Property Claims and Investment in East Germany

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A. Introduction

Property issues are among the most difficult legal problems that German unification on October 3, 1990 resulted in. 15 years thereafter, it is interesting to look back on the approach to the problems in the tense relationship between justice in the individual case and legal security, social acceptability and economic feasibility.

In the course of this workpaper it will not be possible to assess if the German legislature and the German authorities and courts that have dealt with unification law succeeded in a suitable reconciliation of interests between all affected parties in all important fields that complies with constitutional standards. The large amount of court decisions concerning property issues in the New German Laender (the new German states that had been part of the GDR) indicates how controversial these questions are discussed. Last but not least this is illustrated by several decisions of the European Court of Human Rights the subject of which was the compatibility of legal provisions regarding property issues with the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The latest decision dates June 30, 2005 dealing with the legal fate of real estate that was allocated to smallholders during the land reform of the GDR[1]. Another important decision of the European Court of Human Rights dating March 2, 2005 refers to the adequateness of the compensation regulations of real estate expropriations during this land reform that were adopted by the Federal Republic of Germany after German unification[2]. According to the knowledge of the author, other complaints before the European Court are still pending.

Only in 2004, more than 100 decisions of the last court instance were made by Federal Courts dealing with property issues in the broader sense. Due to the missing statistics the amount of decisions of lower courts related to property issues can only be estimated. An amount between 500 and 1,000 decisions only in the last year, however, may not be overstated.

The Federal Republic of Germany was not the only state that was confronted with the legal issues of the transformation of a planned economy being based on public property to a market economy. It is the aim of this workpaper to roughly describe the approach of the Federal Republic of Germany. At the same time, the extent of property issues as specific characteristics of investments in the New German Laender will be shown. For this purpose, this workpaper includes a check list for acquisitions of companies and real estate in East Germany which, however, can only refer to the main features of the most common questions.

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1 EGMR, Grand Chamber, Judgement 30.06.2005, Applications nos. 46720/99, 72203/01, 72552/01, Case of John and others vs. Germany.

2 EGMR, Grand Chamber, Decision 02.03.2005, Applications nos. 71916/01, 71917/01, 10260/02, Case of von Maltzahn and others vs. Germany.

Another more interesting task remains to be done because jurisprudence did hardly apply itself to compare the different methods of approach of different states in transforming its economy. Such a task, however, would go far beyond this workpaper.

B. Open Property Issues Relating to German Unification

1. Preliminaries

In German jurisprudence and legal practice, the notion "open property issues" is mostly used in the closer sense as the legal issues relating to the restitution of property that the owner was deprived of in the former GDR. The issues of property law coming up with the German unification, however, go far beyond this close focus to privatization. The following issues of

- transitional law and harmonization of legal provisions
- allocation of former public property to the current property holder
- privatization of former public property mainly by the sale of companies and real estate
- indemnification, rehabilitation and compensation of unconstitutional interventions and business and investment development, and
- business and investment development

have to be included.

As far as investments in the New German Laender are concerned, it is necessary to take into account probable restitution problems (property issues in the closer sense) and issues exceeding this, as well (property issues in the broader sense).

2. Transitional Law and Harmonization of Legal Provisions

a) General

The harmonization of the legal systems of the two German states in the course of unification is a complex procedure that, meanwhile, can be regarded as completed to a large extent, but not in all its details. In fact, it is true that large parts of the legal system of the Federal Republic of Germany were transferred to the New German Laender. However, in many cases, legal provisions that have been effective in the GDR were retained or remained applicable for legal cases from the past. Sometimes, for example the question whether or not somebody acquired the ownership of a certain asset effectively and, thus, may also realize it to an investor may only be answered by having a look at the legal provisions of the GDR, e.g. the Civil Code of the GDR.

Details about the multitude of legal provisions to be harmonized can be found in the attachments to the Treaty between the Federal Republic of Germany and the

German Democratic Republic Establishing a Monetary, Economic and Social Union dated May 18, 1990[3] and the Unification Treaty dated August 31, 1990[4]. In addition to the amendment of the laws described in these attachments, a multitude of laws was enacted to harmonize the legal systems of the two German states. With regard to planned investments, the adjustment of the company and property laws is of particular importance.

b) Corporate Law

Laws were enacted already in early 1990 under the Modrow Administration, i.e. before the first free elections in the GDR in March 1990, allowing for the establishment of enterprises[5] by which state owned combines and factories were transformed to corporate enterprises[6]. Already in March 1990, the Privatization Agency (Treuhandanstalt) was established by a decision of the Council of Ministers of the GDR the duty of which was initially to deconcentrate the combines, to transform state owned enterprises in corporate enterprises and to secure the enterprise against illegal realization.

The remaining state owned combines and factories were transformed to corporate enterprises by the Privatization Act dated June 17, 1990[7]. The Privatization Agency became holder of any and all shares of these corporate enterprises. The essential duty of the Privatization Agency, the privatization of the state owned factories being transformed to corporate enterprises, will be referred to in the following in more detail.

c) Real Estate Law

In addition to the corporate law, also the real estate law of the two German states developed apart during the 40 years of division. While private real estate was an essential basis of the market economy in the Federal Republic of Germany, private ownership of ground and soil had only minor importance in the GDR. To a great extent, real estate was transferred to public property, or private property was superposed by beneficial rights of the state.

