PROBLEMS IN THE RECOGNITION AND ENFORCEMENT OF US CLASS ACTION JUDGMENTS IN SINGAPORE

An important consequence of the increasing prevalence of cross-border transactions today is that local courts are also increasingly likely to be presented with a judgment from a foreign country with its own unique dispute resolution mechanisms and jurisprudence. A resultant judgment from a US class action judgment is one such foreign judgment. Yet, the traditional rules governing the recognition and enforcement of foreign judgments have largely remained unchanged since they were first developed over a century ago. This article ventures to examine the limits of the existing rules of recognition or enforcement when applied in the context of a US class action judgment, should it be presented before a Singapore court. After highlighting the theoretical and practical difficulties that may arise in applying the existing rules of recognition or enforcement, this article suggests that the adoption of the domestic privity of interests test to foreign judgments may provide a more satisfactory conclusion.

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I. Introduction

1 In today's globalised world economy, the increasing participation in US-based commerce has been matched by an increase in the use of the US system of justice and its mechanisms for dispute resolution. Of the available civil litigation devices, the class action is arguably the most controversial.[1]

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1 See Ilana T Buschkin, "The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the US Federal Courts" (2004–2005) 90 Cornell L Rev 1563 at 1564, fn 2.

2 The class action has been described to bring about certain important practical benefits. Essentially, the class action permits individuals ("the representative plaintiff") to bring a claim on behalf of a class of similarly situated non-participating others ("the absent plaintiffs"). Therefore, not only may it afford plaintiffs with small claims access to judicial relief that would otherwise be uneconomical to obtain individually,[2] it also allows defendants to dispose of the claims of all members of a class, thereby avoiding the risks and inconvenience of defending a large number of suits elsewhere in a variety of jurisdictions.[3] Thus, the *res judicata* effect of a US class action judgment, particularly when it is brought outside the US for the purpose of recognition or enforcement, is of significant practical importance. In fact, whether such a judgment will be recognised elsewhere also has the potential of influencing the structure of the class action in the US itself:[4]

> For instance, in *Bersch v Drexel Firestones Inc*,[5] the 'dubious binding effect' of a defendant's judgment on absent foreign plaintiffs was a significant factor in the court's decision to exclude from the action all persons who were not resident or citizens of the United States.

3 However, despite its practical implications, there remains no judicial guidance whatsoever on the question of recognition or enforcement of a US class action judgment in Singapore.[6] Yet, going by the recent developments in the ongoing Pinnacle Notes dispute,[7] there appears the increasing likelihood of an impending US class action that will not only be led by Singaporean representatives, but will also include

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2 Ilana T Buschkin, "The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the US Federal Courts" (2004–2005) 90 Cornell L Rev 1563 at 1565, fn 5.

3 John C L Dixon, "The *Res Judicata* Effect in England of a US Class Action Settlement" (1997) 46 Int'l & Comp L Q 134 at 134.

4 John C L Dixon, "The *Res Judicata* Effect in England of a US Class Action Settlement" (1997) 46 Int'l & Comp L Q 134 at 134.

5 519 F 2d 974 (2d Cir, 1975).

6 Beyond the shores of Singapore, the recognition question has, in fact, already fallen for consideration at least before one lower court in England and before numerous appellate courts in the US. However, it remains that the question has yet to be considered by the Singapore courts, and the focus of this article is to consider the various conflict of laws issues that may arise in the context of the recognition or enforcement of a US class action judgment in *Singapore*.

7 The Pinnacle Notes dispute concerns the allegations made by a group of Singaporean investors, that Morgan Stanley had fraudulently sold to them rigged Pinnacle Notes masquerading as "safe, conservative" investment instruments. This group of Singaporean investors intend to initiate a class action suit in New York on behalf of thousands of other investors who have purchased these ultimately doomed financial products. For greater details, see Grace Leong, "S'pore Investors Sue in US over Doomed Pinnacle Notes", *The Business Times* (9 September 2011). For a more comprehensive understanding of the Singaporean investors' claim against Morgan Stanley, see also *Dandong v Pinnacle Performance Ltd* 10 Civ 8086 (SDNY, 2011).

as part of the class thousands of Singaporean absent plaintiffs.[8] Thus, it may not be too long before the question of recognition or enforcement of a US class action judgment is presented before a Singapore court for determination.

4 In anticipation, this article seeks to attempt such an enquiry. At the very least, it strives to provide a clear framework through which to consider the various conflict of laws issues that may arise in relation to the recognition or enforcement of a US class action judgment in Singapore.

5 To that end, Part II first outlines the procedural mechanism of the US class action device, so as to better understand the manner in which absent plaintiffs are brought into the class action picture. Part III then sets out Singapore's existing common law rules on the recognition of foreign judgments before attempting to apply these rules to US class action judgments. In doing so, it seeks to highlight the unique conflict of laws issues that may arise *vis-à-vis*: (a) the representative plaintiff; (b) the opted-out class member; and (c) the absent plaintiffs. Part IV then highlights as the main dissatisfaction with the existing rules of recognition the incongruity in permitting an absent plaintiff to resist the recognition of an adverse US class action judgment while remaining entitled to rely on a resultant judgment in his favour. Part V considers first the possibility of adopting the Canadian approach towards international jurisdiction before arguing that the application of the common law doctrine of privity of interests may provide a more satisfactory answer to the conundrum presented by the absent plaintiffs. In acknowledging that the privity of interests doctrine has so far only been applied to local judgments, Part VI finally argues that the incorporation of the doctrine into the international context is not only theoretically sound but also adheres to the fundamental tenet of finality in litigation.

II. The US class action procedure

6 The procedural mechanism of the US class action is governed by Rule 23 of the US Federal Rules of Civil Procedure.[9] In essence, the

8 See Grace Leong, "Investor Suit against Morgan Stanley Moves Ahead", *The Business Times* (27 January 2012); and also Grace Leong, "Morgan Stanley Loses Appeal in Pinnacle Notes Case", *The Business Times* (12 April 2012).

9 For clarity's sake, Rule 23 of the Federal Rules of Civil Procedure (US) govern the conduct of class actions within the US *federal* courts, although several states have modelled their state rules to mirror Rule 23: for a flavour of these state law counterparts, see generally Linda S Mullenix, *State Class Actions: Practice and Procedure* (CCH Inc, 2002).

rule enables a representative plaintiff to bring an action on behalf of a larger group of non-participating absent plaintiffs.[10]

7 However, an action brought by the representative plaintiff will only be certified as a class action (with the class of members defined) if it satisfies the requirements of a two-stage test[11] as laid out under Rule 23. First, the action must satisfy the threshold requirements of Rule 23(a): (a) numerosity of parties; (b) commonality of legal and factual issues; (c) typicality of the claims and defences of the class representative; and (d) adequacy of representation.[12] Second, once these four prerequisites of Rule 23(a) are satisfied, the proposed action must then fall within one of the four recognised categories of class actions under Rule 23(b).

8 Of the four available categories,[13] Rule 23(b)(3) specifically provides that a class action may be maintained if the court determines that the common questions of fact or law predominate over any questions affecting only individual members and that the class action is superior to other available methods for adjudicating the controversy.[14] Given its broad formulation, it is unsurprising that class actions brought pursuant to Rule 23(b)(3) are the most common[15] and might even be

10 William Rubenstein, Alba Conte & Herbert B Newberg, *Newberg on Class Actions* (Trial Practice Series, 4th Ed, 2002) at §1:1.

11 *In re A H Robbins Co Inc* 880 F 2d 709 at 727–728 (4th Cir, 1989).

12 Rule 23(a) of the Federal Rules of Civil Procedure (US) provides:

> (a) PREREQUISITES. One or more members of class may sue or be sued as representative parties on behalf of all members only if:
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> (1) the class is so numerous that joinder of all members is impracticable;
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> (2) there are questions of law or fact common to the class;
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> (3) the class or defenses of the representative parties are typical of the claims or defenses of the class; and
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> (4) the representative parties will fairly and adequately protect the interests of the class.

13 The other three recognised categories of class actions are provided under Rules 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2) of the Federal Rules of Civil Procedure (US). Rule 23(b)(1)(A) prescribes the use of the class action device when it is necessary to avoid the risk of inconsistent or varying adjudications with respect to individual class members, which would establish incompatible standards of conduct for the defendant(s); Rule 23(b)(1)(B) authorises a class action where the adjudications with respect to individual class members, although not technically concluding the rights of other members, might as a practical matter substantially impair or impede their ability to protect their own interests (*eg*, where such early individual claims may exhaust the defendant's funds); Rule 23(b)(2) establishes the proprietary of the class action where injunctive or declaratory relief for the class as a whole is appropriate.

14 Federal Rules of Civil Procedure (US) Rule 23(b)(3). The rule also provides a list of factors relevant for this determination.

15 See Thomas E Willging *et al*, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal

(*cont'd on the next page*)

seen to encompass the other three available categories of class actions.[16] However, an important distinction lies in the additional requirement that for class actions certified under Rule 23(b)(3), *notice* to the non-participating absent plaintiffs is mandatory.[17] More importantly, Rule 23(c)(2) further mandates that such notice must not only inform the absent plaintiff of the binding effect of any resultant judgment over them[18] but also of their choice to be excluded from the class action proceedings.[19]

9 As can be seen, a Rule 23(b)(3) class action clearly provides for an "opt-out" mechanism through which non-participating absent plaintiffs may be brought within the class action litigation and be subject to any resultant judgment without the need to take any positive steps. In so far as these absent plaintiffs are concerned, they "[are] not required to do anything. [They] may sit back and allow the litigation to run its course".[20] In the eyes of the US courts, all that is required is that they are provided with certain procedural safeguards – adequate notice and an opportunity to opt out[21] – in order to bind them to the *res judicata* effects of any resultant class action judgment.[22]

10 It is the recognition or enforcement in Singapore of Rule 23(b)(3) class action judgments – the most common form of class action judgments – that will be the focus of this article. The article shall now pay attention to the existing Singapore common law rules of recognition.

