

# GERMAN REUNIFICATION—THE PRIVATIZATION OF SOCIALIST PROPERTY ON EAST GERMANY'S PATH TO DEMOCRACY\*

## I. HISTORY

After Germany's defeat in World War II, it was divided into two countries: the Federal Republic of Germany (FRG), commonly known as West Germany, and the German Democratic Republic (GDR), commonly known as East Germany. The FRG adopted a social market economy<sup>1</sup> which included the right to own private property<sup>2</sup> in its Basic Law (Grundgesetz).<sup>3</sup> The GDR developed a centrally planned socialist economy,<sup>4</sup> modeled after that of the

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<sup>1</sup> P. KATZENSTEIN, *POLICY AND POLITICS IN WEST GERMANY* 86-87 (1987). The concept of the social market economy expresses the belief that market competition and social protection are not antagonistic to each other, rather, they are mutually reinforcing. The growth dividends of a dynamic market economy were thought to be sufficient to alleviate class conflict and encourage a convergence of interests between business and labor. Individual liberty in economic life was considered the best guarantor of political liberty. *Id.* Ludwig Erhard was primarily responsible for instituting the social market economy in the FRG. Fuhrman, *Ludwig Erhard, where are you?*, *FORBES*, Aug. 6, 1990, at 41.

<sup>2</sup> Article 14 of the Grundgesetz specifically states:

(1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.

(2) Property imposes duties. Its use should also serve the public weal.

(3) Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of the compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.

GRUNDGESETZ [GG] art. 14 (W. Ger.).

<sup>3</sup> Since the entire German nation, as the true holder of sovereignty, was not able to frame a common constitution for the state in 1949, the Germans in the western zones could only act provisionally. As a result, the Basic Law of the FRG is not the constitution of the whole nation, but is under the reservation that such a constitution will be adopted by a free decision of the German people. Klein, *The Concept of the Basic Law*, in *MAIN PRINCIPLES OF THE GERMAN BASIC LAW* 25-26 (C. Starck ed. 1983).

<sup>4</sup> The East German Constitution describes its economy as:

based on the socialist ownership of the means of production. By depriving

Soviet Union,<sup>5</sup> which significantly curtailed the right to own private property.<sup>6</sup> Nationally-owned property of society as a whole, known as "people's property" (Volkseigentum),<sup>7</sup> became the predominant form of property for enterprises in the GDR.<sup>8</sup>

The people's enterprises were treated as economic units in an overarching economic system in which the government, as proprietor, dictated the management, planning, and financing of the enterprises.<sup>9</sup> Neither people's enterprises nor people's real property could be utilized as security to obtain a lien, mortgage, or loan.<sup>10</sup> People's property was also exempt from attachment and protected from third party claims.<sup>11</sup> A usage right was the greatest interest in people's property that an individual could possess.<sup>12</sup> If the right were not exercised in harmony with the material and cultural requirements of GDR society,

the monopolies and big landowners of their power, by abolishing the capitalist profit economy, the source of war policy and the exploitation of man by man was abolished. The socialist relations of production emerged as a result of the struggle for the abolition of the monopol[istic] capitalistic economic system which has brought only distress to the German nation by its aggressive and adventurist policy. Socialist ownership has stood the test.

DIE VERFASSUNG DER DDR [VERF] art. 9 (E. Ger.).

<sup>5</sup> H. LEWIS, *NEW CONSTITUTIONS IN OCCUPIED GERMANY* 37 (1948) [hereinafter LEWIS].

<sup>6</sup> VERF art. 11 (E. Ger.). Article 11 of the GDR Constitution states in part: "The use of personal property may not be contrary to the interests of society." See Turner, *Der Eigentumsbegriff DDR*, 1990, *NEUE JURISTISCHE WOCHENSCHRIFT*, 555, 556 [hereinafter Turner, *Eigentumsbegriff*].

<sup>7</sup> Volkseigentum was property officially owned by the "people," but was actually controlled by the East German Communist Party. Article 12 of the GDR Constitution specifically defines Volkseigentum as:

(1) the mineral wealth, mines, power stations, barrages and large waters, larger industrial enterprises, nationally-owned farms, the banks and insurance societies, the traffic routes, the means of transport of the railways, ocean shipping as well as civil aviation, post and telecommunications installations, are nationally owned property. The private ownership of these facilities is inadmissible. The state can assign their utilization and administration to cooperative or social organizations and associations. Such an assignment must serve the general interests and increase the social wealth.

VERF art. 12 (E. Ger.).

<sup>8</sup> A. KOHLER & R. STREICH, *GESELLSCHAFTSRECHT DER DDR*, ix-xiv (1990).

<sup>9</sup> Knuepfer, *Wandlungen der Eigentumsverhältnisse durch die neue Wirtschafts-gesetzgebung in der DDR*, 1990 *BETRIEBS-BERATER* (Beilage 20 zu Heft 15) 1, 2 [hereinafter Knuepfer, *Wandlungen*].

<sup>10</sup> Turner, *Eigentumsbegriff*, *supra* note 6, at 555.

<sup>11</sup> Blau & Rawert, *East Germany: Legal Steps Towards a Market Economy*, July/August 1990 *INTERNATIONAL BUSINESS LAWYER* 305, 306 [hereinafter Blau & Rawert, *East Germany*] (explaining ZIVILGESETZBUCH [ZGB] art. 20, para. 3).

<sup>12</sup> ZGB art. 286 (E. Ger.).

or if it were used for a purpose different than that for which it was granted, the usage right could be taken away.<sup>13</sup>

Between 1945 and 1952, the Soviet Union expropriated enterprises and real property from GDR citizens who had been affiliated with the Nazi Party or who fled to the FRG.<sup>14</sup> In the years after 1949 the Soviet Union returned some previously expropriated properties and enterprises. However, they were not returned to the prior owners; they were managed as people's property or enterprises.<sup>15</sup> In 1945 the GDR government enacted land reforms resulting in the seizure of lands owned by former Nazis and war criminals. All estates over 100 hectares were expropriated. The socialization of industry gathered momentum during the 1950's, and by 1965 over 80% of all industry was socialist property.<sup>16</sup> Another period of socialization took place in 1972 during which the government seized almost all the remaining small and middle-sized private enterprises and converted them into people's enterprises.<sup>17</sup> By 1988 over 90% of East German enterprises were people's enterprises.<sup>18</sup>

The peaceful revolution that occurred in the GDR during the fall of 1989 was the first step in the reunification of the FRG and GDR. The revolution was also the catalyst for the transformation of property ownership in the GDR from socialist government ownership to a social market system in which private property predominates.<sup>19</sup>

The first legal step towards a market economy was a constitutional amendment enacted on January 12, 1990, which repealed the prohibition of private ownership in the means of production contained

<sup>13</sup> Forder, *Socialist Mountains out of Capitalist Molehills*, 8 LEGAL STUDIES 154, 159 (1986). See Turner, *Eigentumsbegriff*, *supra* note 6, at 555.

