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# Barnet as Tr. of 2012 Saretta Barnet Revocable Tr. v. Ministry of Culture & Sports of the Hellenic Republic, 961 F.3d 193 (2d Cir. 2020)

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# *BARNET AS TR. OF 2012 SARETTA BARNET REVOCABLE TR. V. MINISTRY OF CULTURE & SPORTS OF THE HELLENIC REPUBLIC*, 961 F.3D 193 (2D CIR. 2020)

*Meghan Jackson**

## I. BACKGROUND OF THE CASE

*Barnet as Tr. of 2012 Saretta Barnet Revocable Tr. v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193 (2d Cir. 2020) centers around a bronze horse figurine dating back to the Geometric period (8th century BCE), which is "of Corinthian type."[1] For an object that has been in existence well over 2,000 years, relatively little is known about the figurine. According to the limited provenance, the earliest date the figurine is known was May of 1967 when it was sold by a prominent auction House in Switzerland to an undisclosed buyer.[2] Later, though it is unknown exactly when, the Bronze horse was acquired by Robin Symes from the previous auction purchaser, and on November 3, 1973, Howard and Saretta Barnet acquired the bronze horse from Mr. Symes.[3] The Bronze Horse was displayed in the Barnet's New York home for more than twenty years, and when Howard passed away, Saretta became the sole owner.[4] In 2012, Saretta transferred ownership to the 2012 Saretta Barnet Revocable Trust ("the Trust"), and when she passed away in 2017 the Trust consigned the figurine for auction at Sotheby's Auction House in New York City.[5]

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[1] *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 391 F. Supp. 3d 291, 296 (S.D.N.Y. 2019).

[2] *Id*. at 297.

[3] *Id.*

[4] *Id.*

[5] *Barnet as Tr. of 2012 Saretta Barnet Revocable Tr. v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193, 197 (2d Cir. 2020).

Sotheby's intended to auction the bronze horse in New York City on May 14, 2018.[6] In anticipation of auction, Sotheby's published an auction catalogue, detailing the bronze horse, attributing its country of origin as Greece, and dating the figurine to the 8th Century BCE.[7] Several days prior to the intended auction date, on May 11, 2018, the Greek Ministry of Culture emailed a letter (the "demand letter") to Sotheby's, making the following several points:

- That Greece was aware of the bronze horse intended to be auctioned,
- That the bronze horse is of Greek origin,
- That Greece has no record to prove that the bronze horse left Greece legally,
- That under Greek law, all movable ancient monuments belong to Greece, and there are potential criminal consequences to illegal acquisition of such monuments,
- Greece is in full compliance with international treaties preventing the illicit export of cultural property,
- That there is in force a Memorandum between the United States and the Government of the Hellenic Republic that restricts import of archaeological objects during a certain period which this figurine falls under,
- And finally, arguably most importantly, asking Sotheby's to withdraw the bronze horse from auction and repatriate the object to Greece, reserving the right to take necessary legal action for such repatriation.[8]

Sotheby's did indeed withdraw the figurine, but instead of moving forward with repatriation, they responded to the email, asking Greece to provide more evidence to support their claim to ownership.[9] Greece did not respond, and Sotheby's, in conjunction

[6] *Id.*
[7] *Id.*
[8] *Id.* at 197-98.
[9] *Id.* at 198.

with the Trust, sued in the Southern District of New York for declaration of ownership.[10]

## II. BACKGROUND OF GREEK PATRIMONY LAWS AND THE FSIA

Before delving into the court decisions, it is important to understand Greece's Patrimony Laws, as they are central to the outcome of this case. "The material remains of ancient Greece played a crucial role in shaping national consciousness and legitimizing the modern Greek state…"[11] With a cultural heritage as rich as Greece's, it is obvious that protection of such heritage would be of great importance, and that importance is reflected in the country's legislation. One such law was the Antiquities Act of 1932, stating that "[a]ll antiquities movable or immovable found in Greece and in any State land, in rivers, lakes and at the bottom of the sea, and in municipal, monasterial and private estates from ancient times onwards, are the property of the state."[12] The Antiquities Act also places fines up to 4,000 drachmas on those who come to possess property of Greece and who do not declare it as soon as possible, as well as potential imprisonment up to sixth months.[13] In 2002, Greece enacted the On the Protection of Antiquities and Cultural Heritage in General Act. This Act states that "the Greek State shall care for the protection of cultural objects originating from Greek territory whenever they have been removed from it" and "wherever they are located."[14] The 2002 Act also provides that "[m]oveable ancient monuments dating up to 1453 belong to the State in terms of ownership and possession, are imprescriptible and *extra commercium*," meaning not subject to private ownership.[15]