As regards enterprises, the holding of state owned real estate and the beneficial rights related thereto replaced the private real estate ownership. Legal amendments became necessary, in particular, if a state owned company used ground and soil for its purposes that was formally held by another state owned company.

Often, state owned ground and soil was provided for private house building. However, this property was not transferred to private property. Owners of private homes were granted a beneficial right of the real estate which remained state owned. Sometimes private buildings were built with the approval of public authorities without

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3 BGBl 1990 II S. 537.

4 BGBl 1990 II S. 889.

5 Establishment and Operation of Private Companies and Participations Act dated March 7, 1990 (Gesetz über die Gründung und Tätigkeit privater Unternehmen und über Unternehmensbeteiligungen vom 7.3.1990), Establishment and Operation of Companies with Foreign Participation Regulation dated January 25, 1990 (Verordnung über die Gründung und Tätigkeit von Unternehmen mit ausländischer Beteiligung in der DDR vom 25.1.1990), GBl. DDR 1990 I S. 16.

6 Transformation of State Owned Combines, Factories and Institutions in Corporate Enterprises Regulation dated March 1, 1990 (Verordnung zur Umwandlung von volkseigenen Kombinaten, Betrieben und Einrichtungen in Kapitalgesellschaften vom 1.3.1990), GBl. DDR 1990 S. 107.

7 Privatization and Reorganization of Public Property Act (Gesetz zur Privatisierung und Reorganisation des Volkseigenen Vermögens), GBl. DDR 1990 I S. 300.

having a legal regulation of the ownership or use of the real estate. Therefore, there was often private building property on state owned or externally owned real estate in the GDR. State owned or externally owned real estate was often used by private individuals as weekend or recreational real estate, or for the construction of garages as well. Such dissociation of the building or building facilities' property and the real estate property is unknown to the laws of the Federal Republic of Germany. Thus, provisions had to be found to adjust the legal systems.

Concerning the use of real estate which, according to the laws of the Federal Republic of Germany, is usually connected with the real estate property (in particular private buildings and commercial buildings) the user of the real estate was granted a claim to acquire the real estate at half of the land price, or to be granted a building lease right, mostly for 50 to 90 years.[8] Dividing the land price by half was considered to be the fair compromise between the user of the real estate who was sometimes resident there for decades and the owner of the real estate. The owner of the real estate, however, is confronted with the obligation to sell the real estate.

The use of a real estate that was usually not connected with the ownership of the real estate (weekend and recreational use, garages) was adjusted to the laws of the Federal Republic of Germany by granting the user of the real estate the status of a tenant or lessee who has been protected from untimely termination of the use by particular legal regulations being effective for a long time.[9] The increase of the rent was also limited by law for a long time.[10] The attempt to find a fair compromise between the owner and the user of the real estate resulted in many conflicts because the users were often not able to pay the rent being increased step by step, and, at the same time, the owner of the real estate was prevented from the use of his property for a long time but had to pay the public encumbrances of the real estate (real property tax etc.).

The adjustment of legal provisions was also necessary because public utility companies used external real estate for lines and supply facilities of electricity, gas water, district heating etc. without the use being legally secured. The operating companies of such lines and supply facilities were granted far reaching rights to subsequently claim legal security regarding the use of the real estate[11]. The same applies to users of ways on external real estate that are not legally secured.

Public authorities of the GDR also often constructed buildings on external real estate without legal security. In particular, this applies to road construction. As far as the buildings and facilities are still required for administration purposes also in this case a compromise between the interests of the owner of the real estate and such interests of the public authorities had to be found.[12] Also in this regard, legal conflicts between the owner and the user of the real estate were predictable because by this law the owner is obliged to transfer the real estate to the public authorities at a very favorable price (considerably below half of the land price).

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8 Amendment to Property Law (Gesetz zur Sachenrechtsbereinigung im Beitrittsgebiet vom 21.09.1994), BGBl 1994 I S. 2457.

9 Amendment to Contract Law (Gesetz zur Anpassung schuldrechtlicher Nutzungsverhältnisse an Grundstücken im Beitrittsgebiet vom 21.09.1994), BGBl 1994 I S. 2538.

10 Remuneration of Use Regulation (Nutzungsentgeltverordnung vom 24.06.2002), BGBl 2002 I S. 2562.

11 Land Register Correction Act (Grundbuchbereinigungsgesetz vom 20.12.1993), BGBl 1993 I S. 2182, 2192.

12 The respective legal regulation, however, was enacted at a very late point of time, Land Register Clarification Law (Verkehrsflächenbereinigungsgesetz vom 26.10.2001, BGBl 2001 I S. 2716).

