

## Trust Law in the Process of Reunifying East and West Germany

How a legal concept foreign to German law was the solution to merge a socialist and a capitalist economy between 1989 and the present

Tim A. Beijer\*

### 1. Introduction

A crisis leads to innovation and creativity in problem solving. For Germany, this crisis was caused by the fall of the Soviet Bloc in the early 1990s. As the USSR came tumbling down on 9 November 1989, the reunification of Germany was inevitable. The impossible had to be done, namely the unification of two legal systems that seemed incompatible, one focussed on the acquisition of property, whilst the other detested exactly that. A merger of the two economies would surely prove to be a legal nightmare.

It ought to be recognised that laws form an integral part of the enforcement of a certain ideology. Subsequently, in the USSR, the satellite states under Russian influence began to change their legal codes and constitutions in order to ensure that socialist states could be formed, thereby using law as an enforcement tool for an ideology. In order to enforce the socialist ideology, all means of production were nationalised by the central government. These entities were either transformed into State-Owned Enterprises – SOEs hereinafter – or in collectives. A special ownership relationship between the state and the people as a whole was thereby created.<sup>1</sup>

An implementation of such a policy fundamentally clashes with the capitalist concept of ownership in a system in which various forms of ownership take peculiar shapes, with some systems even allowing property to have multiple owners under equitable ownership schemes; this form of ownership is known as a trust.<sup>2</sup> The trust is primarily associated with the Anglo-American common law legal system and is rather uncommon in the codified and rigid ownership system of civil law legal systems. Yet, there is an exception to the rule.

Historically, Germany has developed a specific fiduciary relationship between two parties known as a *Treuhand*, a trust-like legal concept developed in the early Middle Ages under Salian Frankish law.<sup>3</sup> With the looming danger of the collapse of the East German economy, the Government had to find a way to privatise the East German SOEs, whilst simultaneously ensuring that people maintained their jobs.<sup>4</sup> In order to facilitate this transition from a planned economy to a liberalised market economy, a trust-like legal device appeared to be the solution. As the two Germanys reunified, the East German Government created an

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1 W.E. Butler, *Marxian concept of Ownership in Soviet law* (1985), p. 285.

2 S.B. Gallagher, *Equity and the Law of Trusts in Hong Kong* (2016).

3 B. Akkermans, *The Principle Of Numerus Clausus In European Property Law* (2008).

4 F.K. Koehler, 'Investment in the New German Federal States', (1992) 24 *Case Western Reserve Journal of International Law*, no. 3, pp. 511-564.

agency that was responsible for the privatisation of East German SOEs, and this agency was called the *Treuhandanstalt*, translated into English as a 'trust agency'. Whilst the agency was named after this ancient Germanic trust, it appears that, in reality, the characteristics of *Treuhand* were not employed by the trust agency; rather it appears that a different notion of trusts was used to solve the problems related to the reunification.

Normally, a trust is perceived to be an odd concept in a civil law system and many questions surrounding the creation of the agency therefore remain. More specifically, did the agency operate according to the Germanic concept of *Treuhand*, or did it operate according to the Anglo-American trust, or can the origins of the *Treuhandanstalt* be traced back to Soviet law? This paper aims to answer this question. In short, did the German legislators use a foreign legal concept in order to merge the socialist and a capitalist economy between 1989 until the operation of the *Treuhandanstalt* ceased in Germany in 1994?<sup>5</sup>

However, before the former East and West German legal systems are analysed, this paper will provide a brief introduction into the context and history that surround the *Treuhand*, as this will aid the reader's understanding. Next, the paper will discuss and provide a workable definition of a trust. As various forms of trust exist in numerous legal systems, with minor differences in each system, it is important to define the basic characteristics of what actually constitutes a trust, as this enables a comparison of different legal systems.

