Garsec Pty Ltd v His Majesty The Sultan of Brunei

The New South Wales Court of Appeal recently handed down its decision in the interesting *forum non conveniens* case of *Garsec Pty Ltd v His Majesty The Sultan of Brunei* [2008] NSWCA 211.

The case arose out of an alleged contract for the sale of an old, rare and beautiful manuscript copy of the Koran by Garsec to the Sultan for USD 8 million. Garsec alleged that the Sultan had failed to perform the contract and took action in the Supreme Court of New South Wales against the Sultan for specific performance. The contract was allegedly negotiated with, among others, representatives of the Sultan's Private and Confidential Secretary. As an alternative to the claim against the Sultan, Garsec claimed against the Secretary on the footing that he had represented he had authority to negotiate the contract from the Sultan and, in the event that he did not have that authority, he was liable for breach of warranty and the tort of negligent misstatement. The Sultan and the Secretary applied to have the matter stayed on the basis that New South Wales was *forum non conveniens*. It was accepted on appeal that the *lex causae* for each of the claims was the law of Brunei.

The New South Wales Court of Appeal unanimously dismissed an appeal from the primary judge's decision staying the proceeding. In brief, the Court reached the following conclusions.

1. An immunity from suit conferred on the Sultan by the Constitution of Brunei was substantive not procedural, as that distinction is drawn by Australian common law rules of private international law, and would therefore be applied by the Supreme Court of New South Wales as part of the *lex causae*. (Australian common law adopts a very narrow definition of procedure, essentially limited to rules directed to governing the conduct of court proceedings; matters affecting the existence, extent or enforceability of rights or duties are substantive.)
2. It is irrelevant to the procedure/substance characterisation as to whether the immunity would be characterised as substantive or procedural under Brunei law, as the characterisation is to be done according to the law of

the forum, ie the common law of Australia.

3. Accordingly, Garsec would not obtain any advantage as to the immunity by suing in New South Wales, rather than Brunei, and no question arose in this case as to the weight to be given to such an advantage in determining whether New South Wales is *forum non conveniens*.
4. In any event, the fact that the case would involve interpretation of a foreign country's constitution is a powerful factor in favour of a stay: an Australian court should only interpret a foreign country's constitution if this cannot be avoided.

However, there was disagreement among the judges of the Court as to whether, if the immunity had been procedural such that it would have been applied in Brunei but not in New South Wales, this would have tended against a conclusion that New South Wales was *forum non conveniens*. This raises the broader issue of the weight to be given to the unavailability of an alternative forum and the correctness of the view that, ordinarily, an applicant for a stay on *forum non conveniens* grounds must identify an available alternative forum in order to obtain a stay.