

German Judges Travel to Peru in Climate-Change Trial

In a widely reported trip, members of the 5th Civil Chamber of the Higher Regional Court of Hamm, Germany, together with two court-appointed experts, travelled to Peru to collect evidence in one of Germany's first climate-change lawsuits. The highly symbolic case has been brought by Saúl Luciano Lliuyas, a Peruvian farmer, who claims that man-made climate change and the resulting increased flood risk threatens his house in the Andes, which is located right below a glacial lake. Supported by two German NGOs, he seeks compensation from RWE, Europe's single biggest emitter of carbon dioxide, for the equivalent of its contribution to worldwide human carbon dioxide emissions, i.e. 0.47 percent, of the additional protective measures he had to take to flood-proof his house.

The trip had already been scheduled in 2019 but was delayed by the Covid-19 pandemic. Its main purpose appears to have been the proper instruction of the two experts, who are charged with assessing the climate-change-related risk for the claimant and the extent of RWE's potential contribution to it.

In terms of private international law, the case is straightforward. The German courts have international jurisdiction on the basis of Articles 4(1), 63(1) Brussels Ia as RWE has its statutory seat and central administration in Germany. As far as the applicable law is concerned, the claimant can rely on the privilege awarded to the (alleged) victims of environmental torts by Art 7 Rome II, according to which they may opt for the law of the country in which the event giving rise to the damage occurred (as opposed to the law of the country in which the damage occurred, which generally applies pursuant to Art. 4(1) Rome II), i.e. for German law in the case of pollutions caused by RWE's power plants in Germany. Thus, the usual PIL problems of climate-change lawsuits (international jurisdiction based on Art. 7(2) or 8(1) Brussels Ia, immunity of state-owned corporations, predictability of the law of the place of the damage, application of Art. 17 Rome II, ...) do not arise in this case.

Regarding the application of substantive German law, the case is much more open. In the first instance, the Regional Court of Essen outright rejected the claim for lack of a sufficient causal connection between RWE's contribution to climate

change and the specific risk of the claimant. This is in line with what might still be the majority position in German scholarship, according to which individual contributions to global climate change cannot trigger civil liability in tort or property law. The fact that the second-instance court has now started to collect evidence implies, however, that it considers the claim to succeed on the basis of the claimant's submissions. Seen together with the German Constitutional Court quashing national legislation for being incompatible with Article 20a of the Constitution and international commitments to limit global warming in 2021, the lawsuit in Hamm may be a sign of German courts slowly adopting a more active position in the global fight against climate change, including with regard to civil liability.