Furthermore, the research will be conducted by analysing various different legal traditions, with the capitalist legal systems on the one hand, and the communist legal systems on the other. In order to make a viable comparison between the two German systems, one ought to analyse the origins and the sources of both legal systems in the field of property law, as this is necessary because both systems have a different point of view on certain essential legal concepts concerning the *Treuhand* in particular. Hence, the civil law of the Federal Republic of Germany – the FRG hereinafter – will be analysed, with the effect that the links between the West German concept of ownership and the context in which the *Treuhandanstalt* operated after the reunification become evident. Furthermore, this paper will elaborate on the common law concept of a trust in the Anglo-American legal systems, in particular under English law, as the concept of a trust originated in this legal system. This comparison of legal traditions will be conducted by analysing previous literature on trusts in these legal systems and by an assessment of primarily codified law.

Since the *Treuhandanstalt* was created under the leadership of the German Democratic Republic – the GDR hereinafter – prior to reunification, one may wonder whether the *Treuhandanstalt* operated on the basis of socialist law. In order to gain a better understanding of this socialist legal system, the teachings of Marx will be analysed, next to the legal system of Soviet Russia. The influence of Marx's teachings on the Russian and East German systems is considerable, as this philosopher was the chief designer of the communist political system and his teachings shaped the concept of ownership throughout the USSR. Furthermore, as the study of the pre-1990s East German law will show, it was strongly influenced by its Russian counterpart, hence the study of the latter provides a better understanding of East German socialist ownership.<sup>6</sup> The analysis of the communist legal systems will be conducted in a similar manner as the study of the capitalist legal systems. Moreover, an analysis of both legal traditions permits a study of the characteristics of a trust, and in what way various legal systems sought to tackle problems relating to ownership.

Furthermore, this paper will discuss the legal basis on which the *Treuhandanstalt* was mandated to operate. The study of this mandate is of importance since the creation of the trust agency required brief alterations in German ownership law. The paper will particularly focus on the reasons for these alterations in German law; furthermore, the paper will discuss what impact the change of law had on the German concept of ownership, if any.

Conducting this comparative and contrasting analysis of various legal systems and a study of the legal concept of trusts enables a study of the possible impact of the *Treuhandanstalt* on German law. Through this comparative study of the aforementioned systems it can be deduced whether the trust agency operated according to a foreign legal concept.

5 K. Sugar & U. Jasper (eds.), 'Acquisitions in Germany: Hidden Costs and Pitfalls Await Unwary Entrepreneurs', (1993) 11 *Berkeley Journal of International Law*, no. 2, <https://doi.org/10.15779/Z38G923>, pp. 187-200.

6 J.N. Hazard, 'Unity and diversity in socialist law', (1965) 30 *Law and Contemporary Problems*, Spring, pp. 270-290.

## 2. History of the *Treuhandanstalt*

For almost half a century, Germany was divided between the capitalist West and the communist East. The Western part of Germany became a prosperous capitalist democracy according to Western standards, but for the purpose of this narrative, the FRG will not be revisited until the 1990s. The Eastern part, on the other hand, would begin its long journey to become a communist Utopia, a destination that it would not reach before its collapse. This part of the paper will cover the context in which the *Treuhandanstalt* operated, so as to enable the reader to gain a better understanding of the topics relating to the creation of this trust agency.

Eastern Germany took a whole different course than its Western counterpart. Ownership reforms quickly began; in order to halt the sporadic and arbitrary seizing of property, a legal basis supporting the socialist ideology had to be created. As early as 1945, German lawyers wanted to kick off this new era of change by adapting the German Civil Code of 1900 to suit the needs of the newly created GDR, so the Civil Code was ‘modernized’ in order to support the ‘socialist legality’. Subsequently, the privatization of the means of production was accelerated by the creation of collectives, *Volkseigentum* – translated as people’s property – and personal property being reduced to a bare minimum.<sup>7</sup> By 1965 80% of industry had been converted into *Volkseigentum* and, by 1988, 90% of industry was labelled people’s property.<sup>8</sup>

