Judgment in Case *Ting Lei Miao v Chen Li Hung & Another*, Hong Kong, UK

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Summary of the decision: The court does not recognise or give effect to the order of the Taipei District Court as having effect over the assets of the plaintiff situated in Hong Kong.

Cited international law materials: international doctrine, case law of other jurisdictions

Key words: non-recognised courts, doctrine of public policy, Taiwan, non-recognition

TING LEI MIAO v. CHEN LI HUNG AND ANOTHER

1991, No.A5805

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

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BETWEEN

TING LEI MIAO (磊淼)

Plaintiff

AND

CHEN LI HUNG （陳麗紅)
alias CHAN CHEN LI HUNG

1st Defendant

CHAN KAI YUNG (陳啟庸)

2nd Defendant

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Coram: Hon Patrick Chan J. in Court

Dates of hearing: 9, 10 and 11 April 1997

Date of judgment: 27 June 1997

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J U D G M E N T

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1. This is a trial of two preliminary issues pursuant to O.33, r.3 of the *Rules of the Supreme Court.*

Factual background

2. The plaintiff, Mr Ting Lei Miao, was the President of the Fortune Group of companies in Taiwan. On 20th October 1990, he was adjudged a bankrupt by the Taipei District Court on the ground that he and his companies were unable to pay their creditors. By the same Order, four Taiwanese attorneys-in-law were appointed as trustees-in-bankruptcy.

3. On 2nd August 1991, the present action was commenced in the name of the plaintiff. In the Statement of Claim, it is alleged that the plaintiff is the registered owner of 3,500,000 out of the 5,000,000 issued and fully paid-up shares in Hotel Nikko Hong Kong Limited (Hotel Nikko"). Another 1,000,000 shares were registered in the name of the 1st defendant and 250,000 shares in the name of the 2nd defendant. It is further alleged that the 1st and 2nd defendants are holding these shares as trustees for the plaintiff under two Declarations of Trust, the plaintiff having paid for these shares.

4. In the Defence of the 1st defendant, it is alleged that she was instrumental to the acquisition of all the shares in Hotel Nikko by the plaintiff from Japan Airlines Development Company Ltd. She had also contributed $80 million towards the purchase price of these shares and paid for other expenses. It is also alleged that she had agreed with the plaintiff that she would acquire 1,000,000 shares which would later be transferred by the 1st defendant to the plaintiff upon the plaintiff repaying the 1st defendant the amount of her contribution and payment of expenses. The Declaration of Trust was executed in favour of the plaintiff pursant to such agreement and under such circumstances. It is alleged that since the plaintiff had failed to repay her, the 1st defendant is entitled to those shares.

5. The present action has progressed to the discovery stage. In April 1993, the 1st defendant applied for security for costs to be given by the plaintiff. On 6th May 1993, the four Taiwanese trustees-in-bankruptcy commenced legal proceedings against the 1st defendant in the Taipei District Court and claimed for the return of the 1,000,000 shares. The legal process was initially not served on the 1st defendant. The early part of those proceedings was conducted in the absence of the 1st defendant. However, she was present at a later stage through her Taiwanese attorney. During that trial, her attorney challenged the jurisdiction of the Taiwanese court. The argument put up by the Taiwanese trustees-in-bankruptcy was that the Hong Kong proceedings were brought not in their names but in the name of the plaintiff only. According to the court procedure in Taiwan, the 1st defendant also adduced evidence in defence of her case. At the end of the trial, the Taipei District Court assumed jurisdiction, ruled against the 1stdefendant and gave judgment in favour of the trustees-in-bankruptcy. The 1st defendant appealed to the Taiwan High Court. The appeal was dismissed. On further appeal to the Taiwan Supreme Court, her appeal was allowed and the case was remitted to the Taipei District Court for further hearing. I shall deal at a later stage with the judgment of the Taiwan Supreme Court to which counsel drew my attention.

Events leading to present trial

6. To complete the history of the present proceedings, I should mention that on 11th July 1995, the plaintiff applied for a determination by the court pursuant to O.14A a question of law, namely, whether the 1st defendant is estopped from contesting the present proceedings as a result of the judgment in Taiwan obtained by the trustees-in-bankruptcy of the plaintiff in relation to the same 1,000,000 shares in Hotel Nikko and/or alternatively for a striking out of the 1st defendant's Defence and applying for final judgment against her.

7. On 6th October 1995, the plaintiff applied to amend the writ of summons in the present proceedings by adding the four Taiwanese trustees-in-bankruptcy as the 2nd to 5th plaintiffs. These two applications were adjourned for argument.