<sup>14</sup> LEWIS, *supra* note 5, at 37-38. The expropriations were accomplished by Order Number 124, issued by Marshall Zhukov in October 1945. The order prompted the seizure of 4000 industrial enterprises. *Id.* at 37.

<sup>15</sup> Kaiser, *Forward to FEDERAL MINISTRY FOR ALL-GERMAN AFFAIRS, INJUSTICE THE REGIME* 123 (1952).

<sup>16</sup> M. DENNIS, *GERMAN DEMOCRATIC REPUBLIC* 129 (1988).

<sup>17</sup> Hebing, *Das neue Unternehmensrecht der DDR*, 1990 BETRIEBS-BERATER, (Beilage 18 zu Heft 1) 1, 6 [hereinafter Hebing, *Unternehmensrecht*].

<sup>18</sup> Knuepfer, *Wandlungen*, *supra* note 9, at 2 (citing STATISTISCHES JAHRBUCH DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK 1989 at 99). In 1988 the following percentages of socialist enterprises were people's property: industry = 97.6%, construction industry = 92%, farming and forestry = 95.9%, transportation, postal service and telecommunications = 98.2%, domestic trade = 91.6%, other production branches = 94.6%. *Id.* at 6.

<sup>19</sup> Knuepfer, *Wandlungen*, *supra* note 9, at 5.

in article 12, paragraph one, of the East German Constitution and allowed for exceptions from the principle of state-owned property. Simultaneously, a new article 14a was introduced which allowed the establishment of enterprises with foreign participation by traditional economic entities as well as by craftsmen, businessmen, and private citizens.<sup>20</sup>

On January 25, 1990, the GDR issued the first revolutionary economic law, the Regulation Concerning the Establishment and Business Activity of Companies with Foreign Participation in the GDR.<sup>21</sup> In March of 1990 the newly elected GDR government announced that a Trust Institution would be created in order to privatize the people's enterprises and supervise their transition to capitalism.<sup>22</sup> The process began slowly. Originally, the GDR government enacted regulations designed to facilitate the availability of real property for business purposes and to address demands for the restitution of expropriated property.<sup>23</sup> This ad hoc basis of enacting regulations resulted in gaps in the law and discrepancies in the new regulations.<sup>24</sup> The governments of the GDR and FRG signed the Treaty for the Creation of a Monetary, Economic, and Social Union between the

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<sup>20</sup> Blau & Rawert, *East Germany*, *supra* note 11, at 306.

<sup>21</sup> *Id.* This regulation provided for the establishment of joint ventures between Western enterprises and East German enterprises in cases where the joint venture promoted research and development, production, marketing, services, or environmental protection. From the outset, the Ordinance's deficiencies limited its effectiveness. The East German Economic Committee, which was set up to oversee the process, retained the power to revoke the joint venture if the GDR shareholder or the GDR itself became "disadvantaged." The transitional Ordinance's inadequacy was due to the GDR government's fear of completely "selling out" socialist property to the West. It was later repealed, but serves as an example of the difficulties involved in the transformation of the law of a socialist planned economy into a market oriented legal system. *Id.* at 307. See *Die Verordnung über die Gründung und Tätigkeit von Unternehmen mit ausländischer Beteiligung in der DDR BGBI. I, Nr. 4, S. 16* (E. Ger.) [hereinafter Joint Venture Ordinance].

<sup>22</sup> Hebing, *Unternehmensrecht*, *supra* note 17, at 4-5 (explaining BGBI. I, Nr. 14, S. 107 Beschluss zur Gründung der Anstalt zur treuhänderischen Verwaltung des Volkseigentums (Treuhänderische Verwaltung des Volkseigentums) vom 1.3.1990, and explaining BGBI. I, Nr. 18, S. 167 Statut der Anstalt zur treuhänderischen Verwaltung des Volkseigentums - Beschluss des Ministerrates - vom 15. 3. 1990). Note that at this early stage the Trust Institution's authority did not extend to people's real property, businesses controlled by cities and municipalities, or to agricultural enterprises. *Id.* at 5. The Trust Institution was also empowered to give and loan usage rights in real property, and to issue securities in the transforming enterprises. *Handelsblatt*, March 21, 1990, at 6, col. 1.

<sup>23</sup> Hebing, *Unternehmensrecht*, *supra* note 17, at 2.

<sup>24</sup> Knuepfer, *Wandlungen*, *supra* note 9, at 5.

FRG and GDR (Staatsvertrag) on June 25, 1990.<sup>25</sup> The Treaty provided for German reunification according to the preamble of the FRG's Basic Law, which requires that the East Germans choose to join the FRG,<sup>26</sup> and article 23 of the Basic Law, which stipulates that West German Basic Law replaces the law of the GDR.<sup>27</sup> The implementation of West German law was further achieved through the Agreement Treaty of September 28, 1991 ("Agreement Treaty").<sup>28</sup> The Law for the Privatization and Reorganization of People's Property ("Trust Law") (Treuhandgesetz),<sup>29</sup> which accompanied the Treaty, established the Trust Institution to privatize the people's enterprises and real property during the transformation period. These documents taken together: the property regulations, the Treaty, the Agreement Treaty, and the Trust Law establish the legal basis for many Germans to reclaim their expropriated property and provide for the privatization of people's enterprises and real property. However, the laws also create legal uncertainties in the sale and reclamation of expropriated property and create a special status for enterprises in the Trust Institution that allows them to keep inaccurate records during the privatization process.

## II. LAW

### A. *Property Law and Regulations*

In the interim phase between East Germany and West Germany's decision to reunite and the actual political reunification, the two

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<sup>25</sup> Vertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik, June 25, 1990, West Germany-East Germany, BUNDESGESTZBLATT [BGBI.] II, Nr. 20, S. 537 [hereinafter *The Treaty*].

<sup>26</sup> GG preamble (W. Ger.). The preamble states in part: "The German people . . . have also acted on behalf of those Germans to whom participation was denied. The entire German people are called upon to achieve in free self-determination the unity and freedom of Germany."

<sup>27</sup> Article 23 states:

For the time being, this Basic Law shall apply in the territory of the Länder of Baden, Bavaria, Bremen, Greater Berlin, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern. In other parts of Germany it shall be put into force on their accession.

GG art. 23 (W. Ger.).

<sup>28</sup> Gesetz zu dem Vertrag vom 31. August 1990 zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands - Einigungsgesetz - und der Vereinbarung vom 18. September 1990, West Germany-East Germany, BGBI. II, Nr. 35, S. 885 [hereinafter *The Agreement Treaty*].

