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Higher Regional Court Hamm

Order and reference order

In the legal dispute

Of Mr. Saúl Ananiás Luciano Lliuya, [redacted] Departamento de Ancash, Provincia de Huaraz, Peru (Plaintiff and appellant)

Legal representative: Rechtsanwälte Günther & Partner, Mittelweg 150, 20148 Hamburg,

versus

RWE AG, represented by the Executive Board Dr. Rolf Martin Schmitz, Opernplatz 1, 45128 Essen (Defendant and appellant)

Legal representative: Lawyers Freshfields Bruckhaus Deringer, Feldmühleplatz 1, 40545, Düsseldorf

the 5. Zivilsenat des Oberlandesgerichts Hamm [Fifth Division for Civil Matters of the Higher Regional Court of Hamm]
consisting of the presiding judge of the Higher Regional Court Dr. Meyer, the judge at the Regional Court Dr. Servais and the judge at the Higher Regional Court Uelwer

on 1 July 2021

held as follows:

I.

The Plaintiff's request on page 19 of its pleading of 15.04.2021 (Bl. 2261 d. A.) to limit the answer to the evidentiary questions III. 2. a) to d) in the evidentiary decision of 30.11.2017 to the evidentiary question 2 d) (so mutatis mutandis) is rejected.

Reasons:

The Senate does not yet consider all of the plaintiff's allegations made in the evidence order of 30.11.2017 under III. 2 a) to d) to be proven. According to the current state of scientific discussion, which is of course also pursued by the Senate (as far as this is possible without the corresponding expertise), there is a certain probability for the correctness of the allegations made and proven by the plaintiff under 2. a) and b). However, the Senate does not consider this to be proven at present - in the sense of a forensic procedure and according to the rules of the German Code of Civil Procedure.
How the rise in global temperatures affects the glaciers (including the Palcaraju Glacier) surrounding the Palcacocha Lagoon locally is still completely unresolved, as is the question of how high the defendant's share of the causal chain in dispute is (questions 2. c) and d)).
This has not been changed by the expert opinion of the authors Stuart-Smith, Roe, Li and Allen/Universities of Oxford and Washington (Annex BK 20) submitted by the plaintiff in his written statement of 15 April 2021. This applies in particular with regard to the evidentiary question 2. c).
The Senate has taken note of the fact that this expert opinion is said to have been prepared "without cause or commission" by the plaintiff. Therefore, its value must be higher than private expert opinions commissioned by the parties, which merely represent particularly substantiated parts of the parties' submissions (cf. MüKo/Zimmermann, ZP0, 6th ed. 2020, § 402 marginal no. 9 with further references). However, the Senate does not consider this expert opinion to be sufficient within the meaning of § 286 ZPO to make it unnecessary to obtain an expert opinion of one's own commissioned by the court, which is to reliably answer the present evidentiary questions (Zöller/Greger, ZP0, 33rd ed. 2020, before § 402, marginal no. 10 c).

Furthermore, the expert opinion is not suitable to establish the senate's own expertise that did not exist before, which would then make obtaining an expert opinion equally dispensable (Zöller/Greger, ZP0, 33rd ed. 2020, loc. cit., marginal no. 11).
Something else could only apply if the defendant did not dispute the assertions made by the plaintiff in evidence under 2. a) and b) in the order for taking evidence and, with regard to the assertions under 2. c), admitted the statements in the aforementioned expert opinion of the Universities of Oxford and Washington or the results found there as applicable to the present proceedings. The Senate does not assume this on the basis of the case file. However, for the sake of form and in order not to cut off the plaintiff's opportunity to save costs, the defendant is requested to declare its position within three weeks after receipt of this order.

II.

The attention of the parties is drawn to the following:

1.

On page 6 of his pleading of 15 April 2021 (file no. 2248), the plaintiff asked to be informed to what extent the submission on further protective measures on his property should be substantiated and, in particular, to what extent cost estimates should be submitted.

After consultation, the Senate does not consider the submission of cost estimates to be necessary, as we are dealing with a declaratory action. However, in order for the expert to verify the suitability of the envisaged protective measures on site, the Senate considers it useful to explain the envisaged measures (permanent deflection walls, steel house wall reinforcement and flood protection doors) in more detail with regard to their location, taking into account the expected direction of the flood, by

submitting a sketch plan and with regard to the details of their implementation as well as the approximate costs to be expected.

2.

Insofar as the plaintiff also refers on page 6 of his pleading of 15.04.2021 (BI. 2248 of the A.D.) to his burden of costs due to measures which third parties could carry out on his property and/or - more likely - on the lagoon and which could (also) secure him against flood damage, the Senate, after consultation, sees it as follows:

Third parties in the aforementioned sense could be the State of Peru, the city of Huaraz, the regional administration of the province of Huaraz and/or the Waraq community association.

