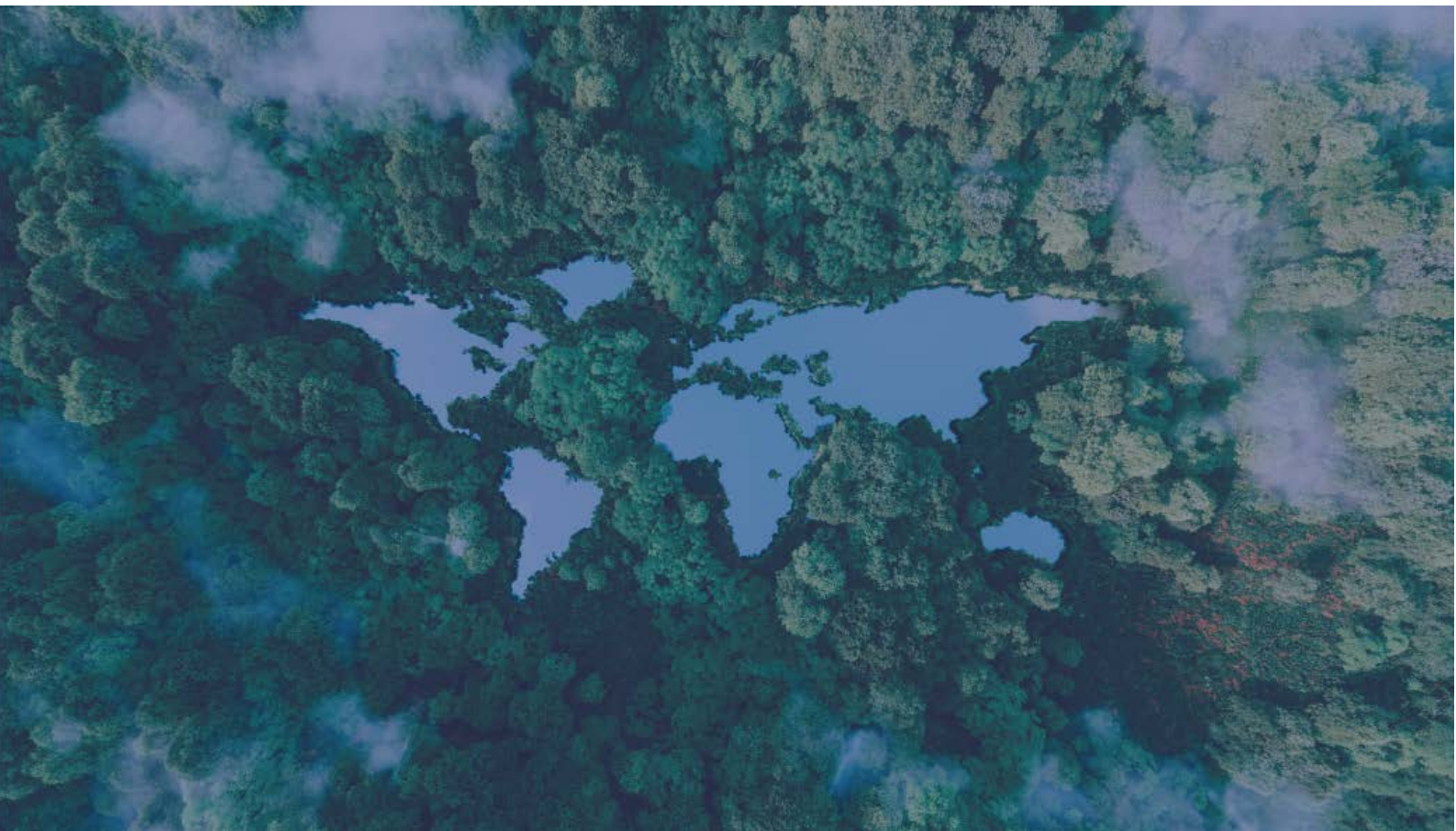




**British Institute of  
International and  
Comparative Law**

# Global Perspectives on Corporate Climate Legal Tactics: Germany National Report

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# Executive Summary

This report focuses on horizontal climate claims in Germany, which are brought by private actors against corporate greenhouse actors before civil courts in order to hold corporate actors responsible for the consequences of anthropogenic climate change. While such climate claims against corporate actors could be aimed at the recovery of damages for past emissions (compensation claims), most climate claims before German courts are forward-looking and aim to order companies to reduce their future emissions (reduction claims) or to take preventive action to mitigate the consequences of climate change or to pay for such preventive measures (adaptation claims).

These cases include the potential landmark case filed by the Peruvian farmer *Saúl Luciano Lliuya* against the energy supplier *RWE AG*<sup>1</sup> with the aim of having *RWE AG* share the costs of the protective measures that *Lliuya* had to take to protect his property from flooding by a glacial lake which is surging as a result of climate change (adaptation claim). More recently, five important greenhouse gas-reduction claims have been filed against *Volkswagen AG*, *BMW AG*, *Mercedes Benz* and *Wintershall Dea*. They aim at a court order to stop these companies from emitting CO<sub>2</sub> or to end their high-emission activities such as the manufacture of combustion engines. All these cases are being brought by private individual claimants, because claimants must demonstrate a (potential) injury of their own individual rights for their claim to be admissible. NGOs can therefore not act directly as claimants in Germany, but can – and do – provide financial and legal support to the claimants. Many of the individual claimants in these cases are directors and managers of NGOs.

Reduction and adaptation claims are mostly based on Sec. 1004 German Civil Code (*Bürgerliches Gesetzbuch, BGB*). This cause of action, which forms the core of German nuisance law, primarily aims at the removal and injunction of the interference with property. However, it is generally acknowledged that the same protection is also granted to other legally protected interests by way of analogy. In climate cases, claimants often base their case on an infringement of the general right of personality or a special “right to preserve greenhouse-related freedoms”.

So far, none of the horizontal climate claims filed in Germany have been successful. The main hurdles include difficulties in proving a causal link between the emissions of an individual corporate actor and the damage asserted, but also establishing the unlawfulness of the behaviour: corporate actors typically acted in compliance with all legal obligations, especially with emission limits and emission certificates and usually on the basis of public law permits. The courts are reluctant to recognise a duty of care

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<sup>1</sup> Regional Court of Essen, judgment of 15.12.2016 – 2 O 285/15, juris; currently: Higher Regional Court of Hamm – I-5 U 15/17.

under private law that goes beyond the existing legal requirements. They also invoke the principle of separation of powers, arguing that it is for the legislator – and not for the courts – to decide on a national climate protection policy.

In addition to these claims addressing CO<sub>2</sub> emissions directly, greenwashing claims have recently become more popular in Germany. The NGO *Deutsche Umwelthilfe* has filed around a dozen actions against large German companies such as the football club *FC Köln GmbH & Co. KGaA*, the oil company *TotalEnergies Wärme & Kraftstoff Deutschland GmbH*, or the drugstore chain *dm-drogerie markt GmbH + Co. KG*.

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# 1. Causes of Action

The term Climate Litigation has no fixed legal meaning.<sup>2</sup> However, it is usually understood as including all legal proceedings related to the causes and consequences of anthropogenic climate change. Based on the person of the defendant in climate claims, a distinction can be made between vertical and horizontal climate claims.<sup>3</sup>

Vertical climate actions concern the relationship between private individuals and the state and address the question of sufficient state climate policy.<sup>4</sup> This usually concerns the area of public law.

This report focuses on horizontal climate claims brought by individuals against corporate greenhouse actors before civil courts in order to hold corporate actors responsible for the consequences of anthropogenic climate change.<sup>5</sup> Such claims might be based on various causes of action, including the German Environmental Liability Act, consumer protection law and company and financial law. Most horizontal climate claims currently pending before German civil courts, however, are based on tort law. In particular, the claim for injunctive relief pursuant to Sec. 1004 BGB plays an important role.

While some climate claims against corporate actors are aimed at the recovery of damages for past emissions (compensation claims), many climate claims before German courts are forward-looking and aim to order companies to reduce their future emissions (reduction claims) or to take preventive action to mitigate the consequences of climate change (adaptation claims).<sup>6</sup> The choice of the relevant cause of action depends primarily on the objective of the claim and on the different remedies that may be awarded under the respective causes of action (see in more detail *infra* Part 3).

## A. Climate Change Law/Environmental Law Statutory Provisions

The German Federal Climate Change Act (*Bundesklimaschutzgesetz; KSG*) lays out a general framework of climate protection policy. It neither contains concrete measures to mitigate climate change nor any provisions on liability of private actors for their contribution to climate change.

However, German law provides a strict liability for the infringement of special interests due to environmental effects in the German Environmental Liability Act (*Umwelthaftungsgesetz; UmweltHG*). Sec. 1 UmweltHG governs the compensation for

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<sup>2</sup> Weller/Tran, *Climate Action 2022*, 1, 2.

<sup>3</sup> Weller/Nasse/Nasse, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 380.

<sup>4</sup> Weller/Tran, *Climate Action 2022*, 1, 2.

<sup>5</sup> Weller/Tran, *Climate Action 2022*, 1, 3.

<sup>6</sup> Weller/Radke, *Klimaklagen vor deutschen Gerichten*, in: *Jahrbuch Bitburger Gespräche 2023*, p. 35, 42 ff.



damages resulting from an environmental impact caused by specific facilities listed in Annex 1, such as power plants or steel factories.<sup>7</sup> As a provision of environmental law, it covers damages resulting from an environmental impact.<sup>8</sup> It requires the infringement of a protected interest, namely life, health, bodily integrity, goods, or objects. It neither requires unlawfulness nor fault.<sup>9</sup> Although normal operation is privileged, it is not exempt from liability.<sup>10</sup>

In the context of climate litigation, Sec. 1 UmweltHG is of little importance due to its specific limitations. First, the scope of application of Sec. 1 UmweltHG is limited to specific plant operators and therefore leaves no room for the applicability to e.g. automotive groups. Second, Sec. 15 UmweltHG provides for an upper limit of liability of 85 million euros.<sup>11</sup>

Furthermore, it is also questionable to what extent the Environmental Liability Act seeks to establish liability for distance damages and summation damages.<sup>12</sup> Distance damages occur at a great distance – spatially or temporally – from the initial emission, summation damages are caused by an unmanageable number of emitters.<sup>13</sup>

At least for temporal distance damages, Sec. 23 UmweltHG shows that a temporally unlimited liability is not intended. Only damages that occur after the commencement of the UmweltHG, i.e. from January 1991, are within the scope of application of the UmweltHG.

In addition, it is disputed if an expansion of the UmweltHG to include summation damages was intended by the German legislator.<sup>14</sup> The legislative materials are ambiguous as to this aspect.<sup>15</sup>

There is currently no pending lawsuit under the UmweltHG before German courts.

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<sup>7</sup> Cf. *Nitsch*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 431.

<sup>8</sup> *Nitsch*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 431.

<sup>9</sup> *Nitsch*, in BeckOGK UmweltHG, 01.10.2022, Sec. 1 para. 1; *Nitsch*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 431.

<sup>10</sup> Higher Regional Court of Düsseldorf, judgment of 29.10.2010 – I-22 U 70/10, juris – para 69.

<sup>11</sup> Cf. *Haller/Rissen*, NJW 2021, 3500, 3502, para. 8.

<sup>12</sup> *Haller/Rissen*, NJW 2021, 3500, 3502, para. 10.

<sup>13</sup> Cf. *Thöne*, ZUR 2022, 323, 325; *Haller/Rissen*, NJW 2021, 3500, 3502, para. 10.

<sup>14</sup> *Landsberg/Lülling*, in: *Opposing* (Eds.), *Umwelthaftungsrecht*, 1991, UmweltHG Sec. 1 para. 182; *Nitsch*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 427, para. 55; see also *Haller/Risse*, NJW 2021, 3500, 3502; in favour *Kloepfer*, *Umweltrecht*, 2016, Sec. 6 para. 141.

<sup>15</sup> Cf. Bundestag document No. 11/6454, p. 15 para. 14; document No. 11/7104, p. 29 para. 18.

## B. Human Rights Law

### i. Violations of fundamental rights as a basis for tort claims

The German Federal Constitutional Court (*Bundesverfassungsgericht; BVerfG*) recently ruled on possible violations of fundamental rights due to insufficient national climate protection targets in its well-known judgment of 24 March 2021 (*Klima-Beschluss*).<sup>16</sup> In this case, the claimants argued that national climate targets and the annual emission amounts allowed until 2030 under the Federal Climate Change Act (*Bundesklimaschutzgesetz; KSG*) are incompatible with fundamental rights insofar as they lack sufficient specifications for further emission reductions from 2031 onwards. The reductions still necessary after 2030 to limit the increase in the global average temperature to below 2°C and preferably to 1.5°C above pre-industrial levels would be too drastic and demanding.<sup>17</sup>

In the judgment, the court left open whether there is a fundamental right to “an ecological subsistence minimum” or to “a decent future” under Art. 1 (1) of the German Constitution (*Grundgesetz; GG*), which guarantees human dignity.<sup>18</sup> However, it noted that fundamental rights also operate “intertemporally” (*intertemporal*) and aim at securing future freedom of action under Art. 2 (1) GG.<sup>19</sup> If the current emission reductions under the KSG are too low, emissions will need to come to a full stop after 2030 in order to achieve long-term reduction goals. This results in an interference-like effect (*eingriffsähnliche Vorwirkung*) and already constitutes a violation of fundamental rights today.<sup>20</sup>

However, this judgment only concerns the relation between individuals and the state (vertical relation, see *supra* Introduction) and not between individuals and other private actors like companies (horizontal relation, see *supra* Introduction). Generally, German fundamental rights guarantee the freedoms of individuals only in their vertical, subordinate relationship with the state.<sup>21</sup> They do not serve as private causes of action. Nevertheless, they can have an indirect third-party effect (*mittelbare Drittwirkung*)

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<sup>16</sup> German Federal Constitutional Court, judgment of 21.04.2021 - 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, NJW 2021, 1723.

<sup>17</sup> German Federal Constitutional Court, judgment of 21.04.2021 - 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, NJW 2021, 1723, 1723.

<sup>18</sup> German Federal Constitutional Court, judgment of 21.04.2021 - 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, NJW 2021, 1723, 1727.

<sup>19</sup> German Federal Constitutional Court, judgment of 21.04.2021 - 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, NJW 2021, 1723, 1728.

<sup>20</sup> German Federal Constitutional Court, judgment of 21.04.2021 - 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, NJW 2021, 1723, 1737.

<sup>21</sup> German Federal Court of Justice, judgment of 19.06.2013 - XII ZB 357/11, juris – para. 14.

between private actors on a horizontal level by influencing the interpretation of open terms and notions of German civil law (for more detail on this see *infra* C.i.).<sup>22</sup>

## ii. Human rights due diligence obligations under the LkSG

Regarding human rights due diligence obligations, the Act on Corporate Due Diligence Obligations in Supply Chains (*Lieferkettensorgfaltspflichtengesetz, LkSG*) came into force in Germany on 1 January 2023.<sup>23</sup> It applies to companies with their registered office in Germany and at least 3000 employees and requires them to comply with certain due diligence obligations along their supply chain. The aim of all due diligence obligations is, according to Sec. 3 (1) cl. 1 LkSG, to prevent or minimise human rights or environment-related risks or to put an end to the violation of human rights or environment-related obligations.

However, the LkSG is primarily aimed at protecting human rights and not the environment or even the climate.<sup>24</sup> The obligations under the LkSG relate to compliance with the conventions listed in Sec. 2 (3) no. 1 to 8 LkSG. These conventions include the Minamata Convention on Mercury (Sec. 2 (3) no. 1 to 3 LkSG), the Stockholm Convention on Persistent Organic Pollutants (Sec. 2 (3) no. 4 and 5 LkSG), and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Sec. 2 (3) no. 6 to 8 LkSG), which stipulate environmental obligations. However, the three conventions were included because, in addition to environmental protection, they serve primarily to protect health and thus, human rights.<sup>25</sup>

Furthermore, a violation of the due diligence obligations under the LkSG is explicitly not designed to give rise to any special civil cause of action (Sec. 3 (3) cl. 1 LkSG). Thus, a violation of the provisions of the LkSG does not give rise to claims under Sec. 823 (2) (see also *infra* C.ii.). On the other hand, the act states that any civil liability established independently of this Act, i.e. under general principles of tort law, shall remain unaffected (Sec. 3 (3) cl. 2 LkSG). Under the general principles of German tort law, however, one is in principle only liable for one's own fault in one's own sphere.<sup>26</sup> This could be different if a company had a supply chain- and group-wide duty of care to ensure human rights independent of the LkSG, the violation of which could then be

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<sup>22</sup> The concept is settled case law - but see German Federal Constitutional Court, judgment of 11.04.2018 - 1 BvR 3080/09, NJW 2018, 1667 paras. 31 ff.

<sup>23</sup> German Federal Law Gazette from 22.07.2021, Part I no. 46, p. 2969.

<sup>24</sup> Explanatory Memorandum to the Draft of an Act on Corporate Due Diligence Obligations in Supply Chains, Bundestag document No. 19/28649, pp. 23 ff.; *Gehling/Fischer*, in: *Gehling/Ott* (Eds.), *LkSG*, 1st ed. 2022, Sec. 2 para. 252.

<sup>25</sup> Recommendation for a decision and report on the Draft of an Act on Corporate Due Diligence Obligations in Supply Chains, Committee for Labour and Social Affairs of the German Bundestag, Bundestag document No.19/30505, p. 37.

<sup>26</sup> *Sprau*, in: *Grüneberg*, *BGB*, 82nd ed. 2023, Sec. 823 para. 46; *Weller/Kaller/Schulz*, *AcP* 2016, 387, 401.

attributed to the company as its own fault.<sup>27</sup> While most authors in German legal literature deny such an extensive duty of care,<sup>28</sup> there are also prominent proponents of such a general expansion of the area of corporate responsibility.<sup>29</sup>

In any case, violations of the LkSG are currently no significant cause of action for corporate climate litigation in practice. As far as can be seen, there have not been any legal actions in Germany based on the LkSG.

Corporate due diligence obligations could, however, become a basis for climate liability if the Corporate Sustainability Due Diligence Directive (CSDDD) should eventually enter into force.<sup>30</sup> Art. 15 (1) CSDDD would require certain big companies to develop and implement a transition plan to ensure that the business model and strategy of the company are aligned with

- the objectives of the transition to a sustainable economy and
- with the limiting of global warming to 1.5°C in line with the Paris Agreement<sup>31</sup> and
- the objective of achieving climate neutrality as established in the European Climate Law<sup>32</sup> as regards its operations in the Union, including its 2050 climate neutrality target and the 2030 climate target.

This would establish an independent climate-related duty of care,<sup>33</sup> the violation of which could lead to civil liability according to Art. 22 CSDDD. However, as the CSDDD proposal is quite controversial, is not yet foreseeable whether and in which form it will be adopted.<sup>34</sup>

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<sup>27</sup> Concerning duties of care: *Hager*, in: Staudinger, 2021, BGB Sec. 823 paras. E 12 ff.; *Spindler*, in: BeckOGK BGB, 01.01.2022, Sec. 823 paras. 393 ff.

<sup>28</sup> *Wagner*, in: MünchKomm BGB, 8th ed. 2020, Sec. 823 paras. 114 ff.; *Habersack/Ehrl*, AcP 219 (2019), 155, 196 ff.; under the LkSG e.g. *Schneider*, ZIP 2022, 407, 412 ff.

<sup>29</sup> *Weller/Nasse*, in: Deutsches, europäisches und vergleichendes Wirtschaftsrecht, Festschrift für Werner Ebke, 2021, pp. 1072 ff.; *Weller/Thomale*, ZGR 2017, 509, 521 f.; *Thomale/Hübner*, JZ 2017, 385, 394; under the LkSG *Paefgen*, ZIP 2021, 2006, 2010 ff.

<sup>30</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

<sup>31</sup> UN Treaty Collection; Vol. II Kap. 27; 7d Paris Agreement of 12.12.2015.