8. On 11th December 1995, the four Taiwanese trustees-in-bankrupty applied for leave to intervene and to be joined as plaintiffs in this action either in addition to or in substitution for the plaintiff and for an order that they, in their capacity as trustees-in-bankruptcy, do have conduct of the proceedings

as plaintiffs in this action. In the same application, they asked for the same relief as in the previous application issued on 11th July 1995. Upon the December application, Leonard J. ordered that four issues are to be determined as preliminary issues pursuant to O.33, r.3.

The two issues in question

9. The learned judge ordered that two of the issues are to be tried first. They are the issues now before me, namely :

(a) whether in all the circumstances of this case, this Honourable Court should recognise and give effect to the Order of the Taipei District Court dated 20th October 1990 (a copy of which is exhibited as KCC-1 to the affirmation of Ku Chia Chun filed on 11th July 1995); and

(b) whether in all the circumstances of this case, this Honourable Court should recognise the said Order of the Taipei District Court as having effect over the assets of Ting Lei Miao situated in Hong Kong.

10. The third and the fourth preliminary issues relate to a Power of Attorney and Confirmatory Power of Attorney dated 5th July 1991 and 19th January 1994 respectively which were alleged to have been executed by the plaintiff in favour of the four Taiwanese trustees-in-bankruptcy. These two are issues which will be dealt with after the determination of the first two issues.

11. Counsel for the four Taiwanese trustees-in-bankruptcy (the applicants) presented three main submissions in respect of the first issue. I shall deal with each submission separately although it is clear that they are related.

First issue – first submission

12. Counsel for the applicants submits that as a result of the change of policy by the United Kingdom Government in 1980, recognition by the courts of a foreign government or its acts no longer depends on whether the executive gives express recognition to that foreign government but on various objective criteria. It is argued that the decision of Hobhouse J. in **Republic of Somalia v. Woodhouse Drake and Carey (Suisse) S.A. and Others** [1993] QB 54 held that the 1980 policy statement by the Foreign Secretary of the U.K. Government requires the court to attempt its own legal characterizations and this involves a shift of responsibility from the executive to the judiciary. It is submitted that the certificate from the Foreign and Commonwealth Office with regard to the recognition or otherwise of a foreign government is no longer conclusive and that the court now has to assess any evidence placed before it and make its own findings. The certificate is merely part of the evidence before the court. It is submitted that the criteria to be adopted are whether the government is able of itself to exercise effective control of the territory of the state concerned and is likely to continue to do so; whether the executive deals with that government on a normal government to government basis. In deciding whether a government is recognised or not, the courts should also take into consideration other factors including those mentioned by Hobhouse J. in the **Somalia** case at p.68.

13. Counsel submits that according to the Certificate of the Foreign and Commonwealth Office in the present case, the court can take judicial notice of the fact that there is a government in Taiwan which satisfies the criteria for the *de facto* if not *de jure* government by international standards. The absence of any official government dealings between the United Kingdom and Taiwan is due mainly to political reasons. Taiwan has formal diplomatic relations with 31 nations thus showing a significant degree of international recognition. The British attitude as indicated in the Certificate is the same as that taken by the government of the People's Republic of China. Hence the impending transfer of sovereignty on 1st July would not make any difference. Furthermore, a statement by the Chief Justice and President of the Supreme People's Court in China, Mr Ren Jian Xin, showed that there is a tendency of the PRC to recognise the civil activities and rights of Taiwanese residents according to the regulations of the Taiwan region as having factual validity.

General principles

14. The general common law principles regarding acts of foreign governments have been summarised by Steyn J. in **Gur Corporation v. Trust Bank of Africa Ltd** [1987] 1 Q.B. 599 at p.605 :

"Two general principles of English law are clearly established. The first is that an unrecognised state cannot sue or be sued in an English court : *City of Berne v. Bank of England* (1804) 9 Ves.Jun.346. The second is that the govenmental acts of an unrecognised state cannot be recognised by an English court :*Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* [1921] 1 K.B. 456."

15. The rationale behind these is, as leading counsel for the plaintiff submits, that where a territory is not recognised as an independent sovereign state, the courts would hold that its government is in law incapable of an executive, administrative or legislative act. In recent times, there are dicta and arguments which advocate for exceptions to be made to these general principles. These points relate to the second submission of the applicants. I shall come back to them at a later stage.

16. Another principle which is not seriously in dispute is that the executive and the judiciary, being different branches of the same government, should speak with one voice insofar as recognition of foreign governments is concerned. The executive has been regarded as in a better position to make a decision in the field of foreign affairs. If the executive branch of government does not recognise a foreign government, the courts would not normally recognise the acts or steps of such government. The attitude of the courts, at least prior to 1980, has been set out in *Halsbury's Laws of England*, 4th ed., Vol.18 (1977), para.1431 :

"A foreign government which has not been recognised by the United Kingdom Government as either de jure or de facto government has no locus standi in the English courts…. The English courts will not give effect to the acts of an unrecognised government."