In 1989, the socialist project came to an end and after 50 years of division the two Germanys could finally reunite. By January 1990, the first steps towards the marketization of East Germany had been taken: private property was extended to include private ownership of the means of production. In order to prevent a collapse of civil society, the creation of a trust institution was announced in March of that year so as to facilitate a smooth transition from a socialist to a capitalist society. In order to enable the opening up of the East German market, the East German Government created the *Treuhandanstalt*, a public trust, on 1 March 1990, by enacting the *Treuhandgesetz* in the same year. This state organ would facilitate the reorganisation and the subsequent privatisation of East German SOEs. Initially, the authorities of the *Treuhandanstalt* were rather limited. The original goal of the *Treuhandanstalt* was to preserve and protect collectively owned property from West German investors, thereby attempting to safeguard the property of the ordinary citizen.<sup>9</sup> Prior to the reunification of the two German states, however, the authority of the trust agency was extended in order to enhance the effectiveness of the agency.<sup>10</sup>

The portfolio of the trust agency was larger than the mere sale of SOEs. In addition, the agency was tasked with the sale of all forms of property that were previously held by the GDR. By conducting these sorts of operations, the agency had to ensure that the former East German economy would not collapse by ensuring that the East Germans continued to be employed, thereby facilitating a smooth transition. The responsibilities of the public enterprise were massive, since the *Treuhandanstalt* would be the employer of six million Germans until the 8,500 companies under the agency’s management in question were sold.<sup>11</sup> By the first half of 1991, a quarter of the East German workforce had no regular employment, or no employment at all.<sup>12</sup> Close cooperation with local governments, however, could not stop the grievances of many East Germans. Finally, in December 1994, the operations of the trust agency came to an end, but work remained to be done. By the end of 1994, some 64,000 properties still had to be sold; as a result, these properties were handed over to the Federal Agency for Special Tasks Resulting from Unification.<sup>13</sup> What should have been a prosperous re-unification with Western Germany was in reality a tough introduction to capitalism.

7 P. Betts, ‘Private Property and Public Culture: A Forgotten Chapter of East European Communist Life’, *Histoire@Politique* 2009/1 (n° 7), <https://doi.org/10.3917/hp.007.0002>.

8 M.J. Thomerson, ‘German Reunification – The Privatization of Socialist Property on East Germany’s Path to Democracy’, (1991) 21 *Ga J Int’l & Comp L*, pp. 123-143.

9 H.J. Krysmanski, *The Conflict Between the Public and the Private Sector: Developmental Aspects of the German Unification Process and the Treuhand Anstalt* (1994).

10 See Koehler, *supra* note 4.

11 See Thomerson, *supra* note 8, pp. 123-143.

12 W. Seibel, ‘Latent Institutional Elasticity: The Demise of Communism in the East Germany 1989/ 1990’, in V. Schneider & B. Eberlein (eds.), *Complex Democracy: Varieties, Crises, and Transformations* (2015), pp. 93-115.

13 I. Wiedemann, *Survival Strategies of East German Companies in a Competitive Market after Reunification* (2003).

### 3. Defining a trust

Providing a workable definition of a trust is essential for this paper. It ought to be noted that this paper will not be able to provide a definite and all-embracing definition of a trust. Defining the essential characteristics of a trust enables us to venture into the different trusts and trust-like institutions of various legal systems, thereby facilitating the comparisons and contrasts between the various forms of trusts.

As noted by Helmholz & Zimmermann, defining a trust too narrowly leaves no room for the flexibility and adaptability for which a trust is used in modern times; therefore, the definition provided by this paper will be a wide interpretation of a trust.<sup>14</sup> A comparison of systems will allow for an analysis of the workings of the *Treuhandanstalt*, implemented after the reunification of Germany, and the form it took in the privatization of former SOEs when it acted as either a trust or a trust-like institution in the civil law German legal system.