<sup>29</sup> Gesetz zur Privatisierung und Reorganisation des volkseigenen Vermögens GB1. I, Nr. 33, S. 300 (E. Ger.) [hereinafter *Trust Law*].

countries enacted legislation to assist the privatization of real property in the GDR. With the GDR's decision to make its enterprises available to Western investment and joint ventures, the need arose for commercial structures and real property suitable for business purposes.<sup>30</sup> The Law for the Sale of People's Structures<sup>31</sup> ("Sales Law") was the first legislation that directly addressed East Germany's need for business space. The Sales Law stated that private parties could purchase East German commercial structures for business purposes.<sup>32</sup> This regulation was an exception to article 20 of the GDR's Civil Law Book (*Zivilgesetzbuch*), which stated that people's property could not be privately acquired or conveyed if the property was to be used for business purposes.<sup>33</sup>

The FRG and GDR issued the Joint Declaration for the Regulation of Open Property Questions<sup>34</sup> ("Declaration") on June 15, 1990, which announced that prior owners of expropriated property can expect the return of their property under qualified circumstances.<sup>35</sup> Generally, prior owners or their heirs possess valid claims for the return of property if their property was expropriated through economic coercion by the GDR.<sup>36</sup> Where the expropriated real property is used for housing projects, business purposes, or new enterprises however, the government will tender compensation instead of the expropriated property itself.<sup>37</sup> Compensation can consist of money, a new piece of land of equal value,<sup>38</sup> or, in cases where the GDR

<sup>30</sup> Handelsblatt, July 23, 1990, at 4, col. 1.

<sup>31</sup> Gesetz über den Verkauf volkseigener Gebäude vom 7.3.1990, BGBI. I, Nr. 18, S. 157 (E. Ger.).

<sup>32</sup> Handelsblatt, July 23, 1990, at 4, col. 1 (clarifying article one of the Gesetz über den Verkauf volkseigener Gebäude vom 7.3.1990, BGBI. I, Nr. 18, S. 157).

<sup>33</sup> ZGB art. 20, abs. 3 (E. Ger.). See also VERF art. 12 (E. Ger.). See LEWIS, *supra* note 5, at 13 (summary of limitations on people's property).

<sup>34</sup> Handelsblatt, June 18, 1990, at 7, col. 3 (explaining Die gemeinsame Erklärung zur Regelung offener Vermögensfragen, June 15, 1990, West Germany-East Germany).

<sup>35</sup> The Joint Declaration was included as part of the Agreement Treaty. The Agreement Treaty, *supra* note 28, at art. 41 (1).

<sup>36</sup> Handelsblatt, June 18, 1990, at 7, col. 3. Examples of economic coercion include expropriation due to overindebtedness, property sales forced on GDR immigrants when the sale was a condition of the issuance of a departure permit, and property converted to people's property after GDR owners had fled to other countries. *Gemeinsame Erklärung zur Regelung der offenen Vermögensfragen*, DDR SPEZIAL, July 13, 1990, at 6, 7 [hereinafter *Gemeinsame Erklärung*].

<sup>37</sup> Handelsblatt, June 18, 1990, at 7, col. 3 (explaining *Gemeinsame Erklärung* item 2a).

<sup>38</sup> *Gemeinsame Erklärung*, *supra* note 36, at item 2b.

expropriated enterprises and converted them into people's property, the government will return the whole enterprise, shares of the enterprise, or provide appropriate compensation.<sup>39</sup> Where expropriations occurred in criminal proceedings that were contrary to constitutional state law, the GDR will create a procedure to provide fair compensation.<sup>40</sup> Item 5 of the Declaration states that GDR law continues to protect rent control and usage rights which touch and concern real property and buildings.<sup>41</sup> In item 13 the GDR agreed to create the necessary legal and procedural provisions for the claims process and agreed to create a fund for compensation claims that will be independent from the national budget. Furthermore, the GDR will allow no property sales if the ownership rights are unclear. Prior ownership conditions must unequivocally prove that the property was never expropriated, and the prior owners must affirm that they have no claim against the property.<sup>42</sup>

The Declaration provides an exception to valid claims for GDR citizens who obtained their property or usage rights through unfair machinations. Such citizens have no legal recourse and their property rights are invalid.<sup>43</sup> Another exception contained within the Declaration states that property expropriated between May 8, 1945 and October 6, 1949 will not be returned.<sup>44</sup> The GDR and FRG reached an impasse on this issue because the GDR maintained that it could not restore property that the Soviet Union had expropriated during that period, nor could records of the expropriations be procured.<sup>45</sup> The FRG took exception and held that only a united German legislature could reach a definitive decision on such compensation.<sup>46</sup> The Declaration was adopted in the Agreement Treaty and became the law as to expropriated property.

In July of 1990 the GDR issued the Regulation of the Registration of Claims to Property Rights ("Registration Regulation"), which described the process by which claimants can assert their claims for

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<sup>39</sup> *Id.* at item 6.

<sup>40</sup> *Id.* at item 9.

<sup>41</sup> *Id.* at item 5.

<sup>42</sup> *Id.* at item 13.

<sup>43</sup> *Id.* at item 8.

<sup>44</sup> *Id.* at item 1.

<sup>45</sup> See *Gemeinsame Erklärung*, *supra* note 36, at 7. See M. DENNIS, GERMAN DEMOCRATIC REPUBLIC at 129, for a description of the East German land reform that began in 1945.

<sup>46</sup> *Handelsblatt*, June 18, 1990, at 7, col. 3

the restitution of expropriated property.<sup>47</sup> The Registration Regulation enacted the items in the Joint Declaration into law and provided some notable clarifications and exceptions. To recover expropriated real property, property rights, chattels, enterprises, and bank account holdings, claimants were required to submit their claims to the district magistrate's office or city administration by January 31, 1991.<sup>48</sup> Each local administration examines all property sales that occurred within the jurisdiction after October 18, 1989 to insure that the titles are clear.<sup>49</sup> The Registration Regulation also contains a catalog of valid and invalid claims.<sup>50</sup> The valid claims include property expropriated from citizens who left the GDR without a permit; property seized by the state as foreign property; and property taken through the misuse of power, corruption, deception, or coercion.<sup>51</sup> Examples of invalid claims are all expropriations during the Soviet occupation from May 8, 1945 through October 6, 1949; property expropriated through the criminal process; foreign restitution claims that have already been settled; and expropriated houses that were seized due to excess indebtedness, lack of rent payments, waiver of ownership rights, or donation into people's property.<sup>52</sup>

#### *B. Monetary, Economic, and Social Unification*

The Treaty for the Creation of a Monetary, Economic, and Social Unification between West and East Germany established the legal basis for East Germany's transition from a planned socialist economy to that of a social market economy.<sup>53</sup> The Treaty guarantees the right to private ownership<sup>54</sup> and economic freedom,<sup>55</sup> and further guarantees that the GDR's economic and fiscal policies are in harmony with the social market economy.<sup>56</sup> In principle, the Treaty altered all GDR

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<sup>47</sup> Von Seldenbeck, *Verordnung über die Anmeldung vermögensrechtlicher Ansprüche*, DDR SPEZIAL, July 20, 1990, at 7 [hereinafter Von Seldenbeck, *Anmeldungsverordnung*] (explaining the *Verordnung über die Anmeldung vermögensrechtlicher Ansprüche*, July 15, 1990 (E. Ger.)).

