WestLB AG *v* Philippine National Bank and others
[2012] SGHC 162

Case Number : Originating Summons No 134 of 2004

Decision Date : 10 August 2012

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Harry Elias SC, S Suressh, Andy Lem, Sharmini Selvaratnam, Sunil Nair and Daphne Jansz (Harry Elias Partnership LLP) for the first and tenth defendants; Rethnam Chandra Mohan and Mabelle Tay (Rajah & Tann LLP) for the second to sixth defendants; Kenneth Tan SC and Soh Wei Chi (Kenneth Tan Partnership) for the seventh defendant.

Parties : WestLB AG — Philippine National Bank and others

Civil procedure – Interpleader

Conflict of laws – Choice of law

Conflict of laws – Foreign judgments

10 August 2012 Judgment reserved.

Andrew Ang J:

Introduction

1 The present case arises from interpleader relief sought by the plaintiff, the Singapore branch of the German bank, West Landesbank ("WestLB"). The subject of dispute are certain sums of money totalling US$16.8m and £4.2m ("the Funds") which are presently held by Harry Elias Partnership LLP ("HEP"), the current solicitors for the first and tenth defendants, *viz*, Philippine National Bank ("PNB") and the Republic of the Philippines ("the Republic"), in an escrow account with WestLB.

2 The Funds were originally part of a pool of assets held in various Swiss bank accounts ("the Swiss Deposits") by the family and close aides of Ferdinand E Marcos ("the Marcoses"). Ferdinand E Marcos was the President of the Republic of the Philippines from 1965 until 1986 when he was overthrown in a bloodless revolution and exiled from the country. It is common knowledge that during his tenure the Marcoses illicitly looted from public coffers to amass a huge personal fortune. These looted assets, valued at approximately US$567m, were parked in various Swiss bank accounts.

3 In 1998, following a chain of events involving the Swiss and Philippines authorities (see [13]–[19] below), the Swiss Deposits were released by the Swiss authorities to PNB, to hold as escrow agent. PNB then deposited the Swiss Deposits in various banks in Singapore. These included the Funds which were deposited with WestLB.

4 Pursuant to an order of court dated 24 March 2004, made after the commencement of the interpleader proceedings, WestLB was ordered to pay the Funds into an escrow account established by PNB's then solicitors, Drew & Napier LLC ("D&N"), for the credit of these proceedings. Following a further order of court dated 22 February 2006, the Funds were transferred to an escrow account held

in the name of HEP for the credit of these proceedings. This remains the current state of affairs, pending the court's determination of the question of entitlement to the Funds.

The parties claiming entitlement to the Funds

5 PNB is a bank incorporated in the Republic of the Philippines with its principal office in Manila and branches in various cities including Los Angeles, New York, Honolulu and Singapore. It is jointly represented together with the Republic, which was joined as a defendant in May 2006. The claims by the Republic and PNB rest upon proceedings involving the Swiss authorities, the Republic and PNB concerning the release of the Funds from the Swiss bank accounts (see [24]–[28] below). The Republic and PNB refer to this chain of events as "the Green Line", which will be described in greater detail at [13]–[19] below.

6 The seventh defendants (Plaintiffs in the Estate of Ferdinand E Marcos Human Rights Litigation in Case No MDL840-R in the United States District Court for the District of Hawaii) were the plaintiffs in a class action human rights litigation which was adjudicated in the United States in *In re The Estate of Ferdinand E Marcos Human Rights Litigation*, MDL No 840 (D Hawaii) ("the US Human Rights Litigation"). These human rights victims ("the HRVs") comprise 9,539 civilian citizens of the Republic, their heirs and beneficiaries, who had, between September 1972 and February 1986, suffered human rights abuses, including torture and summary executions, during the rule of Ferdinand E Marcos. The HRVs' claim to the Funds arises out of enforcement proceedings in the US in relation to the US Human Rights Litigation (see [9]–[12] and [29] below).

7 The second to sixth defendants, *viz*, Maler Foundation, Avertina Foundation, Palmy Foundation, Vibur Foundation and Aguamina Corporation (collectively "the Foundations"), are the named holders of the Swiss bank accounts which originally held the Swiss Deposits before they were released by the Swiss authorities. The second to fifth defendants were foundations established in Vaduz, Liechtenstein, while the sixth defendant was a corporation incorporated in Panama. The Foundations' claim to the Funds is premised on their status as the original legal owners of the same; they seek to impeach the other parties' claims and argue that, in the event, the Funds must revert back to them as original owners (see [31]–[35] below).

8 There were originally two other defendants to these proceedings – the eighth defendant, the Estate of Roger Roxas; and the ninth defendant, The Golden Budha Corporation. However, they discontinued their claims in March 2006 and are no longer relevant to these proceedings.

Background facts

The US proceedings

9 Following the impeachment of Ferdinand E Marcos, the US Human Rights Litigation was initiated against Ferdinand E Marcos in April 1986 by one Robert A Swift for and on behalf of the HRVs. After Ferdinand E Marcos' death in September 1989, the Marcos Estate was substituted as the defendant, with Ferdinand E Marcos' widow and son, *ie*, Imelda Marcos Ferdinand R Marcos ("Marcos Junior"), as its legal representatives.

10 In early 1995, the US District Court of Hawaii ruled in favour of the HRVs and entered judgment for in excess of US$1.9b against the Marcos Estate ("the US Final Judgment") (*Celsa Hilao et al v Estate of Ferdinand E Marcos*, 910 F Supp 1460 (D Haw 1995) (No 86-0390). These sums were to be paid out of the Foundations' respective Swiss bank accounts, which the court found to be the property of the Marcos Estate. The court further imposed a preliminary injunction on the Swiss

Deposits to prevent the Marcos Estate and its agents from transferring or secreting these away. The US Final Judgment was affirmed in its entirety by the US Court of Appeal in *Maximo Hilao v Estate of Ferdinand Marcos*, 103 F 3d 767 (9th Cir 1996).

11 Contempt proceedings were subsequently initiated against Imelda Marcos and Marcos Junior for violating the above-mentioned injunction. By an Order Granting Additional Relief for Contempt dated 13 July 1995 ("the US Contempt Order"), the US District Court of Hawaii ordered the assignment, for the benefit of the HRVs, of all rights, title and interest in the Swiss bank accounts maintained in the names of various members of the Marcos family and their instrumentalities, which included the Foundations. It directed Imelda Marcos and Marcos Junior to, *inter alia*, execute an assignment of the relevant Swiss Bank accounts to Robert A Swift for the HRVs' benefit, failing which the Clerk of the US Court would be directed to execute the same on behalf of Imelda Marcos and Marcos Junior. Judge Manuel L Real ordered that:

> 2. All funds on deposit with banks in Switzerland in accounts under [*inter alia*, the Foundations] were deposited by or on behalf of Ferdinand E. Marcos, are the property of his Estate, and available to pay [the HRVs] as judgment creditors ...
>
> 3. ...
>
> 4. On or before July 10, 1995 Imelda R. Marcos and [Marcos Junior] shall execute an assignment of these bank accounts ... in favour of [the HRVs] for deposit in accordance with paragraph 10 of the [US Final Judgment] dated February 3, 1995, and deliver the same to [Robert A Swift].
>
> 5. ...
>
> 6. *In the event Imelda R. Marcos and [Marcos Junior] fail or refuse to execute the attached assignment, the Clerk of the Court is directed to execute the same on their behalf and deliver the same to [Robert A Swift].*
>
> [emphasis added]

12 The assignment was not executed by the legal representatives of the Marcos Estate. Consequently, on 14 July 1995, a deed of assignment of "all right, title and interest in and to bank accounts maintained in Switzerland in the names of", *inter alia*, the Foundations, was executed by the Clerk of the United States District Court for the District of Hawaii ("Hawaii District Court"), Walter A Y Chinn, on behalf of the Marcos Estate ("the Chinn Assignment"). The Chinn Assignment read as follows:

> Assignment made this 14th day of July, 1995 on behalf of [the Marcos Estate] to [Robert A Swift] in the *Estate of Ferdinand E. Marcos Human Rights Litigation*, MDL No. 840.
>
> The undersigned assign all right, title and interest in and to bank accounts maintained in Switzerland in the names of:
>
> [*inter alia*, The Foundations]
>
> to Robert A Swift ... for the benefit of [the HRVs] in the *Estate of Ferdinand E. Marcos Human Rights Litigation*, MDL No. 840 (D. Hawaii). All persons acting in the capacity or title of custodians, officers, directors or trustees of entities having authority over the above bank

accounts are directed to perform all necessary acts to effect the transfer of the above bank accounts forthwith.

This Chinn Assignment forms the chief basis of the HRVs' claimed entitlement to the Funds (see [29]–[30] below).

The Swiss proceedings

The first request for international mutual assistance

13 After Ferdinand E Marcos' impeachment, the Republic had slowly begun its efforts to recover the Swiss Deposits. On 7 April 1986, it lodged a formal request for assistance from the Swiss authorities to locate and identify the ill-gotten assets of the Marcoses which had been deposited in Switzerland. The request was made pursuant to the Swiss Federal Act on International Mutual Assistance in Criminal Matters (20 March 1981) ("IMAC") which empowers the Swiss authorities to seize and forfeit the proceeds of criminal acts which are within Switzerland.

14 Pursuant to the procedures under IMAC, the Republic's request was processed by the Swiss Federal Office for Police Matters and forwarded to the competent cantonal judicial authorities for execution. After investigations, the magistrates of the Swiss cantons issued freezing orders against the Swiss Deposits ("the Swiss freeze orders"). By a decision dated 21 December 1990, *Swiss Federal Court Decision*, IA 77, 79-84, 1990, the Swiss Federal Supreme Court upheld these freezing orders and gave directions for the in-principle transmission of the Swiss Deposits to the Republic. The Swiss Federal Supreme Court held that the actual transfer would be deferred until presentation of a decision by a Philippine court legally competent in criminal matters:

> 2(b) The remittance to the requesting State of the assets blocked in Fribourg is in principle granted, *their transfer however being deferred until an executory decision in the Sandiganbayan or another Philippine tribunal legally competent in criminal matters to pronounce on their restitution to those entitled or their confiscation.* The proceeding opened to these ends must commence within a maximum of one year from the pronouncement of the present decision, failing which the seizure of the assets shall be lifted on the request of the interest parties. This proceeding shall moreover satisfy the requirements of Articles 4 and 58 Cst and Article 6 CEDH.
>
> Before ordering enforcement of a judgment of restitution to those entitled or of confiscation the authorities of the requested State must examine if this judgment has been rendered as a result of a procedure meeting the requirements -- recalled above -- and if, by its contents, is [*sic*] conforms to Swiss public policy.
>
> [emphasis added]

15 Subsequently, on 17 December 1991, the Republic filed a Petition for Forfeiture before the Sandiganbayan, a special court in the Philippines having jurisdiction over both criminal and civil cases involving graft, corrupt practices and other offences committed by public officers in relation to their office. The Petition was made pursuant to Republic Act 1379 ("RA 1379"), a statute declaring forfeiture in favour of the Republic any property found to have been unlawfully acquired by a public officer and in conjunction with Executive Order Nos 1, 2, 14 and 14A. The defendants to the writ of petition were Ferdinand E Marcos, represented by his estate ("the Marcos Estate") and Imelda Marcos. For convenience, these proceedings will be referred to as "the forfeiture proceedings".

The second request for international mutual assistance

16 In August 1995, the Republic filed a second request with the Zurich District Attorney for the early transfer of the Swiss Deposits into an escrow account with PNB in advance of a final and binding decision of the Philippine Courts in relation to the entitlement to the Swiss Deposits. On 21 August 1995, the Zurich District Attorney granted the request for the transfer of the Swiss Deposits to PNB as the Republic's escrow agent, subject to the terms of certain escrow agreements ("the Escrow Agreements") which were signed on 10 August 1995 between the PNB and the President Commission of Good Government ("PCGG"), which was established to assist in the recovery of the allegedly looted public funds. Under the Escrow Agreements, PNB undertook not to dispose of the Swiss Deposits other than in accordance with the following:

> (a) a final and enforceable judgment of the Sandiganbayan or any other competent court in the Philippines;
>
> (b) written and identical instructions from both the relevant Foundation and the PCGG; or
>
> (c) instructions received from the PCGG as approved in principle by the Marcos Estate's representatives.

17 The orders of the Zurich District Attorney were affirmed by the Swiss Federal Supreme Court on 10 December 1997, subject to two additional requirements, *Swiss Federal Court Decision*, 123 II 595, 1997. First, the Republic had to undertake to brief the Swiss authorities regularly on the judicial confiscation and repayment proceedings as well as on the precautions and procedure pertaining to the compensation for the HRVs. Second, and more significantly, the Republic had to provide an assurance that the confiscation or repayment of the assets in question would be handled through judicial proceedings that complied with the principles established in Art 14 of the International Civil and Political Rights Pact ("Art 14"), which provides that:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...

In this connection, the Swiss Federal Supreme Court held (at [5(bb)]) that:

> The records show that the rights of defense in the proceedings against Imelda Marcos and her children are in fact being warranted; the defendants were allowed to defend themselves at length and have used their process rights extensively. On the other hand, [the Foundations], formally the owner of the assets to be seized or restituted, has not been involved in the collecting procedure pending in the Philippines. *Even though such opponent is nothing but a legal construction to hide the true ownership of the assets of the Marcos family*, they nevertheless *are entitled to a hearing as far as the proceedings are concerned with accounts which are nominally theirs.* The guarantees of [the Republic] therefore must include the process rights not only of the defendants but also the formal owners of the assets to be delivered. ... [emphasis added]

18 Between April and July 1998, the Republic supplied the guarantees required and the Swiss authorities released the Swiss Deposits to PNB to hold as escrow agent. The Escrow Agreements empowered PNB to invest the Swiss Deposits in the money market or in securities, provided the relevant debtor or company had a Standard & Poor's rating of at least "AA". The Swiss Deposits were accordingly deposited in various banks, including the Funds, which came to be deposited in WestLB.

