Access to a national court in Germany

Gerd Winter

(A) Present state of the law

(1) Actions of claiming compensation for personal damage („traditional damage") and alleviation of the burden of proof

In most cases the injured person will seek compensation from the polluter. In addition she may ask for an injunction against further pollution. Both actions are actions under civil law and will be treated by the civil courts.

1. Fault liability (§ 823 para. 1 BGB)
An injury to the health or property of a person must have negligently or intentionally been caused by another person. The compensation is in full, including forgone profit. According to the law text the injured person bears the burden of alleging and proving the causation of the damage as well as the fault.

However, certain alleviations of this burden where introduced by the Bundesgerichtshof (BGH) in a leading case[1] where a car owner claimed that her car while standing in a parking lot had been corroded by chemical dust emitted from a nearby factory.

With regard to causality the BGH said if the plaintiff was able to prove that the emitted substances exceeded the applicable emission thresholds it fell on the defendant to prove that the emissions had not caused the damage to the car.

As to the fault requirement the court ruled that the existence of fault was indicated by the violation of emission and / or environmental quality standards, and that no excuse related to individual circumstances was acceptable. It refused however to shift the burden of proving the observance of such standards on the defendant, arguing that the car owner could have chosen another parking lot. This means by implication, that in the case the plaintiff was a neighboring land-owner the said burden did lay on the defendant.

In more general terms one can conclude that if there are quantified emission standards it suffices for the injured person to prove causality that those thresholds were exceeded. As to the fault requirement this is „objectivised" by reference to emission and immission thresholds which may have been laid down by general standards or conditions to the individual installation permit. The burden of proving the observance of these standards remains however with the plaintiff if the mobile goods were damaged, and it is shifted to the defendant if the damaged good is attached to a neighboring property.

[1] BGHZ 92, 143 - Kupolofen.

No settled case law exists for situations where there are no environmental quality objectives and / or no emission standards.

If the plaintiff can prove that the pollution will be continued in the future she can also ask for an injunction (§§ 1004, 823 BGB, by analogy)

(2)Strict liability according to the Umwelthaftungsgesetz (UHG) (Act on environmental liability)
The UHG of 1990 introduced no fault liability for damage caused by environmental pollution from certain installations. Liability is excluded in cases of acts of god. It is also excluded when the damage is negligible or tolerable under the local circumstances.

The burden of proving the causal nexus is distributed among the parties in a complex manner: If the installation appears to be capable of causing the damage the defendant must prove that this was not the case. This shift of the burden of proof to the defendant is however alleviated by 2 mechanisms:
(a) for disproving causality it suffices for the defendant to prove that the installation was run in accordance with the existing technical rules as laid down by general regulations and the individual authorisation of the installation;
(b) for proving that the technical rules were observed it suffices for the defendant to show that he has conducted regular checks of the operations of the installation..

I have checked recent commentaries for the practical significance of the UHG. It appears that the law has almost never been tried as a means for compensation. The reasons for this fact are difficult to determine. One reason may be that inspite of the basic shift to the defendant of the burden of proving causality the defendant can discharge this burden too easily by referring to regular monitoring. Another reason could be that the costs of a claim under civil law are quite substantial, and that judicial review (although no compensation) is at lower cost available through administrative court proceedings. A third reason may be that given the relatively high technical standards of German industrial installations identifiable damage from industrial pollution has become rare. Of course it cannot be denied that human diseases and nature diseases still exist at substantial magnitude and can be traced to pollution from processes and products. Consider, for instance, the enduring high toll of cancer caused by environmental conditions, the acidification of the soils due to sulfur and other emissions, damage from extreme weather conditions caused by greenhouse gases, etc. But this „new“ environmental damage is characterised by so complex causal chains that it can hardly be treated by compensation schemes under civil law which even with appropriate shifting of proof burdens must be based on causal links between a determinant event and an identifiable effect.

(2) Actions of claiming compensation or injunction for/against environmental damage

There is no provision in German law entitling a private person to claim compensation for environmental damage as such. Only insofar the injured environmental good constitutes a private property the owner can raise this claim. For

instance, if a biotope hosting certain rare plants is destroyed the owner can ask for the restoration of the biotope, including the procurement and settlement of the rare plants (see § 249 BGB). However, although such compensation in kind is the regular form of compensation the defendant can in the normal fault liability scheme choose compensation in cash if the costs of restoring the biotope would be excessive (§ 251 para. 2 BGB). This excuse is made more difficult in the strict liability scheme: The mere fact that the costs of restoration are higher than the economic value of the environmental good is not accepted as a ground for excessive costs. This qualification shall react to the frequently low market price of exemplars of rare flora and fauna or of habitats.