<sup>48</sup> Handelsblatt, July 31, 1990, at 6, col. 6 (explaining the *Verordnung über die Anmeldung vermögensrechtlicher Ansprüche*, July 15, 1990 (E. Ger.)).

<sup>49</sup> *Id.*

<sup>50</sup> Von Seldeneck, *Anmeldungsverordnung*, *supra* note 47, at 7.

<sup>51</sup> Handelsblatt, July 31, 1990, at 6, col. 6 (explaining the *Anmeldungsverordnung*).

<sup>52</sup> *Id.*

<sup>53</sup> The Treaty, *supra* note 25, at preamble.

<sup>54</sup> *Id.* at art. 2(1).

<sup>55</sup> *Id.* at art. 3.

<sup>56</sup> *Id.* at art. 11(1).



laws that were not in accord with the FRG's Basic Law, including previous laws that forbade the private acquisition of people's property.<sup>57</sup>

Supplement Nine to the Treaty emphasizes that the GDR policy proscribing the private acquisition of people's property seriously impedes investment opportunities.<sup>58</sup> The GDR agreed to repeal all laws which prevented the acquisition of real property.<sup>59</sup> The GDR instituted several measures to further this goal. Specifically, it agreed to provide real estate for business purposes, especially in the cities, by making usage rights available. The GDR also assured the cooperation of the municipal administrations in the development of a real estate market.<sup>60</sup> Finally, the GDR requires transforming enterprises to appraise their property and, following privatization, permits such enterprises to utilize the former people's property as security for credit.<sup>61</sup> Beyond these general statements, Supplement Nine did not further clarify the details of the privatization process.

### C. *The Trust Law*

The Law for the Privatization and Reorganization of People's Property ("Trust Law")<sup>62</sup> took effect on July 1, 1990 and recognized guaranties of private ownership and economic freedoms in the Treaty between the FRG and GDR.<sup>63</sup> The Trust Law also created the Trust Institution, a system of holding corporations designed to act in a proprietary role over the people's enterprises and real property during the transformation phase.<sup>64</sup>

The purpose of the Trust Law, as stated in the preamble, is to privatize people's property as quickly as possible; make real property available for business purposes; establish the competitiveness of as

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<sup>57</sup> *Id.* at art. 2(2). Supplement II and III Wirtschaftsunion Nos. 3, 4, & 5 state that the FRG Trade Law and Corporate Laws (GmbH and AG Gesetze) are in effect, but the Trust Law creates exceptions to these laws. Handelsblatt, July 10, 1990, at 6, col. 1. See Handelsblatt, June 12, 1990, at 3, col. 4.

<sup>58</sup> The Treaty, *supra* note 25, at art. 2(1) (referring to Supplement IX).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Trust Law, *supra* note 29, at 300.

<sup>63</sup> Reblin, *Treuhandgesetz der DDR*, DDR SPEZIAL June 29, 1990, at 3. Compare with Turner, *Der Eigentumsbegriff*, *supra* note 6, at 555. Under the prior regime, all property in the GDR had to serve the material and cultural interests of the state. See VERF. art. 12 (E. Ger.), which states that private ownership of people's property is forbidden and any usage rights must serve the interests and increase the social wealth.

<sup>64</sup> Trust Law, *supra* note 29, at art. 2.

many small and middle-sized enterprises as possible; secure and create new jobs; ascertain the financial status of people's enterprises; and assess the profitability of enterprises and their ability to adapt to a social market economy.<sup>65</sup> The Trust Institution, whose powers were significantly increased under the Trust Law, is an institution of public law under the supervision of the East German Prime Minister.<sup>66</sup> Its charter is authorized by the legislature, and its rules of procedure require the confirmation of the Council of Ministers.<sup>67</sup>

The Trust Institution assumed proprietorship over all people's property that had begun transformation under earlier legislation,<sup>68</sup> and on July 1, 1990, automatically gained proprietorship over people's property which had not yet begun transformation.<sup>69</sup> However, separate provisions in the Trust Law dealt with property under the administration of the state or municipalities that exercised a governmental function such as the mail service, railway, administration of waterways and public highways, enterprises that were registered as bankrupt,<sup>70</sup> and agricultural and forestry enterprises. The separate provisions allow these governmental enterprises to maintain their economic, ecological, structural, and legal features.<sup>71</sup> Once the people's enterprises entered the Trust Institution, the Institution had until September 1, 1990 to place them under the supervision of Trust Corporations, holding companies that are responsible for the actual restructuring of the people's enterprises.<sup>72</sup> The people's combinations (Kombinate) would then be designated as "corporations (Aktiengesellschaften) under construction" and the people's businesses designated as "limited liability companies (Gesellschaften mit beschränkter Haftung) under construction."<sup>73</sup> During the construction phase the Trust Institution sells shares or interests in the enterprises, establishing their efficiency and competitiveness, liquidating unreconstructable enterprises or portions of enterprises, and decentralizing the people's combinations. This allows the reconstructable portions of the combinations

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<sup>65</sup> *Id.* at preamble; *Id.* at art. 11.

<sup>66</sup> *Id.* at art. 1 (2).

<sup>67</sup> *Id.* at art. 1 (3).

<sup>68</sup> Beschluss vom 1. März 1990 zur Gründung der Anstalt zur treuhänderischen Verwaltung des Volkseigentums BGBI. I, Nr. 14, S. 107 (E. Ger.).

<sup>69</sup> Trust Law, *supra* note 29, at art. 11 (2).

<sup>70</sup> *Id.* at art. 1 (5).

<sup>71</sup> *Id.* at art. 1 (6).

<sup>72</sup> *Id.* at art. 6.

<sup>73</sup> *Id.* at art. 14.

to become independent competitive economic units, and enables the unprofitable portions to be liquidated.<sup>74</sup> Within this framework the Trust Institution may use all available market measures to establish the enterprises on a financially sound basis, including raising credit, issuing bonds, and selling portions or interests of the enterprises.<sup>75</sup> The Trust Law places no restrictions on who may purchase the interests.

