The Bredius Museum Case: Public Interest and Private International Law

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1 Introduction

The Bredius case[1] is an intriguing example of judicial creativity in private international law, in this case used with positive results for the protection of cultural property. The case represents a significant development in Dutch law in the field of provisions which are, because of their public law character, not subject to the normal rules of private international law.

On 13th April 1946 Dr. A. Bredius died, he was an expert on, and collector of, 17th Century art, in particular that of Rembrandt. He was resident in Monaco in the last years of his life and possessed Monagasque nationality. He had no direct descendants or spouse.

Dr. Bredius had, by will dated 26th April 1944, bequeathed all his paintings and works of art then situated in the Bredius Museum, Prinsengracht, the Hague, to the municipal authority of the Hague. He specified that the bequeathed works of art remain in the Bredius Museum:

> *Je lègue à la ville de La Haye (Pays Bas) tous les tableaux et tous les objets d'art qui sont exposés au Musée Brediushuis, au Prinsengracht, à La Haye; ils devront rester exposés exclusivement dans ledit Musée.*

The municipality accepted the bequest gratefully. The collection was, in accordance with the will, exhibited in the house on the Prinsengracht until 1985. In that year the municipality was obliged, for want of sufficient visitors to the collection, to close the Museum. However, the municipality was of the opinion that the low level of visits should be ascribed to the unfavourable situation of the Museum on the Prinsengracht. This street, as a result of the re-location of the centre of the Hague, no longer enjoyed the central vantage position which it had had in 1944.

The municipality, having negotiated the possibility of re-opening the museum at the more central address at Lange Vijverberg 14, applied, on 26th October 1989, to the Dutch Supreme Court, requesting the Court to exercise its jurisdiction under the Museum

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Act 1925,[2] Article 1, and to amend the condition in the will which required that the works of art be displayed exclusively at the house on the Prinsengracht.

2 The Choice of Law Rule

The difficulty was that the testator, at the time of death, possessed Monagasque nationality. Under established, non-statutory rules of private international law, all questions arising from wills and the inheritance of property are referred to the law of the country of which the deceased was national:[3] although in some cases the rigidity of nationality as a relevant factor is tempered by replacing it with the law of the place in which the deceased had his last residence, this factor too would result in reference to the law of Monaco. In principle it was the law of Monaco which was applicable to the devolution of Dr. Bredius's collection, with the consequence that the power to modify the will under the Dutch Museum Act would not be applicable. Nevertheless the Dutch Supreme Court held that Dutch law was applicable to the question. Its reasoning was characteristically short and to the point:

> [The Monagasque nationality of the testator] does not prevent application of the Museum Act to the litigated bequest. The condition at issue is attached to a bequest made in favour of a Dutch public authority; moreover, the condition concerns the place, situated within the Netherlands, where, and the way in which, artifacts must be kept in a manner which is accessible to the public. For these reasons the possibility of modifying the condition is a matter which directly and intimately concerns the Dutch public interest.[4]

3 Non-application of the Choice of Law Rule

The Court's reasoning is somewhat easier to place in context when read beside the advice (*conclusie*) of the *Advocaat-General*, Mr. Strikwerda, in which he advised the Court that the Museum Act, and hence Dutch law, should be applied. His reasoning is based upon the characterisation of the Museum Act as a 'priority rule' ('*voorrangsregel*').[5] To follow this reasoning it is necessary to grasp the character of priority rules as well as the relevant provisions of the Museum Act.

4 What are Priority Rules?[6]

Priority rules, which form part of the general provisions of private international law in many jurisdictions,[7] are of recent origin. Private international law, as developed by Von Savigny, is concerned, as its name suggests, only with private law rules. But in modern legal

systems there are many private law provisions with a strong public law content; Strikwerda calls them semi-public rules.[8] Since the *Alnati* decision by the Supreme Court in 1966,[9] semi-public rules are subject to a different regime of private international law. A semi-public law rule must be scrutinised to decide whether international or purely domestic application is intended by the legislator. Consequently the rule of Dutch private international law which was applicable in the *Bredius* case is as follows. Semi-public provisions of the *lex causae* are not 'automatically' applicable; and the semi-public provisions which are not part of the *lex causae* are equally not 'automatically' excluded from application. In deciding whether the provision concerned is applicable in the international sphere, the function and content and the interest pursued by the legislating state will all be considered.

