought to the Netherlands, the commission thinks that the transferee should not be able to claim the benefit of Dutch law either as conferring a valid title by an acquisitional limitation rule (acquisition of title by prescription) or as defeating the true owner's title by an extinctive limitation rule.[15] It notes laconically that the Hoge Raad's decision in the present case "offers no support for proposing a different rule."[16]

2.3 EXCEPTIONS TO THE *LEX REI SITAE* RULE?

To return to the issues actually argued in the case, the Hof (and the Rechtbank) had held that the *lex rei sitae* rule required that Dutch law, namely article 2004 BW (old), be applied to the question of whether Saxony's claim had been lost through expiry of an extinctive limitation period. Saxony did not attack the general rule but sought to persuade the Hoge Raad that there were grounds for making an exception in this case and applying German law rather than Dutch law. Under German law, it was said, Saxony's claim had not been lost.[17]

2.3.1 Stolen Property

There were two grounds on which Saxony said that German law should be applied. The narrower one was that the Dutch conflict of laws rule in favour of the *lex rei sitae* of movable property was subject to an exception where the property was

stolen. In such a case, it was said, the law to apply was the law of the country in which the property was situated at the time of the theft. The Hoge Raad held there was no such exception. For the Dutch authorities, the only issues to which the pre-theft *lex situs* continued to apply, notwithstanding a removal of the property from the jurisdiction, were issues of the validity and effect of transactions entered into by the original owner or its successor during the period when the location of the property was unknown.[18] Saxony's claim was not based on any such transaction.

2.3.2 Basic Standards of Reasonableness and Fairness

The broader ground on which German law was said to be applicable was that the application of Dutch law in these circumstances was unjust. Saxony had pleaded facts showing that C had not acquired the property in good faith, because he was aware that the painting was a wartime loss. It contended that to apply the law of a country into which stolen property had been imported, for the benefit of a bad-faith purchaser of the property, was unacceptable on the ground of basic standards of reasonableness and fairness (*redelijkheid en billijkheid*). German law therefore ought to be applied as the law of the country in which the property was situated when it was taken from the true owner.

The Hoge Raad held that the suggested exception to the *lex rei sitae* rule was unsupported by any authority in Dutch private international law.[19] This is a point of some significance, because it deals with the question of whether there is any built-in flexibility in the Dutch choice of law system. The Hoge Raad, it would seem, was denying the existence of any general discretion by which a court can refuse to apply a choice of law rule that leads to what it thinks is an unpalatable result. This inference can be drawn from the opinion that the Advocate-General, Mr. Strikwerda, had given to the court. He said, "Contemporary Dutch private international law knows no general exception by which the legal system indicated by a choice of law rule can be refused application on the grounds of reasonableness and fairness."[20] He referred the Hoge Raad to a 1992 outline for a general statute on private international law, published by the Netherlands Ministry of Justice. The outline had included the standard exception of what in common-law systems is called public policy and, in civil-law systems, ordre public (or, in Dutch, *kennelijk onverenigbaar met de openbare orde*). It is recognized in all systems of private international law, although its scope varies somewhat from one country's system to another. Essentially, it excludes from application any foreign legal rule whose operation would be manifestly contrary to the fundamental moral or social principles enshrined in the domestic legal system. Public policy cannot displace a domestic substantive rule or a court's own conflict of laws rule—which is what Saxony wished to do—because it is a contradiction in terms to say that a country's own laws (whether domestic or private international

legal rules) violate that country's fundamental principles. However, the authors of the outline tentatively proposed, in brackets, that Dutch private international law should embrace a further exception. This would allow a court to depart from the usual conflict of laws rule if it was persuaded that applying the rule would lead to a result that violated basic standards of reasonableness and fairness. Such an exception could lead to a refusal to apply a rule of Dutch law, if the conflict of laws rule pointing to its application was thought to operate unfairly and unreasonably. The Advocate-General said that commentators had reacted with unanimous hostility to the proposed further exception.[21] The Hoge Raad evidently agreed with the Advocate-General that it should not give its imprimatur to such an exception.