The enterprises under construction were required to submit the following to the Trust Institution by October 31, 1990: a draft of the shareholders' agreement for limited liability companies, or a draft of the charter for corporations; the closing balance from June 30, 1990; the opening balance from July 1, 1990; a financial statement; a status report; and the specifications of real property owned by the enterprises.<sup>76</sup> The boards of directors of the transforming enterprises have until June 30, 1991, to submit the following to the commercial register: the shareholders' agreement or charter, the opening balance, financial statement, and an auditor's report.<sup>77</sup> When this submission has occurred, the entry "under construction" will be deleted from the commercial register, and the firms will be considered fully privatized. If these measures have not taken place by June 30, 1991, the enterprises will be liquidated or declared bankrupt.<sup>78</sup>

### III. PROPERTY ANALYSIS

Although the Treaty between the FRG and the GDR furnishes the means for the conversion of people's property to private property, it leaves legal matters concerning the sale of people's property unclarified.<sup>79</sup> Discrepancies and gaps in these areas of the law constitute the greatest impediments to investment in the GDR,<sup>80</sup> ultimately slowing privatization.<sup>81</sup> While the Regulation of the Registration of Claims

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<sup>74</sup> Siebert, *Die entscheidende Frage lautet: Auf welche Weise kann man Betriebe aus der Treuhand heraus lösen?*, Handelsblatt, June 18, 1990, at 6, col. 1 [hereinafter Siebert, *Die entscheidende Frage*]. See Trust Law, *supra* note 29, at art. 2 (6).

<sup>75</sup> Trust Law, *supra* note 29, at arts. 2 (7), 8, 9 (4).

<sup>76</sup> *Id.* at art. 20.

<sup>77</sup> *Id.* at art. 21.

<sup>78</sup> *Id.* at art. 22.

<sup>79</sup> Scholz, *Der Staatsvertrag zur Währungs-, Wirtschafts- und Sozialunion*, 1990 BETRIEBS-BERATER (Beilage 23 zu Heft 18) 1, 5.

<sup>80</sup> Handelsblatt, July 23, 1990, at 4, col. 1. Kiefer, *East Germany Finds Few Investors So Far*, CHRISTIAN SCI. MONITOR, Sept. 18, 1990, at 5, col. 1.

<sup>81</sup> See Drost, *Ungeklärte Eigentumsrechte lösen Investitionstau aus*, Handelsblatt, July 26, 1990, at 3, col. 1 [hereinafter Drost, *Ungeklärte Eigentumsrechte*].

to Property Rights explains the process for registering claims, it does not clarify how and when this process will take place. There are also unanswered questions as to which claims are valid.<sup>82</sup> Uncertainties in the law regarding land sales and restitution of expropriated property deter potential investors, business partners, and lenders.<sup>83</sup> For those who seek to purchase property there is reason to be cautious.<sup>84</sup> A future court or commission may declare land purchases invalid if the titles are unclear, or award property which is purchased to previous owners whose claims for restitution take priority.<sup>85</sup>

#### A. *Property Sales*

A discrepancy in the law between the Joint Declaration for the Regulation of Open Property Questions and the Law for the Sale of People's Structures created an obstacle to the acquisition of property in the GDR.<sup>86</sup> The Joint Declaration, which, with exceptions, became law with the enactment of the Registration of Claims to Property Rights, stated that the GDR will only allow the sale of property or structures when the prior owners affirm that they will not register claims against the purchasers.<sup>87</sup> However, some West German lawyers contend that the Regulation of the Registration of Claims is in conflict with the Sale of People's Property Law, which states in article one that people's structures may be sold to private parties for business purposes.<sup>88</sup> The lawyers argue that in practice the Sales Law takes precedence over the Regulation because the government did not intend to halt the legal sale of land and therefore the sales should not be impeded.<sup>89</sup>

The Federal Justice Administration's spokesman conceded that the legal situation is unclear, and confirmed that despite the Justice Administration's efforts to deter property sales with unclear titles, purchasers are buying land and buildings through unauthorized meth-

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<sup>82</sup> Von Seldneck, *Anmeldungsverordnung*, *supra* note 47, at 7.

<sup>83</sup> *Id.* at 1.

<sup>84</sup> Handelsblatt, July 26, 1990, at 6, col. 1.

<sup>85</sup> Kittke, *Eigentumserwerb an Grund und Boden in der DDR*, DDR SPEZIAL, June 1, 1990, at 3, 4. According to the executive committee of the Trust Institution, 9500 applications for the restitution of businesses that were seized in 1972 have been submitted. Handelsblatt, Aug. 1, 1990, at 1, col. 3.

<sup>86</sup> Handelsblatt, July 26, 1990, at 6, col. 1.

<sup>87</sup> Handelsblatt, July 31, 1990, at 6, col. 6 (explaining the Verordnung über die Anmeldung vermögensrechtlicher Ansprüche from July 15, 1990 (E. Ger.)).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 6, col. 7 (explaining the Anmeldungsverordnung).

ods.<sup>90</sup> The Justice Administration maintains that the Regulation of Claims Registration has priority over the earlier Law, and that all sales of property with unclear titles must cease. The Justice Administration's spokesman stated on July 25, 1990, "we expect that interim sales will be declared null and void."<sup>91</sup>

The GDR must provide a solution to this dilemma, and allow investors to obtain ownership of the land and buildings they require to conduct business. The GDR could solve the investment obstacle by allowing the local magistrates<sup>92</sup> to authorize land conveyances when they believe in good faith that the title is clear. The government could then establish a central fund to compensate victims of expropriation.<sup>93</sup> Such a solution could, however, be construed as a violation of article 14 of the Basic Law.<sup>94</sup>

### *B. Restitution of Expropriated Property*

Rather than establishing a lasting law that settled the expropriations controversy in Germany, the Regulation of the Registration of Claims to Property generated a storm of debate over which claims are legally enforceable.<sup>95</sup> The catalog of valid and invalid claims drew seemingly arbitrary distinctions between the criteria of enforceable and unenforceable claims.<sup>96</sup>

<sup>90</sup> According to GDR law, private parties may only obtain usage rights to people's property. Von Seldeneck, *Probleme beim Abschluss*, DDR SPEZIAL, June 20, 1990, at 1 (citing ZGB art. 20, abs. 3 (E. Ger.)). Also, according to GDR law, Western purchasers must acquire a permit from the district administration in five new German states to purchase private property. As of March 3, 1990, the new state authorities were not issuing the permits to Westerners. Many buyers have resorted to using "strawmen," East Germans who purchase the property and hold the titles for the buyers. Others have drawn up preliminary contracts with the owners which stipulate that the purchaser can utilize the land and has a right to the title when the East German is able to convey it. See Von Seldeneck, *Probleme beim Abschluss*, DDR SPEZIAL, June 20, 1990, at 1.

<sup>91</sup> Handelsblatt, July 26, 1990, at 6, col. 1.

<sup>92</sup> It has been suggested that the transition to West German law and a social market economy could be expedited and made more efficient by the placement of West German officials and experts in key positions in the East German administration. The administration of real property issues and the establishment of industries are especially appropriate areas for this policy. Most East German officials lack the necessary knowledge and qualifications to implement the required changes. Bading, *Schleppendes Angebot von Gewerbeflächen in der DDR führt zu Zurückhaltung bei Investitionsentscheidungen*, Handelsblatt, July 27, 1990, at 4, col. 1.

<sup>93</sup> Handelsblatt, July 23, 1990, at 4, col. 2.

<sup>94</sup> Handelsblatt, July 29/30, 1990, at 3, col. 3. See GG art. 14 (W. Ger.).