Judicial Centre, 1996) at p 8, noting that "[t]he most frequently certified class was the Rule 23(b)(3) or 'opt-out class', which occurred in roughly 50% to 85% of the certified classes".

16 John C L Dixon, "The *Res Judicata* Effect in England of a US Class Action Settlement" (1997) 46 Int'l & Comp L Q 134 at 137.

17 Federal Rules of Civil Procedure (US) Rule 23(c)(2)(B). In contrast, for class actions certified under Rules 23(b)(1) and 23(b)(2), the court "*may* direct appropriate notice to the class" [emphasis added]: see Federal Rules of Civil Procedure (US) Rule 23(c)(2)(A).

18 Federal Rules of Civil Procedure (US) Rule 23(c)(2)(B)(vii).

19 Federal Rules of Civil Procedure (US) Rule 23(c)(2)(B)(v).

20 *Phillips Petroleum Co v Shutts* 472 US 797 at 810.

21 *Phillips Petroleum Co v Shutts* 472 US 797 at 811–812.

22 See Tanya J Monestier, "Transnational Class Actions and the Illusory Search for *Res Judicata*" (2011) 86 Tul L Rev 1 at 5.

III. Applying the existing rules of recognition to US class action judgments

11 Apart from the available statutory regimes for the registration of foreign judgments,[23] a foreign judgment will *prima facie* be *recognised* in Singapore if the judgment was one that was final and conclusive on the merits, emanating from a court of competent jurisdiction in civil proceedings, and if the foreign court had international jurisdiction over the party sought to be bound.[24] A foreign judgment will additionally be *enforceable* if the judgment is for a fixed or ascertainable sum of money.[25] If the above-mentioned legal requirements are satisfied, a foreign judgment is *prima facie* entitled to recognition or enforcement unless one of the defences to recognition can be established.[26]

12 Bearing in mind the aforementioned legal framework, in determining whether a US class action judgment is *prima facie* entitled to recognition or enforcement in Singapore, the requirements that the foreign judgment be final and conclusive on the merits from a court of competent *domestic* jurisdiction, are unlikely to prove much of an obstacle since these are "largely in the control of the US court".[27] Rather, it is the requirement of *international* jurisdiction that may prove especially problematic, particularly in the context of the absent plaintiffs.

13 Under Singapore's existing conflict of laws rules, international jurisdiction is established only if the party sought to be bound had a

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23 In Singapore, the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) provide the statutory regimes of registration for foreign judgments from countries gazetted under the respective legislation, of which the US is not one.

24 See *Halsbury's Laws of Singapore: Conflict of Laws* (LexisNexis, Vol 6(2), 2009) at para 75.146.

25 See *Beatty v Beatty* [1924] 1 KB 807 and *Ralli v Angullia* (1917) 15 SSLR 33 at 36–37. At this juncture, it also bears highlighting that *only* foreign judgments for the payment of fixed or ascertainable sums of money are enforceable; the lack of Singapore or English authority appears to lead to the general assumption that a foreign judgment *other than* that for a fixed or ascertainable sum of money cannot be enforced. Nonetheless, it remains that such latter judgments may be *recognised* in order to utilise its *res judicata* effect for the purposes of cause of action or issue estoppel.

26 In summary, the recognition or enforcement of a foreign judgment will be denied if: (a) the foreign judgment was contrary to some fundamental public policy of the forum; (b) the foreign judgment was contrary to a local judgment, or an earlier recognised foreign judgment; (c) the foreign judgment had been obtained by fraud; (d) the foreign judgment had been obtained in breach of natural justice; and (e) the recognition of the foreign judgment would amount to the direct or indirect enforcement of foreign penal, revenue or other public law.

27 *In re Royal Ahold NV Securities & ERISA Litigation* 427 F Supp 2d 467 (2005) (Civil No 1:03-MD-10539) at pp 7–8.

territorial connection with the foreign court, in the sense that he was either resident at the time when the foreign proceedings were commenced,[28] or had voluntarily submitted to the jurisdiction of the foreign court.[29]

14 Difficulties therefore arise in applying such jurisdictional rules to absent plaintiffs who were obviously not resident or present within the US jurisdiction, but are nonetheless considered by the US courts to be part of the class action proceedings by virtue of their omission to opt out.[30] As shall be seen, whether the US courts had the requisite jurisdictional competence over these absent plaintiffs constitutes the principal controversy when considering the question of recognition of a class action judgment outside the US.[31] However, it is not to say that the positions of the representative plaintiff or the class member who did elect to opt out are without their own difficulties either.

15 In the following sections, the separate conflict of law issues that arise in relation to the representative plaintiff and the opted-out class member will be considered first, before turning to consider the unique dilemmas that present themselves when applying the existing jurisdictional rules to absent plaintiffs.

A. The representative plaintiff

(1) Class action judgment in defendant's favour

16 Where the representative plaintiff is concerned, although the class action procedure has been described as a "non-traditional form of litigation"[32] that permits a representative to initiate proceedings on behalf of a larger number of similarly situated claimants, the representative plaintiff nonetheless stands in a position akin to that of a traditional plaintiff.[33] Having invoked the machinery of the US courts by initiating proceedings, the representative plaintiff is clearly *volens* and will necessarily have submitted to the jurisdiction of the US courts

28 See *Emanuel v Symon* [1908] 1 KB 302 at 309; *Schibsby v Westenholz* (1870) LR 6 QB 155 at 161; *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 at 683–684; and *RMS Veerappa Chitty v MPL Mootappa Chitty* (1894) 2 SSLR 12.

29 *Emanuel v Symon* [1908] 1 KB 302 at 309; *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088.

30 See paras 6–10 above.

31 See *In re Royal Ahold NV Securities & ERISA Litigation* 427 F Supp 2d 467 (2005) (Civil No 1:03-MD-10539) at pp 7–8.

32 *US Parole Commission v Geraghty* 445 US 388 at 402 (1980).

33 See Ilana T Buschkin, "The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the US Federal Courts" (2004–2005) 90 Cornell L Rev 1563 at 1570.

should judgment go against him.[34] Accordingly, in the event that the defendant succeeds in the US class action, the class action judgment[35] may give rise to *res judicata*, that is, cause of action estoppel, and may hence operate to preclude the representative plaintiff from seeking to reinitiate a similar claim in Singapore.[36]

17 There is therefore little complication when considering the recognition of a class action judgment against the representative plaintiff under such circumstances. Having brought and lost the class action proceedings, the representative plaintiff cannot subsequently turn around and aver that he was not bound by the judgment and he is precluded from having a second bite of the cherry in Singapore.[37]

(2) Class action judgment in plaintiffs' favour

18 However, the analysis necessarily changes when the situation is one where the representative plaintiff did succeed in the US class action proceedings and was awarded damages against the defendant. If the requirements of recognition are established, it should necessarily follow that the representative plaintiff is further entitled to enforce the judgment debt against the defendant.[38] However, the more interesting question arises when the representative plaintiff, being dissatisfied with his measure of damages in the US, wants to relitigate the original cause of action in Singapore, in hopes of richer pickings. The question then concerns the extent to which the representative plaintiff may do so, bearing in mind the differential treatment between a *domestic* and a *foreign* judgment when applying the doctrine of merger.

19 In the context of *domestic* judgments, the doctrine of merger operates against "any person in whose favour an English judicial tribunal of competent jurisdiction has pronounced on a final judgment, [and that person is subsequently] precluded from recovering before any English tribunal a second judgment for the same civil relief on the same cause of action".[39] Thus, when a domestic court gives judgment on a cause of action in favour of the plaintiff, the plaintiff's cause of action is said to have merged with the "higher remedy" of a judgment. The cause of action is extinguished and there is nothing else (apart from the

34 *Dicey, Morris and Collins on the Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at para 14-061.

35 Assuming that the other requirements of recognition are met and there are no applicable defences to recognition.

36 See *Ricardo v Garcias* (1845) 12 Cl & F 368 and *Jacobson v Frachon* (1927) 138 LT 386.

37 *Schibsby v Westenholz* (1870) LR 6 QB 155.

38 As long as the judgment is one that is for a fixed and ascertainable sum of money.

39 K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 4th Ed, 2009) at para 19.01.

judgment itself) upon which the plaintiff may sue.[40] However, under Singapore law, the doctrine of merger has no application to *foreign* judgments,[41] and a plaintiff who was victorious in overseas proceedings remains entitled to sue again in Singapore on the original cause of action.[42] Thus, it seems that a representative plaintiff who had obtained a favourable money judgment in the class action proceedings has the option to either enforce the judgment or institute fresh proceedings on the original cause of action in Singapore.[43] Moreover, it would appear that the representative plaintiff may still rely on the favourable class action judgment for the purpose of issue estoppel in Singapore proceedings.[44]

40 *Republic of India v India Steamship Co Ltd* [1993] 1 Lloyd's Rep 387 at 417–418.

41 *Malaysia Credit Finance Bhd v Chen Huat Lai* [1991] 2 SLR(R) 300 at [17].