<sup>32</sup> Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30.06.2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

<sup>33</sup> *Schön*, ZfPW 2022, 207, 209; *Weller/Fischer*, ZIP 2022, 2253, 2254 f.

<sup>34</sup> See also *Lutz-Bachmann/Vorbeck/Wengenroth*, BB 2022, 835, 841 f.

## C. Tort Law

German tort law is codified in Sec. 823 ff. BGB. Instead of one general clause, German tort law offers three fundamental causes of actions: Sec. 823 (1), (2) and 826 (1) BGB.

Sec. 823 (1) BGB only grants a tort claim if certain protected legal interests have been violated. Such protected rights include life, health, bodily integrity, freedom of movement as well as property and “any other rights”. “Other rights” in the sense of Sec. 823 (1) BGB are only individual rights which the legal system protects *erga omnes*, such as real rights (rights in *rem*) and industrial property rights, but also specific rights like the right to one’s name or picture and finally the general right of personality (*Allgemeines Persönlichkeitsrecht*) (see for more detail *infra* C.i.1.).

Sec. 823 (2) BGB attaches liability to the breach of a statutory norm that protects the interests of third parties (*Schutzgesetz*). Sec. 826 BGB complements this system of tort claims with a claim based on an intentional damage inflicted in a manner offending common decency.

The *actio negatoria* enshrined in Sec. 1004 BGB is the core of German nuisance law.<sup>35</sup> The claim primarily aims at the removal and injunction of the interference with property. Thus, in its literal application it is only applicable to impairments of property.<sup>36</sup> However, it is generally acknowledged that the same protection is also granted to other legally protected interests by way of analogy.<sup>37</sup> These other legally protected interests are considered to include the interests protected by Sec. 823 (1) BGB, e.g. the general right of personality.<sup>38</sup> Thus, Sec. 1004 BGB by analogy protects the same interests as Sec. 823 (1) BGB.

### i. Public and private nuisance

Reduction and adaptation claims (see *supra* Introduction on the Causes of Action) can be based on Sec. 1004 (1) cl. 1 or cl. 2 BGB.<sup>39</sup> As Sec. 1004 BGB (by analogy) grants injunctive relief for infringements, it is one of the most important claims in climate change litigation.

However, it must be noted that Sec. 1004 BGB generally requires the infringement of individual rights. It is not possible to invoke an infringement of rights or interests of the general public under this doctrine (*no public nuisance*).

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<sup>35</sup> *Wagner/Arntz*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 408.

<sup>36</sup> *Berger*, in: Jauernig (Ed.), 18th ed. 2021, BGB Sec. 1004 para. 2.

<sup>37</sup> *Fritzsche*, in: Hau/Poseck (Eds.), *BeckOK BGB*, 65th ed. 2023, Sec. 1004 para. 4; *Wagner/Arntz*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 408.

<sup>38</sup> *Fritzsche*, in: Hau/Poseck (Eds.), *BeckOK BGB*, 65th ed. 2023, Sec. 1004, para. 4.

<sup>39</sup> Cf. *Pöttker*, *Klimahaftungsrecht*, 2014, pp. 91 ff.; *Weller/Nasse/Nasse*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 401.

## 1. The claim under Sec. 1004 BGB

Sec. 1004 (1) BGB states that “if the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.” Pursuant to Sec. 1004 (2) BGB, the claim is excluded if the owner is under a legal obligation to tolerate the interference.

While Sec. 1004 (1) cl. 1 BGB focuses on current impairments, Sec. 1004 (1) cl. 2 BGB focuses on future impairments. Both alternatives require that the property of the claimant is impaired by an act of the potential defendant (“Störer”; interferer).<sup>40</sup> According to settled case law, an interferer is someone whose behaviour has adequately caused the impairment (interferer by action) or whose will determines the removal or forbearance of an impairing condition that can be attributed to him or her (interferer by condition).<sup>41</sup> Furthermore, claimants must show a direct causal link between the behaviour of the defendant and the imminent impairment. Problems of establishing this causal link will be discussed in more detail below (*infra* Part 2, C. ii.).

Thus, climate claims can be based on Sec. 1004 BGB if the claimant is the owner of some kind of property and the disturbance of this property or of its ownership is imminent.<sup>42</sup> In contrast, a claim for injunctive relief cannot be based solely on the disturbance of the climate in general because there are no property rights in the climate as such.<sup>43</sup>

Sec. 1004 BGB is, however, also applicable by analogy to the impairment of any other individual legal interests protected by tort law, including the general right of personality.<sup>44</sup> The general right of personality originates from the German fundamental rights (Art. 2 (1) in conjunction with Art. 1 (1) GG). It protects against specific threats to the individual's self-determined development and personality.<sup>45</sup> Inter alia, it ensures that the individual can have an autonomous sphere of private life in which he or she can develop and preserve his or her individuality.<sup>46</sup>

Many claimants invoke Sec. 1004 BGB by analogy to claim infringements of their general right of personality regarding future restrictions in personal life, limitations of cultural life and lack of mobility because of climate change caused by CO<sub>2</sub> emissions

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<sup>40</sup> Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 408, 409.

<sup>41</sup> German Federal Court of Justice, judgment of 04.02.2005 – V ZR 142/04, juris; BGH, judgment of 01.12.2006 – V ZR 112/06, juris; Fritzsche, in: Hau/Poseck (Eds.), *BeckOK BGB*, 65th ed. 2023, Sec. 1004 BGB paras. 15 ff.

<sup>42</sup> Geselle/Falter, *KlimaRZ* 2022, 181, 183.

<sup>43</sup> Geselle/Falter, *KlimaRZ* 2022, 181, 183.

<sup>44</sup> Fritzsche, in: Hau/Poseck (Eds.), *BeckOK BGB*, 65th ed. 2023, Sec. 1004, para. 4.

<sup>45</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861, para. 58.

<sup>46</sup> German Federal Constitutional Court, judgment of 05.06.1973 – 1 BvR 536/72, juris – para. 44; Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861, para. 58.

relating to business operations.<sup>47</sup> They invoke the intertemporal dimension of fundamental rights (see *supra* B.i.) and claim that the general right of personality may be already affected when future restrictions can be predicted with certainty.<sup>48</sup> Other claimants state that Sec. 823 (1) BGB and (by analogy) Sec. 1004 BGB also protect a special “right to preserve greenhouse-related freedoms”.<sup>49</sup> Both groups of claimants invoke the indirect third-party effect of the jurisdiction of the German Federal Constitutional Court (see *supra* B.i.).

## 2. Current lawsuits based on Sec. 1004 BGB

There are currently several important examples of climate lawsuits based on Sec. 1004 BGB in conjunction with Sec. 823 BGB before German civil courts,<sup>50</sup> which partly focus on the legal consequences of past emissions (compensation and adaptation claims, *infra* a.) and partly on the reduction of future emissions (reduction claims, *infra* b.). So far, none of these claims have been successful.

German civil procedure has a four-tier judicial structure, the first instance being the district court (*Amtsgericht*; AG) or the regional court (*Landgericht*; LG). The regional court decides in the first instance on all legal disputes that are not assigned to the district courts.<sup>51</sup> This applies above all to proceedings where the amount in dispute exceeds 5,000 euros.<sup>52</sup> For climate claims, the district court or the regional court may be the court of first instance (depending on the amount in dispute).

Regarding the climate claims on which the courts have decided so far, it is interesting to note that the courts have used similar grounds for rejection. However, in climate reduction claims, both the Regional Court of Braunschweig and the Regional Court of Munich I emphasised that the claims are currently unfounded but left open whether these claims could be successful in the future. Against the judgment of the Regional Court of Essen in the *RWE* case (*LG Essen*), the claimant already appealed to the Higher Regional Court of Hamm (*OLG Hamm*); the appeal is still pending.

It can be assumed that most of these lawsuits will ultimately be decided by the German Federal Court of Justice in the last instance. So far, however, there have been no supreme court rulings in climate lawsuits against corporate actors in Germany. Legal developments in this respect are still in flux.

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<sup>47</sup> Cf. Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861.

<sup>48</sup> *Deutsche Umwelthilfe v. Mercedes Benz AG*, statement of claim of 21.09.2021, p. 48.

<sup>49</sup> *Greenpeace v. Volkswagen*, statement of claim of 08.11.2021, p. 69.

<sup>50</sup> Cf. Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861; Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris; Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris; Regional Court of Essen, judgment of 15.12.2016 – 2 O 285/15, juris (not final, currently pending at the court of second instance, the Higher Regional Court of Hamm, judgment 30.11.2017 – I-5 U 15/17, juris).

<sup>51</sup> Cf. Wittschier, in: Musielak/Voit (Eds.), 19th ed. 2022, GVG Sec. 71 para. 1.

<sup>52</sup> Cf. Wittschier, in: Musielak/Voit (Eds.), 19th ed. 2022, GVG Sec. 23 para. 1.



#### a. Compensation and adaptation claims relating to past emissions

The lawsuit filed by the Peruvian farmer *Saúl Luciano Lliuya* against the energy supplier *RWE AG*<sup>53</sup> is a potential landmark case<sup>54</sup> and probably the first climate lawsuit in Germany. The claim was dismissed in the first instance and is now pending before the Higher Regional Court of Hamm.<sup>55</sup>

*Lliuya* is the owner of a property in a valley in the Peruvian Andes, which lies below a glacier in the adjacent mountains. According to the claimant, the glacier is melting due to rising temperatures, which causes the water volume of the glacier lake to rise and increases the risk of flooding of his land. *Lliuya* seeks *RWE AG* to bear 0.47% of the costs of protective measures on his land against flooding from the glacier lake. This share corresponds to *RWE AG*'s share of global greenhouse gas emissions. His complaint is essentially based Sec. 1004 BGB (see for more detail *infra* Part 3, A. ii.).<sup>56</sup>

In its judgment of 15 December 2016, the Regional Court of Essen dismissed the case in the first instance as unfounded. The court left open whether the glacier infringed the property of the Peruvian farmer. It found that the *RWE AG* can, in any case, not be considered an interferer according to Sec. 1004 BGB due to the lack of equivalent and adequate causation of the impairment (see *infra* Part 2, C. ii.).<sup>57</sup>

However, on 30 November 2017, the Higher Regional Court of Hamm (*OLG Hamm*) as court of appeals recognised the complaint as admissible.<sup>58</sup> The court of appeals is currently collecting evidence to determine whether *Lliuya*'s home is (a) threatened by flooding or mudslide as a result of the recent increase in the volume of the glacial lake located nearby, and (b) how *RWE*'s greenhouse gas emissions contribute to that risk.<sup>59</sup>

Most certainly, the *RWE* case will ultimately be decided by the German Federal Court of Justice.

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<sup>53</sup> Regional Court of Essen, judgment of 15.12.2016 – 2 O 285/15, juris; currently: Higher Regional Court of Hamm, judgment of 30.11.2017 – I-5 U 15/17.

<sup>54</sup> *Wagner/Arntz*, in: Kahl/Weller (Eds.), *Climate Change Litigation 2021*, p. 411.

<sup>55</sup> See the current status of the proceedings here: <https://rwe.climatecase.org/en/legal#legaldocs>.

<sup>56</sup> Cf. Regional Court of Essen, judgment of 15.12.2016 – 2 O 285/15, juris; *Geselle/Falter*, *KlimaRZ* 2022, 181, 185.

<sup>57</sup> Regional Court of Essen, judgment of 15.12.2016 – 2 O 285/15, juris – para. 36.

<sup>58</sup> Higher Regional Court of Hamm, judgment of 30.11.2017 – I-5 U 15/17, juris.

<sup>59</sup> Higher Regional Court of Hamm, judgment of 30.11.2017 – I-5 U 15/17; see the current status: <https://rwe.climatecase.org/de/rechtliches#legaldocs>.



## b. CO2-Reduction Claims

So far, five important greenhouse gas-reduction claims have been filed against Volkswagen AG<sup>60</sup>, BMW AG<sup>61</sup>, Mercedes Benz<sup>62</sup> and Wintershall Dea<sup>63</sup>. The claim against Wintershall Dea has not been decided yet. Only those cases that already have been decided before German civil courts are explained in more detail below.

aa. Regional Court of Stuttgart, judgment of 13 September 2022; Higher Regional Court of Stuttgart, judgement of 8 November 2023: Deutsche Umwelthilfe<sup>64</sup> (DUH) against Mercedes Benz

The Regional Court of Stuttgart dismissed a claim of several private claimants supported by *Deutsche Umwelthilfe* against the car manufacturer Mercedes Benz as unfounded. The claimants asserted claims for injunctive relief based on Sec. 1004, 823 BGB.<sup>65</sup> They maintained that by 30 October 2030, sales of new passenger cars with internal combustion engines that emit more than 516 million metric tons of CO<sub>2</sub>, based on 200,000 km of mileage, should be prohibited; from 30 October 2030, a general ban on sales of vehicles with internal combustion engines should apply.<sup>66</sup> The claimants based their argument on their general right of personality which is also protected by Sec. 1004, 823 BGB (by analogy).<sup>67</sup>

However, the court ruled that the defendant's objected conduct does not unlawfully infringe any of the claimants' rights.<sup>68</sup> The court held that the effects of the further production of internal combustion engines by the defendant on the claimants' way of life are completely uncertain and do not permit a weighing of interests between the possibly impaired interests of the claimants and the opposing rights of the defendant.<sup>69</sup> Therefore, an unlawful infringement of the claimants' general right of personality by the production of internal combustion engines cannot be established.<sup>70</sup>

Recently, the Higher Regional Court of Stuttgart upheld this decision. The court argued that the actions of Mercedes cannot be qualified as illegal because they were in line

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<sup>60</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21; Regional Court of Detmold, judgment of 24.02.2023 – 1 O 199/21, juris.

<sup>61</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861.

<sup>62</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris.

<sup>63</sup> Filed by the *Deutsche Umwelthilfe* in 2021; see: <https://www.duh.de/klimaklagen/klimaklagen-gegen-unternehmen/>.

<sup>64</sup> NGOs cannot claim infringements on their own; the claims are filed by their federal managing directors as individual claimants; see *infra* Part 2, A.i.2.

<sup>65</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris – para. 5.

<sup>66</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris – paras. 9, 11, 14.

<sup>67</sup> For more explanation, see C.i.1. The submission of the claimant is available at:

[https://www.duh.de/fileadmin/user\\_upload/download/Pressemitteilungen/Umweltpolitik/Klimaschutz/Klageschrift\\_Mercedes-Benz.pdf](https://www.duh.de/fileadmin/user_upload/download/Pressemitteilungen/Umweltpolitik/Klimaschutz/Klageschrift_Mercedes-Benz.pdf).

<sup>68</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris – para. 31.

<sup>69</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris – paras. 34, 35.

<sup>70</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris – para. 35.

with the existing legislation to prevent climate change, which, in turn, complies with the protective duties to achieve climate neutrality under the German constitution.<sup>71</sup>

The claimants are now trying to bring this case to the German Federal Court of Justice.<sup>72</sup>

bb. Regional Court of Munich I, judgment of 7 February 2023; Higher Regional Court of Munich, judgement of 12.10.2023: *Deutsche Umwelthilfe* against *BMW AG*

The Regional Court of Munich I also dismissed a comparable case of several private claimants supported by *Deutsche Umwelthilfe* (DUH) against the car manufacturer *BMW AG* as unfounded and justified its decision by stating that the unlawful infringement of individual rights required by Sec. 1004 BGB was not given in the case.<sup>73</sup> According to the claimants, exceeding the CO<sub>2</sub> budget calculated by the DUH for the defendant would result in future drastic restrictions of freedom by the government in order to achieve emission reduction goals.<sup>74</sup> They claim that this would threaten their general right of personality.<sup>75</sup>

However, within the general right of personality, the unlawfulness of the infringement is not indicated but must be positively established.<sup>76</sup> When examining the unlawfulness of the infringement, the District Court of Munich I came to the conclusion that there cannot be an unlawful infringement if the defendant fulfils all legal obligations under the existing laws.<sup>77</sup> Therefore, it ruled that – at least at the moment – there is no unlawful infringement of a protected interest.

Recently, the Higher Regional Court of Munich upheld this decision with a more detailed reasoning. The court argued that the scope of protection of the general right of personality was not affected because the legislator had already taken sufficient measures to comply with its duty to protect. If one were to assume an infringement, this would not be unlawful, because BMW complied with all legal requirements and there was no civil law duty that would go beyond these requirements.<sup>78</sup> Finally, the court held that BMW could not be qualified as a disturber within the meaning of Sec. 1004 BGB because the company itself had no direct influence on future legislation restricting the

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<sup>71</sup> Higher Regional Court of Stuttgart, judgement of 08.11.2023 – 12 U 170/22, BeckRS 2023, 31435, paras 63 ff.

<sup>72</sup> The appeal to the German Federal Court of Justice was not admitted by the Higher Regional Court. However, an appeal against the denial of leave to appeal is now pending under the file number VI ZR 365/23.

<sup>73</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861.

<sup>74</sup> *Deutsche Umwelthilfe v. BMW*, statement of claim of 21.09.2021, pp. 48 ff., [https://www.duh.de/fileadmin/user\\_upload/download/Pressemitteilungen/Umweltpolitik/Klimaschutz/Klageschrift\\_BMW.pdf](https://www.duh.de/fileadmin/user_upload/download/Pressemitteilungen/Umweltpolitik/Klimaschutz/Klageschrift_BMW.pdf).

<sup>75</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861.

<sup>76</sup> The unlawfulness of the infringement is a prerequisite for any claim for defense or injunctive relief. In the case of the right of personality, the unlawfulness is not indicated by the infringement. The unlawfulness and the scope of the general right of personality must be determined in each individual case with careful consideration of all circumstances; Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861.

<sup>77</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861 para. 64.

<sup>78</sup> Higher Regional Court of Munich, judgement of 12.10.2023 – 32 U 936/23, BeckRS 2023, 30283, para. 66 ff.

freedom of the claimants – even more so because these might become necessary even if BMW were to stop the production of cars altogether.<sup>79</sup>

cc. Regional Court of Braunschweig, judgment of 14 February 2023; *Greenpeace* against Volkswagen AG

In the case before the Regional Court of Braunschweig brought by several private claimants supported by *Greenpeace* against *Volkswagen AG*, the claimants sought an injunction against the production of internal combustion engines beyond 2029 and to ensure a reduction of greenhouse gas emissions of a certain percentage compared to 2018 based on stated scientific standards.<sup>80</sup> This claim was also based on Sec. 1004 (1), 823 (1) BGB by analogy.<sup>81</sup> The claimants asserted an infringement of their property, their health, and the right to preserve greenhouse gas-related freedoms (*Recht auf Erhalt treibhausgasbezogener Freiheit*).<sup>82</sup> They claim that such a right is to be newly recognised by civil courts after the climate decision of the German Federal Constitutional Court and to be included in the rights protected *erga omnes* under Sec. 823 (1) BGB.<sup>83</sup>

However, the court dismissed the claim as unfounded and based its judgment on Sec. 1004 (2) BGB.<sup>84</sup> The court left open whether there is a sufficiently precise impairment of the claimants' rights and/or legal interests, whether the defendant can be regarded as an interferer or whether its conduct can be regarded as adequately causal for impending impairments.<sup>85</sup> Instead, the court ruled that in any event, the claimant was under a legal obligation to tolerate a possible impairment as the defendants comply with the applicable legal requirements.<sup>86</sup>

The Regional Court of Braunschweig argued that if the state is not obliged to take further action in order to fulfil its obligation to protect, further action cannot be demanded of private parties either, at least if their emissions are within the legal limits.<sup>87</sup> The court therefore concluded that the claimants had to tolerate possible impairments.

dd. Regional Court of Detmold, judgment of 24 February 2023; *Greenpeace* against *Volkswagen AG*

The latest case decided by the Regional Court of Detmold of 24 February 2023 was filed by a private claimant supported by *Greenpeace* against *Volkswagen AG*.<sup>88</sup> The

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<sup>79</sup> Higher Regional Court of Munich, judgement of 12.10.2023 – 32 U 936/23, BeckRS 2023, 30283, para. 89.