The Philippine proceedings

19 The forfeiture proceedings culminated in a judgment dated 15 July 2003 ("the Forfeiture Judgment") by which the Philippines Supreme Court ordered the Swiss Deposits held in escrow by PNB to be forfeited in favour of the PCGG, *Republic of the Philippines v Sandiganbayan* (GR No 152154) (July 15, 2003). The Philippines Supreme Court held that it did not matter that the Foundations were not made parties to the forfeiture proceedings:

> Respondent [Imelda Marcos] argues that [the Foundations] should have been impleaded as they were indispensable parties without whom no complete determination of the issues could be made. She asserts that ... the non-inclusion of the foreign foundations violated the conditions prescribed by the Swiss government regarding the deposit of the funds in escrow, deprived them of their day in court and denied them their rights under the Swiss constitution and international law.
>
> The Court finds that petitioner Republic did not err in not impleading [the Foundations] ...
>
> ... there was an admission by respondent Imelda Marcos ... that she was the sole beneficiary of 90% of the subject matter in controversy with the remaining 10% belonging to the estate of Ferdinand Marcos. *Viewed against this admission, [the Foundations] were not indispensable parties. Their non-participation in the proceedings did not prevent the court from deciding the case on its merits and according full relief to petitioner Republic.* The judgment ordering the return of the $356 million was neither inimical to [the Foundations'] interests nor inconsistent with equity and good conscience. The admission of respondent Imelda Marcos only confirmed what was already generally known: that [the Foundations] were established precisely to hide the money stolen by the Marcos spouses from petitioner Republic. It negated whatever illusion there was, if any, that [the Foundations] owned even a nominal part of the assets in question.
>
> *The rulings of the Swiss court that [the Foundations], as formal owners, must be given an opportunity to participate in the proceedings hinged on the assumption that they owned a nominal share of the assets. But this was already refuted by no less than [Imelda Marcos] herself. ... But inasmuch as their ownership was subsequently repudiated by Imelda Marcos, they could no longer be considered as indispensable parties and their participation in the proceedings became unnecessary*.
>
> [emphasis added]

20 The release of the Forfeiture Judgment was followed by a press release by the Swiss Federal Office of Justice, issued on 5 August 2003, announcing, *inter alia*, that:

(a) the guarantees given by the Republic were satisfactory;

(b) the Forfeiture Judgment confirmed the view of the Swiss Federal Supreme Court with regard to the criminal origin of the moneys seized;

(c) the Philippines government could dispose of the Swiss Deposits; and

(d) no further decisions on this issue were due on the part of the Swiss authorities.

21 Motions were subsequently made to the Philippines Supreme Court by the Marcos Estate, Imelda Marcos and Marcos Junior seeking reconsideration of the Forfeiture Judgment. The Forfeiture Judgment was reconsidered and affirmed by the Philippines Supreme Court in its Resolution of 18 November 2003 ("the Forfeiture Resolution") (GR No 152154 (18 November 2003)). In rejecting the

applicants' argument that the summary nature of the forfeiture proceedings, which they argued was penal in nature, violated their due process rights as accused persons under RA 1379, Renato C Corona J held as follows (at pp 10–11):

> A careful study of the provisions of RA 1379 readily discloses that the forfeiture proceedings ... did not violate the substantive rights of respondent Marcoses. *These proceedings are civil in nature, contrary to the claim of the Marcoses that it is penal in character*.
>
> ...
>
> The proceedings under RA 1379 do not terminate in the imposition of a penalty but merely in the forfeiture of the properties illegally acquired in favor [*sic*] of the State. ...
>
> *The procedure outlined in the law leading to forfeiture is that provided for in a civil action*: ...
>
> [emphasis added]

Corona J went on to hold in the Forfeiture Resolution as follows (at pp 18–19):

> Respondent Imelda R. Marcos ... asserts that the factual findings that [the Foundations] involved in the instant forfeiture proceedings were businesses managed by her and [Ferdinand E Marcos] will adversely affect the criminal proceedings filed by the Republic against her. The contention is bereft of merit. *The criminal cases referred to ... are actions in personam, directed against her on the basis of her personal liability*. In criminal cases, the law imposes the burden of proving guilt on the prosecution beyond reasonable doubt, and the trial judge in evaluating the evidence must find that all the elements of the crime charged have been established by sufficient proof to convict.
>
> *But a forfeiture proceeding is an action in rem, against the thing itself instead of against the person.* Being civil in character, it requires no more than a preponderance of evidence. ... Hence, the factual findings of this Court in [the Forfeiture Judgment] will, as a consequence, neither affect nor do away with the requirement of having to prove her guilt beyond reasonable doubt in the criminal cases against her.
>
> [emphasis added]

Demands made on the Funds

22 Pursuant to the Forfeiture Judgment, PNB procured the repayment of parts of the Swiss deposits from the various banks in Singapore with whom it had deposited the same. In this connection, PNB instructed WestLB to repay the Funds to PNB as and when the deposits matured. WestLB, however, would not release the Funds, in light of the HRV's competing claim made known to WestLB on 8 September 2003. The Foundations also subsequently lodged their competing claims against the Funds.

23 As mentioned at [4] above, the Funds were subsequently held in an escrow account by D&N for the credit of these proceedings before being transferred into an escrow account held in the name of HEP for the same purpose. This remains the current state of affairs, pending the court's determination of the question of entitlement to the Funds.

Overview of the competing claims

The Republic's case

24 Counsel for the Republic and PNB, Mr Harry Elias SC ("Mr Elias"), argues that the Green Line, as described at [13]–[19] above, encapsulates the completed procedure adopted by the Swiss and Philippines authorities pursuant to the IMAC for the recovery of the ill-gotten gains of the Marcoses and subsequent determination of the entitlement to the Funds, *ie*, as long as this court finds that the Forfeiture Judgment complied with the terms of the Swiss orders and conditions set out in the Escrow Agreements, it must also conclude that the Republic is entitled to the Funds.

25 According to Mr Elias, any other order would defeat the acts of the Swiss and Philippines authorities in the recovery of the ill-gotten gains of the Marcoses. He seeks to invoke the act of state doctrine by pointing out that the Funds were deposited in WestLB pursuant to the Swiss orders, which pertained to the mutual assistance measures adopted by two sovereigns for the determination of the entitlement to the Funds by the Philippines Supreme Court, which determination has been accepted by the Swiss authorities. As such, Mr Elias argues that a finding by this court on the title to the Funds must necessarily involve a finding on whether the IMAC process had been complied with, so as to render the doctrine applicable.

26 In response, the Foundations and the HRVs seek to circumvent this "Green Line argument" by characterising the Republic's claim as, in essence, an attempt to enforce the Forfeiture Judgment in the Singapore courts. In this connection, they argue that (a) the Forfeiture Judgment is a judgment *in personam*, and is therefore not capable of binding them; and (b) the Forfeiture Judgment is penal in nature and therefore cannot be enforced in Singapore.

27 Mr Elias disagrees that the Forfeiture Judgment should be viewed in isolation from the Green Line. In any event, he submits that (a) the Forfeiture Judgment is a judgment *in rem*; and (b) the Forfeiture Judgment is *not* penal in nature as it merely restores ownership of the Swiss Deposits to the rightful owner, *ie*, the Republic. Mr Elias also emphasises that the question of the penal nature of the Forfeiture Judgment does not arise as the Republic is not seeking to enforce a claim against the Funds as judgment creditor but is merely requiring this court to recognise the Forfeiture Judgment.

PNB's case

28 On behalf of PNB, Mr Elias argues that even if the Green Line fails to establish the Republic's entitlement to the Funds, PNB would retain the same as escrow agent. Mr Elias argues that as escrow agent PNB had legal title to the Funds and still retains it through HEP. It is thus entitled to immediate repayment of them as and when the deposits mature.

The HRVs' case

29 The HRVs rely on the Chinn Assignment to establish their purported beneficial entitlement to the Funds arguing, through their counsel, Mr Kenneth Tan SC ("Mr Tan"), that the Chinn Assignment was effective under US law to transfer to the HRVs all rights, title and interest in the Funds held by the Foundations. In this connection, Mr Tan argues that the US court was legitimately exercising *in personam* jurisdiction over the Marcos Estate by making the directions under the US Contempt Order and the Chinn Assignment. He points out that the US court found that the Foundations were the instrumentalities of the Marcoses, arguing that the Foundations were therefore before the US court, *ie*, the Assignment thus bound the Foundations and the HRVs. Mr Tan argues that the HRVs' title to the Funds as conferred by the Chinn Assignment cannot be defeated by the Republic's claim based on the subsequent Forfeiture Judgment, which Mr Tan argues is *in personam* in nature.

30 Further, Mr Tan argues that the expiration of the US Final Judgment as of February 2005, which is undisputed, has no bearing upon the HRVs' claim. First, he argues that the Chinn Assignment transferred the Foundations' rights, title and interest in the Funds to the HRVs *at the time of its execution*. The HRVs' interest in the Funds is thus unaffected by the subsequent expiration of the US Final Judgment. Second, the US Final Judgment had (following its lapse in Hawaii) been registered in, *inter alia*, California, New York, Illinois and Texas. Mr Tan argues that each registration of the US Final Judgment in another state created a new judgment capable of being executed upon beyond February 2005. Mr Elias and the Foundations' counsel, Mr Rethnam Chandra Mohan ("Mr Mohan"), disagree. Relying on the evidence of the US law experts, Margery Bronster ("Ms Bronster") for the Republic and PNB, and Professor Richard M Buxbaum ("Prof Buxbaum") for the Foundations, Mr Elias and Mr Mohan argue that the Chinn Assignment, which was a mode of enforcement of the US Final Judgment, became unenforceable when the US Final Judgment expired in February 2005. For ease of reference, I shall refer to this as "the Re-registration issue".

The Foundations' case

31 The basis for the Foundations' claim to the Funds is fairly straightforward. Mr Mohan argues that since it is undisputed that the Funds originally belonged to the Foundations, as long as the Foundations can demolish the claims by PNB, the Republic and the HRVs, the Funds must necessarily revert to the Foundations as the original owners of the Funds.

32 Mr Mohan argues that PNB, as escrow agent, was a mere custodian of the Funds until a competent court decides on the ownership, and had lost any title to the Funds when the Funds were interpleaded. He emphasised that PNB was merely a conduit to channel the Funds to the rightful party and that its role became superfluous when the Funds came to be held in escrow by HEP. Contrary to PNB's position, Mr Mohan argues that HEP does not hold the Funds on behalf of PNB, but only holds the Funds for the credit of these interpleader proceedings as an administrative measure.

33 Mr Mohan also argues that the Republic has no claim to the Funds. As mentioned at [26] above, it is the Foundations' case that they cannot be bound by the Forfeiture Judgment since it was a judgment *in personam* arising from the forfeiture proceedings to which the Foundations were not parties. Mr Mohan also emphasises that the Republic failed to execute the guarantee it supplied to the Swiss authorities that it would involve the Foundations in the Forfeiture Proceedings and so cannot now purport to bind them by finding that they were the *alter egos* of the Marcoses. Further, Mr Mohan argues that the Forfeiture Judgment cannot, in any event, be recognised or enforced in Singapore as it is penal in nature.

34 Mr Mohan argues that the HRVs' claim also fails. First, he argues that the US Final Judgment binds the HRVs and the Marcos Estate but cannot bind the Foundations, which were not party to the US Human Rights Litigation. Second, the Chinn Assignment was an invalid mode of enforcing a judgment under Hawaiian Law and so failed to pass title to the HRVs. Third, even if the Chinn Assignment was valid under Hawaiian law, it was extinguished when the US Final Judgment expired as of 3 February 2005. Fourth, the Chinn Assignment also failed to pass title to the HRVs under Swiss law, since the Funds were at the material times subject to the Swiss freeze orders barring the Foundations from dealing with them.

35 In light of the foregoing, Mr Mohan argues that title to the Funds must revert to the Foundations, which were the original account holders of the Swiss Deposits.

The issues

36 The competing claims raise interesting and complex questions of private international law and may be distilled as follows:

(a) In relation to the Republic's claim, which rests chiefly upon the Green Line culminating in the Forfeiture Judgment:

(i) Whether the act of state doctrine applies in support of the Republic's Green Line argument (see [37]–[44] below);

(ii) Whether the Forfeiture Judgment is an *in rem* judgment and, if so, whether the Philippines court had jurisdiction to issue such a judgment (see [45]–[65] below); and

(iii) Whether enforcement of the Forfeiture Judgment would amount to indirect enforcement in Singapore of a penal and/or public law (see [66]–[74] below).

(b) In relation to the HRVs' claim, which rests upon the Chinn Assignment: under the applicable law, whether the Chinn Assignment was effective in transferring to the HRVs the title to the Funds (see [75]–[109] below).

(c) What is PNB's interest in the Funds (if at all) given its capacity as escrow agent appointed by the Republic and the Swiss authorities (see [110]–[116] below).

Analysis of the Republic's claim

(1) Whether the act of state doctrine applies in support of the Republic's Green Line argument

37 As mentioned (at [24]–[25] above), Mr Elias relies on the act of state doctrine to assert the propriety and purported unassailability of the events constituting the Green Line. He submits that the Swiss freeze orders, the in-principle grant of the transmission of the Swiss Deposits to the Republic, the delegation of the determination of title to the Philippines courts, the subsequent transfer of the Swiss Deposits to Singapore and the Forfeiture Judgment forfeiting the Funds to the Republic were all acts of state falling squarely within the act of state doctrine. The upshot is that these listed acts must be deemed valid and unassailable by this court, *ie*, the Green Line remains intact and had validly vested the Republic with the title to the Funds.