Policy of UK Government

17. Prior to 1980, the practice of the UK Government was stated in Parliament in 1951 by the Secretary of State for Foreign Affairs (*Hansard*, Vol 485, Col 2410) :

"It is international law which defines the conditions under which a government should be recognised de jure or de facto, and it is a matter of judgment in each particular case whether a regime fulfils the conditions. The conditions under international law for the recognition of a new regime as the de facto government of a state are that the new regime has in fact effective control over most of the state's territory and that this control seems likely to continue. The conditions for the recognition of a new regime as the de jure government of a state are that the new regime should not merely have effective control over most of the state's territory, but that it should, in fact, be firmly established. Her Majesty's Government considers that recognition should be accorded when the conditions specified by international law are, in fact, fulfilled and that recognition should be not be given when these conditions are not fulfilled. The recognition of a government de jure or de facto should not depend on whether the character of the regime is such as to command His Majesty's Government's approval."

18. The practice of the executive was to decide whether the Government would, adopting international criteria, recognise the new regime as a *de facto* or *de jure* government. In appropriate cases, upon request, it would issue a certificate stating clearly what the Government's position was. The courts would as a general rule accept such certificate without further ado, in accordance with the principle that the executive and the judiciary should speak in unison. The certificate was regarded as conclusive.

19. In 1980, the UK Government in two Parliamentary answers stated a new policy. The relevant parts of the answers are as follows :

"We have conducted a re-examination of British policy and practice concerning the recognition of governments. This has included a comparison with the practice of our partners and allies. On the basis of this review, we have decided that we shall no longer accord recognition to governments. The British Government recognises states in accordance with common international doctrine.

We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to governments. Like them, we shall continue to decide the nature of our fealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.

In future cases where a new regime comes to power unconstitutionally our attitude on the question of whether it qualifies to be treated as a govenment, will be left to be inferred from the nature of the dealings, if any, which we may have with it, and in particular on whether we are dealing with it on a normal government to government basis."

20. In my view, leading counsel for the plaintiff is right in saying that this change of government policy has not changed the underlining principles to which I have referred. The same criteria are to be adopted, namely, whether the new regime has effective control of the territory of the state and is likely to continue to do so. The only change which has been made is that the executive will no longer say in a clear and straightforward way whether the Government recognises a particular foreign government or not. It will simply say what dealings, if any, it has with the new regime and the nature of such dealings. It is then left to the courts in receipt of a certificate issued by the Foreign and Commonwealth Office to infer in individual cases and for the purposes of those cases whether the particular foreign government is recognised or not. The purpose of this change in policy of the executive is apparently to avoid political embarrassment, to prevent misunderstanding of its position and to preserve flexibility since a open recognition of a particular foreign government may have political implications.

Hobhouse J's approach

21. Hobhouse J. in the **Somalia** case took the view that the change of policy by the UK Government resulted in the courts being given the task to assess the position. He said at p.63 :

"If recognition by Her Majesty's Government is no longer the criterion of the locus standi of a foreign 'government' in the English courts and the possession of a legal persona in English law, what criteria is the court to apply? The answers do confirm one applicable criterion namely, whether the relevant regime is able of itself to 'exercise effective control of the territory of the state concerned' and is 'likely to continue to do so;' and the statement as to what is to be the evidence of the attitude of Her Majesty's Government has with it and whether they are on a normal government to government basis. The non-existence of such dealings cannot however be conclusive because their absence may be explained by some extraneous considerations, for example, lack of occasion, the attitude of the regime to human rights, its relationship to another state. As the answers themselves acknowledge, the conduct of governments in their relations with each other may be affected by considerations of policy as well as by considerations of legal characterisation. The courts of this country are now only concerned with the latter consideration. How much weight in this connection the courts should give to the attitude of Her Majesty's Government was one of the issues before me."

"Mr Richards submitted that particular weight should be given to these communications. I have difficulty in accepting that submission wihtout some qualification. Once the question for the court becomes one of making its own assessment of the evidence, making findings of appropriate legal conclusion, and is no longer a question of simply reflecting government policy, letters from the Foreign and Commonwealth Office become merely part of the evidence in the case."

"Accordingly, the factors to be taken into account in deciding whether a government exists as the government of a state are : (a)whether it is the constitutional government of the state; (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; (c) whether Her Majesty's Government has any dealings with it and if so what is the nature of thsee dealings; and (d) in marginal cases, the extent of international recognition that it has as the government of the state."

