The Republic of the Philippines *v* Maler Foundation and others and other appeals [2013] SGCA 66

Case Number	: Civil Appeals No 109, 110 and 111 of 2012 (Originating Summons No 134 of 2004)
Decision Date	: 30 December 2013
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Belinda Ang Saw Ean J; Woo Bih Li J
Counsel Name(s)	: Harry Elias SC, S Suressh, Andy Lem, Sharmini Selvaratnam and Sunil Nair (Harry Elias Partnership LLP) for the appellant in Civil Appeal No 109 of 2012 and the respondent in Civil Appeal No 110 of 2012 and Civil Appeal No 111 of 2012; Kenneth Tan SC and Soh Wei Chi (Kenneth Tan Partnership) for the appellant in Civil Appeal No 110 of 2012 and sixth respondent in Civil Appeal No 109 of 2012; Chandra Mohan, Mabelle Tay and Natalie Balakrishnan (Rajah & Tann LLP) for the appellant in Civil Appeal No 111 of 2012 and first to fifth respondents in Civil Appeal No 109 of 2012; Professor Yeo Tiong Min SC as amicus curiae.
Parties	: The Republic of the Philippines — Maler Foundation and others

Conflict of Laws – Characterisation

Conflict of Laws – Foreign judgments – Recognition

Conflict of Laws – Property

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 4 SLR 894.]

30 December 2013 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 These are three appeals against the decision of a High Court Judge ("the Judge") in *WestLB AG v Philippine National Bank and others* [2012] 4 SLR 894 ("the Judgment") determining entitlement to the sums of US$16.8m and £4.2m ("the Funds") held in an account with the Singapore branch of WestLB AG ("WestLB"). The appeals presented the court with a novel factual scenario which did not appear to be readily susceptible to the mechanistic application of established conflict of laws rules. A *sui generis* situation cannot, however, justify a radical departure from settled law. The issues before this court should still be approached on the basis of principle.

2 The appellant in Civil Appeal No 109 of 2012 ("CA 109/2012") is the Republic of the Philippines ("the Republic").

3 The appellants in Civil Appeal No 110 of 2012 ("CA 110/2012") are the plaintiffs in a human rights class action suit ("the Human Rights Victims") brought against the deposed President of the Philippines, Ferdinand E Marcos ("Mr Marcos"), in the United States District Court for the District of Hawaii. The Human Rights Victims are also the sixth respondents in CA 109/2012. The Human Rights Victims form a class comprising 9,539 civilian citizens of the Philippines, their heirs and beneficiaries, who had in December 1995 obtained final judgment in the sum of US$1,964,005,859.90 against Mr Marcos' estate ("the Marcos Estate") after Mr Marcos passed away while the litigation was pending.

4 The appellants in Civil Appeal No 111 of 2012 ("CA 111/2012") are the Maler Foundation, Avertina Foundation, Palmy Foundation, Vibur Foundation and Aguamina Corporation (hereafter collectively described as "the Foundations"). The Foundations are also named as the first to fifth respondents in CA 109/2012. The Maler Foundation, Avertina Foundation, Palmy Foundation and Vibur Foundation are foundations established in Vaduz, Liechtenstein, and the Aguamina Corporation is a Panama-incorporated corporation. The Foundations were the purported original named account holders of certain sums of money that were previously held in various bank accounts in Switzerland. The Funds in dispute are derived from these sums.

5 The Philippine National Bank ("PNB") is the respondent in both CA 110/2012 and CA 111/2012. PNB is a bank incorporated in the Philippines with its principal office in Manila.

6 After the first hearing on 7 February 2013, we appointed Prof Yeo Tiong Min SC ("Prof Yeo"), Dean of the Faculty of Law of the Singapore Management University, as *amicus curiae*. The parties subsequently made submissions on Prof Yeo's opinion.

Facts

Background to the dispute

7 In February 1986, Mr Marcos was overthrown by a non-violent coup that was later popularised as the People Power Revolution, and was exiled to Hawaii with his wife Imelda Marcos ("Mrs Marcos"). On 28 February 1986, Mr Marcos' successor President Corazon C Aquino issued Executive Order Nos 1 and 2 creating the Presidential Commission on Good Government ("PCGG"), which was given the mandate of recovering the ill-gotten wealth accumulated by Mr Marcos, his family and associates. [note: 1] Article XI Section 4 of the 1987 Constitution of the Republic of the Philippines granted the anti-graft court known as the Sandiganbayan – constituted under Article XIII of the 1973 Constitution of the Republic of the Philippines – continued jurisdiction over criminal and civil cases involving graft and corrupt practices by public officers and employees in relation to their offices, and by Executive Order Nos 14 and 14A, the jurisdiction of the Sandiganbayan was extended to include cases investigated by the PCGG. [note: 2]

8 On 7 April 1986, the Solicitor General of the Philippines sought formal assistance from the Swiss authorities pursuant to the Switzerland Federal Act on International Mutual Assistance in Criminal Matters (20 March 1981) ("IMAC"). The Republic requested the Swiss authorities to provide information on assets belonging to Mr and Mrs Marcos that had been deposited in Switzerland, and to take the necessary precautionary measures to freeze such assets. [note: 3]

9 The Swiss authorities in the cantons of Zurich, Fribourg and Geneva gave in-principle acceptance to the Republic's requests for legal assistance and, between April 1986 and January 1990, issued freezing orders against various bank accounts held in the names of the Foundations ("the Swiss Deposits"). In the meantime, Mr Marcos passed away on 28 September 1989. The orders were subject to multiple appeals by the Foundations, Mrs Marcos and the Marcos Estate; this culminated in two concurrent decisions of the Federal Supreme Court of Switzerland, both dated 21 December 1990, which upheld the freezing orders in Fribourg and Zurich with slight modifications and gave directions for the in-principle transmission of the Swiss Deposits to the Republic. In the judgment relating to the assets located in Zurich, the Supreme Court ordered that the actual remittance of the Swiss Deposits would be deferred:

> … until an executory decision of the Sandiganbayan or another Philippine Court legally competent

in criminal matters concerning their restitution to those entitled or their confiscation is presented. [note: 4]

A similar order was given for the appeal against the orders authorising transmission of the assets in Fribourg. [note: 5] The proceedings before the Philippine court or tribunal had to be instituted within a year of the decision and comply with minimal guarantees of due process under the Federal Constitution of the Swiss Confederation and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 XI 1950). [note: 6]

10 The Republic filed a petition to the Sandiganbayan on 17 December 1991, seeking forfeiture of the assets held by Mrs Marcos and the Marcos Estate, including the Swiss Deposits in the name of the Foundations ("the Forfeiture Proceedings"). This petition was made under the provisions of Republic Act No 1379 ("RA 1379"), a statute governing the forfeiture of property that is unlawfully acquired by public officials and employees. [note: 7]

11 In the meantime, in April 1986, soon after the People Power Revolution, a human rights class action suit on behalf of over 10,000 putative class members was initiated by one Robert A Swift ("Mr Swift") against Mr Marcos in the United States District Court for the District of Hawaii ("the District Court of Hawaii"). Following Mr Marcos' death, the Marcos Estate was substituted as the defendant and his personal representatives continued to contest the litigation. On 3 February 1995, judgment for the sum of US$1,964,005,859.90 was entered against the Marcos Estate in favour of the Human Rights Victims, together with a preliminary injunction enjoining, *inter alia*, any transfer, conveyance or disposal of the Swiss Deposits. [note: 8] The judgment was appealed to the United States Ninth Circuit Court of Appeal and affirmed in *Maximo Hilao v Estate of Ferdinand Marcos* 103 F 3d 767 (9th Cir 1996). [note: 9]

12 On 10 July 1995 [note: 10], an Order Granting Additional Relief for Contempt was issued against the representatives of the Marcos Estate which stated: [note: 11]

> 4. On or before July 10, 1995 Imelda R. Marcos and Ferdinand R. Marcos shall execute an assignment of these bank accounts…in favor of the [Human Rights Victims] for deposit…and deliver the same to [the Human Rights Victims'] Lead Counsel.
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> …
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> 6. In the event Imelda R. Marcos and Ferdinand R. Marcos 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 [the Human Rights Victims'] Lead Counsel.

13 Following the failure of the legal representatives of the Marcos Estate to execute the assignment ordered above, a deed of assignment dated 14 July 1995 was executed by one Walter AY Chinn – a Clerk of the District Court of Hawaii – on behalf of the said legal representatives (hereafter referred to as "the Chinn Assignment"). The terms of the Chinn Assignment were as follows: [note: 12]

> 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, [the Human Rights Victims'] Lead Counsel for the benefit of the [Human Rights Victims] 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.*

[emphasis added]

14 The Republic made a second request for assistance from the Zurich District Attorney in August 1995 ("the Second Request"), seeking the immediate transfer of the Swiss Deposits into escrow accounts held by PNB in the names of each of the Foundations. [note: 13] A number of escrow agreements dated 14 August 1995 ("the Escrow Agreements") were also entered into between the PNB and the PCGG on behalf of the Republic. The material clauses are as follows: [note: 14]

WHEREAS, the [PCGG] is entrusted with the recovery of the ill gotten wealth amassed by Ferdinand E. Marcos, his family and the cronies, and

WHEREAS, a number of actions against the Estate of Ferdinand E. Marcos and his heirs are pending in the Sandiganbayan (the "ACTIONS"); and

WHEREAS, the Actions name certain assets actually held in accounts with certain Swiss Banks as ill gotten wealth claimed to be the property of the Republic of the Philippines; and

WHEREAS, such assets are currently frozen under a mutual assistance procedure instigated by the [PCGG];

WHEREAS, the Swiss authorities may be prepared to order the transfer of such assets to the Philippines to be held in escrow pending the resolution of the Actions, provided however that no dissipation of the assets take place other than in accordance with a final and enforceable judgement of the Sandiganbayan or any other competent court in the Philippines, or in accordance with an agreement between [the Foundations] or any successor in right and/or any beneficiary …

NOW, THEREFORE, for and in consideration of the foregoing premises, as well as the terms and conditions hereinafter set forth, the parties hereto hereby agree as follows:

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

2. The ESCROW AGENT will

(i) keep the Escrow Funds received with respect to [the Foundations] and any interest and other earnings on said Escrow Funds in an account named "[the Foundations]" or in an account as named by the Office of the Examining Magistrate of the Canton of Zurich in the Order (hereinafter collectively referred to as the "Account");

…

(vii) not do [sic] dispose of the Escrow Funds other than in accordance with a final and enforceable judgment of the Sandiganbayan or any final and enforceable judgment of any

competent court in the Philippines, or in accordance with written and identical instructions received from both [the Foundations] and the Government of the Philippines as represented by the FIRST PARTY or in accordance with instructions received from the FIRST PARTY, as approved in principle by the properly represented ESTATE OF FERDINAND E. MARCOS, and/or IMELDA ROMUALDEZ MARCOS, MARIA IMELDA MARCOS MANOTOC, FERDINAND R. MARCOS JR. and IRENE MARCOS ARANTEA, whereby in case of any such disposal the above undertakings and guarantee as per clause 3 below lapse;

…

7. The parties agree that the occurrence and fufillment of the above conditions shall have the effect of terminating this Agreement …

15 In the Second Request, the Republic noted that Mrs Marcos had deliberately delayed the Forfeiture Proceedings in the Philippines [note: 15] and that the Human Rights Victims had obtained judgment against the Marcos Estate and intended to enforce the judgment in Switzerland. [note: 16] The Republic claimed that the Philippines was the natural forum for the resolution of these disputes; the claims of the Human Rights Victims against the Marcos Estate should also be dealt with by the Probate Court in the Philippines. [note: 17] The Zurich District Attorney granted the Second Request, subject to the condition that the transfer of the assets would take place within the framework of the obligations set out in the Escrow Agreements, and imposed an investment policy that the assets may be invested in the money market and in securities with a Standard & Poor's credit rating of at least "AA". [note: 18]

16 The Federal Supreme Court of Switzerland affirmed the order in relation to the Aguamina Corporation on 10 December 1997, subject to two additional conditions: [note: 19]

(a) the Republic had to guarantee that the seizure or restitution of the Swiss Deposits would be determined by judicial proceedings that satisfied the principles of due process embodied in Article 14 of the International Covenant on Civil and Political Rights (16 December 1966); and

(b) the Republic had to undertake to inform the Swiss authorities about developments regarding the judicial proceedings for restitution and measures taken to indemnify the Human Rights Victims.

The Federal Supreme Court issued similar decisions for the other Foundations. [note: 20]

17 The Republic gave the necessary undertakings in an exchange of diplomatic notes with the Swiss Federal Office for Police Matters [note: 21], and the Federal Supreme Court issued additional decisions in March and April 1998 that denied motions to suspend the release of the Swiss Deposits to the Republic. [note: 22]

18 Between April to July 1998, the Swiss Deposits were released to PNB to be held in escrow. The total sum of the remitted Swiss Deposits amounted to US$567.2 million, and PNB placed part of the Swiss Deposits into fixed deposit accounts with the Singapore branch of WestLB in accordance with the investment requirements of the Swiss authorities and the Escrow Agreements. The Funds in dispute constitute a portion of the monies deposited with WestLB.