Measures directly at the lagoon could be the reduction of the lake volume by constructing additional outlets and/or fortification measures at the moraine or the artificial dam. These measures would eliminate the danger of a GLOF in the long term, or at least reduce it considerably, and might make the implementation of further securing measures on the plaintiff's property superfluous.

The phrase "burdened with costs" is to be understood as a sovereignly enforced cost sharing by the plaintiff.

If the plaintiff is not burdened (even proportionally) with the costs caused by these measures, he has no claim against the defendant. A claim for a declaratory judgement would also be unfounded in this respect, i.e. if the burden of the plaintiff with costs of third parties is not proven to be sufficiently probable (see above). Voluntary payments are not considered.

If, on the other hand, the plaintiff is shown to be sufficiently likely to be burdened with the costs of this measure, e.g. via property tax and/or a special levy, he may well be entitled to a claim for compensation against the defendant because, as a disruptive party, the defendant has been released from its obligation to remove the property at the expense of the plaintiff (and other owners who were also involved) and may therefore have been unjustly enriched (§§ 1004 para. I sentence 2, 812 para. I sentence 1 alt. 2, 818 para. 2 of the German Civil Code [Bürgerliches Gesetzbuch (BGB)]).

So far, there is no substantiated submission by the plaintiff that and in what way he could be burdened with costs when measures are taken by third parties. Therefore, no statement can be made at this time about the legal basis under Peruvian law on which costs can be passed on to the plaintiff and other residents of Huaraz. And it is therefore also not possible to examine whether these regulations could apply to the plaintiff. Furthermore, the defendant submitted in its written statement of 14 December 2017 by submitting a corresponding legal information on Peruvian law (Annex B 58 = BI. 785 et seq.) in a substantiated manner - albeit in violation of § 184 GVG (a translation is requested) - that a passing on of costs is currently ruled out under Peruvian law, at least if sovereign action is in question. The plaintiff has not yet countered this argument - at least not in a correspondingly substantiated manner. The Senate had already pointed this out - at least in essence - in its decision of 10.12.2020 (page 5 above). In this respect, the application for a declaratory judgement is currently unfounded.

3.

On page 10 of his pleading of 15 April 2002 (file no. 2252), the plaintiff asks the senate to indicate whether it is incumbent upon him to submit continuous volume studies concerning the Palcacocha

Lagoon for the duration of the trial. The Senate does not consider this to be necessary, especially since the water volume of the lagoon must be clarified in any case within the framework of the evidentiary questions 1. and 2. c).

4.

The causality between the concrete danger to his property alleged by the plaintiff and the emission of C02 by the defendant's power plants is to be examined in terms of the theory of adequacy.

According to this theory, an adequate causal connection exists if a fact in general, and not only under particularly peculiar, improbable circumstances to be disregarded in the ordinary course of events, is capable of bringing about a success of this kind. With this definition, the risk increase formula and the foreseeability formula are combined. In the context of an objective subsequent prognosis, all circumstances recognisable to the optimal observer at the time of the occurrence of the damage are to be taken into account (BGH, judgement of 23 October 1951 - I ZR 31/51 ; BGH, judgement of 07 April 2ü00 - V ZR 39/99 -, margin 10; BGH, judgement of 05 July 2019 - V ZR 96/1 8 -, margin 25; Palandt/Grüneberg, BGB, 80th ed. 2021, Vorb. v. § 249 margin 26 f.).

In a case like the present one, in which, according to the plaintiff's submission, many decades can lie between the act of damage - the emission of C02 - and the occurrence of the disturbance - the threatening flooding of the lagoon - the foreseeability can probably not be based on the occurrence of the success, i.e. on the time of the damaging event. Rather, the connecting factor should be the time of the damaging act.

Consequently, the Senate is faced with the question as of when it was recognisable/foreseeable to an optimal observer that increasing C02 emissions would lead to global warming and the allegedly associated consequences. In 1958 - this is known to the courts - Charles D. Keeling pointed to an increase in the atmospheric C02 concentration and' thus the anthropogenic greenhouse effect; he carried out concrete measurements and, after evaluating them, established that the burning of fossil fuels by mankind and the resulting C02 release and steadily increasing CO2 concentration contribute to global warming. The Senate therefore tends to affirm adequate causality from 1958 onwards, if the plaintiff's submission is assumed to be correct, which is appropriate from a relation-technical point of view.

5.