The GDR tried to solve the problem of lacking flats by extensive residential building projects. Without consideration of property boundaries and real estate property, large areas were built on. Today, the legal clarification must allow for numerous legal positions and interests. A particular procedure was adopted for this purpose.[13]

3. Allocation of the Public Property

It had to be clarified already at a very early point of time which holder of an asset - irrespective of later privatization or denationalization - was to be allocated the individual state owned assets. Some real estate property, for example, was required by the municipalities (towns and districts) for administration purposes, other real estate had to be restituted to public corporations that were deprived of the property. Other real estate was required by corporate enterprises for their operational purposes which emerged from state owned building administrations or factories. Furthermore, it had to be clarified who is responsible for a former state owned real estate or another asset and who has to observe the rights and obligations of the owner. The regulations required were partly adopted by the GDR[14], partly the allocation of property is regulated in the Unification Treaty. In general, the allocation of formerly state owned property is regulated now by the Allocation of Property Act dated August 3, 1992.[15] According to this law, the allocation of these assets is decided in administrative proceedings.

4. Privatization

Besides other duties, the privatization of formerly state owned enterprises was the core duty of the Privatization Agency, an institution established for this purpose only. The enterprises were to be restructured mainly by privatizing them, often, however, own restructuring measures of the Privatization Agency were required to make the enterprises privatizable. If enterprises were regarded as not restructurable the Privatization Agency liquidated them. The privatization of enterprises was granted priority over its restitution to former owners by the respective legal regulations.

The description of these duties clearly shows that the activities of the Privatization Agency could not remain undisputedly. The stock of enterprises of the Privatization Agency has permanently changed due to the formation of separate enterprises, split-offs, mergers etc. and is, thus, hardly to be determined. Altogether, the stock of enterprises of the Privatization Agency amounted to almost 13,000 enterprises. Already as of December 31, 1994, the Privatization Agency realized 69% of its stock of enterprises, 81% as of December 31, 1999 and 93% as of September 30, 2003[16].

In this relation, realization means the reduction of the stock of enterprises by complete or majoritarian privatization, liquidation, denationalization, municipalization or allocation of property.

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[13] Separation of Unsurveyed and Built-on Real Estate Act (Gesetz über die Sonderung unvermessener und überbauter Grundstücke nach der Karte - Bondensonderungsgesetz vom 20.12.1993), BGBl 1993 I S. 2182, 2215.

[14] e.g. the Municipal Property Act dated July 6, 1990 (Kommunalvermögensgesetz vom 6.7.1990, GBl. DDR 1990 I S. 660).

[15] Property Allocation Act in the version of the notification dated March 29, 1994 (Vermögenszuordnungsgesetz in der Fassung der Bekanntmachung vom 29.3.1994, BGBl 1994 I S. 709.

[16] Schnell privatisieren, entschlossen sanieren, behutsam stilllegen", Abschlußbericht der Bundesanstalt für vereinigungsbedingte Sonderaufgaben, Berlin 2003, S. 388.

Privatization agreements of the Privatization Agency often provide for obligations regarding a minimum amount of jobs to be created or maintained, or a certain minimum investment amount. In general, these obligations are connected with contractual penalties in case of non-fulfillment.

The Privatization Agency still exist, however, with another name. In 1994, it was named Bundesanstalt für vereinigungsbedingte Sonderaufgaben, BvS (Federal Agency of Special Duties Related to Unification) and is now being liquidated. The business of this Federal Agency, in particular the monitoring and implementation of the privatization agreements made by the Privatization Agency is meanwhile observed by Finanzierungs- und Beratungsgesellschaft mbH, FuB (Finance and Advice Company with Limited Liability), a subsidiary of Kreditanstalt für Wiederaufbau, KfW (Reconstruction Loan Corporation).

Furthermore, TLG Immobilien GmbH arose from the Privatization Agency which, together with approximately 30 subsidiaries, continues to privatize formerly state owned real estate and manages, administrates, develops and restructures the available stock of real estate.

Bodenverwertungs- und Verwaltungs GmbH, BVVG (Real Estate Administration Company with Limited Liability) also arose from the Privatization Agency which, among others, has the duty to privatize agricultural real estate.

5. Denationalization

Denationalization means the restitution of expropriated or compulsorily sold assets to its former owners or their heirs. The cancellation of the compulsory administration of certain assets by the GDR is also included, i.e. this regards the settlement of property issues in the closer sense. In German law, this procedure is named "restitution" The cancellation of expropriations and compulsory realizations of assets has supposedly raised the most complicated and most disputed legal questions during the last years. This is mainly attributed to the fact that matters dating back up to 60 years had to be reviewed.

The first key data are to be found in the Joint Declaration of the Governments of the Federal Republic of Germany and the German Democratic Republic on the Settlement of Property Issues dated June 15, 1990[17]. In this Declaration, the fundamental political decision was expressed that assets have to be primarily restituted, the compensation of assets is subordinated. Furthermore, there is a considerable restriction because expropriations under the Soviet military occupation during 1945 and 1949 were completely excluded from restitution. In these cases, only financial compensation should be granted. Additionally, the Joint Declaration includes further important restrictions of the restitution principle. Thus, restitution is particularly excluded if real estate was acquired by GDR citizens in good faith or for public purposes, for operational purposes or residential building purposes. The Joint Declaration also contains statements about the cancellation of the state's administration of assets ruled for a certain period of time, the protection of tenants and users and the restitution of expropriated enterprises.

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[17] Gemeinsame Erklärung der Regierungen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen, BGBl 1990 II S. 889 (Anlage III).