19 On 15 July 2003, the Supreme Court of the Philippines issued an *en banc* decision in *Republic of*

the Philippines v Sandiganbayan (GR No 152154) (July 15, 2003) ("the Forfeiture Judgment") which ordered as follows: [note: 23]

> The Swiss deposits which were transferred to and are now deposited in escrow at the Philippine National Bank in the estimated aggregate amount of US$658,175,373.60 as of January 31, 2002, plus interest, are hereby forfeited in favour of petitioner Republic of the Philippines.

Mrs Marcos and the Marcos Estate subsequently filed motions to the Supreme Court seeking reconsideration of the Forfeiture Judgment on the grounds that the judgment had violated constitutionally enshrined rights of due process. The motions for reconsiderations were denied with finality in *Republic of the Philippines v Sandiganbayan* (GR No 152154) (18 November 2003) ("the Forfeiture Resolution"). [note: 24]

20 The Swiss Federal Office of Justice issued a press release on 5 August 2003 confirming that the Philippine government could dispose of the Swiss Deposits without further decision on the part of the Swiss authorities. [note: 25] This concluded procedure pursuant to the agreement between the Swiss and Philippine authorities under the IMAC will hereafter be referred to as "the Green Line".

21 The Republic took out a writ of execution dated 22 January 2004 ("the Writ of Execution") to enforce the Forfeiture Judgement and cause the immediate transfer of the Swiss Deposits held in escrow by PNB to the Republic. [note: 26] PNB attempted to procure the release of the Funds from WestLB, but WestLB informed PNB that it had received notice from Mr Swift of orders made by the District Court of Hawaii, and therefore refused to release the Funds pending further legal advice. [note: 27]

The court proceedings in Singapore

22 On 30 January 2004, WestLB filed Originating Summons No 134 of 2004 seeking interpleader relief ("the Interpleader Proceedings"). On 24 March 2004, Lai Siu Chiu J granted interpleader relief and ordered WestLB to pay the Funds into an escrow account held by M/s Drew & Napier ("D&N") – the then solicitors for PNB – for the credit of the Interpleader Proceedings. [note: 28]

23 PNB, the Foundations, the Estate of Roger Roxas and the Golden Buddha Corporation lodged competing claims to the Funds. The last two claims were withdrawn and are not relevant for the purposes of these appeals. After M/s Harry Elias Partnership ("HEP") replaced D&N as solicitors for PNB, the Funds were transferred into an escrow account established by HEP.

24 The Republic subsequently filed Summons No 1048 of 2006 in March 2006 to be added as party to the Interpleader Proceedings and applied for the Interpleader Proceedings to be stayed pursuant to s 3 of the State Immunity Act (Cap 313, 1985 Rev Ed). The stay application was dismissed at first instance and affirmed on appeal by this court: see *Republic of the Philippines v Maler Foundation and others* [2008] 2 SLR(R) 857 ("*Republic of the Philippines (Sovereign Immunity)*").

25 The substantive Interpleader Proceedings to determine entitlement to the Funds were heard by the Judge in November 2011 and are the subject of the present appeals.

The basis of each party's claim to the Funds

26 In the Interpleader Proceedings, the Republic initially claimed legal and beneficial title of the Funds on the basis that:

(a) foreign acts of state had transferred and vested ownership of the Funds in the Republic, and the court should therefore recognise the validity of the Republic's title; and,

(b) the Human Rights Victims and the Foundations were estopped from re-litigating the act of state doctrine by reason of the decision of the United States Ninth Circuit Court of Appeal in *In Re Philippine National Bank; Philippine National Bank v United States District Court for the District of Hawaii* 397 F 3d 768 (9th Cir 2005) ("*In Re PNB*"), which had held that the act of state doctrine was applicable on the facts. [note: 29]

27 The claim of the Human Rights Victims was premised on the Chinn Assignment, which was allegedly effective under United States law (subsequently used to refer more specifically to the law applicable in the state of Hawaii) to transfer or convey all proprietary right, title and interest of the Marcos Estate and the Foundations in the Funds to the benefit of the Human Rights Victims. [note: 30] Further, and to the extent that the Foundations were adjudged to be the owners of the Funds, the Human Rights Victims claimed the Funds as assignees to whom the Foundations had transferred their interest in the Funds. [note: 31]

28 The Foundations asserted a default proprietary interest in the Funds as the undisputed original legal owners of the Swiss Deposits and thus of the Funds which were traceable therefrom. The Forfeiture Judgment purporting to vest title to the Funds in the Republic had not satisfied the conditions imposed by the Swiss courts for the release of the Funds. Further, or in the alternative, the Forfeiture Judgment did not bind the Foundations as they were not party to the proceedings. [note: 32]

29 PNB claimed that it continued to retain legal title to the Funds as the escrow agent holding the Funds pending a final and binding judgment deciding on the restitution or forfeiture of the Funds by a competent Philippine court and as the original named account holder of the Funds deposited with WestLB. [note: 33]

The decision below

30 The Judge held (at [43] of the Judgment) that the act of state doctrine was a "red herring" as the key issue before the court was whether the Forfeiture Judgment had validly vested beneficial title of the Funds in the Republic. The act of state doctrine did not apply as the Forfeiture Judgment was not a legislative or executive act, and the court had not been requested to determine the propriety of any foreign sovereign act as neither the Human Rights Victims nor the Foundations had challenged the legitimacy of any act of the Swiss or Philippine governments (*ibid*).

31 After characterising the crux of the dispute as one concerning the *legal effect* of the Forfeiture Judgment (at [44] of the Judgment), the Judge considered whether the Forfeiture Judgment would be recognised by the Singapore courts. The Forfeiture Judgment was a judgment *in rem* (at [59] of the Judgment) but the Judge could not recognise it as such as it purported to affect title to a *res* that was not situated in the Philippines at the time of the Forfeiture Judgment (at [63] of the Judgment). Further, the Singapore courts could not, under well-established conflict of laws principles, enforce a foreign penal law, and the foundation of the Republic's claim was dependent on the indirect enforcement of a foreign penal law, *viz*, RA 1379 (at [73] of the Judgment). The Republic's claim was therefore dismissed.

32 In relation to the claim of the Human Rights Victims, the Judge characterised the relevant issue

as centring on the question of whether the Chinn Assignment had effectively vested proprietary rights in the Funds in the Human Rights Victims, not the validity of the assignment *vis-à-vis* the assignor and assignee (at [80]–[81] of the Judgment). The Judge considered that the putative effect of the Chinn Assignment was that of a garnishee order (at [87] of the Judgment); after examining alternative formulations of the connecting factor to determine the governing law, the Judge concluded that the appropriate connecting factor should be the proper law of the debt, *ie*, the system of law bearing the closest and most significant connection to the debt (at [101] of the Judgment). Applying this test, the Judge found that Swiss law bore the closest and most significant connection with the Swiss Deposits at the material time (at [101] of the Judgment). The Chinn Assignment had no effect under Swiss law and thus the Human Rights Victims could not have any proprietary right, interest or title to the Funds (at [106] of the Judgment). The Judge also added that if United States law was assumed to be the governing law, the Chinn Assignment would nonetheless have been ineffective as the locus of the deposits was outside the United States (at [107] of the Judgment).

33 Having dismissed the claims of the Republic and the Human Rights Victims, the Judge held that PNB had legal title to the Funds as trustee of the Funds held in escrow (at [113] of the Judgment). The Judge also relied (at [114] of the Judgment) on a finding of fact previously made by this court in *Republic of the Philippines (Sovereign Immunity)* that PNB was "*the original account holder and the legal owner* of the Funds while they were held in accounts at [WestLB]" [emphasis added]: see *Republic of the Philippines (Sovereign Immunity)* at [63(c)]. PNB was not divested of this legal title when the court ordered the Funds to be held by D&N – and subsequently HEP – for the credit of the Interpleader Proceedings (at [115] of the Judgment).

34 Following from the above finding that PNB held legal title to the Funds, the Judge also dismissed the Foundations' claim that the Funds must necessarily revert to the Foundations as the original legal owners of the Funds in the absence of any other party entitled to the Funds (at [118] of the Judgment).

The parties' submissions

35 Before us, the Republic did not pursue its claim on the premise that it already had legal title to the Funds, and, instead, advanced two parallel threads of argument:

(a) Under the act of state doctrine, the Singapore court should, as a rule, accept the validity of the Forfeiture Judgment in determining entitlement to the Funds as the courts are required to (i) give effect to the acts of state adopted by the Philippine and Swiss governments that culminated in the issuance of the Forfeiture Judgment or (ii) regard the Forfeiture Judgment as constituting an act of state. The fact that the locus of the Funds was outside of the Philippines at the time the Forfeiture Judgment was issued should not affect the legal analysis. Further, the Forfeiture Proceedings pursuant to RA 1379 were not penal in nature and the alleged penal nature of RA 1379 is in any event immaterial within the act of state context.

(b) Under the Green Line, the Republic is entitled to the Funds by virtue of cl 2(vii) of the Escrow Agreements, which gave effect to the IMAC measures agreed upon by the Swiss and Philippine governments. The conditions imposed by the clause had been met. This claim to entitlement will hereafter be referred to as "the Green Line Argument". The Republic asserted that this claim "finds its roots" in the following statement of this court in *Republic of the Philippines (Sovereign Immunity)* at [57]:

> ... In the present case, the Appellant was fully aware that its reliance on the [Forfeiture Judgment's] legal effect on the Funds under Singapore law as the basis of its claim to title to

those moneys was contested by the Respondents. *Until this disputed issue is settled, PNB would still hold the Funds as the escrow agent pending a ruling by our courts as to whether the [Forfeiture Judgment] satisfied the Escrow Condition*. ...

[emphasis added]

(a) It was not immediately apparent what the precise legal nature of this claim was in the Republic's Appellant's Case. After having sight of Prof Yeo's opinion, the Republic nuanced its Green Line Argument and submitted that the Escrow Agreements created an express trust in favour of the Republic and that the beneficial interest in the Funds was to be vested in the Republic by operation of law after the Sandiganbayan issued the Forfeiture Judgment, satisfying the condition in clause 2(vii) of the Escrow Agreements.

36 The Human Rights Victims submitted that the relevant issue to be determined with respect to the Chinn Assignment was whether the Chinn Assignment was valid *vis-à-vis* the Human Rights Victims and the Foundations; as this involved a question of the "first-tier relationship" between the assignor and assignee, the appropriate choice of law rule was the proper law of the assignment, which was United States law. Under United States law, the Chinn Assignment had validly transferred all the rights of the Marcos Estate – including the Swiss Deposits in the names of the Foundations – to be held for the benefit of the Human Rights Victims.

37 The Foundations submitted that they were the original named legal owners of the Funds, and if the Republic, Human Rights Victims and PNB failed in their claims, the Funds must of necessity revert to the Foundations.

38 The Human Rights Victims and the Foundations also adduced largely similar arguments against the Judge's finding that PNB had legal title to the Funds:

(a) PNB only had mere custody of the Funds as an escrow agent, and PNB had been divested of any legal title to the Funds when WestLB released the Funds to be held by D&N, and later HEP, for the credit of the Interpleader Proceedings; and,

(b) PNB did not hold legal title to the Funds as a trustee and its obligations as an escrow agent were grounded in contract and restitution.

A preliminary procedural issue

39 Before turning to the substantive merits of the three appeals, we first consider a preliminary objection raised by the Human Rights Victims and the Foundations that CA 109/2012 was procedurally invalid and should be dismissed as the Republic had named the wrong parties as respondents to the appeal. The Human Rights Victims and the Foundations contended that as the only party who had succeeded in asserting an entitlement to the Funds before the Judge was PNB, the Republic ought to have named PNB, and not the Human Rights Victims or the Foundations, as the correct respondent to the appeal. The Republic's position was that it was not appealing the Judge's finding that PNB was legal owner of the Funds, and was only asserting a *beneficial* interest in the Funds on appeal; it was thus not necessary to name PNB as a respondent as PNB would not be directly affected by the appeal. We add that both the Human Rights Victims and the Foundations had, in CA 110/2012 and CA 111/2012 respectively, also named only PNB as the respondent. The apparent effect of this procedural anomaly would be that not all the ten original parties to the Interpleader Proceedings would technically be bound by an order made in each of the appeals.

