

RECENT DEVELOPMENTS

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Unity, Law, and Freedom: Legal Aspects of the Process and Results of German Unification

“Einigkeit und Recht und Freiheit”—unity and law and freedom—this quotation, from the opening line of the German national anthem, catches in a nutshell the chief goals of national politics that all postwar West German governments had declared themselves committed to, albeit with ever-fading hopes of achieving them within the foreseeable future. When the East German Communist regime on October 7, 1989, pompously celebrated the fortieth anniversary of the German Democratic Republic, as East Germany was officially known, no political observer with any sense of reality would have predicted that this country would not live to see its forty-first anniversary. As of October 3, 1990, the German Democratic Republic has ceased to exist as a separate country, as its territory and people have become part of one single German state.

The completion of political unity was preceded by the introduction of the rule of law and the achievement of freedom. In fact, one might say that the three objectives mentioned in the national anthem were fulfilled in reverse order: freedom arrived when the Berlin Wall was opened on November 9, 1989. The East German citizens soon exercised their newly gained freedom to establish a system of law and justice. This development led to the first free parliamentary elections, the abolition of the Communist legal system, and eventually to unification.

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This article outlines the key legal aspects of the process of unification and describes the implications of unification in those areas of law that are of primary interest to Germany's trading partners and foreign investors.

I. From the Fall of the Berlin Wall to the Day of German Unity: The Process of Unification

Even after the opening of the Berlin Wall and the borders between East and West Germany on November 9, 1989, few Germans believed that this would soon lead to unification of the two countries. The political, legal, and economic systems of East and West Germany seemed too fundamentally opposed, the gap between the living conditions in the East and the West too wide, the political heritage and aspirations of the people too different to make a merger appear feasible or desirable within a short period of time.

Politically, West Germany's "Basic Law," the Grundgesetz of 1949, builds on the tradition of the Western parliamentary democracies. The East German Constitution of 1968 reflected the authoritarian, centralist, one-party structure known from Communist states elsewhere in the world. In the economic arena, East Germany's socialist and centrally-planned economy had tried unsuccessfully for over forty years to compete with West Germany's prospering free and social market economy.

The legal systems in both parts of Germany were as disparate as the economic and social environment they reflected. The West German modern legal system provides a suitable framework for free economic and social activity. It had no suitable counterpart in the East German system, which was concerned with implementing party ideology on all levels of society and with helping socialist businesses fulfill the requirements of central planning.

Yet, it was precisely this degree of disparity between the political, legal, and economic systems between the two states that determined the pace and direction of the unification process. In retrospect, one can distinguish between three phases in which unification was achieved: a first period of democratization and termination of Communist rule; a second phase marked by the installation of a democratic government and the work on a monetary, economic, and social union with West Germany; and a third phase during which the conditions of unification were determined.

A. PHASE NO. 1: DEMOCRATIZATION AND TERMINATION OF COMMUNIST RULE (NOVEMBER 9, 1989, TO MARCH 17, 1990)

This first phase started with the opening of the Berlin Wall and the East German borders on November 9, 1989, and lasted until the eve of the first free parliamentary elections in East Germany in over forty years held on March 18, 1990.

The period after November 9, 1989, will be remembered by many as the time of the large demonstrations in East Germany and the waves of East German visitors to the West. Immediately after the opening of the borders, East German citizens travelled to West Germany, compared what they saw in their country back home, and shifted their attention from political to economic goals. Many East Germans decided to move to West Germany to enjoy the better life-style, greater opportunities, and cleaner environment in West Germany. During the winter months, 2,000 East Germans came to West Germany every day, close to 200,000 during the first three months of 1990. At that time, the call for unification became louder, mainly as unification was believed by East Germans to be the fastest way to achieve economic recovery and equalization of the standards of living in the East and the West. The steady flow of East German immigrants to the West increased the pressure on the West German Government to come forward with proposals for economic, monetary, and political union.