<sup>80</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – paras. 34 ff.

<sup>81</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – para. 18.

<sup>82</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris.

<sup>83</sup> *Greenpeace vs. Volkswagen AG*, statement of claim of 8.11.2021, pp. 73 ff,

<https://presseportal.greenpeace.de/204694-greenpeace-reicht-klage-gegen-volkswagen-ein>.

<sup>84</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – para. 72.

<sup>85</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – para. 72.

<sup>86</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – para. 74. For more details on the justification see *infra* Part 2, C. iii.

<sup>87</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – para. 112.

<sup>88</sup> See [https://www.greenpeace.de/publikationen/2021-11-09%20-%20Klage\\_Landwirt.pdf](https://www.greenpeace.de/publikationen/2021-11-09%20-%20Klage_Landwirt.pdf).

claimant requested that the defendant and all its subsidiaries should no longer sell any passenger cars and light commercial vehicles equipped with an internal combustion engine on the market by the end of 2029 and that they reduce their annual aggregated CO<sub>2</sub> emissions by 65% by 2030 compared to 2018, or alternatively by 45% compared to 2019.<sup>89</sup> The claimant based his claim on Sec. 1004 (1) cl. 1, Sec. 1004 (1) cl. 2 BGB<sup>90</sup> and on the infringement of his property, health and his right to preserve greenhouse gas-related freedoms.<sup>91</sup>

The Regional Court of Detmold, however, dismissed the claim as unfounded. The court ruled that it must be left to the defendant to decide how to remove an impairment that has already occurred or how to prevent a serious threat of an impairment.<sup>92</sup> The rights of the interferer should not be restricted to a greater extent than is required for the protection of the claimant against the impairment of his rights.<sup>93</sup> The court also concluded that it was not established that the impairments alleged by the claimant could only be eliminated or prevented by the demanded measures.<sup>94</sup>

Additionally, the court ruled that the right to preserve greenhouse gas-related freedoms is no “other right” in the sense of Sec. 823 (1) BGB, i.e. not an individual right protected *erga omnes*.<sup>95</sup>

The case is now pending in second instance before the Higher Regional Court of Hamm.<sup>96</sup>

## ii. Negligent failure to mitigate or adapt to climate change

While reduction and adaptation claims are typically based on Sec. 1004 BGB, compensation claims could also be based on the three provisions of Sec. 823 (1), (2) and 826 (1) BGB, which are the three main claims for damages under German tort law.

### 1. Sec. 823 (1) BGB

Sec. 823 (1) BGB imposes fault-based liability for the unlawful infringement of a protected interest.<sup>97</sup>

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<sup>89</sup> Regional Court of Detmold, judgment of 24.02.2023 – 1 O 199/21, juris – para. 1.

<sup>90</sup> Regional Court of Detmold, judgment of 24.02.2023 – 1 O 199/21, juris – para. 41.

<sup>91</sup> See also *supra* C.i.2.b.bb; [https://www.greenpeace.de/publikationen/2021-11-09%20-%20Klage\\_Landwirt.pdf](https://www.greenpeace.de/publikationen/2021-11-09%20-%20Klage_Landwirt.pdf) pp. 70 ff.

<sup>92</sup> Regional Court of Detmold, judgment of 24.02.2023 – 1 O 199/21, juris – para. 42.

<sup>93</sup> Regional Court of Detmold, judgment of 24.02.2023 – 1 O 199/21, juris – para. 42.

<sup>94</sup> Regional Court of Detmold, judgment of 24.02.2023 – 1 O 199/21, juris – para. 43.

<sup>95</sup> On the *erga omnes right* within Sec. 823 (1) BGB, see *supra* C.ii.1; Regional Court of Detmold, judgment of 24.02.2023 – 1 O 199/21, juris – para. 46.

<sup>96</sup> File number I-5 U 334/32.

<sup>97</sup> Cf. Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861; Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21; Regional Court of Stuttgart, judgment of

The key elements for a claim under Sec. 823 (1) BGB are (a) the violation of a protected interest, (b) causation, (c) unlawfulness and (d) fault, i.e. intent or negligence.<sup>98</sup> The protected legal interests are specifically listed and contain life, health, bodily integrity, freedom of movement as well as property and “other rights”. The German legislator made a clear policy choice to exclude pure economic loss from the protected interests under Sec. 823 (1) BGB.<sup>99</sup> “Other rights” in the sense of Sec. 823 (1) BGB are therefore only those which the legal system specifically protects *erga omnes*, such as rights *in rem* and industrial property rights, but also some specific rights like the right to one’s name or picture and personality rights.<sup>100</sup>

The most important right in connection with climate change litigation is the general right of personality (see *supra* C.i.1.). The claims supported by Greenpeace are *inter alia* based on the infringement of a “right to greenhouse gas-related freedoms”, which they claim has to be recognised as a (new) protected right under Sec. 823 (1) BGB.<sup>101</sup> However, the Regional Court of Detmold found in its judgment of 24 February 2023 that such a right does not fall within the rights protected *erga omnes* under Sec. 823 (1) BGB.<sup>102</sup>

Within the claim under Sec. 823 (1) BGB, the infringement must be unlawful. There is a presumption that infringements of property etc. are in fact unlawful. However, in the case of the general right of personality, the unlawfulness is not presumed but must be positively established.<sup>103</sup>

In view of the elements of Sec. 823 (1) BGB, a pertinent case for climate damages might be framed as follows: by emitting greenhouse gases, a public utility or other major emitter of carbon dioxide negligently cause the climate to change.<sup>104</sup> While this does not constitute an infringement of a protected right under Sec. 823 (1) BGB in itself, rising sea levels, more serious and more frequent thunderstorms, floods caused by heavy rainfalls, and drought due to long periods without precipitation have led to damages of private property such as agricultural land, forests, residential and commercial real estate, production sites etc.<sup>105</sup> Moreover, the physical well-being of

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13.09.2022 – 17 O 789/21, juris; Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 408.

<sup>98</sup> Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation* 2021, p. 412; Teichmann, in: Jauernig (Ed.), 18th ed. 2021, BGB Sec. 823 para. 1.

<sup>99</sup> Van Gerven, *Tort Law*, 2001, p. 227.

<sup>100</sup> Van Gerven, *Tort Law*, 2001 p. 63; German Federal Court of Justice, judgment of 25.05.1954 – I ZR 211/53, BGHZ 13, 334.

<sup>101</sup> *Greenpeace v. Volkswagen AG*, statement of claim of 08.11.2021, pp. 73 ff., <https://presseportal.greenpeace.de/204694-greenpeace-reicht-klage-gegen-volkswagen-ein>.

<sup>102</sup> Regional Court of Detmold, judgment of 24.02.2023 – 1 O 199/21, juris – para. 46.

<sup>103</sup> In the case of the legal interests literally mentioned in Sec. 823 (1) BGB, the (successful) infringement indicates the unlawfulness. This is not the case for rights that, like the general right of personality, are not mentioned in the provision; see: Teichmann, in: Jauernig (Ed.), 18th ed. 2021, BGB Sec. 823 paras. 48, 49.

<sup>104</sup> Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 412.

<sup>105</sup> Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 412.

individuals can be affected by climate change. Accidents caused by exceptional weather disturbances such as thunderstorms may cause injuries; higher temperatures will set the human body under more stress, impairing overall health.<sup>106</sup> Therefore, Sec. 823 (1) BGB is in principle well suited as a cause of action for climate claims.

## 2. Sec. 823 (2) BGB

Sec. 823 (2) BGB attaches liability to the breach of a protective statutory norm (*Schutzgesetz*). Any statute that is valid and binding may qualify as such a protective norm, regardless of whether it was passed at the federal, the state or the municipal level. However, the violated protective law must be one that is specifically intended to protect the claimant.<sup>107</sup> Whether and to what extent this is the case can only be determined by interpreting the norm of which a violation is asserted in the individual case.<sup>108</sup>

Inter alia, the statutory framework that regulates greenhouse gas emission in Germany (see in detail *infra* Part 2 C. iv.) does not qualify as a protective norm in the interest of others. Rather, it aims at preserving the global climate, but not at protecting certain individuals who stand to suffer damage as a consequence of shifts in climate conditions.<sup>109</sup> Moreover, defendants typically act in accordance with the regulatory framework, so there is no breach of any statutory norm.

*Prima facie*, the provisions of the LkSG could possibly function as a protective statutory norm in the sense of Sec. 823 (2) BGB (see in detail *supra* B.ii.). However, such a claim fails due to Sec. 3 (3) cl. 1 LkSG, which states that a breach of the obligations under this Act shall not give rise to civil liability. According to the explanatory materials published in the legislative process, this is intended to clarify in particular that the provisions of the LkSG are not to be classified as protective laws within the meaning of Sec. 823 (2) BGB.<sup>110</sup>

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<sup>106</sup> Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 412.

<sup>107</sup> Geselle/Falter, *KlimaRZ* 2022, 181, 184.

<sup>108</sup> Geselle/Falter, *KlimaRZ* 2022, 181, 184.

<sup>109</sup> Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 423.

<sup>110</sup> Recommendation for a decision and report on the Draft of an Act on Corporate Due Diligence Obligations in Supply Chains, Committee for Labour and Social Affairs of the German Bundestag, Bundestag document No. 19/30505, p. 39.

### 3. Sec. 826 BGB

Sec. 826 BGB imposes liability for any kind of harm sustained if the tortfeasor acted both with the intention to cause harm and against good morals (*bonos mores*).<sup>111</sup>

These two requirements are not satisfied in typical climate cases concerning greenhouse gas emissions as by-products of industrial activity.<sup>112</sup> With regard to the energy industry in particular, it can be argued that companies run their business to satisfy the public's energy needs, not with the goal of hurting anyone.<sup>113</sup>

However, Sec. 826 BGB could possibly apply in cases of fraudulent misrepresentation (see *infra vi.*).

#### iii. Negligent or strict liability for failure to warn

With regard to the failure to warn, claimants could possibly activate the German institute of producer liability (*Produzentenhaftung*) which has been developed in case law as a specific application of Sec. 823 (1) BGB. It states that the producer who creates a source of danger by releasing a defective product on the market must ensure, within the bounds of what is technologically possible and economically reasonable, that their customers, users of the product and other third parties are not adversely affected in their legal interests protected by Sec. 823 (1) BGB.<sup>114</sup> Energy producers such as RWE AG burn fossil fuels, and harmful CO<sub>2</sub> is released (as waste) during combustion.<sup>115</sup> It has been argued that the major emitters had a duty to warn customers and users of the products of the dangers of climate change as part of their product monitoring obligation.<sup>116</sup>

However, this view is currently supported only by legal scholars. There are no claims pending based on negligent or strict liability for failure to warn at the moment.

#### iv. Trespass

Under German law, cases of trespass are covered by the general claims under tort law (see *supra C.*).

#### v. Impairment of public trust resources

The concept of public trust resources does not exist under German law. However, natural resources like water and the air are qualified as "public things" (*öffentliche*

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<sup>111</sup> Cf. Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 408.

<sup>112</sup> Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 423.

<sup>113</sup> Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 423.

<sup>114</sup> German Federal Court of Justice, judgment of 07.06.1988 – VI ZR 91/87, NJW 1988, 2611; judgment of 31.10.2006 – VI ZR 223/05, NJW 2007, 762; Higher Regional Court of Hamm, judgment of 21.12.2010 – 21 U 14/08, NJW-RR 2011, 893.

<sup>115</sup> Schirmer, *Nachhaltiges Privatrecht*, 2023, pp. 226 ff., 259.

<sup>116</sup> Schirmer, *Nachhaltiges Privatrecht*, 2023, pp. 227 ff.



Sachen).<sup>117</sup> Under this concept, private property rights are restricted by public regulation to protect natural resources, like e.g. the German Emissions Control Act (*Bundes-Immissionsschutzgesetz, BImSchG*). Under this Act, private owners need a permit under Sec. 4 BImSchG to operate plants that produce emissions.<sup>118</sup>

However, the concept of “*öffentliche Sache*” does provide for horizontal claims of private individuals against corporate actors, especially when they comply with these regulations and permits.

#### vi. Fraudulent misrepresentation

A claim for damages based on fraudulent misrepresentation can be granted under Sec. 826 BGB (see *supra* ii.3.). In addition, contracts concluded on the basis of a fraudulent misrepresentation may be voidable (Sec. 123 (1) BGB).

As far as can be seen, no climate claims against companies have been based on fraudulent misrepresentation in Germany so far. However, it is discussed in legal scholarship whether one could draw inspiration from the German Federal Court of Justice’s application of Sec. 826 BGB in the “diesel cases”. In these diesel cases, some courts have highlighted that the defendant systematically and for many years placed vehicles on the market in Germany that complied with the statutory exhaust emission limits only by means of an inadmissible defeat device.<sup>119</sup> Carbon majors arguably knew about the consequences of fossil fuels on the climate early on. However, since the activity of the energy suppliers – unlike the use of a defeat device – was in line with legal requirements, Sec. 826 BGB could only apply if the carbon majors were found to have deliberately deceived the public (*sittenwidrige Täuschung*). This would at least require proof of systematic disinformation campaigns.<sup>120</sup> Some carbon majors are being publicly accused of having systematically promoted doubts to the public about the existence, causes and consequences of climate change in order to continue their lucrative fossil fuel business.<sup>121</sup> If this could be proven, claims under Sec. 826 BGB might be conceivable.

#### vii. Civil conspiracy

There is no special cause of action regarding civil conspiracy to be found in German civil law.

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<sup>117</sup> See for an instructive overview of the evolution of the concept *Kube*, *Natural Resources Journal* 37 (1997), 857.

<sup>118</sup> *Lorenz*, *NVwZ* 1989, 812, 816.

<sup>119</sup> German Federal Court of Justice, judgment of 25.05.2020 – VI ZR 252/19, *NJW* 2020, 1962, para. 16.

<sup>120</sup> On claims based on systematic disinformation campaigns see also *Kieninger*, *ZHR* 187 (2023), 348, 379 ff.

<sup>121</sup> In detail on the actors, history and strategy of the “climate change denial machine” *Dunlap/McCrigh*, in: *Dryzek/Norgaard/Schlosberg* (Eds.), *The Oxford Handbook of Climate Change and Society*, 2011, pp. 144 ff.



### viii. Product liability

As far as can be seen, no climate claims have been based on product liability in Germany so far. In theory, however, this would be conceivable. A distinction must be made between liability under Sec. 1 Product Liability Act (*Produkthaftungsgesetz, ProdHaftG*) and producer liability in tort (*cf. supra* 3.iii.). The *ProdHaftG* follows the concept of strict liability, whereas fault is required under Sec. 823 (1) BGB. In both cases, the product would have to be defective. It could be argued that fossil fuels themselves, as well as products powered by fossil fuels, suffer from a "design defect" because they are not designed to be used safely within the scope of their intended use due to their harmfulness to the climate.

In *DUH v. BMW*, however, the Regional Court of Munich I did not follow the claimants' comparison with a manufacturer of an approved product who becomes aware of the carcinogenicity of their product.<sup>122</sup>

### ix. Insurance liability

Insurance companies can be liable for climate change-related damage caused by extreme weather events such as flooding if the victims have taken out specific insurance covering such damages, such as crop loss insurances in the agricultural sector or so-called natural hazard insurances (*Elementarschadensversicherung*) for buildings. Insurance companies have therefore had to pay for considerable climate change-related losses in recent years. However, only around half of all buildings in Germany are covered by such a natural hazard insurance. An obligation to take out such insurance is therefore currently being discussed.<sup>123</sup>

### x. Unjust enrichment

Claims of unjust enrichment are no suitable legal basis to recover damages for climate change related harm under German law. However, a claim for unjust enrichment has been made in the *RWE* case in order to recover the costs for adjustment measures (see in further detail *infra* Part 3, A.ii.).

## D. Company and Financial Laws

In public limited companies under German law, the board of directors is responsible for managing the affairs of the company, Sec. 76 of the Stock Corporation Act (*Aktiengesetz, AktG*). In corporate management decision-making, the board of directors is entitled, but not generally obligated, to take climate concerns into account.<sup>124</sup> As the directors have to decide in the best interest of the company (Sec. 93 (1) cl. 2 *AktG*),

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<sup>122</sup> Regional Court of Munich I, judgment of 07.02.2023 - 3 O 12581/21, BeckRS 2023, 2861, para. 74.

<sup>123</sup> See Kingreen, NVwZ 2022, 598.

<sup>124</sup> Weller/Fischer, ZIP 2022, 2253, 2258; Spindler, in: MünchKomm AktG, 5th ed. 2019, Sec. 76 paras. 81 ff.

however, they have to consider climate concerns at least insofar as they are linked to financial advantages or when there are mandatory legal requirements of climate protection. In contrast, shareholders generally do not have a say in management matters, Sec. 119 (2) AktG.<sup>125</sup>

#### i. Direct shareholder action

The question whether the shareholders' meeting may vote on the board of directors' climate strategy (so-called "Say-on-Climate"), is currently much discussed. *De lege lata*, the board of directors is entitled, but not obliged, to consult the shareholders' meeting accordingly, while shareholders cannot demand such a vote on their own initiative.<sup>126</sup>

Concerning direct shareholder actions against the board of directors for not taking climate risks into account, the shareholder influence in the dualistic German management model is – unlike in the monistic management model – mediated via the supervisory board; the latter is responsible for enforcing any executive board liability, Sec. 111 (1), 112 AktG.<sup>127</sup> Direct shareholder actions against the executive board for not taking climate matters into account are therefore a rare exception in the German system and must meet strict requirements, Sec. 147 AktG.<sup>128</sup>

#### ii. Agenda addition request

However, shareholders who together hold 20% of the company's shares or the pro rata amount of 500.000 euros can submit a shareholder proposal for the agenda (*Tagesordnungsergänzungsverlangen*) under Sec. 122 (2) AktG. However, the proposed subject of the agenda item must be within the competence of the shareholders.<sup>129</sup> The competence of the shareholders' meeting is limited to the topics listed in Sec. 118 AktG, for example the use of profits or changes to the statutes of the company. Thus, the reduction of climate-damaging emissions per se cannot be put on the agenda.<sup>130</sup> Nevertheless, activist shareholders can find a way to address climate-related topics via agenda addition requests.<sup>131</sup> For example, in a shareholders' meeting in April 2022, an activist shareholder of the RWE AG called *Enkraft Capital GmbH* demanded that RWE AG spin off its lignite division.<sup>132</sup> The shareholders' meeting had

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<sup>125</sup> *Dörrwächter*, NZG 2022, 1083, 1084; *Weller/Hoppmann*, AG 2022, 640, 643.

<sup>126</sup> *Bachmann*, ZHR 187 (2023), 166, 203 ff.; *Weller/Hoppmann*, AG 2022, 640, 643 ff.

<sup>127</sup> *Weller/Benz*, ZGR 2022, 563, 586.

<sup>128</sup> *Weller/Benz*, ZGR 2022, 563, 586.

<sup>129</sup> *Kubis*, in: *MünchKomm AktG*, 5th ed. 2022, Sec. 122 para. 15; *Rieckers*, in: *BeckOGK AktG*, 01.07.2022, Sec. 122 para. 24.

<sup>130</sup> *Weller/Hoppmann*, AG 2022, 640, 645.

<sup>131</sup> On the legitimacy of climate activism in the shareholders' meeting see also *Schirmer*, ZHR 188 (2024), 60.

<sup>132</sup> The demand and the result are available at <https://www.rwe.com/investor-relations/finanzkalender-und-veroeffentlichungen/hauptversammlung-2022/>. It was rejected by a majority of 97,56 percent.

the competence for this vote, since according to Sec. 123 (2), 125, 65 (1) Transformation Act (*Umwandlungsgesetz, UWG*) it must give its consent to a spin-off.<sup>133</sup>

### iii. Action for annulment against discharge resolutions

Under Sec. 120 (1) AktG, the shareholders' meeting votes on the discharge of the board of directors and thereby approves its management decisions, Sec. 120 (2) AktG. If the board of directors is discharged by the shareholders' meeting even though it acted in violation of its duties, this may potentially lead to the annullability of the vote, Sec. 246 AktG.<sup>134</sup> Since the board of directors is *de lege lata* entitled, but not under an obligation, to take climate concerns into account, it would be necessary to justify exactly why the failure to take climate concerns into account should represent such a breach of duty in each individual case.<sup>135</sup> This would require the claimants to show that the discretion of the directors was restricted for reasons of climate protection.

