Summary of the respondent's response to the appeal of 10.07.2017

Background information and summary

Section 511 et seq. of the Code of Civil Procedure [*Zivilprozessordnung* (ZPO)] establishes the conditions under which a plaintiff can proceed against a first-instance court decision of a district or regional court. The plaintiff must state his or her reasons for advancing the suit in the Grounds of Appeal. In accordance with section 520(2) of the ZPO, the presiding judge or the appellate court sets a deadline for the respondent to submit a written response to the appeal. The appellant, in turn, can submit an opinion on the response to the appeal. With the parties' consent, the legal dispute may be decided on the basis of the written preliminary proceedings (section 128 of the ZPO). An appeal is decided in favour of the respondent if the original decision is upheld or the appeal is rejected; the latter is the ideal scenario from the respondent's perspective.

The following are the respondent's main arguments on the admissibility:

- No violation of the judicial obligation to provide notice in accordance with section 139(1) of the ZPO
- Lack of legitimate interest in the action
- Lack of standing to bring suit
- Irrelevance

The following are the defendant's main arguments on the merits:

- No basis of liability
- Climate impacts are not attributable to individuals
- Disproportionate and arbitrary legal consequences
- Mandatory liability is unconstitutional
- No right to abatement of a nuisance under section 1004(1)of the BGB
    - The defendant is not a disturber
    - No danger
    - No illegality
- Limitation period

Contents

The defendant considers the appeal unfounded because there was no infringement of rights and no other decision is justified on the basis of the underlying facts (section 513(1) of the ZPO). Therefore, the appeal should be rejected.

A. Introduction

The District Court [*Landesgericht* (LG)] of Essen rejected the claim that the defendant should contribute to costs for protective measures and, in the alternative, that it should participate proportionately in the implementation of the protective measures, pay 17,000 €, and reimburse the expenses for home modification. The plaintiff has challenged this decision on the grounds that, contrary to the view of the LG, the main and first alternative claims were sufficiently precise, the association of municipalities was a valid public corporation, and there was a repeated failure to notify the plaintiff of the inadmissibility of the claims, in violation of legal obligations under section 139(1) of the ZPO. In addition, the plaintiff complains that the LG rejected his third alternative request as unfounded in the absence of proof of causality and ignored his submissions of facts and evidence. The plaintiff alleges that the LG misrepresented the decisions of the Federal Court of Justice [*Bundesgerichtshof*] in the case on forest damage (known as the *Waldschaden* judgments) and, as a result, incorrectly applied the equivalence and adequacy principles, because the defendant's power plant companies increase the risk of flooding at Lake Palcacocha and constitute a significant partial cause.

B. Inadmissibility of the claim

The LG did not err in law in its ruling on the action. Claims cannot be made admissible through amendments or supplements. The amended motions remain inadmissible. The lack of specificity that the court ascribed to the first and third motions cannot be overcome by the provisions of section 287 of the ZPO. Due to the inadmissibility of the amended claims, the amendment of the claim is itself inadmissible because it is irrelevant under section 533(1) of the ZPO.

I. No violation of the judicial obligation to provide notice

The defendant himself drew attention to the inadmissibility of the claim in its statement of defense, as did the LG in its injunction of 6 May 2016. In addition, the presiding judge stated at the hearing that a final determination as to the admissibility had not yet been made, even though discussions with the parties regarding facts and circumstances were primarily on the merits. A formal, recorded judicial notification was unnecessary because, as in all litigation in which parties are represented by lawyers, it is sufficient if one party receives the necessary information from the other; such information was provided in the statement of defense. Thus, there was no violation of section 139 of the ZPO. Even if a violation had occurred, the decision was not based on this error (within the meaning of section 513(1), first alternative, of the ZPO), because the claims were dismissed as without merit.

II. Inadmissibility of the main claim

The claim was not sufficiently precise, and the plaintiff does not have a legitimate interest in the action, as is required under section 156(1) of the ZPO.

1. Lack of precision [*Bestimmtheit*]

The main claim does not specify who should reimburse for costs (i.e., the identity of the creditor) and what measures would be appropriate for reducing the water volume of the glacial lake. However, the plaintiff is obliged to provide such details, because he has alleged that this is the only measure that would eliminate the disturbance. The plaintiff has therefore denied the defendant its right to choose the appropriate remedy to remove the disturbance. The main claim is thus inadmissible due to a lack of precision, in accordance with section 253(2)(2)of the ZPO.

