

Fordham International Law Journal

Volume 14, Issue 4

1990

Article 10

Investments in the Territory of the Former German Democratic Republic—A Chance of Direction

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Investments in the Territory of the Former German Democratic Republic—A Chance of Direction

Michael Gruson and Georg F. Thoma

Abstract

This Article intends to analyze the major issues which come up in almost every transaction involving investments in the Former GDR. Part I briefly describes the law applicable to transactions in the Former GDR. Part II outlines the legal structure of enterprises in the territory of the Former GDR, the ownership of these enterprises, and questions relating to their balance sheets. Part III addresses the important question of restitution or compensation claims which may be asserted against such enterprises or the investor. Part IV considers problems with which an investor in the Former GDR typically is confronted, mainly issues of environmental liability and the need to reduce the work force. Part V describes the protection of industrial property rights in the Former GDR. This Article concludes that a potential investor must be aware that although the Former GDR is now a part of the Federal Republic of Germany, he will be faced with novel and difficult legal issues. Only a thorough understanding of these issues will prevent costly mistakes and disappointments.

UPDATE

INVESTMENTS IN THE TERRITORY OF THE FORMER GERMAN DEMOCRATIC REPUBLIC—A CHANGE OF DIRECTION

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INTRODUCTION

In March 1991, the German Parliament adopted a law which is designed to simplify the process of privatization of companies located in the territory of the former German Democratic Republic (the "Former GDR")¹ and to encourage investments in that territory. The law is quite appropriately entitled "Law for the Removal of Obstacles to Privatization of Enterprises and for the Promotion of Investments"² (the "Obstacles Removal Law"). The Obstacles Removal Law makes important changes in a number of statutes dealing with issues of privatization and investments.

The Obstacles Removal Law for the most part contains amendments to the Law Concerning Regulation of Unresolved Property Issues (the "Property Law")³ and the Law Relating to

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1. The five new states of the Federal Republic of Germany comprising the territory of the Former GDR are: Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt, and Thüringen.

2. GESETZ ZUR BESEITIGUNG VON HEMMNISSEN BEI DER PRIVATISIERUNG VON UNTERNEHMEN UND ZUR FÖRDERUNG VON INVESTITIONEN VOM 22. MÄRZ 1991, BGBl I AT 766 [HEREINAFTER OBSTACLES REMOVAL LAW].

3. Law Concerning Regulation of Unresolved Property Issues (GESETZ ZUR REGELUNG OFFENER VERMÖGENSFRAGEN) [hereinafter Property Law]. This Law is set forth in the Treaty Between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (dated Aug. 31, 1990), ratified by the Act of September 23, 1990 (Vertrag zwischen der Bundesrepublik

Special Investments in the GDR (the "Special Investments Law").⁴ Most of the amendments to these two laws made by the Obstacles Removal Law are identical to the proposed amendments to the Property Law and the Special Investments Law already discussed by the authors in the previous issue of the *Fordham International Law Journal*.⁵ However, the Obstacles Removal Law makes some important revisions to the Property Law [the Property Law as so revised, hereinafter the Revised Property Law], the Special Investments Law [the Special Investments Law as so revised, hereinafter the Revised Special Investments Law] and some other statutes⁶ that were not contained in the proposed amendments previously discussed.

This Article intends to analyze these major changes made by the Obstacles Removal Law to the extent they are relevant for investments in the territory of the Former GDR.

Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands — Einigungsvertrag [hereinafter Unification Treaty] — ratifiziert in der Bundesrepublik Deutschland durch Gesetz vom 23. September 1990 zu dem Vertrag vom 31. August 1990 zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands — Einigungsvertragsgesetz — und der Vereinbarung vom 18. September 1990), BGBl II at 885, at annex II, ch. III, div. B, subdiv. I, no. 5. The Property Law as amended by the Obstacles Removal Law, *supra* note 2, art. 1, is hereinafter referred to as the Revised Property Law.

4. Law Relating to Special Investments in the German Democratic Republic (GESETZ ÜBER BESONDERE INVESTITIONEN IN DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK) [hereinafter Special Investments Law], Unification Treaty, *supra* note 3, annex II, ch. III, div. B, subdiv. I, no. 4. The Obstacles Removal Law, *supra* note 2, changes the title of that law to "Law Relating to Special Investments in the Territory Referred to in Article 3 of the Unification Treaty" (GESETZ ÜBER BESONDERE INVESTITIONEN IN DEM IN ARTIKEL 3 DES EINIGUNGSVERTRAGES GENANNTE GEBIET (Investitionsgesetz - BInvG)). The Special Investments Law as amended by the Obstacles Removal Law, art. 2, is hereinafter referred to as the Revised Special Investments Law.

5. See Gruson & Thoma, *Investments in the Territory of the Former German Democratic Republic*, 14 *FORDHAM INT'L L.J.* 540, 552-65 & nn.60-61 (1990-1991) [hereinafter Gruson & Thoma].

6. Some of the other statutes amended by the Obstacles Removal Law, *supra* note 2, are the Regulation Concerning the Transfer of Real Property, *see* Gruson & Thoma, *supra* note 5, at 573 n.153; the DM Opening Balance Sheet Law, *see* Gruson & Thoma, *supra* note 5, at 546 n.28; the Gesamtvollstreckungsordnung, the Bankruptcy Law of the Former GDR, which remains in effect pursuant to the Unification Treaty, *see* Gruson & Thoma, *supra* note 5, at 544 n.16; the Trusteeship Law, *see* Gruson & Thoma, *supra* note 5, at 545 n.21; and the Environmental Law, *see* Gruson & Thoma, *supra* note 5, at 566-67 n.120.