Saxony sought to bolster the argument based on reasonableness and fairness by pointing to the special nature of the property in question in the case. It cited the evolution of the law relating to the ownership and right to possession of stolen art objects and cultural property. It referred the Hoge Raad to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property; Directive 93/7/EEC of the Council of the European Communities (15 March 1993), on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State;[22] and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. The Hoge Raad's only comment on the relevance of these international instruments was that they were of no assistance because no alternative choice of law rule could be inferred from them.[23]

3 ARGUMENTS BASED ON DUTCH DOMESTIC LAW

Saxony further argued that even if an exception could not be made to the *lex rei sitae* rule on the grounds of reasonableness and fairness, an exception should be made on those grounds, as a matter of Dutch domestic law, to the usual operation of the limitation rule in article 2004. Saxony argued that it was fundamentally unfair that an extinctive limitation period should commence or continue to run whilst the claimant was unable to assert its claim. The Hoge Raad held that it was clear law that the limitation period ran from the time that someone other than the true owner engages in acts of ownership in relation to the property. The evidence in this case was that persons other than the claimed true owner—Saxony and its predecessors in title—had been doing such acts in relation to the painting since at least about 1950. The state of knowledge of the true owner was irrelevant. The objection that the true owner could thus lose its rights without having any opportunity to assert them against the possessor was not compelling, in the face of the demands of legal certainty, which the limitation rule was designed to assure.[24] To the

extent that different principles were found in the international instruments that Saxony cited, or in the (prospective) amendments to Dutch law that implemented the EEC Directive,[25] the principles were too much at variance with the old law to be applied, at the expense of that law, by judicial decision.[26]

A final argument was that Saxony could rest its claim for return of the picture on the wrong that C had committed against Saxony by buying the painting in bad faith. In other words, C's dealing with the painting, given his (alleged) awareness that it was war loss, amounted to a delict (tort). This argument was also rejected by the Hoge Raad in the name of legal certainty. Saxony's claim was already extinguished when C acquired the picture. Irrespective of whether he knew the facts underlying Saxony's claim, C could not be said to have committed a wrong as against Saxony by acquiring property, the rights to which Saxony had already lost.[27]

4 CONCLUSIONS

The present case is a textbook example of the conflict that can arise between two goals of the law. On the one hand, there is the long-standing policy to prevent the assertion of stale claims of title, which underlies rules of limitation. On the other, there is the newer desire to recognize works of art and other cultural property as having special characteristics that justify a high standard of legal protection for claims to such property. The Hoge Raad felt unable (and, as far as its careful language reveals, was also unwilling) to make an exception in Saxony's favour, either to the *lex rei sitae* rule that directed the court to apply Dutch law or to the operation of article 2004 of the former BW. Saxony had powerful arguments based on the evident justice of returning to it a work of art that had belonged to its predecessors in title for a century and a half, was wrongfully taken, and was in the hands of someone who allegedly knew of its history when he bought it. Nevertheless, the court gave precedence to the goals of legal certainty and security of title. It mandated the application of the Dutch extinctive limitation rule if the property is situated in the Netherlands when the claim is asserted, or—on what I have suggested is the preferable view—was situated in the Netherlands when the current possessor bought it.

The case is also interesting to the comparative lawyer, because it illustrates one aspect of the difference between the way that civil law systems and common law systems conceptualize claims to recover tangible movable property. Civil law systems generally regard such claims as proprietary in nature, whereas common law systems treat them as personal claims in tort. From the civil law point of view, the foundation of such claims is the *plaintiff*'s title, whilst the common law tends to focus on the *defendant*'s dealing with or retention of the property, which constitutes

the tortious interference with the plaintiff's possessory rights. A rule like article 2004 BW (old) acts directly to extinguish the plaintiff's claim to the property. A typical limitation rule in a common law system would, by contrast, be framed in terms of extinguishing or barring not the plaintiff's claim to the property, but the plaintiff's right to sue the defendant for the wrong done in relation to the plaintiff's right to possession. Under the common law, the plaintiff gets a new claim every time a defendant commits a new wrong. Hence, it is rare in common law systems for a claim to personal property to be statute barred in circumstances like those in the present case. At common law, C's purchase of the painting from Gennady Ilyin would have been a conversion of the painting (as would the acts done by all of C's predecessors since 1945, assuming none of them acquired good title as against Saxony). By refusing to deliver up the painting to Saxony, C would also have committed the tort of detinue. A typical limitation statute would start the running of the period only at, respectively, the time of the conversion or the time of a demand and refusal to deliver.[28]

