

Part II: Selected areas and topics

§ 4 Classical: mining law [Bergrecht]

I. An area of law with a long history in Europe

- Mining already a mainstay of Roman economy, with a developed Roman mining law
- German mining law originated from medieval customary law and was for long time Land law
 - see for important Land legislation the *General Mining Act for the Prussian States of 1865*
- Land mining law in 1980 superseded by a Federal Mining Act
- central issue throughout history: the right to extract the natural resources from the land
 - in the early days of the Roman Empire a right of the landowner
 - later largely a privilege of the king or other nobles (so-called Bergregal [mining regal])
 - from 19th century differentiated regulation in modern mining legislation

II. Systematic categorisation and terminology

1) German federal law, supplemented in a few details by Land law and European Union law

- mining law is national law (not European Union law)
- German mining law is federal law (not Land law)
 - the same applies to the environmental law relevant for mining
- however, the German federal mining law is supplemented for certain areas and issues
 - by specialised Land law (on mining supervision, licensing procedures and the extraction of simple soil materials, such as sand and gravel)
 - by specialised EU law (on the safety of miners and environmental impact assessment)

2) A special part of business administrative law

- due to its history and despite the environmental impact of mining, German mining law is considered part of business administrative law, not environmental law
 - a special part of industrial law [Gewerberecht]
- this has an impact on the basic understanding of this field of law

3) An area of law with historically evolved, often misleading legal terminology

- a terminology that can only be understood in its historical context
 - and therefore cannot be translated literally

III. The German Federal Mining Act [Bundesberggesetz] of 1980

- a uniform and comprehensive but not completely exhaustive regulation of mining law
- its purpose is the *economic objective to underpin the secure supply of raw materials* with more efficient licensing and approval procedures (and also to ensure mining safety) (sect. 1 FMA)
 - it is *not* the purpose of the Act to ensure a sustainable and environment-friendly use of natural resources...
- a controversial *raw materials safeguarding clause* (sect. 48(1), phrase 2 FMA) demands that regulations under public law that oppose the exploration and extraction of raw materials on a plot of land should be applied only to the extent that mining is impaired as little as possible.

IV. The fundamental distinction between freehold and freely mineable

mineral resources [grundeigene und bergfreie Bodenschätze] (sect. 3 FMA)

- mineral resources (= resources) are, with the *exception of water*, all mineral deposits in solid, liquid or gas form that occur in natural deposits in or on the ground or the seabed or in the seawater (sect. 3(1))

1) Why is this distinction essential?

- land ownership extends to freehold resources but not to freely mineable resources (sect. 3(2))
 - the landowner may exploit freehold resources without a mining license, while for exploiting freely mineable resources land ownership is irrelevant
- "freely mineable" resources are not really freely mineable, but everyone is free to apply to the state for an exploration license and an extraction license against annual royalties

2) What are freehold resources? [grundeigene Bodenschätze]

- simple, less valuable mineral resources that are often used as building materials
 - basaltic lava, bauxite, bentonite, feldspar, roof slate, quartz etc. (see sect. 3(4))
 - the extraction of sand and gravel is not regulated in federal mining law but special Land law

3) What are freely mineable resources? [bergfreie Bodenschätze]

- all important and valuable mineral resources; see extensive enumeration in sect. 3(3) phrase 1 FMA:
 - most *mineral ores, metals* and *chemical elements*, in particular lead, copper, aluminium, zinc, tin and silver
 - most fossil fuels, in particular *hard coal* (important in the past), *lignite* (extracted in open-cast mines) and the hydrocarbons *crude oil* and *natural gas* (extracted in the North Sea)
 - valuable salts
- resources in the areas of the coastal waters and the continental shelf (sect. 3(3) phrase 2 FMA)
- *geothermal energy* from boreholes more than 400 metres deep (sect. 3(3) phrase 2 FMA)

V. Exploration license [Erlaubnis], extraction license [Bewilligung], operation plan [Betriebsplan], environmental impact assessment [Umweltverträglichkeitsprüfung] and royalties

1) The requirement of an exploration license and a field royalty [Feldabgabe] for prospecting freely mineable resources (sect. 4(1), 6 et seq. 30 et seq. FMA)

- the exploration license grants the exclusive right
 - to explore for the specified resources in a specific field (exploration license field) and
 - to erect and operate the necessary facilities (sect. 7(1) FMA)
- the holder of an exploration license for commercial (not scientific) purposes must pay a *modest field royalty* [Feldesabgabe] (sect. 30 FMA)
 - ranging from 5 €, rising each year by 5 €, up to 25 € per square kilometre or part thereof

2) The requirement of an extraction license and a mining royalty [Förderabgabe] for extracting freely mineable resources (sect. 4(2), 7 et seq., 31 et seq. FMA)