2. Lack of legitimate interest in the action

The uncertainty regarding the quantifiable costs of any preventive measures does not establish legitimate interest, because the provisions of section 1004 of the BGB do not specify a claim for monetary compensation or damages as a potential legal consequence. In order to justify a legitimate interest, the plaintiff cannot base a claim on the principle of agency without authorisation (*negotiorum gestio*). Because the lagoon is located within the territory of a national park, it falls under the jurisdiction of the Peruvian authorities; as a result, preventive measures cannot be carried out without external authorisation as *negotiorum gestio*.

III. Inadmissibility of alternative claims

The alternative claims asserted in the Grounds of Appeal are inadmissible, save for the final one.

As stated, the first alternative claim (originally the main claim) lacks the necessary legitimate interest.

The first, second and third alternative claims lack precision. The first alternative claim does not specify the criteria by which the defendant's share of the expenses would be determined, or the time period within which its participation would take place. The second and third alternative claims are too imprecise, because the plaintiff has not specified which measures would be required to reduce the water level of the glacial lake.

It is not apparent from the fourth alternative claim whether the plaintiff is asserting his own right or the right of the association of municipalities, the existence of which the defendant contests, pleading a lack of knowledge. In the latter case, there is no authority to conduct litigation, because the plaintiff has not provided evidence that he has been authorised to bring the action on the behalf of the person originally entitled to litigation.

IV. Section 287 of the ZPO does not apply

The jurisprudence cited by the plaintiff confirms that section 287 of the ZPO applies only to causal relationships that determine the extent of liability. Nevertheless, the plaintiff argues, mistakenly,

that the provision also applies to causal relationships that justify liability. The standards indicated under section 286 of the ZPO would apply in that case, because, if the plaintiff claims to be affected precisely by emissions from the defendant's power plant companies, the issue concerns causal relationships that justify liability.

V. Consequence: the amendment of the claim is irrelevant

Any amendment of a claim must be relevant or have the consent of the opposing party. A modification that results in an inadmissible motion can never be relevant because it does not lead to a decision on the merits. The inadmissibility of the amended claim precludes its relevance.

C. No individual liability for climate change under German law

Within German civil law, no legal conditions or legal consequences specifically justify individual causation or attribution of climate impacts. Private liability law is not appropriate as a means to address global climate change. Its application would ultimately lead to unconstitutional mandatory liability for unavoidable emissions.

I. Climate impacts are not attributable to individuals

Because the causes are manifold, there is no identifiable linear chain of causation between an emission source and any damage. This is the position established in the case law at the highest judicial level (e.g., with regard to forest damage), as well as in the literature and the explanatory memorandum on the Environmental Liability Law [*Umwelthaftungsgesetz* (UmweltHG)]. In the UmweltHG, which constitutes *lex specialis vis-à-vis* the BGB, the legislature was unable to introduce liability for general and ubiquitous environmental damage; under applicable law, there is no basis for such liability. The differences between the mechanisms governing the action of SO2 and CO2, cited by the plaintiff, do not require a modification of this decision. On the contrary, CO2 is a harmless gas that makes the earth habitable.

Global warming is a highly complex process that has developed as a result of many factors. Liability for global climate change cannot be derived from the share of emissions released by individual plants. If it were possible to ascertain liability in this manner, every individual person could be held accountable as a disturber and would qualify as an injured party at the same time. The result would be a liability of "all against all", which exceeds the regulatory limits of German civil law.

II. Disproportionate and arbitrary legal consequences

From a purely practical perspective, it would be impossible to file suit against all emitters for their contribution to the cause, however necessary such action may be to avert the flood risk. Alone, the defendant's contribution could not have this effect. In addition, depending on the laws applicable in other countries, the amount of liability enforceable in a court of law would vary (and may be nonexistent); therefore, it is highly likely that the plaintiff would fail to achieve his goal of eliminating the danger (i.e., averting the flood risk). This issue also cannot be resolved by invoking the principle of joint and several liability established under section 830(1)(2) of the BGB. This

approach would fail, because it is undisputed that no individual polluter could have caused all of the damage associated with climate change. In addition, the enforcement of joint and several liability would be legally untenable without viable opportunities for internal recourse and dispute resolution.

III. Mandatory liability for climate impacts is unconstitutional

With today's technology, it is impossible to carry out economic activities without releasing any emissions; as a result, there is no way for emitters to avoid doing so. "Mandatory liability" for such activity would therefore be incompatible with the constitutionally protected freedom of profession and freedom of property. Instead, solutions to global climate change should be developed at the state and inter-governmental level.

D. No right to abatement of a nuisance under section 1004(1) of the BGB

The requirements for the statement of the facts of the judgment regarding section 1004(1) of the BGB were not available.

I. The defendant is not a disturber

The allegation that the defendant is a disturber does not specify a basis for any partial or contributory causation linking the emissions to the alleged flood danger, any legally relevant activity to which liability could be linked ("adequate causation"), or a violation of the duty to implement safety precautions, which must always be present in cases in which natural events have occurred.