I. SALE OF REAL PROPERTY AND BUILDINGS

A. Revised Property Law

1. Basic Rules

Since the unification of Germany, private ownership of all types of property is fully recognized in the Former GDR and, as a general principle, former owners of property which in the past has been taken by state act and transferred to state ownership ("Volkseigentum") or to the ownership of a third party or placed under public administration ("staatliche Verwaltung"), now have the right to claim the reconveyance of such property from the present owner or the lifting of such public administration.⁷

The original version of the Property Law, however, already excluded reconveyance of property in certain cases. In these cases, the former owner is limited to compensation payments or conveyance of a substitute property. Most importantly, pursuant to the Property Law, property need not be reconveyed to the former owner where an individual, a religious group, or certain non-profit organizations have acquired the property in good faith.⁸ This exception remains in force under the Revised Property Law. In addition, the Property Law excludes reconveyance if a reconveyance is not feasible because of the nature of the property. The reconveyance of real property is deemed not to be feasible if:

- (i) the use or dedication of the premises has been changed by material alterations and this use is in the public interest;
- (ii) the premises are dedicated to common use (e.g., streets);
- (iii) the premises are used for "complex housing;" or
- (iv) the premises are used commercially or as part of an enterprise, and a reconveyance would have severe adverse effects for that enterprise.⁹

The Revised Property Law requires that the particular circumstances described in clauses (i) and (iv) excluding a recon-

7. See Gruson & Thoma, *supra* note 5, at 554-556.

8. *Id.* at 557.

9. *Id.* at 558.

veyance existed on September 29, 1990.¹⁰ Accordingly, all events occurring after that date, for example, the use of the premises by an enterprise which began after that date, no longer exclude the reconveyance of the property to the former owner.

Moreover, the original version of the Property Law contains a provision which does not directly exclude the reconveyance of taken property, but permits the present owner, or the public administrator after October 13, 1990 to validly dispose of such property, by sale, lease, or otherwise, free of reconveyance claims by the former owner, *provided* the former owner has failed to file a reconveyance claim with the appropriate authorities prior to the closing of such sale or other transaction.¹¹ If the property is validly sold under this provision, the remedies of the former owner are limited to the recovery of the proceeds of the sale.¹² If, however, the present owner has not disposed of the property, the former owner still can recover the property itself by filing a claim.¹³ If a claim for reconveyance has been filed by a former owner prior to the closing of a sale or other disposition, the present owner may not dispose of the property or subject it to long-term agreements without the approval of the former owner, and any purchaser takes subject to such claim.¹⁴ The present owner or the public administrator has a legal obligation to investigate whether a reconveyance claim has been filed with respect to the property.¹⁵ Only an investor who has acquired a property after the October 13, 1991 deadline, provided that no filing has been made by a former owner at the time of conveyance, is not subject to reconveyance claims.

2. Sale of Real Estate by Treuhandanstalt

The Revised Property Law liberalizes the above rules in favor of the right of the present owner to dispose of real prop-

10. Revised Property Law, *supra* note 3, § 5(2).

11. Property Law, *supra* note 3, §§ 3(4), 11(2) & 15(3); see Gruson & Thoma, *supra* note 5, at 563-64.

12. Property Law, *supra* note 3, § 3(4).

13. See Gruson & Thoma, *supra* note 5, at 563-64.

14. Property Law, *supra* note 3, §§ 3(3), 11(2) & 15(2)-(3); see Gruson & Thoma, *supra* note 5, at 563.

15. Property Law, *supra* note 3, §§ 3(5), 11(3) & 15(4); see Gruson & Thoma, *supra* note 5, at 563.

erty, if the present owner of the property concerned is the federal government, a state or political subdivision thereof¹⁶ (hereinafter "Governmental Entity"), or Treuhandanstalt.¹⁷ The Revised Property Law provides that where the present owner of real property and buildings is Treuhandanstalt or a Governmental Entity, the present owner can validly sell and lease¹⁸ the real property or buildings even after the filing of a reconveyance claim by a former owner, if the sale or lease is made for certain "investment purposes," the property is intended to serve such purposes, and there is a reasonable relationship between the property and the investment transaction.¹⁹ These investment purposes are basically identical to the "special investment purposes" within the meaning of section 1 of the Special Investments Law.²⁰ Such an investment purpose exists if the sale or lease of real property or a building is made for the purpose of:

- (i) maintaining or creating jobs, especially by means of establishing a manufacturing or service business;
- (ii) satisfying substantial housing needs; or
- (iii) developing the infrastructure required for (i) or (ii).²¹

The provisions of the Special Investments Law remain the only legal basis for all present owners, other than Treuhandanstalt or a Governmental Entity, who wish to dispose of property after a reconveyance claim has been filed.²² In particular, the provisions of the Revised Property Law discussed above are not available to corporations which succeeded the former

16. "Öffentlich-rechtliche Gebietskörperschaften". As to the allocation of property to Governmental Entities, see Law Concerning the Determination of Allocation of formerly State-Owned Property (GESETZ ÜBER DIE FESTSTELLUNG DER ZUORDNUNG VON EHEMALS VOLKSEIGENEM VERMÖGEN (Vermögenszuordnungsgesetz - VZOG)), which is set forth in art. 7 of the Obstacles Removal Law, *supra* note 2, and published in BGBl I at 784 (1991).