A liability of the defendant would probably have to be made dependent on <u>further conditions of attribution</u>. Admittedly, according to the plaintiff's submission, which is to be assumed as correct in the context of the conclusiveness test (see above), a causal chain running linearly according to physical laws is to be assumed, which was set in motion by the defendant via the subsidiaries controlled by it. However, the defendant is not likely to act directly; in any case, there is likely to be a smooth transition to a merely indirect act of interference. The Senate has not yet decided on this and does not need to do so at this point. Because of the proximity to an indirect or indirect act, the qualification of the defendant as a disturber probably depends on the existence of further factual grounds for imposing responsibility on it for the alleged property damage (BGH, judgment of 05 July 2019 with reference V ZR 96/18 et al. in MDR 201 9, 1130 f. - para. 25).

These further attribution criteria are likely to be affirmed within the scope of an evaluative consideration according to the plaintiff's submission. The defendant caused the release of the C02

emissions by its subsidiaries controlled by it; it could/can control the emissions at the time of the release and it drew/draws the economic benefit from the combustion of fossil fuels. The senate bases this last point on the plaintiff's submission without knowing the details of the profit and loss transfer agreements of the defendant's group; the defendant may submit evidence on this within the scope of its secondary burden of proof if it wants to contradict the assumption.
In addition, there are further considerations which, within the framework of an evaluative view, could speak in favour of the defendant's indirect interfering capacity. These are, for example, the obligation of the energy supply companies to provide an energy supply that is as environmentally compatible as possible, as set out in § 2 para. I EnWG, or fundamental considerations that can be derived from the decision of the Federal Constitutional Court of 24.C)3.2021 with the file number 1 BvR 2656/18. However, this should not and does not need to be further elaborated here.

6.

The Senate no longer unreservedly adheres to the opinion expressed under no. 4 of its decision of 30.11.2017 on the statute of limitations.

However, even if - as the defendant argues - it is assumed that the limitation period could only begin to run with the beginning of the impairment of property, which is supported by the wording of § 199 para. 1 no. 1 BGB, the claims now asserted under nos. 1 and 2 in the main action are nevertheless not time-barred within the meaning of §§ 194 et seq. BGB.

First of all, however, this line of argumentation of the defendant, among others, shows that the (current) legal relationship of the parties is decisively characterised by the factual element of the threatened impairment within the meaning of § 1004 (1) sentence 2 BGB and not by the norms concerning the reimbursement of costs (§§ 677 et seq.; 812 BGB).

Thereuopn, taking the defendant's argumentation as a basis, the following applies:

The defendant has adopted the plaintiff's representation (cf. BI. 183 r.), according to which an imminent impairment of property existed in any case for the first time in 2009; since that time the plaintiff considers the danger of a tidal wave from the Laguna Palcacocha for his house as given. According to his own submission (application page 9 and written statement of 29 September 2006, p. 51 = file no. 347), the plaintiff should also have been aware of the danger of a tidal wave for his house from 2009 onwards due to official warnings (see file no. 9).

Thus, the limitation period may have started to run when the plaintiff or his legal predecessors had also gained knowledge of the further circumstances giving rise to the claim or should have gained knowledge without gross negligence (§ 199 para. 1 no. 2 BGB), i.e. knowledge also of the fact that the defendant had contributed or was contributing proportionately to the global warming considered by the plaintiff to be the cause of the danger of a GLOF.

Grossly negligent ignorance in the sense of § 199 (1) no. 2 BGB is assumed if the creditor has violated the due diligence required in the course of trade to an unusually gross degree and has not made obvious considerations or has not observed what should have been obvious to everyone. The question under which conditions the creditor is obliged to actively investigate in order to avoid gross negligence depends on the circumstances of the individual case. As in the cases of § 932 (2) BGB, the failure to make an enquiry is only to be classified as gross negligence under § 199 (I) No. 2 BGB if there are additional circumstances which make the failure to make an enquiry appear incomprehensible from the point of view of an aggrieved party who is reasonable and has his interests at heart. For the creditor, concrete indications of the existence of a claim against the debtor

must be evident and the suspicion of a possible damage must force itself upon him (BGH, judgement of 10.11.2009, ref.: VI ZR 247/08 in NJW-RR 201 0, 681 - marginal no. 16 f.).

The plaintiff and his legal predecessors do not live or lived in Europe, but in Peru. It cannot therefore be assumed that they were aware of the major emitters in Germany or Europe without further investigation. There is also no evidence that they were aware of the complex scientific relationships underlying the asserted claim, which are also largely disputed, even if they were aware of the impending impairment of their property from 2009 onwards.

Therefore, according to § 199 para. 4 BGB, the 10-year limitation period should be decisive.

The action with its original claim for declaratory relief was served on 18 December 2015 (cf. BI. 62); the extensions to the action in July and November 2016. In December 2005 and July/Nov. 2006, respectively, the claim would therefore already have to have arisen pursuant to § 1004 para. 1 sentence 2 BGB in order to be able to assume that it is time-barred. So far, the defendant has not submitted any evidence in this regard, which is pointed out.

