Beyond Domicile: The BHP Litigation and the Functional Interconnection of Public and Private International Law

from Marcel Vitor de Magalhães e Guerra

On 14 November 2025, the English High Court handed down its Stage 1 judgment in *Município de Mariana and others v. BHP Group Plc and BHP Group Limited* [2025] EWHC 3001 (TCC), finding the defendants liable — under Brazilian law — for the 2015 collapse of the Fundão tailings dam: over 600,000 claimants, an estimated £36 billion, the largest group litigation in English legal history. This post argues that *Mariana* exposes a functional interconnection between public and private international law at the stage of determining jurisdiction itself: although doctrinally distinct, the court's application of a private international law rule required engaging questions of corporate organisation, adjudicatory legitimacy, and transnational responsibility that traditionally belong to public international law.

A jurisdictional rule that was anything but self-executing

The formal basis for the English courts' competence was straightforward: Article 4(1) of the Brussels I Recast Regulation, under which BHP Group Plc — domiciled in England and Wales, then part of a Dual Listed Company structure with the Australian BHP Group Limited — was subject to mandatory jurisdiction. Yet the rule was anything but self-executing. Turner J struck out the claims (*Municipio de Mariana & Ors v BHP Group Plc & Anor* [2020] EWHC 2930 (TCC)) as an abuse of

process, also accepting the Article 34, *forum non conveniens* and case-management applications on alternative grounds. Only the Court of Appeal's 2022 judgment ([2022] EWCA Civ 951) — drawing on *Owusu* (Case C-281/02, [2005] ECR I-1383) and *Vedanta* ([2019] UKSC 20) — rejected those objections, confirming that complexity could not convert mandatory jurisdiction into a discretionary one.

Even this mandatory rule required the courts to engage with contested questions about the defendants' identity, group structure, parallel proceedings and manageability — requiring considerably more than a purely procedural inquiry, and engaging the same transnational corporate reality that later informed the liability determination. The jurisdictional inquiry thus already illustrates the interconnection between public and private international law.

The same underlying corporate relationships

The jurisdictional history of *Mariana* illustrates a phenomenon that has received surprisingly little explicit attention in scholarship. In Private International Law and Global Governance, Horatia Muir Watt and contributors recast private international law as an instrument of transnational governance, allocating and constraining the regulatory authority exercised by private actors, and Ralf Michaels cautions against treating jurisdiction as a single, uniform concept.[1] Alex Mills, in The Confluence of Public and Private International Law, has argued that the two fields increasingly operate as complementary components of a common transnational legal order. The public international law dimension lies not in the jurisdictional rule itself, but in the international legitimacy of projecting adjudicatory authority over conduct occurring partly outside the forum State — a question traditionally analysed through principles governing the permissible bases of jurisdiction. The procedural application of Article 4 in *Mariana* therefore became inseparable from questions of international jurisdictional legitimacy.

Jurisdiction and liability remain analytically distinct, but such litigation may require successive, asymmetrical reconstructions of the same corporate organisation. Allegations about the coordinated operation of the two BHP parent companies formed part of the factual setting for assessing whether the proceedings were abusive or unmanageable; at the merits stage, Mrs Justice

O’Farrell reached a strikingly similar conclusion applying Brazilian law’s “multifactorial and evaluative” approach to indirect polluter liability, finding that BHP, through its control of Samarco, caused or permitted the continued raising of the dam despite known risks.

A caveat: although the corporate reality examined is the same at both stages, the evidentiary burden escalates sharply — from threshold plausibility to proof on the balance of probabilities. The relationship is thus telescopic, not repetitive.

The phenomenon is not confined to environmental litigation. Toussaint Nothias’s recent account of the Kenyan proceedings against Meta describes a comparable problem: Meta contested jurisdiction by relying on its foreign incorporation and moderators’ formal employment status, yet the courts examined its Kenyan operations and subcontractor relationships — relevant both to jurisdiction and to whether Meta was the moderators’ true employer.

Morelli had already asked, in 1953, whether States face limitations in exercising judicial jurisdiction over civil actions.[2]*Mariana* and the Kenyan litigation reveal how far that interconnection extends today — distinct from the choice-of-law analysis that resolves the merits, since which court may hear a case does not turn on which law governs it. Jurisdictional doctrine cannot be developed in complete isolation from the evidentiary realities of transnational litigation.

That overlap is rarely made explicit in the jurisdiction literature, which treats domicile, service, and *forum non conveniens*as self-contained inquiries.

A live illustration for the HCCH parallel proceedings debate

This bears on the continuing HCCH debate following the recently concluded consultation on the Draft Text of a future Convention on Parallel Proceedings. As a recent follow-up post on this blog reported, the German Judges Association flags concerns about Articles 9 and 10, which, in bracketed form, would permit courts to assess whether another court is more appropriate — a discretionary test unfamiliar to jurisdictions like Germany’s, trading predictability for a *forum non conveniens*-style exercise.

Mariana offers a cautionary data point from a jurisdiction where such discretion

is already familiar: BHP's strategy was, in substance, an attempt to secure a comparable reassessment — through *forum non conveniens* and an abuse-of-process argument that the litigation was "irredeemably unmanageable." Both succeeded at first instance, reversed only on appeal, years later — precisely what the Association warns a discretionary regime could produce elsewhere. Its concern that such factors could disadvantage claimants given complex, globalised structures maps onto this case: the Dual Listed Company structure at issue is exactly what such a regime would have to unpack before reaching the forum question.

What this means for private international law

The upshot is not that domicile-based jurisdiction under Brussels I Recast should be reopened to substantive scrutiny — the Court of Appeal was right that complexity cannot convert a mandatory rule into a discretionary one. The point is narrower: courts adjudicating cases like this may already be engaging in a sequence of partially overlapping inquiries spanning what doctrine presents as separate stages. Future work might therefore pay less attention to treating these stages as entirely self-contained, and more to understanding how their factual and normative interdependence shapes transnational litigation.

The significance of *Mariana* extends beyond the relationship between jurisdiction and liability: it shows that determining adjudicatory jurisdiction itself increasingly occupies a space where public and private international law interact functionally, requiring courts to evaluate a common transnational corporate reality before either jurisdictional or substantive questions can be resolved.

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[1] Ralf Michaels, 'Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions' in Eckart Gottschalk, Ralf Michaels, Giesela Rühl and Jan von Hein (eds), *Conflict of Laws in a Globalized World* (Cambridge University Press 2007) 29–62.

[2] Gaetano Morelli, *Diritto processuale civile internazionale* (2nd edn, CEDAM 1953) 87.