40 It seems to us that in raising this procedural objection the Human Rights Victims and the Foundations are adopting too narrow and technical an approach. It must be borne in mind that it was WestLB which took out the Interpleader Proceedings to enable the court to rule, as amongst the competing claimants, namely, the Republic, the Human Rights Victims and the Foundations, who had the better claim to the Funds. PNB was not and is not claiming any beneficial interest in the Funds, but was the titleholder to the Funds held in the account with WestLB. The Judge had ruled that none of the competing claimants had proved any entitlement to the Funds. If the Republic was wrong not to have cited PNB as a respondent to CA 109/2012, so too were the Human Rights Victims and the Foundations when they, in CA 110/2012 and CA 111/2012, cited only PNB as the respondent. This was an interpleader proceeding to enable all the contesting parties to show who had a better claim to the Funds. If we were to accept this argument of the Human Rights Victims and the Foundations, it would mean that this court would have to call a halt to the hearing of these appeals to enable the defects in all three appeals to be rectified. In any event, as all the parties made full substantive arguments before us *vis-à-vis* each and every party's competing claim to the Funds, we are of the view that it would be unnecessarily convoluted at this stage to regard only the respondents to each of the three appeals as strictly bound by an order made by this court in any single appeal. At this juncture, the most practical course of action is to consider the merits of all the appeals together such that all parties to the Interpleader Proceedings will be bound by every order made in the three appeals, thus disposing of all the claims to the Funds with finality. Quite rightly, none of the parties sought to press the procedural objection any further before us during oral arguments, and as all the parties were given ample opportunities to be heard on all the issues that arose, no prejudice would be caused if PNB is bound by the orders made in CA 109/2012 and the Republic is bound by the orders made in CA 110/2012 and CA 111/2012.

The Republic's claim

Whether the act of state doctrine applied to deem the Forfeiture Judgment as validly passing title to the Funds to the Republic

41 The Republic's case relied largely on the legal proposition that the act of state doctrine mandated the recognition by this court of the validity of the Forfeiture Judgment which gave effect to the acts of state of the Philippine and Swiss governments. In essence, the argument was that the act of state doctrine would require this court to accept the effect of an action of a foreign sovereign as presumptively valid.

42 The *locus classicus* of the act of state doctrine is Fuller CJ's judgment in the Supreme Court of the United States decision of *Underhill v Hernandez* 168 US 250 (1897) ("*Underhill*") (at 252):

> 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.
>
> [emphasis added]

This definition emphasised the Westphalian notion of sovereignty, with each nation state exercising absolute power and sovereignty within its territorial boundaries. The act of state doctrine was initially conceived from this perspective as a matter of judicial restraint and comity.

43 However subsequent American jurisprudence shows a gradual shift in the courts' perception of the act of state doctrine. This was especially so when cases involving the expropriation or

confiscation of property by Latin American neighbours during the early 20th century came before the American courts with some regularity. In *Oetjen v Central Leather Co* 246 US 297 (1918) ("*Oetjen*"), the Supreme Court observed that (at 303-304):

> …[t]he principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of the court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based on acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. *To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would certainly "imperil the amiable relations between governments and vex the peace of nations"*.
>
> [emphasis added]

The rationale of the doctrine was therefore based on the acceptance of the validity of sovereign acts and was a manifestation of *external* deference: see also *Ricaud v American Metal Co, Ltd* 246 US 304 (1918) ("*Ricaud*"), which was decided on the same day.

44 Later, the act of state doctrine took on an *internal* constitutional dimension in the seminal Supreme Court decision of *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) ("*Sabbatino*"). There the Supreme Court departed from the foundations of the act of state doctrine in *Oetjen* and *Ricaud*, holding (at 421) that the doctrine was not compelled by the inherent nature of sovereign authority or by principles of international law. Instead, the act of state doctrine (at 423):

> ... 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]

The conceptual basis of the doctrine was therefore reformulated as one of judicial abstention based on separation of powers between the judicial and political branches, a 'foreign government' analogue of the American political question doctrine: see *International Association of Machinists v OPEC* 649 F 2d 1354 (9th Cir, 1981) at [24]. Prof F.A Mann observed in *Foreign Affairs in English Courts* (Oxford University Press, 1986), after tracing the history of the act of state doctrine in the United States, that American precedents (at p 176):

> … have lost their character, so that one might argue *cessante ratione cessat lex*. As Judge Brieant said in 1984,
>
> > Historically the doctrine was based upon the belief that courts should respect the acts of foreign sovereigns conducted within their borders…. That has since been refined and the doctrine is now cited more as a means of maintaining the proper balance between the judicial and political branches of the government on matters bearing upon foreign affairs.
>
> Since *Sabbatino* this is indeed the American theory, but it is a theory which has no counterpart in England. Hence the act of State doctrine in England might be said to have been deprived of its foundation.

45 An increasingly broad scope of the act of state doctrine, founded on vague general exhortations of judicial abstention, was eventually circumscribed in the Supreme Court decision in *WS Kirkpatrick & Co, Inc v Environmental Tectonics Corporation, International* 493 US 400 (1991) ("*Kirkpatrick*"), which held that (at 410):

> ... Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but *merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid*. …
>
> [emphasis added]

46 The modern act of state jurisprudence in England developed in a way where it is not possible to discern a consistent thread of authority. *Oetjen* was cited with approval in *Princess Paley Olga v Weisz* [1929] 1 KB 718 and *Aksionairnoye Obschestvo Dlia Mechanisches-Koyi Obrabotky Diereva AM Luther (Company for Mechanical Woodworking AM Luther) v James Sagor and Company* [1921] 3 KB 532 ("*Luther*"), where Scrutton LJ contemplated (at 558–559) that it would be a "serious breach of international comity" to "postulate that [a foreign state's] legislation is 'contrary to essential principles of justice and morality'". In common with the early United States decisions, the emphasis was on *external* deference.

47 In *Buttes Gas and Oil Co and another v Hammer and another* [1982] AC 888 ("*Buttes Gas*"), Lord Wilberforce considered (at 931A–B) that the "territorial act of state" doctrine was "concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation". His Lordship ostensibly appeared to be partial to the view that the doctrine was concerned with the choice of the proper law to be applied. Lord Wilberforce distinguished this from "a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states" which, as a matter of terminology, was not a variety of act of state but of "judicial restraint or abstention" (at 931G–H). In contrast, Lord Phillips of Worth Matravers in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 was of the view (at 286C) that the act of state doctrine was "a matter of judicial restraint" and concerned situations in which the courts have held themselves "*not competent* to entertain litigation that turns on the validity of the public acts of a foreign state" [emphasis added]. This was reiterated by Lord Hope of Craighead in *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, who stated (at [135]) that the act of state doctrine gave effect to a policy of judicial restraint or abstention. In the same case, both Lord Nicholls of Birkenhead and Lord Steyn also adopted the classic *Underhill* formulation, *viz*, the court would not "sit in judgment" on the acts of a foreign government (at [24] and [112] respectively).

48 From this brief survey of the authorities, it does not appear that a coherent or unified principle has emerged in the English jurisprudence. The act of state doctrine in England is perhaps best characterised as a combination of judicial restraint, comity and a territorial choice of law rule in relation to acts of a foreign sovereign that affect property within its jurisdiction. With respect to the last mentioned aspect of the act of state doctrine, this was the simple explanation of *Oetjen* and *Luther* advanced in Michael Zander, "The Act of State Doctrine" (1959) 53 AJIL 826 at p 831 and pp 836–837, and Cheshire, North & Fawcett, *Private International Law* (Oxford University Press, 14th Ed, 2008) at p 134. It was also the basis of Bankes LJ's decision in *Luther* (at 545–546) and the approach of the English Court of Appeal in *Peer International Corporation and others v Termidor Music Publishers Ltd and others (Editora Musical de Cuba, Part 20 Defendant)* [2004] 2 WLR 849 ("*Peer International*"). If acts of expropriation relate to property which was located within foreign territory

and later removed from the jurisdiction, the *lex situs* at the time of the act would be the law of the foreign territory and the transfer of title would thus be valid under that law. It is nevertheless clear that the conceptual justification for the act of state doctrine in England is still rooted in its historical basis. The shift in focus in the American jurisprudence towards viewing the act of state doctrine as a constitutionally mandated principle also suggests that some caution should be exercised in importing principles from the United States as the emphasis placed on the internal separation of powers has not been endorsed in the English and local contexts.

49 Before considering in more detail the Republic's specific arguments on the act of state doctrine, we observe that this court recently had the occasion to consider the applicability of the act of state doctrine in *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449. There, counsel attempted to argue that the court had no jurisdiction to grant an interim injunction pending arbitration involving a foreign sovereign as it would offend the act of state doctrine. The court (at [27]) considered that the act of state doctrine involved a decision of the court on whether it ought to assume or decline jurisdiction and cited Lord Pearson's comments in *Attorney-General v Nissan* [1970] AC 179 at 237 (arising in the context of domestic acts of state) that:

> … An act of state is something not cognisable by the court: if a claim is made in respect of it, the court will have to ascertain the facts but if it then appears that the act complained of was an act of state *the court must refuse to adjudicate upon the claim.*
>
> [emphasis added]

The version of the act of state doctrine that was in issue thus seemed to be the non-justiciability aspect – the court will not adjudicate upon matters that turn on the legality of a foreign sovereign act.

50 The act of state doctrine contended for by the Republic in the present appeals instead appears to be in the nature of the "territorial act of state" alluded to by Lord Wilberforce in *Buttes Gas*, where the forum court is requested to accept the validity and legal effect of a foreign act of state. However, the Republic's reliance on the "territorial act of state" is undermined by two basic obstacles. The only act relied on as having a legal effect on title to the interpleaded Funds is the issuance of the Forfeiture Judgment by the Philippine Supreme Court, and the Forfeiture Judgment purported to transfer title to Funds which were located in Singapore and not the Philippines at the material time. The Republic recognised these limitations and urged us to adopt a more pragmatic and flexible approach to the act of state doctrine in the light of the entirely fortuitous presence of the Funds in Singapore.

51 First, the Republic submitted that the act of state doctrine applied in the present case as the Swiss and Philippine governments had, under the IMAC measures, delegated the determination of entitlement to the Funds to the Philippine courts, and the Forfeiture Judgment gave effect to and brought into fruition these governmental acts. The Republic further cited the Ninth Circuit Court of Appeal decision of *In Re PNB* as authority for the proposition that a judgment of a foreign court may constitute an act of state under certain circumstances. *In Re PNB* arose from the same background facts that led to the present proceedings before the Singapore courts. The District Court of Hawaii had ruled that the Forfeiture Judgment was entitled to no deference as it violated due process, and issued an injunction stating that any bank which participated in the release of monies in Singapore pursuant to claims filed by the PCGG would be in contempt of court unless the banking institution appeared to show cause before the District Court of Hawaii. An order to show cause was issued to PNB, and PNB filed a petition before the Ninth Circuit Court of Appeal for a petition of mandamus

seeking to restrain the District Court of Hawaii from enforcing its order to show cause. PNB contended that the entire course of proceedings against it had violated the act of state doctrine. The Ninth Circuit Court of Appeal held that the District Court of Hawaii had violated the act of state principle in holding that the Forfeiture Judgment was invalid, and stated (at 773) that:

> ...[a]lthough the act of state doctrine is normally inapplicable to court judgments arising from private litigation, *there is no inflexible rule preventing a judgment sought by a foreign government from qualifying as an act of state. ... There is no question that the judgment of the Philippines Supreme Court gave effect to the public interest of the Philippine government.* The forfeiture action was not a mere dispute between private parties; it was an action initiated by the Philippines government pursuant to its "statutory mandate to recover property allegedly stolen from the treasury" *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d at 546. We have earlier characterized the collection efforts of the Republic to be governmental. *Id. The subject matter of the forfeiture action thus qualifies for treatment as an act of state.*
>
> [emphasis added]

In ascertaining whether an act was an "act of state", the court thus appeared to place more emphasis on the character of the act – whether it gave effect to the public interest of the foreign government – rather than the capacity of the actor. The Republic argued that due to the public nature and historical and political significance of the Forfeiture Proceedings, the Forfeiture Judgment should be considered an act of state.

52 We recognise that the Republic's argument is not merely that the legal effect of the Forfeiture Judgment conclusively determines proprietary entitlement to the Funds, but is premised on a more subtle contention that the Singapore courts should decline to adjudicate upon title in the Interpleader Proceedings independently as it would in effect frustrate or nullify the purpose and object of the IMAC measures entered into by the Swiss and Philippine governments. However, based on the traditional English common law approach to the act of state doctrine, we are not prepared to accept such an expansive notion of the doctrine or to extend its application to judgments of a foreign court which relate to assets not situated within its jurisdiction. In our view, whether the act of state doctrine is considered in the "territorial act of state" sense or judicial abstention sense, it has never been conceived as additionally mandating a *positive* approach, *viz*, that the courts should recognise the legal effect of a foreign judgment or other actions that flow from governmental or legislative acts so as to give effect to the intended consequences of particular acts of state. This court is not merely being asked to accept the validity or legitimacy of acts of the Swiss and Philippine governments or the purported delegation of the determination of entitlement to the Funds, but additionally to accept the *legal effect and validity* of the Forfeiture Judgment as a necessary concomitant of these acts of state. There is no English or local authority that supports this application of the act of state doctrine.