A definition that allows for the most flexibility, but still maintaining a solid workable definition of a trust, can be made by analysing the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* which entered into force in 1992. This paper will use the essential characteristics laid down in this convention in order to compare the trusts and trust-like devices in various legal systems. These characteristics are:

- a) *The assets constitute a separate fund and are not a part of the trustee's own estate'.*
- b) *Title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee.*
- c) *The trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.*<sup>15</sup>

Since the signatory states to this convention constitute both common law and civil law systems alike, it can be concluded that the characteristics of the trust can be related to both forms of legal systems.<sup>16</sup> These characteristics of a trust allow for a comparison of trusts and trust-like devices across various legal systems since the Anglo-American notion of equity is absent in civil law legal systems, thereby allowing for an analysis of trusts in civil law legal systems as well. Hence, the characteristics of the Convention allow for a wide interpretation of what constitutes a trust and these characteristics will be adhered to and used in this paper to assess if a legal device is indeed a trust.

### 4. A comparison of systems

#### 4.1 Introduction

'Various authors, (...) especially English and American, are inclined to deny soviet law the originality that it claims, and to classify this law in the family of Romanist laws'.<sup>17</sup> This extract – written when the Cold War was in full swing in 1985 – clearly shows the tension between scholars from the political East and West, so it was no wonder that the response of the Soviet legal scholars was that their colleges in the West were undoubtedly mistaken. As the communist ideology conceptualised property distinctly differently from the concept upheld in the West, this will become evident when further elaborating on communist law.

With regard to the ideological difference between the capitalist and communist systems, it ought to be established that the ideology of capitalism has been developed and adapted to fit the persisting mindset of each point in history. There have been numerous 'great' thinkers of various ages and political systems who helped shape the way in which we perceive capitalism in our contemporary society. Owing to this diverse

14 R. Helmholz & R. Zimmermann, 'Views of Trust and Treuhand: An Introduction', in R. Helmholz & R. Zimmermann (eds.), *Itinera Fiduciae* (1998), pp. 27-44.

15 Convention on the law applicable to Trusts and on their recognition, 1985.

16 Hague Conference on International Private Law, 'Members of the Organisation', <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=59>> (last visited 8 April 2017).

17 R. David & J.E.C. Brierley, *Major legal systems in the world today* (1985), p. 156.

nature, however, this makes the study of a single source impossible – in contrast to the communist ideology. Therefore, a study of the ideological background of capitalism is cumbersome and would unnecessarily lengthen this paper. Hence, the philosophical background of the capitalist stance concerning ownership will not be dealt with.

With regard to the legal systems that formed the basis of East German jurisdiction before the reunification in 1990, one ought to analyse the Marxian stance towards property in a communist system, as the communist and socialist ideology can be traced back to the thinking of one man, as opposed to the compilation of ideas in the capitalist system.

In assessing the interpretations of the aforementioned ideology, a case study ought to be conducted. Here the communist law of property of Soviet Russia will be addressed due to Russia's influence in the USSR, of which East Germany was a part. Moreover, East German property law will also be analysed, because this enables a case study of the differences in the law brought about by the implementation of the *Treuhandgesetz* after the reunification of the previously divided Germans.

This paper will focus on communist law, as opposed to socialist law; this minor difference in wording is of importance in Marxist teachings. After all 'the soviet state [had] remained a socialist state, founded on an economical infrastructure that conforms to Marxist doctrine', as David & Brierley commented on the Soviet laws of Russia.<sup>18</sup>

## 4.2 Capitalist law of ownership

### 4.2.1 The civil law notion of ownership

Although contemporary capitalist society revolves around the constant consumption and accumulation of wealth, the civil law legal systems that operate according to this ideology do not seem to be obsessed with ownership as much as the Marxian legal systems are. This part of the paper will focus on the concept of ownership in the FRG until the reunification with the socialist GDR. Although there are an enormous number of civil law legal systems in the world, this paper will focus on the legal system of the FRG due to its comparability with its East German counterpart.