[10] *Id.*
[11] *Daphne Voudouri, Law and the Politics of the Past: Legal Protection of Cultural Heritage in Greece, 17 IJCP 547 (2010).*
[12] *Barnet as Tr. of 2012 Saretta Barnet Revocable Tr.*, 961 F.3d at 196.
[13] *Id.*
[14] *Id.*
[15] *Id.*

Across the pond, the United States has laws instructing its courts on how to deal with litigation involving other countries. While the U.S. court system prides itself on resolving conflicts and seeking justice, foreign policy and diplomacy discourage the courts from entangling foreign sovereigns in disputes that could affect the relationships between the U.S. and other nations. For this reason, the Foreign Sovereign Immunities Act ("FSIA") establishes the default rule that a foreign sovereign is typically immune from all litigation in United States courts, unless one of the specific exceptions in the statute applies.[16] Since its enactment in 1976, the FSIA has been continually litigated, despite the fact that the intention was actually to create a uniform rule of sovereign immunity. This case is no exception, because the central issue is whether one of the exceptions to foreign sovereign immunity applies such that Greece is subject to jurisdiction in the United States courts to determine the true ownership of the figurine.

The issue in this case centers on whether the so called "commercial activity exception" applies to actions taken by Greece in an attempt to claim ownership of the bronze horse. More specifically, the parties dispute the direct-effect clause of the commercial activity exception, which abrogates sovereign immunity when an action is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[17] To establish jurisdiction on that basis, the action must be (i) based upon an act outside the United States; (ii) that was taken in connection with a commercial activity of the foreign sovereign; and (iii) that caused a direct effect in the United States.[18] The first element requires the court to identify the act of the foreign sovereign that is the "core" of Plaintiff's suit, the specific act for which relief is sought.[19] Next, the court must identify the activity in connection with which the core act was taken. It is crucial to determine whether that act is commercial and

[16] *Saudi Arabia v. Nelson*, 507 U.S. 349, 352 (1993).
[17] 28 U.S.C. § 1605(a)(2).
[18] See *Petersen Energia Inversora S.A.U. v. Argentine Republic & YPF S.A.*, 895 F.3d 194, 204 (2d Cir. 2018).
[19] *OBB v. Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015).

can be exercised by private citizens, or if it is a "power peculiar to sovereigns."[20] As the statute itself provides, "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[21] The third and final element simply requires an affect "followed as an immediate consequence of the defendant's activity," and the effect "need not be 'substantial' or 'foreseeable.'"[22]

## III. SOUTHERN DISTRICT OF NEW YORK DECISION

Despite the restrictive theory of sovereign immunity laid out by the FSIA, the District Court held that the direct-effect clause of the commercial activity exception was satisfied in this case, and therefore the court had jurisdiction over Greece.[23] The court's analysis started by recognizing the "core" claim from which this dispute arises was the Defendant's demand letter, and its error in "asserting an ownership interest in the Bronze Horse when demanding that Sotheby's withdraw the figure from the auction."[24]

With the first element satisfied, the District Court moved to the core question of the case, whether Greece was engaged in commercial activity. "[T]he issue is whether the government's particular actions (whatever the motive behind them) are the *type* of actions by which a private party engages in commerce."[25] The court describes this activity as "attempting to intervene in the market to assert and enforce its purported rights," and classifies that characterization as the type of commercial activity private

[20] *Saudi Arabia v. Nelson*, 570 U.S. 349, 360 (1993) (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).
[21] 28 U.S.C. § 1603(d).
[22] *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 108 (2d Cir. 2016).
[23] *Barnet*, 391 F. Supp. 3d at 302.
[24] *Id*. at 299.
[25] Republic of Argentina v. *Weltover*, 504 U.S. 607 (1992) (emphasis in original).