53 With all due respect, we also decline to follow the Ninth Circuit Court of Appeal's holding in *In Re PNB* that the Forfeiture Judgment may itself constitute an act of state. The act of state doctrine has consistently been applied in England only to acts of foreign legislatures or governmental acts of officials: see *Lucasfilm Ltd and others v Ainsworth and another* [2012] 1 AC 208 at [87] *per* Lord Collins of Mapesbury; this is also assumed in Dicey, Morris & Collins, *The Conflict of Laws vol 1* (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey, Morris & Collins vol 1*") at para 5-045 and Jonathan Hill and Adeline Chong, *International Commercial Disputes* (Hart Publishing, 4th Ed, 2010) at para 2.2.4. The reasoning in *In Re PNB* was premised on the fact that the Forfeiture Judgment was issued in response to a forfeiture action initiated by the Philippine government pursuant to its statutory mandate to recover property that was allegedly stolen from the treasury; the distinguishing factor was that the judgment gave effect to the public interest of the Philippines. It is not evident to us, however, how

the conceptual underpinnings of the act of state doctrine under the common law could justify this extension of the doctrine to cover judicial acts.

54 The difference between governmental or legislative acts and judicial acts was recently considered by the English Court of Appeal in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2013] 3 WLR 1329 ("*Yukos Capital*"). In *Yukos Capital*, which involved the enforcement in England of an arbitral award against the Russian state-controlled respondent company that had been set aside by a Russian court, it was alleged by the appellant company that the decision of the Russian court had been partial and biased and was part of an overall campaign waged by the Russian state against the appellant. The question before the Court of Appeal was whether the act of state doctrine precluded the forum court from adjudicating upon the conduct of the judiciary of a foreign state. Rix LJ, delivering the judgment of the Court of Appeal, distinguished *In Re PNB* and held that the act of state doctrine did not apply to judicial acts. The rationale for the difference between legislative and executive acts on the one hand and judicial acts on the other was explained in the following terms at [87]:

> … If then the question is asked – Well, why should acts of a foreign judiciary be treated differently from other acts of state, and what is the basis of that difference? – the answer, in our judgment, is that *judicial acts are not acts of state for the purposes of the act of state doctrine. The doctrine in its classic statements has never referred to judicial acts of state, it has referred to legislative or executive (or governmental or official) acts of a foreign sovereign.* Two examples will suffice for more: Lord Hope speaks of the "legislative or other governmental acts" of the foreign sovereign in *Kuwait Airways v. Iraqi Airways* at [135]; and Lord Collins speaks of "foreign legislation or governmental acts of officials such as requisition" in *Lucasfilm v. Ainsworth* at [86]. It is not hard to understand why there should be a distinction. Sovereigns act on their own plane: they are responsible to their own peoples, but internationally they are responsible only in accordance with international law and internationally recognised norms. Courts, however, are always responsible for their acts, both domestically and internationally. Domestically they are responsible up to the level of their supreme court, and internationally they are responsible in the sense that their judgments are recognisable and enforceable in other nations only to the extent that they have observed what we would call substantive or natural justice, what in the United States is called due process, and what internationally is more and more being referred to as the rule of law. *In other words the judicial acts of a foreign state are judged by judicial standards, including international standards regarding jurisdiction, in accordance with doctrines separate from the act of state doctrine, even if the dictates of comity still have an important role to play* …
>
> [emphasis added]

55 We concur with the above observations. Private international law is concerned with both executive/legislative sovereignty and adjudicative sovereignty. The former is covered by the act of state doctrine that applies to governmental and legislative acts; the latter is covered by the rules on recognition, enforcement and public policy that apply to foreign judgments. As explained in *Underhill* (cited above at [42]), courts should not judge governmental acts as sovereigns are equal on the plane of international law and recourse for grievances must be obtained "through the means open to be availed of by sovereign powers". The exclusion of judicial acts from the ambit of the act of state doctrine may be explained quite simply on the basis that much of the ground that would be covered by the doctrine *vis-à-vis* judicial acts is implicitly embodied in the common law conflict of laws rules relating to foreign judgments. A fundamental premise of the rules on recognition is that a foreign judgment is generally conclusive of the matter adjudicated upon and cannot be impeached for an error of fact or law, save for limited exceptions which refer to the international standards of rule of

law alluded to by the Court of Appeal in *Yukos Capital*. These are two distinct concepts that have been designed to deal with acts or decisions emanating from different institutions, and have understandably developed in response to separate considerations. Judgments of a foreign court should not be additionally considered within the rubric of the act of state doctrine.

56 Second, and more fundamentally, the application of the act of state doctrine is territorially limited. The Republic submitted that the locus of the Funds in Singapore should not preclude the act of state doctrine, and cited the following passage in *In Re PNB* which merits citing *in extenso* (at 773):

> The class plaintiffs next argue that the act of state doctrine is inapplicable because the judgment of the Philippine Supreme Court did not concern matters within its own territory. Generally, the act of state doctrine applies to official acts of foreign sovereigns "performed within [their] own territory." *Credit Suisse*, 130 F.3d at 1346 (internal quotations omitted). *The act of the Philippine Supreme Court was not wholly external, however. Its judgment, which the district court declared invalid, was issued in the Philippines and much of its force upon the Philippine Bank arose from the fact that the Bank is a Philippine corporation. It is also arguable whether the bank accounts have a specific locus in Singapore, although they apparently were carried on the books of bank branches there.* See *Callejo v. Bancomer, S.A*, 764 F.2d 1101, 1121-25 (5th Cir.1985) (discussing differing theories of situs of intangibles). Even if we assume for purposes of decision that the assets were located in Singapore, we conclude that this fact does not preclude treatment of the Philippine judgment as an act of state in the extraordinary circumstances of this case. "[T]he [act of state] doctrine is to be applied pragmatically and flexibly, with reference to its underlying considerations." *Tchacosh Co. v. Rockwell Int'l Corp*., 766 F.2d 1333, 1337 (9th Cir.1985). *Thus, even when an act of a foreign state affects property outside of its territory, "the considerations underlying the act of state doctrine may still be present." Callejo, 764 F.2d at 1121 n. 29. Because the Republic's "interest in the [enforcement of its laws does not] end at its borders," id., the fact that the escrow funds were deposited in Singapore does not preclude the application of the act of state doctrine. The underlying governmental interest of the Republic supports treatment of the judgment as an act of state.*
>
> *It is most important to keep in mind that the Republic did not simply intrude into Singapore in exercising its forfeiture jurisdiction. The presence of the assets in Singapore was a direct result of events that were the subject of our decision in Credit Suisse.* There we upheld as an act of state a freeze order by the Swiss government, enacted in anticipation of the request of the Philippine government, to preserve the Philippine government's claims against the very assets in issue today. *Credit Suisse*, 130 F.3d at 1346-47 … To permit the district court to frustrate the procedure chosen by the Swiss and Philippine governments to adjudicate the entitlement of the Republic to these assets would largely nullify the effect of our decision in *Credit Suisse*. *In these unusual circumstances, we do not view the choice of a Singapore locus for the escrow of funds to be fatal to the treatment of the Philippine Supreme Court's judgment as an act of state.*
>
> [emphasis added]

The Republic also relied on the decision of the Appellate Division of the Supreme Court of New York in *Osqugama F Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc* 87 A D 3d 119 (2011) ("*Swezey*"), where an argument was raised that the Sandiganbayan did not have *in rem* jurisdiction of assets held by one Arelma Foundation in a New York bank account. The majority of the court observed:

> … We fail to see how this limitation on the reach of the Sandiganbayan's mandate deprives the Republic of its status as a necessary party to this proceeding. The fact remains that the Republic

> claims to be the true owner of the Arelma assets, which had been found by a Philippine court to constitute the proceeds of wealth stolen from the Philippine people and spirited out of that country by its faithless former president. *Beyond question, the issue of title to the Arelma assets is within the jurisdiction of the Sandiganbayan, even if the fund itself – having been secreted abroad by the wrongdoer – is no longer present in the Philippines* …
>
> [emphasis added]

57 The Republic contended that the theory underlying the territorial limitation to the act of state doctrine was that the foreign state was presumed to be less concerned about the effects of its acts on property outside of its territory than within; however, there may be situations where the considerations underlying the act of state doctrine may still be present when the property is located outside the territorial boundaries of the state. It was argued that the Republic had an underlying governmental interest in the enforcement of its laws over the Swiss Deposits and that the Republic had not intruded into Singapore in exercising its forfeiture jurisdiction over the Swiss Deposits as the presence of the Swiss Deposits in Singapore was the direct result of acts of the Swiss and Philippine governments.

58 We do not consider that the reasoning of the Ninth Circuit Court of Appeal in *In Re PNB* or the Appellate Division of the Supreme Court of New York in *Swezey* may be readily imported into the common law act of state doctrine that presently applies in England and Singapore. First, the finding in *Swezey* that the Sandiganbayan had jurisdiction over the assets held by the Arelma Foundation was expressly founded on the premise that the Republic's claim was that the assets belonged to the Republic as a matter of Philippines law *at the time of misappropriation*. In other words, it was a patrimonial claim (see footnote 7 of the majority's opinion in *Swezey*), but this was not the basis upon which the Republic advanced its claim to the Funds before us.

59 Second, the argument that the Republic had a governmental interest in recovering the ill-gotten gains from corruption that were secreted in bank accounts overseas precisely to place the money beyond the reach of the Republic does have an intuitive appeal. However, the territorial limitation of the act of state doctrine has historically been regarded as an essential element of the doctrine (see *Dicey, Morris & Collins vol 1* at para 5-049, citing *Empresa Exportadora De Azucar v Industria Azucarera Nacional SA (The "Playa Larga" and "Marble Islands")* [1983] 2 Lloyd's Rep 171 at 194; *Yukos Capital* at [68]). Where title to property is concerned, the *lex situs* rule in Rule 137 of Dicey, Morris & Collins, *The Conflict of Laws vol 2* (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey, Morris & Collins vol 2*") also states (at para 25R-001):

> **RULE 137**—A governmental act affecting any private proprietary right in any movable or immovable thing will be recognised as valid and effective in England if the act was valid and effective by the law of the country where the thing was situated (*lex situs*) at the moment when the act takes effect, and not otherwise.

60 There is no principled basis for us to displace either established rule merely because the act purporting to have extraterritorial effect is based on an underlying governmental interest. The classic enunciation of the act of state doctrine was premised on sovereign states possessing absolute sovereign powers with respect to acts within their territorial boundaries that should not be questioned by a foreign court, and "[t]he near universal rule of international law is that sovereignty, both legislative and adjudicative, is territorial, that is to say it may be exercised only in relation to persons and things within the territory of the state" (*per* Lord Millett in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation and others* [2004] 1 AC 260 at [80]). We are unable to accept that the invocation of governmental interest, in the form of the public policy of mutual judicial assistance in

enforcing foreign confiscation orders, creates an exception to the territoriality or *lex situs* rule.

61 A similar argument was rejected by the English Court of Appeal in *Peer International*. In *Peer International*, a Cuban decree purported to assign the United Kingdom copyright in a number of Cuban music works to a Cuban entity, and the issue before the court was whether the decree was effective to divest the original owner of the copyright by reason of a positive public policy exception to the *lex situs* rule. The Cuban decree was purportedly aimed at reasserting Cuban control over intellectual property rights that had been exploited by foreign companies, and it was argued that the decree was consonant with both English and international concepts of public policy. After reviewing the old English authority of *Lorentzen v Lydden and Company, Limited* [1942] 2 KB 202 which had held that a foreign wartime decree for the requisition of property could be recognised and given effect to even if the property was located beyond the territorial boundaries of the foreign country, Aldous LJ concluded that the case had been wrongly decided and observed at [46]:

> ... the submission that there should be an exception to the lex situs rule based on public policy is misguided. This was demonstrated by Mr Lloyd Jones in his submissions. He rightly submitted that any exception based upon public policy was wrong in principle because (1) it would subordinate English property law to that of a foreign state; (2) the rule would be founded and would operate by reference to public policy which could change from time to time and could be uncertain; (3) it would require the English courts to assess the merits of the foreign legislation; (4) it would lead to intractable problems when the property was situated in a third state; (5) it would require the court to balance one public policy against the public policy that states do not interfere with property situated abroad, and (6) it would lead to great uncertainty.

Mance LJ also considered (at [65]) that there was "little basis for elevating public policy to a positive connecting factor overriding the law of the situs" and that to do so would create confusion and uncertainty. We respectfully adopt these reasons, and would add in this regard that Singapore, as the situs of the Funds at the material time, regulates the proprietary incidents of the Funds and must itself determine whether the exercise of the forfeiture jurisdiction by the Sandiganbayan constituted an intrusion into Singapore. The presence of a governmental interest of a foreign state cannot displace our established domestic property law principles or established rules of private international law based on territorial jurisdiction.

62 Further, as Prof Yeo astutely observed, the focus of the Ninth Circuit Court of Appeal in *In Re PNB* on the underlying governmental interest of the Republic is unsurprising in the light of the choice of law jurisprudence in the United States, which has departed from the traditional common law approach and now focuses on a state interest analysis, *viz*, a balancing of factors including the policy of the forum and the policies of interested states and the relative interests of these states in the determination of the issue (see §6(2) of the *Restatement (Second) of Conflict of Laws*). The United States position has been interpreted as elevating the act of state doctrine to a "super choice of law rule requiring the lex fori to apply foreign law as the lex causae where it otherwise would not do so under its own private international law rules" (*per* Perram J in *Habib v Commonwealth of Australia* [2010] FCAFC 12 at [38]), which may occasionally displace the law of the situs where governmental interests dictate this. In contrast, there is no such counterpart to the choice of law analysis under the common law in Singapore, which proceeds by a rule-based identification of connecting factors, derived from requirements of justice, that are applicable to the resolution of particular categories of legal issues.