17. Revised Property Law, *supra* note 3, § 3a(1).

18. "Vermietung" or "Verpachtung".

19. Revised Property Law, *supra* note 3, § 3a(1), No. 1. A sale or lease is no longer permissible if the former owner obtains a final court decision ordering reconveyance of the property. *Id.* at § 3a(2).

20. Special Investments Law, *supra* note 4, § 1(2); see Gruson & Thoma, *supra* note 5, at 561.

21. Revised Property Law, *supra* note 3, § 3a(1) No. 1. Section 3(a)(1) excludes the application of Property Law, *supra* note 3, § 3(3)-(5). *Id.*

22. See Gruson & Thoma, *supra* note 5, 560-63 (discussing acquisition of real property for special investment purposes).

state-owned enterprises and became the owners of the assets which their predecessor state-owned enterprises had used before they were transformed into corporations.²³ Under the Revised Property Law, however, Treuhandanstalt has the power to act as legal representative, for the companies owned by it and the subsidiaries of such companies, with regard to the property of such companies and subsidiaries.²⁴ As a result, real property owned by such direct or indirect subsidiaries of Treuhandanstalt can be sold or leased either by the subsidiaries under the Special Investments Law,²⁵ or by Treuhandanstalt on behalf of the subsidiaries under the provisions of the Revised Property Law. Treuhandanstalt should obtain the consent of the subsidiary owning the real property before it enters into a sale or lease.²⁶ If this consent is not obtained, the sale or lease is valid *vis-à-vis* the buyer or lessee, but Treuhandanstalt becomes liable to the subsidiary for any damages suffered by the subsidiary.²⁷

There are two major differences between, on the one hand, the rules of the Revised Property Law applicable to the disposition of real property and buildings by Treuhandanstalt or Governmental Entities and, on the other, the general rules of the Special Investments Law applicable to other owners of real property and buildings.

First, the Special Investments Law requires that the present owner obtain a certification that there is a special investment purpose (the "Certification") from the local administration,²⁸ whereas this requirement does not exist for Treuhandanstalt or Governmental Entities under the Revised Property Law. Treuhandanstalt and Governmental Entities have the power to decide themselves whether investment purposes justifying a sale or other disposition of real property exist. They need only notify the local authorities and known former owners about their plans.²⁹

23. See Gruson & Thoma, *supra* note 5, at 545-46, 548.

24. Revised Property Law, *supra* note 3, §§ 2(3) & 3a(1). Treuhandanstalt can act in its own name or in the name of the direct or indirect subsidiary.

25. See Gruson & Thoma, *supra* note 5, at 560-63.

26. Revised Property Law, *supra* note 3, § 3a(1).

27. *Id.*

28. See Gruson & Thoma, *supra* note 5, at 561-62.

29. Revised Property Law, *supra* note 3, § 3a(3).

Second, present owners, other than Treuhandanstalt or a Governmental Entity, may dispose of real property or a building under the Special Investments Law only if such real property or building is necessary for an urgently needed investment project that is appropriate to achieve one or more of the enumerated special investment purposes, for example, the creation or preservation of jobs.³⁰ By contrast, under the Revised Property Law, the facts that the real property is intended to serve one of the enumerated investment purposes, and that there exists a reasonable relationship between the real property and the investment transaction, are sufficient bases for the validity of a disposition carried out by Treuhandanstalt or a Governmental Entity.³¹

The special rules of the Revised Property Law for Treuhandanstalt and Governmental Entities only apply to sale or lease agreements entered into prior to December 31, 1992.³² This is the same date until which an application for Certification under the original Special Investments Law could be filed. The filing date of the Special Investments Law, however, has been extended to December 31, 1993,³³ and, although prior to 1993 the Special Investments Law is not available to Treuhandanstalt and Governmental Entities,³⁴ during 1993 Treuhandanstalt and Governmental Entities must use the provisions of the Special Investments Law. After 1993, a sale or other disposition for investment purposes by the present owner of real property or buildings no longer excludes the claim of a former owner.

Sale and lease agreements are valid only if they contain an obligation of the buyer to reconvey the property to the seller (Treuhandanstalt or the Governmental Entity) if the buyer fails to carry out the measures which he promised to carry out during the first two years or if he substantially deviates from these measures.³⁵

30. See Gruson & Thoma, *supra* note 5, at 561.

31. Revised Property Law, *supra* note 3, § 3a(1), No. 1.

32. *Id.* § 3a(9).

33. Revised Special Investments Law, *supra* note 4, § 2(2); see Gruson & Thoma, *supra* note 5, at 561.

34. Until December 31, 1992, the Special Investments Law, *supra* note 4, is excluded for Treuhandanstalt and Governmental Entities, Revised Property Law, *supra* note 3, § 3a(9).

35. Revised Property Law, *supra* note 3, § 3a(7).

The rights of a former owner of real property or a building disposed of by Treuhandanstalt or a Governmental Entity vary depending upon whether the disposition is a sale or a lease. If the property is sold, the former owner is entitled to recover the sales proceeds or, if there are no proceeds or the proceeds are substantially below the market value, the market value at the time of the sale.³⁶ The creation of a lease does not exclude the former owner's claim for reconveyance, but the former owner will take subject to the lease.³⁷

If a former owner challenges the decision of Treuhandanstalt or a Governmental Entity to sell or lease the property, the decision is no longer suspended pending the administrative or judicial proceedings.³⁸ As a result, a transaction under the Revised Property Law that serves an investment purpose may now go forward, even if it has been contested by the former owner of the concerned property. Moreover, such dispositions no longer require a separate approval under the Regulation Concerning the Transfer of Real Property.³⁹

B. *Revised Special Investments Law*

The Special Investments Law provides that the present owner of expropriated real property or a building may validly sell the real property or building, even if a claim by a former owner has been filed, if a special investment purpose is present.⁴⁰ Thus, an investor could cut off a former owner's claim for reconveyance and relegate him to a damage claim by obtaining an official Certification of a special investment purpose.⁴¹ The Revised Special Investments Law extends the scope of the Special Investments Law to the extent that, upon Certification of the existence of a special investment purpose,⁴² the present owner may not only sell the real property or building, but may also establish a kind of long-term ground

36. *Id.* § 3a(5).

