

Garsec discontinued

Readers may recall that a special leave application from the interesting *forum non conveniens* case in the New South Wales Court of Appeal, *Garsec Pty Ltd v His Majesty The Sultan of Brunei* [2008] NSWCA 211; (2008) 250 ALR 682, was to be heard by the High Court. My previous posts are [here](#) and [here](#). The case concerned 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. The Court of Appeal unanimously dismissed an appeal from a decision staying the proceeding on *forum* grounds.

One of the key issues between the parties was whether an immunity afforded to the Sultan in the Brunei Constitution would be applicable in proceedings before Australian courts. That issue was said to turn on the characterisation of that immunity as substantive or procedural, according to Australian notions of that characterisation. The Court of Appeal concluded that it was substantive.

Unfortunately, we will not now have the High Court's views on the question, as the applicant discontinued its application to the High Court. There are some clues to the possible thinking of at least some judges, however, in the transcript of the applicant's original special leave application before Gummow, Heydon and Kiefel JJ. On that application, Gummow J suggested that the question was really one of the "essential validity" of the contract at issue, and that this was governed by the proper law of the contract, which was accepted to be the law of Brunei. Separately, there was debate between the parties as to whether the appropriate approach was to characterise different aspects of Brunei law as procedural or substantive, according to Australian notions of that dichotomy. While that seems to be the hitherto orthodox approach, discussion in the application raises the possibility that the High Court may reconsider it in a future case.