However, Mr. Strikwerda, in advising the Dutch Supreme Court to treat the Museum Act as a priority rule, took quite a bold step. The Museum Act does not closely resemble any previous cases in which the priority rule was applied; nor does the Act fit easily into either of the two established categories. The two established categories are:

(1) Provisions protecting vulnerable groups of individuals in relation to individuals or organisations considered by the legislator to be economically or socially more powerful. Such cases are: consumer protection, Rent Act protection and employee protection. The reasoning behind such rules is that abuse of the weakness of the weaker party is detrimental to the whole community.

(2) Provisions which interfere with private law relationships in order to protect public interests. Such cases are: protection against cartels, monetary control, environmental control, general regulation of the employment market and price controls.

The unusual character of the application in the *Bredius* case of the priority rules has been remarked upon by Professor Th. de Boer in his note on the *Bredius* case.[10] He points to the fact that the Supreme Court had declined to apply the priority rule in a decision of 1979,[11] and that it was applied to a provision which is indisputably part of private law. In particular, it was the museum (a non-public body) which requested the amendment to the will, and it was not a dispute to which a public body was party. Nevertheless, it was a case in which there was a strong public law element.

5 The Museum Act[12]

The provisions of the Museum Act are stringent. An application may only be made once forty years have elapsed since the death of the testator, by a person obliged to comply with a condition attached

to a bequest. Not all conditions attached to all bequests can be amended. The Act covers only conditions which concern:

(i) the place where, and the manner in which, artefacts or objects of historical or scientific value (including documents), must be kept in a collection which is accessible to the public; or
(ii) the extent to which, and under which conditions, the public must be afforded access to view or use the objects;
(iii) the object to which money bequeathed for artistic or research purposes should be applied.

The Supreme Court must exercise its jurisdiction under the Act in accordance with the public interest, and, insofar as possible, in accordance with the wishes of the testator.[13]

Mr. Strikwerda argued that the Museum Act should be characterised as a priority rule because the purpose of the Act is to modify wills manifestly made in the public interest, namely, to further educational or artistic objects. Under the Act modification is possible when modification is, in consequence of a change in circumstances, in the public interest.[14] Mr. Strikwerda said:

> In consequence of the Act's orientation on the public interest the Act has a marked public law streak. Accordingly the Act is not subject to the normal choice of law rules and is applicable in international cases if, and insofar as, the Dutch public interest is affected by the implementation of the testamentary provisions. The public interest is affected in the present case: the will provisions concern an art collection located in the Netherlands which, according to the testator's wishes, is destined to remain in the Netherlands and to be displayed to the public.

6 The Scope of the Rule

It will be noticed, when one compares the statements of Mr. Strikwerda and the Supreme Court quoted above, that the Supreme Court and Mr. Strikwerda do not have precisely the same view about the facts of the *Bredius* case which justify the invocation of the priority rule. The Court mentions first, apparently intending to indicate it as the most important factor, that the bequest was made to a Dutch public authority. By contrast, the quotation above shows that Mr. Strikwerda considered the vital facts to be that the will concerned an art collection located in the Netherlands, and that the testator wished the collection to remain in the Netherlands displayed to the public. The discrepancy is a point of considerable importance to the law of cultural property; would the Museum Act be applicable in a later case in which a bequest is not made to a

Dutch public authority but instead to a private museum or society? It has been suggested by Professor Schultsz that the Dutch public interest would be equally directly and intimately affected by a gift to a private beneficiary; he stresses that the Museum Act is primarily concerned to regulate bequests pertaining to collections which are accessible to the public.[15] Schultsz suggests that the Supreme Court relied upon the fact that the bequest was in favour of a public body in order to bring its new rule as close as possible to the established examples of priority rules. It is undesirable, however, that the Supreme Court might consider itself constrained in a later case to hold the rule not to be applicable simply because the bequest was not made in favour of a public authority.