42 *Malaysia Credit Finance Bhd v Chen Huat Lai* [1991] 2 SLR(R) 300 at [18]–[19]. It bears mentioning that the UK position has been altered by s 34 of the Civil Jurisdiction and Judgments Act 1982 (c 27) (UK), which effectively provides that a claimant who has obtained a favourable judgment overseas may not bring fresh proceedings on the same cause of action against the defendant in England, if the foreign judgment is entitled to be recognised or enforced. However, as it stands, there is no such legislative equivalent in Singapore.

43 Although as was observed by Yeo Tiong Min in "The Problem of Non-Merger in Foreign Judgments" (1997) 18 Sing LR 394 at 397:

> [T]he advantages to the plaintiff are not obvious. He not only incurs additional costs of the renewed litigation, but also takes the extra risk of losing his action. In such a case the local judgment will prevent him from suing on his earlier foreign judgment in the forum, and possibly in a third country too. The plaintiff [nonetheless] may gain an advantage if he can obtain higher damages by instituting a fresh action on the original cause of action.

In the context of the class action proceedings, it may be further added that in the likelihood that any US class action judgment in favour of the plaintiffs would include an element of punitive damages on top of any award of compensatory damages, it seems practically unlikely that a successful plaintiff (whether representative or absent) would seek to institute any fresh proceedings in Singapore, where punitive damages are not part of its jurisprudence.

44 In other words, to estop the other party from denying a question of fact or law that has already been decided by the US courts in the earlier class action proceedings. It bears mentioning that the *defendant* is also able to rely on the US class action judgment to raise an estoppel in respect of any substantive points that were decided *against the representative plaintiff*. It also bears mentioning that in the circumstance where the representative plaintiff loses in the newly brought proceedings in Singapore, it would appear as a matter of principle that the representative cannot subsequently fall back on his favourable class action judgment. If a foreign judgment cannot be recognised or enforced, if to do so would be inconsistent with a prior judgment pronounced in the forum (see *ED & Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429 at 435–436), it should not make any difference even if the foreign judgment was pronounced before the local judgment: if the foreign judgment should have been, but was not, raised in the local proceedings, it is arguable that not only is the local judgment conclusive in respect of the substantive issue between the parties, it is simply too late to subsequently rely on that foreign judgment.

20 Nonetheless, the doctrine of "non-merger" in foreign judgments is subject to two important limitations, which may accordingly restrict the extent to which the representative plaintiff may institute fresh proceedings on the original cause of action in Singapore. First, the institution of fresh proceedings in Singapore may amount to an abuse of process if such proceedings were brought in respect of a claim or contention that should have been advanced in the earlier foreign proceedings. This is simply the application of the wider doctrine of *res judicata*[45] as enunciated in *Henderson v Henderson*,[46] which held that in the absence of special circumstances, the court will not:[47]

> … permit the same parties [in present proceedings] to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case [in the earlier action].

Accordingly, where the representative plaintiff institutes fresh proceedings in Singapore hoping to obtain a higher award of damages, the Singapore court may well strike out the action as an abuse of process if the claim is based on contentions that should have been raised before the US courts in the first place.[48] It would appear that the representative plaintiff will only be allowed to proceed if he can establish special circumstances[49] for not raising the arguments for the larger claim in the earlier US class action proceedings.

21 Second, even if the Singapore courts were prepared to award greater damages, the representative plaintiff may still be precluded from suing again on the original cause of action if his favourable class action judgment has already been fully satisfied.[50] Having obtained the full satisfaction of his judgment debt – to adopt the words of Jelf J in *Taylor v Holland*[51] – the representative plaintiff has elected to take the US judgment as discharge of the underlying obligation, which was the foundation of the original cause of action in the US class action.[52] To sue again before the Singapore courts would thus be inconsistent with his earlier election to pursue the foreign judgment to satisfaction.

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45 *Ching Mun Fong v Liu Cho Chit* [2000] 1 SLR(R) 53 at [22]–[23].

46 (1843) 3 Hare 100; see also *Ching Mun Fong v Liu Cho Chit* [2000] 1 SLR(R) 53 at [45] and *Kwa Ban Cheong v Kuah Boon Sek* [2003] 3 SLR(R) 664.

47 (1843) 3 Hare 100 at 115.

48 See Yeo Tiong Min, "The Problem of Non-Merger in Foreign Judgments" (1997) 18 Sing LR 394 at 402.

49 Yeo Tiong Min, "The Problem of Non-Merger in Foreign Judgments" (1997) 18 Sing LR 394 at 402.

50 Presumably within the US jurisdiction itself.

51 [1902] 1 KB 676.

52 [1902] 1 KB 676 at 681.

22 Although there is limited support for the proposition,[53] it remains unclear whether a plaintiff will also be taken to have made his election upon *partial* satisfaction. Yet, the problem is of practical relevance in determining the extent to which a representative plaintiff may sue afresh on his original cause of action. In particular, what subsequent steps may the representative plaintiff take after having obtained a favourable judgment before he is precluded from instituting fresh proceedings in Singapore? If the doctrine in *Taylor v Holland* is premised on the unequivocal act of the plaintiff in registering his choice between two inconsistent courses of action,[54] it is difficult to see why a representative plaintiff should be precluded from suing afresh in the forum only if he had obtained the full satisfaction of his judgment. In principle, it would also seem arguable that as long as the representative plaintiff has taken some steps to procure satisfaction, he must be deemed to have elected to pursue the foreign judgment in discharge of his cause of action. To otherwise allow the institution of fresh proceedings in Singapore on the original cause of action in the forum will be precisely to allow the representative plaintiff to abrogate and derogate, to blow hot and cold.[55] Nevertheless, practical problems may still remain in discerning precisely what steps are sufficient to constitute an election to pursue the satisfaction of a favourable US class action judgment.[56]

B. Opted-out class members

23 The position of the class member who *did* opt out of the class action proceedings may also be more complicated than first thought and requires further consideration. This is because unlike an absent plaintiff who will be deemed by the US court to be part of the class action by virtue of his *omission* to opt out, a class member who opts out has, in fact, voluntarily done a *positive* act by responding to the Rule 23(c)(2) notice. The interesting question then concerns whether the defendant can contend that a class member's election to opt out amounts to a submission to US courts' jurisdiction by appearance.[57]

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53 *In the Marriage of Miller and Caddy* (1985) 80 Fam LR 398 at 404–405 (appealed allowed without disturbing this point).

54 See Yeo Tiong Min, "The Problem of Non-Merger in Foreign Judgments" (1997) 18 Sing LR 394 at 398.

55 *Taylor v Holland* [1902] 1 KB 676 at 681.

56 For example, where a court master is appointed to manage the administration of a "distribution fund" (as would often be the case where damages are awarded against the defendant in a class action suit), would an application to the court master to a claim for damages be sufficient to constitute an election to pursue the foreign judgment in the US?

57 At first glance, the question does appear to be a rather strange one. After all, a class member who elects to opt out of the class action proceedings does not physically make an appearance before the US courts conducting the class action proceedings.

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24 If the effect of the Rule 23(c)(2) notice is to inform a prospective class member that unless he opts out he would be deemed to be part of the class action litigation, may it be contended that an election to opt out, in fact, constitutes an acknowledgement of the existence of the US courts' jurisdiction over him in the first place? After all, a class member could only opt *out* if he was not otherwise already *in* the class action. More specifically, may it be contended that a class member's election to opt out merely amounts to an application to the US courts *not to exercise its jurisdiction* over him, rather than a protest to say that the US courts have *no jurisdiction* to adjudicate his claim at all? If so, it would seem that a class member who opted out must have necessarily fallen foul of the rule in *Henry v Geoprosco International Ltd*,[58] that an application to a foreign court not to exercise its jurisdiction amounts to a voluntary submission to its jurisdiction.[59] Such a contention, if successful, will undoubtedly be of additional advantage to a defendant who is already victorious in the class action proceedings: the defendant may rely on his favourable judgment to preclude even class members who have previously opted out, from instituting any proceedings in Singapore on the same cause of action.

25 There is undoubtedly more work to be done in looking at the nature of a class member's election to opt out, in determining whether such an election itself may amount to submission. Nevertheless, if the question ultimately turns on the distinction between the *exercise* and *existence* of jurisdiction,[60] it must be noted that it is precisely the engagement in such technicalities that provoked the High Court in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*[61] ("*WSG Nimbus*") to warn against adopting an overly theoretical approach in determining what constitutes submission.[62] In particular, the High Court's commercially minded approach and emphasis on the reasonable expectations of commercial parties appear to provide room for the argument that an application to the court not to exercise

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However, in so far as Singapore's conflict of laws rules are concerned, whether a party submits by appearance hinges on whether the party in question has acted in such a way that amounts to an acknowledgement of the foreign court's jurisdiction to adjudicate the dispute: see *Henry v Geoprosco International Ltd* [1976] QB 726 at 748–749 and *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 at [54].

58 [1976] QB 726.

59 [1976] QB 726 at 750. The point has been the subject of severe academic criticism, and it is significant to note that the position in the UK has been altered by s 33 of the Civil Jurisdiction and Judgments Act 1982 (c 27) (UK), which was enacted to reverse the effects of *Henry v Geoprosco International Ltd* [1976] QB 726 by statute.

60 Or more specifically, whether a challenge to jurisdiction is a challenge as to whether the US courts has *jurisdiction to determine merits* or merely its *jurisdiction to determine its own jurisdiction to determine merits*.

61 [2002] 1 SLR(R) 1088.