persons can, and often do, engage in.[26] The District Court rejected Greece's contention that they were acting as sovereigns by explaining that "[w]hile the *purpose* of sending the Demand Letter may have been to fulfill the Ministry's constitutional mandate to protect Greece's cultural heritage, the *nature* of the act is analogous to a private citizen attempting to enforce his property rights."[27]

The final element is whether the Demand Letter had a direct effect in the United States. This element is obvious, as the Demand Letter caused Sotheby's to withdraw the Bronze Horse from the auction one business day before it was set to take place.[28]

With every element of the direct-effect clause of the commercial activity exception satisfied, the District Court held that it had jurisdiction over Greece to hear the case.[29] The effect of this holding is that any foreign state who sends a demand letter claiming ownership over an object has effectively waived its sovereign immunity under the FSIA and thereby agreed to be subject to the jurisdiction of U.S. courts. Displeased with the outcome, Greece appealed to the Second Circuit.[30]

## IV. U.S. COURT OF APPEALS, SECOND DISTRICT DECISION

The Court of Appeals reversed and remanded to the District Court to dismiss for lack of jurisdiction.[31] The Court of Appeals agreed with the lower court that the core act challenged in this suit was the Defendant sending of the demand letter.[32]

However, that is where the agreement ended. According to the Court of Appeals, the District Court erred in their conclusion

[26] *Barnet*, 391 F. Supp. 3d at 300.
[27] *Id.* (emphasis in original)
[28] *Id*. at 301.
[29] *Id.* at 302.
[30] *Barnet as Tr. of 2012 Saretta Barnet Revocable Tr. v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193 (2d Cir. 2020).
[31] *Id.* at 195.
[32] *Id*. at 200.

that the act was commercial in nature rather than sovereign.[33] The Court of Appeals explained that the District Court incorrectly treated the act of sending the letter as the core act *and* the related commercial activity required by 28 U.S.C. 1605(a)(2), which, the court said, is impossible because "a single act cannot be undertaken in connection with itself."[34] Instead, the Court of Appeals concludes that "Greece undertook the act of sending the letter in connection with its claim of ownership over the figurine pursuant to its patrimony laws."[35] The court categorizes this claim of ownership as sovereign because "Greece has claimed ownership over the figurine by adopting legislation that nationalizes historical artifacts and by enforcing those patrimony laws."[36] This conclusion is bolstered by the fact that the Demand Letter sent by Greece explicitly invokes such national laws at the same time the assertion of ownership is made.[37] As the court makes clear, "[n]o private party could nationalize historical artifacts and regulate the export and ownership of those nationalized artifacts – that is the activity in connection with which Greece sent its letter."[38] The Court of Appeals completely disagrees with the District Court's "nature v. purpose" analysis, saying that the nature of the act was not a commercial claim of ownership, but "the enactment and enforcement of laws declaring the figurine to be state property."[39]

Accordingly, the Court of Appeals held that the direct-effect clause of the expropriation exception is not satisfied, and therefore the District Court has no jurisdiction over Greece, and the case was remanded for dismissal.[40] The court recognized that "to 'hold otherwise and look only to the fact of a mere claim of ownership for purposes of our commercial activity analysis would allow the exception to swallow the rule of presumptive sovereign

[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Barnet as Tr. of 2012 Saretta Barnet Revocable Tr.*, 961 F.3d at 201.
[37] *Id.* at 200.
[38] *Id.* at 202.
[39] *Id.* at 201.
[40] *Id.* at 203.

immunity codified by the FSIA.'"[41] Shortly after the case was decided, a spokesperson for Sotheby's said "[w]hile we are disappointed with yesterday's decision, it does not impact what is at the heart of this matter—there is, and remains, no evidence to support Greece's claim to ownership of the bronze sculpture. We, together with our client, are reviewing next steps."[42] These next steps, however, did not result in further litigation, as no appeal was ever made to the United States Supreme Court.