Lastly, the case prompts the question whether amendments to Dutch law after 1990, when this case arose, will make a difference as to how claims to stolen or looted property will fare in similar circumstances. One change, of course, is that the Netherlands implemented the EEC Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State.[29] The Directive applies to "national treasures possessing artistic, historic or archaeological value" whenever, inter alia, such property forms "an integral part of public collections recorded in the inventories of museums, archives or libraries or those of church bodies." However, it contemplates that only a member state may initiate proceedings for the return of the property.[30] It is only in relation to claims by member states that the relevant provisions of Dutch law make an exception to the usual rules of limitation.[31] Therefore, even if a stolen art work was illegally removed from Germany after January 1, 1993, so as to make the Directive applicable, the claim for its return of the painting would have to be made by Germany rather than, as in Saxony's case, by the original owner.

The other change in Dutch law is the replacement of old article 2004 by new article 3:306 BW. This is hardly likely to assist a claimant in Saxony's position. Its wording is somewhat less emphatic in that it omits the express statement in the old provision that bad faith on the defendant's part is no ground for making an exception to the limitation rule.[32] It is doubtful whether this will affect the result in cases like the present one, given that neither the Hoge Raad nor the Hof made any reference to this feature of old article 2004 in arriving at the conclusion that Saxony had no claim even as against a bad-faith buyer. So the outcome in cases like Saxony's, if they are litigated under the new Dutch Civil Code, would seem to be the same, except that the extinctive limitation period has been shortened from thirty years to twenty. The new Code makes no general exception for cultural property to the general twenty-year limitation period.[33]

For the time being, therefore, it appears that the Netherlands will continue to be a relatively safe place to buy works of art that were wrongfully taken from their true owners long ago. One should probably not, however, take the prized acquisition to England. If one does so, there is a risk that the original owner may be able to make a successful claim based on its title to the property. The usual defence to such a claim would be to invoke the *lex rei sitae* rule and say that since the art object was situated in the Netherlands when one bought it, Dutch law determines proprietary rights stemming from the purchase. One would argue that under Dutch law, as definitively established by the Saxony case, even a purchaser who knows the property was originally stolen obtains good title against the original owner if the twenty-year (under the new BW) limitation period on the original owner's claim has already expired at the time of the purchase. Before an English court, this defence may not work if it is put forward by somebody who acquired the property with notice of the original owner's claim. An English judge has held, albeit *obiter*, that a rule that denies a true owner's rights as against a bad faith purchaser of property is against public policy and will not be given effect.[34]

NOTES

1. The identity of the painting seems to have been admitted. It was presumably the picture listed as gallery no. 1662 in H. Ebert, *Kriegsverluste der Dresdener Gemäldegalerie: Vernichtete und vermisste Werke* 108 (Staatliche Kunstsammlungen Dresden, Dresden 1963) entitled *Das Bergkloster*. The picture, 24 × 29 cm. on an oak panel, had been in the gallery's collection since at least 1817. Only two van der Heyden pictures belonging to the gallery are shown as having gone missing in the war, *Das Bergkloster* and a street scene in Cologne (gallery no. 1664).

2. Art. 2004 BW [Burgerlijk Wetboek, or Civil Code], as it read before it was replaced by the new BW as of January 1, 1992, read: "All legal claims, both proprietary and personal, are barred after the expiry of thirty years, without the person who relies upon expiry of the limitation period being obliged to show any title, or being liable to have invoked against him any exception based upon his bad faith." [All translations from the Dutch in this comment are my own.] The corresponding provision in the new BW is art. 3:306, which says, "Unless the law provides otherwise, a legal claim is barred after the expiry of twenty years." The new BW is available online: Legislatio <http://www.wetten.nu/wetgeving/burgerlijk/materieel/index.htm> (accessed October 11, 1999).

3. HR 8 May 1998, 1st Chamber, Nos. 16.546, C97/025; NJ 1999, No. 44, ann. Th. M. de Boer.

4. The treatment of limitation rules is a good example. Common law systems traditionally draw a distinction between limitation rules that are drafted in terms of barring a remedy and those that are drafted in terms of extinguishing a right. The former are classified as procedural and only the latter as substantive. The distinction has often been criticised as elevating form over function. The distinction has been removed, and all limitation periods declared to be substantive for purposes of the conflict of laws, by statute in England (Foreign Limitation Periods Act 1984 (U.K.), c. 16) and by judicial decision in Canada (Tolofson v. Jensen, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289).

