

Summary of the submission of 27 November 2017

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The decision of the Senate rejects the defendant's view that there is cause to dismiss the action on legal grounds alone.

However, there are legal inconsistencies in the Senate's preliminary legal opinion.

A. The amended claim is inadmissible, imprecise, and unfounded

1. Inadmissibility

The revised main claim does not fulfil the requirements for specificity or establish the legal interest in bringing the suit.

The plaintiff has amended his claim because, in the Senate's opinion, regulations on the principle of agency without authorisation (*negotiorum gestio*) permit the plaintiff to be reimbursed for only 0.47% of the costs incurred for the protective measures. Assuming causality, this would amount to 33 cents. This confirms that the plaintiff cannot achieve his desired goal with this action, because civil law does not provide an appropriate means for regulating climate change. The high costs of taking evidence are disproportionate to this low value.

2. Imprecise and unfounded

The amended complaint is inconclusive because it is not covered by the plaintiff's submission. It remains unclear which protective measures are 'appropriate' and what basis there would be for any discernible, existing legal relationship.

The request is unfounded because the plaintiff is not obligated to carry out the security measures or bear the costs thereof. The plaintiff also has not claimed that a third party would have recourse against him. In the absence of evidence to support the plaintiff's position, the defendant disputes the alleged obligation to bear costs.

If the plaintiff's submission concerns measures implemented by the plaintiff himself, this is unfounded, because the plaintiff does not demand 0.47% and the measure at issue is not appropriate.

The amendment to the application contains a covert partial withdrawal of the claim, which, under section 269(1)(1) of the *Code of Civil Procedure* [*Zivilprozessordnung* (ZPO)], requires the consent of the defendant.

B. Incompatibility with the legal system

If section 1004(1) of the *German Civil Code* [*Bürgerliches Gesetzbuch* (BGB)] were used to justify the liability of power plant companies, this would contradict provisions of public law. As an energy supply company, the defendant makes an indispensable contribution to the common good, as the jurisprudence of the Federal Constitutional Court [Bundesverfassungsgericht (BVerfG)] has emphasised repeatedly. The supply of energy ensures the functioning of the German economy and the viability of modern industrial society. Its importance in this respect was even greater in past decades, when coal (and nuclear energy) were the only reliable energy sources. The specific energy sources used by the federal government is an energy policy issue that must be decided after taking into account factors like supply security, economic efficiency, effects on the labour market, international obligations, and climate and environmental protection. The legislature standardised operator obligations for emitting plants in the *Federal Immission Control Act* [*Bundesimmissionsschutzgesetz* (BImSchG)] and created greenhouse gas (GHG) certificate trading schemes under the *Greenhouse Gas Emissions Trading Act* [*Treibhausemissionshandelsgesetz* (TEHG)]. According to the Higher Administrative Court [Verwaltungsgerichtshof (VwGH)], the TEHG regulations are final. The approval granted under these provisions ensures the usability of relevant facilities and the right to operate established businesses. In the period prior to the introduction of this legal regulation, the approval also authorised unrestricted emissions.

Liability for emissions would violate the *Basic Law* [*Grundgesetz* (GG)] because it would violate the defendant's freedom of ownership and occupation, as well as the principle of legal consistency.

According to the established jurisprudence of the Federal Supreme Court [Bundesgerichtshof (BGH)], civil obligations fall outside the scope of the obligations established under public law. In this respect, if the defendant fulfils the requirements of the *Federal Immission Control Act* [*Bundes-Immissionsschutzgesetz* (BImSchG)] and TEHG, it cannot also be held liable under the BGB. Under section 906 of the BGB and section 14 of the BImSchG, public emission limits are governed by private law. These provisions presuppose a special spatial and temporal relationship to the facility. It cannot be the case that the plaintiff, as a third party without a special relationship to the plant, enjoys more extensive rights than does the neighbour. In addition, any permission the law grants neighbours, including the permission to use a property for purposes that produce emissions, cannot be denied to third parties.

C. Contradiction of legislative intent

Unlimited liability does not reflect the motivation [*Motiven*] for the historical BGB. Section 906 of the BGB refers to liability within geographical areas with defined boundaries, such as a neighbourhood. Not every 'authorised mechanical or physical outward impact' can be considered objectively illegal.¹ In one view, it is sufficient for a negative claim if the imponderable is alleged to have had an outward impact. The other view--which has been adopted by the legislature--requires a ban to be in place. The second view is supported by the fact that business operations and industrial sector would otherwise be paralysed.² The plaintiff and the Senate have aligned themselves with the view rejected by the legislature. The mildew [*Mehltau*] decision of the BGH also confirms that an immission cannot constitute a violation of rights without an explicit legal ban. Reference has already been made to the explanatory memorandum on environmental liability law, which excludes individual liability for environmental pollution. In the amendment to the *Environmental Impact Assessment Act* [*Umweltverträglichkeitsgesetz* (UVPG)], the legislature has made clear that individual emitters cannot be held liable for climate change impacts. The legislature has already rejected any reference to aggregate emissions and joint and several liability in the wording of section 906 of the BGB. Spatial planning is a process governed by public law. If an enterprise observes the BImSchG and TEHG, it is not subject to any further duty of care. Imposition of civil law liability would conflict with the principles of the legal system.