38 Despite the appealing simplicity of the Green Line argument, however, it is fundamentally flawed in its assumption that the act of state doctrine applies in aid of the Republic's claim. The act of state doctrine immunises from judicial review the sovereign acts of a foreign state, which are automatically non-justiciable by reason of their sovereign nature. Where the doctrine applies, the forum court will refrain from adjudicating upon the propriety of the *legislative or executive acts* of a recognised foreign state within the limits of its own territory (Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2010) at paras 10.06 and 10.09; and Dicey, Morris & Collins, *The Conflict of Laws*, vol 1 (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey, Morris & Collins*,*vol 1*") at paras 5–041 and 5–043). In what was probably the earliest formulation of the modern act of state doctrine, Chief Justice Fuller of the US Supreme Court held in *Underhill v Hernandez* 168 US 250 (1897) that:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

39 The doctrine limits, for prudential rather than jurisdictional, reasons, the forum court from inquiring into the validity of a recognised foreign sovereign's public acts committed within the latter's own territory (*Honduras Aircraft Registry Ltd v Government of Honduras* 131 F.3d 157 (11th Cir, 1997)). As such, it is separate and distinct from the doctrine of sovereign immunity (David Epstein & Charles S Baldwin, IV, *International Litigation: A Guide to Jurisdiction, Practice and Strategy* (Martinus Nijhoff Publishers, 4th Rev Ed, 2010) ("*Epstein & Baldwin*") at p 292).

40 Such restraint stemmed from the judicial recognition that certain disputes involving foreign sovereigns are not appropriately considered by the courts (*Epstein & Baldwin* at pp 278, 281–282). As was observed in *Banco Nacional de Cuba v Peter L F Sabbatino* 376 US 398 (1964) at 423:

> The act of state doctrine ... arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. *The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.* ... [emphasis added]

41 In *Underhill v Hernandez*, the defendant was a general in command of a revolutionary army in Venezuela which had seized the city Bolivar where the plaintiff, an American citizen, was resident. The plaintiff had constructed a waterworks system for Bolivar under a contract with the defeated government and also ran a machinery repair business. When he applied for a passport to leave the city, this was refused by the defendant who wished that the former would operate his waterworks and repair works for the benefit of the community and revolutionary forces. When the plaintiff was finally allowed to return to the US, he commenced proceedings in the Circuit Courts to recover damages caused by, *inter alia*, the defendant's refusal to grant him a passport, his alleged confinement in his own house and for alleged assaults and affronts by the defendant's subordinates. On appeal, Chief Justice Fuller declined a decision on the merits. The revolutionary government under which the defendant was acting had since been recognised by the US as the legitimate government of Venezuela. The defendant's acts were thus the acts of the government of Venezuela and, as such, were not properly the subject of adjudication in the courts of another country (*Underhill v Hernandez* at 254).

42 For the act of state doctrine to apply, the "act" in question must be a public governmental act and the subject-matter of the act must be located within the foreign sovereign's territory at the material time (*Epstein & Baldwin* at pp 279, 289). Further, there must exist a "factual predicate" for the doctrine to apply, *ie*, act of state issues only arise when the outcome of the case turns upon the effect of official action by a foreign sovereign (*W S Kirkpatrick & Co, Inc, et al v Environmental Tectonics Corporation, International* 439 US 400 (1990) at 406).

43 Turning to the present facts, the Green Line argument based on the act of state doctrine appears to be a red herring. First, the challenge mounted by the HRVs and the Foundations against the Republic's case is that *the Forfeiture Judgment* did not validly vest in the Republic an entitlement to the Funds. The Forfeiture Judgment, which was rendered by the Philippines Supreme Court, was not a legislative or executive act to which the act of state doctrine applies. Second, and more importantly, there is no issue arising for determination by this court as to the propriety of any foreign sovereign act. A close examination of the claims by the HRVs and the Foundations shows that neither contains a challenge as to the legitimacy of the Swiss freeze orders, the in-principle grant of the transmission of the Swiss Deposits to the Republic, the delegation of the determination of title to the Philippines courts and the subsequent transfer of the Swiss Deposits to Singapore. The act of state

doctrine would have been relevant and of aid to the Republic had the challenge against its case been in relation to these listed acts. As this is not the case, the Republic's reliance on the act of state doctrine appears somewhat misplaced.

44 As stated, the crux of the dispute in relation to the Republic's entitlement to the Funds centred on the legal *effect* of the Forfeiture Judgment, *viz*, whether it passed beneficial title to the Republic, which would in turn depend upon whether the Forfeiture Judgment is *in personam* and penal in nature, as the HRVs and the Foundations assert. Given the foregoing, the act of state doctrine does not apply in this case.

(2) Whether the Forfeiture Judgment is an in rem judgment and, if so, whether the Philippines court had jurisdiction to issue such a judgment

45 It is the HRVs' and the Foundations' case that the Forfeiture Judgment is a judgment *in personam* which only binds parties to the forfeiture proceedings, *ie*, the Republic and the Marcoses. In response, Mr Elias argues that the Forfeiture Judgment is a judgment *in rem*, drawing support from the Philippines Supreme Court's statement in its Forfeiture Resolution that RA 1379 proceedings were *in rem* (see [21] above). After a close examination of the relevant authorities and the facts before me, I am of the view that the Forfeiture Judgment is by nature *in rem*. However, for reasons stated at [63]–[65] below, this court nevertheless is unable to grant recognition to the Forfeiture Judgment.

Whether the Forfeiture Judgment is an in rem judgment

The law

46 A judgment *in rem* determines the status of a thing or person and is binding on the world. By contrast, a judgment *in personam* binds only parties to the proceedings (Adrian Briggs & Peter Rees, QC, *Civil Jurisdiction and Judgments* (Informa, 5th Ed, 2009) ("*Briggs & Rees*") at paras 7.44 and 7.57 and *Pattni v Ali and anor* [2007] 2 AC 85 ("*Pattni*") at [21]). For example, while a divorce decree may be a judgment *in rem* in so far as it determines the status of the parties, an ancillary order declaring the interests of those parties to the matrimonial assets binds only the parties personally and is a judgment *in personam* (*Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria* [2007] 4 SLR(R) 565 ("*Murakami Takako*") at [33]).

47 In determining whether a foreign judgment is *in rem* or *in personam*, it is not relevant whether the foreign court recognises these concepts. The forum court will have to undertake this inquiry independently, considering the *nature* of the proceedings culminating in the foreign judgment, the *substance* of the judgment and the *intended effect* of the order on the parties to the proceedings *(Murakami Takako* at [30]). In *Pattni*, for example, the English court held that a Kenyan judgment ordering the respondents to transfer certain shares to the appellant "as per the said sale and purchase agreement" was a classic order *in personam* for specific performance, following an examination of the aim and intended effect of the Kenyan judgment. Lord Mance held (*Pattni* at [28]–[35]):

> 28 ... Whatever else might be in doubt about the course of the Kenyan proceedings, it is clear that they involved contractual issues between parties to the proceedings ...
>
> 29 ... *The obvious aim and effect of [the Kenyan] orders was to establish and give effect to their rights inter se with regard to such shares and affairs.* If some third party emerged subsequent to the Kenyan judgment and decree, and claimed that Mr Pattni had, prior to 27 September 2001, agreed to on-sell the World Duty shares to him, *nothing in the Kenya judgment*

and decree could, or could have been intended to, preclude the third party from showing this. ... The Kenyan judgment and decree do not constitute or involve any form of adjudication or purported adjudication in rem relating to the shares in World Duty. *Nor were the Kenyan judgment and order even purporting actually to transfer or deal with the shares, as opposed to determining the parties' rights and duties relating to them*. ...

30 ... *It is* ... *a classic order in personam for specific performance in terms reflecting and predicating the judge's findings of an agreement for sale and of its breach* ...

...

35 The suggestion ... that the Kenyan judgment purported to pass legal title to the shares has no foundation. ... the transfer of legal title to the shares would depend upon alteration of the shareholder's identity in World Duty's register of members kept in the Isle of Man. The Kenyan judgment did not purport to make any such alteration, but merely to order Mr Ali and Dinky to effect a transfer. ... *The judge was simply ordering that Mr Ali and Dinky give effect to his findings of an agreement and its breach by specifically performing their consequential obligations to transfer their shares to Mr Pattni*.

[emphasis added]

Lord Mance emphasised that a judgment *in rem* must relate to the status or disposition of property which is to be valid as against the whole world; the mere fact that a judicial determination relates to the existence of property rights between parties does not in itself mean that it is *in rem* (*Pattni* at [23]).

48 In another English decision, *Louis Castrique v William Imrie and anor* (1869–1870) LR 4 HL 414 ("*Castrique*"), the House of Lords examined the nature and effect of certain French proceedings before concluding that they were *in rem*. In that case, the original owner of the ship, one Claus, executed a mortgage of the ship in favour of one Harrison in November 1854. The mortgage was transferred to one Emley, who registered himself as the ship owner, and subsequently to one Castrique in April 1855. As Castrique only registered himself as owner in April 1857, Emley remained the owner under English law as of April 1855. In the interim, the ship embarked upon a voyage during which it stopped by in Melbourne to be repaired and furnished with necessities. The captain Benson drew a bill on Claus for the amount due ("the Melbourne Bill").

49 The ship entered a French port on 4 May 1855. While it was there, Claus became bankrupt and, in the meantime, the Melbourne Bill was indorsed to French subjects, who commenced a suit in the Tribunal de Commerce in France against Benson on the bill. Benson appeared but did not defend the suit. On 15 May 1855, judgment was entered against Benson ("the French judgment") declaring the debt "privileged on the ship", *ie*, having priority over others. The French authorities seized the ship pursuant to the French judgment. However, before it could be sold, the Tribunal de Commerce's judgment had to be ratified by the French Civil Tribunal which would first hear the ship owners. Although Claus and Benson received notices to appear before the French Civil Tribunal, they did not appear, and the judgment was confirmed and the ship's sale ordered. When Castrique subsequently became aware of those proceedings, he commenced a suit in the French Civil Tribunal to replevy the ship, but was unsuccessful. When the ship finally arrived in England, he demanded possession of it and brought a suit in an English court to recover it on the ground that the sale in France was illegal and void as against his earlier title.

50 The decision in *Castrique* turned upon the nature of the French judgment; if the French

judgment was *in rem*, Castrique would fail in his claim since the ship was in France at the time of the French proceedings, *ie*, the French *in rem* judgment would bind the world, including Castrique. On the other hand, the French judgment would not bind Castrique if it was *in personam*, given that Castrique was absent from the French proceedings.

51 The distinction between judgments *in rem* and *in personam* was explained in some detail by Blackburn J. If the court ordered a litigant's property to be sold in execution of a judgment against that litigant, there was nothing to prevent any third party from setting up his claim to that property because the tribunal neither had jurisdiction to determine, nor did it determine, anything more than that the litigant's property should be sold, and did not do more than to sell the litigant's interest, if any, in the thing (*Castrique* at 427–428). The case was, however, different when the tribunal had jurisdiction to determine not merely the rights of the parties but also the disposition of the thing, and did in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred (*Castrique* at 428). Blackburn J held (*Castrique* at 428–430):

> In *Story* on the Conflict of Laws, it is said that the principle that the judgment is conclusive "is applied to all proceedings *in rem* as to moveable property within the jurisdiction of the Court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such Courts have a rightful jurisdiction founded ***in the actual or constructive possession of the subject matter*** ."
>
> We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from *Story.* ***We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the Court sits; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against the world*** **.**
>
> ... The ship ... was in *France*, and if the transfer of the ship in consequence of the decree of the French Court was in *France* good against all the world, it could only be so on the ground that the judgment of the French Court was, according to the French law, a judgment *in rem* transferring the ship itself, and not merely the interest, if any, of *Claus* in the ship.
>
> ***The first question ... is one of fact, namely, what was the nature of the proceeding before the Tribunal de Commerce at Havre, and what was the meaning and effect of the judgment on the 15th of May, 1855, pronounced against Benson*** . ...
>
> [emphasis in original in italics; emphasis added in bold italics]

52 In concluding that the French judgment was *in rem* in nature, Blackburn J held (*Castrique* at 432):

> *... If the Tribunal of Commerce was merely awarding execution against the ship as far as it was*

a debtor's property, it was irrelevant and premature to say whether that debt would have priority of payment or not. ... And the subsequent proceedings in the Civil Tribunal, ... seem to be very like the proceedings in the Court of Admiralty after the ship is libelled. *All those who had any claim on the ship ... were summoned to appear, and they having made default, a judgment was pronounced, not, as it appears to us, against them personally, but that the seizure of the ship should be confirmed, and that it should be sold; and notice of this judgment was served on Claus' assignee in bankruptcy, who had thereby another opportunity given him to oppose the sale of the ship*.

We can, therefore, come to no other conclusion of fact, than that this proceeding has been correctly stated to be a proceeding against the ship. ...

[emphasis added]

Lord Hatherley also concluded that the French judgment was a judgment *in rem* (*Castrique* at 443–445):

... ***I think that it would be very difficult to say that a proceeding in rem was not one of the matters contemplated in the original judgment*** . ...

... regard being had to the original proceeding, being a proceeding against *Benson* and the ship, and *Benson* himself being excluded from any personal liability, and the judgment against him being by privilege upon the ship, it does appear to me that the word "privilege," as used here, is used much more in the sense ... of a charge upon a vessel which the person is entitled to realize by sale, than in the sense of saying simply that amongst all the several persons who may have claims when the ship comes to be sold, *Benson* is to stand in a favoured position. In other words, the French Court intended by the proceeding taken to adjudge the sale of the vessel in order to satisfy this privilege.

But, ***beyond that, I think the case becomes somewhat clearer when it is carried to the Civil Tribunal, which ... summoned all who were supposed to be the owners of the ship*** . ... For what purpose did they call *Claus* and his assignee? For the purpose of making them liable upon the bill, not because *Claus* had accepted it, but only because, being interested in the thing they were about to sell, they thought it right that *Claus* and his assignee should be present.

Therefore, upon the whole proceeding, taking first the proceeding against *Benson* and the ship, next, the detainer of the vessel by the Tribunal of Commerce for the purpose of the sale being affirmed by the Superior Court, and then the Superior Court when it arrives at the question of sale or no sale, taking care to summon those whom alone it could recognise as owners, ***I think there can be no doubt that the judgment of the Court was intended to be a judgment*** **in rem** ***, and therefore the Court intended to do that which by the French law it did, namely, to transfer the ownership in the vessel*** .