62 [2002] 1 SLR(R) 1088 at [54].

jurisdiction has at its underlying objective that the case should not be heard and that is all that matters to commercial parties. Moreover, one must bear in mind the words of Scott J, who observed in *Adams v Cape Industries plc*:[63]

> If the steps would not have been regarded by the domestic law of the foreign court as a submission to the jurisdiction, they ought not, in my view, to be so regarded here, notwithstanding that if they had been steps taken in an English court they might have constituted a submission.

26 As such, it may well be unlikely that a Singapore court would regard a class member's election to opt out as amounting to submission, for the purpose of establishing international jurisdiction. This would particularly be so if such an election would not be regarded as much under US law. In so far as the US courts are concerned, once a class member has opted out, he is not a part of the class action proceedings from the very beginning. It would indeed be a bizarre state of affairs if the Singapore courts were to hold that any resultant class action judgment is binding on such a class member when he would not be so in the US.

C. Absent plaintiffs

(1) Class action judgment in defendant's favour

27 In any case, for the absent plaintiff who *failed* to opt out, the question of submission by *appearance* does not arise. Then, the only plausible context in which the requirement of international jurisdiction can be satisfied is if the absent plaintiff had nonetheless submitted to the jurisdiction of the US courts by *agreement*.

28 The regular context in which such submission by agreement is usually found is that of a contractually binding agreement on jurisdiction.[64] It has been said that as a general rule of private international law, and as was enunciated in *Vogel v R & A Kohnstamm Ltd*[65] ("*Kohnstamm*"), "an implied agreement to assent to the jurisdiction of a foreign tribunal is not something which [the courts of England] have entertained as a legal possibility".[66] In other words, an agreement evincing submission must be made expressly and cannot be

63 [1990] Ch 433 at 461 (the Court of Appeal's decision was subsequently affirmed by the House of Lords on other grounds). See also *Akai Pty Ltd v The People's Insurance Co* [1998] 1 Lloyd's Rep 90 at 97.

64 Whether such agreements take the form of an exclusive or non-exclusive choice of jurisdiction clause.

65 [1971] QB 133.

66 [1971] QB 133 at 145.

implied.[67] Yet, as a matter of contract law, it must be theoretically possible that such an agreement to submit may be found in an implied term of a contract.[68] It may well be that the general rule in *Kohnstamm* goes no further than that "in the absence of good evidence",[69] the courts will be extremely slow to infer an agreement to submit merely by reference to the party's *conduct*. Thus, the essential question to be asked *vis-à-vis* the absent plaintiff is whether his *conduct*, in particular, his omission to opt out, is sufficient by itself to constitute an agreement to submit to the jurisdiction of the US courts.[70]

29 However, the analysis is confronted with a very fundamental difficulty. The difficulty lies in the fact that the existing common law rules on international jurisdiction have focused solely upon the position of the *defendant*, with little or no consideration of the *plaintiff*.[71] The reason for this largely stems from the assumption that in the run-of-the-mill cases involving the recognition of foreign judgments (at least at the time when such rules were developed), the question of the foreign court's jurisdiction over the plaintiff is generally considered a moot point.[72] As noted above in the context of the representative plaintiff, who having filed proceedings in the first place, the plaintiff will be taken to have voluntarily submitted to the foreign court's jurisdiction.[73] It was never envisaged that because the plaintiff was neither within the jurisdiction nor had taken any part in the foreign proceedings, it could be contended that the foreign court did not have the necessary jurisdictional competence. Yet, that is precisely the novel situation that the absent plaintiff who did not opt out is in. In short, a fundamental problem arises as to the extent to which a set of

67 The observations of Ashworth J in *Vogel v R & A Kohnstamm Ltd* [1971] QB 133 were also approved locally by the High Court in *United Overseas Bank Ltd v Tjong Tjui Njuk* [1987] SLR(R) 275 at [16]–[17].

68 The question is ultimately to be determined in accordance with the proper law of the contract. In so far as the common law is concerned (which thereby also encompasses the Singapore position), the court will not imply into a term in a contract unless (a) it is necessary for business efficacy or (b) if it is a term so obvious that both parties must have intended it to be a part of the contract: see *The Moorcock* (1889) 14 PD 64 at 68, 70; *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227. However, it is nonetheless suggested that in the context of finding an implied term amounting to a submission to the jurisdiction of a foreign tribunal, such instances would practically be rare.

69 Adrian Briggs & Peter Rees, *Civil Jurisdictions and Judgments* (Informa, 5th Ed, 2009) at p 737.

70 See Mark Stiggelbout, "The Recognition in England and Wales of United States Judgments in Class Actions" (2011) 52 Harv Int'l LJ 433 at 483.

71 See John C L Dixon, "The *Res Judicata* Effect in England of a US Class Action Settlement" (1997) 46 Int'l & Comp L Q 134 at 138.

72 John C L Dixon, "The *Res Judicata* Effect in England of a US Class Action Settlement" (1997) 46 Int'l & Comp L Q 134 at 138.

73 See text accompanying n 34 above.

defendant-based rules can be applied in answering a *plaintiff-based* problem.[74]

30 Nonetheless, the specific question of whether a failure to opt out amounts to an agreement to submit to the jurisdiction of the US courts was considered by Adrian Briggs. By relying on a fundamental proposition in contract law, that silence or a lack of response cannot constitute the basis of an agreement,[75] Briggs contended that a US class action judgment would have no preclusive effect against an absent plaintiff who failed to opt out:[76]

> [W]here the would-be claimant is told that he or she is deemed to have opted in unless he or she opts out, but who does nothing, the ordinary sense of the common law, that one cannot impose an obligation or deem acceptance to have taken place by virtue of silence or lack of response, will provide a sensible answer: unless the individual has, as a matter of English law, submitted to the foreign jurisdiction, say by instructing or accepting the offer of attorneys to act on his behalf, he is not bound to or obliged.
>
> …
>
> Consider it this way. If the natural defendant were to bring proceedings for a declaration of non-liability and serve a natural claimant out of the jurisdiction, a judgment in favour of the natural defendant would not be recognised in England if the natural claimant did not submit by appearance. The position cannot rationally be different when a natural claimant is made a party to the foreign proceedings by other claimants, or by the court: the foreign court is still not one of competent jurisdiction in relation to him: what, one may ask rhetorically, has the person in question done to assume the obligation to abide by the judgment? The answer is nothing. It follows that a court should be extremely cautious before proposing to alter the rules on the recognition of judgments in this area.

31 The second half of Briggs' argument will be considered first. Certainly, if the natural defendant were to take pre-emptive steps by initiating proceedings in the foreign tribunal for a declaration of non-liability against a natural plaintiff, the preclusive effect of any judgment in favour of the former cannot be operative against the latter if the natural plaintiff was neither present nor had submitted to the jurisdiction of the foreign tribunal. However, under such circumstances, the natural plaintiff is treated as the *defendant* in this particular action. The question of whether any foreign judgment given in favour of the

74 See Mark Stiggelbout, "The Recognition in England and Wales of United States Judgments in Class Actions" (2011) 52 Harv Int'l LJ 433 at 479–480.

75 *Felthouse v Bindley* (1862) 142 ER 1037.

76 Adrian Briggs & Peter Rees, *Civil Jurisdictions and Judgments* (Informa, 5th Ed, 2009) at p 783.

natural defendant has any preclusive effect against the natural plaintiff in the forum is framed by treating the natural plaintiff as a *defendant* to the foreign proceedings. Accordingly, the existing rules on international jurisdiction over the *defendant* are applicable.

32 The position must necessarily be different when it is asked whether a foreign judgment has any preclusive effect against a natural plaintiff who was made a party to the foreign proceedings as a *plaintiff*.[77] It does not necessarily follow that when an adverse foreign judgment is found to have no preclusive effect against a party acting as a *defendant* in the foreign proceedings, a similar conclusion accordingly must be found against a party acting as a *plaintiff* in the foreign proceedings. As Harris observed, "One cannot, accordingly, argue that just because a state of affairs is so if C sues D, it should necessarily be so if D sues C."[78] With respect, Briggs' contention merely serves to underscore our present conundrum: how do we apply a set of *defendant*-based rules to what is essentially a *plaintiff*-based problem?

33 Nonetheless, there is still something to be attracted by the simplicity of Briggs' earlier contention. Indeed, what can be more natural or logical than the proposition that if a person's silence or lack of response does not constitute acceptance to create a binding agreement, it should follow that an absent plaintiff's silence by way of an omission to respond to a class action notice similarly cannot create a binding agreement to submit to the jurisdiction of the US courts.

34 However, it must be borne in mind that Briggs' reference to the "ordinary sense of the common law" is merely a domestic principle in contract law relating to offer and acceptance.[79] Accordingly, its application in the class action context *vis-à-vis* an absent plaintiff appears to hinge on the presupposition that the absent plaintiff is necessarily *a party* to *a contract*. Such a position is unnecessarily restrictive: although a contractual agreement on jurisdiction is the regular context in which a submission by agreement is usually found, it does not necessarily mean that it is *only* within the confines of a formal contract that submission can be found. To contend otherwise would be to give an unduly restrictive understanding of "agreement" in the *private international law* context of finding a submission "by agreement".[80]

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77 See also *Parsons v McDonald's Restaurants of Canada Ltd* (2005) 250 DLR (4th) 224 at [19]–[21].

78 Jonathan M Harris, "The Recognition and Enforcement of US Class Action Judgments in England" (2006) 22 *Contratto e Impresa/Europa* 617 at 631.

79 See Mark Stiggelbout, "The Recognition in England and Wales of United States Judgments in Class Actions" (2011) 52 Harv Int'l LJ 433 at 484.