- the extraction license grants the exclusive right
 - to explore for the specified resources and to extract them and other resources in a specific field (extraction license field)
 - to acquire ownership in the extracted resources
 - to erect and operate the necessary facilities and
 - to request the cession of the concerned land (!) (sect. 8(1) FMA);the provisions of the German Civil Code for claims arising from ownership apply analogously to this right (sect. 8(2) FMA)

- the holder of an extraction license for commercial (not scientific) purposes must pay a significant *annual mining royalty* [Förderabgabe] of 10 percent of the average attainable market value (sect. 31 FMA)
 - but Land governments may under certain conditions lower the royalty or exempt from it for specific resources for a specified period of time (sect. 32(2) FMA)

3) **The requirement of an operation plan** [Betriebsplan] **with prior environmental impact assessment** [Umweltverträglichkeitsprüfung] **for erecting, carrying out and terminating exploration, extraction and treatment operations** (sect. 51 et seq. FMA)

- a special legal institution and administrative procedure for effective official supervision of mining operations
- the mining entrepreneur needs to prepare and submit a comprehensive *operation plan*, which needs to be approved by the mining authority
 - except for minor exploration activities without intervention in the ground
- several *types of operation plans* (cf. sect. 52, 53 FMA):
 - main operation plans for erection and operation of mines for 2 years
 - general operation plans in case of environmental impact assessments or on request
 - special operation plans for certain works and facilities
 - closure plans for termination of operations
- the *approval* of the operation plan
 - an administrative decision that can be challenged by affected parties (esp. neighbours) and environmental associations before the administrative court
 - requires that far-reaching requirements relating to public safety & security, environment protection and protection of the rights & goods of third parties are met (sect. 55)
- in the approval procedure, the mining authority must involve concerned other authorities and hear affected citizens (sect. 54(2) FMA, sect. 28 Administrative Procedure Act)
- most major mining projects require an **environmental impact assessment (EIA)**
 - a key instrument of environmental law, used in mining law, with the purpose to avoid excessive damage to the environment by assessing the project's impact at an early stage
 - legal basis: the German *EIA Act* [UVP-Gesetz] and EIA Mining Ordinance [UVP-Verordnung Bergbau], which implement the European Union's *EIA Directive (2011/92)*.
 - a complex sub-procedure of the approval procedure in the highly formalised form of a planning approval procedure [Planfeststellungsverfahren]
 - requires extensive involvement of other authorities and the public and the writing of a formal, reasoned EIA report
 - prevents cronyism and manipulation by powerful economic players and enables environmental organisations to exert influence, but can delay projects considerably

4) **The registration of licenses and proprietorships in a mining authorization book and a mining authorisation map** (sect. 75 FMA)

- provides transparency and legal security
- all entries are made ex officio

VI. **Mining proprietorship** [Bergwerkseigentum] (sect. 9 FMA)

- a special kind of mining right that includes substantially the same rights as an extraction license but is treated legally like an equivalent to land ownership
 - is registered in the Land Register
 - can be transferred and encumbered with rights in rem
- is only granted if applicant holds already an extraction license for the relevant field

VII. Mining supervision [Bergaufsicht] (sect. 69 et seq. FMA)

- responsibility of the Länder; some northern Länder have joint mining authorities
- mining authorities have *extensive supervisory powers* and powers to issue orders to implement the Federal Mining Act, prevent illegal activities and prohibit employment of certain persons (sect. 70 to 73)
- mining entrepreneurs have extensive duties to disclose, notify, assist and tolerate (sect. 70, 74)

VIII. Strict liability for mining damages (sect. 114 et seq. FMA)

- where mining kills, injures or damages the health of someone or a thing, the mining entrepreneur and the mining license holder are jointly and severally liable to compensate for the ensuing subsidence damage [Bergschaden] (sect. 114)
- liability does not require fault (intention or negligence)
 - they must take responsibility for the source of danger they have created...
- but contributory negligence of the injured party reduces his claim (sect. 118 FMA, 254 German Civil Code)

IX. Criticism of current mining law

- mining law is often criticised by environmental associations, legal scientists and authorities; frequent points of criticism:
- unjustified privileges for mining interests
- impermeability of mining law for environmental standards
- inadequate protection for those affected by mining
- insufficient participation of the public in mining matters

X. The end of an era: Germany's coal phase-out

- coal contributed largely to Germany's economic rise in the 19th and 20th centuries, but ending its use as energy source is important to reduce Germany's contribution to global warming
- step 1 (2007): *Law on Financing the End of Subsidized Hard Coal Mining by 2018*
 - caused the immediate end of hard coal mining after the expiration of the last subsidies in 2018
 - however, hard coal is still imported for burning in coal-based power plants
- step 2 (2020): *Coal-based Power Generation Termination Act* [Kohleverstromungsbeendigungsgesetz]
 - power generation from hard coal and lignite is continuously reduced and will end in 2038
 - this will also end the controversial lignite mining in open-cast mines
 - however, economic lobbies repeatedly question this decision and it may finally be revised