[emphasis in original in italics; emphasis added in bold italics]

5 3 *Castrique* was applied in *Minna Craig Steamship Company and James Laing v Chartered Mercantile Bank of India London and China* [1897] 1 QB 55 ("*Minna Craig*"). In that case, while a ship owned by the English plaintiff company was loading in Bombay for a voyage to Hamburg, the master was fraudulently induced to sign bills of lading for goods which were never loaded onto the ship. The bills of lading were indorsed to the English defendants. Under German law, non-delivery of goods specified in a bill of lading entitles the bill holder to a lien upon the vessel. Upon the ship's arrival in

Germany, a winding-up order was made against the plaintiff. The defendants, who had in the meantime discovered the fraud, arrested the ship and commenced proceedings against her in a German court to enforce their lien. The German court ordered the ship to be sold, and ordered that lien to be satisfied out of the sale proceeds. Although the plaintiff had notice of these proceedings, it did not appear. Subsequently, liquidators of the plaintiff sued the defendants in England to recover the fruits of the foreign judgment. The defendants argued that the German proceedings were *in rem* and binding on the plaintiff. Collins J agreed with the defendants (*Minna Craig* at 61):

> ... I took time to go carefully through the proceedings in the German Court in order to satisfy myself whether they were or were not proceedings in rem. I have come to the conclusion that they were practically undistinguishable [*sic*] from those which in *Castrique v. Imrie* were held by the House of Lords to be proceedings in rem and not merely a roundabout method of getting execution upon a judgment in personam. ... It is true that the words "par privilége sur ce navire" are wanting here, but I do not think that makes any real difference. ***The proceedings were taken against the ship; the liability was limited to the value of the ship; and in each of their judgments the German Courts refer to the right of the bill-of-lading holders as a lien. Therefore I must treat the decision as one in rem*** . [emphasis in original in italics; emphasis added in bold italics]

54 It is essential to the recognition of a foreign judgment *in rem* that the *res* should have been situated in the foreign country concerned at the time of the proceedings (*Dicey, Morris & Collins, vol 1* ([38] *supra*), at para 14–104; and *Briggs & Rees* ([46] *supra*) at para 7.57). If the *res* were so situated, jurisdiction would exist even if the owner did not consent to its being there, *eg*, where a yacht is stolen and abandoned in a foreign port (*Dicey, Morris & Collins, vol 1*, at para 14–104). On the other hand, if the *res* were situated elsewhere, the foreign court would have had no such jurisdiction (*Dicey, Morris & Collins, vol 1*, at para 14–101).

55 A case in point is *Calyon v Irene Michailaidis and others* [2009] UKPC 34 ("*Calyon*"), which concerned an ownership dispute in relation to a collection of Eileen Gray furniture ("the Collection"). From about the 1970s until his death, Christo, who was part of a wealthy Greek shipping family, lived with one Robin in a house in Kensington. When Christo died in 1999, he was domiciled in Greece and, under Greek law, his mother ("Irene") and sister ("Despina") were his heirs. In 2000, Robin sold the Collection through a Paris dealer for $15m. The Collection was flown to Switzerland for delivery to the buyer and the sale proceeds were dissipated by Robin for various purposes. The Collection ended up with the Gibraltar branch of a French bank ("Calyon").

56 Christo's family disputed Robin's right to sell the Collection, claiming that the Collection belonged to Christo and had therefore passed to his heirs upon his death. On 23 February 2001, they started proceedings against Robin and Robin's company ("RSL") which had benefitted from the sale proceeds. On the same day, Robin and RSL issued proceedings in Athens seeking a declaration that Robin was the owner of the Collection and joined Irene, Despina and the administrators as defendants. In June 2004, the Greek court delivered judgment in favour of Irene and Despina. Armed with the Greek judgment, Irene and the administrators proceeded to the courts of Gibraltar, asserting that Calyon had dishonestly assisted Robin in a breach of trust.

57 Lord Rodger held that, if it were treated as a judgment *in rem*, it could not be granted recognition since the Collection was never within the jurisdiction of the Greek court (*Calyon* at [20]):

> ... the Collection was last seen as it was flown from London to Switzerland in April 2001 to be delivered to its purchaser. *There is therefore no reason to suppose that the Collection was ever "so situated as to be within the lawful control of the State [Greece] under the authority of*

which" the court which determined its ownership sat. So the Greek judgment does not satisfy the first test for a judgment in rem, laid down by Blackburn J, giving the opinion of most of the consulted judges, and approved by Lord Chelmsford in Castrique v Imrie (1870) LR 4 HL 414, 429 and 448. The Court of Appeal duly held that the Greek judgment was not a judgment in rem. Counsel for the claimants and respondents, Mr Steinfeld QC, did not challenge that conclusion. The Board agrees with it and therefore proceeds on the basis that the Greek judgment was in personam. [emphasis added]

58 As a judgment *in personam*, the Greek judgment could not bind Calyon. This was because Calyon had not been made a party to the Greek proceedings (*Calyon* at [21]):

> Equally clearly ... Calyon, was not a party to the counter-claim in the Greek proceedings. ... In these circumstances, *since Calyon was not itself a party to the proceedings, the judgment of the Greek court could not give rise to any estoppel per rem judicatam against Calyon in the present proceedings* – even if it would have given rise to such an estoppel against [Robin] and RSL. The Court of Appeal rightly so held and the respondents did not cross-appeal against that decision. [emphasis added]

The present facts

59 As earlier stated at [45] above, I am of the view that the Forfeiture Judgment is a judgment *in rem*. The Philippines Supreme Court had explicitly stated in the Forfeiture Resolution that "a forfeiture proceeding is an action *in rem*, against the thing itself instead of against the person". It had also clearly indicated its intention to finally determine the ownership of the Funds, stating, in the Forfeiture Judgment, that:

> ... Almost two decades have passed since the government initiated its search for and reversion of such ill-gotten wealth. The definitive resolution of such cases on the merits is thus long overdue. If there is proof of illegal acquisition, accumulation, misappropriation, fraud or illicit conduct, let it be brought out now. Let the ownership of these funds and other assets be finally determined and resolved with dispatch, free from all the delaying technicalities and annoying procedural sidetracks.
>
> We thus take cognizance of this case and settle with finality all the issues therein.

60 The *in rem* nature of the forfeiture proceedings may also be discerned from the wording of RA 1379 pursuant to which the proceedings were instituted. In particular, ss 2 and 6 of RA 1379 provide:

> **Section 2**. *Filing of petition*. Whenever any public officer or employee has acquired during his incumbency an amount of property which is manifestly out of proportion to his salary as such public officer or employee and to his other lawful income and the income from legitimately acquired property, *said property shall be presumed prima facie to have been unlawfully acquired*. ...
>
> ...
>
> **Section 6**. *Judgment*. If the respondent is unable to show to the satisfaction of the court that he has lawfully acquired the property in question, then *the court shall declare such property, forfeited in favor [sic] of the State, and by virtue of such judgment the property aforesaid shall become the property of the State*: ...

[emphasis added]

It is clear, from the wording of these provisions, that the proceedings under RA 1379 were directed against the *res* in question – as long as the presumption of unlawful acquisition is not adequately rebutted, the *res* would become vested in the State. That the forfeiture proceedings were directed against the *res*, *ie*, the Funds in the present case, is also demonstrated by the fact that the Funds were in the meantime parked in escrow accounts pending final determination of their disposition (see [16] above). Further, the forfeiture proceedings were brought in relation to Executive Order No 2 (12 March 1986), which, *inter alia*, required full disclosure from all persons and entities who had knowledge of possession of such ill-gotten assets, and prohibited them from concealing, transferring or dissipating them and from otherwise frustrating or obstructing the recovery efforts of the government.

Whether the Philippines court had jurisdiction to issue an in rem judgment

Non-participation of the Foundations in the forfeiture proceedings

61 Having found that the Forfeiture Judgment is *in rem* in nature, what effect does it have in the present proceedings? Mr Mohan argues that the Philippines Supreme Court did not, in any event, have jurisdiction to bind the Foundations, since, contrary to the guarantees provided by the Philippines authorities to the Swiss authorities (see [17]–[18] above), the Foundations were not made parties to the forfeiture proceedings. I disagree.

62 As Mr Elias rightly points out, while the Philippines government guaranteed that the Foundations would be entitled to be heard in the forfeiture proceedings, it did not undertake a duty to implead the Foundations. Significantly, after the Forfeiture Judgment was released in July 2003, the Swiss Federal Office of Justice issued a press release announcing, *inter alia*, that the guarantees provided by the Republic were satisfactory and that the Philippines government could dispose of the Swiss Deposits (see [20] above). In the circumstances, there is no basis for this court to find that the Philippines authorities had breached the conditions set out by the Swiss Federal Supreme Court. As evidenced by Powers of Attorney executed by Imelda Marcos in favour of the Foundations' Mr Patrick Foetisch, the Foundations were aware of the forfeiture proceedings and their right to participate in the same. They chose not to participate in the forfeiture proceedings despite having notice of the same and cannot now rely on their non-participation as a basis for arguing that the Forfeiture Judgment did not bind them (see, for example, *Minna Craig*) ([53] *supra*).

Situs of the Funds at the material time

63 In spite of the foregoing, there is an impediment to the recognition of the Forfeiture Judgment in that the Funds were not in the Philippines but in Singapore at the time of the Forfeiture Judgment. As discussed (see [54]–[57] above), it is essential to the recognition of a foreign judgment *in rem* that the *res* should have been situated in the foreign country concerned at the time of the proceedings.

64 To circumvent this difficulty, Mr Elias argues that the Philippines Supreme Court had jurisdiction to bind the world as the authorities of Switzerland, where the Funds were originally situated, had delegated jurisdiction to it pursuant to the IMAC proceedings, thus giving it constructive custody of the Funds. In other words, as the Funds were deposited in Singapore pursuant to and in accordance with the Swiss orders, the *situs* of the Funds in Singapore was immaterial to the force of the Forfeiture Judgment which was rendered in compliance with the IMAC process.

65 Unfortunately, no authority has been cited in support of such an extension of the principle of recognition of judgments *in rem*. While the references to "actual or constructive possession of the subject matter" and "situated within the lawful control of the state" in, for example, *Castrique* and *Calyon* ([55] *supra*), may suggest that the principle may accommodate situations where the foreign state only has constructive custody of the *res*, in the absence of full and proper argument on this specific point, this court would be slow to adopt such a position. In any event, *even if*, as the Republic suggests, the jurisdictional requirements were fulfilled on the basis of constructive custody, this court would still be unable to grant recognition to the Forfeiture Judgment due to its penal nature, as explained below.

(3) Whether the Republic's claim depends upon the indirect enforcement in Singapore of a foreign penal law

66 The HRVs and the Foundations argue that enforcement of the Forfeiture Judgment in Singapore would amount to indirect enforcement of RA 1379, which, they aver, is a penal law. Accordingly, they argue that the Republic's claim, premised on the Forfeiture Judgment, must fail.

The law

67 It is trite that a forum court will not enforce a foreign judgment if to do so would amount to a direct or indirect enforcement of a penal law, revenue law or other public law of the foreign state (*Dicey, Morris & Collins, vol 1*, at para 5–020 and *Relfo Ltd (in liquidation) v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 at [53]). As Lord Denning MR held in *Attorney-General of New Zealand v Ortiz* [1984] 1 AC 1 ("*Ortiz*") at 20:

> ... our courts will not entertain a suit brought by a foreign sovereign, directly or indirectly, to enforce the penal or revenue laws of that foreign state. We do not sit to collect taxes for another country or to inflict punishments for it. ...

68 This rule stems from the foreign state's lack of international jurisdiction to enforce its laws outside its own territory and the forum court's unwillingness to exercise its own jurisdiction in aid of an attempt by the foreign state to act in excess of its own jurisdiction (*Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2008] 3 WLR 486 ("*Barakat Galleries*") at [97]). The rule was explained by Lord Denning MR in similar terms (*Ortiz* at 21):

> ... By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority.

69 In *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140 ("*Banco de Vizcaya*"), the Spanish Republic declared the ex-King of Spain ("Alfonso") to be a traitor, decreed that all his property be seized for the benefit of the State and ordered all bankers in Spain having in deposit any such property to deliver the same to the Spanish Treasury. Certain securities belonging to Alfonso had been deposited in an English bank ("WBank") to the order of the Spanish bank ("BV"), which was Alfonso's agent. Both Alfonso and BV claimed the delivery up of these securities. WBank took out an interpleader summons. Lawrence J held that BV was not in reality asserting its own contractual rights as they originally existed but the rights of the Spanish Republic. Consequently, BV's claim failed, since to countenance it would amount to an enforcement of an admittedly penal law of the Spanish Republic (*Banco de Vizcaya* at 143–145):

> ... the substance of the right sought to be enforced by [BV] is the delivery to them of the

> securities in question and the enforcement of this right will directly or indirectly involve the execution of what are undoubtedly and admittedly penal laws of the Spanish Republic. [BV's] whole case is that they are bound by virtue of the decrees to hand over the securities to the Spanish Government in defiance of the mandate of [Alfonso], and, that being so, it seems to be unarguable that the enforcement of [BV's] right will not directly or indirectly involve the execution of the decrees.
>
> ... But in the present case *the penalty imposed is seizure by the State for its own benefit of all [Alfonso]'s properties, rights, and grounds of action, and this penalty is imposed in terms for high treason, and the only way in which [BV is] able to assert their claim that they are entitled as against [Alfonso] is by virtue of these decrees*, and they are compelled to admit that they have no personal right or title to the property in the securities. ... I therefore hold that [Alfonso] and not [BV] is entitled to the securities in question.
>
> [emphasis added]

70 It is important to note that whether a foreign law is penal is to be determined by the forum court (*Barakat Galleries* at [106]). "Penal law" was defined by the Privy Council in *Huntington v Attrill* [1893] AC 150 ("*Huntington v Attrill*") at 156–157 as follows:

> ... The rule has its foundation in the well-recognised principle that crimes, including in that term *all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public*, are local in this sense, that they are only cognizable and punishable in the country where they were committed. *Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the Courts of any other country*.
>
> ...
>
> ... in *Wisconsin v. The Pelican Insurance Company* [127 U.S. (20 Davis) 265] ... Mr. Justice Gray, after referring to the text books, and the dictum by Chief Justice Marshall already cited, went on to say: "*The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenues or other municipal laws, and to all judgments for such penalties*."
>
> Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule.
>
> [emphasis added]

In light of this nuanced definition, care should be taken not to conflate the concepts of "criminal" with "penal"; the forum court may conclude that the foreign law is penal even if it does not form part of the criminal code of a foreign country (*Barakat Galleries* at [108]). As observed in *Dicey, Morris & Collins, vol 1* ([38] *supra*), at para 5–027, for the present purposes, a penal law could be one which punishes or prevents an offence.