The transitional East German all-party government, still controlled by the Communists, made first, mostly tepid, attempts towards legal and economic reforms. In January 1990, drafts for a regulation on the formation of businesses with foreign participation (so-called Joint Venture Regulation)¹ were published and soon became law. As the regulation limited foreign ownership to 49 percent and provided for numerous administrative obstacles, it was dismissed as insufficient by East German and West German industries alike. The East German parliament also enacted legislation allowing private citizens to start their own businesses and reducing taxes and other administrative burdens on private enterprises.²

The main achievement of the interim government in the area of business law was to lay the groundwork for the privatization of social businesses. In March 1990, it issued a regulation requiring all socialist businesses to change their corporate form to corporations³ and created the Council for the Trusteeship over People's Property,⁴ which was to become the shareholder of these newly created corporations and was charged with their restructuring and privatization.

Yet, the government refused to go further in reforming the legal and economic system, stating that it lacked a clear mandate from the electorate. Preparations for the first free elections began. Political parties evolved and formed alliances, most of which were supported by their West German counterparts. At the same

1. Verordnung über die Gründung und Tätigkeit von Unternehmen mit ausländischer Beteiligung in der DDR, of Jan. 25, 1990, GB1.I Nr. 4, at 16.

2. Gesetz über die Gründung und Tätigkeit privater Unternehmen und über Unternehmensbeteiligungen, of Mar. 7, 1990, GB1.I Nr. 17, at 141.

3. Verordnung zur Umwandlung von volkseigenen Kombinat, Betrieben und Einrichtungen in Kapitalgesellschaften, of Mar. 1, 1990, GB1.I Nr. 14, at 107.

4. Beschluss zur Gründung der Anstalt zur treuhänderischen Verwaltung des Volkseigentums (Treuhandanstalt), of Mar. 1, 1990, GB1.I Nr. 14, at 107.

time the leakage of East German citizens to West Germany continued as a feeling of great uncertainty over the future pace of the revolution set in. On the eve of the first free political elections held on March 18, 1990, the political scenario could be characterized as follows:

- Change and reform in East Germany would be occurring in close proximity to a strong, successful, and historically connected West German neighbor. As a result, West Germany would be looked upon as a model for reform and recovery.
- An overwhelming majority of East Germans, including former supporters of the old regime, wanted the country to replace the unsuccessful centrally planned economy with a West German style social and free market economy.
- Reforms would have to be achieved as quickly as possible to stop the continuing leakage of East Germans to the West and the eventual collapse of the East German system.
- Rapid economic and social changes should not negate achievements in the social sector and should provide for protection against the consequences of change, in particular in the area of unemployment and welfare.

**B. PHASE NO. 2: TOWARDS THE CREATION OF A MONETARY, ECONOMIC, AND SOCIAL UNION BETWEEN EAST AND WEST GERMANY
(MARCH 18 TO JUNE 30, 1990)**

The results of the March elections clearly reflected the parameters delineated above. The conservative alliance, headed by the Christian Democrats and supported by their West German sister parties, scored an unchallenged victory that was interpreted as a clear mandate to move toward economic and political unification with West Germany.

On May 18, 1990, only two months after the elections, the governments of the two German states signed a Treaty on the Creation of a Monetary, Economic and Social Union between East and West Germany effective July 1, 1990.⁵ Besides introducing the West German deutsche mark (DM) as legal tender in East Germany, the State Treaty set the framework for the transformation of the East German economic and legal systems. It provided that effective July 1, 1990, East Germany would adopt West German legislation in all areas of economic activity, including banking, insurance, corporate, antitrust, accounting, tax, environmental, consumer protection, and labor law, and repealed or amended conflicting legislation from the Communist area. In addition, East Germany amended its constitution to delete all references to "socialism," to guarantee private ownership and the freedom to form unions, and to install an independent judiciary.

5. Vertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik, BGBI.II 518.

The State Treaty also abolished the former state monopoly on foreign trade, authorizing all East German businesses to trade directly with partners located outside East Germany without any state intervention. At the same time, all restrictions on foreign direct investment were removed, which also meant that the Joint Venture Regulation was repealed less than six months after its introduction.

The second step towards unification had been taken when the last East German mark was spent on June 30, 1990, and the ramifications for a monetary, economic, and social union were in place.

C. PHASE NO. 3: WORKING TOWARDS UNIFICATION (JULY 1 TO OCTOBER 2, 1990)

Since the March elections, it had been clear that economic union was only a first step towards political union. While work on the State Treaty progressed, the discussion focused on four key issues in connection with political unification.