80 Indeed, in *SA Consortium General Textiles v Sun and Sand Agencies Ltd* [1978] QB 279 at 307–308, Shaw LJ observed that in determining whether a party had "agreed" to submit to the jurisdiction of the foreign court, "'agreed' must mean

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35 Nonetheless, the prevailing view remains, that in determining whether a party had submitted to the jurisdiction of the foreign court, what *is* required is some "clear indication of [that party's] consent to the exercise by the foreign court of jurisdiction",[81] and not some vague acknowledgment of the foreign court. Although one could contend in reply to Briggs' rhetorical question that what the absent plaintiff had done is that he did not elect to opt out despite having been informed of his right to do so, it would seem that such conduct could at best only constitute an equivocal acknowledgment of the US courts' jurisdiction over the class action claim.[82] As it stands, it may well be that where Singapore's existing rules of private international law are concerned, it appears unlikely that a Singapore court will hold that the US courts had the necessary international jurisdiction over an absent plaintiff who failed to opt out to bind the latter to any adverse class action judgment.

(2) Class action judgment in plaintiffs' favour

36 Fewer complications arise where the plaintiffs have obtained a favourable class action judgment with damages awarded in their favour, and the absent plaintiff subsequently seeks to enforce his share of the judgment debt in Singapore. As long as the absent plaintiff is able to establish all the requirements of recognition,[83] it should follow that he will be entitled to enforce the class action judgment.[84]

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expressed willingness or consented to or acknowledged that he would accept the jurisdiction of the foreign court. *It does not require that the judgment debtor must have bound himself contractually or in formal terms so to do*" [emphasis added]. Admittedly, such observations were made in the context of the court seeking to determine the appropriate meaning to be attributed to the expression "agreed … to submit to the jurisdiction" in s 4(2)(*a*)(iii) of the UK Foreign Judgments (Reciprocal Enforcement) Act 1933 (c 13). Nonetheless, in *Adams v Cape Industries plc* [1990] Ch 433 at 466, Scott J was prepared to countenance a similar argument in outlining the limits of the requirements for an agreement to submit at common law.

> *If the alleged 'consent' does not form part of a contractually enforceable agreement, it ought, in my view, to be treated as an agreement – for it is not one – but as a representation …* [I]f a non-contractual representation is to be relied on as establishing the court's jurisdiction, it must be a representation intended to be acted upon or, at least, be a representation that the plaintiff believed and had reasonable ground for believing was intended to be acted upon. [emphases added]

From that passage, it therefore seems clear that in determining whether a party had, in fact, submitted to the jurisdiction of the foreign court by *agreement*, the enquiring forum is not necessarily precluded from looking beyond the four corners of a *formal contractual agreement* (whether there is, in fact, such an agreement or not).

81 See *Adams v Cape Industries plc* [1990] Ch 433 at 466.

82 See *In re Royal Ahold NV Securities & ERISA Litigation* 427 F Supp 2d 467 (2005) (Civil No 1:03-MD-10539) at p 12.

83 In other words, the absent plaintiff has to prove to the satisfaction of the Singapore court that the class action judgment was final and conclusive on the matters adjudicated and that the US court was a court of competent jurisdiction in civil

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37 However, if a class action judgment *against* the plaintiffs is not entitled to recognition on the basis that the US courts lacked the requisite jurisdictional competence over the absent plaintiff,[85] is it open to the defendant to resist the enforcement of a class action judgment *in favour of* the plaintiffs on the same ground? To that, it bears pointing out that although the existing rules of recognition have invariably been developed with the position of the defendant in mind, these requirements exist to protect *the party* against whom the judgment is sought to be recognised or enforced.[86] There is no additional requirement that the party who seeks to rely on the foreign judgment must also establish that the foreign court had international jurisdiction over *himself*. To rely on the class action judgment, the absent plaintiff only has to establish that the US courts had the requisite international jurisdiction over the defendant.

38 Alternatively, suppose that the absent plaintiff had *no notice* of the class action proceedings but nonetheless wants to enforce the resultant judgment. May the defendant then oppose the enforcement on the basis that the absent plaintiff was denied an opportunity to take part in the proceedings in the first place and that therefore there was a breach of natural justice?[87] It is suggested that the above reasoning is similarly applicable. In so far as the available defences to recognition exist to protect the party against whom the judgment is sought to be recognised or enforced, it is the party who is himself denied natural justice who should plead the defence. Thus, as pointed out by Harris, it would be a very curious case if the *defendant* were to contend that the absent plaintiff is not entitled to enforce the US class action judgment *against*

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proceedings, which had international jurisdiction over the defendant. See para 11 above.

84 The judgment debt being that for a fixed and ascertainable sum of money. See para 11 above.

85 It would seem to be, from the earlier discussion. See paras 27–35 above.

86 See Adrian Briggs & Peter Rees, *Civil Jurisdictions and Judgments* (Informa, 5th Ed, 2009) at p 784, fn 2. This is why, when a plaintiff initiates enforcement proceedings in Singapore on a foreign award of damages against a defendant, it is for the plaintiff to establish that the foreign court had international jurisdiction over the defendant. In contrast, when a defendant obtains and seeks to rely on a foreign judgment in his favour to estop the plaintiff from suing on the same claim in Singapore, it is the defendant who must establish that the foreign court had international jurisdiction over the plaintiff.

87 Generally, the party against whom the foreign judgment is sought to be recognised or enforced may deny such recognition or enforcement against him by raising a defence that the foreign judgment was obtained in breach of natural justice. A breach of natural justice would thereby encompass cases where the party against whom the foreign judgment is sought to be imposed on had not been given notice or opportunity to take part in the proceedings that produced that foreign judgment: see *Jacobson v Frachon* (1928) 138 LT 386 at 392.

him on the basis that the *absent plaintiff* was denied natural justice.[88] If anything, by electing to rely upon and enforce the US class action judgment, it may be said that the absent plaintiff has in any event waived any objections to that judgment.[89]

39 Therefore, it seems clear that a US class action judgment in favour of the plaintiffs will be entitled to recognition and enforcement in Singapore if so relied upon by the absent plaintiff. Additionally, this would appear to be so even if the absent plaintiff did *not* have notice of the class action proceedings in the first place.

40 It also bears reminding that the absent plaintiff has yet another string to his bow. As mentioned earlier, a foreign judgment that was pronounced in favour of the plaintiff is not regarded under Singapore law to merge with the underlying obligation that formed the basis of the original cause of action against the defendant.[90] Accordingly, the absent plaintiff has an option to ignore his favourable class action judgment and sue afresh on the original cause of action in Singapore. Nonetheless, it will also be the case that the absent plaintiff's right to institute fresh proceedings will be denied if his judgment has already been *fully* satisfied;[91] although it remains unclear – albeit arguable – whether *partial* satisfaction or even steps taken to procure satisfaction are sufficient by themselves to constitute an election to pursue the class action judgment.[92] Moreover, the absent plaintiff may also rely on the class action judgment in local proceedings for the purpose of issue estoppel.[93]

41 However, in contrast with the case of the representative plaintiff, it does not necessarily seem to be an abuse of process of the Singapore court if the absent plaintiff were to institute afresh to obtain a larger measure of damages. As mentioned earlier, it follows from the principle in *Henderson v Henderson*, that a party is precluded from instituting new proceedings or arguing a particular issue of fact or law in the forum where such a claim or matter ought to have been advanced in the earlier foreign proceedings.[94] However, unlike the representative plaintiff,[95] an

88 Jonathan M Harris, "The Recognition and Enforcement of US Class Action Judgments in England" (2006) 22 *Contratto e Impresa/Europa* 617 at 649.

89 Jonathan M Harris, "The Recognition and Enforcement of US Class Action Judgments in England" (2006) 22 *Contratto e Impresa/Europa* 617 at 649.

90 See n 41 above and accompanying main text.

91 As is arguably the case for the representative plaintiff. See paras 18–22 above.

92 See paras 18–22 above.

93 See, however, n 43 above and the analysis provided within.

94 See n 47 above and accompanying main text.

95 Where it is argued that the Singapore court will most likely strike out the representative plaintiff's newly instituted action as an abuse of process if his claim for a reassessment or higher award of damages is premised on contentions that

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absent plaintiff did not actively participate in the class action litigation process.[96] Having taken no active part in the US class action litigation in the first place, it seems then that the *Henderson v Henderson* principle would be inapplicable in the context of an absent plaintiff, and accordingly it might not be an abuse of process for an absent plaintiff to attempt to relitigate the original cause of action even if such proceedings were brought to obtain a reassessment or higher award of damages.

IV. Inadequacy of the existing rules of recognition

42 Having considered through the lens of Singapore's private international law the potential *res judicata* effects of a US class action judgment in Singapore *vis-à-vis* an absent plaintiff, it would appear that one is left with a rather incongruous set of conclusions. If it is likely that a class action judgment pronounced *against* the plaintiffs is not entitled to recognition on the basis that the US courts lacked the requisite international jurisdiction over an absent plaintiff, it would then seem rather odd that the Singapore courts will nevertheless be prepared to allow an absent plaintiff to enforce or rely on a class action judgment pronounced *in his favour*.

43 The discomfort that lingers with such a result plainly lies in the fact that the absent plaintiff appears to be entitled to have his proverbial cake and eat it. As Sir Christopher Staughton suggested in his Expert Declaration in *In re Royal Dutch/Shell Transport Securities Litigation*, when he considered whether an absent plaintiff could enforce a favourable US class action judgment in England:[97]

> [W]hen the question of enforceability is considered together with the question of recognition, it is to my mind plain that the US class action proceedings would be opposed to natural justice if the result were that the absent plaintiffs have the right to succeed if the class action wins, and the right to sue again if they lose. *That is not justice. The aim of justice is to decide yes, or no, whether the plaintiff is entitled to his remedy. It should not be a bet that can win and cannot lose*. [emphasis added]

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should have been raised in the US class action litigation in the first place: see n 49 and para 20 above.