Now, civil law ownership can be distilled down to two major concepts of law. Firstly, there is the concept of *numerus clausus*, a concept developed by Roman lawyers and later integrated into civil law by German lawyers, with Germany in particular being influenced by the German jurist Von Savigny, who strongly advocated the separation of the law of obligations and property law in the mid-19<sup>th</sup> century.<sup>19</sup> The concept of *numerus clausus* revolves around a set number of real rights and the limited acquisition of these rights over property, with German property law in particular focussing on the fact that the content of those rights may only be determined between the parties within the limits of these rights, and the fact that only pre-set recognised rights may be created.<sup>20</sup> This is because Von Savigny saw the importance of the separation of the law of obligations and property law, as the two fields of law expect different actions from the holder. Property law, on the one hand, grants the owner the freedom to use the property as he or she wishes, whilst the law of obligations recognises and respects the actions of a third party; the latter does not allow for the free use of property. Hence, the two fields of law are incompatible due to their very nature.<sup>21</sup> In line with the refusal of the German system to acknowledge the unitary rights of ownership, the doctrine of *numerus clausus* is maintained, as the fracturing of property rights binds the property to a third party, thereby restricting the free use and disposal of property due to the interests of a third party.<sup>22</sup>

Another key principle in the civil law approach to ownership is the indivisibility of property, meaning that not more than one person – legal or physical – may hold ownership over property. Thus, the actual owner of a property may allow someone to use the property given to him for use and abuse, but the specific property

18 Ibid., p. 189.

19 E. Goessens, 'De historische oorsprong van het numerus clausus beginsel in het goederenrecht', (2010-2011) 47 *Jura Falconis*, no. 1, pp. 168-171.

20 J.M. Smits, *Elgar Encyclopedia of Comparative Law* (2012), pp. 726-743.

21 See Goessens, *supra* note 19, pp. 168-171.

22 See Akkermans, *supra* note 3.

rights remain with the former.<sup>23</sup> The transfer of certain rights to a third party does not *per se* make that third party an owner, except when this is the transfer of the right of ownership.<sup>24</sup> This is in stark contrast with the common law concept of ownership in the capitalist world, since these systems allow for multiple owners to hold a title over the same property, only in different capacities.<sup>25</sup>

Perhaps surprisingly, it seems that, historically, German law had trust-like provisions as well, namely, the *Salman*. The Germanic institution of *Salman* or *Treuhand* was a form of proto-trust, dating back to the 5<sup>th</sup> century *Lex Salica* – the legal code of the Salian Franks. From the literature on the *Salman*, it becomes evident that the *Salman* was a third individual who was handed the property of an individual during his lifetime – equivalent to the modern-day settlor – in order to hand the property over to another – which would be the contemporary beneficiary – in the case of the death of the former.<sup>26</sup> The reason for this complex system of transfers of title to individuals was a result of the lack of a testamentary system in the laws of the Salian Franks. Hence, the *Salman* would normally be a trusted third party of the settlor.<sup>27</sup> Furthermore, Verbit points out that the *Treuhand* was used when one would, for example, travel, with a reasonable belief that the traveller would not return.<sup>28</sup> This flexibility indicates that the *Salman* is comparable with the characteristics of the original English trust and the purposes for which it was used.<sup>29</sup>

These days, the *Salman* is commonly referred to as the *Treuhand*. This legal device works as follows: in a modern-day *Treuhand*, the transferee (*Treuhänder*) has an obligation to manage the transferred property for the benefit of the transferor (*Treugeber*) and the management of this property must be in accordance with a contract to transfer, thereby limiting the power of the owner. Moreover, the *Treuhand* allows for a deviation from the law of property and the law of obligations under Article 137 of the German Civil Code. Even though this division exists, German law strictly adheres to the doctrine of the indivisibility of rights and the *Treuhänder* may use and dispose freely, but the internal relationship of the *Treuhänder* and the *Treugeber* is managed on a contractual basis.<sup>30</sup> Furthermore, the *Treugeber* is protected by the right to bring a counterclaim in order to halt the seizure of a property subject to a *Treuhand* under Article 771 of the Civil Procedure Regulation.<sup>31</sup> This indicates that the actual ownership of the *Treuhand* property is debatable, as it seems that there are some restrictions on the use of *Treuhand* property.