1. *The Constitutional Issue*

From a West German viewpoint, there were two constitutional ways of arriving at unification, each with its fervent supporters: East and West Germany could unite under a new constitution to be drafted by an all-German constitutional council; or East Germany could accede to West Germany and, thereby, adopt the Basic Law. The catchwords used to refer to the two factions were article 146 and article 23, which are the pertinent provisions of the Basic Law. Article 146 provides that the Basic Law shall lose its validity once a new constitution adopted by the German people in free self-determination enters into effect. Article 23, on the other hand, deals with the territorial application of the Basic Law. It lists the States (Länder) formerly comprising West Germany and states that the Basic Law shall be introduced "in other parts of Germany after their accession."

The victory of the conservative alliance during the March elections was also viewed as a mandate for unification by virtue of article 23, as the conservatives had favored accession over the drafting of an entirely new constitution.

2. *The "External Aspects" of Unification*

Until July 1990, the so-called "external aspects" of German unification seemed to present the thorniest of all issues surrounding unification. The chief question was whether in the area of military alliances a united Germany would have to be neutral, or whether it should have double membership in NATO and the Warsaw Pact, or whether it could remain in NATO, perhaps under certain conditions. After intensive diplomatic activity on all sides, including the EC, NATO, and on a bilateral level, Chancellor Kohl and President Gorbachev, during their meeting in the Caucasian Mountains in early July 1990, agreed that the united Germany could freely decide which military alliance it wished to join and that this could include membership in NATO.

Once this impediment had been cleared away, the “Two Plus Four Talks” between the two German Governments and those of the four victorious World War II powers—the United States, Britain, France, and the Soviet Union—were soon concluded, when all six signed a treaty terminating the four powers’ special rights regarding Germany as a whole and restoring it to a fully sovereign state, effective as of the date of unification.

Even though the issue of the recognition of the Western Polish border was another important “external aspect” of unification, it never was a substantive issue, but rather one of the proper form of confirming the inviolability of this border. Early on, the German Governments and parliaments had confirmed the finality of the Oder-Neisse border and stated that the united Germany would comprise East and West Germany and Berlin and have no territorial claims against any other state.

3. *The Issue of Timing*

As the process of economic integration was picking up momentum, in particular as a result of the State Treaty, the view that political unity should be achieved as soon as possible drew more and more support. The initial driving factor in this regard was the impending date for federal elections in West Germany, which according to the Basic Law would have to be held during the winter of 1990/1991. To avoid having two campaigns at perhaps relatively close intervals, it was soon felt desirable to hold the first all-German federal elections at the same time. For a while December 2, 1990, seemed likely to be the date for the first all-German elections and the effective date of unification. The early breakthrough in the issue of NATO membership, the collapse of the East German coalition government during the summer, and the erosion of the political morale in East Germany, as more and more of the misdeeds and corruption of the old system were uncovered, brought the date for unification forward even further. On August 23, 1990, the East German parliament, with a more than 75 percent majority vote in favor, declared East Germany’s accession to the Federal Republic of Germany, effective October 3, 1990.

4. *The Issue of How to Implement Accession: Integration Law or State Treaty?*

Article 23 of the Basic Law does not state how to introduce the Basic Law in areas of Germany that have decided to accede to its scope of application. When the Saarland in the 1950s joined the Federal Republic, the German parliament enacted an “integration law” (*Eingliederungsgesetz*), stating in detail how the then-new state was to be integrated into the Federal Republic of Germany. Even though the route of adopting an integration law was also available with respect to East Germany, it was always felt preferable to lay down the road towards political unification in a second state treaty between East and West Germany. This method was perceived as not only presenting a more dignified procedure, especially for East Germany, but also as giving East Germany and its government the opportunity to better represent the interests of the East German population.

Work and negotiations on the second state treaty, soon named the Unification Treaty, began immediately after the May 18 State Treaty dealing with monetary union had been completed. For a short time during the summer, it seemed doubtful whether it would draw the necessary parliamentary majority; but when the political quarrels over such issues as the electoral system and abortion were resolved, the negotiations on the treaty were soon concluded. The Unification Treaty was signed on August 31, 1990, and promptly ratified by the parliaments of East and West Germany. In accordance with its terms, East and West Germany became one single country, effective October 3, 1990.