96 William Rubenstein, Alba Conte & Herbert B Newberg, *Newberg on Class Actions* (Trial Practice Series, 4th Ed, 2002) at §1:5. See also *Phillips Petroleum Co v Shutts* 472 US 797 at 810, where the judge observed that by the very nature of the class action mechanism, "an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course".

97 See Declaration of the Right Honourable Sir Christopher Staughton, *In re Royal Dutch/Shell Transport Securities Litigation* (No 04-37) 2008 WL 2166243 (DNJ 2008) at [45].

Moreover, from the perspective of finality of litigation, such a state of affairs is clearly untenable to the extent that it permits a form of forum-shopping, in allowing an absent plaintiff to pick and choose his remedies from different jurisdictions even if judicial resources have already been consumed in litigating to judgment in the US.

44 Thus it would seem that the existing rules of recognition of foreign judgments, in particular, the rules of international jurisdiction, do not provide a satisfactory answer to the novel conflict of laws problems that arise in relation to the recognition of a class action judgment *vis-à-vis* an absent plaintiff.

45 At this juncture, it is apposite to consider that Briggs himself recognised:[98]

> [T]he class action has been developed in response to a social problem faced by multiple small plaintiffs confronting a powerful single defendant, and that the rules on the recognition and enforcement of judgments should be allowed to evolve *to accommodate and support*, and *not to frustrate such litigation*. [emphases added]

Having made such an acknowledgment, it seems rather unfortunate that Briggs went on to contend that a class action judgment has no preclusive effect against an absent plaintiff who failed to opt out. One may perhaps be more sympathetic with Harris' observations, that "given the lack of clear authority on the entitlement to recognition of a US class action judgment against an absent claimant in the US proceedings, [the Singapore courts] should not be actively looking to find ways to deny recognition in what are expedient, multiple-party proceedings in the US".[99] Indeed, an important point that was sought to be emphasised following the analysis and critique of Briggs' arguments above is that the courts should not be confined to a narrow search for a contractual agreement *per se*. The necessary corollary to this is that in determining the limits of the *res judicata* effect of a US class action judgment, the court need not confine its enquiry within the realm of contract law but may seek guidance from other common law principles to find a more satisfactory answer. It bears reminding that one of the common law's greatest virtues lies in its flexibility and scope for development and adjustment in order to meet the changing requirements of society.[100]

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98 Adrian Briggs & Peter Rees, *Civil Jurisdictions and Judgments* (Informa, 5th Ed, 2009) at p 783.

99 Jonathan M Harris, "The Recognition and Enforcement of US Class Action Judgments in England" (2006) 22 *Contratto e Impresa/Europa* 617 at 633.

100 See Sir Lawrence Collins gen ed, *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) at pp 601–602, which provides the sensible advice that "[t]he rules of common law … as to jurisdiction are not necessarily exhaustive. Like any other common law rules, they are no doubt capable of judicious expansion to meet the changing needs of society".

V. Searching for alternative solutions

A. A real and substantial connection test to international jurisdiction?

46 If it is unlikely that the US courts would have the requisite international jurisdiction over an absent plaintiff under the existing jurisdictional rules, one may then ask whether there should be room for the expansion of such orthodox rules beyond its well-established categories. As it stands, apart from presence and submission, there is no other basis of jurisdictional competence recognised under the Singapore conflict of laws rules: thus far the common law has been extremely slow to recognise new grounds of international jurisdiction.[101]

47 However, such a step was taken by the Supreme Court of Canada: first, in relation to inter-provincial judgments in *Morguard Investments Ltd v De Savoye*[102] ("*Morguard*"); then, international judgments in *Beals v Saldanha*[103] ("*Beals*"). Under existing Canadian law, in addition to the traditional common law categories of presence and submission,[104] the jurisdictional competence of the foreign court can also be established if there was a *real and substantial connection* between the foreign court and the subject matter of the dispute.[105]

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101 At the moment, despite suggestions to the effect in earlier English cases – to that end, see, for *eg*, *Emanuel v Symon* [1908] 1 KB 302 at 308–309 and *Gavin Gibson & Co v Gibson* [1913] 3 KB 379 at 385 – domicile and nationality are not sufficient grounds of international jurisdiction. Also, reciprocity, in the sense that the enquiring court would itself have taken jurisdiction upon similar facts in the forum is also not recognised as a ground of establishing international jurisdiction: see *Schibsby v Westenholz* (1870) LR 6 QB 155 and *Henry v Geoprosco International* [1976] QB 745; but *cf Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077.

102 [1990] 3 SCR 1077.

103 [2003] SCR 416.

104 It remains open to interpretation whether the Supreme Court in *Beals v Saldanha* [2003] SCR 416 intended the "real and substantial connection" test to be an addition basis of international jurisdiction or whether it replaces the existing traditional bases of presence and submission altogether. At [37], Major J observed that "[a] real and substantial connection is the *overriding* factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction … will serve to bolster the real and substantial connection to the action or parties". However, Major J nevertheless proceeded to state in the very same paragraph that "parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved … by agreeing to the jurisdiction of the foreign court".

105 On the question of what exactly needs to be satisfied in order to come to the conclusion that there is a real and substantial connection between the dispute and the foreign court that gave the judgment, see LeBel J in *Beals v Saldanha* [2003] SCR 416 at [177]–[182], who concluded that one looks for "the totality of the connections between the forum and aspects of the action".

48 Significantly, following the radical path marked out by the Supreme Court of Canada, the Ontario Court of Appeal has thereby provided a different answer to the very question of whether an absent plaintiff is bound by an adverse overseas class action judgment.[106] Where Canadian law is concerned, a foreign class action judgment can have *res judicata* effect over an absent plaintiff, provided that there is a real and substantial connection linking the cause of action to the foreign jurisdiction, as long as the absent plaintiff was adequately represented and accorded procedural fairness, including adequate notice.[107]

49 At the moment, such a departure from the traditional rules of international jurisdiction has not been adopted in Singapore.[108] Yet, there remains something appealing about the Canadian approach, particularly since Singapore now recognises the primacy of the *forum non conveniens* doctrine upon which the Singapore courts may retain or restrain its own jurisdiction.[109] If in the eyes of the Singapore courts, the foreign jurisdiction is the most appropriate place to adjudicate the claim, a judgment emanating from that court should then in principle be entitled to recognition in Singapore.[110]

50 However, one must still necessarily appreciate how radical the Canadian departure is. The traditional common law methodology to international jurisdiction exclusively enquires into *the conduct* of the party: whether the party sought to be bound has acted in such a way that he can be said to have assumed an obligation to obey the foreign judgment.[111] In contrast, the Canadian development shifts the analysis away from the conduct of the party in question to *the nature of the claim* that constitutes the subject matter of the foreign litigation. To adopt the Canadian approach would thus require a fundamental reorientation of the existing rules of recognition of foreign judgments.[112] Moreover, the operation of the Canadian test may also make it practically difficult for parties to decide how best to respond to foreign litigation.[113] In the

106 See *Currie v McDonald's Restaurants of Canada Ltd* [2005] OJ No 506.

107 *Currie v McDonald's Restaurants of Canada Ltd* [2005] OJ No 506 at [30].

108 See *Halsbury's Laws of Singapore: Conflict of Laws* (LexisNexis, Vol 6(2), 2009) at para 75.195.

109 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

110 Additionally, this would be particularly so where the Singapore courts had already stayed its own proceedings on the basis that that foreign jurisdiction was the *forum conveniens*.

111 See Adrian Briggs & Peter Rees, *Civil Jurisdictions and Judgments* (Informa, 5th Ed, 2009) at pp 743–746.

112 Adrian Briggs & Peter Rees, *Civil Jurisdictions and Judgments* (Informa, 5th Ed, 2009) at pp 743–746.

113 In particular, in deciding whether it is prudent to appear and defend in the foreign proceedings or whether it is safe to allow judgments to be entered in default of appearance. See Adrian Briggs, "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004) 8 SYBIL 1 at 13–14; see Adrian

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context of the class action, prospective class members may be placed in the difficult position of having to predict – at perhaps too early a stage to make any reliable judgment – whether a Singapore court would consider that the US courts had a real and substantial connection with the dispute, in deciding whether to opt out of the class action proceedings.

51 It is therefore suggested that the Singapore courts would and should be extremely cautious before following the directions marked out by *Morguard* and *Beals*.[114] Short of such a radical reform of the existing parameters of international jurisdiction, it appears then that in finding a more satisfactory answer to the problems presented in the recognition and enforcement of a class action judgment *vis-à-vis* the absent plaintiff, the Singapore courts may just have to make do with the tools that the common law presently provides.

B. Res judicata *in foreign judgments*

52 The problem can be stated as such: even if the Singapore courts were to decide that international jurisdiction cannot be established over an absent plaintiff, are there other applicable principles within the common law that may bind an absent plaintiff to the *res judicata* effect of a US class action judgment? In other words, does the common law provide one with a more sensible answer in other ways? It may make sense to first consider briefly what the doctrine of *res judicata* is, and then to ask what the limits of the *res judicata* effect of a foreign judgment are.

(1) The doctrine of res judicata

53 According to K R Handley J (as he then was):[115]

> [A] *res judicata* is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes once and for all of the fundamental matters decided, so that, except on appeal, they cannot be relitigated between persons bound by the judgment.