5. G.C. Venturini, chap. 21, Property, *in* 3 *International Encyclopedia of Comparative Law*: *Private Inter-*

national Law 7, § 21–3 (1976); K.F. Kreuzer, La Propriété mobilière en droit international privé, 259 *Recueil des cours de l'Académie de droit international* 9, 53–56 (1996).

6. Kreuzer, *id.* at 58–59.

7. In his very full treatment of the private international law relating to movable property, Kreuzer gives the issue of limitation (in French, *prescription*) only a passing mention (*id.* at 83).

8. Kreuzer, *id.* at 54–56.

9. It is possible that the incidents of the rights conferred by the old *lex rei sitae* may change as the *situs* changes. As a practical matter, property rights can only be enforced by invoking the legal machinery that exists under the law of the country where the property is currently situated. The machinery in effect defines the nature of the rights, as far as their practical incidents are concerned. Some change in the incidents may therefore follow from a change in *situs*. *See* Venturini, *supra* note 5, at 14, § 21–14; Kreuzer, *id.* at 60–64. This question is also extensively discussed in the Netherlands' Staatscommissie voor het Internationaal Privaatrecht [State Commission for Private International Law], *Rapport aan de Minister van Justitie: Internationaal Goederenrecht* [Report to the Minister of Justice: International Law Relating to Goods] (November 1998), online: Ministerie van Justitie <http://www.minjust.nl/c_actual/rapport/cie/privaat.htm> (date accessed: October 9, 1999), §§ 7.1–7.13. The report comments on draft legislation to codify the Dutch private international law relating to property rights. On the issue of the *conflit mobile* (conflict of laws questions arising from the movement of persons or property), the majority of the commission proposed its own provision, art. 5, which says in part: "If movable property is moved to the territory of another state, a right to the property, in that other state, derives its content from the law of that state. This content is the same as the content the right had in the state in which it first vested, except in so far as it is irreconcilable with the law of the state to which the property was moved." The minority thought that the property rights created by the original jurisdiction should as far as possible continue to apply directly, notwithstanding the movement of the property to a new jurisdiction.

10. Dutch law distinguishes between extinctive (*extinctieve*) limitation rules, which are framed in terms of the loss of a right, and acquisitional (*verkrijgende*) limitation rules, which are framed in terms of the acquisition of a right. An example of the latter is art. 3:99 BW (new), para. 1: "Rights to movable property that is non-register property [i.e., property the transfer of rights in which does not require an entry in a registry], and rights to instruments made out to bearer or to order, are acquired by a possessor in good faith through uninterrupted possession for three years, and rights to other goods, by uninterrupted possession for ten years." If movable property is stolen, the true owner's rights as against a subsequent bona fide purchaser for value are in any event subject to an extinctive limitation period of three years (art. 3:86 BW). Common law terminology generally observes the acquisitional-extinctive distinction, albeit less systematically, by referring to rights being acquired by *prescription* (an uninterrupted exercise of those rights), whilst rights are lost by rules of *limitation*.

11. "[N]ow that the painting is in the Netherlands and has also been seized here, Netherlands law is applicable as the *lex rei sitae* according to unwritten Dutch private law" (Hof, NJ 1999 at 170). "I note that the appellant's argument does not challenge the decision of the Hof that the question whether the claim is statute-barred is in principle to be answered according to the law of the country in which the property is situated at the time the claim is first asserted." (Opinion of Advocate-General Strikwerda in the Hoge Raad, NJ 1999 at 176, para. 12.) The Hoge

Raad repeated the Hof's ground for applying Dutch law and made no further comment on the point: NJ 1999 at 178, § 3.1.

12. *Supra* note 4.

13. *Supra* note 9.

14. *Id.*, § 8.1 (proposed art. 6).

15. *Id.*, § 8.2.

16. *Id.*, § 8.1. See the annotation on the present case by De Boer, NJ 1999 at 181, who also favours treating the limitation issue according to the law of the *situs* at the time the property is acquired.