22. With respect, I do not think I can agree with the learned judge's approach. If what he has suggested is what the courts should be doing in future, namely, to receive evidence and to assess on its own whether recognition should be given to a foreign government, there would be at least three risks. First, the executive and the judiciary may speak with different voices ? one recognises a particular foreign government while the other does not. This is not a remote possibility since the evidence before the court, if this is to be admitted, may be more than and/or different from the type of information which is available to the executive. Second, the courts would be involved in almost every case in assessing the political situation in a territory where there has just been an unconstitutional change in power or authority. Third, different courts may speak with different voices in respect of the same foreign government depending on the available evidence then.

23. As I said, I do not think that the change in policy by the executive has changed the legal principles which the courts should apply. Nor, I believe, was it intended to do so. The executive applies the same criteria as it did before 1980 in deciding what sort of dealings the Government has and/or should have with a new regime, namely : whether it is able of itself to "exercise effective control of the territory of the state concerned" and is "likely to continue to do so". This decision is a political decision and may change from time to time depending on a host of political reasons and circumstances including the political situation of the state concerned. The factors stated by Hobhouse J. will no doubt be relevant for consideration by the executive. Once a decision is made by the executive at a particular point in time on the sort of dealings it should have with the foreign government and the nature of such dealings, whether on an official or unofficial basis, and so conducts itself, these facts will, upon request, be stated in the certificate issued by the Foreign and Commonwealth Office. These are facts which the courts are anxious to know in deciding the issues before them. In many cases, the executive may like to be more unequivocal in stating clearly what the Government's position is in relation to a particular foreign government. In other cases, for some reasons or other, mostly political, the executive may like to be less unequivocal. It is for the court in each individual case to look into the contents of the certificate and to infer from the facts stated therein whether the acts or steps in question which have been taken by the foreign government concerned should be given effect to, having regard to the purpose for which the question has to be resolved and the issues before the court. The court's ruling that certain acts or steps are valid or invalid for the purpose of deciding the issues before it does not necessarily mean that it has recognised that foreign government as the de jure or de facto government there. But even if the court can be said to have, by necessary implication, come to such a conclusion, it is only for the particular purpose before the court.

24. In my view, if the executive has deliberately refrained from stating or drawing its conclusion, it is none of the business of the judiciary to do so. It is not the function of the court to declare or rule that a particular foreign government is recognised as a *de jure* or *de facto* governemnt of the place. The court's function is to decide on the issues brought before it. If when deciding such issues, it is necessary to take into consideration the status of a foreign government, it will seek the assistance of the executive. In this respect, the court's role is limited. It is to interpret the certificate issued by the executive and draw the necessary conclusion in relation to the questions or issues it has to resolve. It should not attempt to embark on an inquiry in order to assess whether a particular foreign government should be recognised as the *de jure* or *de facto* government in that state. An attempt by the court to make such an assessment will run the risk of condescending, unnecessarily and undesirably, into the political arena. If evidence is required, it should not be for the purpose of such an assessment but only for the purpose of deciding the issues before the court, e.g. showing the effect of the acts and steps in question on the parties or civilians generally.

25. I find support for my views in what Nourse LJ said in **Gur Corporation v. Trust Bank of Africa Ltd** [1987] 1.Q.B.599 at 625 with which I would resepectfully agree :

"The rule that the judiciary and the executive must speak with one voice presupposes that the judiciary can understand what the executive has said. In most cases there could hardly be any doubt in the matter. But in a case like the present, where there is a doubt, the judiciary must resolve it in the only

way they know, which is to look at the question and the construe the answers given. It is not for the judiciary to criticise any obsurity in the expressions of the executive, nor to inquire into their origins or policy. They must take them as they stand."

26. It is clear from what the learned judge said that the rule that the executive and the courts must speak with one voice survives the executive's change of policy in 1980 and that the certificate of the executive remains to be conclusive and the courts should not attempt to embark on the sort of inquiry anticipated by Hobhouse J. In my view, the certificate is conclusive in respect of the facts stated therein. It is not conclusive only in the sense that the executive does not state its own conclusion.

Certificate from FCO

27. The parties in the present action having consulted the learned judge posed two questions for the Foreign and Commonwealth Office. The answers they obtained are as follows:

Question 1 :

"What government, state or authority, if any does HM Government recognise as the de facto or de jure government of Taiwan?"

Answer :

"Her Majesty's Government does not recognise Taiwan as a state, and does not have any official dealings with the authorities there. In March 1972, the United Kingdom signed a Joint Communique with the People's Republic of China (PRC) on the exchange of ambassadors, in which the British Government acknowledged the position of the Government of the PRC that Taiwan was a province of the PRC and recognised the PRC Government as the sole legal government of China. This remains the Government's position. There has been no official UK representation in Taiwan since 1972, when, in consequence of the upgrading of relations with the PRC, the consulate at Tamsui was withdrawn."