In order to implement the Declaration, the GDR provided for regulations already before October 3, 1990 to file claims according to property law.

The Restitution Act (Gesetz zur Regelung offener Vermögensfragen)[18] still passed by the GDR parliament was enacted by the Unification Treaty.

This Act and a series of amendments provide the substantial regulations of the denationalization of expropriated or compulsorily sold assets. The main points of these regulations can be summarized as follows:

- Expropriations are not called off by civil law. Instead of this, it is restituted in the course of administrative proceedings according to public law by particular authorities, i.e. the Restitution Offices (Ämter zur Regelung offener Vermögensfragen), the State Restitution Offices (Landesämter zur Regelung offener Vermögensfragen) and the Federal Restitution Office (Bundesamt zur Regelung offener Vermögensfragen). The decisions of the restitution offices are subject to judicial restraint by the administrative courts. Any party to the proceedings may file a lawsuit there against a decision.

- There is a difference between the restitution of enterprises, real estates and other assets and the cancellation of state's administration. Particular regulations are provided for each complex.

- In general, the restitution of expropriated or deprived assets takes priority over compensation. However, expropriations in the GDR do not automatically lead to restitution or compensation claims. The law provides a catalogue of specified expropriation procedures and circumstances, as, for example, expropriation without any compensation. A restitution or compensation claim is only to be taken into account if one of the elements of this catalogue is fulfilled. Thus, for example, expropriations of the GDR that were compensated (as, for example, expropriations for road constructions) do not result in a restitution or compensation claim. This is applicable even if, in practice, the expropriated actually had never been compensated, i.e. the compensation existed on paper only. Even if certain elements of the catalogue are given this does not inevitably result in the restitution of the respective asset. However, the law provides a catalogue of exclusions which are opposed to restitution, e.g. the acquisition of real estate by citizens of the GDR in good faith. If such exclusion is applicable the respective party will only be compensated. The amount of compensation is calculated by a rather complicated procedure and may considerably be below the current market value. A priori, owners that were expropriated under Soviet occupation between 1945 and 1949 are limited to being compensated.

- The Restitution Act also provides restitution claims for assets that were expropriated under the Nazi regime between January 30, 1933 and May 8, 1945. The extension of restitution procedures to this period of time has become necessary because the GDR generally did not restitute or compensate the property of persons prosecuted by the Nazi regime. Specific characteristics of these restitution claims are the result of the criminal methods

[18] Current version by notification dated December 21, 1998 (Bekanntmachung vom 21.12.1998), BGBl 1998 I S. 4026.

of the Nazi regime. Upon preparation of the extermination of complete ethnic groups, in particular the Jewish people, this regime coerced owners into selling their assets. This was referred to as "aryanisation". Because the Nazis often exterminated complete families nowadays there is nobody who could raise a claim for a deprived asset. However, it would not be acceptable if assets without heirs remain with the German state. Thus, it is provided by law that Jewish assets without heirs may be claimed by a specific organization, the "Conference on Jewish Material Claims against Germany" (JCC). With reference to the indemnification of Nazi expropriations of assets the law provides a series of additional specific regulations.

- The current holders of assets which a restitution claim relates to are referred to by law as "party entitled to disposal" (Verfügungsberechtigter). The press often described property issues as "fight for houses", as conflict between former owner from West Germany and current owner from East Germany. Such cases actually exist in practice but most often the state or state institutions in the broadest sense are entitled to disposal. The party entitled to disposal is generally obliged to neither sell nor change the asset as long as the restitution claim is filed. With respect to real estate, this prohibition of sale is particularly protected. Each sale of real estate in the New German Laender requires a specific approval, the so-called approval of real estate transaction (Grundstücksverkehrsgenehmigung). The granting of this approval is subject to the Real Estate Transactions Regulation[19]. In general, it is only granted unless restitution claims are filed. In order to secure this the restitution offices must be requested a confirmation that there are no restitutions claims filed (Negativattest) before this approval is granted. In practice, this resulted in considerable problems because the real estate has not always been registered with the restitution offices under their correct description. Until December 31, 2004, the restitution offices granted almost 12 million of such certifications.

- The deadline to file restitution claims was limited by law. Regarding restitution claims of real estate and enterprises, it expired as of December 31, 1992, regarding movable assets as of June 30, 1993.

- The obstruction of the privatization/denationalization of state owned enterprises and real estate and real estate transaction in general by restitution claims should be prevented by specific legal provisions. Basically, investors should have priority over restitution claimants. For this purpose, a specific law was enacted, the Investment Priority Act[20] which allowed the investor to acquire real estate or a company even if restitution claims were filed. A decision had to be made in the course of specific official proceedings. The claimants were granted the possibility to oppose their own investment concept to the concept of an external investor. The deadlines in these proceedings, however, were extremely short. In the course of the investment priority proceedings, the investor had to bindingly guarantee a defined investment amount and the creation of living space or jobs and was subject to contractual penalty in case of non-fulfillment of his obligations.

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19 Grundstücksverkehrsordnung, GVO, BGBl 1993 I S. 2182.