### iv. Restraining order against management decisions

In this context, restraining orders against management decisions of the board of directors that fail to take climate concerns into account are also debatable; however, their success depends on the existence of a climate-related due diligence obligation of the board of directors and its enforceability.<sup>136</sup> As far as can be seen, there have not yet been any restraining orders against management decisions with regard to climate concerns.

## E. Consumer Protection Laws

Actions in connection with greenwashing have recently become more popular in Germany. The NGO *Deutsche Umwelthilfe* has filed around a dozen actions against large German companies such as the football club *FC Köln GmbH & Co. KGaA*, the oil company *TotalEnergies Wärme & Kraftstoff Deutschland GmbH*, or the drugstore chain *dm-drogerie markt GmbH + Co. KG*.<sup>137</sup>

### i. Act against unfair competition

The legal basis of these actions is the Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb, UWG*). Sec. 3 UWG states the prohibition of unfair business-to-consumer commercial practices. Misleading consumers represents such an

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<sup>133</sup> *Fuhrmann/Döding*, AG 2022, R168.

<sup>134</sup> *Drinhausen*, in: Höllers/Weber (Eds.), 4th ed. 2022, AktG 120 para. 41; *Hoffmann*, in: BeckOGK AktG, 01.07.2022, Sec. 120 para. 53.

<sup>135</sup> In this direction *Steuer*, ZIP 2023, 13 ff.; *Weller/Fischer*, ZIP 2022, 2253 ff.

<sup>136</sup> Concerning Human Rights see *Weller/Nasse*, ZGR special edition 22 (2020), 107 ff.

<sup>137</sup> *Deutsche Umwelthilfe*, Overview of climate neutrality advertising procedures, 18.01.2023, available at [https://www.duh.de/fileadmin/user\\_upload/download/Projektinformation/Verbraucher/2023-01-17\\_Ubersicht\\_DUH\\_Verfahren\\_Klimaneutralität.pdf](https://www.duh.de/fileadmin/user_upload/download/Projektinformation/Verbraucher/2023-01-17_Ubersicht_DUH_Verfahren_Klimaneutralität.pdf).

unfair commercial practice under Sec. 5 (1) UWG. Misleading may include, in particular, the representation of false or misleading information as to the essential characteristics of a product, Sec. 5 (1) no. 1 UWG, or withholding or concealing essential information that the consumer needs to make an informed commercial decision, Sec. 5a (1) and (2) no. 1 UWG.

### ii. Misleading advertisement under Sec. 5 (1) no. 1 UWG

Since details of terms such as "environmentally friendly" or "eco-friendly" are unclear and not regulated by law, and since such advertising is particularly likely to have an emotional effect on potential customers (concern for one's own health or for future generations), statements made by a company in this regard have an increased potential to mislead.<sup>138</sup> Blanket statements such as "carbon-dioxide-reduced" or "climate friendly product" which, for example, leave open to which aspect of the production process the "climate friendliness" refers to, are therefore regarded as misleading according to Sec. 5 (1) no. 1 UWG.<sup>139</sup> This can also relate to advertisement with "climate neutrality" based on questionable compensation projects which actually save little or no emissions.<sup>140</sup>

### iii. Withholding climate related information under Sec. 5a (2) no. 1 UWG

If a company advertises the climate neutrality of its product, the average consumer assumes a balanced carbon footprint.<sup>141</sup> They will not assume that the advertised climate neutrality is based entirely on the purchase of carbon dioxide certificates without any reduction efforts of its own; from the consumer's point of view, certificate trading is rather suspect of greenwashing.<sup>142</sup> Therefore, it is necessary to clarify whether the advertised climate neutrality was achieved in whole or in part through compensation measures.<sup>143</sup> Withholding this information may represent an unfair commercial act within the meaning of Sec. 5a (2) no. 1 UWG.

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<sup>138</sup> German Federal Court of Justice, judgment of 20.11.1988 – ZR 238/87, juris; judgment of 22.09.2005 – I ZR 55/02, juris; Higher Regional Court of Hamm, judgment of 19.08.2021 – 4 U 57/21, juris; Higher Regional Court of Schleswig, judgment of 30.06.2022 – 6 U 46/21, juris.

<sup>139</sup> Higher Regional Court of Hamm, judgment of 19.08.2021 – 4 U 57/21, juris; Higher Regional Court of Schleswig, judgment of 30.06.2022 – 6 U 46/21, juris.

<sup>140</sup> See on a recent successful case against *Total Energies* before the Regional Court of Düsseldorf <https://www.duh.de/presse/pressemitteilungen/pressemitteilung/verbrauchertauschung-mit-vermeintlicher-klimaneutralitaet-deutsche-umwelthilfe-gewinnt-vor-gericht>.

<sup>141</sup> Higher Regional Court of Schleswig, judgment of 30.06.2022 – 6 U 46/21, juris; Higher Regional Court of Koblenz, judgment of 10.08.2011 – 9 U 163/11, juris.

<sup>142</sup> Higher Regional Court of Frankfurt am Main, judgment of 10.11.2022 – 6 U 104/22, juris.

<sup>143</sup> Higher Regional Court of Frankfurt am Main, judgment of 10.11.2022 – 6 U 104/22, juris; Regional Court of Konstanz, judgment of 19.11.2021 – 7 O 6/12 KfH, juris.

## F. Fraud Laws

Under German civil law, liability for fraud falls under the general provisions of tort law: A liability can be based on Sec. 832 (2) BGB in connection with Sec. 263 of the German Criminal Code (*Strafgesetzbuch, StGB*) if the behaviour falls under the notion of fraud under criminal law. This would presuppose that the liable party intentionally deceived the injured party and that this injured party has therefore made a financial disposition that resulted in a financial loss. Even if it was to show that at least some carbon majors deceived the general public regarding the effects of CO<sub>2</sub> emissions on the climate,<sup>144</sup> it seems hard to establish that claimants relied on this in their financial dispositions and suffered a financial damage from exactly these dispositions. Thus, this legal basis can, at best, be activated in very special factual situations.

Besides, fraud might, under certain conditions, give rise to a liability under Sec. 826 BGB (see *supra* C.ii.3.).

As far as can be seen, fraud has not been invoked in climate change litigation cases against corporate actors in Germany so far.

## G. Contractual Obligations

Under German law, the buyer is entitled to a number of warranty rights, namely supplementary performance, withdrawal from the contract, reduction of the purchase price and compensation for damages, Sec. 437 BGB. They are each linked to the existence of a material defect within the meaning of Sec. 434 BGB. In view of its broadness, the concept of material defect under Sec. 434 BGB is also principally open to the consideration of a product's climate characteristics. If the seller makes certain statements on climate protection in a sustainability report or a code of conduct, this may represent a public statement within the meaning of Sec. 434 (3) cl. 2 no. 1 BGB; if the statement is incorrect, this could constitute a material defect that activates the aforementioned warranty rights.<sup>145</sup>

However, as far as can be seen, there are currently no lawsuits pending that concern climate claims under Sec. 434, 437 BGB. Wrong public statements on climate related issues are rather treated under the rules of the UWG (see *supra* E.).

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<sup>144</sup> See on this *Kieninger*, ZHR 187 (2023), 348, 379 ff.

<sup>145</sup> *Schirmer*, Nachhaltiges Privatrecht, 2023, p. 336; *Lüttringhaus*, AcP 219 (2019), 29; *Gsell*, ZHR 187 (2023), 392, 405 ff.

## H. Planning and Permitting Laws

The violation of planning regulations under public law and the non-compliance with specifications in permit notices can only form the basis of a claim for damages under civil law if the violated norm constitutes a protective law within the meaning of Sec. 823 (2) BGB. Whether this is the case must be determined in each individual case by interpretation (see *supra* C.ii.2.).

Compliance with permissions under public law is, however, often invoked as a justification in climate litigation (see *infra* Part 2 C.iii).

## I. Other Causes of Action

In our view, the categories above cover all relevant causes of action for climate litigation against corporate actors under German law.

## 2. Procedures and Evidence

### A. Actors Involved

#### i. Plaintiffs

##### 1. Individual claimants

In Germany, anyone who has the capacity to sue (*Parteifähigkeit*) can generally sue another person before civil courts. The capacity to sue is determined by a person's legal capacity (*Rechtsfähigkeit*), Sec. 50 (1) German Code of Civil Procedure (*Zivilprozessordnung*; ZPO), i.e. foremost natural and legal persons.<sup>146</sup> Most climate claims against corporations in Germany are brought by individuals (natural persons) because claimants must demonstrate an infringement of their own (subjective) rights, for example the right to health. Legal entities, however, do not benefit from this subjective right; hence, most climate claims are filed by natural persons.<sup>147</sup>

However, individuals do not usually possess the means to start (sometimes multijurisdictional) lengthy proceedings or to pay for the sophisticated legal advice required for successful climate claims. As a result, individuals bringing climate action against corporations are typically backed by NGOs in the climate and/or human rights space. NGOs in Germany like ECCHR<sup>148</sup>, *Gesellschaft für Freiheitsrechte*<sup>149</sup>, *Deutsche Umwelthilfe*<sup>150</sup>, *Germanwatch*<sup>151</sup> or *Greenpeace*<sup>152</sup> are specialised in so-called strategic litigation<sup>153</sup> such as climate litigation. These organisations help individuals to bring climate claims by way of financial and legal support. Yet, they do not act as parties to the proceedings but merely assist the individual who is the actual claimant, as best exemplified by the climate action by the Peruvian farmer *Saúl Luciano Lliuya* against the German electricity company *RWE*. *Lliuya* filed the claim in 2015, i.e. more than eight years ago at the time of writing.<sup>154</sup> His claim was supported both financially and in terms of legal advice by the German human rights NGO *Germanwatch*, which also

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<sup>146</sup> *Lindacher/Hau*, in: MünchKomm ZPO, 6th edition 2020, Sec. 50 para. 3-4.

<sup>147</sup> See *infra* B.i.

<sup>148</sup> *European Center for Constitutional and Human Rights*, <https://www.ecchr.eu>.

<sup>149</sup> *Gesellschaft für Freiheitsrechte e.V.*, <https://freiheitsrechte.org>.

<sup>150</sup> *Deutsche Umwelthilfe e.V.*, <https://www.duh.de>.

<sup>151</sup> *Germanwatch e.V.*, <https://www.germanwatch.org/de>.

<sup>152</sup> *Greenpeace Germany*, <https://www.greenpeace.de>.

<sup>153</sup> See on the notion of strategic litigation the definition of the European Center for Constitutional and Human Rights: „Strategic litigation aims to bring about broad societal changes beyond the scope of the individual case at hand. It aims to use legal means to tackle injustices that have not been adequately addressed in law or politics. (...) Successful strategic litigation brings about lasting political, economic or social changes and develops the existing law. (...)“, [www.ecchr.eu/en/glossary/strategic-litigation/](https://www.ecchr.eu/en/glossary/strategic-litigation/); *Friedrich*, DÖV 2021, 726 ff.; *Verheyen/Pabsch*, in: *Kahl/Weller* (Eds.), *Climate Change Litigation*, 2021, p. 507, n. 1.

<sup>154</sup> [https://climate-laws.org/geographies/germany/litigation\\_cases/luciano-lliuya-v-rwe](https://climate-laws.org/geographies/germany/litigation_cases/luciano-lliuya-v-rwe).

helped raise awareness by way of litigation PR for the underlying climate cause.<sup>155</sup> Presumably, *Lliuya* would not have been able to fund his litigation – including appeal proceedings – in Germany for eight (plus) years had it not been for *Germanwatch*. This demonstrates the NGOs’ role in the proceedings, who do not merely assist the claimants in corporate climate litigation but play a vital role in their very existence.

## 2. Class actions

In general, classes of claimants cannot bring climate claims in Germany. This is due to the fact that only claimants who assert claims *in their own right* are authorised to bring proceedings (*Prozessführungsbefugnis*).<sup>156</sup> A third party who does not itself have a relevant right is only permitted by the ZPO to bring claims within the narrow limits of the (statutory or arbitrary) litigation in one’s own name on another’s behalf (*Prozessstandschaft*).<sup>157</sup> The legal figure of *Prozessstandschaft* serves precisely to exclude class actions.<sup>158</sup> Actions by classes of claimants are only permissible under narrow conditions and in exceptional cases.<sup>159</sup> No such exceptions exist for climate claims. In particular, the Environmental Remedies Act (*Umweltrechtsbehelfsgesetz, UmwRG*) does not foresee climate action before civil courts but can only be invoked in order to make public bodies comply with environmental standards.<sup>160</sup> This, however, is an administrative law mechanism, not a private law one.

Art. 9 (3) Aarhus Convention<sup>161</sup> does not change this result.<sup>162</sup> While Art. 9 (3) Aarhus Convention also refers to judicial procedures between private persons, as is the case in corporate climate litigation, the Aarhus Convention only applies to the compliance with legal norms in national law relating to *environmental matters*. However, climate litigation in Germany is usually based on Sec. 823, 1004 BGB (see

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<sup>155</sup> <https://www.germanwatch.org/en/rwe>.

<sup>156</sup> *Weth*, in: Musielak/Voit (Eds.), 19th ed. 2022, ZPO Sec. 51 para. 14.

<sup>157</sup> German Bundestag, Wissenschaftliche Dienste, Rechtliche Grundlagen und Möglichkeiten für Klima-Klagen gegen Staat und Unternehmen in Deutschland, Berlin, 2016, p. 12, <https://www.bundestag.de/resource/blob/459048/3bbbd712bc3d33d7cbbe851f032b3e01/wd-7-116-16-pdf-data.pdf>.

<sup>158</sup> *Weth*, in: Musielak/Voit (Eds.), 19th ed. 2022, ZPO Sec. 51 para. 14.

<sup>159</sup> E.g. as proclaimed in the German Act on Injunctive Relief (*Unterlassungsklagengesetz, UKlaG*) as regards consumers; see also the Collective Redress Directive of the European Union, Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020, Official Journal of the European Union, L 409/1, 04.12.2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

<sup>160</sup> See the scope of application in Sec. 1 and 2 UmwRG; *Boerstra/Römling*, EurUP 2022, 1, 42.

<sup>161</sup> Convention on access to information, public participation in decision-making and access to justice in environmental matters, 25.06.1998, Aarhus, Denmark.

<sup>162</sup> Art. 9 para. 3 Aarhus Convention: “In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”



*supra* Part 1). These are general rules of torts, however, not legal norms specifically relating to the environment.<sup>163</sup>

### 3. NGOs, shareholders

Because NGOs as legal entities cannot claim any infringements in the right to health or in the right to preserve greenhouse gas-related freedoms,<sup>164</sup> the lawsuits against *BMW*, *Mercedes Benz* and *Wintershall Dea* etc.<sup>165</sup> are not brought by *Greenpeace* or *Deutsche Umwelthilfe*, but by their federal managing directors as individual claimants (natural persons), albeit with support from the NGOs.<sup>166</sup> The federal managing directors are asserting *their own rights* (*Prozessführungsbefugnis*, see *supra* 1.), regardless of whether the legal questions arising in climate change cases are of general interest.<sup>167</sup>

An exception to this has been introduced recently with Sec. 11 of the LkSG, which gives trade unions and NGOs legal standing to assert claims of victims affected by breaches of the new human rights related due diligence obligations. However, since the LkSG is not specifically directed towards climate protection (see *supra* Part 1, B. ii.), this path cannot be activated for climate claims.

Climate claims against companies by its own shareholders, like the lawsuit by *Client Earth* as one of *Shell's* shareholders against *Shell*<sup>168</sup> in the UK, are not likely in Germany. In the German two-tier-management system, the board of directors is controlled by the supervisory council; hence, in contrast to one-tier management systems like in the UK, individual shareholders cannot directly sue the board of directors (see *supra* Part 1, D.).<sup>169</sup>

Federal states, cities and municipalities in Germany are technically capable of bringing climate claims because they have the capacity to bring legal claims before civil courts.<sup>170</sup> However, they would need to invoke their own rights.<sup>171</sup> To date, no such claims have been brought before German civil courts.

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<sup>163</sup> *Boerstra/Römling*, EurUP 2022, 1, 39, 40.

<sup>164</sup> Cf. *Vogt-Beheim*, in: *Anders/Gehle* (Eds.), 80th ed. 2022, ZPO Sec. 51, n. 22.

<sup>165</sup> <https://www.duh.de/klimaklagen/unternehmensklagen/>.

<sup>166</sup> <https://www.greenpeace.de/klimaschutz/mobilitaet/vw-klage-gericht>.

<sup>167</sup> See the reasoning by the court in Regional Court of Munich I, judgment of 7.2.2023 - 3 O 12581/21, BeckRS 2023, 2861, para. 46.

<sup>168</sup> <https://www.clientearth.org/latest/latest-updates/news/we-re-taking-legal-action-against-shell-s-board-for-mismanaging-climate-risk/>.

<sup>169</sup> *Janisch*, Können Aktionäre Klimaschutz einklagen?, *Süddeutsche Zeitung*, Karlsruhe 10.02.2023, <https://www.sueddeutsche.de/wirtschaft/klimaschutz-unternehmen-nachhaltigkeit-aktionaere-klimaklagen-1.5749031>.

<sup>170</sup> *Lindacher/Hau*, in: *MünchKomm ZPO*, 6th ed. 2020, Sec. 50 para. 20.

<sup>171</sup> See *infra* B.i.

## ii. Defendants

The claimants are procedurally free to decide against whom they want to bring their action.<sup>172</sup> In Germany, climate action has been focused on corporations in the energy<sup>173</sup> and automotive industry<sup>174</sup>. In the energy sector, for example, *Deutsche Umwelthilfe's* federal managing directors filed a claim against the German gas and oil company *Wintershall Dea AG*, i.e. a producer of fossil fuels.<sup>175</sup> Another claim of this sort is exemplified by the abovementioned lawsuit by *Saúl Luciano Lliuya* against the electricity company *RWE*.<sup>176</sup> Claims have also been brought against automobile manufacturers like *Volkswagen AG*, *BMW* or *Mercedes-Benz AG*.<sup>177</sup>

States and the government are typically only sued as defendants in administrative actions: claims against the state, whether seeking certain precautions or for the state to refrain from climate-damaging behaviour, are founded in public law, making them public law disputes before administrative courts.<sup>178</sup>

## iii. Third-party intervenors

German civil proceedings are guided by the two-party principle (*Zweiparteienprinzip*), which means that, in principle, only two parties are involved in the proceedings – the claimant and the defendant.<sup>179</sup> Exceptions to this rule are provided in Sec. 64 to 77 ZPO. The most common case is the so-called *Nebenintervention*, where a third party joins the proceedings on the side of one existing party. This is often initiated by a *Streitverkündung* under Sec. 72 ZPO.<sup>180</sup> Under Sec. 72 ZPO, one party can include a third party in the dispute if it believes that it is entitled to recourse against that third party in case it loses its own case – e.g. if it is being held liable for damages that another is liable for against them.

On the side of the claimant, there has been no third-party intervention in the climate claims filed before German civil courts to date. It should be particularly noted that the

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<sup>172</sup> *Fellenberg*, NVwZ 2022, 913, 920. *Fellenberg* notes that this may lead to distortions of competition because the claimant's choice who to sue – out of several entities responsible for climate change – is ultimately arbitrary.

<sup>173</sup> *Weller/Nasse/Nasse*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 403.

<sup>174</sup> E.g. Regional Court of Stuttgart, judgment of 13.9.2022 – 17 O 789/21, juris; Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21 – BeckRS 2023, 2861. For an overview of the current lawsuits see *supra* Part 1, C. i.