Question 2 :

" What dealings generally does HM Government have with any regime situate in Taiwan and purporting to exercise authority in Taiwan, and, in particular, what dealing does HM Government have with any regime on a government to government basis ?"

Answer :

"The British Government has no official dealings with the authorities in Taiwan on a Government to Government basis. Those contacts with the authorities in Taiwan that do take place, primarily of an economic and commercial nature, do so on an unofficial basis, through the medium of the unofficial British Trade and Cultural Office (BTCO) in Taipei. The authorities in Taiwan maintain unofficial offices in London, through which similar unofficial contacts also take place."

28. In my view, the answers given in this Certificate are amply clear. The UK Government does not recognise Taiwan as an independent state. She does not have official dealings with the authorities there. It accepts the PRC Government's position that Taiwan is a province of the PRC and that PRC is the sole and legal government in China. There is no question of the PRC conferring or delegating authorities to the government in Taiwan. (Contrast the **Carl Zeiss Stiftung** case and the **Gur Corporation case**.) The only contacts the UK Government has with the authorities in Taiwan are unofficial and restricted to economic and commercial contacts only. One can only assume that the UK Government, when deciding to maintain only such types of contacts with the authorities in Taiwan, must have already borne in mind the criteria accepted by international law, namely : whether there is effective control of the territory of the state concerned and whether this is likely to continue and also the factors stated by Hobhouse J. in the **Somalia** case. I do not propose to deal specifically with these criteria and factors. While it can be said that there is effective control of the territory of Taiwan by an organised body with an effecive legal system and that a small number of nations recognise this body as a *de jure* or *de facto* government, there may be some reservations on its stability and continuity in

the light of the well-known position taken by the PRC towards Taiwan. In any event, this exercise should, in my view, be more appropriately conducted by the executive and not the judiciary in deciding what, if any, dealings the Government should have with this place.

29. I think it is beyond doubt that there is no recognition of the authorities in Taiwan as a de jure government. The facts are also, in my view, not indicative of a *recognition* by the UK Government of the authorities in Taiwan as a *de facto* government in that place. The main purpose of maintaining economic and commercial ties is to protect the business interests of the people in the two places and cannot, without more, be said to point irrevocably to a recognition by the UK Government of the organisation there which purports to act as a legitimate government. Furthermore, *taking note* of the activities in a foreign place is different from *recognising* the body conducting such activities as its de facto government. Upon a true construction of the answers given in the Certificate, I take the view that the executive' attitude is far from being one of recognition whether on a *de jure* or *de facto* basis. That being the case, it would be wrong for the court to depart from such attitude.

30. If the executive does not recognise the authorities in Taiwan as a *de jure* or *de facto* government, as it is the case here, I think prima facie, the courts in Hong Kong should not recognise the acts of the Taiwanese courts which are considered as not lawfully and properly constituted. Hence, unless there are other reasons, the Bankruptcy Order made by the Taipei District Court cannot and should not be recognised by this court. I note incidentally that at least the Taipei District Court, took the view that Taiwan does not recognise the validity of the judgment of the Hong Kong court and vice versa. This view was not disapproved by the Taiwan Supreme Court.

31. I do not think that the applicants' position can be improved by the change of sovereignty on 1st July. The UK Government's stance is the same as that of the PRC. It is argued that Taiwan like Hong Kong would be considered as part of China, and the law applicable there would be the laws of a province of the same state and not foreign law. That may be so. But whether such laws would be acceptable to or regarded as valid by the PRC is very much an open question since such laws were enacted by the Taiwan authorities as the laws of a sovereign state and not of a province of China. I do not want to surmise on this matter. For the present purpose, without a clear recognition (as opposed to indulgence) by the PRC of the laws of Taiwan, I have grave doubts whether the applicants' argument can succeed.

First issues – second submission

32. Counsel for the applicants submits that where the executive does not recognise a foreign government, the courts may, in the interests of justice and common sense, and where no consideration of public policy to the contrary has to prevail, give recognition to the realities found to exist in the territory of Taiwan and to recognise the validity of judicial acts affecting the day to day affairs of the people there, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government. Reliance is placed on the dicta of Lord Wilberforce in the **Carl Zeiss Stiftung** case and subsequent decisions on this point.