The doctrine of *res judicata* accordingly reflects the courts' attempts to achieve *finality in litigation*, in upholding the public interest by ensuring

Briggs & Peter Rees, *Civil Jurisdictions and Judgments* (Informa, 5th Ed, 2009) at pp 742–743.

114 It is also thereby suggested that any such change in the law would require parliamentary intervention in the form of legislation rather than through judicial expansion.

115 See K R Handley, *Spencer Bower and Handley:* Res Judicata (LexisNexis, 4th Ed, 2009) at para 1.01.

that there is an end to litigation as well as the private interest by protecting parties from being harassed by repeated suits and prosecutions for the same cause.[116] More fundamentally, the doctrine encapsulates the central and pervading tenet inherent in all judicial systems, which is that controversies once resolved are not to be reopened.[117]

(2) Res judicata *in foreign judgments and the* House of Spring Gardens Ltd v Waite *privity of interests test*

54 That finality is a necessary goal in litigation is also an important element in the conflict of laws, and it finds its expression through the rules governing the treatment of foreign judgments. Although it was at one time supposed that foreign judgments were merely *prima facie* evidence of the existence of a cause of action, it is now well established that a foreign judgment can have *res judicata* effect in the forum.

55 Where Singapore is concerned, a foreign judgment that satisfies *all* the requirements of recognition is conclusive on the merits and therefore *res judicata*.[118] However, as a matter of English private international law, it appears that even if the foreign court lacked the requisite international jurisdiction over a particular party (and thus the requirements of recognition are not all satisfied), the party in question may nonetheless be subject to the *res judicata* effect of a foreign judgment. This would be so if the party had stood in a relationship of "*privity of interests*"[119] with other parties over whom the foreign court did have international jurisdiction over, and thus over whom the foreign judgment is properly recognised. Following the reasoning above, it would appear arguable that an absent plaintiff may be bound by the US class action judgment if there is privity of interests between him and the representative plaintiff over whom the class action judgment is properly recognised.

56 However, it is difficult to discern from the authorities what exactly amounts to "sufficient interest".[120] In *Carl Zeiss Stiftung v Rayner & Keeler Ltd*,[121] Lord Reid observed that although "[privity of interests] can

116 K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 4th Ed, 2009) at para 1.10.

117 *Burrell v R* (2008) 82 ALJR 1221 at [15].

118 *Godard v Gray* (1870) LR 6 QB 139. See also *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 at [12].

119 It has been said that privity may arise by way of blood, title or interest: see *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853. For the purpose of the present enquiry, it is only the last category that is of relevance.

120 See *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 at 252; see also *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* [1970] Ch 506 at 541.

121 [1967] 1 AC 853.

arise in many ways … it seems to [him] essential that the person now to be estopped from defending himself must have had *some kind of interest* in the previous litigation or its subject-matter".[122] This is unfortunately inadequate, as it simply begs the question of what kind of interest in earlier litigation is sufficient. A more workable test would appear to be that provided by Megarry VC in *Gleeson v J Wippell & Co Ltd* ("*Gleeson*"), who stated that:[123]

> … having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two *to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party*. It is in that sense that I would regard the phrase 'privity of interest'. [emphasis added]

From this passage, it would appear that Megarry VC had fashioned a broad and flexible test based on the question of whether it is "just" to hold a party bound to the *res judicata* effect of an earlier judgment. Subsequently in *House of Spring Gardens Ltd v Waite*[124] ("*Waite*"), the Court of Appeal adopted a similar test of "justice and common sense" to preclude a third party (not a party to an earlier foreign litigation) from denying that he had been bound by that earlier foreign judgment.

57 In *Waite*, the plaintiffs successfully obtained a favourable judgment in Ireland against three defendants ("IJ1").[125] Two of the three defendants subsequently commenced separate proceedings in Ireland to set aside IJ1 on the basis that it had been fraudulently obtained. The application to set aside the judgment was dismissed ("IJ2").[126] When the plaintiffs sought to enforce IJ1 in England, the three defendants raised the same allegations of fraud that had been the subject of IJ2. The defendants would have been entitled to do so under the rule in English private international law, which generally permits a party to rerun allegations of fraud in the forum, even if they have already been adjudicated in the foreign court, and without the need the adduce fresh evidence.[127] Nonetheless, in so far as two of the defendants were concerned, having raised the allegations of fraud in "a separate and

122 [1967] 1 AC 853 at 910.

123 [1977] 1 WLR 510 at 516.

124 [1991] 1 QB 241.

125 Specifically, the plaintiffs commenced a first round of proceedings in Ireland against the three defendants for damages for misuse of confidential information and breach of copyright, which resulted in a settlement agreement. A second round of litigation was then successfully brought by the plaintiffs, based on a breach of the settlement agreement in addition to the original cause of actions.

126 Ironically, the application to set aside IJ1 was dismissed on the grounds that the defendants themselves had engaged in fraud by bribing their witnesses to give false evidence in court.

127 See *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295 and *Vadala v Lawes* (1890) 25 QBD 310.

second action in the foreign jurisdiction" (that is, IJ2), they were bound by IJ2 and estopped from rerunning the allegations of fraud in England.[128] The pertinent issue then concerns whether the third defendant – who had taken no part in the IJ2 proceedings – could be similarly estopped, on the basis that he was a *privy* to the other two defendants who were bound by IJ2.[129] In holding that he was, the Court of Appeal adopted a rule that had originated in probate:[130]

> [I]f a person knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done *bona fide* in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened.

Accordingly, the Court of Appeal held that the third defendant, being well aware of the IJ2 proceedings (and instead of joining his co-defendants to run the allegations of fraud), was "content to sit back and leave others to fight his battle". Therefore, the third defendant stood in a position of privity of interests with the other two defendants and was thus bound by IJ2.[131]

(3) Applying the House of Spring Gardens Ltd v Waite *privity of interests test to absent plaintiffs*

58 From the above passage, it is unsurprising that the decision in *Waite* "is thought to deal with issues analogous to those raised by a class action".[132] As Stiggelbout observed, the concern is *precisely* that the absent plaintiffs, who were well aware of the pending US class action litigation, "knew that [he] had the ability to 'opt out' but instead elected to stand by while their battle was fought for them by the representative plaintiffs".[133]

59 Moreover, it seems clear that in arriving at its decision in *Waite*, the Court of Appeal's predominant concern was that if the defendants

128 *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 at 251.
129 *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 at 252.
130 *Nana Ofori Atta II v Nana Ab Bonsra II* [1958] AC 95 at 102–103, citing with approval the observations of Lord Penzance in *Wytcherley v Andrew*s (1871) LR 2 P&M 327 at 328.
131 *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 at 254.
132 See *In re Royal Ahold NV Securities & ERISA Litigation* 427 F Supp 2d 467 (2005) (Civil No 1:03-MD-10539) at [20].
133 See Mark Stiggelbout, "The Recognition in England and Wales of United States Judgments in Class Actions" (2011) 52 Harv Int'l LJ 433 at 468.

had succeeded in its application to set aside IJ1, the plaintiffs would have been precluded from enforcing IJ1 against the third defendant in England.[134] To therefore accede to the third defendant's contentions would thus be tantamount to allowing the third defendant to not only reap the *res judicata* benefits of a successful application to set aside the earlier adverse IJ1 but also to hold his hands up and contend that he is not disadvantaged by his contemporaries' failed application. Thus, the Court of Appeal was prepared to invoke "justice and common sense" to prevent such an anomalous result. Similarly, the anomaly that arises in the context of the class action is *precisely* that an absent plaintiff appears able to reap the benefits of a favourable class action judgment,[135] but is also able to deny its preclusive effect should judgment go against him.[136]

60 Applying the *Waite* formulation of the "privity of interests" test, which is founded upon "justice and common sense", one might strongly argue that an absent plaintiff – who was aware of the pending class action litigation and consequently elected not to opt out – stood in a position of sufficient privity with the representative plaintiff. Being content to sit back and allow the litigation to run its course, justice and common sense should prevail to bind the absent plaintiff to the *res judicata* effect of an adverse US class action judgment. This is irrespective of whether the US courts had the requisite international jurisdiction over such an absent plaintiff under the existing jurisdictional rules. That such an absent plaintiff is a privy to the representative plaintiff over whom the US court is jurisdictionally competent, is itself sufficient to bind him to the class action judgment.

61 However, one must still bear in mind Megarry VC's warning in *Gleeson*, that "any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest suspicions".[137] Clearly, such suspicions will be particularly acute where the *res judicata* effects of a class action judgment is sought to be extended over an absent plaintiff who failed to opt out because he did *not* receive notice of his ability to do so in the first place. Indeed, although recognising that "the trend in the common law world has been that *all* members of the class whom a party purports to represent will be deemed parties and thus bound by an order of the court",[138] Barnett went on to suggest that the courts might additionally require that "the

134 *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 at 253.
135 By either enforcing the favourable US class action judgment or by relying on it in fresh proceedings to establish an issue estoppel: see paras 36–41 above.
136 See paras 27–35 above.
137 *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at 516.
138 Peter R Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (Oxford University Press, 2001) at para 3.32.

claimant … had *notice* of the foreign class action and had the chance to withdraw or object".[139]

62 As such, where an absent plaintiff had no notice of the pending US class action litigation, and thus not knowing that he had the ability to opt out of the proceedings, it cannot be said that such an absent plaintiff was "content to sit back and leave others to fight his battle". Justice and common sense should then dictate that such absent plaintiffs did not constitute privies with the representative plaintiff and thus will not share the *res judicata* burdens of a US class action judgment.