63 In summary, we conclude that the traditional version of the act of state doctrine, as applicable in Singapore, does not assist the Republic's case. The court will not question the validity of the IMAC measures entered into by the Swiss and Philippine governments or the delegation of the determination

of entitlement to the Swiss Deposits (and hence the Funds) to the Philippine courts, but it remains for the Singapore courts to determine the effect of the Forfeiture Judgment on title to the Funds – and to do so would require this court to apply the common law rules on recognition of foreign judgments.

Recognition of the Forfeiture Judgment

64 We agree with the Judge that the Forfeiture Judgment is properly characterised as an *in rem* judgment, which was defined in the following terms by Lord Mance in the Privy Council decision of *Pattni v Ali and another* [2007] 2 AC 85 ("*Pattni*") at [21]:

> … a judgment in rem in the sense of [the common law rules relating to recognition of foreign judgments] is thus a judgment by a court where the relevant property is situate, adjudicating on its title or disposition as against the whole world (and not merely as between parties or their privies in the litigation before it). …

The above passage was cited with approval by this court in *Takako Marakami (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria and others* [2007] 4 SLR(R) 565 at [32], and it was also observed (at [30]) that in characterising the nature of a foreign judgment, the Singapore court would consider the substance of the judgment and its intended effect on the parties, whether or not the foreign law recognised the concepts of an *in rem* or *in personam* judgment.

65 It is clear that the Supreme Court of the Philippines had considered that the Forfeiture Proceedings were proceedings against a *res*, and had framed its orders in the Forfeiture Judgment as a forfeiture of title to the Swiss Deposits instead of a judgment directed against Mrs Marcos or the Marcos Estate personally:

> *The Swiss deposits* which were transferred to and are now deposited in escrow at the [PNB] in the estimated aggregate amount of US$658,175,373.60 as of January 31, 2002, plus interest, *are hereby forfeited in favor of petitioner Republic of the Philippines*. [note: 34]
>
> [emphasis added]

This corresponds with the relevant section of RA 1379, which states as follows:

> Sec.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 of the State, and *by virtue of such judgment the property aforesaid shall become property of the State*. [note: 35]
>
> [emphasis added]

The Forfeiture Resolution also expressly endorsed an earlier decision of the Philippine Supreme Court in *Republic v Sandiganbayan and Macario Asistio, Jr* 200 SCRA 667 [1991] that "forfeiture proceedings [were] actions *in rem* and therefore civil in nature". [note: 36] The nature of the Forfeiture Proceedings was therefore such that the Forfeiture Judgment was intended to have an *in rem* effect by deciding on the ownership of the Swiss Deposits.

66 We now turn to consider the question of whether the Philippine Supreme Court had jurisdiction – in an international sense – to issue an *in rem* judgment, which question is governed by the common law rules on the recognition of foreign judgments. The rule relating to the recognition of the legal

effect of a foreign *in rem* judgment in the forum court is set out in Rule 47 of *Dicey, Morris & Collins vol 1* (at para 14R-108):

> **RULE 47**—(1) A court of a foreign country has jurisdiction to give a judgment *in rem* capable of enforcement or recognition in England if the subject-matter of the proceedings wherein that judgment was given was immovable or movable property which was at the time of the proceedings situate in that country.

It is therefore essential to the recognition of a foreign judgment *in rem* that the *res* was situated in that foreign country at the time of the judgment. The Judge considered the authorities of *Louis Castrique v William Imrie and another* (1869-1870) LR 4 HL 414 and *Minna Craig Steamship Company and James Laing v Chartered Mercantile Bank of India London and China* [1897] 1 QB 55 in some detail (at [48]–[53] of the Judgment), and it suffices for us to note that that the key principle that may be distilled from these authorities is embodied in *Dicey, Morris & Collins*' Rule 47: also see *Pattni* at [24].

67 It is not disputed that the situs of the Funds was Singapore as the Funds were held by the Singapore branch of WestLB at the time the Forfeiture Judgment was rendered. Territoriality is a historically entrenched principle that underpins the common law concepts on recognition, and departing from the rules on recognition of *in rem* judgments would engender considerable difficulties in delineating the scope of an exception for *sui generis* circumstances. Although the Judge tentatively alluded (at [65] of the Judgment) to a possibility that recognition of judgments *in rem* may be extended to circumstances where the foreign court has "constructive custody" of the subject matter of the judgment, the Republic did not make full arguments on this point before us, and we do not express any concluded opinion on this. We therefore find that the legal effect of the Forfeiture Judgment, in so far as it purported to vest title to the Funds in the Republic at the time the Funds were located outside of the Philippines, cannot be recognised for the purposes of determining entitlement to the Funds in the Interpleader Proceedings.

68 We are also of the view that the legal effect of the Forfeiture Judgment cannot, in any event, be recognised as it would be tantamount to the indirect enforcement of a penal law of a foreign country. The relevant principles of law in this regard are well-established and we summarise them as follows:

(a) The courts will not enforce, either directly or indirectly, a penal, revenue or public law of a foreign state: see Rule 3(1) in *Dicey, Morris & Collins vol 1* (at para 5R-019).

(b) The question of whether a law is "penal" is to be determined by the *lex fori*, and while the word "penal" does not lend itself to an accurate or specific definition, the broad test is whether the proceeding leading to the judgment is in the nature of a suit in *favour of the State* for the recovery of penalties (*Huntington v Attrill* [1893] AC 150 ("*Huntington*") at 155–157).

(c) Whether or not the penal law is part of the criminal code of the foreign country is not conclusive; the forum court must give due consideration to the particular impugned provision of the foreign law (*Huntington* at 155–156; *Attorney-General of New Zealand v Ortiz and others* [1984] AC 1 ("*Ortiz*") at 33).

(d) Whether the recognition of a foreign law would involve a direct or indirect enforcement of a penal law depends on whether such recognition involves the *execution* of the penal law (*Huntington* at 155; *Ortiz* at 32).

69 Applying the above principles, we find that RA 1379 was clearly a penal law although the Forfeiture Proceedings were regarded as civil proceedings under Philippines law (see the Forfeiture Resolution at 10). The Republic's expert witness, Dean Ed Vincent S Albano ("Dean Albano"), strenuously denied that RA 1379 imposed a penalty but said that it instead "[partook] in the nature of a penalty", and we consider that it is clear that RA 1379 would, under Singapore conflict of laws principles, be classified as a penal law as it is directed towards the forfeiture of the property of public officials that is presumed to have been derived from illegal sources. The property is forfeited in favour of the State and the proceedings are instituted by the State: see ss 2 and 6 of RA 1379. [note: 37] Dean Albano also acknowledged that forfeiture proceedings under RA 1379 are a means of punishing and deterring public officials to advance a State interest. [note: 38]

70 We are thus unable to recognise the legal effect of the Forfeiture Judgment – made pursuant to RA 1379 – as affecting title to the Funds, as this would in substance be an execution and indirect enforcement of a foreign penal law.

The Green Line Argument

71 The Green Line Argument was initially run as the secondary string to the Republic's bow, but following Prof Yeo's opinion that this court is not precluded from recognising a beneficial entitlement arising under an express trust, the Republic sought to reframe the Green Line Argument as a claim to the Funds under an express trust created by the Escrow Agreements. The Republic argued that the beneficial interest in the Swiss Deposits, which were held on trust by PNB, vested by operation of law in the Republic following the satisfaction of the condition in cl 2(vii) of the Escrow Agreements. Clause 2(vii) of the Escrow Agreements provides as follows:

> 2. The ESCROW AGENT will
>
> ...
>
> (vii) *not do [sic] dispose of the Escrow Funds other than in accordance with a final and enforceable judgment of the Sandiganbayan or any final and enforceable judgment of any competent court in the Philippines*, or in accordance with written and identical instructions received from both Aguamina Foundation and the Government of the Philippines as represented by the [PCGG] or in accordance with instructions received from the [PCGG], as approved in principle by the properly represented ESTATE OF FERDINAND E. MARCOS and/or IMELDA ROMUALDEZ MARCOS, MARIA IMELDA MARCOS MANOTOC, FERDINAND R. MARCOS, JR. and IRENE MARCOS ARANETA, whereby in case of any such disposal the above undertakings and the guarantee as per clause 3 below lapse ...
>
> [emphasis added]

72 We will first address the threshold procedural objection of the Human Rights Victims and the Foundations that the Republic should not be permitted to claim a beneficial interest under an express trust as this was not pleaded before the Judge or argued at the first hearing before us on 7 February 2013. The Republic underscored the fact that the parties were not required to file formal pleadings in the Interpleader Proceedings, and that this claim was implicit in its Green Line Argument and had been recognised by this court in *Republic of the Philippines (Sovereign Immunity)*.

73 As mentioned above (at [22]), the interpleader proceedings were commenced by way of originating summons, and parties were directed by Kan Ting Chiu J on 4 March 2009 to file and exchange Statements of Case and replies to the same, presumably pursuant to O 17 r 5(1)(*b*) of the

Rules of Court (Cap 322, R 5, 2006 Rev Ed) which states as follows:

> (1) Where on the hearing of an originating summons or a summons under this Order all the persons by whom adverse claims to the subject-matter in dispute (referred to in this Order as the claimants) appear, the Court may order —
>
> ...
>
> (*b*) *that an issue between the claimants be stated and tried* and may direct which of the claimants is to be plaintiff and which defendant.
>
> [emphasis added]

The parties subsequently obtained directions for discovery and the filing of affidavits of witnesses and experts, and this was followed by an 11 day hearing with cross-examination of witnesses. While strict formal pleadings – in the nature of statements of claim or defences in a writ action – were not filed for the Interpleader Proceedings, we recognise that the objection raised by the Human Rights Victims and the Foundations is not merely technical or pedantic. It appears to us from a perusal of the record that the nature of the evidence adduced during the hearing before the Judge was shaped by the legal characterisation and controverted aspects of the claims as framed by the parties in their Statements of Case. The Judge and parties must, therefore, have proceeded on the assumption that the Statements of Case clearly defined the issues for determination by the court in relation to each competing claim, and we are of the view that the rationale underlying the rules for pleadings on the raising of new arguments on appeal should be given due weight where one party may be taken by surprise by the canvassing of new arguments by the other.

74 No mention was made in the Republic's Statement of Case filed below of any claim to a beneficial interest under an express trust; the Statement of Case did not identify the asserted entitlement to the Funds within the parameters of a trust claim, nor did it aver to the facts relating to the Escrow Agreements that gave rise to an express trust, *ie*, the terms of the Escrow Agreements that evinced an intention of the parties to the Escrow Agreements that the Funds would be held by PNB as trustee. Turning to the Republic's argument that it must have, in any event, been obvious from this court's observations in *Republic of the Philippines (Sovereign Immunity)* that the Republic was, in the alternative, relying on a proprietary claim as a beneficiary under a trust, we do not read the relevant remarks as categorically stating a legal conclusion of the basis of the Republic's claim. The court noted at [21] that:

> … Before us, the [Republic] nuanced its argument to state that the effect of the Forfeiture Order was that it "had possession and control of the Funds through PNB". In other words, the argument was that *PNB held the Funds for the [Republic's] account or on trust for the [Republic]* as the escrow had terminated due to the fulfilment of the Escrow Condition as a result of the Forfeiture Order.
>
> [emphasis added]

The general references to PNB holding the Funds "for [the Republic's] account or *on trust*" [emphasis added] should be construed in the specific context of whether the Republic had a sufficient interest in the Funds to assert state immunity. The court's remarks were merely a possible interpretation of the Republic's vague assertion that it had "possession and control" of the Funds, and did not define the actual legal basis upon which the Republic had in fact framed its substantive claim of entitlement to the Funds.

75 For the above reasons, we consider that the Republic had to satisfy the usual requirements for raising a new argument on appeal to advance a claim to a beneficial interest under a trust at this belated stage, *viz*, this court should be in as advantageous a position as the court below to consider the issue and no new evidence is required to be adduced: see *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at [61]–[62].

76 In our judgment, it would be prejudicial to the Human Rights Victims and the Foundations to allow the Republic to assert an additional claim premised on a beneficial interest under an express trust created by the Escrow Agreements. If there were no foreign law elements and the sole legal question was whether the terms of the Escrow Agreements should be construed as creating an express trust, this would possibly have been a pure question of law that this Court could determine. However, the express trust analysis is complicated by the interpolation of multiple layers of choice of laws issues; Prof Yeo's opinion identified at least two different aspects – the law governing the creation of the express trust and the law governing the operation of the express trust – which raise questions relating to the application and interpretation of foreign law as well as the principles of construction of documents (*ie*, the Escrow Agreements) that may be governed by foreign law. Satisfactory evidence of these matters was not placed before us.