33. Counsel submits that Taiwan has its own government and legal system for many years. The UK Government had previously recognised the government of the Republic of China but had subsequently withdrawn the same and recognised the PRC government instead. It is argued that the adjudication of bankruptcy of an individual and the administration of his assests are acts of everyday occurrence. It affects the rights and interests of a lot of investors. It is in the interest of justice and common sense that the court should recognise such actual fact existing in Taiwan. There is no prevailing public policy which is contrary to accepting this adjudication in Taiwan.

Lord Wilberforce's dictum

34. There are decided cases which support counsel's argument as a genreal proposition. The most authoritative statement came from Lord Wilberforce in **Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No.2)** at p. 954 :

"My Lords, if the consequences of non-recognition of the East German 'Government' were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about its total, or whether some mitigation of the severity of this result can be found. As Locke said : 'A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human cosiety,' and this must be true of a society – at least a civilised and organised society -such as we know to exist in East Germany. In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question.

No trace of any such doctrine is yet to be found in English law, but equally, in my opinion, there is nothing in those English decisions, in which recognition has been refused to particular acts of non-recognised governments, which would prevent its acceptance or which precribes the absolute and total invalidity of all laws and acts flowing from unrecognised governments. In view of the conclusion I have reached on the effect to be attributed to non-recognition in this case, it is not necessary here to resort to this doctrine but, for my part, I should wish to regard it as an open question, in English law, in any future case whether and to what extent it can be invoked."

35. This has received much judicial support in various subsequent cases. Lord Denning MR in **Hesprides Hotels Ltd v. Aegean Turkish Hoilidays Ltd** [1978] 1 Q.B. 205 at 217 :

"I would unhesitatingly hold that the courts of this country can recognise the laws or acts of a body whic is in effective control of a territory even though it has not been recognised by Her Majesty's Government de jure or de facto : at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth …"

36. Steyn J. in **Gur Corporation v. Trust Bank of Africa Ltd** [1987]1 Q.B. 599, at 605 :

"One qualification of the general principles may be the necessity for English courts to take cognisance of government acts of unrecognised states which directly affect family or property rights of individuals. There is no binding English authority supporting such a qualification of the general principles. Lord Wilberforce in Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2) [1967 1 A.C. 853, 954, regarded it as a possible avenue for future development."

37. Sir John Donaldson M.R. also echoed Lord Wilberforce's reservation on this point and said in the same case at p.622 :

"I see great force in this reservation, since it is one thing to treat a state or government as being 'without the law,' but quite another to treat the inhabitants of its territory as 'Outlaws' who cannot effectively mary, beget legitimate children, purchase goods on credits or undertake countless day-to-day activities having legal consequences."

38. I think Lord Wilberforce's dictum must be correct. There are bound to be cases in which it would be unjust and contrary to common sense not to recognise certain acts and steps of unrecognised governments. The affirmations placed before me in this trial are full of examples in which the courts would and should accord recognition to those acts and steps which affect the rights and properties of persons who transact their business and conduct their activities on the assumption that such acts and steps of foreign governments are not in doubt. It is only right that these private individuals' rights and properties are protected and preserved. The **Pioneer Container** [1994] 2 A.C.324 and **Taiwan Via Versand Ltd v. Coomodore Electronics Ltd** [1993] 2 HKC 650 are simply examples illustrating the desirability of having an exception in appropriate cases (although it is not clear whether the issue here was argued in the former case and the latter case dealt with the construction of an express provision of an ordinance).

39. However, as Lord Wilberforce said, the scope of this exception has never been precisely defined. The learned Law Lord referred to cases involving "private rights, or acts of everyday occurrence, or perfunctory acts of administration". The examples given in that case and in subsequent cases in which this dictum was accepted are cases concerning marriages, divorces, legitimacy and commercial transactions. Does it apply to the present case ?

40. The applicants are seeking to be joined in this action either in addition to or in substitution for the plaintiff. They do so with the authority of the order of the Taipei District Court. Without the Order dated 20th October 1990, they would have no locus standi to do so. They are making the application seeking participation in this action as officers of the Taipei District Court. They are conducting these proceedings under the supervision of that court. As leading counsel for the 1st defendant correctly points out, this court is in effect asked to recognise the validity of an order of a Taiwanese court.

41. In my view, this is not a matter which can be regarded merely as a private affair between individuals. This court is not asked to deal with the 'private rights, or acts of everyday occurrence, or perfunctory acts of administration". It is asked directly and specifically to recognise the acts of a court of law of a foreign government. For this court to give validity to the Order dated 20th October1990 is to recognise the Taipei District Court's legitimacy, authority and jurisdiction. I do not think the Wilberforce exception applies to the present case. I doubt the Wilberforce dictum was intended to create this kind of exception. There is, as leading counsel for the plaintiff submits, a distinction between approving the internal effectiveness of a system on which the parties rely to conduct their private affairs on the one hand and expressly accepting the validity of the judicial acts of an unrecognised system on the other. The applicants' case falls within the latter category which is, in my view, outside the exception. I am not asked to approve an exception to the general principle. I am asked to directly contradict it.