The compensation scheme does not compell the owner to insist on the restoration of or financial compensation for the biotope. He can well confine his claim to the market value of the damaged good.

There is no possibility for environmental associations to file the action nor for other environmental guardians (such as the public prosecutor with regard to the Brasilian civil-public action).

(3) Citizen action to stop violations of environmental standards
The law provides those who are injured or are about to be injured by unlawful pollution with an action for injunction. The action must be filed with a civil court. Its basis is neighborhood nuisance law (§ 1004, 906 BGB) if the plaintiff owns or possesses a land property which is affected. Its basis is tort law as further developed by jurisprudence if the plaintiff claims damage to mobile goods (see above the case of the corroded car). In any case, however, the plaintiff must have suffered individual damage. There is no citizen suit against a polluter without personal injury.

(4) Association action to stop violations of environmental standards
In Germany there is no association action for an injunction against a polluter. Such an action does exist in relation to consumer protection. A consumer association may ask a civil court to determine that certain standard contract conditions violate the requirements of the Gesetz über Allgemeine Geschäftsbedingungen (AGBG) (Act on Standard Contracts), or that some company has violated the rule of fair competition according to the Gesetz über unlauteren Wettbewerb (UWG) (Act on unfair competition). This model has however not yet been adopted as an instrument of enforcing environmental law.

(5) Action against a passive administration
If an installation is operated without the required authorisation and the responsible administrative body remains passive a private person can in principle file a Verpflichtungsklage (action of mandamus) upon which the court can order the administrative body to issue an administrative act requiring the operator to stop opertions. There are however 2 hurdles to pass: Firstly, the plaintiff must show that the operation of the installation interfers with an individual rights of hers, i.e. that it violates an environmental provision which protects the interests of individual persons (such as neighbours) to which the plaintiff belongs. This means that the mere absence of the authorisation is no sufficient ground for standing. Secondly, even if

there is such a rights creating provision the administrative agency has discretion whether to intervene or not (the so-called Opportunitaetsprinzip – opportunity principle). Therefore the right of the plaintiff is, more specifically seen, not more than a right to a fair balancing of interests. In rare cases the circumstances may be so compelling that the court will indeed prescribe a specific administrative order. Normally, it will ask the administrative body to decide the case within a certain delay or, if it had already taken a decision the plaintiff found unsatisfactory, to decide anew and thereby take the court´s reflections into consideration.

If the administrative agency´s inaction was negligent the plaintiff can also claim compensation should she have suffered harm. This will be the case only under rare circumstances.

(B) Prospects for new law under the Aarhus Convention

(6) Association action for administrative inactivity?
Some German Laender have introduced an association action in the area of nature protection law. The action allows only to ask for the quashing of administrative acts (especially authorisations for the use of protected land). It does not include a claim that the agency shall be ordered to do something.

I believe it would be good to introduce such a claim and to extend both the action for quashing and the action for mandamus to more areas of environmental law, including the law prohibiting air, water and soil pollution. Such action should cover not only process related but also product related environmental law. Therefore, an association should also be able to ask for a prohibition of the marketing of a certain dangerous substance.

Of course, such action would in the normal case only lead to a judgement requiring the administrative body to take a first or fresh decision on the matter. In terms of rights the right will only be one of considering the case, not a right to a specific content of the decision. Only if the circumstances are compelling the right will extend to a specific decision (or, in terms of procedural law, the judgement will prescribe a specific content).

(7) Association action for compensation of damages?
In the field of unfair competition consumer associations have the possibility of obtaining penalties from the offender. This may be necessary in that field in order to trigger association action. I believe this is not necessary in the environmental field.

However, associations losing a case must of course be able to recover their costs from the defendant.

In addition, should the polluter have caused environmental damage the action should also comprehend that the defendant must pay compensation. The recipient of the money might be the association as a trustee or a public environmental protection fund. In any case the money should be spent for the necessary reparation measures.