II. The Unification Treaty: Law in the United Germany

A. GENERAL

The Treaty between the Federal Republic of Germany and the German Democratic Republic on the Achievement of the Unity of Germany⁶ is probably the most comprehensive legal document drafted in Germany in the last fifty or more years. In over a thousand pages, the Unification Treaty covers virtually every aspect of political, economic, and social life in the united Germany and lays down the principles and, in many areas, the details of the legal environment in which the two formerly independent states are to grow together.

The text of the Unification Treaty itself is divided into nine chapters covering such issues as the constitutional effect of accession, the impact of unification on international treaties and conventions, the structure of public administration and the judicial system in the united Germany, public assets and debts, and aspects of social and medical systems, family and women, culture, education, sciences, and sports. The bulk of the Treaty, however, deals with the conditions of introducing the West German legal system into the eastern part of Germany. The drafters of the Unification Treaty have analyzed virtually every single piece of West German and East German legislation to determine what changes are required as a result of unification and what transitional measures must be taken to introduce West German legislation into East Germany within certain periods. Thus, the Treaty not only states that the West German Criminal Code shall now apply in the eastern part of Germany, but also that section 7, subsection 2 of the Regulation Regarding the Raising of Hogs,⁷ to name just an example, will enter into effect in the eastern part of Germany only as of January 1994. The Unification Treaty also lists those laws and regulations enacted by the former East German legislature that will remain in effect, either permanently as they deal with specifically eastern issues, or until an all-German, new solution has been

6. Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands—Einigungsvertrag—, BGBI.II. 1246.

7. Schweinehaltungsverordnung, Unification Treaty, Exhibit I, ¶ B, Ch. VI, area A, sec. III, No. 16.

found. As a result of this, the unity of law has not yet been achieved completely, even though most of the differences will be gone in a few years.

The following is a summary of a few key aspects of law in the united Germany in those areas that are relevant not only to Germans but also to foreign investors and trading partners.

B. CONSTITUTIONAL FRAMEWORK

As pointed out above, accession by virtue of article 23 of the Basic Law implied that once accession had become effective, the Basic Law would have to be introduced into the new territories. Since the Basic Law provides for a certain organizational structure, in particular a federal system with individual states (Länder) and a system of representation of the people and the states in the legislative bodies, rules on the introduction of this constitutional system and the principles that would govern the period of transition had to be worked out. To make the formerly centralist East Germany fit into the West German federal system, the East German parliament had enacted a law on the reintroduction of those states the Communists had abolished during the 1950s.⁸ This law reinstated the five East German states, i.e., Mecklenburg-Vorpommern (along the Baltic Sea), Brandenburg (the heart of what formerly constituted Prussia in the center and surrounding Berlin), Saxony-Anhalt (west of Berlin), Thuringia (in the southwest), and Saxony (in the southeast). Accordingly, article 1, subsection 1 of the Unification Treaty states that effective as of the date of the accession of the German Democratic Republic, these five states will become states of the Federal Republic of Germany, the Federal Republic with its Basic Law thus being the "surviving state" upon consummation of the merger. According to article 1, subsection 2, the twenty-three districts of Berlin now form the City and State of Berlin, which is of course no longer divided into an eastern and a western part.

In the meantime, the parliaments of the "Five New States," as the former German Democratic Republic is now more frequently referred to, were elected in the fall of 1990 and have begun to establish working state administrations.

The Unification Treaty also provided for an interim representation of the eastern population in the Federal Parliament, the Bundestag, by calling on the former East German parliament to nominate 144 of its members to be delegated to the new all-German Bundestag. Their offices terminated on December 2, 1990, when the first all-German elections were held in the eastern and western parts of Germany.

According to article 2, subsection 1, the capital of the united Germany is Berlin, but the issue of where the parliament and the government are to take up residence is being referred to a later decision. Thus, it is clear that Berlin will at

8. *Ländereinführungsgesetz*, of July 22, 1990, GB1.I Nr. 51, at 955; Unification Treaty, Exhibit II, ¶ B, ch. II, area A, sec. II.

least be the ceremonial capital. At the time this report was written, the controversy between the supporters of Bonn and Berlin as the two candidates for "capitalship" continued.