## V. IMPACT ON FUTURE LITIGATION

The Court of Appeals' reversal and dismissal seemingly hinges on two errors by the district court: assuming that a single demand letter could satisfy both the act and the related commercial activity, and its classification of Greece's assertion of ownership as commercial not sovereign. Looking further into the first point, the Court of Appeals explained that there ought to be an act and a separate commercial activity to which the act is connected, citing just the statute itself and a 1994 case from the D.C. Circuit, which only hints at such point.[43] Addressing the second error made by the District Court, the Court of Appeals then seems to alter course, explaining that the act of sending the letter was "in connection with its claim of ownership over the figurine pursuant to its patrimony laws."[44] The Court of Appeals effectively found that a sovereign activity may exist within the same act that it had just decided could not contain commercial activity. While that undermines the logic the Court of Appeals used to disagree with the District Court, it also raises an interesting question: what if Greece didn't have patrimony laws? Assume, *in arguendo*, that Greece's demand letter was sent in connection with its claim of ownership over the figurine but lacked the patrimony laws explicitly nationalizing objects such as the bronze horse. Private

[41] *Id*. at 202 (quoting *Anglo-American Underwriting Management v. P.T. Jamsostek*, 600 F.3d 171, 178 (2d Cir. 2010).
[42] Kate Brown, *Sotheby's Just Lost Its Lawsuit Against Greece over 8th-Century BC Horse Statue—and the Decision May Have Lasting Implications for the Trade*, https://news.artnet.com/art-world/barnet-case-sothebys-1883349.
[43] *Barnet as Tr. of 2012 Saretta Barnet Revocable Tr.*, 961 F.3d at 202.
[44] *Id*.

citizens often assert claims for ownership of a commercial nature. It seems that the Court of Appeals decision then leaves open the possibility that other foreign sovereigns lacking such ownership laws attempting to assert ownership via demand letter may be subject to jurisdiction in U.S. courts, while others like Greece enjoys immunity.

This case is similar to many FSIA claims because boiled down to a decision of whether the act taken by Greece was commercial or sovereign in nature. As is made obvious by the difference in interpretation between the District and Appellate Courts, this is not always an obvious distinction. There are acts that can easily be identified as sovereign: the exercise of police power[45], seizure of farmland[46], granting or denying exchange rate compensation akin to subsidy[47], or even "clandestine surveillance or espionage."[48] There are, on the other hand, acts that courts have deemed commercial, such as: entering and subsequently breaching contracts,[49] and issuance of bonds.[50] It is also a difficult but crucial to the FSIA standard, that in making that determination a court

[45] *Saudi Arabia v. Nelson,* 507 U.S. 349, 361 (1993) ("The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.").

[46] *Sequeira v. Republic of Nicaragua*, 815 F. App'x 345, 351 (11th Cir. 2020), *cert. denied sub nom. Sequeira v. Nicaragua*, No. 20-428, 2020 WL 7132327 (U.S. Dec. 7, 2020) ("The commercial-activity exception does not apply here because Sequeira's amended complaint was based on the alleged taking of his land, which is not a commercial activity.").

47 *Corzo v. Banco Cent. de Reserva del Peru*, 243 F.3d 519, 525 (9th Cir. 2001) ("the BCRP's act of granting or denying exchange rate compensation is clearly a sovereign activity, and it is therefore not subject to suit in the United States on this particular claim.").

[48] *Broidy Capital Mgmt., LLC v. State of Qatar*, 982 F.3d 582, 594 (9th Cir. 2020) ("We have little difficulty in concluding that, without more, a foreign government's conduct of clandestine surveillance and espionage against a national of another nation in that other nation is not 'one in which commercial actors typically engage.'").

[49] *Adler v. Fed. Republic of Nigeria,* 219 F.3d 869, 875 (9th Cir. 2000), as amended on denial of reh'g and reh'g en banc (Aug. 17, 2000).

[50] *Weltover*, 504 U.S. at 607.

*must* look at the nature, and *not* at the purpose of an act to determine whether it was commercial or sovereign.[51] At face value, sending a demand letter asserting ownership seems more similar to entering a contract or issuing a bond than it does espionage or exercise of police power.