The present facts

71 In arguing that the Forfeiture Judgment was not penal in nature, Mr Elias emphasised that the Forfeiture Judgment and the Forfeiture Resolution had stated in no uncertain terms that forfeiture proceedings under RA 1379 are civil in nature and do not terminate in the imposition of a penalty (see [21] above). This, however, does not foreclose the issue since, as mentioned at [70] above, whether a foreign law is penal is to be decided by this court. That the proceedings under RA 1379 were not criminal in nature also does not determine the issue whether such law is of a penal nature.

72 In *United States of America v Inkley* [1989] 1 QB 255 ("*Inkley*"), the US government brought an action against the defendant for the enforcement of a judgment for the amount of an appearance bond obtained in a Florida federal court sitting as a civil court. The defendant, who had been arrested in the US and charged with criminal offences, had been released on bail but had subsequently failed to appear to answer criminal charges. In refusing to enforce the Florida judgment, the English Court of Appeal held that since the purpose of the action was part of a public law process aimed to ensure attendance of persons accused of crime before the criminal courts, the general context was criminal and penal, and was unaffected by the fact that it was dressed up in civil form (*Inkley* at 265–266):

> ... *the fact that in the foreign jurisdiction recourse may be had in a civil forum to enforce the right will not necessarily affect the true nature of the right being enforced in this country*.
>
> ... we have come firmly to the conclusion that the general context and background against which the appearance bond was executed was criminal or penal. The power to require the execution of the bond arose from section 3146 et seq. of the United States Code Annotated for Crimes and Criminal Procedure. The circumstances in which it came into existence were clearly criminal in nature and breaches of the conditions incorporated in it could give rise to further criminal process. Finally, the whole purpose of the bond was to ensure, so far as it was possible, the presence of the executor of the bond to meet justice at the hands of the state in a criminal prosecution. *The fact that the obligations under the bond were the subject matter of a declaratory judgment in a civil court does not affect, in our judgment, the basic characteristic of the right which that judgment itself enforced, namely the right of the state as the administrator of public law and justice to ensure the due observance of the criminal law or the exaction of pecuniary penalties if that course was frustrated. Notwithstanding its civil clothing, the purpose of the action initiated by the writ issued in this case was the due execution by the United States of America of a public law process aimed to ensure the attendance of persons accused of crime before the criminal courts*.
>
> [emphasis added]

73 I find that the HRVs and the Foundations are correct in contending that the success of the Republic's case is dependent upon the indirect enforcement of a foreign penal law. RA 1379, which provides for the forfeiture of property in favour of the state whenever any property is found to have been unlawfully acquired by a public officer, is clearly of a penal nature since it summarily forfeits property in the hands of public officials in consequence of a wrong committed by the individual. Significantly, during Mr Tan's cross-examination of the Republic and PNB's Philippines law expert Mr Ed Vincent S Albano ("Mr Albano"), Mr Albano confirmed that the forfeiture proceedings under RA 1379 did not apply to *revest* originally state-owned property in the State but vested property in the State *by virtue of the forfeiture*:

> Mr Tan: The State doesn't have to show that the jewellery, which is being forfeited, was actually bought with State funds. That's not the purpose of the Act.
>
> Mr Albano: Yes, because it is---

Mr Tan: Isn't that correct?

Mr Albano: ---because it is the---

Mr Tan: Just---just answer---

Mr Albano: Yes.

...

Mr Tan: ... Even if that jewellery was bought with---not with State funds, because of the net asset accounting, you can't explain how you got this addition of 1 million, this property is just declared forfeited. "You're punished. We take this property", that's how it works, isn't it?

Mr Albano: Yes, because here the---

Mr Tan: Yes.

Mr Albano: ---the person is given the right to explain how he---how he got it. *If he cannot explain it then that is ordered forfeited in favour of the State*.

Mr Tan: ... *It's after the forfeiture and divestment that it becomes the property of the State*.

Mr Albano: *Yes*.

Mr Tan: Thank you. ...

[emphasis added]

74 Indeed, the intrinsically penal nature of the forfeiture proceedings under RA 1379 was borne out during Mr Tan's cross-examination of Mr Albano:

Mr Tan: RA 1379 is a specific enactment in The Philippines and it authorises the forfeiture to the State of property of a public officer or employee in certain circumstances. That's correct, isn't it?

Mr Albano: Yes, Sir.

Mr Tan: Now, the forfeiture comes about when it's found that what the public officer or employer has, is manifestly out of proportion to his salary as such public officer or an employee, when compared with his other lawful income and the income from legitimately acquired property.

Mr Albano: Yes, Sir.

Mr Tan: If it's found that there is this unexplained wealth, what RA 1379 authorises is the forfeiture of the illegally acquired property.

Mr Albano: Yes, Sir.

Mr Tan: *By the forfeiture, it means that this property is divested from the public officer without compensation.*

Mr Albano: *Er, yes, Sir, because of illegal act that is committed.*

...

Mr Tan: So this divesting of property, this forfeiture, is a punishment imposed on RA 1379 on the officer.

Mr Albano: *It is in the form of a punishment because he is divested.*

...

Mr Tan: ... So it is the law of The Philippines that any forfeiture under RA 1379 amounts to a penalty because it punishes the public officer found liable.

Mr Albano: It does not pun---it---it, er, it is---it is in that sense but it does not punish in the sense---in the sense that he's sent to prison.

Mr Tan: *Other than the fact that it---he's not sent to prison, he is punished by the divestment of his property.*

Mr Albano: *Yes, Sir, because the property that he stole or amassed is returned to the rightful owner which is the State.*

[emphasis added]

That RA 1379 was penal in character was also conceded by Mr Albano during his cross-examination by Mr Mohan:

Mr Mohan: So, when the Supreme Court here says forfeiture partakes the nature of a penalty?

Mr Albano: Yes. *Because, er, the property that was illegally gotten by the public officers*, er, which is not proportionate to his income goes back to the government---to the legally---to the, er, government which is the---or to the state, who is the legal owner.

Mr Mohan: *And---and that you agree with me is a penalty?*

Mr Albano: *Penalty in the sense that it is---it is forfeited*. ...

[emphasis added]

In the premises, I find that the Forfeiture Judgment was penal in nature, and consequently dismiss the Republic's claim.

Analysis of the HRVs' claim

75 The HRVs' primary case is that the Chinn Assignment validly transferred all right, title and interest in the Funds from the Foundations to the HRVs. Their argument is based on the assumption that the issue is the validity of the Chinn Assignment *vis-a-vis* the assignor and assignee, and that such issue is to be determined by US law. They rely on the evidence of their US law expert, Professor David I Levine ("Prof Levine"), to support their claimed entitlement to the Funds pursuant to the Chinn Assignment under US law.

76 The Republic and PNB disagree, arguing that it is Swiss law which governs the question of validity of the Chinn Assignment. In any event, they argue that the Chinn Assignment is invalid under *both* Swiss law and US law. For this, they rely on the evidence of their Swiss law expert, Dr Andres

Lanzlinger ("Dr Lanzlinger"), and the evidence of Ms Bronster. The Foundations did not, in their closing submissions, address the question of the appropriate law governing the issue. However, like the Republic and PNB, their position is that the Chinn Assignment was ineffective in passing title to the HRVs under *both* Swiss law and US law. They rely on the evidence of Prof Buxbaum, who testified on the content of US law, and the evidence of Dr Lanzlinger on the content of Swiss law.

77 Two questions arise. First, is there a true conflict between US law and Swiss law on the relevant issues to be decided? As mentioned, although only the Republic and PNB have tendered expert evidence on Swiss law, parties have all produced evidence in relation to US law and, perhaps unsurprisingly, the US law experts have provided varying opinions on the validity and effect of the Chinn Assignment. The possibility of a false conflict thus presents itself since the Chinn Assignment could very well be ineffective to pass title under *both* US law and Swiss law. Second, if US law and Swiss law differ in their treatment of the Chinn Assignment, which system of law applies? As will be seen (at [109] below), these questions will in turn determine the Re-registration issue.

78 A court seeking to discover the *lex causae* (*ie*, governing law) typically embarks on a three-stage process involving, *viz*:

(a) the characterisation of the relevant issue;

(b) the selection of the choice of law rule which lays down a "connecting factor" for that particular issue; and

(c) the identification of the system of law which is tied by that connecting factor to the relevant issue (*Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1966] 1 WLR 387 ("*Macmillan No 3*") at 391–392; *Raiffeisen Zentralbank Ősterreich AG v Five Star Trading LLC* [2001] QB 825 ("*Raiffeisen*") at [26]).

79 Although, generally, the three-step "search" for the *lex causae* is undertaken after a determination of the presence of a true conflict situation (Janeen M Carruthers, *The Transfer of Property in the Conflict of Laws* (Oxford University Press, 2005) ("*Carruthers*") at para 4.10), there is, in the present case, value in first setting out the appropriate characterisation of the issue and the relevant connecting factor because (as will be seen from the analysis) much of the disagreement on the effect of the Chinn Assignment may be attributed to a mischaracterisation of the relevant issue, feeding into the failure to pinpoint the appropriate connecting factor and, hence, the appropriate governing law. In undertaking the three-step inquiry, the following observations by Mance LJ in *Raiffeisen* at [26]–[29] are borne in mind:

> 26 ... The process falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum, ...
>
> 27 While it is convenient to identify this three-stage process, it does not follow that courts, at the first stage, can or should ignore the effect at the second stage or characterising an issue in a particular way. *The overall aim is to identify the most appropriate law to govern a particular issue*. ... A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. ...
>
> 28 ...
>
> 2 9 *There is in effect an element of interplay or even circularity in the three-stage process identified by Staughton LJ. But the conflict of laws does not depend (like a game or even an*

election) upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations.

[emphasis added]

Stage 1: Issue characterisation

80 Mr Tan frames the issue as one concerning the validity of the assignment as between the assignor and assignee, *ie*, the Foundations and the HRVs. I find this to be too narrow a construction of the dispute at hand, bearing in mind its context as an interpleader action. By focusing purely on the assignor-assignee relationship, Mr Tan has essentially characterised the issue as a contractual one. This, however, is problematic. First, framing the issue in contractual terms is artificial when one considers the involuntary nature of the Chinn Assignment. Second, and more importantly, a "contractualisation" of the issue ignores the fact that the Chinn Assignment had expressly directed "all persons acting in the capacity or title of custodians, officers, directors or trustees of entities having authority over the bank accounts" to effect the transfer of the Funds as directed. This putative third party reach of the Chinn Assignment cannot be ignored.

81 As Mr Elias rightly points out, the court is ultimately concerned with determining who has proprietary entitlement to the Funds. In the face of the competing claims, the issue is more appropriately framed in property terms, *viz*, whether the Chinn Assignment effectively vests in the HRVs proprietary rights to the Funds which are good against the whole world.

Stage 2: The choice of law rule

82 Parties have suggested various connecting factors that might apply on the present facts. Given the manner in which Mr Tan has framed the issue (see [80] above), he argues that US law applies as the *lex loci actus*, and that, pursuant to US law, the Foundations' rights, title and interests in the Funds were validly assigned to the HRVs under the Chinn Assignment. Alternatively, he argues that the appropriate governing law should be the law governing the assignor and the assignee (*ie*, the proper law of the assignment), and that since both were subject to the jurisdiction of the US court at the relevant time, the *lex causae* is US law. Mr Elias, on the other hand, argues that the validity of the Chinn Assignment, which was an involuntary assignment akin to an attachment or garnishment of debt, should be determined based on the *lex situs* of the debt, that being Swiss law. As mentioned, Mr Mohan takes the view that it is immaterial which law applies as the HRVs would have no claim in any event.

83 However, the *lex loci actus*, the *lex situs* and the proper law of the assignment appear to be inappropriate in cases of involuntary assignments of intangible movable property, such as the present. After reviewing the authorities, I am of the view that the law governing the question whether the HRVs had obtained a proprietary right to the Funds under the Chinn Assignment is the proper law *of the debt*, which is in this case Swiss law. This is distinct from the proper law of the *assignment*. I will examine each connecting factor raised by the parties before explaining why the proper law of the debt is the most appropriate law to govern the issue.

(i) US law as the lex loci actus

84 The HRVs rely on the leading case of *Republica de Guatemala v Nunez* [1927] 1 KB 669 ("*Nunez*") in support of their position that US law applies as the *lex loci actus*. *Nunez* concerned moneys which were deposited with London bankers by a former president of the Republic of Guatemala ("ROG"), Cabrera, who was domiciled in Guatemala. The moneys had allegedly been

wrongfully misappropriated by Cabrera from the ROG. Cabrera subsequently assigned the moneys, by way of gift, to his son, Nunez, who was also domiciled in Guatemala. An interpleader action was brought by the London bankers to determine the title issue between the ROG and Nunez. To do so, the English court had to determine the validity of the purported assignment based on either English law as the *lex situs*, under which the assignment was valid, or Guatemalan law, under which the assignment was void. The English court opted for the latter position. Unfortunately, due to the lack of unanimity in the judges' reasoning, it is unclear whether Guatemala law applied as the *lex domicilli* or the *lex loci actus*, since those two connecting factors coincided on the facts (Mark Moshinsky in *The Assignment of Debts in the Conflict of Laws* (1992) 108 LQR 591 ("*Moshinsky*") at pp 598–599, 601). However, regardless of whether Guatamala law applied as the *lex domicilli* or *lex loci actus*, *Nunez* does not really advance the HRVs' case as it dealt with a *voluntary* assignment, as distinct from the Chinn Assignment.