Even though the general rule is that by acceding to the Federal Republic of Germany the Five New States have adopted to the Basic Law, the Unification Treaty also provides for amendments to the Basic Law that have become necessary as a result of unification. Thus, the objective of unification has been deleted from the preamble, making it clear that the united Germany considers itself a saturated country that no longer pursues any territorial options. Besides making a few other technical changes, the most important constitutional issues are presented by article 5 of the Unification Treaty, which deals with future amendments to the Basic Law. This article states that the governments of East and West Germany "recommend" that the legislative bodies of the united Germany consider within two years amending the constitution in a number of important respects, in particular as regards the introduction of state objectives (such as the protection of the environment or the preservation of jobs) and the submission of the Basic Law to a general referendum. This clause is expected to create substantial political debate, as these issues may perhaps be coupled with other issues, such as the participation of German forces in military ventures outside the territory of the NATO member states.

Finally, article 10 of the Unification Treaty makes it clear that as of the effective date of unification, the Five New States also have become part of the European Communities and become bound by and subject to the various European treaties and European law in general. In the meantime, the Commission has promulgated specific rules dealing with the integration of the five new East German states into the European Communities.⁹

C. BUSINESS LAW AND ORGANIZATIONS

Relatively little had to be said in the Unification Treaty about the restructuring of the formerly socialist businesses, as most of the legislative work had already been done by the East German Government and parliament. Yet to divest the large industrial conglomerates and change the socialist businesses into privately organized corporations remains one of the most pressing tasks in the Five New States.

Under Communist rule, the East German economy had been dominated by socialist businesses, in particular, so-called "people-owned businesses" (*volkseigene Betriebe*, or VEBs), which had been the main factors in producing East Germany's gross national income. The role of private businesses, by contrast, had been restricted to providing minor services in the crafts and trades. VEBs had been legal entities headed by a director whose responsibility was to fulfill the

9. Commission Decision of Sept. 27, 1990, AB1. L 267/37 of Sept. 29, 1990.

functions and achieve the targets set by the five-year and other long-term plans. Many VEBs had been part of a combine (*Kombinat*), which was charged with coordinating the activities and responsibilities of the VEBs of a particular industry. This responsibility had been functional only and had not been reflected in the ownership structure. A combine had not had any ownership stake in its members. This system of central planning and coordination through combines had worked to create huge monopolies that did not have any competitors within East Germany.

The status and functions of socialist businesses such as VEBs and combines had been governed by a special regulation.¹⁰ Even though VEBs had been legal entities, they could be compared to trustees of socialist property, responsible not to any shareholder, but only to the central planning process. They did not establish financial reports and, therefore, did not show any profits. Since there was no determination of dividends or of taxable profits, no rules existed for the determination of profits or for accounting principles.

Already, the transitional all-party government that ruled the country prior to the March 18, 1990, elections had introduced legislation changing the legal status of VEBs and other socialist businesses to limited liability companies (GmbHs) or stock corporations (*Aktiengesellschaften*, or AGs). The task of restructuring the formerly socialist businesses was entrusted to the Trusteeship Council. From the beginning, the practical problems of restructuring the socialist businesses were enormous. There were no rules on how to value assets and liabilities of businesses whose survival chances were doubtful. Also, East German businessmen and lawyers were not used to thinking in market-oriented terms and had difficulty in working out appropriate strategies for restructuring. In addition, the former Communist party bureaucracy was less than enthusiastic in implementing the new policies. To accelerate the process, the new East German Government appointed as a result of the March 18, 1990, elections had introduced legislation in connection with the creation of a monetary and economic union with West Germany, providing for a mandatory change of corporate status as of July 1, 1990, and imposing on each socialist business the obligation to come forward with an opening DM balance sheet within a few months. At that time, the Act on the Preparation of the Opening Balance Sheet in Deutsche Mark and the Restatement of Equity was still in the legislative process. It was finalized at last in connection with the Unification Treaty and became one of the numerous exhibits to the Treaty.¹¹

The Act sets forth the rules for the preparation of the opening balance sheet of formerly socialist businesses in DM as of July 1, 1990. Generally, assets have to be valued at market and liabilities at book value; sufficient accruals have to be

10. Verordnung über die Aufgaben, Rechte und Pflichten der volkseigenen Betriebe, Kombinate und VVB, of 1973, as amended.