The logic of the Dutch Supreme Court in the *Bredius* case would also apply to the reverse case. Assuming that the Dutch court had jurisdiction, one must imagine that the testator had Dutch nationality just before death, and that the will is subject to Dutch law. In this hypothetical will, paintings situated in Monaco to be displayed to the public in Monaco are bequeathed to a Monagasque museum or public authority. If the conditions attached to the bequest subsequently require amendment, it is submitted that the Dutch Supreme Court should decline to apply the Museum Act to this case. Considering the function and the purpose of the Act, and its relationship to the Dutch public interest, it should be concluded that the Museum Act does not extend to such case, notwithstanding that Dutch law is the *lex causae* governing the will. Furthermore, the claim of Monaco to amend provisions in a will affecting Monagasque cultural property should be recognised.

7 Hague Convention on Succession 1988[16]

The importance of the *Bredius* decision outside the Netherlands is enhanced by the opportunity which the case provides to consider the application of the Hague Convention on Succession 1988 to the cultural property question raised.

Article 7 provides that:

> (1) Subject to Article 6, the applicable law under Articles 3 and 5, paragraph 1, governs the whole of the estate of the deceased wherever the assets are located.
> (2) This law governs – (a) the determination of the heirs, devisees and legatees, the respective shares of those persons *and the obligations imposed upon them by the deceased.*

Articles 3 and 5 refer generally to the succession of the deceased's estate to the law of the place of which he was a national at the date of death, or, under certain conditions, the law of the place with which he was more closely connected or where he had habitual residence. According to De Boer,[17] it is reasonable to suppose that

modification of the 'obligations' mentioned in Article 7 will also be subject to the deceased's personal law. Accordingly, he concludes that the *Bredius* facts, were they to re-arise once the Convention has come into force, would result in the question of modification of the condition being subject to the law of Monaco. However, this view might be rebutted by an argument derived indirectly from paragraph (3) of Article 7:

> Paragraph (2) does not preclude the application in a Contracting State of the law applicable under this Convention to other matters which are considered by that state to be governed by the law of succession.

Because modification of a condition is not expressly mentioned in paragraph (2), paragraph (3) is certainly relevant. And the permissive wording of paragraph (3) suggests that 'other matters' which are 'considered by that state [*not*] to be governed by the law of succession' do not, or at least, need not be held to, fall under the 'law applicable under this Convention'. Were this not to be the case paragraph (3) would have been a completely superfluous provision. Since the Dutch Supreme Court in the *Bredius* case decided that a 'Museum Act type provision' is not considered by Dutch law to fall automatically under the *lex causae* of the will, arguably Article 7 of the Convention does leave room for the *Bredius* solution to be adopted in a future case.

If paragraph (3) of Article 7 is not construed as suggested by the author, then the argument by De Boer that the Convention is too narrow to take account of the interests of cultural property[18] becomes relevant. If one accepts De Boer's view that Article 7 results in the application of the *lex causae*, the only hope of being able to take account of the public character of the rule and escaping the application of the *lex causae* is Article 15. Article 15 reads:

> The law applicable under the Convention does not affect the application of any rules of the law of the State where certain immovables, enterprises or other special categories of assets are situated, which rules institute a particular inheritance regime in respect of such assets because of economic, family or social considerations.

De Boer doubts, in the writer's view correctly, whether Article 15 is applicable to the problem in *Bredius*. In particular, the Museum Act cannot be considered to be 'a particular inheritance regime'; nor can the protection of art easily be classified as 'economic, family or social considerations.' Should this problem arise when the Convention is in force, there may well be cause to regret that no thought was given in the preparation of the Convention to the kind of problem which the *Bredius* case presents. Since not all problems

can be forseen, De Boer suggests that a more open clause than Article 15 should have been included.[19] He prefers, modelled on Article 17 of the Hague Convention on Sale:[20]

> The Convention does not prevent the application of those provisions of the law of the forum that must be applied irrespective of the law that otherwise governs the [will].