<sup>95</sup> See Handelsblatt, Aug. 2, 1990, at 4, col. 5. See also *Gemeinsame Erklärung*, *supra* note 37, at 7.

<sup>96</sup> *Gemeinsame Erklärung*, *supra* note 36, at 7.

According to the Regulation, no property which was expropriated before October 7, 1949 will be returned to the prior owners.<sup>97</sup> The GDR's delegation to the meeting on the Joint Declaration for the Regulation of Open Property Questions asserted that the reason for this cutoff date was that the Soviet occupation of the GDR during that period was responsible for those expropriations.<sup>98</sup> The West German representatives to the meeting disputed the assertion<sup>99</sup> by pointing out that in 1945 the GDR, of its own accord, enacted the land reform<sup>100</sup> that expropriated over 2.5 million hectares.<sup>101</sup> The representatives did not settle the dispute. The West German delegation wanted a united German legislature to reach a decision regarding that period, but the East Germans issued the Claims Regulation despite West German protest.<sup>102</sup>

After the GDR enacted the Regulation on July 15, 1990, an association was formed to represent people whose property in the GDR had been seized.<sup>103</sup> The association maintains that article 14 of the Basic Law requires the GDR to provide for the return of expropriated property that otherwise meets the criteria of the Regulation,<sup>104</sup> and further contends that any agreement between the GDR and FRG that did not include such a provision would be unconstitutional.<sup>105</sup>

The Claims Regulation also left approximately 68,000 citizens, whose houses were expropriated between June 11, 1953 and November 13, 1989 due to excess debt or lack of rent payments, without legal means of recovering their property.<sup>106</sup> The clause in the Joint Declaration that provided compensation for these cases was not included in the Claims Regulation.<sup>107</sup> The GDR government created an arbitrary distinction in this case between people who left the GDR without providing for their property and those who left their property in the

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<sup>97</sup> Handelsblatt, July 31, 1990, at 6, col. 6, (explaining the Anmeldeungsverordnung).

<sup>98</sup> See *Gemeinsame Erklärung*, *supra* note 36, at 7. See Handelsblatt, July 18, 1990, at 7, col. 3.

<sup>99</sup> Handelsblatt, July 18, 1990, at 7, col. 3.

<sup>100</sup> See *Gemeinsame Erklärung*, *supra* note 36, at 7.

<sup>101</sup> M. DENNIS, GERMAN DEMOCRATIC REPUBLIC 129 (1988).

<sup>102</sup> See Handelsblatt, July 18, 1990, at 7, col. 3.

<sup>103</sup> Handelsblatt, July 29/30, 1990, at 3, col. 3.

<sup>104</sup> *Id.* Article 14 requires the government to compensate owners for expropriated property. GG art. 14 (W. Ger.).

<sup>105</sup> *Id.*

<sup>106</sup> Handelsblatt, Aug. 2, 1990, at 4, col. 5.

<sup>107</sup> Handelsblatt, July 30, 1990, at 6, col. 7.

possession of another private party.<sup>108</sup> The former emigrants had valid claims and the latter did not. The Free Democratic Party (FDP) in the FRG heavily criticized the GDR for the lack of the clause in the Regulation.<sup>109</sup>

Solving the property questions before German reunification took place was practically impossible. The GDR sought to limit the restitution of expropriated property, while the FRG preferred to increase the number of compensable claims.<sup>110</sup> The solution will require a complex and discriminating system of laws to distinguish between claims that warrant the return of property and claims that warrant only compensation. The East German and West German legislatures, separated by hundreds of kilometers and a border, could not agree on the same set of laws.

Article 14 of the Basic Law necessitates that the united German legislature compensate the victims of unjustified expropriation.<sup>111</sup> The Agreement Treaty developed a system of compensation which would award compensation from a central fund when the return of property would cause a hardship for others.<sup>112</sup> Expropriations that took place before October 7, 1949 will most likely not be compensated. Yet, the 68,000 claimants that were not accounted for in the Claims Regulation probably do have valid claims, as the Agreement Treaty stipulated that Germany would enact no law which contravenes the Joint Declaration.<sup>113</sup>

#### IV. ANALYSIS

##### A. *The Trust Institution*

The Trust Law accorded the Trust Institution reorganizational and financial recovery functions that encompass almost the entire GDR economy, which includes approximately 8000 enterprises and over six million employees,<sup>114</sup> and created a special status for transforming

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<sup>108</sup> Handelsblatt, Aug. 2, 1990, at 4, col. 5.

<sup>109</sup> The chairman of the FDP, Otto Graf Lambsdorff, called the lack of the clause an "unconstitutional limitation" and asked the West German government to hold the GDR to the Joint Declaration and to supplement the Claims Regulation with the missing clause. *Id.*

<sup>110</sup> See *id.*

<sup>111</sup> See GG art. 14 (W. Ger.).

<sup>112</sup> See Handelsblatt, July 23, 1990, at 4, col. 2.

<sup>113</sup> Agreement Treaty, *supra* note 28, at art. 41 (3).

<sup>114</sup> Strobel, *Die staatsvertragliche Umstellung des DDR-Rechnungswesens und die Neuerungen des DDR-Trehanagesetzes*, 1990 BETRIEBS-BERATER (Beilage 23 zu Heft 18) 17, 26 [hereinafter Strobel, *Die Umstellung*].

enterprises due to the unusual circumstances and requirements involved in transforming socialist property into private property.<sup>115</sup> Three noteworthy obstacles to privatization are inherent in this temporary state of the enterprises under the Trust Institution. The first obstacle concerns the financial statements which the enterprises must submit to the commercial register to become fully privatized.<sup>116</sup> The second obstacle regards the difficulties involved with the decentralization of the people's businesses.<sup>117</sup> The last issue relates to the Trust Institution's methods utilized in privatizing the enterprises.<sup>118</sup>

The fiduciary status of an enterprise under the Trust Law created an exception to the West German Trade Law (*Handelsgesetzbuch*), which also took effect in East Germany on July 1, 1990 as part of the Treaty.<sup>119</sup> The Trade Law requires that a corporation or company's financial status be publicized and authorized by a notary public before the corporation can be entered in the commercial register.<sup>120</sup> GDR enterprises in transformation are able to avoid registering with the commercial register by submitting their financial information, including opening balances,<sup>121</sup> directly to the Trust Institute,<sup>122</sup> rather than to the commercial register. Many enterprises probably were not able to meet the October 31, 1990 registration deadline due to the complexities surrounding the submission of financial statements<sup>123</sup> and

<sup>115</sup> See Kelm, *Das Treuhandgesetz der DDR schafft ein fragwürdiges zeitweiliges Sonderrecht*, *Handelsblatt*, July 10, 1990, at 6, col. 1 [hereinafter Kelm, *Fragwürdiges Sonderrecht*].

<sup>116</sup> See *Handelsblatt*, July 27, 1990, at 15, col. 5. See Reblin, *Treuhandgesetz der DDR*, *DDR SPEZIAL*, June 29, 1990, at 3, 4.