42. Further, if the Taiwanese government is not recognised by the executive and the courts, there is no reason why the order of its judicial body *should* be recognised as valid. If the Taipei District Court held that Taiwan does not recognise the validity of any judgment of the Hong Kong court, it would be difficult for a Hong Kong court to be perusaded that it is in the interest of justice and common sense to recognise a judgment and order of the Taiwanese court. In my view, the second submission also fails.

First issue – third submission

43. Counsel's third submission is based on the assumption that Taiwan is regarded as a province of the PRC. It is submitted that although the PRC Government has not set up the present Taiwanese government, it has not set up an alternative government there either. In fact, the PRC has regarded some of the governmental acts of the Taiwanese government as valid insofar as they relate to private law matters, such as marriages, notarial acts, and registration of companies. Counsel relies on a report of the Chief Justice and President of the PRC Supreme People's Court who said :

"… The Supreme People's Court of the PRC announced in April 1991 that on the basis that it does not contravene the laws of the PRC and damage the public interest of the society, the civil activities of a Taiwan resident in Taiwan and the civil rights obtained by a Taiwan resident in accordance with the regulations of the Taiwan region can be recognised as having its factual validity. Regarding the civil judgments made by the Courts of Taiwan region, the question of recognition on the validity can also be resolved in accordance with the aforesaid principles depending on the different circumstances. …"

44. The stance of the Taiwanese government is the exact converse of that taken by the PRC government. Both claim to be the sole and legitimate government of China and the other is not. There is no question of one regime setting up a governmental authority for the territory occupied by the other. But the fact of the matter is that the UK Government recognises the PRC government and its stance and not that of the Taiwanese government.

45. The basis of the acceptance and/or recognition by the PRC of Taiwanese governmental acts in relation to private matters may be similar to or different from that for the Wilberforce exception. From the evidence before me, there are disputes on the rationale behind such acceptance and/or recognition. I do not think I should try to resolve these differences on these affirmations. However, I cansee no legal basis for the Hong Kong Courts which operate differently and on well-established common law principles to follow the alleged practice of the PRC. The position will remain the same after the transfer of sovereignty and I do not think this will change after 1st July. The legal effect of the report of the Chief Justice of the Supreme People's Court and its scope and application are also not at all clear and there is no reason for the Hong Kong Courts to give effect to it.

46. For the reasons given by me in dealing with the second submission, I do not think this third submission can be sustained.

Second issue

47. In view of the conclusion which I have reached on the first issue, the second issue must also be decided against the applicants. But in case I am wrong on the first issue and also out of respect to the most comprehensive arguments submitted to me by all counsel, I shall now deal with it. Counsel's submissions are made on the basis that this court would recognise the Order of the Taipei District Court.

48. Leading counsel for the applicants argues that if the order is recognised as valid, the court should give effect to it over the assests of the bankrupt not only in Taiwan but also in Hong Kong and these include the shares in question. Counsel submits that the authorities (**Alivon & Furnival**1 Cr.M.R.277 and **Macaulay v. Guaranty Trust Co. of New York** (1927)44 TLR 99) show that it is not necessary for foreign bankruptcy order to be expressed to have extra-territorial effect or to be reciprocal.

49. A lot of the written submissions and parts of the oral arguments before me centred round the judgment of the Taipei District Court in the case between the trustees-in-bankruptcy against the 1st defendant and the judgment of the Taiwan High Court which upheld the decision of the lower court on appeal. It transpired during the course of argument that the Taiwan Supreme Court had overturned the decisions of Taiwan High Court and Taipei District Court and remitted the case for reconsideration by the Taipei District Court.(That court subsequently gave default judgment against the 1st defendant for reasons which do not concern us.) As a result of these events, I shall only refer to the judgment of the Taiwan Supreme Court.

50. Whether the Taiwanese trustees-in-bankruptcy are entitled to sue in Hong Kong in respect of properties situated in Hong Kong depends on whether the Bankruptcy Order made by the Taipei District Court covers properties outside Taiwan. This involves a decision based on the conflicts of laws principles.

51. I agree with leading counsel for the 1st defendant that the Taiwanese trustees-in-bankruptcy can only have *locus standi* to sue and recover the property of the bankrupt if the order or instrument appointing them operates as an assignment of the bankrupt's property to them. With regard to the bankrupt's property outside Taiwan, Rule 169 in **Dicey & Morris** states as follows :

"An assignment of a bankrupt's property to the representative of his creditors under the bankruptcy law of any other foreign country whose courts have jurisdiction over him in accordance with Rule 167(2) is or operates as, an assignment of the movables of the bankrupt situate in England."