<sup>175</sup> *Barbara Metz et al v. Wintershall DEA AG*, [https://climate-laws.org/geographies/germany/litigation\\_cases/barbara-metz-et-al-v-wintershall-dea-ag](https://climate-laws.org/geographies/germany/litigation_cases/barbara-metz-et-al-v-wintershall-dea-ag).

<sup>176</sup> See *supra* Part 1, C. i. a.

<sup>177</sup> See *supra* Part 1, C. i. b.

<sup>178</sup> German Bundestag, Wissenschaftliche Dienste, *Rechtliche Grundlagen und Möglichkeiten für Klima-Klagen gegen Staat und Unternehmen in Deutschland*, Berlin, 2016, p. 7, <https://www.bundestag.de/resource/blob/459048/3bbbd712bc3d33d7cbbe851f032b3e01/wd-7-116-16-pdf-data.pdf>.

<sup>179</sup> *Weth*, in: Musielak/Voit (Eds.), 19th ed. 2022, ZPO Sec. 50 para. 4.

<sup>180</sup> See for a more detailed description *Schultes*, in: MünchKomm ZPO, 6th ed. 2020, Sec. 64-77; *Weth*, in: Musielak/Voit (Eds.), 19th ed. 2022, Sec. 50 para. 5.

assistance by NGOs in these disputes cannot be regarded as a third party intervening, but merely as assistance of the claimant by way of monetary and legal support.

On the side of the defendant, no third-party intervention has taken place in climate cases in Germany thus far either. However, scholars in Germany have argued that corporate actors sued for climate change might invoke the mechanism of *Streitverkündung* under Sec. 72 ZPO in corporate climate litigation to include the state in the proceedings. This could be based on the argument that it is essentially the state who is responsible for climate change policies and that the company is being held accountable for emissions that were made possible due to Germany's (insufficient) climate policies.<sup>181</sup>

#### iv. Other actors in climate litigation

All major actors typically involved in climate litigation cases against corporate actors in Germany have been addressed above.

## B. Procedural hurdles

### i. Standing

In German procedural law, there is no exact equivalent to the English legal term of "standing". It essentially means that claimants must (potentially) have been injured in their own rights. The term is mostly translated into German as *Rechtsschutzinteresse* (literally "interest in protection of rights").<sup>182</sup> *Rechtsschutzinteresse* is a condition for the admissibility of a claim and requires a legitimate interest in a decision by the courts, most often missing when there is an easier way to achieve legal protection.<sup>183</sup>

However, in German law, some elements of the American definition of standing are also treated as separate conditions of admissibility or merits and would thus be considered independently. Most importantly, the requirement of an injury in fact that is concrete and particularised is found in the German condition of admissibility of *Prozessführungsbefugnis* (right of action, literally "power to litigate"), which requires claimants to assert a right as their own.<sup>184</sup> In most cases, the person suing must be the person (potentially) injured, which limits the possibilities of group litigation (see *supra* A. i.). It is sufficient for the plaintiff to claim that he is the one entitled to the right asserted. The question of whether the claimant actually has the purported right, has been injured or is threatened by an imminent injury is a matter of the merits of the claim

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<sup>181</sup> *Haller/Risse*, NJW 2021, 3500, 3503.

<sup>182</sup> *Dietl/Lorenz*, Wörterbuch Recht, Wirtschaft & Politik, 7th ed. 2016.

<sup>183</sup> *Foerste*, in: Musielak/Voit (Eds.), 19th ed. 2022, ZPO before Sec. 253, para. 7, 8; Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861, para. 46.

<sup>184</sup> *Weth*, in: Musielak/Voit (Eds.), 19th ed. 2022, Sec. 51 para. 16.

(see *infra* C. i.).<sup>185</sup> In the climate claims before German courts, the claimants asserted their own rights (e.g. their general right of personality) and were therefore also entitled to bring proceedings. The Regional Court of Munich I recently decided that the right to bring the case is not precluded by the fact that the interest of the claimants cannot be distinguished from the interest of the general public (which will also suffer from the general consequences of climate change).<sup>186</sup>

However, courts find it impossible to predict whether granting injunctive relief will actually prevent the alleged injuries, thus not finding it likely that the injury will be redressed by a favourable decision.<sup>187</sup> Claimants argue that a favourable decision may not be able to prevent damages and injuries, but could help reduce the risks and mitigate the effects of climate change.<sup>188</sup> Whether or not the courts can grant the requested injunctive relief on the specific basis of the claim raised is a different matter, explicitly left open by the Regional Court of Braunschweig.<sup>189</sup> Although an obvious lack of redressability could be a barrier to admissibility, courts consider the redressability issues in climate litigation against companies in the merits: a court decision may not be evidently unsuited to redress the claims, but a favourable decision necessarily brings with it an interference with defendants' rights which cannot be justified in light of the remaining uncertainties of the reduction claim based on hypothetical developments.<sup>190</sup>

The requirement of an injury fairly traceable to the challenged action of the defendant is not typically discussed as an issue of standing – concerning the admissibility of a claim – in the German private law system, particularly in cases such as these where traceability seems possible. Causality and attribution are rather examined as substantive requirements of the basis of the claim, necessary for a decision on the merits.<sup>191</sup> In this context, causation and attribution are contentious questions widely debated in the literature and often left open by the courts (*infra* C.ii.).

## ii. Justiciability

The question of justiciability can be divided into two parts: separation of powers and displacement by written law.

Unlike in the United States, there is no explicit “political question doctrine” in Germany by which courts must first examine whether a certain issue is reserved for the political

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<sup>185</sup> Weth, in: Musielak/Voit (Eds.), 19th ed. 2022, Sec. 51 para. 18.

<sup>186</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861, para. 46.

<sup>187</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris – para. 35; Regional Court of Detmold, judgment of 24.02.2023 – 1 O 199/21, juris – para. 15.

<sup>188</sup> Statement of claim Lliuya v. RWE, Regional Court of Essen, judgment of 15.12.2016 – 2 O 285/15, p. 20.

<sup>189</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – para. 69.

<sup>190</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861 para. 73; Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – para. 77.

<sup>191</sup> Regional Court of Essen, judgment of 15.12.2016 – 2 O 285/15, paras. 6 ff.

branches of government and may not decide such cases.<sup>192</sup> However, a similar task allocation follows from the principle of the separation of powers inherent to the German Constitution.<sup>193</sup> The debate surrounding the separation of powers is not treated as an admissibility issue, but rather discussed in the merits, typically as the last point examined in the judgments.<sup>194</sup> It is never (presented as) the deciding factor for the claims' failure but is considered last, after other, more certain grounds for rejection have been identified.

Defendants argue that the courts are not authorised to decide cases of climate litigation against companies, as they would be going against the principle of separation of powers: decisions on national climate change policy must be made by the legislature, a favourable decision by the courts would conflict with the constitutional allocation of responsibilities between the three branches.<sup>195</sup> Courts agree, explaining that climate change is a global problem requiring a global solution. Deciding on a national climate change policy is a task for the legislator as the branch able and authorised to take all of the conflicting interests and implications surrounding such a decision into consideration. Courts, which are only concerned with bilateral conflicts, are not suitable for such wide-reaching decisions; by granting the claimants request, they would sidestep the legislative process.<sup>196</sup>

Recent examples are provided by the first-instance decisions in the proceedings against *Mercedes-Benz*<sup>197</sup>, *BMW*<sup>198</sup> and *VW*<sup>199</sup>.

The Regional Court of Stuttgart refused to grant *DUH's* claim against *Mercedes-Benz*, referring among other things to the fact that the claim contradicted the constitutional division of responsibilities between the legislative and judicial branches; the essential decisions for shaping social life and living conditions were to be made by the

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<sup>192</sup> See e.g. *Weller/Radke*, *Klimaklagen vor deutschen Gerichten*, in: *Jahrbuch Gespräche 2023*, p. 35, 44 with further references.

<sup>193</sup> Grzeszick, in: *Dürig/Herzog/Scholz* (Eds.), 99th ed. 2022, GG Art. 20, paras. 113 ff.

<sup>194</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris - paras. 36 ff; the defendants before Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861 para. 33 raise the point to dispute the admissibility of the claim, the court examines the point in the merits and rejects the claim.

<sup>195</sup> Regional Court of Stuttgart, judgment of 13.9.2022 – 17 O 789/21, juris - para. 19; Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861, para. 33; Regional Court of Braunschweig, judgment of 14.2.2023 – 6 O 3931/21, juris – para. 58.

<sup>196</sup> Regional Court of Stuttgart, judgment of 13.9.2022 – 17 O 789/21, juris – paras. 36 ff.; Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861, paras. 69 ff.; similar Regional Court of Braunschweig, judgment of 14.2.2023 – 6 O 3931/21, juris – para. 86.

<sup>197</sup> For more details on the case, see *supra* Part 1, C.i.2.b.aa.

<sup>198</sup> For more details on the case, see *supra* Part 1, C.i.2.b.bb.

<sup>199</sup> For more details on the case, see *supra* Part 1, C.i.2.b.cc.

legislature.<sup>200</sup> If the court were to uphold the action, it would give individuals the right to correct legal regulations in the transport sector by way of civil law.<sup>201</sup>

In the legal dispute against *BMW*, the Regional Court of Munich I also took into account that, in order to achieve the goals of the Paris Climate Agreement, the legislature had enacted a large number of regulations – which, according to the climate decision of the German Federal Constitutional Court<sup>202</sup>, were within the limits of the legislature's discretionary and creative leeway.<sup>203</sup> Additionally, it argued that climate protection, with its economic, social and environmental policy implications, was the responsibility of the parliament and the government.<sup>204</sup>

In the legal dispute against *VW*, the Regional Court of Braunschweig located the question in Sec. 1004 (2) BGB.<sup>205</sup> An obligation to tolerate the impairment of legal interests follows from the fact that the defendant is not subject to any more far-reaching obligations than the state by way of the indirect third-party effect.<sup>206</sup> However, according to the climate decision of the German Constitutional Court, the state fulfils its duty to protect.<sup>207</sup>

In the literature, too, the problem of justiciability is treated as a matter of substantive law. In some cases, it is already being considered at the causality level via evaluative criteria; climate damage is seen as a general life risk caused by energy production and industrial activities.<sup>208</sup>

Predominantly, the question is embedded in the dogmatics of duty and illegality (duty of care towards third parties (*Verkehrspflicht*) under Sec. 823 (1) BGB, the concept of the inferer (*Störer*) under Sec. 1004 (1) BGB or the duty of tolerance (*Duldungspflicht*) under Sec. 1004 (2) BGB).<sup>209</sup>

The displacement of unwritten common law or case law developed by the courts through codified law is not further discussed as an independent legal issue, as the

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<sup>200</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris – para. 36; critically *Schmidt-Ahrendts/Schneider*, NJW 2022, 3475, 3478.; see also, in more detail, *Weller/Radke*, Klimaklagen vor deutschen Gerichten, in: Jahrbuch Bitburger Gespräche 2023, p. 35, 45.

<sup>201</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris – para. 37.

<sup>202</sup> See *supra* Part 1, B.i.

<sup>203</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861 para. 65, 68.

<sup>204</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861 para. 70.

<sup>205</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – paras. 73 ff.

<sup>206</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – paras. 87, 104, 112, 119.

As a decisive and superordinate canon of values, fundamental rights are to be taken into account in the interpretation of civil law provisions, in particular of indeterminate legal concepts with a general clause-like character; the concept is settled case law, see only German Constitutional Court, judgment of 11.04.2018 – 1 BvR 3080/09, NJW 2018, 1667 paras. 31 ff.

<sup>207</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – para. 109.

<sup>208</sup> *Chatzinerantzis/Herz*, NJOZ 2010, 594, 598; *Keller/Kapoor*, BB 2019, 706, 709.

<sup>209</sup> *Wagner/Arntz*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, 403, 417 f. paras. 63 ff., 422 f. paras. 88f.; *Wagner*, *Klimahaftung vor Gericht*, 2020, pp. 47 ff.; *Weller/Tran*, *Climate Action 2022*, 1, 12; *Weller/Tran*, ZEuP 2021, 573, 604.

German legal system is based on codified written law and precedent is not binding like in common law systems.

### iii. Jurisdiction

Jurisdiction in climate change litigation against companies has not been an issue before German courts.

With regard to cases brought against defendants from the EU member states, international jurisdiction is governed by the Brussels Ia-Regulation<sup>210</sup>, which declares the jurisdiction of courts at the statutory seat, central administration or principal place of business for claims against legal persons in Art. 4 no. 1, 63 no. 1 as well as in the place where the harmful event occurred for matters relating to tort in Art. 7 (2). While the determination of the place where the harmful event occurred – relevant for determining the applicable law as well as the competent jurisdiction – has been widely discussed in the literature<sup>211</sup> and explained in detail in the claims<sup>212</sup>, it has been no practical issue so far because the climate litigation cases brought before German courts were only directed at companies who had their seat in Germany. The occasionally raised question of whether German courts could forbid the sale of cars worldwide was determined to be a matter of the merits.<sup>213</sup>

For cases brought against defendants from third countries, the national rules on local jurisdiction serve a double function and simultaneously determine international jurisdiction (see Art. 6 (1) Brussels Ia-Regulation).<sup>214</sup> Jurisdiction against defendants from third countries could e.g. be based on Sec. 23 ZPO (jurisdiction based on assets in Germany) or on Sec. 32 ZPO (jurisdiction for tort claims).

Subject matter jurisdiction is determined according to the amount in dispute. If the disputed amount is higher than 5.000 euros, claims are subject to the jurisdiction of the regional courts at first instance, Sec. 1 ZPO in connection with Sec. 23 no. 1 of the Courts Constitution Act (*Gerichtsverfassungsgesetz, GVG*).

### iv. Group litigation / class actions

Climate change litigation against companies in Germany is being exclusively pursued by individual claimants, as there is neither a relevant possibility for class action nor can legal entities such as NGOs generally assert their members' rights in the German legal

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<sup>210</sup> Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012 L 351, 1.

<sup>211</sup> See only Weller/Tran, *ZeUP* 2021, 573, 592 and Kieninger, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 119 with further references.

<sup>212</sup> Statement of claim *Lliuya v. RWE*, Regional Court of Essen, 15.12.2016 – 2 O 285/15, p. 21 ff.

<sup>213</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861 para. 44.

<sup>214</sup> Heinrich, in: Musielak/Voit (Eds.), 19. Ed. 2022, ZPO Sec. 12 para. 17.



system (*supra* A.i.2.).<sup>215</sup> The German legal system generally does not allow an “*actio popularis*”: claimants must demonstrate a (potential) injury to their own individual rights for their claim to be admissible.<sup>216</sup> Defendants have consistently disputed that claimants fulfil this requirement in court, stating that claimants assert hypothetical and unspecific injuries, are no more affected by climate change than any other person, and that the claims are simply a workaround.<sup>217</sup> This argument is not entirely far-fetched, considering that all current lawsuits are being supported by well-known climate protection NGOs and most of the individual claimants are directors and managers of these institutions.<sup>218</sup> Courts have consistently refuted this objection, however, accurately pointing out that even with a large number of affected people, when examined independently – as is the case in every lawsuit – each individual fulfils the requirements of (potential) injury in their own rights and must be able to protect themselves through legal action.<sup>219</sup>

Similarly to mass tort cases in the United States, the current cases of climate change litigation against companies in Germany follow a political purpose beyond simply winning the case and redressing the individual issue (*strategic litigation*). However, this second purpose does not make the claim any less legitimate since the essential requirement of a (potential) injury in the claimants’ own rights is given; an abuse of rights or of the legal system cannot be identified.<sup>220</sup>

#### v. Apportionment (of costs)

As a rule, the costs of the proceedings are borne by the losing party (Sec. 91 ZPO). However, Sec. 91 ZPO only covers the “necessary” costs, i.e. those objectively necessary and suited to defend or pursue a right, not necessarily the costs of optimal litigation, thereby limiting the financial risk for the climate litigants who might be losing their cases.<sup>221</sup> Any costs that go beyond statutorily fixed tables cannot be recovered; attorney fees must only be reimbursed in the amount of compensation fixed by law,

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<sup>215</sup> Class action is limited to very few cases in the German legal system, including the Musterfeststellungsklage (Sec. 606 ZPO ff.) in certain cases between consumers and businesses and certain administrative procedures. Collective action by an organisation on behalf of its members is only possible in specific constellations according to the UklG as well as in competition law.

<sup>216</sup> Weth, in: Musielak/Voit (Eds.), 19. Ed. 2022, ZPO Sec. 51 paras. 14 f.

<sup>217</sup> Regional Court of Stuttgart, 13.09.2022 – 17 O 789/21, juris – para. 19; Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861, para. 33.

<sup>218</sup> <https://www.duh.de/klimaklagen/klimaklagen-gegen-unternehmen/>; <https://www.greenpeace.de/klimaschutz/mobilitaet/vw-klage-gericht>; <https://rwe.climatecase.org/de>.

<sup>219</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861, para. 46; with the same result Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris – para. 25; Regional Court of Braunschweig, judgment of 14.2.2023 – 6 O 3931/21, juris – para. 65.

<sup>220</sup> Regional Court of Braunschweig, judgment of 14.2.2023 – 6 O 3931/21, juris – para. 70.

<sup>221</sup> *Flockenhaus*, in: Musielak/Voit ZPO (Eds.), 20th ed. 2023, Sec. 91 ZPO para. 8; *Schulz*, in: MüKo ZPO, 6th ed. 2020, Sec. 91 ZPO, para. 48 ff.



irrespective of the contractually agreed fees, which may be much higher.<sup>222</sup> Usually, climate litigation requires sophisticated legal advice on both sides, given the relatively new phenomenon and atypical nature of these claims.<sup>223</sup> As a result, defendant companies will usually mandate high-paying law firms with these claims, while claimants typically have limited financial means. Thus, the limitation of the reimbursement of costs to the statutory fees limits the risk for the claimants. The financial risk for the individual claimants is further minimised by the fact that most claimants are financially (and otherwise) supported by NGOs.

Furthermore, claimants have the option of seeking legal aid (*Prozesskostenhilfe*, Sec. 114 ff. ZPO), if they can demonstrate that they lack the means to go to trial and if the lawsuit is not wanton or frivolous. In order to demonstrate this, claimants need to show a certain probability that they will prevail on the claim. While many climate cases have ultimately been dismissed, they will likely succeed on this hurdle, as climate cases usually pass the pre-trial phase – which requires some degree of merit (*Schlüssigkeit*) – and go to trial. Legal aid can exempt a party from bearing its own costs or reduce the costs, but the party must still reimburse the opposing winning party; since there is a large risk that the aided party is truly and permanently unable to pay, the process and requirements for granting legal aid must be carefully examined to protect the winning party.<sup>224</sup>

However, legal aid covers at most the statutory fees for an attorney.<sup>225</sup> Due to the need for intensive and specialised legal advice, climate litigation can therefore typically not be funded through legal aid alone.<sup>226</sup> Rather, climate litigation in Germany is typically backed by an NGO.<sup>227</sup> Since NGOs, in turn, are mainly financed through donations, questions arise when competing companies support climate cases against a competitor by donation; it is not yet clear how these cases will be handled long-term.<sup>228</sup> Furthermore, questions of cost arise when claimants are unsuccessful: if successful respondents were barred from seeking reimbursement by the financial backer and could only turn to the individual claimant, the incentives for litigation would appear skewed, as the respondent might be left with the costs of an elaborate case.<sup>229</sup> As a

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<sup>222</sup> Schulz, in: MüKo ZPO, 6th ed. 2020, Sec. 91 ZPO, para. 61.

<sup>223</sup> Cf. Domej, in: Reinisch/Hobe/Kieninger/Peters (Eds.), *Unternehmensverantwortung und Internationales Recht*, 2020, p. 241.

<sup>224</sup> Wache, in: MüKo ZPO, 6th ed. 2020, Sec. 114 ZPO, para. 5 ff.

<sup>225</sup> Wache, in: MüKo ZPO, 6th ed. 2020, Sec. 121 ZPO, para. 30.

<sup>226</sup> Cf. Domej, in: Reinisch/Hobe/Kieninger/Peters (Eds.), *Unternehmensverantwortung und Internationales Recht*, 2020, p. 241 ff.