77 It is trite that foreign law has to be proven as a matter of fact and that the law of the forum will be applied in default of proof: *Dicey, Morris & Collins vol 1* at para 9-002. However, we do not think that it lies in the mouth of the Republic to assert that Singapore law may apply as the default position or that the court may take judicial notice of the relevant aspects of the foreign law (*ie*, Philippines law), when the very reason why evidence on these matters was not available was because the Republic had failed to argue this point below. Indeed, the Republic took the position that it was "apparent that the Republic had asserted an interest on the grounds of, *inter alia*, a trust" [note: 39] when the Republic first made a claim to the Funds, yet the Republic only expressly articulated the legal nature of its claim as a beneficial interest under an express trust for the first time after Prof Yeo submitted his opinion. Both the Human Rights Victims and the Foundations also disagreed with the Republic's submissions on the applicable foreign law and the interpretation of that law, but did not have the opportunity to canvass comprehensive arguments or adduce expert evidence. We therefore consider that it would not be in the interests of justice to grant leave to the Republic to raise this additional point on appeal. As stated earlier in this paragraph, foreign law must be proven as a fact. It is too late now for the Republic to raise a new point which has a foreign law dimension, *ie*, requiring evidence relating to foreign law governing the point.

78 For completeness, we note that the original Green Line Argument was premised on the satisfaction of the escrow condition in cl 2(vii) of the Escrow Agreements, but there was no further legal analysis as to why the satisfaction of cl 2(vii) would vest the beneficial interest in the Funds in the Republic. In the absence of a trust, the satisfaction of cl 2(vii) would, at most, give the Republic a contractual claim against PNB under the Escrow Agreements. This was not the Republic's case.

Conclusion

79 In the premises, we affirm the Judge's finding that the Forfeiture Judgment cannot be recognised as having the legal effect of vesting beneficial interest in the Funds in the Republic.

The Human Rights Victims' claim

80 The claim of the Human Rights Victims hinges on a single question: did the Chinn Assignment validly pass title to the Swiss Deposits, and hence the Funds, from the Marcos Estate or Foundations to the Human Rights Victims? This question is in turn to be answered by the law that governs the

validity and effectiveness of an involuntary judicial assignment purporting to transfer title to a contractual chose in action.

81 The broad common law methodology for resolving a legal question with a foreign law element involves a three-stage process: (i) the *characterisation* of the relevant issue; (ii) the selection of the appropriate choice of law rule in the context of the relevant *connecting factors*; (iii) the identification of a *system of law* by the application of those connecting factors: see *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC and other*s [2001] 1 QB 825 ("*Raiffeisen Zentralbank*") at [26]; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387 ("*MacMillan*") at 391–392.

Characterisation of the issue

82 In our view, the fundamental flaw in the methodology of reasoning adopted by the Human Rights Victims is one of characterisation, *viz*, the identification of the functional juridical category within which the relevant issue falls, and not the subsequent selection of an appropriate connecting factor or the identification and application of the foreign law.

83 The Human Rights Victims submitted that there were two tiers of relationships involved in the assignment of debts:

(a) the first-tier relationship between the assignor and assignee; and

(b) the second-tier relationship between the third party debtor, the assignor, and the assignee.

This distinction is drawn from Rule 135 of *Dicey, Morris & Collins vol 2* at para 24R-050, which is based on what was then Article 12 of the Rome Convention on the Law Applicable to Contractual Obligations and said to also represent the common law position:

> **RULE 135**–(1) As a general rule,
>
> (a) the mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") are governed by the law which applies to the contract between the assignor and assignee; and
>
> (b) the law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.
>
> (2) But in other cases (*semble*) the validity and effect of an assignment of an intangible may be governed by the law with which the right assigned has its most significant connection.

The Human Rights Victims argued that the question before the court only concerned the first-tier relationship. The second-tier relationship as between the Swiss Banks, the Foundations (as assignor) and Human Rights Victims (as assignee) was but "a matter of history" as the Swiss Banks had ceased to hold the Funds since 1998 and are not claimants in the Interpleader Proceedings.

84 We are not persuaded by the contention that the proper issue before this court should be

framed as whether the Chinn Assignment was valid *vis-à-vis* the assignor (the Marcos Estate and/or the Foundations) and assignee (the Human Rights Victims). As observed by Staughton LJ in *Macmillan* at 418A–B:

> … I agree with the judge when he said [1995] 1 W.L.R. 978, 988 : *"In order to ascertain the applicable law under English conflict of laws, it is not sufficient to characterise the nature of the claim: it is necessary to identify the question at issue."* Any claim, whether it be a claim that can be characterised as restitutionary or otherwise, may involve a number of issues which may have to be decided according to different systems of law. *Thus it is necessary for the court to look at each issue and to decide the appropriate law to apply to the resolution of that dispute*. …
>
> [emphasis added]

As the Human Rights Victims seemed to be saying that the formulation of their claim to the Funds did not involve any assertion that they had obtained proprietary rights to the Funds at the time the Chinn Assignment was executed, then in the context of the present Interpleader Proceedings, their claim would be seriously undermined. The only question that the court is concerned with in an interpleader proceeding is the resolution of adverse claims to the *res* that forms the subject matter of the interpleader, and the entitlement must be founded on a title or proprietary interest: see the decision of this court in *Tay Yok Swee v United Overseas Bank and others* [1994] 2 SLR(R) 36 at [12]–[15], followed in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 at [14]–[16]; *Singapore Civil Procedure 2013* (Sweet & Maxwell Asia, 2013) at para 17/1/6. Interpleader proceedings are not concerned with a relative *in personam* entitlement to property, or an oblique *jus ad rem* in the form of a right relating to another person's right to the property.

85 While the Human Rights Victims chose to frame their cause of action based on a hierarchy of relative entitlement to the Funds, we consider that the defining element of the claims of all the parties to the Interpleader Proceedings is the question of title to property – the correct characterisation of the substance of the *issue* before this court is the *effect* of the Chinn Assignment on the title to the Swiss Deposits at the time that the judicial assignment allegedly took place, and this falls most appropriately within a proprietary rubric. The common law does not recognise a distinction between a right of property as between the assignor and assignee and a right of property as between the assignee and the rest of the world, and we consider that the Human Rights Victims' characterisation of the issue as one relating to the first-tier relationship is hardly adequate. If the Human Rights Victims' contention was that a different characterisation of the proprietary issue ought to apply to the transfer of property in relation to the present matter as only the assignor and assignee are involved in the appeals, we were not referred to any authority that supported this proposition (see the rejection of a similar argument in *Glencore International AG v Metro Trading International Inc (formerly Metro Bunkering and Trading Co) (No 2)* [2001] CLC 1732 at [30]) and nor do we think that this is the correct characterisation of the issue before us, which involves competing assertions of entitlement to property by parties other than the assignor and assignee.

The relevant connecting factor

86 There is no common law authority on the appropriate connecting factor when the proprietary effect of a judicial assignment of a contractual chose in action in the form of a debt is in issue, and involuntary assignments have generally not been regarded as a coherent juridical category which is subject to a fixed set of rules governing the appropriate connecting factor. The Judge identified, by analogy, the *lex situs* rule that applies to the garnishment of a debt as a connecting factor (at [89]–[95] of the Judgment), but preferred – in the light of the criticism that has been advanced against

the *lex situs* rule – the proper law of the debt as the most appropriate connecting factor (at [96]–[100] of the Judgment).

87 Prof Yeo's opinion suggested four different analogies that may be of assistance in ascertaining the relevant connecting factor:

(a) with voluntary assignments of contractual choses in action, under which the *lex actus*, *lex situs*, proper law of the debt and residence of the parties are possible contenders depending on the specific legal question before the court;

(b) with the recognition of foreign judgments *in rem*, under which the applicable connecting factor would appear to be the *lex situs*;

(c) with the rules relating to legislative or executive confiscation of property, under which the connecting factor would either be the *lex situs* or the proper law of the debt; and,

(d) with the judicial garnishment of a debt, under which the appropriate connecting factor is generally the *lex situs*.

88 In our view, analogy (a) cannot be pressed too far on the present facts. A judicial assignment involves the involuntary transfer of an intangible by a court order or by the operation of law, and is by its nature very different from a voluntary assignment: see *Raiffeisen Zentralbank* at [40], where Mance LJ expressed doubts on the appropriateness of this comparison. Rule 135 of *Dicey, Morris & Collins vol 2* (cited above at [83]), which applies to voluntary assignments, is intended to encompass a gamut of legal issues that do not arise in relation to an involuntary assignment (see *Dicey, Morris & Collins vol 2* at para 24-051), and these questions may each fall within very different juridical categories that are not subsumed neatly under the wide label of "assignment". Prof Yeo pointed out, and we agree, that Rule 135(1)(a) of *Dicey, Morris & Collins vol 2* is relevant only to questions relating to the contractual rights and obligations with respect to the contractual instrument of the assignment, which does not exist in an involuntary assignment. We therefore rule out the connecting factors of the *lex loci actus* (*ie*, the law of the place where the transfer took place) or the proper law of the assignment, as contended for by the Human Rights Victims, as they are inappropriate to govern the question in issue, which concerns the effect of the assignment on title instead of the validity of the assignment or the mutual obligations as between the Human Rights Victims and the Foundations. We would also add that whilst Rule 135(1)(b) of *Dicey, Morris & Collins vol 2* apparently treads the contract/property divide and covers issues that may potentially arise in an involuntary assignment, the connecting factor under Rule 135(1)(b), *ie*, the law governing the underlying right that constitutes the subject matter of the assignment, is based on a predominantly contractual view whereby it is assumed that the parties have implicitly decided that the chose in action ought to bear the characteristics of (and be governed by) the law governing the creation of that chose.

89 Analogy (d) was adopted by the Judge as the starting point as the putative effect of the Chinn Assignment was to effect a garnishment of the accounts in which the Swiss Deposits were held (at [87] of the Judgment). To the extent that a garnishee order is an "enforcement of the judgment in rem against the debt" (per Lord Hoffmann in *Kuwait Oil Tanker Co SAK and another v Qabazard* [2004] 1 AC 300 at [16]), the effect of the garnishee order may be regarded as a question of title, *ie*,

whether the garnishee order transfers title of the chose in action from the judgment debtor to the judgment creditor. The proprietary effect of a garnishment order may be viewed as equivalent to a judicial transfer of title, and thus, in terms of the court's jurisdiction to issue a garnishee order or the rules on recognition of a foreign garnishee order, the requirement that the debt be sited within the territorial jurisdiction of the foreign court is justified in principle (see *Dicey, Morris & Collins vol 2* at para 24-085). Following this reasoning, the appropriate connecting factor for questions relating to whether a judicial assignment purporting to transfer title of a debt has an *in rem* effect would be the *lex situs*.

90 Analogies (b) and (c) also present a close parallel to the present situation; (b) is concerned with the effect of a judgment on title to property while (c) is concerned with the involuntary divestment of a property interest through expropriation or confiscation. Both categories involve questions that are analysed through a purely proprietary lens, and the common law has generally converged on the same connecting factor of the *lex situs*. Although (c) is concerned with governmental and legislative acts as opposed to judicial acts, the same question arises – whether the debt may now be enforced against the original debtor (the Swiss banks) by the party who has purportedly obtained title (in this case the Human Rights Victims). The courts have generally looked to the *lex situs* to answer this. Prof Yeo also helpfully directed our attention to the Privy Council case of *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147, where Lord Hoffmann drew a distinction (at [15]) between the question of transfer of title to a chose in action and the question of whether a debt has been discharged. For the former, the *lex situs* has generally applied, while the latter has usually been answered by the proper law of the debt. We would be inclined to the view that the proper characterisation of the issue before us here is the question of transfer of title to a chose in action, but for the purposes of the present matter, do not propose to decide this as there is no need for us to choose between the *lex situs* or the proper law of the debt (see [92] below).

91 Returning to analogy (b), there is something to be said for the view that the judicial assignment is in effect embodied in a judicial order, and that the rules relating to recognition of judgments *in rem* may shed light on the relevant considerations in selecting a connecting factor. In *George E Duke and another v Josephine Andler and others* [1932] SCR 734, the issue before the Supreme Court of Canada was whether a judgment from a Californian court ordering a conveyance of immovable property situated in British Columbia and a judicial order from a Californian court purporting to execute the conveyance could be recognised. It was held that the judgment could not be recognised to affect title to the immovable property as the *lex situs* of the property was the law of British Columbia. The primacy of territoriality in relation to the rules for the recognition of *in rem* judgments have been examined above in a different context, and it suffices to note that it follows from the rules on recognition that it is the *lex situs* of the property that governs whether title to the property has been transferred.

92 From the foregoing it would be apparent there are really two appropriate connecting factors: the *lex situs* and the proper law of the debt. The Judge preferred the proper law of the debt as he appeared to consider it artificial to ascribe to a debt a notional situs that would obfuscate the real basis for the court's selection of a connecting factor (at [96]–[97] of the Judgment). There is considerable academic debate surrounding this issue, but it is not necessary for us to choose between either connecting factor, as it is apparent that both connecting factors point to the same governing law, *viz*, the law of Switzerland. We reserve our opinion on whether the Judge was correct to prefer the proper law of the debt over the *lex situs*.