52. The question then is whether the Bankruptcy Order made by the Taipei District Court has the effect of assigning the plaintiff's movable property (which includes shares) in Hong Kong to the Taiwanese trustees-in-bankruptcy. According to **Dicey & Morris**, the general principle of English law is that a foreign bankruptcy order does have this effect if that is its effect under the foreign law. The learned authors however qualifies this by saying :

"The effect in England of the assignment of a debtor's proeprty under the bankruptcy law of a foreign country is subject to certain limitations : (i) the assignment only takes place if under the law of the foreign bankruptcy, provision is made for the extra-territorial effect of the bankruptcy …". (at p.1176)

53. I accept that these propositions are correct.

54. The evidence adduced by the 1st defendant shows that her experts, Mr Hus and Dr Geng, take the view that the "consensus" of legal opinions in Taiwan is that there is no extra-territorial effect in the Bnkruptcy Order in question. Such expert opinion is couched in such term because there is no express provision in the Taiwanese Bankruptcy Law to this effect. Leading counsel for the applicants submits that such "consensus" opinion is not good enough. On the other hand, leading counsel for the 1st defendant argues that this is more than sufficient because there is a presumption against extra-territoriality and hence the lack of express legislative provision does not suffice.

55. I have been referred to the relevant part of the judgment of the Taiwan Supreme Court which touches on this issue. The translation says :

"Where … a bankruptcy is declared abroad, it shall have no effect on assets of the debtor or bankrupt in the Republic of China. This is expressly provided in Article 4 of the Bankruptcy Law. In the premises, in accordance with the prinicple of international equality and mutual benefits, where … the bankruptcy is declared in the Republic of China, countries where the properties of the debtor or bankrupt are situated should also be entitled to refuse to accept its validity. The trial court in this case, while admitting that between the Repoublic of China and Hong Kong, there is no recripocal recognition of judgments, still found that the effect of bankruptcy order of Taipei District Court against Ting Lei Miao could be extended to the properties of the bankrupt Ting Lei Miao in Hong Kong and further held that the shares in dispute in this case were also the assets of the bankrupt group of companies. In making an adverse ruling against the appellant, the trial court was rather hasty and without due consideration. The ground of appeal is … not without merit."

56. As a result, the Taiwan Supreme Court allowed the 1st defendant's appeal and ordered a re-trial.

57. With respect, I think the submission of leading counsel is supported and by the judgment of the highest court in Taiwan. Not only is there no express provision about overseas properties, the bankruptcy law of Taiwan does not recognise the validity of a bankruptcy order made abroad. It is difficult to imagine how the Taiwanese courts would expect a foreign court, in this case, the Hong Kong court, to accept the validity of its bankruptcy order. In fact the Taiwan Supreme Court said that the foreign court is entitled to refuse acceptance. It is worthy to note that in the Bankruptcy Order, the list of properties contains assets which are all in Taiwan. In my view, it is necessary to have an express provision in the Taiwanese Bankruptcy Law to enable a bankrputcy order made in Taiwan to have effect over the bankrupt's assets outside Taiwan. There is no such provision. On the contrary, there is every indication in the Taiwanese Bankruptcy Law suggesting that it does not cover such overseas assets. I cannot accept the applicant's arguments.

Conclusion

58. For the reasons given above, I would hold that :

(1) in all the circumstances of this case, this court should not recognise or give effect to the Order of the Taipei District Court on 20th October 1990; and

(2) in all the circumstances of this case, this court should not recognise the said Order of the Taipei District Court as having effect over the assets of the plaintiff Ting Lei Miao situated in Hong Kong.

59. I shall give liberty to the parties to apply on the question of costs and for directions with regard to the trial of the third and fourth preliminary issues.

Patrick Chan
Judge of the High Court

Representation:

Mr Benjamin Yu, Q.C. & Mr Godfrey Lam, inst'd by Messrs Lau & Chau & Co. for the Applicants

Mr Ronny Tong Q.C. & Mr K L Lui, inst'd by Messrs Philip Pang & Co for the Plaintiff

Mr Denis Chang Q.C. & Mr Erik Shum, inst'd by Messrs Stevenson Wong & Co for the 1st Defendant

Mr Charles Chiu, inst'd by Messrs Chan, Yip, So & Partners for the 2nd Defendant

Appeal by the "trustees" of the Plaintiff to Court of Appeal allowed. Please refer to CACV178/1997 dated 2 July 1998