<sup>117</sup> See Schum, *Marktwirtschaft von oben ist in keinem Fall ein hilfreiches Rezept*, *Handelsblatt*, July 27, 1990, at D1, col. 1.

<sup>118</sup> See Siebert, *Die entscheidende Frage*, *supra* note 74, at 6, col. 1.

<sup>119</sup> Books I-III of the Trade Law became effective in the GDR on July 1, 1990, as part of the Treaty. The Treaty, *supra* note 25, at 553. See Kelm, *Fragwürdiges Sonderrecht*, *supra* note 115, at 6, col. 1.

<sup>120</sup> *HANDELSGESETZBUCH* [HGB] sec. 10 (W. Ger.). A notary public must accurately and thoroughly examine a firm's assets before it enters the commercial register. See Kelm, *Fragwürdiges Sonderrecht*, *supra* note 115, at 6, col. 1.

<sup>121</sup> The opening balance must be an appraisal of the company's total worth in West German deutsch marks. According to the GDR's Statistics Office, the GDR requires a great deal of assistance from the FRG in this area due to a lack of accounting know-how. See *Handelsblatt*, Jan. 22, 1991, at 12, col. 1; see also *Handelsblatt*, Jan. 22, 1991, at 12, col. 1.

<sup>122</sup> Trust Law, *supra* note 29, at art. 20.

<sup>123</sup> *Handelsblatt*, July 27, 1990, at 15, col. 5; see Kelm, *Fragwürdiges Sonderrecht*, *supra* note 115, at 6, col. 1.



the rendering of accounts to meet West Germany standards.<sup>124</sup>

After the financial information has been submitted to the Trust Institution, the enterprises have until June 30, 1991 to submit the financial information to the commercial register. Until the financial documents from each enterprise are authorized by the commercial register, the actual financial status of each enterprise will remain unclear, since many financial statements are likely to be inaccurate.<sup>125</sup> Hence, the Trust Law created a questionable status for the transforming firms that allows them to keep inadequate financial records while they remain "under construction." Some enterprises will likely utilize the opportunity to make their records more attractive to banks and investors by overstating their assets in the opening balance<sup>126</sup> and underestimating their debt.<sup>127</sup> Upon reunification, however, the West German Trade Law took precedence over the Trust Law<sup>128</sup> and requires an enterprise to submit the financial information to the commercial register for authorization upon privatization.

Once a firm submits its information, the register judges face the momentous task of quickly processing thousands of financial documents. Investors, creditors, and possible business partners of enterprises "under construction" must do without the evidentiary advantage of the commercial register and must rely instead on their own investigations.<sup>129</sup> After reunification the register judges will have the responsibility of accurately checking the newly privatized firms' financial status so that public trust in the commercial register may be maintained.<sup>130</sup>

Possibly the Trust Institute's most difficult function is decentralizing the conglomerations of firms within the monopolistic structure of the people's combinations and developing small and middle-sized

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<sup>124</sup> Luckey, *Neubeginn in der Rechnungslegung*, Handelsblatt, July 6/7, 1990, at D2, col. 3 [hereinafter Luckey, *Neubeginn*].

<sup>125</sup> Jürgen Siedler, a West German member of the directorate of the Henkel KGaA (partnership limited by shares), which is taking over the Genthin GmbH, a transforming enterprise under the Trust Institution, recently stated: "One cannot always ask questions and wait until the questions are answered. By that time the East German businesses will be bankrupt. You have to take risks." The East German firm had not submitted an opening balance. Handelsblatt, Aug. 2, 1990, at 14, col. 1.

<sup>126</sup> Luckey, *Neubeginn*, *supra* note 124, at D2.

<sup>127</sup> See Handelsblatt, July 30, 1990, at 7, col. 1.

<sup>128</sup> See Handelsblatt, July 23, 1990, at 1, col. 1.

<sup>129</sup> See Handelsblatt, July 30, 1990, at 7, col. 1.

<sup>130</sup> See Kelm, *Fragwürdiges Sonderrecht*, *supra* note 115, at 6, col. 1.

firms from the different departments.<sup>131</sup> Since the goal of the Trust Institution is the privatization of the people's property, only firms or portions of combinations that have a possibility of survival in the market should receive credit from the Trust Institution.<sup>132</sup> Enterprises which have no chance of survival must either be liquidated or declared bankrupt.<sup>133</sup> Property which is not capable of privatization but performs a government or social function may be conveyed to municipal or city governments.<sup>134</sup> The market should also determine which enterprises obtain credit from outside the Trust Institution, offers for joint ventures, and other forms of assistance. When an enterprise cannot acquire enough proceeds to cover its expenses through its own production, services, or through investments from other sources, it should be reorganized much like under American chapter 11 law.<sup>135</sup>

Unfortunately the Trust Institution has initiated the "watering can principle" of funding the transforming enterprises, whereby the Trust Institution directly gives each enterprise 41% of its credit requirement.<sup>136</sup> One resultant problem is that some firms overestimate their financial need and thereby take away funding from firms that accurately assess their credit requirements. A second undesirable consequence is that the "watering can principle" unnecessarily adds to the life of firms that cannot survive and does not provide enough support to the firms that could survive if they had adequate credit.<sup>137</sup> The Trust Institution should develop a fair system to rate the firms' possibilities of survival and provide credit on a case by case basis pursuant to the findings of a committee of financial experts.

Also, risks involving the decentralization of GDR enterprises through the Trust Institution exist. The Trust Institution may not completely decentralize the combinations and, instead, will sell considerable portions to individual Western firms enabling portions of the combinations to continue operating as a unit. Thus, the Trust Institution may defeat a purpose of the Trust Law as stated in its preamble.<sup>138</sup>

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<sup>131</sup> See Handelsblatt, July 24, 1990, at 4, col. 3.

<sup>132</sup> See Siebert, *Die entscheidende Frage*, *supra* note 74, at 6, col. 1.

<sup>133</sup> Joachim & Zeiner, *Was nicht privatisierungsfähig ist, das ist auch nicht sanierungsfähig*, Handelsblatt, Jan. 14, 1991, at 15, col. 1 [hereinafter Joachim & Zeiner, *Privatisierungsfähig*].

<sup>134</sup> Trust Law, *supra* note 29, at art. 1 (1).

<sup>135</sup> See Siebert, *Die Entscheidende Frage*, *supra* note 74, at 6, col. 4.

<sup>136</sup> See Handelsblatt, July 30, 1990, at 13, col. 4.