8 The *Bredius* Problem Under Common Law

The international character of this Journal and the rarity of private international law cases justifies a brief consideration of how such problems would be resolved by the common law. Using the principles of English common law a gift of this kind would almost certainly take the form of establishing a charitable trust. To achieve a factual parallel with the *Bredius* case one has to imagine a testator/settlor with Monagasque domicile who establishes a trust for the display of art treasures in England. If the trust subsequently fails, the question arises whether the doctrine of cy-près is applicable. The answer to the private international law question depends upon whether the trust is subject to English law and administered by English trustees. If such is the case then an English court will hold that it has power to direct a cy-près application even if the trust has substantial connections with another country.[21] Conversely, an English court will make no cy-près direction in respect of a trust which is not administered in England.[22] The reason is that the equitable jurisdiction over trusts is premissed upon the control which the court can exercise over the trustees. But the court cannot control the behaviour of trustees outside the jurisdiction.[23]

To test the common law to its limits, the international elements of the *Bredius* case can be reversed. Under this variant a testator/settlor domiciled in England purports, by a will subject to English law, to establish a charitable trust to set up a museum in which works of art would be displayed to the public in, for example, Monaco. It is, however, doubtful whether such trust would be charitable. A trust to display works of art abroad would, in the absence of some exceptional, proved advantage to the British public, not satisfy the test of public benefit which is an element of all charitable trusts.[24] For this reason it would not be eligible for a cy-près application. Should, however, such trust manage to satisfy the public benefit test, there is no provision of English law which could require English law to respect the special interest of Monaco in determining the conditions relevant to cultural property on Monaco's territory which was housed and exhibited to, *inter alia*, Monagasque public. English cy-près jurisdiction applies to a charitable trust administered in England willy nilly. There is no English equivalent to the Dutch private international law priority rule that requires consideration to be given to a 'public interest' of a foreign state.[25]

It may be that this deficit in English private law is a matter which will require consideration in the future.

The *Bredius* case shows that considerations pertaining to cultural property present a new challenge to legal development in common law and civil law systems. Moreover, as the discussion of the *Bredius* problem in relation to the Hague Convention on Succession shows, it is essential that, in the preparation of such treaties, cultural property issues are not forgotten.

Notes

1 Dutch Supreme Court (*Hoge Raad van 16 maart 1990, NJ 1991, 575).*

2 Wet van 1 mei 1925, Stb. 174 (Museumwet).

3 Conclusie A-G Mr. Strikwerda in the Bredius case, Para. 6; I.S. Joppe, Vademecum internationaal erfrecht (1980), p. 33 e.v.; E. Cohen Henriquez, I.P.R. Trends (1980), p. 123 e.v.; R. van Rooij/ M.V. Polak, Private International Law in the Netherlands (1987), p. 230/231; L. Strikwerda, Inleiding in het Internationaal Privaatrecht (1990), p. 150/151; J.G. Sauveplanne, Elementaire Internationaal Privaatrecht, 9de druk, (1989), p. 49/50.

4 Hoge Raad van 16 maart 1990, NJ 1991, 575, para. 2.3., *'Zulks verhindert echter niet op het onderwerpelijke legaat de Museumwet van toepassing te oordelen. Het gaat hier immers om een beding dat is verbonden aan een ten gunste van een Nederlands overheidslichaam gemaakt legaat, welk beding betrekking heeft op de in Nederland gelegen plaats waar, en de wijze waarop voortbrengselen van kunst in een voor het publiek toegangelijk verzameling moeten worden bewaard, en daarom is bij het mogelijk maken van een wijziging van dat beding het Nederlands openbare belang onmiddellijk en nauw betrokken.'*

5 Conclusie Mr. Strikwerda, HR 16 maart 1990, NJ 1991, 575, p. 84–91. See Prof. Th. M. de Boer, Internationaal privaatrecht: herziening van een testamentair beding, AA 1990, 556, p. 560.

6 The general literature on the subject is surprisingly extensive: R. van Rooij, *De positie van publiekrechtelijke regels op het terrein van het ipr,* diss., 's-Gravenhage, 1976; Strikwerda, *Semipubliekrecht in het conflictenrecht*, diss. Alphen aan den Rijn, 1976; Mr. W.E. Haak, *Plaats en invloed van 'publiekrechtelijke'* regels in het ipr, WPNR 1984, 5717–5718; Kotting, *Extraterritoriale wetgeving en ipr, mededelingen,* NVIR no. 89, 1984, p. 111; R. van Rooij, Conflict of laws and public law, Neths rep. XIIth Int. Congres Comparative Law, 1986, p. 185.