However, even a statute of limitations that may have occurred from 2009 onwards pursuant to § 199 para. I BGB would be irrelevant if, in the case in dispute, a new statute of limitations had begun to run against the background of further emissions by the defendant and a renewed threat of or deepening encroachment on property. This is to be assumed here:

It is undisputed that the water level of the lagoon peaked in 2009 at 17.3 million qbm. In the following years, the level was reduced to 12 million qbm (see BI. 681); the state of emergency for the lake was not extended after 01.11.2012 (BI. 161). It was only in the second half of 2015 and in 2016 that, according to the records, the water level rose extremely again, indisputably to 17.4 million qbm in February 201 6. With the rise in water, the danger of a GLOF is likely to have increased according to general physical laws.

However, a new encroachment on property after an interruption or a deepening of the encroachment on property or an increase in the probability of an imminent encroachment on property is likely to lead to a new limitation period for a claim for removal under § 1004 of the Civil Code. (BGB?)

7.

It is doubtful whether the defendant's reference to the book "Klimahaftung vor Gericht" (Climate Liability in Court) by Prof. Wagner is admissible in the form made here; in any case, the reference already does not meet the formal requirements because copies were not handed over to the opposing party. For the rest, reference is made to the rapporteur's letter of 22.04.2021.

However, this may be irrelevant. In the meantime, the Senate has read the book and treats it for what it is: a party submission commissioned by the defendant in the form of legal statements.

The submission of two further copies for the plaintiff or his legal representatives within three weeks is anticipated.

8.

The Senate will not make the scheduling of the on-site hearing at the glacial lake dependent on the inability of private experts of one or both parties to attend.

In doing so, the Senate does not cut off the right of the parties to attend a hearing of evidence in the sense of § 357 para. 1 ZPO.

The principle of fair proceedings and the right to be heard require that the parties to the proceedings be given the opportunity to attend the determination of the factual basis of an expert opinion by the expert and to submit comments, unless there are compelling legal or factual obstacles to this (BVerwG, decision of 18.03.2014, ref.: I ü B I 1/14 in NVwZ 2014, 744 ff.- marginal no. Il ff.). The Senate also considers the completeness and correctness of the bases established in the course of the on-site inspection to be important with regard to the further expert work of the experts and the informative value of their expert opinions.

Here, it is about the inspection of the localities and, if necessary, about examinations that are to prepare an expert opinion to be prepared. There will be no negotiations on the spot, nor will the procedure of the expert be discussed, nor any interim results, which should not exist there anyway. This will all take place at a subsequent hearing before the Higher Regional Court in Hamm. However, if desired, the findings obtained on the spot can be exchanged and in this respect suggestions and comments will also be received there.

However, the limits of a party's right to be present under section 357 (1) of the Code of Civil Procedure are to be drawn where they make it very difficult or even impossible for the court to organise the taking of evidence.

Therefore, the Senate is of the opinion that the right to the presence of a number of private experts of the parties determined by the parties, let alone the right to the presence of very specific, named experts at the announced on-site inspection, cannot be derived from § 357 ZPO beyond the right of presence of the party and its legal representatives.

In addition, it is pointed out that the National Park on the Lagoon can in principle be visited by anyone at any time. Entering it as a private person is much less complicated than doing so in the context of a German court case, which the Senate has had to experience in the meantime. The Senate also assumes that Prof. Amann has already been there because, after all, he and his colleagues from RWTH Aachen University stated as a result of a "scientific assessment of the probability of a seriously threatening flood hazard for the plaintiff's property" - commissioned by the defendant - as early as March 2019 that there was no such hazard.

In any case, the Senate did everything in its power to give the parties, their lawyers and also their experts the opportunity to participate in the scheduled on-site meeting in September of this year. Already on Wednesday, IO. March - i.e. approximately six months (!) before the planned trip - the chairman called the legal representatives of both parties to inform them that the on-site meeting would take place at the beginning of September and to find out the number of participants on both sides. In the meantime, a permit to enter the National Park has been issued for the number of participants indicated. The Senate therefore informed all participants in good time of the planned on-site visit and also carried out further organisational measures to enable them to participate without restrictions. If, against this background, a party - for whatever reason - does not see itself in a position to (fully) make use of this possibility, that is its problem.

9.

There is only a kind of partial approval (concerning the national park) for the announced site visit. The comprehensive permit is not yet available. If this approval is not received by 26.07.2021, the site visit will not take place in September of this year, but only in 2022, most likely between mid-May and mid-June 2022.

Dr. Meyer Uelwer Dr. Servai