37. *Id.* § 3a(6).

38. *Id.* § 3a(4).

39. *Id.* § 3a(8); see Gruson & Thoma, *supra* note 5, at 573 (discussing Regulation Concerning the Transfer of Real Property). The proposed amendment to the Property Law, § 5(d), discussed in Gruson & Thoma, *supra* note 5, at 560 n.88 and accompanying text, was not adopted in the Revised Property Law, *supra* note 3.

40. See Gruson & Thoma, *supra* note 5, at 560-63.

41. *Id.* at 561.

42. See *id.* at 561 (discussing special investment purposes).

lease ("Erbbaurecht").⁴³ Furthermore, the Certification may permit the present owner to lease the property for a maximum term of twelve years at a rental customary in the area,⁴⁴ or to encumber the property with servitudes.⁴⁵ The special investment purposes permitting a lease have been expanded for agricultural land.⁴⁶ The creation of a long-term ground lease, of a twelve-year lease, or the encumbrance of the property with servitudes does not exclude, however, the claim of the former owner for reconveyance.⁴⁷ He will take subject to the rights established by the present owner.⁴⁸ In the case of the creation of a long-term ground lease, the former owner may, instead of a reconveyance, request payment of the market value at the time of the encumbrance with the long-term ground lease.⁴⁹

Under the Revised Special Investments Law, the present owner of real property or a building may even be permitted by the Certification itself to carry out investment projects on such property by way of the erection of new buildings or the expansion of an existing plant located on the property in question.⁵⁰ Such projects by the present owner exclude the reconveyance of the real property to the former owner if the project is carried out within a certain period set forth in the Certification,⁵¹ and the former owner is limited to compensation in the

43. Erbbaurecht is literally translated as hereditary building right. Revised Special Investments Law, *supra* note 4, § 1(4); Gruson & Thoma, *supra* note 5, at 562 n.103.

44. Revised Special Investments Law, *supra* note 4, § 1a; see Gruson & Thoma, *supra* note 5, at 562 n.103. The Revised Special Investments Law permits "Vermietung" and "Verpachtung."

45. A "Dienstbarkeit" is a right similar to an easement. Revised Special Investments Law, *supra* note 4, § 1b; see Gruson & Thoma, *supra* note 5, at 562 n.103.

46. Revised Special Investments Law, *supra* note 4, § 1a(3) & (4).

47. Revised Special Investments Law, *supra* note 4, § 1a(6).

48. Revised Special Investments Law, *supra* note 4, §§ 1a(5) & 3(1); see Gruson & Thoma, *supra* note 5, at 562 n.103. The rights that a former owner of a property, to whom that property has been reconveyed encumbered by a lease, may have against the lessee and the former owner are set forth in Revised Special Investments Law, § 1a(5), and the rights that a former owner of a property, to whom that property has been reconveyed encumbered by an easement, may have against the former owner are set forth in Revised Special Investments Law, § 3(1) last sentence.

49. Revised Special Investments Law, *supra* note 4, § 1(4); see Gruson & Thoma, *supra* note 5, at 562 n.103.

50. Revised Special Investments Law, *supra* note 4, § 1c; see Gruson & Thoma, *supra* note 5, at 562 n.103.

51. Revised Special Investments Law, *supra* note 4, § 1c(2); see Gruson & Thoma, *supra* note 5, at 562 n.103.

amount of the market value of the property at the time the investment project was commenced by the present owner.⁵² Under this new provision, an investor could choose a two-tier strategy. First, the investor would acquire a company located in the Former GDR that is the present owner of real property, with respect to which a reconveyance claim has been filed. As a second step, the investor would immediately apply for a Certification with regard to an investment project to be carried out by the acquired company on the real property, the effect of which would be to prevent the reconveyance of the property. Of course, the investor would have to pay the fair market value to the former owner,⁵³ a factor which should be taken into account in negotiating the purchase price for the company.

The Special Investments Law requires that the Certification permitting the sale of a property, the creation of a long-term ground lease, or an investment project by the present owner, each set a deadline for carrying out the project.⁵⁴ If this deadline is not met, or if the property is used for a purpose other than the purpose set forth in a Certification permitting a 12-year lease or the establishment of an easement, the Certification must be revoked.⁵⁵

Present owners, other than entities under public law or public authorities, can only obtain a Certification if they furnish security in the amount of the market value of the property concerned.⁵⁶

The Revised Special Investments Law also simplifies the Certification procedure in two respects. First, a Certification replaces a separate approval under Regulation Concerning the Transfer of Real Property.⁵⁷ Second, the Certification is no longer suspended pending an administrative or judicial proceeding if the former owner challenges the decision of the issu-

52. Revised Special Investments Law, *supra* note 4, § 3(1a).

53. *Id.* §§ 1c & 3(1a); Gruson & Thoma, *supra* note 5, 562 n.104.