The governing law and application to the question

93 If the connecting factor is the *lex situs*, it is clear that the debt was situated in Switzerland,

where the debtors (the Swiss banks) resided, and the governing law would be Swiss law.

94 If the connecting factor is the proper law of the debt – described in Janeen M Carruthers, *The Transfer of Property in the Conflict of Laws* (Oxford University Press, 2005) at para 6.32 as "the legal system with which the right has its closest and most significant connection" – we also find that the governing law is Swiss law, if only by default. The parties presented their cases as a binary choice between Swiss law or United States law, and it is unquestionable on the available evidence that no law apart from Swiss law plausibly has any significant connection to the debt represented by the Swiss Deposits at the time the Foundations deposited the sums with the Swiss banks. United States law only came into the picture when the Chinn Assignment purported to transfer the Foundations' and/or the Marcos Estate's interest in the Swiss Deposits to the Human Rights Victims, but this law otherwise had no discernible connection with the underlying obligation in the form of the debt owed by the Swiss banks to the Foundations. We add that we were not referred to any contractual or banking documents relating to the Swiss Deposits that suggested an alternative express choice of law to govern the contracts of deposit.

95 We also find that on an application of Swiss law, the Chinn Assignment did not have the effect of transferring any proprietary right in the Swiss Deposits to the Human Rights Victims. Dr Andreas Lanzling, the sole expert on Swiss law who appeared on behalf of the Republic and PNB, gave evidence that:

(a) no transfer of proprietary rights could be effected as the Swiss Deposits were subject to a criminal freeze order at the time the Chinn Assignment was executed [note: 40]; and

(b) under Swiss law, a foreign court order can only have effect if it is formally recognised through proceedings before a Swiss court and in the present case a Swiss court would have to be asked to recognise the Chinn Assignment and declare it enforceable in Switzerland. The Human Rights Victims conceded that they did not take out any formal enforcement or recognition proceedings. [note: 41]

The Human Rights Victims did not call an expert witness on Swiss law, and none of the above points were undermined in cross-examination.

Conclusion

96 While we emphasise that we would not in any way wish to deny the moral claims of the Human Rights Victims and acknowledge that the Human Rights Victims deserve redress for the grievous wrongs that they have suffered, we are compelled to reject the Human Rights Victims' claim to the Funds in these proceedings as the Chinn Assignment did not have the legal effect of transferring a proprietary interest in the Funds to the Human Rights Victims at any point in time.

The Foundations' claim

97 The Foundations' legal case was straightforward – they claimed that if the Republic, the Humans Rights Victims and PNB failed to establish any entitlement to the Funds, the default legal title to the Funds must necessarily revert to the Foundations on the grounds that they were the original legal owners of the Swiss Deposits. In our judgment, this assertion of the Foundations totally ignored the effects of the orders of the Swiss courts and the consequential actions of the Swiss authorities in authorising the transfer of the funds in the Swiss Deposits to be held in escrow for the specific purposes set out in the Escrow Agreements. The Foundations' legal title to the monies in the Swiss Deposits, and therefore the Funds, was lost at that point in time, and the Foundations have not

suggested any legal basis or alluded to any subsequent legally significant events to explain why its extinguished legal title would be revived by the mere fact that ownership of the Funds could not subsequently be determined in interpleader proceedings. It is therefore erroneous for the Foundations to allege a "default" legal title, and we add that the Foundations did not, at any point in these proceedings, claim that they were the beneficial owners of the Funds. [note: 42] In the circumstances, like the Republic and the Human Rights Victims, the Foundations have also failed to show that they had any entitlement to the Funds.

PNB's claim

Whether PNB held legal title to the Funds

98 PNB claimed to hold the legal title to the Funds as the escrow agent under the Escrow Agreements and/or as the named account holder of the Funds deposited with WestLB.

99 We express no view on the Judge's finding that PNB was a trustee under the Escrow Agreements. As a matter of law, we consider that there is nothing in principle that precludes the creation of a trust relationship under an escrow arrangement. In *Thomson Hill Pte Ltd v Chang Erh and another and another appeal* [1992] 2 SLR(R) 366 ("*Thomson Hill*"), this court held at [15]:

> According to Denning MR in the passage we have cited above from *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]

There are local authorities following *Thomson Hill* which state that a stakeholder is not a trustee: see *Ong Hun Seang and others v Yeoh Oon Teik and others* [1996] 2 SLR(R) 488 at [69]; *Promenade Properties Pte Ltd v Gabriel Peter and another* [1998] 1 SLR(R) 250 at [16]. Both decisions were concerned with the narrow common law position of a stakeholder in relation to deposits under contracts for the sale and purchase of property. Similarly, in Peter Watts and FMB Reynolds, *Bowstead & Reynolds on Agency* (Sweet & Maxwell, 19th Ed, 2010) ("*Bowstead & Reynolds*"), the legal status of a stakeholder (or escrow agent) is described in the following terms at para 9-026:

> ... A person receiving money as a stakeholder must hold or at least account for it pending the occurrence of the relevant event, and when this has occurred, pay it across in accordance with his instructions. ...*He does not hold the deposit in trust and must pay it to one of the parties, usually the vendor, when the relevant event occurs*. ...It is sometimes said that in such a case he is agent of both parties; but it seems rather that he receives the money from the purchaser under a specific and separate obligation as principal.
>
> [emphasis added]

The two authorities cited by the editors of *Bowstead & Reynolds* for the proposition that a

stakeholder does not hold the deposit in trust are *Potters (A Firm) v Loppert* [1973] Ch 399 ("*Potters*") and *Harington v Hoggart* (1830) 1 B & Ad 577 ("*Harington*").

100 However, neither *Potters* nor *Harington* stated conclusively that the escrow agent (or stakeholder) can never concurrently be a trustee. The issue that arose in *Potters* was whether an estate agent was liable to account for interest on a pre-contractual deposit paid to him as a stakeholder. Pennycuick V-C observed at 406B–E:

> Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal upon a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event.
>
> *It must depend upon the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.*
>
> ...
>
> *Turning now to authority, it is to my mind conclusive that, apart from agreement to the contrary, a contract deposit paid to a stakeholder is not paid to him as trustee*, but upon a contractual or quasi-contractual liability with the consequence that the stakeholder is not accountable for profit upon it.
>
> [emphasis added]

Pennycuick V-C did not make any general statement of principle that funds received by a stakeholder could never be impressed with a trust, and indeed contemplated that whether the money was paid to the third party as a trustee would depend on the intention of the parties. *Harington*, which was relied on by Pennycuick V-C in *Potters*, involved the isolated issue of whether an auctioneer who had received a deposit was liable for interest under an action for *assumpsit* for money had and received. It was held that the auctioneer, who was in the position of a stakeholder, was not liable for interest. There was nothing in the decision which indicated that the nature of the obligations or liabilities assumed by a stakeholder could not be varied or determined by contrary agreement.

101 Notwithstanding what we consider to be the correct legal position, we decline to decide on whether the Escrow Agreements had created an express trust. The Judge appeared to apply Singapore law in construing the terms of the Escrow Agreements to determine whether PNB was a trustee under the arrangement (at [113] of the Judgment), but as Prof Yeo pointed out, it is not clear whether the Judge applied Singapore law as the governing law for the creation of the trust or in default of proof of foreign law. It appears that the construction of the Escrow Agreements was not in issue in the arguments before the Judge, and none of the parties made submissions on the governing law. Prof Yeo also opined that there was no authority on the issue of what law governs the creation of an express trust, but tentatively appeared to prefer the proper law of the putative trust. Applying this connecting factor, it is clear that the governing law could not have been Singapore law at the time the Escrow Agreements were executed; the connection to Singapore only arose after the Swiss Deposits were released to PNB pursuant to the Escrow Agreements and deposited in bank accounts in Singapore. As we do not have any evidence of foreign law before us, we are hesitant to attempt to make a determination of whether PNB's interest in the Funds was in the nature of a legal title as a trustee.

102 We would, however, affirm the Judge's alternative finding (at [114]–[115] of the Judgment) that PNB held legal title to the Funds as the depositor of the Funds and original account holder with

WestLB. The Judge relied on the finding of fact of this court in *Republic of the Philippines (Sovereign Immunity)* 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.

In other words, as the named account holder, PNB held legal title to the Funds in its deposit account with WestLB. The Human Rights Victims and Foundations did not dispute that PNB held legal title to the Funds at the time the Funds were deposited with WestLB, but submitted that PNB had lost this legal title when the court ordered the Funds to be held by D&N in escrow for the credit of the Interpleader Proceedings.

103 In our judgment, the contentions of the Human Rights Victims and the Foundations are untenable. The purpose of interpleader proceedings is to "decide the claims between the persons present at the proceedings in order that the person interpleading may get the relief to which he is entitled": see *Australia and New Zealand Banking Group Ltd v Ding Pei Chai and others* [2004] 3 SLR(R) 489 at [3]. The order made by Lai J on 24 March 2004 (see above at [22]) merely granted WestLB relief from potential proceedings commenced against it by claimants asserting adverse interests in the Funds by ordering the disputed Funds to be held by D&N in an escrow account for the credit of the Interpleader Proceedings. It did not and could not divest PNB of its legal title of the Funds as the named account holder. PNB must have retained an ostensible interest in the Funds to remain a claimant in the Interpleader Proceedings, at least until some claimant had proven in the interpleader proceedings his title to the Funds. In the absence of proof of such an entitlement by a claimant, it must follow that the Funds would revert to PNB as the original legal title holder of the Funds (the position immediately prior to the commencement of the Interpleader Proceedings). Any other interpretation of the effect of the transfer on PNB's legal title would undermine the purpose of the interpleader procedure and would in effect mean that no one would be entitled to the Funds if no competing claimant was able to prove his beneficial interest. This would be an absurd outcome. If PNB had some proprietary entitlement before the Interpleader Proceedings were commenced, the proprietary rights could not have been extinguished *because* of the Interpleader Proceedings. We should mention that HEP, who is the current escrow account holder of the Funds for the purposes of the Interpleader Proceedings is, quite correctly, not claiming any interest or title to the Funds.

104 There are also two subsidiary arguments that we may dispose of briefly. First, the Human Rights Victims submitted that PNB's claim to legal title was premised on the right to demand repossession of the Funds from WestLB; once the Funds were released, PNB lost the right to possession of the Funds and hence legal title. With respect, the logic of this argument is not immediately apparent and confuses the nature of PNB's claim to the Funds. PNB's claim is as the named account holder and thus legal owner of the Funds. It is not a title based on possession of any tangible assets. Second, the Foundations argued that as the purpose of the Interpleader Proceedings is to determine entitlement to the Funds, a finding that PNB has legal title is insufficient as PNB was not beneficially entitled to the Funds. The Foundations have not cited any authority to support the proposition that Interpleader Proceedings are concerned only with beneficial and not legal title, nor does the case law delineate such a restricted meaning of the word "entitlement" – all that is required is that the asserted entitlement must be some form of *proprietary* interest. We would further add that if we should subscribe to this view of the Foundations it would mean that no one would be entitled to the Funds, an outcome which we have labelled in the immediately preceding paragraph as absurd.

Whether the recognition of PNB's legal title would constitute indirect enforcement of a penal

Whether the recognition of PNB's legal title would constitute indirect enforcement of a penal law

105 The Human Rights Victims and Foundations further argued that a decision that PNB holds legal title to the Funds would run afoul of the rule against the enforcement of a penal law. As a representative of PNB had given evidence that PNB would, if awarded the Funds, release the Funds to the Republic pursuant to clause 2(vii) of the Escrow Agreement, the Funds would therefore be transferred in accordance with the determination of entitlement under the Forfeiture Judgment and in execution of the judgment.

106 As we have discussed above (at [68]), the rule against enforcement of a penal law extends to both direct and indirect enforcement, which should be distinguished from recognition that does not in substance give the penal law extraterritorial effect. Prof Yeo cited the three-tiered classification of penal laws in *Settebello Ltd v Banco Totta and Acores* [1985] 1 WLR 1050 ("*Settebello*") at 1056E–H:

> The last occasion upon which this court was required to consider the enforceability of foreign law was in *Williams and Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.* [1985] 3 W.L.R. 501 , the "Dry Sack" sherry trade mark case, judgment having been given on 3 April 1985. We were greatly assisted by Miss Diana Procter, the law reporter, who made galley proofs of the judgments available to us. In the court below, Nourse J., at p. 506 et seq., had undertaken an exhaustive review of the circumstances in which, on the authorities, the English courts would decline to give effect to foreign law. He had classified these circumstances, at p. 510, under the following headings:
>
> *Class 1 laws*, which the English courts will not recognise: A. Foreign confiscatory laws which, by reason of their being discriminatory on grounds of race, religion or the like, constitute so grave an infringement of human rights that they ought not to be recognised as laws at all. B. Foreign laws which discriminate against nationals of this country in time of war by purporting to confiscate their movable property situated in the foreign state.
>
> *Class 2 laws*, which will be recognised, but to which effect will not be given: A. Foreign laws confiscating property situated in the foreign state, if they are penal. B. Foreign laws which purport to confiscate property situated in this country.
>
> *Class 3 laws*, to which effect will be given provided that they do not fall within Class 1: Foreign laws which confiscate property in the foreign state and where title has been perfected there.
>
> This classification was accepted by this court on the appeal.