<sup>227</sup> For *Lliuya v. RWE* see the material provided by Germanwatch e.V. at <https://rwe.climatecase.org/de/material>, last accessed 28.4.2023; although *Lliuya* may have been entitled to legal aid, he has refrained from making use of his right, *Verheyen*, ZRP 2021, 133, 134.

<sup>228</sup> Cf. Domej, in: Reinisch/Hobe/Kieninger/Peters (Eds.), *Unternehmensverantwortung und Internationales Recht*, 2020, p. 247.

<sup>229</sup> Cf. Domej, in: Reinisch/Hobe/Kieninger/Peters (Eds.), *Unternehmensverantwortung und Internationales Recht*, 2020, p. 248.

rule, reimbursement claims only exist between the opposing parties, although there are exceptions i.e. for legal insurance companies.<sup>230</sup> Although financing agreements – particularly with a commercial financier – frequently include the obligation to reimburse the winning respondent, there are no direct grounds for a reimbursement claim provided in German law.<sup>231</sup>

In Germany, contingency fees, i.e. agreements by which the fees are dependent on the successful outcome of the case and the lawyer gets a portion of the total sum awarded to the winning litigant, are widely considered to be unethical and are only allowed under specific and narrow circumstances.<sup>232</sup> These so-called “no win, no fee” agreements that are available in the US, are seen as increasing incentives to go to court – an incentive not offered by the German legal system.

#### vi. Disclosure

It is important to note that in Germany, no US- or UK-style pre-trial discovery<sup>233</sup> or disclosure<sup>234</sup> exists. Absent this tool to gather facts and evidence at the early stages of the proceedings, the claimant needs to demonstrate the merits and probability of his or her claim with the evidence available in the course of the written submissions and the oral hearings. However, opposed to traditionally adversarial systems like the US or the UK, judges in Germany are able to take a more active part in the clarification of the facts.<sup>235</sup>

Civil cases are, however, decided on the basis of the information provided by the parties, the court does not investigate independently.<sup>236</sup> In principle, each party bears the burden of proof for the information and supporting evidence that is beneficial for its own argument – there is no requirement to provide the opposing party with all the information and evidence that would support its side.<sup>237</sup> The exceptions to this division of the burden of proof are typically based on an imbalance of power or information deficits between the parties (see *infra* D.i.).

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<sup>230</sup> Schulz, in: MüKo ZPO, 6th ed. 2020, Sec. 91 ZPO, para. 19.

<sup>231</sup> Cf. Domej, in: Reinisch/Hobe/Kieninger/Peters (Eds.), Unternehmensverantwortung und Internationales Recht, 2020, p. 248.

<sup>232</sup> Cf. Domej, in: Reinisch/Hobe/Kieninger/Peters (Eds.), Unternehmensverantwortung und Internationales Recht, 2020, p. 243; see Sec. 49b (2) Bundesrechtsanwaltsordnung, Federal Lawyers’ Act, Sec. 4a Rechtsanwaltsvergütungsgesetz, Lawyers’ Compensation Act.

<sup>233</sup> This is one of the differences between the so-called inquisitorial system as practiced in Continental-Europe and the adversarial system applied in US civil procedure, Glaser, Pretrial Discovery and the Adversary System, 1968, pp. 1 ff., 146; see also Weiner, StudZR WissOn 2019 (1), 1, 10-12.

<sup>234</sup> Schneider, IWRZ 2018, 195, 198.

<sup>235</sup> Langbein, The German Advantage in Civil Procedure, The University of Chicago Law Review 1985, 52 (4), 823, 826.

<sup>236</sup> Prütting, in MünchKomm ZPO, 6th ed. 2020, Sec. 284 ZPO, para. 107.

<sup>237</sup> Prütting, in MünchKomm ZPO, 6th ed. 2020, Sec. 284 ZPO, para. 111.

## C. Arguments and Defences

### i. Imminence of a violation of legal rights

In order to establish an imminent infringement of legal rights, claimants often refer to the decision of the Federal Constitutional Court from 24 March 2021<sup>238</sup>, in which the Federal Constitutional Court recognised the intertemporal dimension of basic rights. Claimants argue that it is certain future injuries are being caused by current emissions; the injuries thus do not need to be imminent but only predicted with certainty, since they can only be prevented by injunctive relief before it is too late.<sup>239</sup>

The lower courts currently concerned with climate change litigation against companies handle the problem differently. The Regional Court of Stuttgart held that a balancing of interests between the claimants' potentially impaired interests and the opposing rights of the defendant was not possible, as the effects of the continued production of internal combustion engines by the defendant on the claimant's life are completely uncertain.<sup>240</sup> This view is shared by the Higher Regional Court of Munich.<sup>241</sup>

The Regional Court of Munich I, although supposing a certain injury,<sup>242</sup> concluded that – at least at present – there was no unlawful infringement of the claimants' general right of personality.<sup>243</sup> The Regional Court of Braunschweig left the question open.<sup>244</sup>

### ii. Causation

Even though today the causal link between carbon dioxide emissions and climate change in general is in principle established, causation remains one of the main hurdles for (private) climate litigation against corporate actors. This is because a claim for damages requires the claimant to trace an individual violation of legal interests back to a defendant's individual emissions. Quite similarly, climate litigation aimed at a reduction of future emission presupposes a specific cause and effect relationship between the behaviour of the defendant (e.g. production of cars) and the threat of a violation of specific legal rights of the claimant.<sup>245</sup> How great the difficulties of proving causality are therefore depends above all on the type of infringement and the infringed right.

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<sup>238</sup> German Federal Constitutional Court, judgment of 24.03.2021 – 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, NJW 2021, 1723, 1723.

<sup>239</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris – para. 4.

<sup>240</sup> Regional Court of Stuttgart, judgment of 13.9.2022 – 17 O 789/21, juris – para. 23.

<sup>241</sup> Higher Regional Court of Munich, judgement of 12.10.2023 – 32 U 936/23, BeckRS 2023, 30283, para. 85.

<sup>242</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861, paras. 61 ff.

<sup>243</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861, paras. 6 ff.

<sup>244</sup> Regional Court of Braunschweig, judgment of 14.02.2023 - 6 O 3931/21, juris.

<sup>245</sup> See on causation with regard to reduction claims *Schirmer*, NJW 2023, 113.

Causation under German private law has two components. (1) The *conditio sine qua non*-test<sup>246</sup> requires a causal link in a factual sense. Under this test, an act has caused an injury if the injury would not have happened without the act in question. (2) The doctrine of adequate causation limits the range of causal behaviour by classifying an act as the adequate cause of the injury only if it led to a serious increase of the risk of harm and if the injury is within the natural course of events that could be expected to flow from the defendant's wrongful act.

As far as can be seen, domestic civil courts that have already ruled on climate claims against corporate actors have either denied the causality question<sup>247</sup> without collecting any evidence or (mostly) left it open and dismissed the climate claims on other grounds.<sup>248</sup> However, the Higher Regional Court of Hamm as court of second instance in the *RWE* case has decided to gather evidence on the question of causality.<sup>249</sup> Most legal scholars state that causation will be difficult or even impossible to establish in compensation claims against corporate actors.<sup>250</sup> However, most of the discussion on causation is focused on the *RWE* case. The problems addressed there will not necessarily arise in the same way in reduction claims or with other infringements of legal rights.

### 1. *Conditio sine qua non*-test

Climate claims against corporate actors are often held to fail the *conditio sine qua non*-test, i.e. the demonstration of a factual causal connection. Problems arise mainly at two points in the causal chain:

- 1) Causal link between the general increase in global surface temperatures and an individual extreme weather event: In cases of damages for extreme weather events, the *conditio sine qua non*-test may fail due to the complexity of weather events and of the multiple and multifactorial preconditions of such events. While it can be shown that climate change increases the frequency and severity of extreme weather on average, any single event could also have occurred without global warming. Thus, in cases of floods, storms and draughts, even the factual causal link between climate change and the individual weather event is hard to

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<sup>246</sup> In English, this is also referred to as *but for*-test.

<sup>247</sup> Regional Court of Essen, judgement of 15.12.2016 – 2 O 285/15, NVWZ 2017, 734.

<sup>248</sup> Regional Court of Stuttgart, judgment of 13.09.2022 – 17 O 789/21, juris; Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris; Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861.

<sup>249</sup> Higher Regional Court of Hamm, judgment of 30.11. 2017 - I-5 U 15/17, juris.

<sup>250</sup> See e.g. *Wagner/Arntz*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 413, para. 37; *Frenz*, RdE 2021, 66; *Chatzinerantzis/Appel*, NJW 2019, 881, 882 ff.; *Keller/Kapoor*, BB 2019, 706, 7097 ff.; *Zeidler*, *Klimahaftungsklagen*, 2022, p. 133; differentiating *Ipsen/Waßmuth/Plappert*, ZIP 2021, 1843, 1844 ff.; for an optimistic approach *Schirmer*, JZ 2021, 1099; *Schirmer*, *Nachhaltiges Privatrecht*, 2023, pp. 187 ff.; *Frank*, NVwZ 2017, 664, 666 f.; *Kling*, KJ 51 (2018) 213, 221.

establish.<sup>251</sup> Here the legal argument must be based on advanced scientific research, which has, however, made great progress in the last years in attributing certain events to a specific rise in temperature.<sup>252</sup>

- 2) Causal link between the share of emissions of the individual corporate actor and the harmful event: Climate change is brought about by a multitude of emitters. To establish a causal link between the emissions of an individual corporate actor and a harmful event (such as the melting of a glacier), claimants have to deal with a combination of cumulative and alternative causality.<sup>253</sup> In the case of several acts of different agents, each single act will be classified as causal if all acts brought about the injury together, i.e. if the injury had not occurred without each individual act (cumulative causality). On the other hand, each of the acts is causal if each one would have brought about the injury on its own (alternative causality). In climate cases for damages (like the *RWE* case), however, neither of these conditions is fulfilled.
- Even the emissions of large emitters are only a relatively small part of innumerable other emissions that are and were emitted by a multitude of small and large emitters. They would, for themselves, never have sufficed to create any damage (no alternative causality).
  - Climate change and its ecological effects like the melting of glaciers are not necessarily linear developments but can be intensified or mitigated by certain elements. Inter alia, there may be tipping points after which certain harmful events can no longer be prevented. This, however, would mean that emissions after a certain point in time are no longer causal because the harmful event would have occurred even without the later emissions.<sup>254</sup> Returning to the example of the *RWE* case, the glacier would arguably have melted even without the emissions of a single large emitter like *RWE* (no cumulative causality).<sup>255</sup>

Therefore, the court of first instance in the *RWE* case denied the causality of emissions of carbon majors for climate related damages. This position is also based on a former decision of the German Federal Court of Justice regarding the liability of several emitters for forest damage via acid rains. In this case, the German Federal Court of

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<sup>251</sup> See e.g. *Wagner/Arntz*, in: *Kahl/Weller* (Eds.), *Climate Change Litigation*, 2021, p. 414, para. 40; *Zeidler*, *Klimahaftungsklagen*, 2022, S. 122; *Kling*, *KJ* 51 (2018), 213, 216.

<sup>252</sup> See e.g. *Stuart-Smith et al*, *Nature Climate Change* 2021, 651; *Burger/Wentz/Horton*, *Columbia Journal of Environmental Law* 45 (2020), 57 ff.; *Kieninger*, *ZHR* 187 (2023), 348, 369 ff.

<sup>253</sup> See also *Ipsen/Waßmuth/Plappert*, *ZIP* 2021, 1843, 1844 ff.; *Chatzinerantzis/Appel*, *NJW* 2019, 881, 882.

<sup>254</sup> *Zeidler*, *Klimahaftungsklagen*, 2022, p. 122; *Pöttker*, *Klimahaftungsrecht*, 2014, pp. 53 ff., 200 f.

<sup>255</sup> *Regional Court of Essen*, judgement of 15.12.2016 – 2 O 285/15, *NVWZ* 2017, 734, 736. See also *Zeidler*, *Klimahaftungsklagen*, 2022, p. 127; *Wagner/Arntz*, in: *Kahl/Weller* (Eds.), *Climate Change Litigation*, 2021, p. 414, para. 43.

Justice also insisted on an individual causal link between each individual emitter and the damage.<sup>256</sup>

Some authors, however, try to establish causality in these cases by either combining the principles of cumulative and alternative causality<sup>257</sup> or by relying on Sec. 830 (1) cl. 2 BGB.<sup>258</sup> These approaches would lead to a full liability of individual corporate actors for the whole damage of the harmful event.<sup>259</sup>

A more promising approach in literature tries to overcome the problem of causation by establishing a *partial* liability of each large emitter *proportionate* to their share in the overall emissions that have added up in the atmosphere and lead to global warming.<sup>260</sup> The *RWE* case was structured accordingly; *Lliuya* seeks *RWE AG* to reimburse 0.47% of the costs of his protective measures which corresponds the share of *RWE's* emissions. This result could be justified by the idea that, in principle, each individual particle emitted causes the same (minimal) rise in temperature. Thus, the overall damage is split up into individual partial damages that can be linked to the emissions of each individual emitter.<sup>261</sup> However, as intuitive as this approach may seem, it cannot yet be based on generally accepted principles of German tort law. At least the Higher Regional Court Hamm as court of second instance in the *RWE* case seems to be open for such a partial liability and has decided to gather evidence on the question of causation and the share of *RWE's* emissions.<sup>262</sup>

## 2. Adequate causation

If the *conditio sine qua non*-test should be satisfied, adequate causation further poses several typical problems in cases of climate liability. The courts have, so far, not addressed these questions because claims were dismissed on other grounds. The following arguments are being made in legal literature:

- 1) Because the share of individual greenhouse gas emitters in global climate change is so small, it can be argued that the share of the individual emitter,

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<sup>256</sup> German Federal Court of Justice, judgment of 10.12.1987 – III ZR 220/86, NJW 1988, 478 f. For an application of this reasoning to damages for climate change *Wagner/Arntz*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 414, para 47; *Chatzinerantzis/Appel*, NJW 2019, 881, 882; for a different opinion see *Kling*, KJ 51 (2018), 213, 220 ff.; *Frank*, NVwZ 2017, 664, 668.

<sup>257</sup> *Ipsen/Waßmuth/Plappert*, ZIP 2021, 1843, 1845.

<sup>258</sup> In detail *infra* Part 3, A. ii.; see also *Pöttker*, *Klimahaftungsrecht*, 2014, pp. 203 ff.

<sup>259</sup> See *Pöttker*, *Klimahaftung*, 2014, pp. 237 ff.

<sup>260</sup> In detail *infra* Part 3, A. ii.; see also *Schirmer*, JZ 2021, 1099, 1103; *Schirmer*, *Nachhaltiges Privatrecht*, 2023, pp. 187 ff.; *Frank*, NVwZ 2017, 664, 666 f.; *Kling*, KJ 51 (2018) 213, 221; *Kieninger*, ZHR 187 (2023), 348, 367 ff.

<sup>261</sup> In this direction *Schirmer*, JZ 2021, 1099, 1103. It is accepted that actors who have caused individual partial damages are only liable for the respective partial damage they caused, see *Wagner*, in: MünchKomm BGB, 8th ed. 2020, Sec. 830 paras. 1, 51; *Spindler*, in: BeckOK BGB, 2023, Sec. 830 para. 30.

<sup>262</sup> Higher Regional Court of Hamm, decision of 30.11. 2017 – I-5 U 15/17, juris.

and be it a large emitter such as RWE, does not increase the risks related to climate change in a *significant* way.<sup>263</sup>

- 2) Another argument that can be made against adequate causation turns on the question of foreseeability. The prevailing opinion takes an *ex ante* approach to this question. Thus, when calculating the relevant emissions of the defendant, one may only look at those emissions that were caused at a point in time where climate change became a publicly known fact or at least known in the scientific community.<sup>264</sup> When this knowledge generally became available is viewed differently: while *Wagner* sees this point in time in 1990, the Higher Regional Court of Hamm as the court of second instance in the RWE case currently assumes predictability since 1958.<sup>265</sup> A counterargument would take an objective *ex post* approach and ask whether the result of global warming was foreseeable based on the knowledge available today.<sup>266</sup>
- 3) Thirdly, it is often said that one of the key functions of the adequacy test is to exempt socially adequate behaviour from liability. It could be said that e.g. the manufacturing of cars or the operation of a power plant is socially adequate and even necessary behaviour.<sup>267</sup> This argument is closely related to the defence of lawful behaviour based on permits and emission certificates.

### iii. Lawful justification based on permits and emission certificates

Another prominent defence are the permits issued to the defendants, the compliance with emission limits and issued or acquired emission certificates.<sup>268</sup> Immission control permits (Sec. 4 of the German Immission Control Act (*Bundes-Immissionsschutzgesetz, BImSchG*)) play a role primarily for energy-producing companies and other high-emission industries such as the iron and steel industry. They also typically hold permits under the Greenhouse Gas Emissions Trading Act (*Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen, TEHG*) and are subject to the obligation to surrender emission allowances to the Federal Environment Agency, the number of which corresponds to the emissions caused by their activities in the previous calendar year (Sec. 5, 7 TEHG). Air traffic is also subject to the TEHG.<sup>269</sup> The German

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<sup>263</sup> Regional Court of Essen, judgment of 15.12.2016 – 2 O 285/15, NVWZ 2017, 734, 736. See also *Wagner/Arntz*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 414, para. 50; *Chatzinerantzis/Appel*, NJW 2019, 881, 882. See for a criticism on this argument *Schirmer*, JZ 2021, 1099, 1103.

<sup>264</sup> For foreseeability from the 1990s: *Wagner/Arntz*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 414, n. 53; for foreseeability from the 1960s *Schirmer*, JZ 2021, 1099, 1105.

<sup>265</sup> Higher Regional Court of Hamm, judgment of 01.07.2021 – I-5 U 15/17, juris.

<sup>266</sup> In this direction: *Grüneberg*, in: *Grüneberg* (Ed.), 82nd ed. 2023, BGB before Sec. 249 para. 27.

<sup>267</sup> *Wagner/Arntz*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 414, paras. 56 ff.

<sup>268</sup> See with reference to the defendant's arguments Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – paras. 92, 94; Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861 paras. 38; *Wagner/Arntz*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, 403, paras. 61 f.; *Wagner*, *Klimahaftung vor Gericht*, 2020, pp. 75 f.

<sup>269</sup> Subsequently included, see Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse



Fuel Emissions Trading Act (*Gesetz über einen nationalen Zertifikatehandel für Brennstoffemissionen, BEHG*) also subjects companies that put fossil fuels on the market to surrender emission allowances (Sec. 8 BEHG). In the automotive industry, type approvals and fleet limits play a role.<sup>270</sup> By means of the type approval, the German Motor Transport Authority confirms that a type of similar vehicle produced in series in large numbers complies with the legal requirements.<sup>271</sup> The fleet limit sets the maximum CO<sub>2</sub> emissions of their vehicle fleet per kilometre driven for manufacturers of passenger cars and light commercial vehicles.<sup>272</sup>

### 1. Explicit provisions

Sporadically, the law contains explicit provisions that address the relationship between public-law regulation and private-law claims, which are also discussed in the context of climate liability.<sup>273</sup>

#### a. Sec. 906 (1) cl. 1, cl. 2 BGB

According to Sec. 906 (1) cl. 1, cl. 2 BGB, an owner generally cannot prohibit the supply of imponderable substances, including gases, which are within legal limits or guidelines. In the case of compliance with greenhouse gas limits, some authors argue that the obligation to tolerate should also be extended to those affected by climate change.<sup>274</sup> Greenhouse gas emissions that must be tolerated by the neighbourhood would have to be lawful *a fortiori* with respect to more distant and less affected climate change victims.<sup>275</sup> Others, however, argue that the assumption of lesser affectedness is mistaken. Distant climate change affected persons such as the Peruvian farmer *Lliuya* in the *RWE* case are exposed to significant property and health hazards from greenhouse gas emissions and are therefore typically more, not less, affected than the neighbourhood.<sup>276</sup> In addition, none of the relevant rules and regulations specifies a limit or guideline value within the meaning of Sec. 906 (1) cl. 2 BGB.<sup>277</sup> This would only

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gas emission allowance trading within the Community; exceptions can be found in Annex 1 Part 2 no. 33 lit. a to i to the TEHG.