1. No contributory or partial causation

In accordance with the *conditio sine qua non* formula (causation in a legal (i.e., not scientific) sense; "equivalence formula"), even if there had been no emissions by the defendant, the same outcome would have occurred. This means that global climate change or the alleged threat of flooding would not have been averted if the defendant had not caused the emissions.

Because it is of foreign origin, the jurisprudence cited by the plaintiff has set no precedent in Germany, and the modification of the *conditio sine qua non* formula that its application would require is legally nontransferable. Under German law—which the plaintiff selected when he filed his claim—the formula is based on the elimination of each individual causal contribution rather than the elimination of the sum of all potential contributions. Even in her submission, the plaintiff's attorney of record made reference to the consideration of factors in isolation. If, in her submissions, the plaintiff's lawyer herself states that no emissions contribution alone is large enough to trigger even a slight increase in temperature, it follows that eliminating only the defendant's contribution would cause no change. As a result, there would be no way to conclude that climate change would have progressed differently. Because more than half of the emissions released since 1750 were absorbed by natural sinks, greenhouse gasses constitute one case of emissions that, at best, are substantial

only in the aggregate. Any single contribution to the aggregate is therefore excluded under the *conditio sine qua non* formula.

In addition, due to the manifold factors involved, no linear causality can be demonstrated—not even through models or statistics, as the plaintiff has alleged. However, in accordance with the principles of causation, the plaintiff must prove the existence of a classical linear causal relationship. Damage from a cause that can be estimated merely on the basis of probabilities is one of the general risks associated with everyday life.

a. The defendant has not increased the flood risk

From the plaintiff's submission, it is unclear exactly how, where, or when the defendant's emissions would have influenced the global and regional temperatures, the melting of the glacier, and the water level of the lagoon.

First of all, it is not certain that the defendant's emissions have in fact led to a measurable densification of GHG in the atmosphere and thus to a measurable increase in GHG concentration. There is currently no way to measure the quantity of CO2 molecules removed by sinks or other natural chemical processes. Compared to the total emissions, most of which are due to natural fluctuations, anthropogenic emissions—especially those caused by the defendant—are negligible. In addition, the molecules are distributed differently in different parts of the world and have had different effects based on the properties and conditions of specific regions. Due to all of these uncertainties, the defendant disputes the claim that a single emitter’s alleged contribution to a consolidation and increased concentration of GHG in the atmosphere is measurable.

In addition, it is disputed that the defendant is responsible for 0.5% of the global temperature rise of 1°C, as alleged by the claimant. First, the temperature increase is a highly uncertain average of measured values, which can vary depending on the calculation method. The rise in GHG emissions is not always correlated with the temperature increase. For the affected region in particular, there has been an alleged cooling since the late 1990s, and it is now disputed whether the temperature has increased. This is also significant, because global temperature changes play a subordinate role to local ones, as evidenced by the differences in the reaction of different glaciers to such changes.

In the expert opinion of Dr. Huggel, glacial retreat has many other causes apart from temperature changes and precipitation. In the absence of further details about the exact time period, the defendant disputes the claim that anthropogenic emissions are responsible for 60-70% of the glacial retreat and that ice melt occurs at a rate of 10-20kg melt for every kilogram of CO2. The plaintiff has not submitted materials sufficiently substantiating the change in the glacier above the lagoon. In order for data on glacier development to be conclusive, local influences would have to

be examined closely. Instead, the applicant merely cites long-term overall trends, which does not allow for any assessment of the specific case. The effects of El Niño events and the PDO [Pacific Decadal Oscillation] on the glacier are particularly significant. In addition, the plaintiff overlooks the effects of soot deposits on the glacier surface.

The water volume of the lagoon also changes as a result of manifold factors, only one of which is glacier melt. The plaintiff does not take these considerations into account when assessing linear causality and the causal contribution. He cites the temperature increase to explain the initial increase in the volume of water, concealing the fact that an El Niño event was the reason for the peak. The defendant submits that the second increase was due to a dry phase, which led to a decrease in the albedo of the glacier surface and a melting of the glacier. This demonstrates how decisive internal fluctuations are for the inflow to the lagoon.