20 Investitionsvorranggesetz, BGBl 1997 I S. 1996.

Did the investment authority come to the result that the planned investment complied with the specific investment purpose (creation of living space or jobs) the party entitled to disposal was granted an investment priority decision (Investitionsvorrangbescheid). Thus, the party entitled to disposal was allowed to sell the real estate or the company to the investor. So the investment priority decision replaced the approval of real estate transaction. The investment priority decision may be revoked even after years if the investor did not make the investment at all or in due time. This results in the investor being obliged to retransfer the real estate or the company to the vendor. If, however, the investor fully made the investment he may claim a particular decision. This decision is final and irrevocable. The predominant part of the investment priority regulations was subject to the time limit of December 30, 2000. After the expiration of this time limit, assets which were claimed restitution may mainly be acquired only by the approval of the claimant of restitution.

The intrastate provisions on the settlement of property issues are amended by several intergovernmental treaties. The GDR already signed treaties referring to the settlement of property issues pursuant to international law with Denmark, Finland, Austria and Sweden. The assets that are subject to these treaties are not subject to restitution and compensation claims according to the Restitution Act. The Federal Republic of Germany is obliged pursuant to an agreement with the West Allied Forces to apply the principles of indemnification of Nazi injustice to the New German Laender. Furthermore, a treaty on the settlement of certain restitution claims was signed with the USA.

As of December 31, 2004, the total amount of 240,000 restitution claims related to enterprises was filed. They referred to approximately 96,000 enterprises. Approximately 230,000 of these claims (= 95.74%) were decided about at this point of time. Nowadays, commercially active enterprises are only rarely subject to restitution claims. Restitution proceedings concerning enterprises that are still pending mainly refer to individual business premises. As of December 31, 1994, in addition, the restitution of 2.2 million real estates and approximately 140,000 other assets was filed. 97.39% of these applications have been decided about meanwhile[21].

At first glance, the percentage of applications for restitution according to the Restitution Act that are still pending seems to be rather low. However, it has to be taken into account that these matters mostly have particular legal or factual difficulties. Thus, the accomplishment will still take a long time. It is particularly clear in case of the applications for restitution that relate to damage under the Nazi regime. These applications which, since January 1, 2004, the Federal Restitution Office is responsible for have been separately collected only for a short time. Only 20,000 of the approximately 150,000 applications filed with the Federal Restitution Office were decided about. Among these assets are around 30,000 enterprises and more than 100,000 real estates.

6. Business and Investment Development

In order to develop the economy in the New German Laender, numerous instruments have been adopted on the different levels the detailed description of which would go

[21] Bundesamt zur Regelung offener Vermögensfragen, Statistische Übersichten IV/2004, 31.12.2004.

far beyond this workpaper. The specific regulations to secure the priority of investments over restitution claims were already referred to. However, it has to be pointed out that the allocation of subsidies is often connected with obligations, as, for example, the guarantee of a defined investment amount or the guarantee of a defined amount of jobs. Development measures from the past play a certain role until today as the compliance with these obligations must be monitored unless the applicable time period expired.

7. Indemnification, Rehabilitation and Compensation

Issues of indemnification, rehabilitation and compensation are regularly not of great importance for investors in the New German Laender. They should be mentioned here only for the sake of completeness. The compensation for the loss of assets was already mentioned in connection with privatization/denationalization. Specific rehabilitation laws provide for the possibility to repeal unlawful administrative and court decisions. In particular, the repeal of court decisions pursuant to criminal law which run contrary to basic fundamental rights became possible. The respective rehabilitation laws include compensation provisions for unjust custody or damages of the professional advancement.

C. Contemporary Importance of Property Issues in Relation to Investment in East Germany

1. General

Property issues are still important in relation to investments in the New German Laender. This applies to the acquisition of real estate or other assets as well as to the acquisition of shares by a share deal. In the following, it will be pointed up which specific characteristics may result from the various parts of the property issues in relation to investments in the New German Laender.

2. Transitional Law and Harmonization of Legal Provisions

a) Corporate Law

The transformation of state owned combines and factories to stock corporations and companies with limited liability is important today if shares are to be acquired. It has to be taken into account that, in particular in the early phase of the transformation process, sometimes mistakes were made having considerable effects until today. It is of crucial importance upon acquiring shares if the target company (stock corporation or company with limited liability) was effectively established according to the law of the former GDR. The lack of effectiveness upon establishment of the company may result in complicated legal problems.

b) Real Estate Law

In the Federal Republic of Germany, the most important legal relations with regard to real estate are registered in the land register. This applies to the New German Laender only in a limited way. Buildings erected on real estate not owned by the owner of the real estate and the user of which may still claim the acquisition of the

real estate from its owner. Furthermore, there may be lines, supply facilities and ways the users of which may claim registration of an easement from the owner of the real estate. If such rights are not registered in the land register they are regularly forfeited if a third party acquires the real estate without having knowledge of these rights. However, there are also exceptions from this. In spite of multiple sales of the real estate, beneficial rights regarding the supply with electricity and water and the disposal of sewage may still be claimed from the respective owner of the real estate until December 31, 2010.

In addition, the rights that are not registered in the land register are only forfeited in case of an asset deal. In case of a share deal, however, these rights remain unaffected. They may be claimed from the company which is the owner of the respective real estate further on. Furthermore, public authorities or private users, for example, which built a building or building facility on the respective real estate may claim their rights vis-à-vis the owner of the real estate in case of a share deal.