54. Revised Special Investments Law, *supra* note 4, §§ 1(3), third sentence, & 1c(2).

55. Revised Special Investments Law, *supra* note 4, § 1d(2).

56. *Id.* § 6; *see* Gruson & Thoma, *supra* note 5, at 562 n.104.

57. *See* Gruson & Thoma, *supra* note 5, at 573 n.156. Pursuant to the Revised Special Investments Law, *supra* note 4, § 2(3), the Certificate is substituted for the approval under § 2 of the Regulation Concerning the Transfer of Real Property (GRUNDSTÜCKSVÉRKEHRSVERORDNUNG vom 15. Dezember 1977).

ing authority.⁵⁸ Moreover, the Revised Special Investments Law extends the deadline for the filing of the application for a Certification from December 31, 1992 to December 31, 1993.⁵⁹

II. SALE OF BUSINESS ENTERPRISES

Under the original Property Law, the former owner of a business enterprise was always entitled to reconveyance of the business enterprise previously expropriated or placed under public administration unless the present condition of the enterprise was no longer comparable to its condition at the time of the taking.⁶⁰ The Revised Property Law provides significant exceptions to the principle of reconveyance of business enterprises by applying the approach of the Special Investments Law. In effect, the Revised Property Law permits a parent company or Treuhandanstalt to sell a company to an investor—rather than return it to the former owner—if this is advantageous for job creation and maintenance, or for the obtaining of investments.

Similarly, as in the case of real property, the Revised Property Law contains different rules concerning the disposition of business enterprises depending upon whether Treuhandanstalt or a Governmental Entity is the present owner, or whether the present owner is another entity, such as a corporation.

A. Sale or Lease by Treuhandanstalt

Pursuant to section 3a of the Revised Property Law, Treuhandanstalt or a Governmental Entity now can validly sell or lease a business enterprise in spite of the fact that a former owner has filed a claim for reconveyance, if the sale or lease is made for certain “investment purposes.”⁶¹ An investment

58. Revised Special Investments Law, *supra* note 4, § 4(3). Certifications will be issued by the county or by the municipality that is not part of a country. *Id.* § 2(1). Furthermore, appeals (“Berufung”) against court decisions generally are not permissible. *Id.* § 5(2).

59. Revised Special Investments Law, *supra* note 4, § 2(2).

60. Property Law, *supra* note 3, §§ 6(1) & 12; see Gruson & Thoma, *supra* note 5, at 558-59.

61. Revised Property Law, *supra* note 3, § 3a(1), No. 2. A sale or lease is no longer permissible when the former owner obtains a final court decision ordering

purpose for the disposition of a business enterprise exists if the sale or lease of the enterprise is made for the purpose of (i) creating or maintaining jobs or obtaining investments to improve competitiveness or (ii) if the former owner cannot ensure that he will continue the operation of the enterprise.⁶²

As in the case of real property, Treuhandanstalt has the power to act as legal representative for its direct or indirect subsidiaries with regard to companies owned by such subsidiaries.⁶³ Therefore, companies owned by such direct or indirect subsidiaries of Treuhandanstalt can be sold or leased either by the parent company pursuant to section 3(6) of the Revised Property Law, discussed below,⁶⁴ or by Treuhandanstalt on behalf of its subsidiaries under the simplified provision of section 3a of the Revised Property Law. However, as in the case of real property, Treuhandanstalt should obtain the consent of its subsidiary owning the company to be disposed of before it enters into a sale or lease.⁶⁵ If this consent has not been obtained, Treuhandanstalt may be liable to its subsidiary for damages suffered by the subsidiary, although the sale or lease is valid *vis-à-vis* the buyer or lessee.⁶⁶

Treuhandanstalt and Governmental Entities have the power to determine whether an investment purpose justifying a sale or other disposition of an enterprise exists. No certification by a governmental agency is required. Treuhandanstalt or the Governmental Entity must only notify the local authorities and known former owners about their plan.⁶⁷

The special rules of section 3a of the Revised Property

reconveyance of the business enterprise, *id.* § 3a(2), or if the former owner has obtained possession of the enterprise on a provisional basis by entering into a purchase agreement or lease ("Pacht") with Treuhandanstalt. *Id.* §§ 3a(2) & 6a; see Gruson & Thoma, *supra* note 5, at 565.

62. Revised Property Law, *supra* note 3, § 3a(1), No. 2. Note that the inability of the former owner to ensure that he will rehabilitate the enterprise does not constitute an investment purpose under Revised Property Law, § 3a(1), No. 2, but constitutes an investment purpose under Revised Property Law, § 3(6), No. 2, the provision dealing with the sale or lease of enterprises by owners other than Treuhandanstalt or Governmental Entities.

63. *Id.* §§ 3a(1) & 2(3). Treuhandanstalt can act in its own name or in the name of the direct or indirect subsidiary.

64. See *infra* notes 74-81 and accompanying text.

65. Revised Property Law, *supra* note 3, § 3a(1), last sentence.

66. *Id.*

67. *Id.* § 3a(3).