VI. Incorporating the privity of interests test to foreign judgments in Singapore

63 In Singapore, the privity of interests test has so far only been applied in determining whether a non-party may be bound by the *res judicata* effect of a *local* judgment.[140] As it stands, whether the privity of interests test applies with equal force to a *foreign* judgment has yet to be judicially considered and remains an open question. Yet, to then conclude that the test has no application to foreign judgments raises the question of why a foreign judgment must be treated differently from a local judgment. To that end, it is apposite to consider what status is accorded to a foreign judgment when it is brought before a Singapore court.

64 According to *Dicey, Morris and Collins on the Conflict of Laws*, "[a] foreign judgment has no distinct operation in England. It cannot, thus, be immediately enforced by execution".[141] The same would apply where the foreign judgment is relied on for the purpose of utilising its *res judicata* effect. Thus, the starting point is that a foreign judgment has no direct legal effect[142] outside the territory where it was originally granted.[143] Nonetheless, a foreign judgment can have legal effect in the forum to the extent that the private international law of that forum permits. In Singapore, if a foreign judgment is to have any effect within the forum, it must first be recognised. Once a foreign judgment meets

139 Peter R Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (Oxford University Press, 2001) at para 3.32.

140 To that end, see, for *eg*, *Tohru Motobayashi v Official Receiver* [2000] 3 SLR(R) 435 and *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565.

141 *Dicey, Morris and Collins on the Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at para 14-002.

142 Short of any applicable international treaties.

143 That a foreign judgment is of no direct effect before the enquiring court merely follows from the principle of territoriality, that the operation of legal systems is, in general, territorially circumscribed: see *Dicey, Morris and Collins on the Conflict of Laws* (Sir Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at para 14-002.

the requirements for recognition,[144] it is deemed to be final and conclusive on the merits, and this is so even if the foreign tribunal had made an obvious error in fact or law.[145] This is because the enquiring court of the forum will not act as the appellate court *vis-à-vis* a foreign judgment.[146]

65 As such, it is well established that a *foreign* judgment can have *res judicata* effect in the forum in the same way as a local judgment,[147] provided that recognition – which is the *sine qua non* for attributing any legal effect to a foreign judgment within the forum – is established. That a *recognised* foreign judgment is as final and conclusive as a local judgment is also consonant with the overarching tenet inherent in all judicial systems, of achieving finality of litigation.[148] Therefore, there is no logical reason as to why a foreign judgment – once recognised within the forum – should necessarily be treated any differently from a local judgment.

66 More problematic, perhaps, is whether the incorporation of the privity of interests test to foreign judgments is necessarily inconsistent with the general rule in the conflict of laws, that an implied agreement to submit is insufficient to bind a party to a foreign judgment.[149] As mentioned above, this general rule is traditionally recognised to have been unequivocally affirmed by Ashworth J in *Kohnstamm*. In so concluding, Ashworth J had also specifically rejected Diplock J's conclusion in *Blohn v Desser*[150] ("*Blohn*"), that a person who became a partner – including a sleeping partner – in a foreign firm must have impliedly submitted to the jurisdiction of the foreign court in which the firm's business is carried out and thus may be bound by a judgment emanating from that foreign court.[151]

144 Additionally, if the foreign judgment is not subject to any applicable defence to recognition.

145 See n 118 above.

146 *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 at [28].

147 To that extent, it is significant to note that under both the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed), a judgment from a gazetted country shall – upon successful registration – be of the same force and effect, as if it had been a judgment procured from the Singapore courts: see s 3(*a*) of the Reciprocal Enforcement of Commonwealth Judgments Act and s 4(*a*) of the Reciprocal Enforcement of Foreign Judgments Act.

148 See para 53 above.

149 See text accompanying n 67 above.

150 [1962] 2 QB 116.

151 See *Blohn v Desser* [1962] 2 QB 116 at 123 where Diplock J said:

> It seems to me that, where a person becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court, and appoints an agent resident in that jurisdiction to conduct business on behalf of the partnership at that place or business, and causes or permits, as in the present case, these matters to be notified to persons dealing with that firm by

(*cont'd on the next page*)

67 The weight of existing authorities to the contrary[152] does suggest that Diplock J was incorrect to regard that an agreement to submit could be implied. Nonetheless, Diplock J may have been correct in concluding that a sleeping partner in a foreign partnership can be bound by a foreign judgment pronounced against the partnership, albeit for a different reason.

68 In *Blohn*, the pertinent issue concerned whether a plaintiff who had obtained a judgment in Vienna against an Austrian partnership could enforce that judgment in England against an English resident who was a sleeping partner in the Austrian partnership and who took no part in the Austrian proceedings. The case was thus concerned with a partnership's liability *vis-à-vis* an outside creditor: if the partnership had successfully defended the Austrian proceedings, the defendant would have been able to rely on the partnership's favourable judgment to preclude the plaintiff from pursuing the original claim against him. One might contend that such a defendant stood in a position of sufficient privity of interests with the partnership to bind him to any judgment *vis-à-vis the partnership*. The essential point is that, in *Blohn*,[153] there was *another party* over whom a foreign judgment can be properly recognised. In applying the *Waite* privity of interests test, the key questions are: (a) whether *such other party* exists; and (b) whether justice and common sense dictate that the party sought to be bound should be recognised as having sufficient privity of interests with *that other party*.

69 As such, the privity of interests test may not be inconsistent with the general rule that an agreement to submit cannot be made impliedly. This is because in determining whether an agreement to submit exists, the key question is instead whether *the party sought to be bound* had acted in such a manner as to amount to an unequivocal consent to the foreign court's jurisdiction.

70 Accordingly, as a matter of principle, it would appear that there is similarly no good reason as to why the application of the doctrine of privity of interests should be confined in the domestic setting. Once recognised in the eyes of the Singapore court, the *res judicata* effect of

registration in a public register, he does impliedly agree with all persons to whom such a notification is made – that is to say, the public – to submit to the jurisdiction of the court of the country in which the business is carried on in respect of transactions conducted at that place of business by that agent.

152 To that end, see Lord Selborne in *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 at 686 and Kennedy LJ in *Emanuel v Symon* [1908] 1 KB 302 at 314. See also *Vogel v R & A Kohnstamm Ltd* [1973] 1 QB 133 at 144–146 and *Adams v Cape Industries plc* [1990] Ch 433 at 464–465.

153 As was also the case in *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 and, as argued above, in the context of the absent plaintiffs.

the foreign judgment must be given its full effect, and the doctrine of privity of interests should apply with equal force.

VII. Conclusion

71 The US class action is indeed an animal as yet quite alien to the Singapore conflict of laws.[154] Certainly, if and when such a judgment is brought to be recognised or enforced in Singapore, it will present a case of the most unique kind, unprecedented before the Singapore courts. Undoubtedly, the US class action judgment raises important foundational questions about the limits of the existing common law rules of recognition of foreign judgments.

72 This article has attempted to unravel some of the possible conflict of laws issues that may arise *vis-à-vis* the representative plaintiffs, the opted-out class member and the absent plaintiffs, in outlining *who* can (or cannot) do *what* with a US class action judgment in Singapore. To that end, the issue of recognition or enforcement poses little difficulty *vis-à-vis* the representative plaintiff who also appears entitled, subject to certain limitations, to sue afresh on the original cause of action due to the continued application of "non-merger" in foreign judgments. There remains some uncertainty over the nature of a class member's election to opt out and whether it amounts to submission, though the sentiments of the Singapore High Court in *WSG Nimbus* seem to indicate that such a contention is unlikely, particularly where such election has as its underlying objective of not wanting his claim to be adjudicated. It is then the case of the absent plaintiffs that presents a most fundamental difficulty. In determining whether the US courts had the requisite international jurisdiction over an absent *plaintiff*, the difficulty lies in applying a set of *defendant*-based rules of recognition to a *plaintiff*-based problem. Unfortunately, the application of the existing rules of recognition leads to the unsatisfactory conclusion that permits an absent plaintiff to resist the recognition of an adverse class action judgment while remaining able to rely on a favourable one.

73 This article then explored the possibility of adopting the Canadian approach towards international jurisdiction, where instead it is asked whether there was a *real and substantial connection* between the foreign court and the subject matter of the dispute. However, apart from the practical difficulties that may arise, the operation of such an approach would require a radical reform of the existing rules of

154 As pointed out by Dixon, "[t]he law in this area is difficult to analyse as there is no case that has really come close to considering this issue": see John C L Dixon, "The *Res Judicata* Effect in England of a US Class Action Settlement" (1997) 46 Int'l & Comp L Q 134 at 150.

recognition: a domain more appropriate for legislature rather than the courts. This article finally argued that the common law doctrine of privity of interests can provide a more satisfactory solution. In particular, the flexible version of the privity of interests test in *Waite* – founded upon "justice and common sense" – provides fodder for the argument that an absent plaintiff who was aware and elected not to opt out of the class action litigation stood in a position of sufficient privity of interests with the representative plaintiff to bind the former to an adverse judgment. Nonetheless, justice and common sense may also dictate that an absent plaintiff who had *no notice* of the pending class action should not be similarly bound.

74 As it stands, the application of the privity of interests test has so far only been applied to local judgments in Singapore. However, it is submitted that the incorporation of the doctrine into the international context is not only sound in principle but also adheres to an important tenet in litigation – that of finality. Certainly, the application of such a broad and open-ended test may lead to some uncertainties in its practical application. However, and perhaps more importantly, it provides the courts with the latitude to do justice between the parties.