11. Gesetz über die Eröffnungsbilanz in Deutscher Mark und die Kapitalneufestsetzung (DM-BilG), Unification Treaty, Exhibit II, ¶ B, ch. III, area D, sec. 1.

made for renovation and restructuring expenses. In stating amounts, the conversion rate of two former East German marks to one DM has to be observed. Equity is defined as the difference between assets and liabilities. If the statutory equity is insufficient, a compensation receivable against the Trusteeship Council has to be shown on the assets side of the balance sheet. Conversely, a compensation liability must be shown if the amount of the net equity would otherwise exceed the amount shown for fixed assets (except for real estate). The opening balance sheet and the attachment must be audited by an auditor. Otherwise, the Act refers to West German commercial accounting rules, which are in accordance with the pertinent EC directives.

The audited DM opening balance sheets provide the formerly socialist businesses with an entrance ticket into the world of company management in a free market environment. They also form the most reliable basis for the valuation of a company and its assets in connection with an acquisition.

D. REAL ESTATE AND OWNERSHIP

Under the Communist regime, the legal status of real estate had been substantially changed from the prewar situation when real estate, like in other western countries, had been privately owned and traded. Since 1945 East German real estate and businesses had undergone a series of expropriation measures. These measures began with the so-called "land reform" under Soviet occupation between 1945 and 1949. They continued with actual and constructive expropriation during the first two decades of Communist rule, when many private land owners and businesses were forced to sell their property to the state or socialist organizations. And they ended with an expropriation order in 1972, when most of the private property and businesses that had survived until then were confiscated or expropriated.

At a relatively early stage in the political discussion, western industry and government officials requested that the Communist expropriation measures be turned back and expropriated property either be returned to its rightful owner or that the owner be compensated. This request created a conflict between the rights of previous owners of expropriated property and a policy of opening up East Germany for new direct investment and reconstruction that should not be faced with protracted fights over ownership.

The solution of how to reconcile these conflicting interests emerged only gradually. Because of the complexity of the problem, the drafters of the first State Treaty regarding monetary and economic union only managed to prepare a policy paper on the possibilities for private investors to acquire property in real estate and means of production. This policy paper was added at the last minute to the text of the Treaty as an exhibit.¹² This exhibit imposed on East Germany the obligation to provide sufficient quantities of real estate for purchase by investors

12. Exhibit IX to art. 2, subsec. 1 of the State Treaty (*see supra* note 5).

and stated that real estate previously used by the socialist businesses would become the property of the new corporations once they had changed their corporate status. While the East German Government insisted that the expropriations between 1945 and 1949 would remain final as they occurred at a time of Germany's occupation, there was no controversy over restoring to their former position previous owners that suffered from confiscations after that time. To clarify the status of property located within East Germany as quickly as possible, the East German Government issued a Regulation on the Notification of Property Claims,¹³ which required every claimant to file property claims prior to January 31, 1991; this deadline was later shortened to October 13, 1990. Still, the Regulation did not deal with the substantive aspects of restitution and compensation, which were finally resolved only in connection with the Unification Treaty.

In confirming the validity of the Trusteeship Law¹⁴ and certain regulations promulgated under it, the Unification Treaty makes it clear that real property previously used by socialist businesses has become the property of those businesses, now changed into corporations.¹⁵ The conditions and procedure for restoring expropriated owners to their previous position are governed by the Act Concerning Open Property Issues.¹⁶ In accordance with the position taken by the East German Government, the law does not concern confiscations "on the basis of occupation law or based on the exercise of occupation powers,"¹⁷ but covers all other expropriation or confiscation measures, including even those from the Nazi period. As a general principle, property, including expropriated businesses, should be returned to their previous owners unless a return is no longer possible or reasonable. In particular, real estate will not be returned if it has been substantially changed or if its use has been changed from private to commercial or public use. Businesses are to be returned only if they are reasonably comparable in nature to the businesses originally expropriated. If property can no longer be returned or if the claimant so elects, the claimant is entitled to adequate compensation.¹⁸

Even though there is no clear deadline within which to file claims under the law, the Notification Regulation mentioned above retains its relevance in that property in relation to which no claims have been filed by October 13, 1990, may

13. Verordnung über die Anmeldung vermögensrechtlicher Ansprüche, of July 11, 1990, GB1.I Nr. 44, at 718.

14. Unification Treaty, art. 25, Gesetz zur Privatisierung und Reorganisation des volkseigenen Vermögens--Treuhandgesetz (Law on the Privatization and Reorganization of People-Owned Property--Trusteeship Law), of June 17, 1990, GB1.I Nr. 33, at 300.