In addition, the volume of water in the lagoon indicated in the alternative claim was outdated, because since then the water level has fallen again.

b. Contribution to aggregate emissions cannot prove causality

The defendant's contribution cannot be estimated on the basis of contributions to emissions in accordance with section 287 of the ZPO, because, to establish liability, evidence must be sufficient to dispel any doubts about causality. The contribution to emissions cannot be determined with the necessary certainty. The defendant disputes the allegation that it contributed 0.47% or 0.41% of total historical emissions; the plaintiff's submission failed to substantiate this assertion. The *Heede* study, on which this claim is based, neglects to account for internal fluctuations and is therefore of no use in determining the contribution to emissions.

c. Model calculations cannot prove causality

Models are not suitable for proving causality, because they are highly simplified representations and therefore do not fully capture reality. The LG determined correctly that the expert statements were ineffective. In the Fourth Assessment Report, the IPCC [Intergovernmental Panel on Climate Change] revised the climate sensitivity metric, which had proved increasingly inaccurate as a result of the uncertainties associated with feedback effects. Many studies estimated a lower value; as a result, today the “temperature response” of CO2 remains scientifically controversial.

The fact that the climate models did not predict the temperature decrease of 1998 shows how greatly internal climatic fluctuations, such as those from volcanoes and solar activity, have been underestimated. In particular, ocean cycles, ENSO events and other atmospheric and oceanic circulation could have been underestimated as a result of "tuning", i.e., the adjustment of individual parameters. According to the IPCC and an expert report, such factors could lead to modelling errors. Although models have been used to gain insight into climatic developments, they are not a suitable basis for proving causation with the degree of certainty that, in accordance with section 286(1) of the ZPO, is necessary to establish civil liability.

2. No adequate causation

On the issue of adequate causation, even if one assumed that the defendant had in fact contributed an emissions share of 0.47%, this contribution could not have increased the danger significantly. The plaintiff has used incomprehensible criteria to distinguish essential from non-essential contributions. In the TEHG, the legislature explicitly authorised emissions up to a certain level that, if observed, could not be grounds to initiate civil liability proceedings. In addition, the defendant did not cause the emissions as an end in itself, but rather to supply power in the public interest. The suit initiated by the plaintiff could instead be brought against the defendant's customers, who were the source of the electricity demand.

3. The defendant did not violate a duty of care

Under established case law, for natural events, such as the alleged flood wave, liability for a disturbance [*Störerhaftung*] only exists if a duty of care was also violated, i.e., a legal duty to act existed and was neglected. No duty of this kind can be shown on the basis of property, nor on the basis of rights relating to neighbouring premises, nor on the basis of any legal obligation to intervene to eliminate a risk to third parties from a source to which one has contributed [*Ingerenz*]. Contrary to state warnings, the plaintiff established a residence in the relevant area without planning permission and is therefore, according to established case law, responsible for his own protection. Operations on a plot of land, such as those undertaken by the defendant, do not provide the basis for claims to protection against an infringement of rights, and the emissions remained within the legally permissible limits. In addition, liability is impossible and inappropriate because plant operators cannot take preventive measures that will control climate change and global and regional temperatures.

II. On the alleged flood risk

In response to the defendant's objections against the allegations that the dam would burst, the plaintiff has revised his statements and now claims that the danger is of a dam overflow. The defendant contests the plaintiff's claim that the property will be flooded under various scenarios (small, medium or large avalanche). A small to medium avalanche would not cause flooding, and, according to the study, the likelihood of a large avalanche is small. In addition, the plaintiff bases his claim on a water level measurement that is no longer correct. The flood risk is contested in this respect out of an abundance of caution.

III. No illegality

The defendant did not have a duty of care and therefore did not neglect this duty; as a result, there has been no actual illegality.

IV. Incorrect legal consequence: no monetary compensation

Section 1004(1) of the BGB does not establish the right to file a claim for damages or other monetary compensation. The plaintiff has reinterpreted the provisions of section 1004 of the BGB to assert a standard of strict liability. Legislation allows for the imposition of such liability for incidents involving road transport or certain products, but not in the present case.

E. Alternative claims are unfounded

In the absence of a liability standard, and lacking the constituent facts of the offence, the first, second, third, and fourth alternative claims are unfounded. The fifth alternative claim (claim arising from sections 683, 677, 670 of the BGB and sections 684, 812) also fails to fulfil the requirements. The issue does not concern a third-party transaction, because the defendant is not a disturber under the provisions of section 1004 of the BGB. There is, at most, a partial claim. Joint and several liability is excluded.

F. Limitation period

Any potential claims by the plaintiff are fully time-barred; therefore, the judgment of the LG should be upheld.

The LG was right to dismiss the action, because the plaintiff could not establish a claim on the basis of section 1004 of the BGB or the provisions on agency without authorisation [*negotiorum gestio*].

Because the judgment is not based on an error in law, the appeal should be dismissed as unfounded. The LG's refusal to take evidence was also not an error in law.

This summary was prepared on a voluntary basis by Tim Sterniczuk and Francesca M. Klein of the Institute for Climate Protection, Energy and Mobility (IKEM). English translation provided by Kate Miller, also of IKEM.