International Insight: Second Circuit Holds that Greece is Immune from Suit Over Ownership of Cultural Property

On June 9, 2020, the United States Court of Appeals for the Second Circuit held, in *Barnet v. Ministry of Culture and Sports of the Hellenic Republic*, that Greece was entitled to immunity under the Foreign Sovereign Immunities Act ("**FSIA**") with respect to its assertion of ownership over an ancient Greek artifact that was up for auction at Sotheby's in New York.[1] The Second Circuit concluded that Greece's assertion of ownership was not a "commercial activity" under the FSIA and therefore reversed the finding of the United States District Court for the Southern District of New York that jurisdiction existed under the so-called "direct effect" clause of the FSIA's commercial activity exception.[2]

Background of the Dispute

In April 2018, Sotheby's announced that it would auction a bronze horse figurine from the 8th Century B.C., Greece. The figurine was being sold on consignment from the Barnet family, which had acquired the figurine in a private sale in 1973. The provenance of the figurine could be further traced back to a sale by a Swiss auction house in 1967.[3]

In May 2018, the Greek Ministry of Culture emailed a letter to Sotheby's demanding that the figurine be removed from the auction and repatriated to Greece. The letter stated that Greece had no records demonstrating that the figurine was legally exported out of Greece. It further stated that antiquities, such as the figurine, are property of the Greek state under Greece's Antiquities Act of 1932, and that the transfer of such antiquities is illegal under the Antiquities Act and Greece's Protection of Antiquities and Cultural Heritage Act of 2002. The letter explains that these statutes were compliant with Greece's rights and obligations under the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[4]

After receiving the letter, Sotheby's removed the figurine from the auction, and sent a written response disputing Greece's claim of ownership of the figurine. Thereafter, Sotheby's and the Barnet family commenced an action against Greece in the Southern District of New York, seeking a declaratory judgment that the Barnet family is the lawful owner of the figurine and that Sotheby's may lawfully sell the figurine on behalf of the

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[1] *Barnet v. Ministry of Culture and Sports of the Hellenic Republic,* No. 19-2171, ___ F.3d ___ (June 9, 2020).
[2] 28 U.S.C. § 1605(a)(2).
[3] *Barnet* Op. at pp. 6-7.
[4] *Id.* at pp. 7-8.

Barnet family. Greece moved to dismiss the case for lack of subject matter jurisdiction under the FSIA.[5]

The District Court Rejected Greece's Assertion of Foreign Sovereign Immunity

While foreign states are presumptively immune from the jurisdiction of U.S. courts under the FSIA, the district court held that Greece was not entitled to jurisdictional immunity under the third clause (or so-called "direct effect" clause) of the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2).[6]

The direct effect clause applies where the plaintiff's "action is [1] based upon … an act outside the territory of the United States [2] in connection with a commercial activity of the foreign state elsewhere and [3] that act causes a direct effect in the United States."[7]

The district court concluded that the plaintiffs' case was "based upon" the "act" of sending the demand letter to Sotheby's and that the letter had a "direct effect in the United States" because it caused Sotheby's to remove the figurine from its auction in New York.[8]

The principal dispute was whether Greece sent the letter "in connection with a commercial activity" under the "direct effect" clause. The district court explained that the FSIA defines "commercial activity" by reference to the nature of the activity and not its purpose. It further explained that, under the Supreme Court's decision in *Weltover v. Republic of Argentina*,[9] an action is "commercial" if it is the type of action by which private parties engage in commerce. Applying these standards, the district court concluded that Greece engaged in "commercial activity" by sending the letter to Sotheby's because "private parties can, and often do" send demand letters in attempts "to intervene in the market to assert and enforce [their] purported property rights …."[10]

The Second Circuit Reversed and Held that Greece Was Immune from Suit

The Second Circuit reversed. It held that the "direct effect" clause of the FSIA's commercial activity exception did not apply and therefore remanded the case with instructions to dismiss the case for lack of subject matter jurisdiction under the FSIA.[11]

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[5] *Barnet v. Ministry of Culture and Sports of the Hellenic Republic,* 391 F. Supp. 3d 291, 295 (S.D.N.Y. 2019).
[6] *Id.* at 302.
[7] 28 U.S.C. § 1605(a)(2).
[8] *Barnet*, 391 F. Supp. 3d at 299-301.
[9] *Weltover v. Republic of Argentina*, 506 U.S. 607 (1992).
[10] *Barnet*, 391 F. Supp. 3d at 299-301.
[11] *Barnet* Op. at p. 2.