15. Trusteeship Law, sec. II, Subsec. 2, § 23; Fifth Implementation Regulation, of Sept. 12, 1990, GB1.I Nr. 60, at 1466.

16. Gesetz zur Regelung offener Vermögensfragen, Unification Treaty, Exhibit II, ¶ B, ch. III, area B, § I, No. 2.

17. *See id.* § 1, subsec. 8(a).

18. *Id.* §§ 4 *et seq.*, 8.

now be disposed of. If a notification has been filed, the property involved may not be disposed of.¹⁹ The drafters of the Unification Treaty realized, however, that even where claims have been filed on time, there should be instances where property may be sold to investors if the sale is in the public interest. According to the Act Regarding Special Investments in the Former Territory of East Germany,²⁰ local authorities may issue special exemptions from the prohibition to sell property that may be the subject of restitution claims if the sale serves "special investment purposes." These are defined as instances where the sale will preserve or create jobs in a business, or help to provide housing, or improve the infrastructure. While the Act is expected to encourage investment in real estate for industrial or public purposes, it does not affect the rights of previous owners to obtain adequate compensation, which may include compensation in excess of the purchase price paid by the investor if the property is sold below the market value.

Only the future development will show whether the statutory framework described above will help to attract investment in the Five New States while at the same time satisfying the rights of those who have been deprived of their property and maintaining social peace within the eastern parts of Germany.

E. ENVIRONMENTAL LAW

The first State Treaty on the creation of a monetary, economic, and social union had already provided for the introduction of most of West Germany's legislation in the area of environmental law into East Germany, except that the effective date for the introduction of environmental standards was deferred to different dates depending on the areas concerned. The Unification Treaty confirms that the General Environmental Law, which entered into effect on July 1, 1990, remains applicable, subject to certain technical changes.²¹ In addition, all environmental laws that had not yet entered into effect in East Germany have now become law in the Five New States as well, effective with unification.

The severe contamination of the environment in the eastern part of Germany and, generally, the state of affairs as regards the protection of the environment has been considered as one of the most severe obstacles to investment there. As an incentive to investors, the General Environmental Law provided for the possibility for investors to obtain an exemption from the liability for long-term toxic liabilities (*Alllasten*). The pertinent section states that the buyers of plants or equipment intended for commercial use may not be held responsible for damage or contamination caused prior to July 1, 1990, if the competent authority grants

19. *Id.* § 3, subsecs. 3 and 4.

20. Gesetz über besondere Investitionen in dem in Artikel 3 des Einigungsvertrages genannten Gebiet, Unification Treaty, Exhibit II, ¶ B, ch. III, area B, § 1, No. 1.

21. Umweltrahmengesetz, of June 29, 1990, GB1.1 Nr. 42, at 649; Unification Treaty, Exhibit II, ¶ B, ch. XII, § III, No. 1.

an exemption from liability. The application for an exemption must be filed at the latest by December 31, 1991.²² Investors should be careful not to rely on this statute as a safe way out of environmental liability. Since issuance of the exemption is within the discretion of the authority, it may be denied if the authority determines that in view of all circumstances the issuance is not appropriate. Furthermore, the exemption only relates to damage or contamination caused prior to July 1, 1990, which creates the difficulty of distinguishing between historic and recent contamination. Also not clear is whether the exemption is available to the purchasers of stock in businesses that may be subject to environmental liability or whether the operation must be acquired as an asset. Finally, the legislature has preserved the possibility of creating an environmental cleanup fund to which owners of plants may have to contribute as a matter of mandatory law. Therefore, investors in contaminated real estate or businesses should obtain as much protection as possible from the seller, which may include some form of guaranty from the Trusteeship Council.