In Prof Yeo's opinion, indirect enforcement should be distinguished from recognition, and there was no public policy consideration that would preclude the Singapore courts from recognising the validity or enforceability of RA 1379 within the territorial boundaries of the Philippines. Hence, to the extent that the operation of RA 1379 is confined to the territory of the Philippines, RA 1379 may be categorised as a Class 2 law under the *Settebello* classification that "will be recognised, but to which effect will not be given". The Human Rights Victims submitted that it was dangerous to parse recognition and enforcement.

107 We endorse Prof Yeo's opinion that there is, in principle, a distinction between recognition and enforcement. The rationale for the rule against enforcement of a penal law is explained in the following terms in *Dicey, Morris & Collins vol 1* at para 5-020:

> ... Although the theoretical basis for the Rule is a matter of some controversy, the best

explanation, it is submitted, is that suggested by Lord Keith of Avonholm in *Government of India v Taylor*, that enforcement of such claims is an extension of the sovereign power which imposed the taxes, and "*an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign*, is (treaty or convention apart) contrary to all concepts of independent sovereignties.

[emphasis added]

Dicey, Morris & Collins vol 1 also states at para 5-023:

… Rule 3(1) relates only to enforcement, but it does not prevent *recognition* of a foreign law of the type in question, and it is sometimes difficult to draw the line between an issue involving merely recognition of a foreign law and indirect enforcement of it.

There is no objection against recognition of a foreign penal law (in so far as its scope of operation is limited to the territorial boundaries of the foreign country) because recognition *simpliciter* does not require the forum court to *assist* the foreign country in asserting its sovereign powers within the territory of the forum court. The difficulty is not in identifying this conceptual distinction, but in delineating when recognition is in reality a guise for indirect enforcement.

108 We are also unable to accept the contention of the Human Rights Victims that the Class 2 law identified in *Settebello* must be confined to matters which have "no effect". The Human Rights Victims referred us to *Banco De Vizcaya v Don Alfonso De Borbon Y Austria* [1935] 1 KB 140 ("*Banco De Vizcaya*") in support of their argument that this court would be actively assisting PNB in returning the Funds to the Republic if it were to make an order in these Interpleader Proceedings that PNB is the legal owner of the Funds. This case involved interpleader proceedings whereby the former King of Spain brought an action against the Westminister Bank in London claiming for the delivery up of certain bonds and share certificates. These securities had been deposited in the Westminster Bank by a Spanish bank as the former King's agent. A decree was later enacted by the President of Spain seizing all properties situated in Spain that belonged to the private fortune of the former King on the grounds of treason; the decree also ordered that all bankers established in Spain who had in deposit such properties should make delivery of such properties to the Spanish Treasury. The Westminster Bank interpleaded after both the former King and the Spanish bank claimed to be entitled to the securities in question. Lawrence J held at 143–144:

In my judgment, the substance of the right sought to be enforced by the plaintiffs 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. *The plaintiffs' 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 the defendant*, and, that being so, it seems to be unarguable that the enforcement of the plaintiffs' right will not directly or indirectly involve the execution of the decrees.

It was contended on behalf of the plaintiffs that, though the decrees may be penal, the plaintiffs' claim is not a penal action, because they are not asserting the right of the Spanish Government, but their own contractual right to the securities as against the Westminster Bank. I am unable to accept this contention. The plaintiffs are not asserting their contractual rights as they originally existed, but as altered by the decrees of the Spanish Republic. Nor are they in substance asserting their own rights at all, but the rights of the Spanish Republic. … the only way in which the plaintiffs are able to assert their claim that they are entitled as against the defendant 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.

[emphasis added]

The holding in *Banco De Vizcaya* appears to provide some measure of support for the Human Rights Victims' argument that it would be an indirect enforcement of a penal law to allow PNB to obtain the Funds pursuant to its contractual rights against WestLB because a representative of PNB had admitted that the Funds would be released to the Republic in accordance with the Writ of Execution that enforces the Forfeiture Judgment. However, we note that Lawrence J's reasoning was expressly premised upon his finding that the Spanish bank was asserting contractual rights as altered by the decrees of the Spanish Republic as well as the rights of the Spanish Republic. As Prof Yeo correctly observed, the character of the claim in *Banco De Vizcaya* has to be carefully viewed in the light of the fact that the Spanish bank was claiming *on behalf* of the Spanish government in defiance of the mandate *vis-à-vis* the former King and the Spanish Bank, and Lawrence J had found (at 144) that the only basis for the Spanish bank's better entitlement to the securities was the decree. In substance, the Spanish bank was therefore claiming as nominee of the Spanish government. In our opinion, *Banco De Vizcaya* should not be interpreted as precluding the court from recognising the right of a party who has expressed an intention to comply with a foreign penal law within the territory of that foreign state, where the right of that party is not attributable to an extraterritorial application or enforcement of the penal law.

109 In this context, we consider that the reference to a Class 2 law "to which effect will not be given" means that the court will not declare the plaintiff's proprietary interest in legal proceedings when the result is to give substantive effect to the penal law. It does not mean that the acknowledgment of the effect of the foreign penal law within the foreign territory or under the foreign law governing a particular issue before the forum court cannot carry any legal consequences. Thus, while we found above (at [70]) that recognition of the *in rem* legal effect of the Forfeiture Judgment as the basis for the Republic's entitlement to the Funds would constitute the enforcement of a penal law, we do not think that the same objection may be taken if we determine that PNB holds legal title to the Funds. Our express basis for finding that PNB is legal owner is premised on the simple fact that PNB was the named holder of the accounts in which the Funds were deposited, and in the absence of any party who has successfully asserted an entitlement to the Funds, the Funds should be returned to PNB as legal owners, restoring the *status quo* prior to the commencement of the Interpleader Proceedings. In other words, PNB's pre-existing legal title to the Funds arose prior to, and independently of, the Forfeiture Judgment, and PNB's claim does not require this court to give effect to RA 1379. It is incorrect to say that PNB requires the assistance of the court to establish its legal title in Singapore – its legal title simply arose from the private contractual relationship between PNB as depositor and WestLB as depositee.

110 We also agree with Prof Yeo that if PNB chooses to perform the Escrow Agreements in accordance with the governing law, there is no legal basis for this court to decline to declare PNB's legal title on the pre-emptive ground that PNB would subsequently perform its obligations under the Escrow Agreements and release the Funds to the Republic pursuant to the Writ of Execution. What PNB chooses to do in accordance with the governing law of the Escrow Agreements is not subject to this court's intervention. In *In Re Lord Cable, Decd* [1977] 1 WLR 7 ("*Re Lord Cable*"), which involved the question of whether a failure of the English court to intervene (by declining to issue an injunction to restrain trustees from removing monies from the United Kingdom in order to comply with Indian currency legislation) would be tantamount to enforcing an Indian revenue law, Slade LJ observed at 23B–C that:

… it would not, in my judgment, be correct to say that the failure of the English court to

> intervene in regard to the redemption moneys amounted to an enforcement of the exchange control laws of India. It is one thing for the court to intervene by requiring trustees to comply with foreign fiscal legislation: it is quite another thing for it to decline to prevent trustees of a foreign trust from complying with fiscal legislation of the country of the proper law, which under such foreign law they are entitled and indeed obliged to obey.

This aspect of *Re Lord Cable* was recently applied by Briggs J in *Carey Group Plc and others v AIB Group (UK) plc and another* [2012] Ch 304 at [61]–[62]. We respectfully follow this distinction and hold that no issue arises as to the Singapore court enforcing RA 1379 by an order that PNB is entitled to the Funds as legal owner.

Conclusion

111 We conclude that the Judge correctly found that PNB held legal title to the Funds on the basis that PNB was the original named account holder with WestLB.

Judgment

112 For the foregoing reasons, we dismiss CA 109/2012, CA 110/2012 and CA 111/2012 as the Republic, Human Rights Victims and the Foundations have not satisfied us that they are legally or beneficially entitled to the Funds. We also hold that PNB has legal title to the Funds as the original named account holder with WestLB prior to the commencement of the Interpleader Proceedings. As all three contesting parties have failed in their claims for the Funds, none of them is entitled to any costs. However, as the Human Rights Victims and the Foundations have resisted the claim of PNB as the legal owner of the Funds in the account with WestLB, we order that they shall bear the costs of PNB in respect of the getting up of this issue.

113 It remains for us to record our gratitude to Prof Yeo for his scholarly and incisive opinion that greatly assisted us in framing and analysing the material issues.

[note: 1] CA 109/2012 Appellant's Core Bundle Vol II Part A p 103; Record of Appeal Vol IV Part E pp 1290-1297.

[note: 2] Record of Appeal Vol IV Part E pp 1310-1315.

[note: 3] CA 109/2012 Appellant's Core Bundle Vol II Part A p 64.

[note: 4] CA 109/2012 Appellant's Core Bundle Vol II Part A p 96.

[note: 5] Record of Appeal Vol IV Part B p 479.

[note: 6] CA 109/2012 Appellant's Core Bundle Vol II Part A p 96; Record of Appeal Vol IV Part B p 479.

[note: 7] CA 109/2012 Appellant's Core Bundle Vol II Part A p 99 ff.

[note: 8] CA 110/2012 Appellant's Core Bundle Vol II pp 86-92.

[note: 9] 1st Affidavit of Robert A. Swift; Record of Appeal Vol II Part B pp 419-420.

[note: 10] The date indicated on the Order was manually altered from 13 July 1995 to 10 July 1995.

[note: 11] CA 110/2012 Appellant's Core Bundle Vol II at p 95.

[note: 12] CA 110/2012 Appellant's Core Bundle Vol II at p 97.

[note: 13] CA 109/2012 Appellant's Core Bundle Vol II Part A pp 178-179.

[note: 14] CA 109/2012 Appellant's Core Bundle Vol II Part A pp 228-232.

[note: 15] CA 109/2012 Appellant's Core Bundle Vol II Part A p 199.

[note: 16] CA 109/2012 Appellant's Core Bundle Vol II Part A pp 215-218.

[note: 17] CA 109/2012 Appellant's Core Bundle Vol II Part A p 219.

[note: 18] CA 109/2012 Appellant's Core Bundle Vol II Part A p 246.

[note: 19] CA 109/2012 Appellant's Core Bundle Vol II Part A p 282.

[note: 20] Record of Appeal Vol IV Part B pp 599-600; Record of Appeal Vol IV Part C pp 601-620.

[note: 21] CA 109/2012 Appellant's Core Bundle Vol II Part A pp 285-290.

[note: 22] Record of Appeal Vol IV Part C pp 826-848.

[note: 23] CA 109/2012 Appellant's Core Bundle Vol II Part B p 103.

[note: 24] CA 109/2012 Appellant's Core Bundle Vol II Part B p 106.

[note: 25] CA 109/2012 Appellant's Core Bundle Vol 2 Part B p 128.

[note: 26] Record of Appeal Vol III Part I pp 2306-2308.

[note: 27] First Affidavit of Roger L. Zenarosa, Record of Appeal Vol II Part A p 40.

[note: 28] Record of Appeal Vol II Part A pp 27-30.

[note: 29] Statement of Case of the Tenth Defendant at para 35; Record of Appeal Vol II Part C pp 617-618.

[note: 30] Statement of Case of the Seventh Defendants at paras 34-35; Record of Appeal Vol II Part C p 599.

[note: 31] Statement of Case of the Seventh Defendants at paras 34-35; Record of Appeal Vol II Part C p 600.

[note: 32] Statement of Case of the Second to Sixth Defendants at para 23; Record of Appeal Vol II Part C p 575.

[note: 33] Statement of Case of the First Defendant at paras 20-22; Record of Appeal Vol II Part C p 564.

[note: 34] CA 109/2012 Appellant's Core Bundle Vol 2 Part B at p 239.

[note: 35] Record of Appeal Vol III Part D at p 915-916.

[note: 36] CA 109/2012 Appellant's Core Bundle Vol 2 Part B at p 260.

[note: 37] Record of Appeal Vol III Part D at pp 915-916.

[note: 38] NE, XXN of Ed Vincent S Albano, Day 5 p 98-99 generally; Record of Appeal Vol III Part A pp 4252-4253.

[note: 39] Republic's Reply Submissions to the Amicus Opinion at [17].

[note: 40] Affidavit of Evidence in Chief of Dr Andreas Lanzling; Record of Appeal Vol III Part A pp 249-250.

[note: 41] Affidavit of Evidence in Chief of Dr Andreas Lanzling; Record of Appeal Vol III Part A pp 247-249.

[note: 42] Statement of Case of the Second to Sixth Defendants at para 46; Record of Appeal Vol II Part C p 583.