The Second Circuit agreed with the district court's conclusion that the plaintiffs' case was "based upon" Greece's "act" of sending the demand letter to Sotheby's. However, it held that the district court erred in concluding that sending the letter was both the "act" upon which the case was based as well as the "commercial activity" performed by Greece. It explained that Section 1605(a)(2) explicitly requires that the predicate "act" be performed "*in connection* with a commercial activity of the foreign state elsewhere" – "and a single act cannot be undertaken in connection with itself."[12] Instead of viewing the letter as a "single, self-contained activity," the Second Circuit held that the "act" of sending the demand letter had to be analyzed within the broader context of Greece's claim of ownership under its patrimony laws.[13]

The Second Circuit held that Greece sent the letter and made a claim of ownership "in connection" with the adoption and enforcement of its patrimony laws and that such "activity" was sovereign, not commercial, in nature. It construed Greece's patrimony laws – *i.e.,* the Antiquities Act and Cultural Heritage Act – as effectively nationalizing Greece's cultural property. It then held that the nationalization of property is a quintessential sovereign activity, and that the enforcement of its patrimony laws constituted the exercise of sovereign police powers. Because the case was based upon an act undertaken "in connection" with a *sovereign* activity, the Second Circuit held that the commercial activity exception did not apply.[14]

The Second Circuit relied on its prior decision in *Anglo-Iberia Underwriters Mgmt. Co. v. PT Jamsostek*, which held that Indonesia's state-owned health insurer, Jamsostek, did not engage in "commercial activity" for purposes of the FSIA. Although Jamsostek "provided services resembling those of a private insurer," it acted as the default insurance provider within the legal framework of Indonesia's social security program and therefore its actions did "not equate to those of an independent actor in the private marketplace of potential health insurers."[15] Drawing an analogy to *Jamsostek*, the Second Circuit in *Barnet* explained that Greece was not competing with private dealers in the antiquities market. Rather, it was enforcing "a scheme of patrimony laws according to which artifacts such as the figurine are '*extra commercium*.'"[16]

The *Barnet* decision reflects the Second Circuit's nuanced approach to determining whether an activity is "commercial" for purposes of the FSIA. While the Supreme Court's decision in *Weltover* created a distinction between activities that are "peculiar to sovereigns" and those that can be undertaken by a "private player" in the market,[17] the

[12] *Id.* at pp. 12-13.
[13] *Id.* at p. 13.
[14] *Id.* at pp. 13-15.
[15] *Barnet* Op. at p. 16 (quoting *Anglo-Iberia Underwriters Mgmt. Co. v. PT Jamsostek*, 600 F.3d 171 (2d Cir. 2010)).
[16] *Barnet* Op. at p. 16.
[17] *Weltover*, 506 U.S. at 614.

Second Circuit's approach in *Barnet* reflects the reality that, at a certain level of abstraction, an otherwise sovereign activity can be characterized to resemble the type of actions commonly undertaken by private parties – such as sending demand letters and asserting rights in property. The *Barnet* decision makes clear that courts should look past superficial similarities to private commercial conduct and consider the broader legal framework governing the foreign state's actions.

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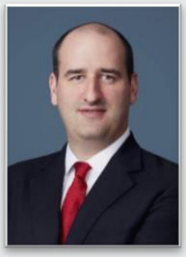
Please feel free to contact any of the persons listed below if you have any questions on this important development:

Joseph D. Pizzurro
Partner
Co-chair, Litigation
jpizzurro@curtis.com
New York: +1 212 696 6196



Kevin Arthur Meehan
Partner
kmeehan@curtis.com
New York: +1 212 696 6197

Betsy Feuerstein
Associate
bfeuerstein@curtis.com
New York: +1 212 696 8886