In the area of emissions into the air or water and waste disposal, the laws previously enacted by West Germany now apply in all of Germany, including the Five New States, except for certain strict environmental standards, which will be introduced in the Five New States only at a later date.

Since the administration of the environmental laws for the most part is entrusted to the state rather than the federal authorities, it will take some time until the Five New States have built up an administration capable of handling the administrative work. In the meantime, they will be supported by personnel from the West German authorities, many of which have created tutorships with their eastern companion authorities.

F. OTHER AREAS OF BUSINESS LAW

As already mentioned above,²³ the first State Treaty on the creation of a Monetary, Economic and Social Union had already introduced into East Germany most key pieces of West German business and commercial legislation. The Unification Treaty has now completed the process of harmonization of law in other areas relevant for commercial transactions. As of October 3, 1990, the following laws and statutes now apply in all of Germany:

- The German Civil Code (*Bürgerliches Gesetzbuch*, or BGB), subject only to certain specific transitional rules;
- The Introductory Law to the Civil Code (EGBGB), containing Germany's private international law;
- The Code regarding the Land Register (*Grundbuchordnung*, concerning the function and administration of the land register where all pieces of real estate are registered);

22. Umweltrahmengesetz, art. 1, § 4, subsec. 3.

23. See *supra* text section I.B.

- The Product Liability Law (*Produkthaftungsgesetz*), which implemented the EC Product Liability Directive;
- The Copyright Act; and
- The Unfair Competition Act (UWG).

In addition, corporate law, antitrust law, and tax law apply equally in all of Germany, subject to certain technical modifications that will apply for a transitional period.²⁴

Labor law has been harmonized in all of Germany. As a result, both private and collective labor law (including the various laws regarding codetermination) now also apply in the Five New States.

G. LAWYERS AND COURTS

In accordance with the general objective of the Unification Treaty to introduce West German law into the Five New States, the West German judicial system has been introduced into eastern Germany. However, to complete this task, more will be required than to simply provide that the judicial laws apply in the Five New States. The judiciary in the German Democratic Republic had been one of the key instruments to implement party policy and ideology, and accordingly, law students and lawyers in general had been carefully selected to ensure that the candidates were in line with Marxist and Communist party ideology. Therefore, one of the difficult tasks in the years to come will be to establish an independent judiciary committed to the principles of a free democracy and the rule of law. To achieve this, the appointments of East German judges have been maintained, but made subject to investigation and confirmation or revocation in each individual case. For this purpose special committees have been created that will investigate the personal background and education of each individual East German judge to determine whether he or she may remain in office.

The practice will be somewhat more liberal as far as attorneys are concerned. Under the Unification Treaty those attorneys that had been licensed to practice as attorneys in East Germany will retain their admission and be allowed to practice as lawyers in the united Germany. Exceptions have been made for graduates from certain party schools. Students currently enrolled under the old curriculum—which is undergoing immediate change—will be able to finish their education and fit into the Western democratic legal regimen.

The old East German legislature had attempted to introduce certain new features into the previous East German Attorneys' Act in legalizing the multicity law firm and professional corporations. As there has been a heated discussion within the West German bar on these topics, which has not yet resulted in any clear position, these new features were expressly declared abrogated by the

24. The transfer tax laws (including real estate transfer and importation VAT) only applied as of Jan. 1, 1991.

Unification Treaty. Thus, the future development in the area of multicity law firms, professional corporations, advertising, and admissions to various courts remains open.

III. Conclusion

The above can only be a rough outline of the drastic changes that have occurred in Germany in less than a year. Even though the work completed by government, business, and lawyers alike is enormous, what has been accomplished is to set the path for the unification of the political, economic, and social systems in the two parts that now comprise the united Germany. It will certainly take years until the actual living conditions catch up with these changes and a truly homogeneous society emerges.

The opening-up of the former East Germany in the wake of monetary union and unification will provide western business access to a significant central European market with a population of 16,000,000 people. While West German industry may have a head start, the chances for non-German industry should not be underestimated. Lawyers from the west will need to accompany their clients in exploring this new market. Given the enthusiasm with which West and East German business and government have prepared for the introduction of a free-market and democratic governmental system in the eastern German states, there can be little doubt that the Five New States formerly comprising the German Democratic Republic will recover soon from a system to be remembered only in history.