<sup>137</sup> *Id.*

<sup>138</sup> Schum, *Marktwirtschaft von oben ist in keinem Fall ein hilfreiches Rezept*, Han-

Evidence supports the assertion that the Trust Institution is selling large portions of combinations and entire firms to individual parties for the sake of expediency.<sup>139</sup> All the purposes of the Trust Institution must be considered during the transformation. A better choice, however, is furthering privatization at the expense of less decentralization. East German firms under the Trust Institution lack Western entrepreneurial expertise. In many cases, East German firms' survival depends on whether they receive timely and competent advice in their undertakings and administration. The Trust Institution is overburdened and cannot meet the management needs of all the firms under its authority.<sup>140</sup> For that reason, it is preferable to sell some firms in their entirety to Western investors rather than allowing them to go bankrupt due to their own mismanagement.

Another crucial question is by which method will all the firms be taken out of the Trust Institution. The firms that are financially healthy and capable of independent privatization can sell shares of the enterprise or receive credit secured by the firms' assets to finance the process.<sup>141</sup> However, the majority of the enterprises are incapable of procuring the necessary investment and liquid capital due to their lack of accurate financial statements and due to the uncertainty in the ownership of their real property.<sup>142</sup> The poor financial condition of many firms also limits the possibility of management buy outs.<sup>143</sup>

In such cases, the Trust Institution performs the essential function of finding purchasers for transforming enterprises. When possible, the Trust Institution seeks multiple applicants in order to establish a market and market price for the enterprises by conducting auctions.<sup>144</sup> The bulk of new investment presently goes to enterprises in the service sector.<sup>145</sup>

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delsblatt, July 27, 1990, at D1, col. 1. The preamble to the Trust Law states that a duty of the Trust Institution is to create as many small and middle-sized firms as possible. See Trust Law, *supra* note 29, at preamble.

<sup>139</sup> See Handelsblatt, Aug. 1, 1990, at 2, col. 4.

<sup>140</sup> See Ziener, *Die Wirtschaft diktiert das Geschehen*, Handelsblatt, Aug. 6, 1990, at 2, col. 3.

<sup>141</sup> Fockenbrock, *Hochzeitskandidaten werden immer seltener*, Handelsblatt, Jan. 14, 1991, at 15, col. 1. Previously the Trust Institution underestimated the number of enterprises which could survive without privatization. Helmuth Coqui, director of the Berlin branch of the Trust Institution, questions the principle of privatization as an end in itself. He maintains that privatization is urgently required only for the problem cases. *Id.*

<sup>142</sup> Kiefer, *East Germany Finds Few Investors So Far*, CHRISTIAN SCI. MONITOR, Sept. 18, 1990, at 5, col. 1.

<sup>143</sup> Joachim & Zeiner, *Privatisierungsfähig*, *supra* note 133, at 15.

<sup>144</sup> *Id.*

<sup>145</sup> Liebfritz, *Economic Consequences of German Unification*, BUSINESS ECONOMICS

The Trust Director stated in January 1991 that the marketing of the enterprises will enter the active phase only after establishment of a large number of sales teams and an information system to permit greater insight into and management of the workings of the privatization process. The production of business catalogs oriented towards foreigners will facilitate these sales.<sup>146</sup>

The risk exists that the Institution will perpetuate itself and in the process will lose its original purpose—the privatization of people's property. This can be prevented by legally limiting the Institution's duration. Additionally, the Institution must remain separated from the political process, much like the West German Federal Reserve (Bundesbank).<sup>147</sup> Furthermore, the best protection against the Trust Institution becoming a government holding and degenerating into an investment control center is the legal establishment of the right of businesses to become privatized through the Trust Law.<sup>148</sup>

## V. CONCLUSION

After the East Germans revolted in the Fall of 1989 and voted to rejoin West Germany, the unification of two completely different systems of property ownership confronted them. East Germany possessed a planned socialist economy in which the government controlled 90% of all businesses as socialist property. In the spring of 1990, East Germany began the process of privatizing its socialist property by enacting regulations to allow Western firms to invest in and purchase East German firms. Issuance of the early regulations was

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vol. 7, no. 4. This includes retail sales outlets, tourism industries, restaurants, and banking and insurance services. *Id.* The value of service industries is more ascertainable than the value of other enterprises, such as the parts of the decentralized combinations which require valuations and can often be sold only for their net assets value. Joachim & Zeiner, *Privatisierungsfähig*, *supra* note 133, at 15.

<sup>146</sup> Joachim & Zeiner, *Privatisierungsfähig*, *supra* note 133, at 15.

<sup>147</sup> See Siebert, *Die entscheidende Frage*, *supra* note 74, at 6, col. 2. The German National Bank is one of the most independent central banks in any of the industrial nations. It is independent of government instructions or directives and can advise the federal government on monetary matters of importance. Government officials can attend the deliberations of the Central Bank Committee, but they have no vote and their power is limited to the ability to delay decisions by up to two weeks. See P. KATZENSTEIN, *POLICY AND POLITICS IN WEST GERMANY* 84, 86 (1987).

<sup>148</sup> When a firm makes a reasonable offer to purchase an enterprise within the Trust Institution, the Institution has two months to examine the offer and compare it to any other offers for the enterprise. After the Institution's publication and examination of the offer, the transforming enterprise has a firmly established right to become privatized. Siebert, *Die entscheidende Frage*, *supra* note 74, at 6, col. 2.

in an ad hoc manner, intended to serve as only temporary measures until East Germany and West Germany could reunite.

East and West Germany issued the Joint Declaration for the Regulation of Open Property Questions on June 15, 1990, which provided for the return of property which had been expropriated by the East German government after 1949. The Joint Declaration also halted the legal sale of previously expropriated property. As a follow up to the Joint Declaration, East Germany enacted the Regulation of the Registration of Claims to Property Rights. This did not include some of the compensable categories included by the Joint Declaration. As a result, the validity of approximately 68,000 claims was doubtful. The Agreement Treaty between East and West Germany resolved this ambiguity by adopting the Joint Declaration as the governing law.

The Treaty for the Creation of a Monetary, Economic, and Social Unification of West and East Germany established the legal basis for East Germany's transition to a social market economy on July 1, 1990. In principle, the Treaty replaced all East German laws that were not in accord with a social market economy with West German law. Accompanying the Treaty was the Trust Law, which created the means for privatizing East Germany's socialist enterprises through the Trust Institution. The Trust Institution is a system of holding corporations designed to provide credit and find buyers for East German firms under transformation.

The Trust Law also created some exceptions to West German trade law which East Germany implemented. The firms under the Trust Institution are not required to maintain accurate records until they actually become privatized. This process may last up to one year. In the intervening time, investors must be skeptical of the firms' financial records and conduct their own investigations. German economists also fear that the Trust Institution will not fully decentralize the socialist businesses and, instead, will sell portions of large firms to Western firms thereby creating monopolies.

Only the unified legislature of East and West Germany will be able to formulate a workable solution to the problems of the restitution of expropriated property. In many cases, the right to restitution will be sacrificed in favor of compensation. East and West Germans will find it easier to resolve their difficulties in a unified parliament. However, the uncertainties involved in the issues of restitution and return of expropriated property are still the greatest obstacles to investment and privatization in the five new states of Germany.

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