Law for Treuhandanstalt and Governmental Entities concerning dispositions of business enterprises only apply to sale or lease agreements entered into prior to December 31, 1992.⁶⁸ Until that date, section 3a is *lex specialis* and Treuhandanstalt and Governmental Entities cannot sell or lease business enterprises pursuant to section 3(6) of the Revised Property Law. From January 1, 1993 until December 31, 1993, the sunset date of section 3(6) of the Revised Property Law, Treuhandanstalt and Governmental Entities must use section 3(6) of the Revised Property Law. As of January 1, 1994, the reconveyance claim of a former owner of a business enterprise only can be excluded under very limited circumstances, for instance, if the present condition of the enterprise is no longer comparable to its condition at the time of the taking.⁶⁹ Generally speaking, after January 1, 1994, the right to reconveyance of a former owner of an operating enterprise is the same as it was before the adoption of the Obstacles Removal Law.

Moreover, sale and lease agreements are only valid if they contain an obligation of the buyer to reconvey the enterprise to the seller (Treuhandanstalt or the Governmental Entity) if the buyer fails to carry out the measures which he promised for the first two years or if he substantially deviates from these measures.⁷⁰ The former owner of an enterprise sold by Treuhandanstalt or a Governmental Entity is entitled to receive the sales proceeds or, if there are no proceeds or the proceeds are substantially below the market value, the market value at the time of sale.⁷¹ If the enterprise was leased, the former owner can still obtain reconveyance, but he will take subject to the lease.⁷² If the former owner challenges the decision of Treuhandanstalt or the Governmental Entity to sell or lease the enterprise, a judicial or administrative proceeding does not suspend the decision.⁷³ Thus, a sale or lease of an enterprise by

68. *Id.* § 3a(9).

69. *See supra* note 60 and accompanying text (discussing this exception to reconveyance claim of former owner). After December 31, 1993, reconveyance of a business enterprise, whose operations have been terminated, also can be excluded pursuant to Revised Property Law, §§ 4(1) & 6(6a). *See infra* notes 89-90 and accompanying text (discussing these sections).

70. Revised Property Law, *supra* note 3, § 3a(7).

71. *Id.* § 3a(5).

72. *Id.* § 3a(6).

73. *Id.* § 3a(4).

Treuhandanstalt or a Governmental Entity may now proceed even if contested by a former owner of the enterprise.

B. Sale or Lease by Other Present Owners

Section 3(6) of the Revised Property Law also permits a present owner other than Treuhandanstalt or a Governmental Entity to sell or lease a business enterprise despite the fact that a former owner has filed a claim for reconveyance. This provision mainly applies to parent companies which now may sell their subsidiaries. Similarly, as in the case of a sale or lease by Treuhandanstalt, such a sale or lease is permissible (i) if the disposition is appropriate for the creation or preservation of jobs or for obtaining investments to improve competitiveness, or (ii) if the former owner cannot ensure that he will continue the operation of, or rehabilitate, the enterprise.⁷⁴ The sale or lease is subject to approval by the public authority having jurisdiction over the reconveyance claim concerning the enterprise in question.⁷⁵ In contrast, pursuant to section 3a of the Revised Property Law, Treuhandanstalt or a Governmental Entity, as present owners, have the sole power to decide whether to sell or lease an enterprise rather than reconvey it to the former owner.⁷⁶ Moreover, whereas pursuant to section 3a of the Revised Property Law the mere intention to achieve one of the investment purposes is a sufficient basis for Treuhandanstalt and a Governmental Entity to validly dispose of an enterprise, all other present owners availing themselves of section 3(6) of the Revised Property Law must demonstrate that selling or leasing the enterprise is objectively appropriate to achieve such goals.⁷⁷

An application of the present owner under section 3(6) must be filed before December 31, 1993.⁷⁸ After a sale or

74. *Id.* § 3(6); see Gruson & Thoma, *supra* note 5, at 560. A final determination regarding the claim of a former owner, or regarding an application by a former owner for obtaining possession of the enterprise on a provisional basis by entering with Treuhandanstalt into a purchase agreement or lease ("Pacht"), Revised Property Law, *supra* note 3, § 6a, destroys the right of the present owner to sell a business for which a claim for reconveyance has been filed. *Id.* § 3(6).

75. Revised Property Law, *supra* note 3, § 3(6). The authorities must approve the application if all statutory conditions have been met. *Id.*

76. *Id.* § 3a(1).

77. *Id.* § 3(6).

78. *Id.*

lease has taken place, the former owner is only entitled to the proceeds from the sale or lease or the market value of the property.⁷⁹ The purchaser or lessee must demonstrate to the authorities that he has sufficient financial means to continue or rehabilitate the business enterprise,⁸⁰ a requirement that does not apply to a disposition by Treuhandanstalt or a Governmental Entity pursuant to section 3a of the Revised Property Law. Similarly, as in the case of a disposition by Treuhandanstalt, upon the application of the former owner the authorities may order the purchaser or lessee to return the enterprise if the purchaser or lessee does not carry out the measures promised to be carried out during the first two years after the sale or lease, or if the purchaser substantially deviates from these measures.⁸¹

C. *Own Investments by Present Owner*

Under the same conditions which permit a present owner to sell or lease a business enterprise despite the fact that a former owner has filed a claim for reconveyance, the public authorities having jurisdiction over the reconveyance claim may permit the present owner himself to take appropriate measures for job creation or preservation, or for obtaining investments to improve competitiveness.⁸² The present owner must be willing to provide the business enterprise with the necessary capital.⁸³ This permission excludes a reconveyance claim by the former owner if the present owner carries out the measures promised to be carried out during the first two years, and does not substantially deviate from these measures.⁸⁴ In this case,

79. Section 3(6) of the Revised Property Law does not provide for compensation of the former owner, and none of the other provisions of the Revised Property Law dealing with compensation applies to a sale or lease pursuant to § 3(6). A conversation with an official of the German Federal Ministry of Justice confirmed that this omission is only due to a drafting error.