<sup>270</sup> For the action against VW before the Regional Court of Detmold, see *Schirmer*, NJW 2023, 113, 116 para. 16; see also *Weller/Hössl/Radke*, Gesellschafts- und deliktsrechtliche Klimaklagen, in: *Nachhaltigkeit im Wirtschaftsrecht* 2023, p. 143.

<sup>271</sup> See Sec. 2 (1) lit. a) of the German Act on the Establishment of a Federal Motor Transport Authority (*Gesetz über die Errichtung eines Kraftfahrt-Bundesamtes, KBAG*) in conjunction with Regulation (EU) 2018/858.

<sup>272</sup> Since 01.01.2020: 95 g CO<sub>2</sub>/km (passenger cars), 147 g CO<sub>2</sub>/km (light commercial vehicles), see Sec. 1 (2) Regulation (EU) 2019/631.

<sup>273</sup> See Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – para. 91.

<sup>274</sup> *Wagner*, Klimahaftung vor Gericht, 2020, p. 81; *Wagner/Arntz*, in: *Kahl/Weller* (Eds.), *Climate Change Litigation*, 2021, p. 403, n. 72.

<sup>275</sup> *Wagner*, Klimahaftung vor Gericht, 2020, 81; *Wagner/Arntz*, in: *Climate Change Litigation*, 2020, 403, 420 para. 72.

<sup>276</sup> *Schirmer*, *Nachhaltiges Privatrecht*, 2023, p. 262.

<sup>277</sup> *Schirmer*, *Nachhaltiges Privatrecht*, 2023, p. 211; with regard to the Fleet Limit Value Regulation see also *Schirmer*, NJW 2023, 113, 118 para. 18.

be the case if they served as a typified assessment of individual impairments.<sup>278</sup> However, the relevant rules and regulations merely address the question of the limit up to which greenhouse gases are acceptable for the global climate, but say nothing about the specific compatibility for individually affected persons.<sup>279</sup>

#### b. Sec. 14 cl. 1 BImSchG

Sec. 14 cl. 1 BImSchG precludes claims under private law for the cessation of operations if a plant is approved under the BImSchG. This obligation to tolerate is extended by some authors to those affected by climate change.<sup>280</sup> At the same time, a claim for damages under Sec. 14 cl. 2 BImSchG is denied.<sup>281</sup> The justification is that the spatial-personal applicability of the provision is limited to the neighbourhood.<sup>282</sup> Some argue that this is inconsistent: on the one hand, the obligation to tolerate in Sec. 14 cl. 1 BImSchG is interpreted broadly in order to include affected persons outside of the neighbourhood in the scope of application of the provision, on the other hand, a narrow interpretation of the provision in the context of the compensation claim is proposed, which deprives those obligated to tolerate the emissions of the claim.<sup>283</sup>

### 2. Unity of the legal order and mandate to supply

Outside the scope of these explicit provisions, the topos of the “unity of the legal order” is used to negate climate liability with reference to the permissibility of the defendant's conduct under public law.<sup>284</sup> It is seen as a contradiction if those responsible for greenhouse gas emissions could be held accountable under civil law for greenhouse gas emissions which they were permitted to emit and which were within the relevant limits and/or were covered by European emissions trading.<sup>285</sup> The argument of the unity of the legal order goes back to a 1939 decision.<sup>286</sup> Here, it was ruled that a mining

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<sup>278</sup> German Federal Court of Justice, judgment of 10.12.2004 – V ZR 72/04, NJW 2005, 660, 663; see also Schirmer, *Nachhaltiges Privatrecht*, 2023, p. 212; Schirmer, NJW 2023, 113, 118 para. 18.

<sup>279</sup> Cf. Schirmer, *Nachhaltiges Privatrecht*, 2023, p. 212; with regard to the Fleet Limit Value Regulation see also Schirmer, NJW 2023, 113, 118 paras. 18.

<sup>280</sup> Wagner, *Klimahaftung vor Gericht* Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 403 n. 90.; see also Gärditz, *EurUP* 2022, 45, 70.

<sup>281</sup> Wagner, *Klimahaftung vor Gericht*, 2020, p. 110; Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, 403, n. 98.

<sup>282</sup> Wagner, *Klimahaftung vor Gericht*, 2020, p. 110; Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, 403, n. 98.

<sup>283</sup> For a non-applicability of the provision to climate change affected persons also Schirmer, *Nachhaltiges Privatrecht*, 2023, pp. 264 f. See also Weller/Radke, *Klimaklagen vor deutschen Gerichten*, in: *Jahrbuch Bitburger Gespräche* 2023, p. 35, 55.

<sup>284</sup> See with reference to the defendant's arguments Regional Court of Braunschweig, judgement of 14.02.2023 – 6 O 3931/21, juris – para. 95; Chatzinerantzis/Appel, NJW 2019, 881, 885; Wagner, *Klimahaftung vor Gericht*, 2020, pp. 75 f.; Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2020, 403, paras. 62, 90.

<sup>285</sup> Cf. Chatzinerantzis/Appel, NJW 2019, 881, 885; Gärditz, *EurUP* 2022, 45, 55, 58, 61, 68f.; Lehmann/Eichel, *RabelsZ* 83 (2019), 77, 103; Treffer, *JR* 2022, 503; Wagner, *Klimahaftung vor Gericht*, 2020, pp. 75 f.; Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, 403, n. 62, 90.

<sup>286</sup> Reichsgericht, judgment of 14.09.1939 - V 46/39, RGZ 161, 203, 208.

company that conducted its operations in accordance with public law did not act unlawfully within the meaning of Sec. 823 BGB.<sup>287</sup>

In addition, the literature refers to the legal obligation of energy companies (Sec. 2 (1), 1 (1) of the German Energy Industry Law (*Energiewirtschaftsgesetz, EnWG*)) to supply the general public with electricity<sup>288</sup> and case law of the German Constitutional Court, in which it equated the supply of electricity with the "interest in daily bread"<sup>289</sup> and assigned the energy supply to the area of services of general interest.<sup>290</sup>

However, the German Federal Court of Justice prominently ruled in 1984 that public-law limits merely serve as an orientation for the civil law duty of care, but that the civil law duty of care could require more extensive protective measures from the permit holder in the event of concrete indications.<sup>291</sup> Accordingly, the Regional Court of Braunschweig rejected VW's recourse to public law permits and the conformity of its conduct with regulations harmonised at the European level for the limitation of emissions.<sup>292</sup> Neither permits nor the primacy of European law application (*Anwendungsvorrang*) justified an obligation to tolerate.<sup>293</sup> There was no automatic concurrence or "parallelism" between claims under public and civil law.<sup>294</sup> In the literature, too, a growing number of voices reject the argument of the unity of the legal order in the area of climate liability and recognise a fundamentally autonomous determination of duties of care under civil law.<sup>295</sup>

Normatively, this idea is reflected in Sec. 906 (1) cl. 2 BGB: For the purpose of civil law, compliance with the requirements of public law only means "as a rule" that there is no significant impairment.<sup>296</sup> However, the presumption can be rebutted. Sec. 906 (1) cl. 2 BGB shows that, even in the area of services of general interest regulated under public law, the legislature is fundamentally in favour of a differentiating solution in

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<sup>287</sup> Reichsgericht, judgment of 14.09.1939 - V 46/39, RGZ 161, 203, 208.

<sup>288</sup> Wagner, *Klimahaftung vor Gericht*, 2020, pp. 60 f.; Wagner/Arntz, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 403, para. 59; see also Chatzinerantzis/Appel, NJW 2019, 881, 885; Keller/Kapoor, BB 2019, 706, 709, 711 f.

<sup>289</sup> German Constitutional Court, judgment of 11.10.1994 - 2 BvR 633/86, juris - para. 93.

<sup>290</sup> German Constitutional Court, judgment of 17.12.2013 - 1 BvR 3139/08, 1 BvR 3386/08, juris - para. 286.

<sup>291</sup> German Federal Court of Justice, judgment of 18.09.1984 - VI ZR 223/82, NJW 1985, 47, 49 (immission control); with regard to construction law German Federal Court of Justice, judgment of 31.05.1994 - VI ZR 233/93, NJW 1994, 2232, 2233; in the following Higher Regional Court of Jena, judgment of 06.10.2005 - 4 U 882/05, NJW 2006, 624, 625; with regard to product liability German Federal Court of Justice, judgment of 16.09.1975 - VI ZR 156/74, juris - para. 12; German Federal Court of Justice, judgment of 07.10.1986 - VI ZR 187/85, juris - para. 16; German Federal Court of Justice, judgment of 09.12.1986 - VI ZR 65/86, juris - para. 25.

<sup>292</sup> Regional Court of Braunschweig, judgment of 14.02.2023 - 6 O 3931/21, juris - paras. 92, 94; see also Haller/Risse, NJW 2021, 3500, 3501.

<sup>293</sup> Regional Court of Braunschweig, judgment of 14.02.2023 - 6 O 3931/21, juris - paras. 92, 94; see also Haller/Risse, NJW 2021, 3500, 3501.

<sup>294</sup> Regional Court of Braunschweig, judgment of 14.02.2023 - 6 O 3931/21, juris - para. 95.

<sup>295</sup> Schirmer, NJW 2023, 116 f. para. 17; Schmidt-Ahrendts/Schneider, NJW 2022, 3475, 34780; Thöne, ZUR 2022, 323, 329, 332; generally see also Treffer, JR 2022, 503, 505, subsequently, however, critical, see 509 f.

<sup>296</sup> For this also Schirmer, NJW 2023, 113, 117 para. 17.

balancing the public macro level and the civil micro level, in which, at any rate, the mere reference to an energy supply mandate falls short if the aggrieved parties are substantially affected.<sup>297</sup> Moreover, Sec. 1 (1) EnWG also stipulates that the supply of energy to the general public should be as environmentally friendly as possible and increasingly based on renewable energies.

#### iv. Specifics of the civil law duty of care

Hence, it can be argued that civil law can, in principle, stipulate autonomous duties of care that go beyond the fulfilment of duties under public law and which may be the basis for a liability of large emitters of CO<sub>2</sub>. However, it has not yet been specified whether, which, and under which circumstances greenhouse gas emitters have such duties under civil law. The German courts have denied such further duties under civil law so far: The Regional Court of Braunschweig denies such duties in relation to VW.<sup>298</sup> It points out that in any case, no more protection could be demanded from private individuals than from the state.<sup>299</sup> In its climate decision, the German Constitutional Court has ruled that no further protection could be demanded from the state "at present".<sup>300</sup> The Regional Court of Munich I as well as the Higher Regional Court of Munich in the second instance ruled that BMW had, at least currently, no civil law obligations beyond those under public law.<sup>301</sup> The impairment of the general right of personality as alleged by the claimants did not deviate from the interests underlying the abstract-general regulations of the legislator.<sup>302</sup> The Higher Regional Court of Stuttgart recently took the same position, stating that actions of Mercedes which were in line with legal requirements laid down in the German emission reduction legislation could not be qualified as illegal.<sup>303</sup>

However, *Schirmer* recently supplemented the likewise restrained literature<sup>304</sup> with his plea for a duty to warn on the part of emitters of the dangers of fossil fuels (see *supra* 1.C.iii.).<sup>305</sup> This line of argument could also be linked to the problem of scope 3 emissions.<sup>306</sup> Up to now, the attribution of scope 3 emissions in particular has been

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<sup>297</sup> See *Schirmer*, *Nachhaltiges Privatrecht*, 2023, p. 215.

<sup>298</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – paras. 87, 104, 119.

<sup>299</sup> Regional Court of Braunschweig, judgment of 14.02.2023 – 6 O 3931/21, juris – paras. 87, 104, 119.

<sup>300</sup> German Constitutional Court, decision of 24.03.2021 – 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, juris – paras 143 ff.; 173 ff.

<sup>301</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861 para. 71; Higher Regional Court of Munich, judgement of 12.10.2023 – 32 U 936/23, BeckRS 2023, 30283, para. 66 ff.

<sup>302</sup> Regional Court of Munich I, judgment of 07.02.2023 – 3 O 12581/21, BeckRS 2023, 2861 para. 73.

<sup>303</sup> Higher Regional Court of Stuttgart, judgement of 08.11.2023 – 12 U 170/22, BeckRS 2023, 31435, paras 63 ff.

<sup>304</sup> See *Haller/Risse*, NJW 2021, 3500, 3501; *Treffer*, JR 2022, 503, 509; *Thöne*, ZUR 2022, 323, 332.

<sup>305</sup> *Schirmer*, *Nachhaltiges Privatrecht*, 2023, pp. 232 ff., 260.

<sup>306</sup> The distinction between Scope 1, 2 and 3 emissions comes from the Greenhouse Gas Protocol, an international climate accounting standard. Scope 3 emissions include emissions that occur upstream, i.e. "further up" in the supply chain (from the extraction of raw materials and intermediate products to the manufacture of the end product) as well downstream, i.e. during delivery and finally during the use of the products by the end consumers.

viewed critically, mainly because German tort law knows no imputation of third-party behaviour and fault.<sup>307</sup> This hurdle might not arise if the defendant's own actions or omissions are considered, be it the marketing of fossil fuels or of products that release greenhouse gases when used or consumed, the active misleading of the public about the causes and dangers of climate change, or the failure to make efforts to reduce the company's CO<sub>2</sub> emissions.<sup>308</sup> Thus, the relevant legal question is whether an exact infringement act and the corresponding civil law duty of care can be identified.<sup>309</sup> Such an approach closes the circle to the product liability outlined above (*supra* 1.C.viii).

Finally, regarding compensation claims, it must also be taken into account that civil law duties of care are dynamic<sup>310</sup> and that today's standards cannot be applied retroactively to yesterday's behaviour. At the earliest from the point in time at which the representatives of carbon majors were aware of the threat of significant global warming and its dangers, it is possible to argue about a breach of a civil law duty of care.<sup>311</sup>

## D. Evidence

### i. Burden of proof

In civil proceedings, the claimant generally bears the burden of proof for all circumstances that justify his or her claim. In climate litigation, it must, *inter alia*, be established to the conviction of the court that a climate change phenomenon is attributable to the CO<sub>2</sub> emissions of a company (see *supra* C. ii.).

This basic distribution of the burden of proof applies to all relevant facts disputed by the defendant. However, the defendant cannot deny the claimant's substantiated submissions in general terms, but must provide substantiated information on the facts (*sekundäre Darlegungslast*).<sup>312</sup> Otherwise, the claimant's submission can be deemed to be admitted, so that it can be used as the basis for the judgment without further proof. However, if the defendant has disputed the facts asserted by the claimant in a substantiated way, the claimant still bears the full burden of proof.

A genuine reversal of the burden of proof is accepted only in exceptional cases, namely where there is structural lack of information on the part of the claimant. This is, for example, the case in product liability, where it is near impossible for an individual

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<sup>307</sup> See Weller/Radke, Klimaklagen vor deutschen Gerichten, in: Jahrbuch Bitburger Gespräche 2023, p. 35, 56.

<sup>308</sup> See Kieninger, ZHR 187 (2023), 348, 381 ff.

<sup>309</sup> See also Weller/Radke, Klimaklagen vor deutschen Gerichten, in: Jahrbuch Bitburger Gespräche 2023, p. 35, 50.

<sup>310</sup> See Weller/Radke, Klimaklagen vor deutschen Gerichten, in: Jahrbuch Bitburger Gespräche 2023, p. 35, 53.

<sup>311</sup> See Kieninger, ZHR 187 (2023), 348, 381 ff.

<sup>312</sup> Stadler, in: Musielak/Voit, ZPO, 20th ed. 2023, Sec. 138 ZPO para. 10; Fritsche, in: MünchKomm ZPO, 6<sup>th</sup> ed. 2020, Sec. 138 ZPO, para 19.

claimant to gain access to the inner workings of the defendant company, so the element of fault must be disproven by the defendant.<sup>313</sup>

With regard to causality in climate litigation cases, few authors argue in favour of a shift of the burden of proof to the defendant based on Sec. 6 (1) UmweltHG, which contains a presumption of causality to the detriment of the operator of a plant if the plant was in itself generally apt to cause the damage occurred.<sup>314</sup>

## ii. Standard of proof

The relevant standard of proof in civil matters, which also applies to the element of causation, is laid down in Sec. 286 ZPO. The court must be fully convinced of the relevant facts and base its conviction on a proper assessment of the evidence. According to the German Federal Court of Justice, this does not require a conviction free of all doubts but rather a degree of certainty that can be actually reached in practical life, which “silences doubts without excluding them completely.”<sup>315</sup> This means that causation must be proven beyond reasonable doubt.

In the *RWE* case, the court of first instance denied causality because the expert opinions only proved a causal connection between *all* greenhouse gas emissions and climate change, as well as between climate change and the feared violation of legal rights (flooding of the claimant's property).<sup>316</sup> The courts thus ask for sources of evidence that show a causal connection in the sense of the *conditio sine qua non*-test (see *supra* C. ii.) between the individual emissions of the defendant and climate change (and its consequences). The Higher Regional Court of Hamm as court of second instance in the *RWE* case is now gathering evidence on the question of causation. In this context, the court refused to use studies of renowned scientists provided as direct proof for the causal link between global warming and the melting of the glacier in question, as well as of the contribution of *RWE* to this causal chain. Instead, the court has decided to appoint an own forensic expert on these issues.<sup>317</sup>

Those authors who argue in favour of a partial liability related to the proportion in which large emitters have contributed to the total sum of anthropogenic carbon dioxide emissions propose to use Sec. 287 ZPO, which allows the court to estimate damages. While this view has already received some support,<sup>318</sup> it must be noted that the prevailing opinion in Germany applies Sec. 287 ZPO only to the estimation of *amount*

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<sup>313</sup> Prütting, in: MünchKomm ZPO, 6th ed. 2020, Sec. 286 ZPO para. 128.

<sup>314</sup> See on this Pöttker, Klimahaftungsrecht, 2014, pp. 164 ff.

<sup>315</sup> German Federal Court of Justice, judgment of 17.02.1970 – III ZR 139/67, BGHZ 53, 245, 256.

<sup>316</sup> Regional Court of Essen, judgment of 15.12.2016 – 2 O 285/15, NVWZ 2017, 734, 736.

<sup>317</sup> Higher Regional Court of Hamm, judgment of 01.07.2021 – I-5 U 15/17.

<sup>318</sup> Frank, NJOZ 2010, 2296, 2298; Schirmer, JZ 2021, 1099, 1103.

of damages awarded (i.e. in the context of the remedy) and not to establish the prerequisites of the claim.<sup>319</sup>

## E. Limitation Periods

The standard limitation period in Germany is three years, Sec. 195 BGB, and applies unless there is a special limitation period.<sup>320</sup> In corporate climate litigation cases, however, which are typically based on torts and nuisance claims (see *supra* Part 1), the general limitation period of three years applies. Under Sec. 199 (1) BGB, the regular limitation period begins, unless another date is specified, at the end of the year in which the claim arose and the creditor becomes aware or, in the absence of gross negligence, had to have become aware of the circumstances giving rise to the claim.<sup>321</sup>

The beginning of a limitation period for a claim arising out of environmental damage does not require that the person was aware of all of the details resulting in the damage. It is sufficient for the limitation period to begin that the injured party was aware of the changing or harmful circumstances.<sup>322</sup> However, if the injury in question is a result of a continuous or recurring nature (i.e., as is the case with climate damage), the limitation period may be extended. The clock for the limitation period may start anew each time a new instance of harm occurs (“continuing harm doctrine”) or when the type of harm changes.<sup>323</sup> In cases in which the harm is not immediately apparent or where it develops over time, the limitation period may start when the injured party becomes aware of the harm. This is consistent with the idea that the limitation period should not begin until the injured party knows, or reasonably should know, about the harm and its causation. The continuing harm principle and the possibility to extend the limitation period in terms of corporate climate litigation can be exemplified by the *LLiuya vs. RWE* case: In the case of *Saúl Luciano Lliuya and RWE*, the Higher Regional Court of Hamm found that a statute of limitations would not bar the claim because the limitation period had to be assessed in respect of the specific claim, Sec. 194 BGB.<sup>324</sup> The claim in question arose from an imminent infringement of the property of the claimant which had been present since 2009. The continuing harm doctrine therefore did not help the claimant here. However, the limitation period could not start before the creditor became aware or, in the absence of gross negligence, had to become aware of the circumstances giving rise to the claim. The Higher Regional Court of Hamm held that it could not be assumed

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<sup>319</sup> See e.g. German Federal Court of Justice, judgment of 12.02.2008 – VI ZR 221/06, NJW 2008, 1381. The application of Sec. 287 ZPO was also rejected by the Regional Court of Essen, judgment of 15.12.2016 – 2 O 285/15, NVWZ 2017, 734, 736.