7 Thus they are known as *Eingriffsvorschriften, voorrangsregels, norme di applicazione exclusiva, règles d'application immédiate* and spatially conditioned internal rules: Mr W.E. Haak, *Plaats en invloed van 'publiekrechtelijke' regels in het IPR, WPNR 5717 (1984), p. 670.*

8 Strikwerda, Inleiding in het Internationaal Privaatrecht, *loc. cit. n. 3,* pp. 84–91.

9 HR 13 mei 1966, NJ 1967, 3; the signs can already be found in a decision 13 years earlier, HR 5 juni 1953, NJ 1953, 613 (*Melchers*).

10 *loc. cit. n. 5, p. 561.*

11 *Sewrajsingh*, HR 12 januari 1979, NJ 1980, 526. This point is, however, unconvincing, since the facts in *Sewrajsingh* were neither on all fours with the *Bredius* case, nor did they fall under the established priority rules. An

Antillian resident, Mr. Sewrajsingh, sold the matrimonial home, situated in the Antilles, in accordance with Antillian law. The conveyance was made to his brother, who was resident in Suriname. Mrs. Sewrajsingh sought to impugn the transaction by claiming that it was void according to Surinamese currency regulations. Although the relevance of the Surinamese regulations were accepted on the basis of the Suriname residence of the purchaser, the regulations were held, in the circumstances, not to have international applicability so as to impugn the Antillian property transaction. See Mr. W.E. Haak, *loc. cit. n.*7 pp. 694–695.

12 A general account of this jurisdiction can be found in Lubbers, *De culturele beschikking*, in *'Plus en vous, opstellen over recht en cultuur aangeboden aan A. Pitlo'*, 1970, p. 347.

13 As laid down in Museum Act, Article 1. When the inheritance provisions of the New Civil Code (book 4) come into force, the restrictive provisions of the Museum Act will be replaced by a general provision (Article 4.4.3.3.) which will empower amendment of conditions attached to testamentary gifts in all cases, and not just when cultural property is affected. Further, the forty year time limit will be dropped. See Prof. Th. M. de Boer, *loc. cit.* n. 5, p. 558.

14 *Hoge Raad* van 16 maart 1990, NJ 1991, 575, *conclusie* Mr. Strikwerda, para. 7; *memorie van toelichting, tweede kamer, 1924–1925, 274 nr. 3 p. 1; Hand. Eerste Kamer, 1924–1925, 29 April 1925, p. 819, 820* (parliamentary history).

15 Note, by Professor J.C. Schultsz, attached to the Supreme Court's decision: *Hoge Raad van 16 maart 1990, NJ 1991, 575, p. 2405–5.*

16 Convention on the Law Applicable to Succession to the Estates of Deceased Persons, signed in the Hague on 20th October 1988.

17 *loc. cit.* n. 5, p. 560.

18 De Boer, *loc. cit.* n. 5, p. 561.

19 De Boer, *loc. cit.* n. 5, p. 562.

20 Of 22nd December 1986.

21 See P.M. North and J. J. Fawcett: Cheshire and North's Private International Law, 11th Ed., London, 1987, pp. 893–894, citing *The Colonial Bishopric's Fund, 1841* [1935] Ch 148; *Ironmongers' Co v AG* (1844) 10 Cl & Fin 908; *Re Barnes* (1976) 72 DLR (3d) 651; *Kytherian Association of Queensland v Sklavos* (1958) 101 CLR 56: *Re Duncan* (1867) 2 Ch App 356.

22 *A-G v Lepine* (1818) 2 Swan 181.

23 *New v Bonaker* (1867) LR 4 Eq 655.

24 The assertion in M. Chesterman: Charities, Trusts and Social Welfare, London, 1979, p. 148, that trusts for the advancement of education 'are construed in very broad terms and transcend national boundaries (for example, "for the benefit, advancement and propagation of education and learning in every part of the world" (*Whicker v Hume* (1858) 7 H.L.C. 124)) notwithstanding.

25 It is established that certain laws – revenue laws, penal laws and 'other public laws' will not be enforced by English courts. In *A-G of New Zealand v Ortiz* [1984] AC 1 it was held that legislation providing for the automatic forfeiture to the State of works of art should they be exported fell within the category of 'other public laws' and thus would not be enforced. This is because such legislation infringes the principle that a government has no power to exercise soverign authority over property beyond its territory. The principle behind this rule does not apply to the hypothetical case under discussion which concerns the claim of a state to recognition of a certain 'cultural property interest' in respect of property within its own jurisdiction.