Presumably, the compensation provision of Revised Property Law, § 3a(5) & (6) would be applied, by analogy, to a former owner who lost his reconveyance claim pursuant to Revised Property Law, § 3(6). See *supra* notes 36-37 and accompanying text (discussing rights of former owner under Revised Property Law, § 3a(5) & (6)).

80. Revised Property Law, *supra* note 3, § 3(6).

81. *Id.*

82. *Id.* § 3(7).

83. *Id.*

84. *Id.*

the former owner is limited to compensation.⁸⁵

Judicial proceedings by a former owner against a decision of the public authority to permit a sale or lease of a business enterprise by the present owner,⁸⁶ or to permit the present owner to take investment measures,⁸⁷ have no suspensive effect.⁸⁸

D. *Other Exclusions of Reconveyance*

Under the Revised Property Law, the reconveyance of a business enterprise is excluded if its operation has been terminated and it would not be feasible to recommence the business activities.⁸⁹ Moreover, the enterprise does not have to be reconveyed if it has been sold on the basis of certain statutory provisions relating to the privatization of former state-owned properties which commenced in 1990, such as the Trusteeship Law.⁹⁰

III. ENVIRONMENTAL LIABILITIES

Investors' fears of environmental liabilities are a major impediment on investments in the Former GDR. For this reason, the Unification Treaty⁹¹ provided for the continued validity of Article I, Section 4(3) of the Environmental Law of June 29, 1990 of the Former GDR, as amended by the Unification Treaty (said Article I, Section 4(3) hereinafter the "Environmental Law"),⁹² which provided that purchasers of facilities that serve commercial purposes, or that are used as part of a business enterprise, can be released from liability for environmental damages caused by such facilities before July 1, 1990.⁹³

85. *Id.* The compensation is in the amount of the market value of the enterprise at the time the reconveyance claim was excluded, unless the former owner elects compensation on the basis of the value of the enterprise at the time of the taking or at the time of placement under public administration. *Id.* §§ 3(7) & 6(7).

86. *Id.* § 3(6); see *supra* notes 74-81 and accompanying text (discussing § 3(6)).

87. Revised Property Law, *supra* note 3, § 3(7) see *supra* notes 82-85 and accompanying text (discussing § 3(7)).

88. Revised Property Law, *supra* note 3, § 3(8).

89. *Id.* §§ 4(1) & 6(6a); see Gruson & Thoma, *supra* note 5, at 559-60.

90. Revised Property Law, *supra* note 3, §§ 4(1) & 6(6a).

91. See *supra* note 3.

92. Environmental Law (UMWELTRAHMENGESETZ) set forth in the Unification Treaty, *supra* note 3, annex II, ch. XII, subdiv. III, no. 1(b).

93. See Gruson & Thoma, *supra* note 5, at 566-67.

The Environmental Law provided that the release may be granted by the governmental authorities upon an application by the purchaser filed prior to December 31, 1991.⁹⁴ The release did not cover environmental liabilities to third parties under private law.

The Obstacles Removal Law amends the Environmental Law in several significant respects.⁹⁵ Henceforth, not only purchasers, but also owners and those in possession of facilities which serve commercial purposes, or which are used as part of a business enterprise, may obtain a release from environmental liabilities.⁹⁶ Application for such release must be filed on or before March 28, 1992, the first anniversary of the publication of the Obstacles Removal Law.⁹⁷ In making its decision, the authority must not only balance the interests of the investor, of the public, and of environmental protection, but, according to the Obstacles Removal Law, the authority must also consider the interests of the owner, the person in possession, and the person potentially injured by the use of the property.⁹⁸ However, the release still does not *ipso facto* fully cover environmental liabilities to third parties under private law: the release only excludes general private law rights of the owner of a property against the owner of a second property to require that the owner of the second property terminate harmful emissions originating from the second property,⁹⁹ and substitutes monetary damage claims.¹⁰⁰ The Environmental Law, as amended by the Obstacles Removal Law, however, gives the appropriate authority the broad discretionary power to release

94. *Id.*

95. Obstacles Removal Law, *supra* note 2, art. 12.

96. Environmental Law, *supra* note 92, as amended by the Obstacles Removal Law, *supra* note 2, art. 12.

97. *Id.*

98. *Id.*

99. *Id.*, fifth sentence. The principal example of such a right is set forth in Section 906 of the German Civil Code. The Environmental Law does not exclude private law rights of a property owner against the owner of a second property to terminate harmful emissions, to the extent that such rights are based on special statutes.

100. The Environmental Law, *supra* note 92, as amended by the Obstacles Removal Law, *supra* note 2, art. 12. The fifth sentence of the Environmental Law states that the owner of the injured property is entitled to compensation for damages. Generally under German law, "compensation for damages" ("Schadensersatz") includes, among other things, the omission of the harmful act. It is probable, however, that the Environmental Law, as amended by the Obstacles Removal Law, intended to limit compensation for damages to monetary compensation.

an environmental violator from the obligation to pay damages to third parties for environmental violations and to substitute the state (*Land*) as the debtor of the monetary damage claims of the third parties.¹⁰¹ It remains to be seen whether and to what extent the authorities will be willing to exercise their discretion in favor of a release from private damage claims, and of a corresponding liability of the state, for environmental injuries.