D. 'Disturber' criteria are not met

The Senate has determined that the defendant, through its subsidiaries, has met the criteria for an indirect 'disturber' [*Handlungsstörer*] on the basis of its actions or omissions. The Senate's opinion therefore contradicts the established jurisprudence of the BGH on the liability of indirect disturbers. In its conclusion, it overlooks the fact that disturber criteria are to be evaluated on the basis of the the source of the disturbance. In the present case, the source of the disturbance is not the defendant's operation of power plants, but the alleged flooding by the glacial lake. In this respect, it is not a question of indirect liability, but of liability for the state of the lagoon from which the floodwaters would allegedly be released. In such cases, jurisprudence requires the implementation of proper safety precautions. These precautions are lacking in the present case.

1 Mugdan, Volume III, *Sachenrecht*, p. 264

2 Mugdan, Volume III, *Sachenrecht*, pp. 265–266

I. No liability for the operation of the power plant

The fact that no perceptible substances were transported to the plaintiff's property conflicts with the claim that the defendant is a 'disturber'. In the *Kaltluftsee* case on cold air pools, the BGH ruled that it is impossible to avert an effect if it is imperceptible and produced by physical interrelationships governed by the laws of nature.

The plaintiff has not disputed the fact that the disturbance is the alleged flood risk, not the operation of the power plants. He has, however, confused the terms *immission* and *emission*. *Immission* refers to the flood wave that poses the alleged danger. The plaintiff does not directly link his statement on the defendant's emissions to this specific immission. In light of the permits granted for its activities, it would be unreasonable--and, for the continuity of the energy supply, impossible--for the defendant to instruct its subsidiaries to restrict the operation of the power plant. As a result, the defendant cannot even be made a party to these proceedings.

II. No liability for the alleged flood risk

If the source of the disturbance is based on the state of the lagoon, the defendant's legal responsibility is relevant only with regard to the lagoon. In fact, it has no such responsibility. The alleged flood risk is due instead to the fact that persons settled below the lagoon and that, among other relevant natural processes, water naturally flows downhill. Because the defendant has no control over the lagoon, it cannot be considered a disturber by virtue of its position as the owner or occupier of the property on which the disturbance takes place [*Zustandsstörer*]. The defendant has neither ownership nor power of disposal over the property on which the lagoon is located, nor is it in a position to control the complex climatic processes. At the very least, the liability of the defendant cannot be greater than that of the owner of the lake property.

In its *Mehltau* decision on mildew, the BGH ruled that a disturbance induced by natural forces can qualify as such only if there has been a failure to fulfil an obligation. In accordance with this ruling, the present case would need to establish an obligation to prevent damage. A duty of the defendant (i.e., to carry out protective measures at the lagoon) is absent in every conceivable respect. The risk of global climate change cannot justify an individual's duty of care. No one could fulfil a global duty. In the absence of a duty of care, the defendant cannot be held liable.

E. Exclusion through contributory cause

The claim is excluded through the principle of contributory cause in accordance with section 254 of the BGB, because the current danger resulted solely from the fact that the plaintiff's parents settled in the area, in violation of official warnings and without a building permit. According to established jurisprudence, section 254 of the BGB applies analogously to the claim for abatement or removal, even without the culpable conduct of a disturber. Had the illegal settlement not been established in the area below the lagoon, the plaintiff would not now find himself in the situation that is the basis for his claims.

According to the case-law of the BGH, the person who initiates activities in a dangerous area is responsible for the security of those activities and for his or her own protection.³ In the present case, this excludes the claim entirely.

F. Violation of judicial authority to interpret the law

The Senate's current interpretation of section 1004(1) of the BGB would have consequences that are unjust, impracticable, and unmanageable. The court must base its interpretation of the law on the purpose of a legal provision. At the same time, it must consider issues of practicability and expediency. This means that the court must take into account the result in the specific case, as well as its further consequences in the context of the fundamental legal questions associated with climate change. The Senate's decision would permit every person to assert a claim under section 1004 of the BGB against every emitter in the event of a property disturbance caused by climate change. This would lead to the imposition of unlimited liability without a finding of fault, and every person, without exception, would be considered a disturber. Even if one presupposed a scientific basis for causality, whether a party qualified as a 'disturber' could not be established without closer evaluation. Holding a party liable for distant and uncontrollable climatic consequences would contradict the purpose of section 1004 of the BGB and underestimate the repercussions of private-law immission protection, which would deprive the corporation of its economic livelihood.

Nor can the interpretation depend on the income level in Peru, as indicated by the court. Rather, it should be noted that holding every emitter liable for climate change would have unacceptable consequences. There are no legal grounds to support the argument that poverty justifies a special worthiness for protection from the effects of climate change. How would the case be decided if the land belonged to the state, a major corporation, or a millionaire? The Senate's preliminary interpretation could channel global losses and risks to German emitters and overburden German courts—and would still fail to mitigate climate

³ BGH NJW 1985, 1773, 1774

change.

The NGO cooperating with the plaintiff has already announced that this is a 'test case'. One would therefore anticipate that a large number of similar lawsuits would follow. Corporate bodies would also try to shift climate-change-related costs to other emitters under company law.

A balance between economic development and climate change must be struck at an intergovernmental level, not through an uneven and arbitrary allocation of liability.

The costs incurred for the taking of evidence, which would necessarily occur abroad and over a long period, is wholly disproportionate to the economic value of the item in the main claim (33 cents).

The Senate's preliminary interpretation would have consequences that are unjust, inappropriate, and impractical.

There is cause to dismiss the action on legal grounds alone.

The defendant requests that the pronouncement of the judgment be canceled or, in the alternative, postponed. The defendant's right to be heard, provided for under Article 103 of the GG, would be meaningless if the court did not consider the defendant's statements. Because only two working days remain before the date of the ruling, it is feared that there is insufficient time for the court to conduct a comprehensive review and evaluation.