85 I also note that the emphasis on the *loci actus* as a connecting factor appears now to have become outmoded even in the context of voluntary assignments, since modern conditions may render the place of the transaction to be purely fortuitous (JHC Morris, *The Conflict of Laws* (Sweet & Maxwell, 7th Ed, 2009) ("*Morris*") at para 15–027, *Moshinsky* at p 601 and *Macmillan No 3* at 402). *A fortiori* in the context of involuntary assignments.

(ii) US law as the proper law of the assignment

86 The HRVs also suggest that US law may apply as the proper law of the assignment. There are, however, at least two reasons for rejecting this suggestion. First, it would not be sensible for the proper law of the assignment to be pivotal in cases of involuntary assignments. As I have explained, the contract metaphor in cases of involuntary assignments is not well-founded, and consequently, focusing on the act constituting the assignment, may not be the most appropriate option. Second, it is important to note that there are two tiers of relationships involved in assignment of debts, *viz*:

(a) the relationship between the assignor (*ie*, the Foundations) and assignee (*ie*, the HRVs); and

(b) the relationship between the third party debtor (*ie*, the Swiss Banks) and the assignor or assignee.

As we are concerned with the proprietary effect of the Chinn Assignment, it would not be appropriate to focus purely on the relationship in the first tier. As was observed in *Moshinsky* at pp 594–595:

> It is true that in practice assignments are often made in conjunction with, or effected by, a contract to assign. In English law and some other legal systems the line between contract and property is blurred because a present contract to assign an existing debt operates as a conveyance of the debt in equity, and indeed the contract of assignment is itself sometimes referred to as an "assignment." However this should not be allowed to obscure the distinction between the contractual and the proprietary effects of the transaction. ... *Questions concerning the contractual relationship between the assignor and assignee, such as what warranties the assignor has given the assignee, (e.g. recourse in the case of non-payment by the debtor), are governed by the proper law of the contract between them*. ... *Questions concerning the proprietary aspects of the assignment, particularly whether title to the debt has passed to the assignee, should be referred to the most appropriate law for the transfer of property*. [emphasis added]

(iii) The lex situs and proper law of the debt

87 As Mr Elias argues, despite the labelling of the Chinn Assignment as an "assignment", its putative effect is essentially to effect a garnishment of the Swiss accounts in which the Funds were deposited. Questions relating to the effect of garnishment of debts may be broadly divided into two categories. First, whether the Singapore court should garnish a debt; and second, whether the Singapore court should recognise a foreign court's garnishee order or its equivalent as having discharged a debt (P J Rogerson, *The Situs of Debts in the Conflict of Laws – Illogical, Unnecessary and Misleading* (1990) 49(3) CLJ 441 ("*Rogerson*") at p 447).

88 These two categories of cases may be further sub-divided. Under the first category, the Singapore court may be asked to decide whether to make a garnishee order over a debt situated:

(a) in Singapore; or

(b) in another country.

(a) Under the second category of cases, which raises more difficult questions, the Singapore court may have to determine the validity of a garnishee order made in a foreign country over:

(c) a debt situated in Singapore; or

(d) a debt situated in yet another foreign country.

(b) This court's assessment of the Chinn Assignment falls within situation (d), which raises the most complex questions. There is, unfortunately, a dearth of cases dealing with situation (d). It thus becomes necessary to consider cases within situations (a) to (c) in order to draw out the relevant and underpinning principles.

Situation (a) and (b) cases

89 When determining whether to garnish a debt, courts have concentrated on the *situs* of the debt as an important factor in coming to a decision. As observed in *Rogerson* at p 450:

> ... It appears that so long as, *inter alia*, the debt has a *situs* in England, *i.e.*, the debtor is resident [in England], the [English] court will normally exercise its jurisdiction and make an order. Alternatively, if the *situs* of the debt is outside England then the court will normally not make the order.

The emphasis on the *situs* of the debt stems from the concern that the potential garnishee may otherwise be faced with the "double jeopardy" problem of multiple claims if the English court makes a garnishee order which does not discharge the debt of the potential garnishee to the judgment debtor according to the law governing the debt (*Morris* at paras 15–042 and 15–043; and *Carruthers* at para 6.65); Philip R Wood, *Conflict of Laws and International Finance* (Sweet & Maxwell, 2007) explains at para 10–018:

> ... If an attachment is recognised here but not recognised there, the third party debtor (the garnishee) may have to pay twice – once to his original creditor, the judgment debtor, and then again to the judgment creditor.

90 In *Societe Eram Shipping Co Ltd v Cie Internationale de Navigation* [2004] 1 AC 260 ("*Societe Eram*"), a Romanian shipping company sought to enforce a judgment against judgment debtors residing in Hong Kong. Execution was sought against moneys standing to the judgment debtors' credit

in a Hong Kong bank account. In third party proceedings, the Romanian company obtained an English garnishee order *nisi* against the bank but, on application for the order to be made absolute, the undisputed evidence was that Hong Kong law did not recognise such an order made in England in relation to a debt sited in Hong Kong. The House of Lords upheld the trial judge's decision to discharge the order *nisi*. Lord Bingham of Cornhill held (*Societe Eram* at [16]):

> In a much-quoted passage of his judgment in *Ellis v M'Henry* (1871) LR 6 CP 228, 234, Bovill CJ sitting in the Court of Common Pleas said:
>
> > "In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. ... *Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country*; ..."
>
> *This statement remains good law. ...*
>
> *It is evident that the Hong Kong law and procedure ... which deny recognition to a third party debt or garnishee order made in England in relation to a debt sited in Hong Kong is not an unusual or idiosyncratic rule but one which reflects general international practice*.
>
> [emphasis added]

9 1 *Societe Eram* was affirmed in *Kuwait Oil Tanker Co SAK and another v Qabazard* [2004] 1 AC 300 ("*Qabazard*"). Having obtained judgment in an English court, the judgment creditor sought execution against moneys standing to the judgment debtor's credit in a Swiss bank account. The English court refused to make a garnishee order. Lord Hoffmann held that (*Qabazard* at [16]–[17]:

> 16 ... It is not correct to characterise the garnishee or third party debt order as a claim in personam made against the third party in England. *It is enforcement of the judgment in rem against the debt, which in this case is situated in Switzerland.* Article 16(5) therefore confers exclusive jurisdiction on Switzerland and it is understandable that UBS's Swiss law expert should have said that a Swiss court would regard the order as an infringement of its sovereignty. ...
>
> 17 The other point is also governed by your Lordships' judgment in [the *Societe Eram*] case. *The Swiss debts, if any, are foreign debts and will not be discharged by compliance with the English order. So even without article 16(5), Langley J was right not to make the order*.
>
> [emphasis added]

9 2 *Societe Eram* and *Qabazard* may be contrasted against *Swiss Bank Corporation v Boemische Industrial Bank* [1923] 1 KB 673 ("*Boehmische*") where a garnishee order was made absolute by the English court. The plaintiff ("SBC") obtained judgment against a Czech bank ("BIB") carrying on business in Prague. SBC then obtained a garnishee order *nisi* in an English court attaching a debt owed by an English bank to BIB. The garnishee order was made absolute by the English Court of Appeal which held that there was no significant risk that the English bank would be compelled to pay twice. Banks LJ placed much emphasis on the *situs* of the debt, holding (*Boehmische* at 678–680):

> ... [A question is raised as to] whether there is any real risk that the garnishees, if they pay the judgment creditors under a garnishee order ... will be called upon to pay that amount over again in any proceedings which may be taken against them in Prague or elsewhere in any foreign country.
>
> *The decision of that question depends upon where the debt sought to be attached is situate*. If the debt is situate, or in other words if it is properly recoverable, in this country, then it would be discharged by payment under an order of our Courts and the garnishee need have no fear of being required to pay it a second time; but if the debt is situate, that is properly recoverable, in a foreign country, then it is not discharged by payment in this country under an order of the Courts of this country, and the debtor may be called upon to pay it over again in the foreign country. ...
>
> ... It is clearly expressed by Bovill C.J. in *Ellis v. M'Henry ...* "that *a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, ... will be an effectual answer to the claim, not only in the Courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries.*" ... *The debt in this case is situate in England and is discharged in whole or in part by payment under a garnishee order in England*, which is not mere procedure and is recognized in international law. ... The appeal must be allowed and the garnishee order must be made absolute.
>
> [emphasis added]

It is clear, from this extract, that the underlying concern is, as discussed, the risk of exposing the third party debtor to multiple claims. Atkin LJ also placed much emphasis on the *situs* on the debt, holding (*Boehmische* at 684–685):

> ... The plaintiffs having got judgment by an order of the Court now seek to get execution by attaching a debt which to my mind clearly "arises" and "is situate" within the territorial limits of the jurisdiction of the English Courts, if there is any difference between the two expressions. ... such process when executed has the effect of discharging the person who owes the debt thus attached from further liability to pay it. ... *Martin v Madel* is plainly distinguishable, and its only claim to be considered in this case is by reason of a sentence in the judgment of Vaughan Williams L.J. ... "By international law an execution which has been carried into effect in a foreign country under foreign law, and has taken away part of a man's property, is not recognized as binding." ... I feel satisfied that the very learned judge ... cannot have intended the wide meaning now attributed to the words used. ... *I think, when he used the words "execution which has been carried into effect in a foreign country under foreign law," the learned Lord Justice intended to exclude that foreign country in which the property happened to be situate*. ... [emphasis added]

Situation (c) and (d) cases

93 Situation (c) and (d) cases involve the forum court having to determine the validity of a foreign garnishee order. According to *Morris* ([85] *supra*) at para 15–044, whether an English court gives effect to a foreign garnishee order depends on whether the debt is situated, *ie*, properly recoverable, in the foreign country where the garnishee order was made. The significance of the *lex situs* in these situations is also recognised in *Halsbury's Laws of Singapore*, vol 6(2) (LexisNexis, 2009) at para 75.326:

> A foreign garnishee order may be recognised in the forum if the following conditions are satisfied: (1) the judgment which the garnishee order had been granted to enforce must be one recognized under the private international law of the forum; (2) the *situs* of the garnished debt must be within the territory of the court granting the order; and (3) payment of the garnished debt by the garnishee must have the effect under the foreign law of discharging the debt. On the basis that the garnishment process is actually expropriation of property, this appears to be an application of the *lex situs* principle, and not any rule relating to the recognition of foreign judgments or orders. ...

There are, unfortunately, few cases on this point, though two cases, *viz*, *Rossano v Manufacturers' Life Insurance Co Ltd* [1963] 2 QB 352 ("*Rossano*") and *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233 ("*Power Curber*") are consistent with this formulation.

94 In *Rossano*, the plaintiff Egyptian national ("Rassano") bought certain insurance policies from the defendant company ("MLI") which was incorporated according to Canadian law with branches in many countries, including Egypt. When the policies matured, Rassano brought an action in England claiming the money due under them. In defence, MLI argued, *inter alia*, that it was not liable to pay Rossano such sums as there were garnishee orders served upon MLI's Egyptian branch by the Egyptian tax department in respect of tax alleged to be due by Rassano and that payment to Rossano would expose MLI to the risk of having to pay the money twice. Significantly, the policies prescribed the mode of payment as "in banker's demand draft on London" or "on New York", *ie*, the *situs* of the debt was *not* Egypt (*Rosanno* at 379). Following the position taken in *Morris* (see [93] above), one might surmise that the Egyptian garnishee orders should not be recognised since the debt was not situated in Egypt. However, McNair J relied upon a different ground to refuse recognition of the validity of the garnishment orders, *viz*, that recognition of those orders would offend against the well-settled principle that an English court would not enforce a foreign revenue law. It was thus strictly unnecessary for McNair J to address the parties following arguments on the choice of law question outlined by the learned judge (*Rossano* at 376):

> On behalf of [MLI] it was submitted (1) that whatever be the proper law of the contract, the debt is and was situated in Cairo and that debt has been validly attached in the country where it was situated [*ie*, Egypt]; (2) that an English court will as a matter of private international law recognise and give effect to the validity of that attachment and not put the garnishee [*ie*, MLI] in peril of having to pay twice, and that it does not matter whether the attachment proceedings are in respect of a revenue claim; (3) that if the debt is not situated in Egypt, the English court will as a matter of comity give effect to the proceedings and will not put the garnishee in peril of having to pay twice if the court is satisfied (a) that by the law of the place of attachment the situs of the debt is in that place, that is, Egypt; or (b) that by the law of the place of attachment there is jurisdiction over the debtor [*ie*, Rossano], the garnishee [*ie*, MLI] and the garnishor [*ie*, the Egyptian tax department].
>
> [Rossano], on the other hand ... submitted (1) that the situs of the debt was not Egypt; (2) that the garnishee orders were invalid ... (3) that the garnishee orders provide no defence since (a) no payment has been made under either or (b) Neither of them was made until after the maturity date on which [MLI] should have paid; (4) that this court should not recognise the garnishee [order] as to do so would be indirectly at least to enforce a foreign revenue law; and (5) that the orders being in the nature of administrative orders and not orders of any court, an English court will not enforce them.
>
> Many of the points raised in these submissions raise difficult questions of private international law upon which English authority is scanty. But as I have reached the conclusion that the

> fundamental objection to the recognition of these orders is that their recognition would offend against the well-settled principle that the English court will not recognise or enforce directly or indirectly a foreign revenue law or claim, it is not necessary for me as a matter of decision to deal with many of the other points raised. ...