17. In City of Gotha v. Sotheby's (September 9, 1998), Nos. 1993 C 3428, 1997 G 185 (Q.B.D.), online: University of Oxford Institute for European and Comparative Law <iecl.iuscomp.org/gla/judgments/foreign/gotha1.htm> (accessed October 11, 1999), a case very similar to the present one, the judge held that the thirty-year extinctive limitation period in art. 221 BGB [German Civil Code] had not run against the German owner of a Dutch painting that disappeared at the end of the Second World War, reappeared in Berlin in the 1980s, and was offered for sale in London in 1992. The key to this finding, however, was that the painting had been misappropriated in 1987 from the then possessor of it. According to the judge, based on expert testimony as to German law, a misappropriation has the effect of breaking off the running of the thirty-year limitation period under art. 221 BGB and causing it to recommence, to the benefit of the true owner. It would seem that in the present (Hoge Raad) case there had been no misappropriation (since the original one in 1945). If so, on the English judge's interpretation of the German rule (there is no German case authority on the point), the thirty-year limitation period in art. 221 BGB would have run against Saxony.

18. In the annotation to this case, NJ 1999 at 181–82, De Boer notes that the Hoge Raad may be describing the exception too narrowly. De Boer suggests that the exception should apply to all cases of involuntary loss of the property, not just of theft; that it should make no difference whether the property's whereabouts at the time of the true owner's dealing with it was unknown or known; and that transfers of property from an insured to an insurer may be governed not by the *lex rei sitae* at the time the property was lost, but by the law governing the insurance policy.

19. NJ 1999 at 179, § 3.4.2. Compare the decision in the *Gotha* case, *supra* note 17, in which the judge held that if the plaintiff's claim was barred by the German limitations rule (which it was not), he would have refused to apply the rule on the ground of public policy. The public policy ground cited by the judge was the first of those advanced by Saxony in this case as grounds for the exception of reasonableness and fairness, namely, the unacceptability of preferring a bad-faith acquirer's rights over those of the true owner. The judge specifically refused to find a public policy relating specifically to cultural property.

20. *Id.* at 176, para. 15.

21. *Id.*

22. The Directive was implemented in Dutch law by amendments to the new BW. These included art. 3:86a, which creates an exception to the rule in art. 86 that the true owner of stolen property loses the right to reclaim the property after the expiry of three years (*see supra* note 10). Art. 86 cannot be invoked, according to art. 86a, against a member state of the European

Union or the European Economic Zone that claims movable property that, according to the national law of the state, is cultural property within the meaning of Directive 93/7/EEC and has been illegally removed from the territory of the state within the meaning of the Directive. See also art. 3:310a BW (new), creating an exception to the twenty-year ultimate limitation period in art. 306, which replaced old art. 2004. These and the other provisions implementing the Directive do not apply to goods illegally removed from the member state before January 1, 1993. *See infra* note 30 and accompanying text.

23. NJ 1999 at 180, § 3.4.

24. *Id.* at 180, § 3.5.

25. *Supra* note 22.

26. *Id.*

27. *Id.* at 180, § 3.6.

28. See Solomon R. Guggenheim Foundation v. Lubell, 567 N.Y.S. 2d 623, 569 N.E. 2d 426 (1991), in which a museum's claim in replevin (a procedure for recovering property in specie) to a painting that had been stolen from it twenty years before was held not to be statute barred. The limitation period only began to run when the museum demanded the picture's return and the possessor, a bona fide purchaser, refused, thus making the detention tortious.

29. Council Directive 93/7/EEC.

30. *Id.*, para. 6. There is a one-year limitation period after the requesting state becomes aware of the location of the cultural object and the identity of its possessor or holder (para. 7). There is also a seventy-five-year ultimate limitation period that runs from the date of the unlawful removal of the property from the requesting state's territory (para. 8).

31. *Supra* note 22.

32. *See supra* note 2 for the text of both the old and the new provisions.

33. De Boer, in the annotation to the Hoge Raad decision, NJ 1999 at 183, § 5, points out that of the international instruments to which Saxony referred, only the 1995 UNIDROIT Convention, art. 3 and 4, contains rules capable of direct application in the courts of states parties. At the time of De Boer's writing, however, neither the Netherlands nor Germany had ratified the Convention. For a comment on the convention when it was in draft form, see K. Siehr, International Art Trade and the Law, 243 *Recueil des cours de l'Académie de droit international* 9, 264–78 (1993).

34. City of Gotha v. Sotheby's (9 Sept. 1998), nos. 1993 C 3428, 1997 G 185 (Q.B.D.), online: University of Oxford Institute for European and Comparative Law <http://iecl.iuscomp.org/gla/judgments/foreign/gotha1.htm> (accessed October 11, 1999); *see supra* note 19.