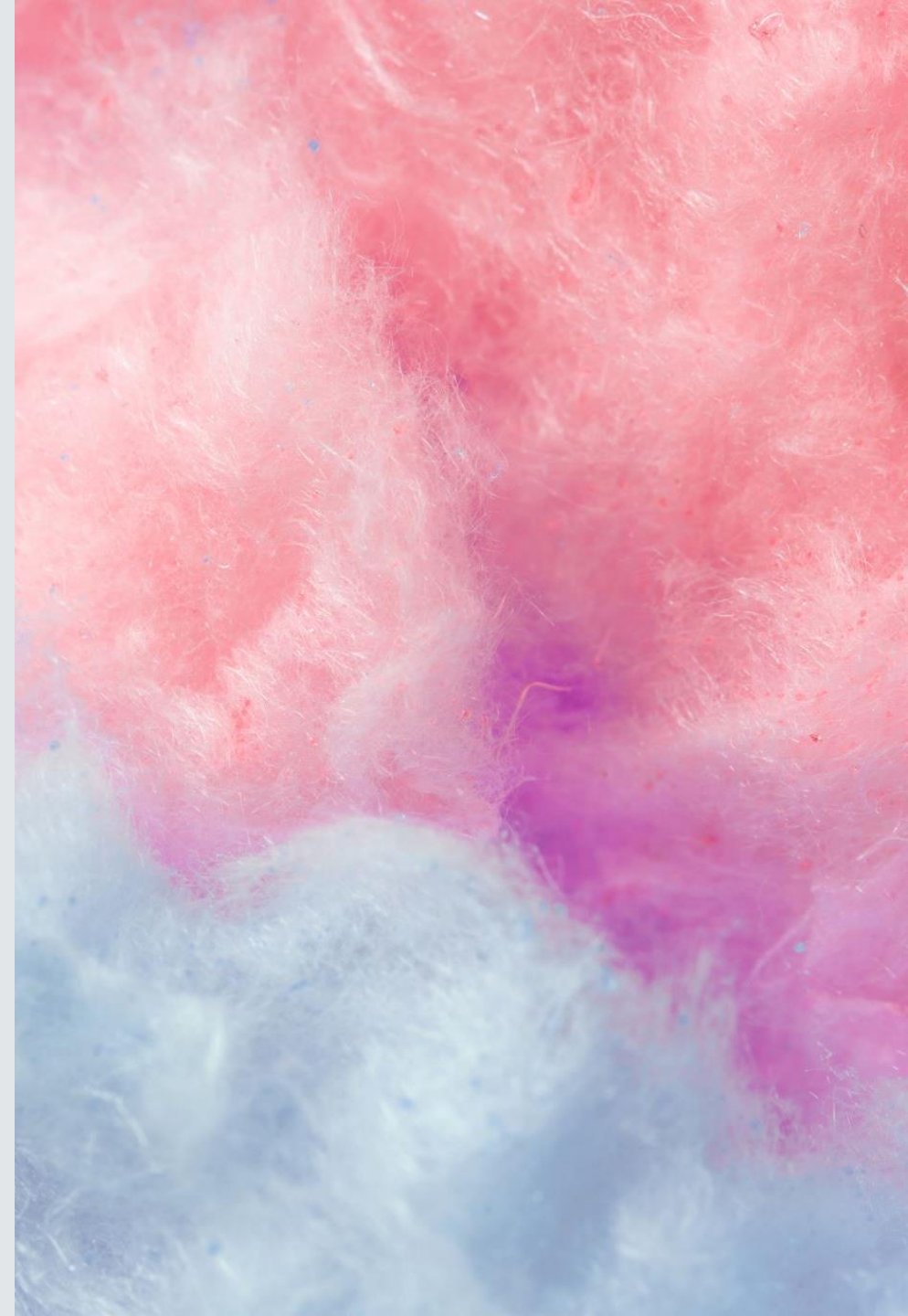


FORUM SHOPPING AND MASS TORT CLAIMS

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INTRODUCTION

Município de Mariana v BHP Group (UK) Ltd and others

- 'the largest ever class action in England'
- over 720,000 Brazilian claimants, 2 English-linked defendants, 1 Brazilian co-defendant
- £36 billion claimed
- claims under Brazilian law
- the English court was the *forum conveniens*



SOME QUESTIONS

- is this forum shopping

& is it a problem?

- *this* poses some questions



WHAT IS FORUM SHOPPING - IS IT A PROBLEM?

What does forum shopping mean?

Can it be illegitimate to choose an available forum?

A distinction: forum selection is not illegitimate, *but* the consequences may be problematic

- *distinguish* proceedings in an *inappropriate* forum

- *from* proceedings in a forum which is not *the most appropriate*



WHY DO CLAIMANTS CHOOSE A FORUM?

The purpose of litigation: settlement not judgment

No real choice of forum in mass tort actions?

Forum selection: factors in all litigation:

neutrality of the court | rules of procedure & evidence | the applicable law: identity, scope | remedies: availability, extent



...

Forum selection: factors in mass tort litigation:

the existence and sophistication of the class action procedure | the experience of courts and lawyers | the recognition and enforceability of any judgment or settlement | the availability of litigation funding | the scope for 'defendant shopping' | no effective access to justice elsewhere | the scope for jurisdiction challenges



HOW IS THE CLAIMANTS' CHOICE OF FORUM CONTROLLED?

- selection limited to available courts
- by excluding claims which are an abuse of process (claims in which C has no legitimate interest because pointless, oppressive)
 - are 'unconnected' or 'unmanageable' claims abusive?
- by declining to *exercise* jurisdiction ...



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- *for example*, in English law on *forum non conveniens* grounds
 - identify *the* most appropriate forum (not *an* appropriate forum)
 - the forum which is most suitable in the ‘interests of the parties and of justice’
 - the optimal forum, subject to access to justice



...

- *for example, the English court as forum conveniens in Mariana*
- proceedings in Brazil ‘not an available route for any of the claimants in Brazil’
- in Brazil ‘there is a real risk that the claimants cannot obtain substantial justice’
- ‘justice requires’ proceedings in England

BUT ... ARE TRANSNATIONAL SUPER CLAIMS PROBLEMATIC?

Risk to corporate defendants *but* D is linked to the forum |
result will be the same

An inappropriate balance of regulatory interests (*locus actus*
should regulate mass torts?) *but* forum has an interest | *lex*
loci governs

Disbenefit for the forum - the court, the legal system *but*
depends on the forum | Cs select appropriate courts



CONCLUSIONS

Forum *selection* is legitimate in principle

Impacts overstated, misconceived?

but The problem of *an inappropriate forum*

- because of incapacity to hear such cases
- a problem for domestic law of the forum
- solved by ... forum shopping



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The real problem: identifying *the most appropriate forum?*

- requires a control mechanism which:
 - ensures proceedings in optimal forum
 - ensures access to justice
 - as in *Mariana?*