McNair J observed *obiter* (*Rossano* at 381–382) as follows:

> ... on the assumption that the garnishee orders or either of them are valid by Egyptian law, and by that law binding upon [MLI] ... being garnishee or sequestration orders imposed by the act of the executive, and not the result of any judicial proceedings, must or should an English court afford them recognition? ... *The editors of Dicey when stating in rule 92 that the validity and effect of an attachment or garnishment of a debt is governed by the lex situs of the debt are clearly referring to garnishee orders made by a competent court*. I should not be disposed on general principles to extend the recognition further.
>
> ... I now turn to the third submission advanced on behalf of [MLI]. This may be stated as follows: That the English courts will as a matter of comity give effect to foreign garnishee proceedings if the court is satisfied (a) that by the law of the place of attachment the situs of the debt is in the country of attachment, namely, Egypt, or (b) that by the law of the place of attachment there is jurisdiction over the garnishee, the debtor and his garnishor.
>
> As to the first limb of this proposition *I have already stated my views as to the situs of the debt and need not develop this point further since so far as I know no separate authority was relied upon under this branch of the argument*.
>
> As to the second limb of this submission based upon the jurisdiction of the foreign court over the debtor the garnishee and the garnishor, as at present advised I should not be prepared to accept that on the facts proved the Egyptian court had jurisdiction over Rossano. ... Even if the attachment order had been an order of the Egyptian court upon Rossano personally so as to have the status of a judgment of a foreign court, as at present advised I should not have concluded that the Egyptian courts had such jurisdiction over Rossano as to justify enforcement of that judgment at common law in the English courts.
>
> [emphasis added]

9 5 *Power Curber*, on the other hand, involved a Kuwaiti garnishment of sums payable in North Carolina under a letter of credit. The facts may be stated briefly. An American corporation ("PC") supplied goods to a Kuwaiti firm, Hammoudeh. In return, Hammoudeh asked its bank in Kuwait to issue a letter of credit to banks in the US. Subsequently, there was a Kuwaiti court order for provisional attachment of the sums payable by the Kuwaiti bank under the letter of credit to PC, which purported to prevent the Kuwaiti bank from making any further payments under the letter of credit. An action was brought by PC against the Kuwaiti bank in England for summary judgment *vis-a-vis* the sums due to PC under the letter of credit. In holding that the Kuwaiti order did not provide the bank with a defence against a claim for payment under the letter of credit, Griffiths J observed (*Power Curber* at 1242–1243) as follows:

> ... The bank submit that the judge should give leave to defend because payment of the sums due under the letter of credit is unlawful according to the proper law of the contract. ... *In my view the proper law of the letter of credit was the law of the state of North Carolina. ... The bank could not have discharged its obligation by offering payment in Kuwait*. ...

> Secondly, it was submitted that payment was unlawful according to the lex situs of the debt which it is said is Kuwait. But ... *[t]he] lex situs of the debt is North Carolina, and this ground for giving leave to defend* cannot be supported.
>
> ...
>
> *... [The English court] must face the choice between enforcing the obligation upon the bank to pay under its irrevocable letter of credit or recognising the order of the Kuwait court*.
>
> *I have no doubt that we should uphold the obligation to pay under the irrevocable letter of credit and remove the stay.* Letters of credit have become established as a universally acceptable means of payment in international transactions. ... they have been rightly described by that most distinguished commercial lawyer Kerr J. as "the life-blood of international commerce": ...
>
> *...*
>
> *There is no recognised rule of international law that compels this court to recognise this ex parte order of the Kuwaiti court.* It is of course entitled to be treated with respect and wherever possible this court will in the interests of comity seek to recognise and uphold the order of the court of a friendly state. But unhappily in this case the approach of the Kuwaiti court appears to be so out of step with that of our own courts and the courts of other trading nations that I fear we cannot recognise it. The choice lies between upholding the world-wide practices of international commerce or the order of the Kuwaiti court. I choose the first option and would remove the stay.
>
> [emphasis added]

In short, the court refused to recognise the Kuwaiti order which was ineffective to discharge the debt under North Carolina law. It is unclear whether North Carolina law was applied as the *lex situs* or proper law of the letter of credit since those connecting factors coincided on the facts. What was clear was the obvious concern that the banks could otherwise be exposed to multiple claims.

The *lex situs* or the proper law of the debt?

96 The cases discussed thus far indicate that the *lex situs* assumes a large measure of significance in issues to do with garnishee orders involving foreign elements. This position has however been criticised. The most obvious criticism arises from the artificiality of treating debts as capable of having a *situs* (*Rogerson* ([87] *supra*) at pp 454–455):

> The debt is only a right, a claim; and although it takes on the appearance of other physical property because of its value and its transmissibility it has different characteristics which are fundamentally important. It can only exist anyway in an abstract sense and it depends on the willingness of some system of law to enforce it as an obligation in order to exist at all. That system of law – usually referred to in conflicts terms as the proper law of the debt – may well not be the residence of the debtor, nor the *situs* of the debt as chosen by the English court. Thus, the idea of a debt having a *situs* is illogical: first, because it does not have one in a generally acceptable sense; secondly, because that *situs* may not coincide with the more generally accepted governing law.

97 Flowing from this is the more fundamental objection that using the *situs* as a connecting factor

adds an extra unnecessary layer to the choice of law analysis, which obfuscates rather than clarifies the *actual* connecting factor relied on by the courts. This objection has been stated in the following terms (*Rogerson* at p 453):

> By ascribing a *situs* to it the court is going through an extra, unnecessary process. ... in order to decide what the *lex situs* is the court has had to use its rules of ascription of a *situs* to debt – which is, broadly, the place of the debtor's residence. By using a choice of law rule which hides this fundamental process the court deludes itself as to the real basis for its decision and also denies itself any opportunity to ask whether the choice of law rule is appropriate. ...

In other words, as a debt does not *in reality* have a *situs*, deferring to the *lex situs* requires the court to attempt to locate the *situs* by asking further questions, *eg*, where the debtor is resident, where the debt is enforceable, *etc*. This obscures the true basis for the court's conclusion on the choice of law and results in the *situs* being an unstable connecting factor. Such a situation is not desirable because a choice of law rule requires a connecting factor that, ideally, points to a *single* system of law. The *situs* of the debt fails to achieve this as (*Rogerson* at 455):

> ... A debtor may have more than one residence, the debt may be enforceable in any country in which a court will assert jurisdiction over the debtor and the debt may be payable in more than one place. ...

Indeed, it must not be assumed that, where a debt is situated in England, there will never be a risk of double jeopardy and that jurisdiction will always be assumed (Cheshire, North & Fawcett, *Private International Law* (Oxford University Press, 14th, 2008) at p 1239; Dicey, Morris & Collins, *The Conflict of Laws*, vol 2 (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey, Morris & Collins, vol 2*") at para 24–082).

98 In *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd (trading as Shell International Trading Co)* [1990] 1 AC 295, a German company ("DST") was awarded, pursuant to arbitration, a sum of money from a company incorporated in R'As al-Khaimah ("Rakoil"). The arbitration award was recognised under English law but not under the law in R'As al-Khaimah. Before the English court, DST sought to garnish a debt owed to Rakoil by Shell International Petroleum ("Shell") which was the English subsidiary of an Anglo-Dutch group of companies. Shell was subject to the jurisdiction of the English court and the debt was situated in England. It was, however, clear that the garnishee order would not be recognised in R'As al-Khaimah. Payment to DST under an English garnishee order would therefore not discharge Shell from its obligations under R'As al-Khaimah law. It also appeared that the courts of R'As al-Khaimah were in a position to force Shell to pay. As it would have been unfair to make Shell pay twice, the House of Lords held that the garnishee order should not have been made.

99 Against this background, several authors have proposed that the *lex causae* should be the proper law of the *debt*, rather than the *lex situs* (*Rogerson* at pp 459–460, *Carruthers* at paras 6.31–6.32). Indeed, the authors of *Dicey, Morris & Collins, vol 2*, at paras 24–082 to 24–083 suggest that greater attention should be given to the proper law of the debt in cases of involuntary assignments:

> **24–082** ... it is unclear why no direct attention is paid to the identity of the *lex contractus*. The discharge of a debt is normally thought to be a matter governed by the *lex contractus*, and if that is taken to be a general rule, English legislation will only discharge a debt which is governed by English law. The correct response to this point, ... may be that if another court may refuse to recognise the discharge of the debt as resulting from the English order even though the debt was situated in England, and would hold the third party's liability to the judgment creditor to remain

undischarged, the court should decline to make the order absolute.

... The best illustration of this is *Deutsche Schachtbau v Shell International Petroleum Co Ltd*.

24–083 ... *Although the point has not arisen for decision, it is plainly arguable that a foreign order in the nature of a garnishment or third party debt order should not be recognised in England as discharging the liability of the third party to the judgment debtor unless the debt is considered to be so discharged by the lex contractus*.

[emphasis added]

100 Similarly, it is observed in *Carruthers* at paras 6.31–6.32 that:

6.31 To formulate a mechanical choice of law rule – whether based on the law of the domicile, or the law of the place where the act or transaction occurred, or the law of the *situs* – which is intended to govern every question which potentially may arise in connection with the assignment of intangible movable property, clearly is contentious. A more viable rule is one which is more flexible, and which permits account to be taken of each factor relevant to the issue in question. The difficulty inherent in applying a rigid, exclusive connecting factor, stemming from a resolute characterization of the problem in issue, was highlighted in *F&K Jabbour v Custodian of Israeli Absentee Property*, and more recently in *Raiffeisen Zentralbank Őesterreich v Five Star General Trading LLC*. Staughton LJ in *Macmillan* saw the benefits of applying in relation to simple contract debts not the *situs* rule, per se, but the related, though more flexible, factor of 'proper law of the right'.

6.32 ... that is, *to the legal system with which the right has its closest and most significant connection; the proper law of the right, in many cases, will constitute the law of the situs of the intangible movable property. But the proper law approach, while leading often to application of the law of the situs, permits additional flexibility insofar as the constituent parts of a particular transaction* (eg capacity of the parties, formal validity of the transaction, essential validity of the transaction etc) *may be referred to the particular legal system with which those issues, respectively, enjoy the closest and most significant connection*. ...

[emphasis added]

In light of the foregoing, it is important to note that although the proper law of the debt often coincides with the *lex situs*, they are conceptually different and there may be situations where both lead to the application of different laws.

Stage 3: The governing law

101 Having explained that the appropriate connecting factor where the forum court must assess the validity of a foreign garnishee order *vis-a-vis* a foreign debt is the proper law of the debt (*ie*, the system of law bearing the closest and most significant connection to the debt), I am satisfied that the law governing the issue at hand is Swiss law. At the time of the execution of the Chinn Assignment in July 1995, the debt, being the Swiss Deposits, were in Switzerland, the third party debtors were Swiss banks and the Swiss Deposits were the subject of the Swiss freeze orders. By contrast, the only connection between the debt and US law was the fact of the Chinn Assignment itself, arising from proceedings brought in the US court by American parties. In light of this, I find that it is Swiss law, and not US law, which bore the closest and most significant connection with the Swiss Deposits at the material time.

102 Dr Lanzlinger was the sole expert on Swiss Law, appearing on behalf of the Republic and PNB. He testified that the Chinn Assignment had no legal effect whatsoever in Switzerland, reasoning that, as an assignment, the Chinn Assignment had no effect on the Swiss Deposits and the Foundations since the Foundations were separate and distinct from the Marcos Estate. In his words:

> ... what I see here is we have representatives of the estate of Mr Marcos disposing over a claim they don't have because it's not their claim; it's the claim of the Foundations. So therefore under Swiss contract law, this assignment doesn't really affect the banks and it doesn't affect the relationship between the banks and the Foundations because for getting there, you would have the Foundations assign the claim and not someone else. And for the purposes of Swiss law, the representatives of the estate of Marcos are someone else. Therefore, under Swiss law, that assignment of the claimants of the Foundations against the banks did not take place with this piece of paper.

103 The force of this argument is of course attenuated in light of the Swiss Federal Supreme Court's holding that the Foundations were "nothing but a legal construction to hide the true ownership of the assets of the Marcos family" (see [17] above). However, Dr Lanzlinger had three extra strings to his bow. First, he testified that *even if* it was assumed that the Foundations were physically present during the US proceedings giving rise to the Chinn Assignment and had purported to assign their interests in the Funds under the Chinn Assignment, the Chinn Assignment would nevertheless be ineffective, given the existence of the Swiss freeze orders at the material time, which froze the Foundations' ability to transfer their rights *vis-a-vis* the Funds:

> But let's go that far and say let's assume that as well. Now at the time [the Foundations] signed this piece of paper purportedly, under the assumption, those assets have already been the subject of a freeze order for a long time. So therefore, *even if [the Foundations] had transferred or attempted to transfer their rights under their contract with the banks in a legal---theoretically legal correct manner, it would still not have any effect because those---those relationships have been frozen and their rights has been to dispose all the assets has been frozen as well, so to speak, so they couldn't really assign the claim pending the freezing order*. So in effect, and that is I refer to that decision in my declaration. There is Supreme Court decision of the year 2000, the Swiss Supreme Court, which, made it clear that pending a freeze of a claim, you cannot assign that claim, which is what would happen here as well. [emphasis added]

104 Second, Dr Lanzlinger explained that assuming that the Chinn Assignment was a court order, it had no effect whatsoever in Switzerland since it was not registered and declared enforceable in Switzerland:

> Assuming it is a Court order, which I understand it to be, it would only then have effect in Switzerland against the banks and the parties over which Swiss Courts have jurisdiction. If that order has been declared is enforceable in Switzerland because the Hawaiian Court action do not have any effect in the Swiss territory unless it's been declared enforceable. And that there was no attempt to get there and if---if they were, intend to get there, it would not have been declared enforceable. ...

105 Third, Dr Lanzlinger stated in his affidavit of evidence-in-chief that the Swiss courts would, in any event, refuse to recognise the Chinn Assignment because the Swiss deposits were already subject to existing criminal Swiss freeze orders:

> 53. At the time the Chinn Assignment was signed in 1995, the Marcos Assets were already the

subject of [the Swiss freeze orders] ... The orders freezing the Marcos Assets issued by the Swiss cantonal authorities ... were entered pursuant to [the IMAC procedures], and accordingly, are deemed criminal court orders under Swiss law.