3. Allocation of Public Property

The allocation of former public property may also result in problems that may be of certain importance for planned investments. Sometimes, in the course of the allocation of a real estate pursuant to property law, it was overlooked that the real estate was not only used by one, but by several formerly state owned companies. If one of the companies was overlooked in the course of the allocation of the property, its legal successor may still attack the allocation decision and claim its own rights. In general, such rights are forfeited if a certain real estate is sold by way of an asset deal. However, if the sale is planned as share deal the claim may be directed against the company even in case of the change of ownership.

4. Privatization

Also the privatization of formerly state owned companies may be of importance for investment in the New German Laender. In case of investments by a share deal, investment obligations and job guarantees are of importance that were taken over in the course of the privatization of the company. Privatization agreements have to be reviewed if such obligations may be imposed on the investor. In addition, such obligations may trigger claims of contractual penalty. This is also to be applied if the company to be acquired was transferred real estate by privatization. Investment obligations may have been taken over upon such acquisition of real estate that the company may be subject to or that may trigger claims of contractual penalty.

5. Denationalization

a) General

In spite of the accomplishment of numerous restitution claims they may still be of importance for investments in the New German Laender. This applies to investments that are directed to the acquisition of real estate or participations in companies which own real estate. As a rough estimation, around 150,000 real estates in the New German Laender are still subject to restitution claims. These claims are of different importance with regard to planned investments depending on these agreements being executed by share deal or asset deal.

b) Share Deal

In case of a share deal, the restitution claims pursuant to property law remain unaffected. Thus, they may be directed against the target company further on. In case of planned investments it is, thus, necessary to be sure if there are still restitution claims regarding the business premises of the company. The so-called negative certification (Negativattest), i.e. a certification that there are no restitution claims filed with regard to the respective real estate, has to be applied for with the respective Restitution Office, State Restitution Office and Federal Restitution Office. For the sake of security it is necessary to apply for the negative certification with all of the three public authorities because a restitution claim may well be filed only with the local Restitution Office or the Federal Restitution Office.

Some more security is given if the target company acquired business premises after October 3, 1990 and, for this purpose, was granted an approval of real estate transaction. In general, this approval proves that, at least at the time of its granting, no restitution claims were filed. However, in this case negative certifications should additionally be applied for. It cannot be excluded that certain restitution claims, although being filed within due time, were registered at a later point of time. If this is the case the applicant of restitution claims not being registered until such point of time may challenge the approval of real estate transaction even after years.

Specific review is needed if the target company acquired business premises in the course of investment priority proceedings. The highest security is granted by a decision about the finalization of the planned investments. It cannot be absolutely excluded, but it is very unlikely that this decision may be challenged. If, however, such decision is not available the investment priority decision may still be revoked (even after years, e.g. if the investment was not made at all or within due time). In this case, there may be the risk that the target company has to retransfer the acquired real estate to the vendor. Thus, it is recommendable to apply for negative certifications in these cases as well. The risk of the investment priority decision being revoked is only applicable if there are still restitution claims regarding this real estate at all.

c) Asset Deal

Upon acquisition of business premises by an asset deal it is to be taken into consideration that, in case of the acquisition of real estate in the New German Laender, the approval of real estate transaction is still required. Generally, it is only granted if, in advance, the respective restitution offices confirmed by negative certifications that restitution claims according to property law have not been filed for this real estate. By being granted such negative certification a certain security may be achieved prior to coming to an agreement.

If restitution claims were filed regarding the real estate to be acquired the approval of real estate transactions may, however, be granted if these claims are obviously unsubstantiated. Otherwise, the only possibility remains to ask the claimant of this restitution for his approval to sell the real estate. Often, such claimant will only be willing to give his approval if he gets an appropriate purchase price for his real estate in case the restitution claim proves to be substantiated. Regularly, it will be necessary

to conclude an agreement with the claimant of restitution that provides the legal consequences in detail that would result if the respective public authority acknowledges his application to be qualified.

6. Business and Investment Development

Nowadays, investors will draw their main attention to the support that they may be granted by state advancements - e.g. by the granting of subsidies, tax benefits or state aid for the debt relief of a company. But in connection with planned investments, subsidies granted to the investment target in the past are still of importance. Probably still existing investment obligations and contractual penalty claims against the target company in connection with the acquisition of business premises by investment priority proceedings have already been referred to. Investment obligations and contractual penalty claims may also result from the granting of subsidies. Furthermore, it has to be reviewed upon the acquisition of a company by share deal if and under which circumstances granted subsidies may have to be repaid. Also in case of acquisition of real estate by an asset deal state subsidies in favor of a real estate may be of importance. For example, the vendor of a residential real estate may insist on the purchaser to take over the obligation to repay the subsidies granted for the remedy of vacancy.

D. Check List: Acquisition of Companies and Real Estate in Eastern Germany

The following list refers to the most common characteristics of acquisitions in the New German Laender. However, this list is not exhaustive (e.g. it does not include tax or balance issues.

The list is specified for the acquisition of companies by way of a share deal. Restitution claims of third parties of particular assets or collateral rights of third parties regarding business premises are, in general, not affected by a share deal. They are directed against the company also after the sale of the shares.