<sup>320</sup> Cf. *Piekenbrock*, in: BeckOGK BGB, 01.02.2023, Sec. 195 para. 12.

<sup>321</sup> Cf. *Piekenbrock*, in: BeckOGK BGB, 01.02.2023, Sec. 199 para. 5.

<sup>322</sup> *Spindler*, in: BeckOGK BGB, 01.08.2023, Sec. 823 para. 831.

<sup>323</sup> *Spohnheimer*, in: BeckOGK BGB, 01.11.2023, Sec. 1004 para. 243.3.

<sup>324</sup> Higher Regional Court of Hamm, judgment of 30.11.2017 – I-5 U 15/17, juris – para 4.



that the claimant living in Peru even knew of the responsibilities of carbon majors in Europe. Therefore, the court did not apply the standard three-year limitation period, but instead relied on the absolute ten-year limitation period under Sec. 199 (4) BGB, which had not yet expired.<sup>325</sup>

A special 30-year limitation period exists for certain claims, such as claims for damages based on an intentionally caused fatal injury, personal injury, or injury to someone's health, etc., Sec. 197 (1) no. 1, 199 (2) BGB.<sup>326</sup> However, this is not the case in climate litigation cases.

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<sup>325</sup> Higher Regional Court Hamm, judgment of 01.07.2021 – I-5 U 15/17, juris.

<sup>326</sup> Cf. *Piekenbrock*, in: BeckOGK BGB, 01.02.2023, Sec. 197 para. 1.

## 3. Remedies

Under German law, cause of action and remedy are inextricably linked. Each claim is assigned a specific remedy. With regard to climate claims, three essential aims may be pursued: first, refraining from future climate-damaging behaviour (CO<sub>2</sub> reduction claims), second, compensation for damage already caused by climate damaging behaviour (compensation claims), and third, taking climate-protecting measures or pecuniary compensation for the necessary precautionary costs (adaptation claims). The legal basis for possible claims is determined in particular by the party against whom the claim is directed.<sup>327</sup>

The remedy of Sec. 823 BGB is damages for damage already caused. In contrast, Sec. 1004 BGB is the legal basis to claim injunctive relief, which means it can be used to claim an order to refrain from future emissions or to claim climate-protecting measures.

### A. Pecuniary remedies

#### i. Tortious claims for pecuniary remedies

##### 1. Compensatory function of damages under German tort law

The rules of tort law (Sec. 823 (1) and (2) BGB and Sec. 826 BGB) grant damages for damage already caused. The injured party is, in general, entitled to full compensation for all disadvantages according to the principle of total reparation (*Totalreparation*).<sup>328</sup> The compensation granted shall eliminate all consequences for the property or rights of the injured party which are attributable to the damaging event irrespective of the amount of the total amount or the degree of fault. This includes lost profits (Sec. 252 BGB) and, at least in principle, also damages which were not foreseeable for the tortfeasor.

The principle of total reparation is closely connected to the compensatory function of German tort law (*Ausgleichsfunktion*).<sup>329</sup> Its main objective is to restore equality between the parties and the disturbed distribution of assets caused by the actions of the tortfeasor.<sup>330</sup> Beyond that, German tort law does not award punitive damages.<sup>331</sup> This is further exemplified by the fact that damages governed by foreign law which are punitive in nature cannot be claimed in Germany (see the special public policy ground

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<sup>327</sup> *Geselle/Falter*, *KlimaRZ* 2022, 181, 182.

<sup>328</sup> *Wagner*, in: *MünchKomm BGB*, 8th ed. 2020, Sec. 823 para. 86.

<sup>329</sup> *Teichmann*, in: *Jauernig BGB*, 18th ed. 2021, Sec. 249 para. 2; *Brand*, in *BeckOGK BGB*, 01.03.2022 Sec. 249, para. 42, 63.

<sup>330</sup> *Brand*, in *BeckOGK BGB*, 01.03.2022, Sec. 249 para. 42.

<sup>331</sup> *Hermann*, in *BeckOGK BGB*, 01.02.2023, Sec. 823 para. 1884; *Lorenz*, *NJW* 2020, 1924, 1926.

under Art. 40 para. 3 Nr. 1 EGBGB) because this would be seen as contrary to the fundamental understanding of the legal function of tort law in Germany.<sup>332</sup>

## 2. Calculation of damages under German tort law

The damages are calculated by the courts on the basis of the so-called difference hypothesis (*Differenzhypothese*). According to this hypothesis, a comparison must be made between two situations: The actual situation of the injured party at the relevant time on the one hand and the hypothetical situation at this time, had the damaging event not occurred, on the other hand. A damage exists if there is a difference between the two situations which is to the detriment of the injured party. The disadvantage suffered by the injured party does not necessarily have to be a pecuniary disadvantage. German tort law recognises both material and immaterial damage as compensable, thereby ensuring that victims receive appropriate restitution for their losses.<sup>333</sup> While material damage (tangible, quantifiable economic losses suffered by the injured party) can be calculated in a relatively straightforward way based on concrete evidence and objective measures, immaterial damage often relies on subjective assessments and can be more challenging to determine. As a result, immaterial damage can only be claimed in the express cases proclaimed by the Civil Code, i.e. Sec. 253 para. 1 BGB. Under Sec. 253 para 2 BGB, immaterial damage is granted for pain and suffering as a result of an injury to a person's life, health, freedom, or sexual self-determination. The court will quantify these damages based on an overall assessment, taking into account various factors, such as the severity and duration of emotional distress, the impact on the victim's life, as well as any psychological or physical consequences resulting from the tortious act.<sup>334</sup>

## 3. In rem restitution and pecuniary damages

Regarding their nature, damages are, in principle, to be granted *in rem* (priority of *in rem* restitution; *Vorrang der Naturalrestitution*), e.g. by repairing or replacing damaged goods.<sup>335</sup> However, if the injury in question concerns a person or an object, the injured person can request under Sec. 249 para. 2 subsection 1 BGB to be reimbursed monetarily instead (*facultas alternativa*). The idea behind this rule is that the injured party should not be obliged to entrust the injured legal asset to the injuring party for

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<sup>332</sup> Regarding the refusal to enforce these judgments in Germany, see German federal court of justice, judgment of 04.06.1992 - IX ZR 149/91, NJW 1992, 3096, 3104; *Junker*, in MünchKomm BGB, 8th ed. 2021, Art. 40 EGBGB para. 109.

<sup>333</sup> *Förster*, in BeckOK BGB, 01.05.2023, Sec. 823 paras. 45-46.

<sup>334</sup> *Oetker*, in MünchKomm BGB, 9th ed. 2022, Sec. 253 para. 36.

<sup>335</sup> *Oetker*, in MünchKomm BGB, 9th ed. 2022, Sec. 249 para. 320; *Brand*, in BeckOGK BGB, 01.03.2022, Sec. 249 para. 56.

restoration.<sup>336</sup> Equally, the amount of money required for restitution can be demanded instead of restitution *in rem* if the injured party ordered the tortfeasor to compensate the injured party *in rem* within a certain time limit and that limit has elapsed (Sec. 250 BGB), or if *in rem* restitution is impossible or insufficient (Sec. 251 para. 1 BGB). Furthermore, the debtor can reimburse the creditor monetarily instead of *in rem* restitution, if the latter can only be achieved through disproportionate expenses (Sec. 251 para. 2 subsection 1 BGB).<sup>337</sup> The amount of money necessary to restore the *status quo ante* is determined by what a reasonable third person in the role of the injured party would deem necessary and just.<sup>338</sup>

In most climate changes cases, claimants will therefore be able to request pecuniary damages, because in most cases the restitution *in rem* will be impossible and/or because persons or objects are damaged.

#### 4. Adequate causation and attribution of damages

The principle of total reparation is limited by the requirement that each damage must be caused by and attributable to the actions of the tortfeasor (*haftungsausfüllende Kausalität*), i.e. the damage incurred must be causally linked to the actions of the tortfeasor and must be attributable to this behaviour from a normative perspective. This normative perspective mainly consists of the criteria of adequacy and the protective purpose of the legal norm (see on these criteria also *supra* Part II, C. ii. 2.). However, while causation and adequacy are difficult to prove in climate cases regarding the link between the tortfeasor's actions and the violation of legally protected rights or interests (so called *haftungsbegründende Kausalität*), these links are not specifically difficult to establish in climate related cases between the damages suffered and the infringement of the protected rights and interests.

#### 5. Joint and several vs. partial liability

If several persons are responsible for the damage resulting from a tortious act, they are jointly and severally liable pursuant to Sec. 840 BGB. This means that the injured party can demand full performance from each responsible party (Sec. 421 BGB). They do not have to prove the share of responsibility of each individual tortfeasor and sue each one individually but can choose the most solvent tortfeasor and recover the full damage from this one tortfeasor. The latter can then take recourse against the other tortfeasors.

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<sup>336</sup> Oetker, in MünchKomm BGB, 9th ed. 2022, Sec. 249 para. 357; Förster, in BeckOK BGB, 01.05.2023, Sec. 823 para. 45

<sup>337</sup> This provision seeks to shield the tortfeasor from having to compensate the injured party past a reasonable limit, or potentially having to take measures that are uneconomical in order to compensate the injured party, Oetker, in MünchKomm BGB, 9th ed. 2022, Sec. 251 para. 35; R. Schulze, in HK-BGB, 11th ed. 2021, Sec. 249 para. 1 (protection from material and immaterial harm).

<sup>338</sup> R. Schulze, in HK-BGB, 11th ed. 2021, Sec. 249 para. 5.

The causal contributions of the individual tortfeasors are thus only taken into account in the context of internal compensation between the polluters.

The prerequisite for the application of this privilege of the injured party is that all tortfeasors are each responsible for the same uniform damage. This is the case if (1) each tortfeasor is independently and on its own fully responsible under the general rules of causation (so called *Nebentäterschaft*), or (2) if the damage was caused by deliberate cooperation of the tortfeasors (cf. Sec. 830 (1) cl. 1 BGB), or (3) in cases in which it cannot be determined which of several parties caused the damage (cf. Sec. 830 (1) cl. 2 BGB). Due to the difficulties in establishing a causal link between the CO<sub>2</sub> emissions of individual emitters and climate related damages (see *supra* Part 2, C ii.), some authors propose to apply Sec. 830 (1) cl. 2 BGB to climate damage.<sup>339</sup> However, the case law requires for Sec. 830 (1) cl. 2 BGB that a party's individual contribution to the cause would have been suitable to cause the overall damage alone.<sup>340</sup> Climate-damaging behaviour of an individual party is not suitable to cause climate damages in their entirety. This gives rise to scepticism about the application of Sec. 830 (1) cl. 2 BGB in climate cases.<sup>341</sup>

Therefore, most proponents of a corporate liability for damages caused by climate change propose a partial liability, depending on the amount of the individual causation share (see *supra* Part 2, C.ii.). While this approach cannot be based on the generally accepted principles of German tort law, it enjoys relatively broad support from a policy perspective. However, it must be noted that this line of reasoning could then be applied to every single climate damage worldwide and could, in principle, also lead to a vast liability of corporate actors, even if their share in every single damage is small. The Higher Regional Court of Hamm as court of second instance in the *RWE* case nevertheless seems to be open for such an approach. Its preliminary decision suggests that a measurable and calculable share of responsibility for climate change could also lead to partial liability for damage caused by climate change.<sup>342</sup> While this approach is quite innovative, it resembles the older concept of market share liability. This approach, which has not so far been generally accepted under German law either, has been discussed in the area of complex product liability cases.<sup>343</sup> Each producer of an incriminated product must compensate each individual victim for their damage to an

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<sup>339</sup> Pöttker, *Klimahaftungsrecht*, 2014, pp. 203 ff.

<sup>340</sup> See only German Federal Court of Justice, judgment of 22.06. 1976 - VI ZR 100/75, NJW 1976, 1934, 1935; German Federal Court of Justice, judgment of 11.01.1994 - VI ZR 41/93, NJW 1994, 932, 934; German Federal Court of Justice, judgment of 12.07.1996 - V ZR 280/94, NJW 1996, 3205, 3207.

<sup>341</sup> Kieninger, ZHR 187 (2023), 348, 363 f.; in principle against a broader interpretation Wagner, in MünchKomm BGB, 8th ed. 2020, Sec. 830 para. 80.

<sup>342</sup> Higher Regional Court of Hamm, decision of 30.11. 2017 – I-5 U 15/17, juris.

<sup>343</sup> See Wagner, in: MünchKomm BGB, 8th ed. 2020, Sec. 830 paras. 80 ff.; Spindler, AcP 208 (2008), 283, 317 ff.; but on similar approaches in the field of environmental liability, see e.g. Pöttker, *Klimahaftungsrecht*, 2014, pp. 177 f.

extent corresponding to their market share at the time the product was placed on the market; it is not necessary for the victims to prove that the product of a specific producer was the cause of the damage.<sup>344</sup>

## ii. Pecuniary claims based on Sec. 1004 BGB

Although Sec. 1004 BGB does not provide a claim for pecuniary damages,<sup>345</sup> the claimant in the *RWE* case based his pecuniary claim for a proportionate financial contribution of *RWE* to the costs of protective measures on the property threatened by glacier melt. Such a claim can indeed be based on Sec. 1004 BGB in combination with Sec. 677, 683 cl. 1, 670 BGB (*negotiorum gestio*) or in combination with Sec. 812 (1) cl. 1 Var. 2 BGB (*unjust enrichment*).<sup>346</sup> The general idea of these claims is that *RWE* was under an obligation to take active measures to protect the land of the claimant and therefore has benefited economically from the fact that the claimant has protected his property himself. The rules on *negotiorum gestio* and *unjust enrichment* would then give the claimant the right to recover (all or part of) the amount of money that was necessary to take the protective measures from the interferer.

## iii. Pecuniary claims under Sec. 9 UWG

Sec. 9 UWG provides compensatory damages for two different types of claimants in the event of a violation of the UWG: competitors (Sec. 9 (1) UWG) and consumers (Sec. 9 (2) UWG).

Sec. 9 (1) UWG grants competitors a claim for pecuniary damages in the event of a violation of the UWG. Competitors can thereby claim compensation for several damages suffered:

- Firstly, the so-called market confusion damage (*Marktverwirrungsschaden*) is compensated, which occurs because unfair commercial practices create a situation in which consumer decisions are mistakenly made in favour of the misleading company and to the disadvantage of its competitors.<sup>347</sup> The competitor will then be reimbursed for the costs of clearing up the market confusion, for example by informing consumers, as well as for the pecuniary disadvantages that cannot be eliminated even through clarification.<sup>348</sup>
- Secondly, damages also include the loss of profit as a result of the infringing act.<sup>349</sup>

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<sup>344</sup> See *Wagner*, in: MünchKomm BGB, 8th ed. 2020, Sec. 830 para. 81.

<sup>345</sup> *Wagner/Arntz*, in: Kahl/Weller (Eds.), *Climate Change Litigation*, 2021, p. 425.

<sup>346</sup> See for more detail *Schirmer*, JZ 2021, 1099.

<sup>347</sup> German Federal Court of Justice, judgment of 06.06.1991 – I ZR 234/89, juris; judgment of 17.05.2001 – I ZR 291/98, juris; *Eichelberger*, in: BeckOK UWG, 01.01.2023, Sec. 9 paras. 76 ff.

<sup>348</sup> *Eichelberger*, in: BeckOK UWG, 01.01.2023, Sec. 9 para. 77.

<sup>349</sup> *Fritzsche*, in: MünchKommUWG, 3rd ed. 2022, Sec. 9 para. 86.

- Lastly, legal costs incurred by the injured party, for example the costs of a lawyer, are part of the damage, insofar as they were necessary and expedient from the relevant point of view of the injured party with regard to their specific situation in order to exercise their rights.<sup>350</sup>

Since 28 May 2022, Sec. 9 (2) UWG also grants consumers a direct claim for damages. This claim is a new development in German law, as previously only competitors had been able to claim damages. From now on, the individual contract concluded under misrepresentation is regarded as a damage; it can therefore be rescinded under Sec. 9 (2) UWG.<sup>351</sup>

## B. Non-Pecuniary Remedies

### i. Tort law

In principle, under German tort law, restitution is to be granted *in rem* (see *supra* A. i. 3.).<sup>352</sup> Regarding climate claims, this principle emphasises the preference for taking measures to restore the environment and mitigate the effects of climate change, rather than merely providing monetary compensation to the affected parties. If, for example, the damage in question caused by emissions relates to property, the tortfeasor is primarily required under Sec. 249 para.1 BGB to repair the object, or provide a similar one, if it is available on the market.<sup>353</sup> Monetary compensation can only be granted in the cases mentioned above.

### ii. Sec. 1004 BGB

Sec. 1004 BGB essentially creates an obligation of the responsible party to cease and desist, i.e. to discontinue the activity that causes the impairment. This can be ordered by the court in a judgment granting injunctive relief. Reduction claims usually aim at a court order to stop emitting CO<sub>2</sub> or to end high-emission activities such as the manufacture of internal combustion engines.

However, Sec. 1004 BGB may also give rise to a claim that is aimed at active countermeasures of the defendant to take preventive action. In the case of the Peruvian farmer against the RWE AG, the claim is directed at active measures by the defendant to fend off the risk of flooding by installing safety measures against floods, such as dehydration pipes, dams and the like. Such preventive measures could also be ordered by a court (injunctive relief).

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<sup>350</sup> Eichelberger, in: BeckOK UWG, 01.01.2023, Sec. 9 para. 68.

<sup>351</sup> Eichelberger, in: BeckOK UWG, 01.01.2023, Sec. 9 paras. 113 ff.; Köhler, in: Köhler/Bornkamm/Federsen (Eds.), 41st ed. 2023, Sec. 9 paras. 2.1 ff.

<sup>352</sup> Oetker, in MünchKomm BGB, 9th ed. 2022, Sec. 249 para. 320; Brand, in BeckOGK BGB, 01.03.2022, Sec. 249 para. 56.

<sup>353</sup> Cf. R. Schulze, in HK-BGB, 11th ed. 2021, Sec. 249 para. 9.



### iii. Sec. 8 (1) UWG

Under Sec. 8 (1) UWG, a company using unfair commercial practice can be sued for injunction as non-pecuniary remedy. This claim can be enforced by competitors (Sec. 8 (3) no. 1 UWG) and certain NGOs such as *Deutsche Umwelthilfe* (Sec. 8 (3) no. 2, Sec. 8b UWG). Since no specific damage needs to be proven for this claim, it is very popular in practice and currently being asserted in greenwashing cases by *Deutsche Umwelthilfe*.<sup>354</sup>

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<sup>354</sup> *Deutsche Umwelthilfe*, Overview of climate neutrality advertising procedures, 18.01.2023, available at [https://www.duh.de/fileadmin/user\\_upload/download/Projektinformation/Verbraucher/2023-01-17\\_Übersicht\\_DUH\\_Verfahren\\_Klimaneutralität.pdf](https://www.duh.de/fileadmin/user_upload/download/Projektinformation/Verbraucher/2023-01-17_Übersicht_DUH_Verfahren_Klimaneutralität.pdf).

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