54. [The Swiss freeze orders] were still in effect when the Chinn Assignment was entered and remained in effect while the Marcos Assets were in Switzerland. In fact, the Marcos Assets were subject to [the Swiss freeze orders] until the moment they were transferred out of Switzerland to the PNB escrow accounts, as per the judgments of the Swiss Federal Supreme Court in its 10 and 19 December 1997 decisions.

55. Accordingly, *a Swiss court would not recognize the Chinn Assignment as having any effect whatsoever on the Marcos Assets*.

[emphasis added]

106 In light of the foregoing, the HRVs' claim in this interpleader also fails as, under Swiss law, the Chinn Assignment did not vest in the HRVs any proprietary right, interest or title to the Funds. While this court sympathises with the HRVs' plight during the rule of Ferdinand E Marcos, it must act in a principled manner when dealing with such questions of law and is bound by the enunciated principles to reject the HRVs' claim. This result is of course unfortunate, since, as confirmed by the chairman of the PCGG during cross-examination, no compensation of the HRVs has taken place out of the sum in excess of US$600m which has been recovered by the Republic from the Marcos Estate. However, some comfort may be drawn from the testimony of the chairman of PCGG confirming that legislation for the compensation of the HRVs is being debated. There is thus some hope that the HRVs will soon receive the redress they long await.

107 I should also add that the same result would have been reached had US law been the governing law *vis-a-vis* the effect of the Chinn Assignment. In this connection, Ms Bronster testified that under Hawaii law a court has neither the power to execute an assignment of property as a means of executing a money judgment nor the power to assign out-of-state assets as a means of executing a judgment. I note that while Prof Levine for the HRVs argued that the US court had such power to order the Chinn Assignment, his opinion was rendered in ignorance of the existence of the Swiss freeze orders at the material time:

Mr Elias: My first question on this is, why is it that you have not mentioned the freezing order in Switzerland in all your affidavit? Why did you ignore the fact that there was a freezing order in Switzerland as early as 1986? Is there a reason you omitted it from your opinion and affidavit?

Prof Levine: I was only asked to assume certain facts in the case, er, I don't think it's relevant either to what I have to say about the assignment.

Mr Elias: Let's try my question again, why did you ignore it? Because your instructions were not to focus on it or pay attention to it?

Prof Levine: Nobody has shown me a freezing order.

...

Mr Elias: So basically I can put this very simply. Because you were not told about this, you didn't pay any attention to it and the consequences thereof has not been considered by you. For a---

Prof Levine: There are a lot of things I wasn't told about.

During cross-examination by Mr Mohan, Prof Levine confirmed again that he had not been aware of the Swiss freeze orders at the time his opinion was rendered.

108 Furthermore, the HRVs themselves agree that third parties, *eg*, the Swiss Banks who were not subject to the jurisdiction of the US Court, were not bound to comply with the direction in the Chinn Assignment to "perform all necessary acts to effect the transfer of the above bank accounts forthwith". In Prof Levine's words, "the ownership interest would be unchanged":

Mr Mohan: Professor, you will agree with me that as a matter of pure legal principles between parties to an assignment, if the parties are under a disability, if one of the parties to an assignment is under any form of disability, the assignment would be ineffective?

Prof Levine: Correct.

Mr Mohan: Okay. And likewise as between parties to an assignment, third parties would not be affected by the assignment. ...

Prof Levine: *The ownership interest would be unchanged*.

Mr Mohan: Will be unchanged, correct.

...

Mr Mohan: ... Was any act---act done to effect the transfer of the above assets to Robert A Swift?

Prof Levine: You mean in---with---with respect to the banks we've talked about?

Mr Mohan: Yes.

Prof Levine: I don't---I don't believe so.

Mr Mohan: So on what basis are you saying that the assignment has taken effect?

Prof Levine: Because the assignment took effect between, as I've said, the two parties in front of the Court. It's---it's---it's---again, it comes back to the separate issue of was this the right forum to have the banks do something? That's a---that's a separate question on the basis of the assignment.

Mr Mohan: Do you agree with me that at this point in time, the funds were not before the District Court in Hawaii?

Prof Levine: Correct.

Mr Mohan: ... What jurisdiction did the Hawaii Court have to deal with assets which are in a foreign jurisdiction? ...

Prof Levine: They---they wouldn't. I mean, they wouldn't. They would have jurisdiction over the parties in front of them and then you might need further steps elsewhere.

Mr Mohan: So the Court would not have any jurisdiction in respect of the funds themselves. Am I correct?

Prof Levine: *In a sense like in rem jurisdiction or something, they did not have that jurisdiction*.

Mr Mohan: *Neither would the Court be in a position to determine any questions of ownership of the funds independent of the parties who were before it. Am I correct?*

Prof Levine: *Correct.*

[emphasis added]

109 In light of the foregoing, I am of the view that the Chinn Assignment did not vest in the HRVs the title to the Funds at the date of the Chinn Assignment. This conclusion renders the Re-registration issue (see [30] above) moot; regardless of whether the Chinn Assignment remained alive after February 2005, its effect under Swiss law and even US law, was *not* to vest in the HRVs' title to the Funds. Consequently, the HRVs' claim is dismissed.

Analysis of PNB's claim

110 The HRVs deny that, as escrow agent, PNB ever held legal title to the Funds. Instead, they submit that PNB was a one-time custodian of the Funds with the bare right of immediate possession, *ie*, a right to repayment *vis-a-vis* WestLB, which terminated when WestLB interpleaded the Funds and the Singapore courts appointed a new escrow agent for the credit of the present proceedings. Alternatively, the HRVs argue that PNB renounced legal title to the Funds on the day the Forfeiture Judgment was passed and its role as escrow agent terminated.

111 On consideration of the relevant authorities, I reject the argument that PNB never held legal title to the Funds. When the Swiss authorities ordered the Funds to be paid to PNB, it did so with the intention of making PNB a stakeholder. The position of a stakeholder was described in *Harington v Hoggart* (1830) 1 B & Ad 577 by Lord Tenterden CJ at 586:

> ... A stakeholder does not receive the money for either party, he receives it for both; and until the event is known, it is his duty to keep it in his own hands. If he think fit to employ it and make interest of it, by laying it out in the funds or otherwise, and any loss accrue, he must be answerable for that loss. ...

Similarly, cl 2(vii) of the Escrow Agreements clearly imposed on PNB a duty to hold the moneys pending the outcome of "a final and enforceable judgment of the Sandiganbayan or any final and enforceable judgment of any competent court in the Philippines".

112 In *Thomson Hill Pte Ltd v Chang Erh and another appeal* [1992] 2 SLR(R) 366 ("*Thomson Hill*"), our Singapore Court of Appeal considered the legal position of a stakeholder. At [11], it first took cognisance of Lord Denning MR's dissenting decision in *Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426 at 435–436, where his lordship described a stakeholder as a trustee for both vendor and purchaser. It observed that Lord Denning's statement appeared to have been approved by the House of Lords in *Sorrell v Finch* [1977] AC 728 (*Thomson Hill* at [11]), before noting that that position had been challenged by Pennycuick VC in *Potters v Loppert* [1973] Ch 399 (*Thomson Hill* at [15]):

> ... According to Denning MR in ... *Burt v Claude Cousins*, the status of a stakeholder is that of a trustee. However, this view of the matter was dissented from by Pennycuick VC in *Potters v Loppert* [1973] Ch 399, who felt perplexed that Denning MR should on the one hand describe the

stakeholder as a trustee and yet on the other hand say that the stakeholder was not liable for interest arising from the deposit. *It has always been a rule of equity that a trustee is accountable for profit derived from his trust estate*. Pennycuick VC preferred to hold that the stakeholder's liability was of a contractual nature. We would be inclined to accept the latter as the correct view of the matter. There is no need to further label the stakeholder as a trustee or agent. *The position of a stakeholder is no doubt similar to that of a trustee, but they are not identical*. [emphasis added]

113 The difficulty the Court of Appeal in *Thomson Hill* faced with characterising the stakeholder as trustee without qualification was the stakeholder's entitlement to interest arising from the deposit. That difficulty does not arise in this case since the Escrow Agreements specifically provided that the interest would follow the escrow funds. Significantly, the Escrow Agreements state that PNB was "authorised to perform trust functions" and instructed PNB to ring fence the Funds, *and interest on the Funds*, in separate accounts. The material portions of the Escrow Agreements are as follows:

This ESCROW AGREEMENT executed ... between:

[PCGG]

-and-

[PNB], a commercial banking corporation ... authorized to perform trust functions through its Trust Banking Group ...

...

1. Certain funds (the Escrow Funds) will be delivered and deposited in accordance with an order by Examining Magistrate Peter Cosandy, or any order upon appeal (the "Order") ... into an account of [PNB].

2. [PNB] will

(i) keep the Escrow Funds received ... and any interest and other earnings on said Escrow Funds in an account ... referred to as the "Account");

(ii) keep the Escrow Funds and any interest or other earning in the currency as received unless reinvested in accordance with the Investment Policy [ordered by the Swiss authorities];

(iii) keep any shares, bonds or other securities as received unless reinvested in accordance with the Investment Policy;

(iv) ...

(v) invest any moneys or time deposits received with or through any of the banks named or described in the Order, or to reinvest the proceeds of any shares, bonds or any other securities by way of payment, repayment or otherwise, in either time deposits or, in case of bonds or similar, in equivalent securities, all subject to instructions as follows, and all with the general aim to retain the value of the Escrow Funds received.

...

> 5. We hereby guarantee that the Escrow Funds, if invested with a Philippines' bank or otherwise, will not become the asset of such bank or other body where the investment is made, but remain the Escrow Funds which the Account is entitled to, and therefore such Escrow Fund will not be affected by any receivership, bankruptcy, insolvency or other measure taken over such banks or the other body's Escrow Funds, and that such Escrow Funds will not be pledged or encumbered otherwise save in accordance with the agreement between [the Foundations] and the [PCGG].

In light of the foregoing, I am of the view that PNB holds legal title to the funds as trustee of the same.

114 Even if I am mistaken in my characterisation of PNB's legal position as trustee, it still remains certain that legal title to the Funds was transferred to PNB. This was the finding of fact made by the Court of Appeal in an earlier decision on an interlocutory summons on the same matter: see *Republic of the Philippines v Maler Foundation* [2008] 2 SLR(R) 857 ("*CA 7/2007*"). In particular, the court held (*CA 7/2007* at [29]) that:

> The legal relationship between PNB, as the depositor of the Funds and the original account holder, and [WestLB], as the depositee bank, was originally that of creditor and debtor. As such, *PNB had the legal title to the Funds and was entitled to immediate repayment of the Funds as and when the deposits matured.* PNB did demand repayment of the Funds from [WestLB], but was unable to obtain payment as [WestLB] had by then received adverse claims from [the Foundations]. [emphasis added]

The court in *CA 7/2007* went on to hold at [63(c)] that:

> There was no reason for PNB to make a claim to the Funds on [the Republic's] behalf when PNB itself as in a position to claim the Funds on its (PNB's) own behalf. ***As the original account holder and the legal owner of the Funds while they were held in accounts at [WestLB], PNB was in as good a position as [the Republic] to recover the Funds from [WestLB]*** . Any action taken by PNB to recover the Funds for itself would have been done *not on behalf of [the Republic]* (which claimed a proprietary interest in the Funds by reason of the Forfeiture Order), but on its (PNB's) own behalf, albeit *for the benefit of [the Republic]*. [emphasis in original in italics' emphasis added in bold italics]

115 PNB was not divested of its legal title when the Funds were ordered to be held by D&N, and subsequently HEP, since it is clear that any order made by the court for deposit of the property pending determination of title is intended to release the applicant from the proceedings as soon as possible, and is not in and of itself a determination of title (GP Selvam, *Singapore Civil Procedure* (Sweet & Maxwell Asia, 2007) at para 17/5/12). This is in line with the rationale behind the interpleader process which is instituted to provide relief to an applicant who is harassed by competing legal claims against the same property such that he does not know to whom the property ought to be delivered, hence compelling him to prosecute the claims and have them adjudicated upon (see *De La Rue v Hernu, Peron & Stockwell Ltd* [1936] 2 KB 164 at 171–172). An alleged adverse claim cannot divest the initial owner of his *prima facie* title; the initial owner retains an interest in the property to remain a claimant in the interpleader. As the court in *CA 7/2007* held at [14]:

> On 24 March 2004, the court ... ordered the Funds to be transferred to an escrow account in the name of PNB's then solicitors, [D&N], "for the credit of these proceedings". However, the court did not remove PNB as the escrow agent (and this would be consistent with the principle of comity as PNB had been appointed as such by [Escrow Agreements] between [the Republic] and

> the Swiss authorities). As such, D&N (and later [HEP]) presumably held the Funds as PNB's nominee, but subject to the control of the court for the credit of the interpleader proceedings. ... [emphasis added]

D&N, and subsequently HEP, held the Funds as PNB's nominees, subject to the court's control for the credit of these proceedings. In other words, until title is conclusively determined in these proceedings, PNB's position as account holder of the WestLB bank account gives it a *prima facie* interest in the Funds which it may assert in the interpleader.

116 Finally, the argument regarding PNB's alleged "renouncement of title" is untenable as the actual legal status of the property is a matter of law to be determined by the court; parties' perception of their status cannot affect the court's judgment of the matter.

Conclusion

117 For the reasons stated above, I dismiss the claim by the Republic. The Republic's claim was premised on the Forfeiture Judgment, which this court cannot recognise given that the Funds were never in the Philippines (see [63]–[65] above). In any event, I have explained (see [66]–[74] above) that the Republic's claim depends on this court's indirect enforcement of a foreign penal law (RA 1379), which this court would decline to do.

118 The HRVs' claim is also dismissed since the Chinn Assignment, which they seek to rely on, failed to transfer title in the Funds to them under Swiss law (see [102]–[109] above). On the other hand, the claim by PNB, which acquired legal title to the Funds via the Escrow Agreements is allowed. Consequently, the Foundations have failed to demolish all the other opposing claims. Their claim is, accordingly, also dismissed.

119 I will hear the parties on costs.

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