I. Target Company

1. Was the target company (e.g. a company with limited liability or a stock corporation) effectively established?

   - by change of corporate form pursuant to the Reorganization Act (Umwandlungsgesetz) of the GDR?
   - by transformation pursuant to the Trusteeship Act (Treuhandgesetz)?
   - by split-up?[22]
   - by other forms of establishment?

[22] pursuant to the Act on the Split-up of Companies Administrated by the Privatization Agency (Gesetz über die Spaltung der von der Treuhandanstalt verwalteten Unternehmen vom 5.4.1991, BGBl 1991 I S .2911.

2. Did the current owner acquire the shares effectively?

   - by way of privatization from the Privatization Agency?
   - by sale subsequent to investment priority procedures?
     - Is there a decision on the finalization of the investments?
     - Has an application been filed for the revocation of the investment priority decision or is the decision appealed otherwise?
   - by other forms of acquisition?

II. Business Premises

1. Was the target company (e.g. stock corporation or limited liability company) registered as owner of the business premises in the land register?

2. Is the target company still registered under its old name as GDR state owned company (VEB) in the land register?

3. Has the company been registered in the land register according to a decision on the allocation of property? Is this decision available? Is this decision unappealable?

4. Did the company acquire real estate in the late phase of the GDR (between October 1989 and October 3, 1990)?

   The effectiveness of these agreements has to be particularly reviewed. Many mistakes were made, for example, ineffective representation of the seller, notarization faults etc.

5. Has the company acquired additional real estate since October 3, 1990?

   - Was the seller represented effectively?
   - Has the official permission to transfer the real been granted for the acquisition? Is this decision unappealable?
   - Has an investment priority decision regarding the acquisition been issued? Is is unappealable? Has a decision on the finalization of the investments been issued? Has an application been filed for the revocation of the investment priority decision?

6. As regards the business premises or other assets of the company, are there any restitution claims filed pursuant to the Restitution Act? Are the available negative certificates issued by the competent Restitution Office, State Restitution Office and Federal Restitution Office up-to-date (all three are required!)?

7. Do any real estate or collateral rights of external real estate belong to the company that are not surveyed?

IV. Buildings on and Use of the Real Estate of the Target Company by Third Parties

1. Are there any buildings or other building facilities on the business premises that are not owned by the company?

   - Residential buildings?
   - Summer residences (dachas) or garages?
   - Commercially used buildings?
   - Streets or other publicly used buildings or building facilities?

2. Are there any lines and supply facilities (electricity, gas, water, sewage, district heating) or ways or other kinds of use on the real estate that, in order to be secured, usually have to be registered as easement in the land register? Are there any other collateral rights that are not registered in the land register, e.g. rights of joint use pursuant to the laws of the GDR etc.? Are there any external kinds of use on the real estate which have been established before October 3, 1990?

3. Were business premises sold to a third party before October 3, 1990, and the purchase agreement, however, was not executed anymore?

4. Do third parties use business premises of the company according to agreements that were completed before October 3, 1990? Are there any factual kinds of use dating before October 1990 that are not contractually settled?

V. Buildings on and Use of Real Estate of Third Parties of the Target Company

1. Has the target company used buildings or building facilities (e.g. parking lots) on external real estate since the time before October 3, 1990 or did the company use external real estate according to permission for use contracts at that time?

2. As to the time before October 3, 1990, are there any lines and supply facilities (electricity, gas, water, sewage, district heating) or ways or other kinds of use of the target company on external real estate that, in order to be secured, usually have to be registered as easement in the land register? (probable claim of putting up an easement)

3. Has the target company used building facilities jointly with other users since the time before October 3, 1990?

4. Do buildings or building facilities (e.g. parking lots) belong to the target company that were constructed on more than one cadastral unit before October 3, 1990?

VI. Investment Obligations, Contractual Penalty Claims and Repayment of Subsidies

1. Are there any uncompleted investment obligations or job guarantees (e.g. provided for in privatization agreements, real estate purchase agreements or investment priority decisions)?

2. Is the target company exposed to contractual penalty claims (e.g. according to non-fulfillment of investment obligations)?

3. Is the target company exposed to the obligation of repaying subsidies?

E. Conclusions

As a result it remains to be stated that investments in the New German Laender have numerous specific characteristics that are the results of the adjustment and transformation of the ownership relations in connection with the German unification. It is still not predictable when the open property issues will be completely settled. As regards the restitution claims, the course of the indemnification in the West German States may be a criterion. There, the restitution of assets deprived by the Nazis was enacted by allied laws already before the foundation of the Federal Republic of Germany in 1949. Until the end of the eighties, there was a Supreme Restitution Court in Berlin (West) that dealt with the restitution of deprived assets. Cases that had not been settled at the time of the expiration of the activities of this court were transferred to the Federal Supreme Court. A small number of cases has been decided about only shortly.

This clearly shows that the restitution of expropriated assets can take several decades. In addition, the clarification of property issues and the legal adjustment required go far beyond the restitution of deprived assets. Also in this regard, it is not predictable when the legal relationships in the New German Laender will conform to the Old West German States.