(8) Costs of litigation
In Germany the loser of a litigation must bear the court fees and expenditure for court ordered evidence as well as the costs for advocacy etc. incurred by the winning party.

The court and attorney fees are precisely prescribed by law. As they are calculated on the basis of the so-called value of the litigation (Streitwert) much depends how this value is determined. If financial compensation is at stake the value of litigation is the sum claimed by the plaintiff. Therefore: the higher the claim the higher the value. If the matter is „untouchable" like in the case of air pollution or habitat destruction, the value of litigation is assessed by the court. Unlike civil courts administrative courts tend to produce very low estimations (for instance the value of an action for quashing a nuclear power plant has been estimated as low as EUR 10.000,-.

(9) Import and export of reform ideas into/out of Germany
I believe the narrow concept of standing which is typical for German administrative law should be broadened. I have elsewhere suggested to adopt a formula for standing which comes close to the US American one. It reads: A person has standing, i.e. she can ask for court protection if her interest is substantially affected by administrative action or inaction and if her interest is part of collective interest which is protected or regulated by a law.

In addition the association action, maybe reserved to associations recognised according to some standards prescribed by law, should be introduced in any area of environmental law. It should include the action of quashing administrative acts as well as the action of ordering the administration to take a decision or other action or desist from taking a decision or other action.

What seems to me to be worth of being exported out of Germany is the standard of review of administrative activities. The courts should not only review the legality of the administrative decision but also go to the merits of the case. This is particularaly important in the environmental field where the factual aspects are often controversial. Furthermore, the courts should apply not only a „Wednebury" standard of review, i.e. a standard of arbitrariness and capriciousness of the administration. I believe there is more room for legal considerations between such extreme criteria and the (much and legitimately feared) acting of a judge as an administrator.

(C) EC level

(10) Necessity of an EC system
I believe we do need more harmonisation of access to courts and judicial review in the member states. The problem is how to identify what can be left to the member states and what must be harmonised. I believe the minimum to be harmonised is the law of standing, a minimum area of association action, and the standard of review with regard to the checking of the factual basis (where differences might be accepted depending on whether there is a court-like formal procedure of fact-finding at the pretral stage).

(11) Enforcement
When complaining about non-enforcement one should not forget that much of the present environmental deterioration is due to the shape of the law itself. More and more formulae of balancing interests are introduced, in national as well as in EC law. One instance is the law and jurisprudence concerning the bird and habitat directives. Much effort has been spent to develop a rather strict obligation of the member states to establish protected areas. But this effort is wasted because depending on a system of balancing interests projects may nevertheless be realised even in the protected areas. Furthermore, if the material law changes the law of enforcement has also changed. In some member states forms of cooperation, negotiation and incentives have replaced much of the former more hierarchical approach. In other member states these „new" forms have only legitimised older negligence. But the trend is nevertheless to accept more flexibel forms of „enforcement" (note that the term itself is not appropriate any more) as legally allowed and sometimes even required.

Apart from this and given nevertheless many shortcomings of enforcement I believe that the „enforcement culture" of the German enforcement agencies is still that they want to actually make the law effective. One major problem is however that are given ess and less staff. It is also problematic that the law (not least forced by EC law) often prescribes tight time limits for the issuance of authorisations but never for monitoring activities.

(12) Limitation of access to court harmonisation to the enforcement of EC law?
My impression is that EC and national law is so intertwined that it would be difficult and indeed often ridiculous to distinguish 2 areas. Consider, for instance, 2 national emission standards, one for substance X which goes back to an EC standard, and one for Y which emanates from pure national legislation. In Germany neighbours do not have standing to sue the administration to enforce the emission standards because they are considered to be precautionary measures and the precaution principle does not ceate subjective rights. Now, if EC law introduces standing to sue also with regard to emission standards, the German plaintiff could sue the administration with regard to X but not Y. Nobody would understand this difference.

(13) More remedies concerning Commission decisions?
The principle should be that recourse should lie against that authority which decides on the core aspects of a matter without a subsequent authority being able to modify this decision. In the case of authorising genetically modified products, pesticides, biocides, etc., the main decision is clearly taken by the Commission. In such cases recourse should be possible not only by the member states but also by those individuals who have standing, or for recognised associations. The standing requirements should be formulated along the line suggested in no. 9 above. The action should go to the European Court, but schemes of involving the national courts should also be considered.