

## § 2 Mining law [Bergrecht]

### I. Introduction to mining law

#### 1) 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- German mining law originated from medieval customary law and was for a long time Land law, until it was superseded in 1980 by a Federal Mining Act
  - important Land legislation: the *General Mining Act for the Prussian States of 1865*
- a 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 19<sup>th</sup> century differentiated regulation in modern mining legislation

#### 2) Systematic categorisation and terminology

##### a) 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
- but 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)

##### b) A special part of business administrative law

- due to its history, German mining law forms a classical part of business admin. law
  - more precisely: of industrial law [Gewerberecht], which is a part of business admin. law
- this influences the basic understanding of this area of law

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

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

### II. The German Federal Mining Act [Bundesberggesetz] of 1980

- a uniform and comprehensive but not completely exhaustive regulation of mining law
- a law in the spirit of the 1970s: its purpose is the *economic objective to underpin the secure supply of raw materials* with more efficient licensing and approval procedures (sect. 1 FMA)
  - and also to ensure mining safety, but *not* to ensure a sustainable & 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.

### III. The 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 laws of the Länder

## 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)

# IV. 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 even 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)
- all exploration and extraction licenses will be registered ex officio in a *mining authorisation book* and a *mining authorisation map* (sect. 75 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

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

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

### VI. **Mining supervision** [Bergaufsicht] (sect. 69 et seq. FMA)

- by Land authorities; 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)

### VII. **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)

- this is a *strict liability*: it does not require fault (intention or negligence)
  - the mining entrepreneur and license holder must take *responsibility for the source of danger* they have created...
  - however, contributory negligence of the injured party reduces his claim (sect. 118 FMA, 254 German Civil Code)

## VIII. Special: The legal regime for the extraction of coal, oil and gas

### 1) Application of the Federal Mining Act

- hard coal, lignite and the hydrocarbons crude oil and natural gas are freely mineable resources that fall under the FMA (cf. sect. 3(3) phrase 1 FMA)
- the FMA does not provide for a special regime for their extraction

### 2) The end of an era: Germany's coal phase-out

- coal contributed largely to Germany's economic rise in the 19<sup>th</sup> and 20<sup>th</sup> centuries, but from the 1960s hard coal mining and later also lignite mining became unprofitable and needed to be subsidised by the state - but the political will to do so dwindled
- moreover, ending the use of coal as energy source became important to reduce Germany's contribution to global warming
- finally, Germany decided to phase out coal:
  - 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 environmentally destructive open-cast mines
    - however, economic lobbies repeatedly question this decision and it risks to be revised

### 3) Germany's extensive ban on fracking

- a small amount of crude oil and natural gas is extracted in Germany by means of deep drilling on land and from the North Sea
- there is a potential for extracting more oil and gas by the controversial method of fracking (breaking up rock deep underground by injecting a mixture of water and chemicals under high pressure)
- but to protect groundwater and soil, fracking is largely banned by law since 2017:
  - *conventional fracking* (in conventional reservoirs, such as sandstone) is categorised as water usage [Gewässerbenutzung] and requires in addition to the extraction license under mining law a *water usage permit* under water resources law, for which very high environmental requirements must be met (cf. sect. 8(1), 9(2) no. 3 Water Resources Act [Wasserhaushaltsgesetz])
  - *unconventional fracking* (in unconventional reservoirs, such as shale, clay, marl or coal seam rock) is generally banned
- despite the promotion of fracking by U.S. President Donald Trump it is unlikely that Germany will lift its extensive ban in the future

## 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