Nevertheless, it would be inappropriate to regard unclarified property issues as considerable restraint of investments in the New German Laender. Sufficient legal instruments are available in order to legally secure investments in the New German Laender. Investors, however, may not abandon specialized legal advice and accompaniment of their investments.

F. Address List

1. Bundesamt zur Regelung offener Vermögensfragen (Federal Restitution Office)

Mauerstr. 39 - 40
10117 Berlin
Postfach 305
10107 Berlin
Phone: (018 88) 70 20 – 0
(030) 2 23 10 - 0
Fax: - 260
E-Mail: poststelle@barov.bund.de

2. Landesämter zur Regelung offener Vermögensfragen (State Restitution Offices)

Berlin
Landesamt zur Regelung offener Vermögensfragen/
Landesausgleichsamt
Adalbertstr. 50
10179 Berlin
Phone: (030) 90 20 - 0
90 20 - 6516 bis 6518
Fax: 90 20 - 6439
E-Mail larov@berlin.de

Brandenburg
Landesamt zur Regelung offener Vermögensfragen Brandenburg
Magdeburger Str. 51
14770 Brandenburg an der Havel
Phone: (03381) 39 82 - 00
Fax: 39 82 – 66

Mecklenburg-Vorpommern
Landesamt zur Regelung offener Vermögensfragen des Landes Mecklenburg-Vorpommern
Markt 20/21
17489 Greifswald
Postfach 11 25
17464 Greifswald
Phone: (03834) 57 11 - 0
Fax: - 39 22
E-Mail poststelle@gw.larovmv.de

Sachsen
Sächsisches Landesamt zur Regelung offener Vermögensfragen
Olbrichtplatz 1
01099 Dresden
Postfach 10 06 52
01076 Dresden
Phone: (0351) 81 35 - 01
Fax 81 35 - 6102
E-Mail poststelle@slrv.smi.sachsen.de

Sachsen-Anhalt
Landesverwaltungsamt
Landesamt zur Regelung offener Vermögensfragen des Landes Sachsen-Anhalt
An der Fliederwegkaserne 13
06130 Halle (Saale)
Postfach 20 02 56
06003 Halle (Saale)
Phone: (0345) 514 - 0
Fax: 514 - 3988
E-Mail Poststelle@rph.mi.lsanet.de

Thüringen
Thüringer Landesamt zur Regelung offener Vermögensfragen
Ernst-Toller-Str. 14
07545 Gera
Postfach 16 51
07506 Gera
Phone: (0365) 82 37 - 0
Fax: 82 37 - 111
E-Mail ThLARoV@t-online.de

3. Authorities and Institutions

Bodenverwertungs- und -verwaltungs GmbH (BVVG)
Schönhauser Allee 120
10437 Berlin
Phone: (030) 44320
Fax: 44321205
Homepage: http://www.bvvg.de

Kreditanstalt für Wiederaufbau
Charlottenstr. 33/33a
10117 Berlin
Postfach 04 03 45
10062 Berlin
Phone: (030) 20264-0
Fax: 20264-5188
Homepage: http://www.kfw.de

Sekretariat der Unabhängigen Kommission zur Überprüfung des Vermögens der Parteien und Massenorganisationen der DDR
Bundesallee 216-218
10719 Berlin
Phone: (01888) 681-4100
681-4367
Fax: -4363

TLG IMMOBILIEN GmbH
Holzmarktstr. 15
10179 Berlin
Phone: (030) 24 70 - 50
Fax: 24 70 - 7337
Homepage: http://www.tlg.de

4. Conference on Jewish Material Claims Against Germany, Inc.
(Claims Conference or JCC) http://www.claimscon.org/
General inquiries: info@claimscon.org

USA: New York: 15 East 26 Street Room 906 New York, NY 10010 Phone: 646-536-9100 Fax: 212-679-2126	Israel: 18 Gruzenberg Street P.O.B. 29254 65251 Tel Aviv Phone: 03-519-4400 Fax: 03-510-0906
Austria: Desider-Friedmann-Platz 1 A-1010 Vienna Phone: 1-533-1622 Fax: 1-533-1623	Germany: Claims Conference Successor Organization Sophienstrasse 26 60487 Frankfurt am Main Phone: +69/ 970708-0 Fax: +69/ 970708-11

G. Literature

- v. Drygalski/Wetter/Gemmeke, Immobilienhandbuch Ost, 2. Auflage, Herne/Berlin 1996

- Rädler/Rapach/Bezzenberger, Vermögen in der ehemaligen DDR, Loseblattsammlung (5 Bände), Herne/Berlin, Stand: 33. Ergänzungslieferung, Dezember 2004

- v. Westerholt, Real Estate Law, in: Rüster/Campbell, Business Transactions in Germany, Vol. 2, Rel.25, May 2001

- Kimme, Offene Vermögensfragen, Loseblattsammlung (3 Bände + Archivordner), Köln, Stand: 24. Ergänzungslieferung, November 2004

- Clemm v. a., Rechtshandbuch Vermögen und Investitionen in der ehemaligen DDR, Loseblattsammlung (4 Ordner), München, Stand 39, Ergänzungslieferung, Dezember 2002

Berlin, 15.7.2005