IV. *EXPROPRIATIONS BETWEEN 1945 AND 1949*

The Joint Declaration of the governments of the Former GDR and of the Federal Republic of Germany¹⁰² stated that confiscations that were executed in the territory of the Former GDR on the basis of occupation law between 1945 and 1949 are no longer reversible.¹⁰³ Article 143(3) of the Basic Law, the Constitution of the Federal Republic of Germany, which was added by virtue of the Unification Treaty, specifically recognized the continued validity of these expropriations.¹⁰⁴

On April 23, 1991,¹⁰⁵ the German Constitutional Court ("Bundesverfassungsgericht") upheld the validity of Article 143(3) of the Basic Law, and held that therefore the recognition of the continued validity of these expropriations does not violate the Basic Law.¹⁰⁶ The principal argument of the Court

101. The Environmental Law, *supra* note 92, as amended by the Obstacles Removal Law, *supra* note 2, art. 12. The last sentence of the Environmental Law refers to damage claims pursuant to the fourth sentence of the Environmental Law, *supra* note 100, and pursuant to other provisions of law. The reference to the fourth sentence makes no sense because that sentence provides that applications for release must be filed until and including March 28, 1992. The intention, most likely, was to refer to the fifth sentence, discussed in the text accompanying notes 99-100.

102. See Gruson & Thoma, *supra* note 5, at 553 n.59.

103. *Id.* at 553-54.

104. The recognition of the continued validity of expropriations in the Former GDR on the basis of occupation law is set forth under No. 1 of the Joint Declaration. The Joint Declaration is part of the Unification Treaty (annex III), Unification Treaty, art. 41(1). Article 143(3) of the Basic Law of the Federal Republic of Germany ("Grundgesetz") which was added to the Basic Law by virtue of Article 4, No. 5 of the Unification Treaty specifically states that the recognition of the 1945-49 expropriations is valid under the Basic Law.

105. Bundesverfassungsgericht, decision of the First Senate of April 23, 1991 (I BvR 1170/90, I BvR 1174/90, I BvR 1175/90) (unpublished slip opinion) [hereinafter Slip Opinion].

106. Slip Opinion, *supra* note 105, at 39. The validity of an amendment to the Basic Law must be measured by Article 79(3) of the Basic Law, which prohibits

is that the expropriations took place outside of the territory of the Federal Republic, and before the Basic Law became the Constitution of the Federal Republic.¹⁰⁷ Furthermore, German conflict-of-laws rules relating to foreign expropriation recognize expropriations by a foreign country of property located in the territory of that foreign country, even if such expropriations violate the laws of such foreign country.¹⁰⁸ This rule based on territoriality is consistent with the Basic Law.¹⁰⁹ The Court held,¹¹⁰ however, that the Basic Law rule of equal treatment¹¹¹ requires the compensation of the former owners of property expropriated between 1945 and 1949, because the Unification Treaty provides for the compensation of former owners of property expropriated other than on the basis of occupation law between 1945 and 1949 (either reconveyance or money damages).¹¹²

The far-reaching importance of the decision for investments in the Former GDR becomes clear if one realizes that more than 30% of the territory of the Former GDR, all large corporations, and many medium-sized enterprises were expropriated on the basis of the occupation law between 1945 and 1949.¹¹³

amendments to the Basic Law that violate certain human rights (Article 1 of the Basic Law) or certain basic constitutional principles (Article 20 of the Basic Law, "Rechts- und Sozialstaatsprinzip"). The Court held that Article 143(3) does not violate the barriers against amendments to the Basic Law set forth in Article 79(3). Slip Opinion, *supra* note 105, at 45.

107. Slip Opinion, *supra* note 105, at 46.

108. Slip Opinion, *supra* note 105, at 47-49. Only where the foreign expropriation has sufficient connection with Germany, may German public policy limit the principle of recognition. *Id.*; see Gruson, *The Act of State Doctrine in Contract Cases as a Conflict-of-Laws Rule*, U. ILL. L. REV. 519, 529-30 (1988) (discussing U.S. act of state doctrine, which is similar to rule stated by German Constitutional Court).

109. Slip Opinion, *supra* note 105, at 48.

110. *Id.* at 54.

111. Article 3 of the Basic Law.

112. The Joint Declaration, *supra* note 104, noted only that a future German parliament will have to consider the question of government compensation of former owners of property confiscated between 1945 and 1949.

113. The expropriation on the basis of occupation law between 1945 and 1949 affected about 33,000 square kilometers (12,741 square miles) of agricultural and forest land, all large corporations and many medium-size enterprises. Fieberg & Reichenbach, *Zum Problem der offenen Vermögensfragen*, 44 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 321, 322 (1991). The territory of the Former GDR was 108,333 square kilometers or 41,827 square miles.

CONCLUSION

The Obstacles Removal Law reverses to a large extent the approach taken by the Unification Treaty, the original Property Law and the original Special Investments Law. Although the Obstacles Removal Law still pays lip service to the principle of reconveyance of real property and business enterprises to the former owner, the exceptions to the principle introduced by the Obstacles Removal Law are so broad that a reconveyance will be the exception rather than the rule. Only a former owner who is willing to invest in and to operate his former enterprise will be able to have it reconveyed. In all other cases, the serious investor will prevail over the former owner. This is good news for investors. The decision of the Constitutional Court upholding the continued validity of expropriations on the basis of occupation law between 1945-1949 will also help to allay fears of investors.

**FORDHAM
INTERNATIONAL
LAW JOURNAL**

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FORDHAM INTERNATIONAL LAW JOURNAL

VOLUME 14

1990-1991

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