Foreign Law and Public Policy in Australia

A recent case in the Supreme Court of Victoria provides a good opportunity to point out the new statutory provisions in the State of Victoria for the proof of foreign law, and to discuss the public policy reasons for the non-enforcement of foreign law.

Paradise Enterprises Inc v Kakavas [2010] VSC 25 (16 February 2010) concerned a loan for gambling entered into in the Bahamas which the creditor (a Bahamas casino operator) then sought to enforce in Victoria as a debt claim against the Australian-resident debtor. Both parties agreed that the claim was governed by the law of the Bahamas, and expert evidence was received on that law.

Since the hearing of that case, the *Evidence Act 2008* (Vic) has come into force, which contains the same fairly liberal provisions for the proof of foreign law as apply in New South Wales, Tasmania and Commonwealth courts (ss 174-6 of the respective uniform Evidence Acts). Previously, Victoria was alone among Australian jurisdictions in not having any statutory provisions for the proof of foreign law, apart from a curious provision enabling judicial notice to be taken of the statutes of the United Kingdom, New Zealand and Fiji: *Evidence Act 1958* (Vic) ss 59–61, 77.

The Australian defendant unsuccessfully sought to resist the claim on a number of bases. The first was that the gambling contract was the product of unconscionable conduct (namely, the alleged exploitation of the debtor's pathological gambling). Two curiosities arise from the evidence taken on that point: first, in an equitable claim of that kind it is not clear whether foreign law would generally apply at all; and second, there was in any event a false conflict (Australian law being identical to Bahamas/English law on point).

A second defence concerned the lawfulness under Bahamas law of gaming and the enforceability of gambling loans.

A final defence to the claim was that the enforcement of the debt would be contrary to the public policy of the forum. That received short shrift from the judge:

> *The short answer is that the agreement was governed by the laws of the Bahamas. Reference to the law in Victoria governing the conduct of gambling here is not apposite to determining whether a gaming loan made in another country in which it is lawful and recoverable would be unenforceable as being against public policy in Victoria. (at [93])*

This reasoning seems unsatisfactory. Whatever the proper law of the gaming loan contract (or of the debt), the law of the forum can nevertheless intervene in the case of a mandatory rule or a public policy reason for non-enforcement of foreign law. Indeed, a public policy claim presupposes that foreign law would otherwise govern the matter. Of course, this is not to say that the judge should ultimately have reached a different conclusion about the enforceability of the debt, but a few more steps of reasoning were needed before one could reach that view.

Paradise Enterprises Inc v Kakavas [2010] VSC 25 (16 February 2010)