Indeed, it seems more logical to look at the demand letter as having the nature of asserting ownership, and the purpose of enforcing its patrimony laws. This scenario feels similar to that in *Weltover*, where Argentina unsuccessfully argued that its issuance of bonds was "to fulfill its obligations under a foreign exchange program designed to address a domestic credit crisis, and as a component of a program designed to control that nation's critical shortage of foreign exchange."[52] The Supreme Court was unconcerned with *why* the bonds were issued, just that the issuance of bonds is a commercial activity. So logically, it should not matter *why* Greece sent a demand letter asserting ownership, just that it did so, and such is the kind of commercial act that "can also be exercised by private citizens."[53]

A final issue with the outcome of this case was a point made by Sotheby's: Greece had not at any point come forward with any documentation to indicate actual ownership. Would it not have been easier to provide Sotheby's with proper documentation and move forward with repatriation privately than to go through two years of litigation? It is not completely unreasonable to guess Greece's refusal to provide documentation was simply because it does not have any. If that is the case, how can Greece assert ownership pursuant to its Patrimony Laws as a sovereign state, if it not certain it does indeed have a rightful claim to the figurine? There are many cases, such as this one, where the merits of a claim and jurisdiction cannot be easily separated.[54] It leaves the courts with the almost impossible decision of deciding what facts ought

[51] *Id*. at 617.
[52] *Id.* at 616.
[53] *Id.* at 614.
[54] *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co*., 137 S. Ct. 1312, 1318-1319 (2017).

to be analyzed at the outset of a case involving a foreign sovereign, and there is likely no right way to approach such a task. What then, should Sotheby's have done differently?

Ultimately, the Second Circuit chose the path that does not offend the principles of sovereign immunity. The consequences of the District Court's decision would likely have had a chilling effect on countries attempting to assert ownership over nationalized object, which is certainly an undesirable outcome. Under the FSIA, waiver of immunity is one way a foreign state can be subject to litigation in the United States, and obviously initiating an action in a U.S. court constitutes a waiver.[55] The District Court's opinion would subject a foreign state to jurisdiction for sending a demand letter the same way it would for filing a complaint, effectively providing a massive hole in the shroud of immunity enjoyed by foreign states.

An objective of the FSIA was to codify a the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law. "Under this principle, the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts."[56]

The Second Circuit opinion serves as a "reset" on the theory of restrictive sovereign immunity and effectively makes countries freer to assert ownership claims without worrying about being subject to U.S. litigation. Indeed, the United States has formally recognized Greece's ownership claims to many objects in the Memorandum of Understanding Between the Government of the United States and the Government of the Hellenic Republic Concerning the Imposition of Import Restrictions on Categories of

[55] 28 U.S.C. § 1605(a)(1).
[56] H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7 (1976).

Archaeological and Byzantine Ecclesiastical Ethnological Material Through the 15th Century A.D. of the Hellenic Republic ("the Memorandum").[57] The Memorandum recognizes a desire to "reduce the incentive for pillage of irreplaceable archaeological material of Greece…" and both countries agree to take certain steps to meet this goal, including the U.S. returning any objects of a certain type to Greece if forfeited to the U.S.[58] Therein lies an ideal that Greece has a right to assert ownership over certain objects, the bronze horse being of the appropriate type, and subjecting Greece to potential litigation every time it makes such a claim of ownership would likely have a significant impact its willingness to do so, while undermining the entire purpose of the Memorandum.

Because of the worldwide nature of the market surrounding art and cultural heritage, cases revolving around these objects will often face jurisdictional obstacles, and invoking any exception to the FSIA is always a tough hurdle for claimants. Each artwork or cultural object has a unique story to tell, which results in litigation involving intricate facts that Congress could have never anticipated in drafting the FSIA. It then falls on the courts to resolve such complicated issues, and *Barnet* is no exception.

[57] *Memorandum of Understanding Between the Gov't of the United States of Am. & the Gov't of the Hellenic Republic Concerning the Imposition of Imp. Restrictions on Categories of Archaeological & Byzantin*, T.I.A.S. No. 11-1121 (Nov. 21, 2011).
[58] *Id*.