The rigid system of *numerus clausus* appears to be flexible when it comes to the trust-like *Treuhand*; in the case of a *Treuhand* the property rights are restricted by means of contract law between the *Treuhänder* and the *Treugeber*. The creation of this Germanic trust in civil law has developed on a case law basis, making its development rather similar to the development in the common legal systems.<sup>32</sup> In relation to the indivisibility of rights the *Treuhand* is not exempted from this provision and the *Treuhänder* is the sole owner of the *Treuhand* property; he or she is merely bound by the *Treugeber* not to dispose of the property or to pledge it as security. Moreover, if the *Treuhänder* would breach the duty assigned to him or her as a fiduciary, then the *Treuhand* fails, thereby defeating its original purpose.<sup>33</sup>

But why is the trust so popular, whereas the *Treuhand* is not? The main reason for this is the fact that the *Treuhand* lives in relative obscurity within German law, where it takes various forms.<sup>34</sup> The more common version of the German trust is the *Wirtschaftliches Treuhand*, or economic *Treuhand*, which is a contractual relationship where a fiduciary may use property even if it is not his or hers. An example of this contractual relationship between the contracting parties is that the *Treugeber* holds an irrevocable power of attorney in

23 H. Hansmann & R. Kraakman, *Property, Contract, and Verification: The Numerous Clausus Problem and the Divisibility of Rights* (2002), pp. 1-40.

24 See Akkermans, *supra* note 3.

25 See Gallagher, *supra* note 2.

26 I. Gvelesiani, 'Interpretation of the origin of "Trust" on the basis of the in-depth terminological analysis', (2015) *Fiat Iustitia*, no. 1, pp. 76-82.

27 *Ibid.*

28 G.P. Verbit, *The Origins of the Trust* (2002), p. 104.

29 K.O. Scherner, 'Formen der Treuhand im alten deutschen Recht', in R. Helmholz & R. Zimmermann (eds.), *Itinera Fiducia* (1998), pp. 237-266.

30 See Akkermans, *supra* note 3.

31 *Ibid.*

32 *Ibid.*

33 M. Wolf & M. Wellenhofer, *Sachenrecht* (2017) p. 29.

34 P. Stec, 'Fiducia in Emerging Economies', in E. Cooke (ed.), *Modern Studies in Property Law* (2003), Vol. 2, p. 46.

relation to the *Treuhänder*.<sup>35</sup> Whilst the creation of the *Treuhand* remains largely customary, the contractual relationship between the parties is enshrined in Articles 662 and 675 of the German Civil Code, in which the bipolar contractual relationship of the *Treuhand* is established.<sup>36</sup>

Less obscure is the right to property in German law, as it is seen as one of the fundamental rights that a legal person can hold under German law, and for this reason the right to property is laid down in Article 14 of the German Constitution.<sup>37</sup> In this piece of legislation property is seen in a much wider sense than in the communist counterparts. By analysing the Basic Law it is evident that Article 14 entails the following: movable and immovable property, intellectual property, industrial and commercial property and even the rights to social security benefits.<sup>38</sup> This means that even the rights of ownership of non-physical legal bodies are protected as well, in stark contrast to the concept of which property belongs to whom under communist law.

Analysing the form of trust that is indigenous to the German legal system makes it easier to put the *Treuhand* into context. According to the Hague Convention's characteristics of a trust, the German *Treuhand* occupies a special place. It is evident from the sources used for this paper that the assets are separated from the fund of the *Treugeber* through the disposal of a property and the subsequent disposal of the ability to exercise rights over a said property – as is compulsory under ordinary German property law according to Article 14 of the German Constitution. Furthermore, the *Treuhänder* holds the title to a property, whilst the *Treugeber* is contractually bound by the purpose of the property, thereby shielding the *Treugeber* from any misuse. Since the *Treugeber* has such a vested interest against the misuse of a property, it can be said that the *Treuhänder* holds the title on behalf of the *Treugeber*. However, due to the lack of the concept of equity within the German legal system, which traditionally allows for equitable ownership, it can be argued that the contractual relationship of a *Treuhand* is a mere fiduciary relationship, rather than a quasi-equitable relationship. This leaves some room for classifying a *Treuhand* as a trust. Lastly, the *Treuhänder* does have a duty 'to manage, employ or dispose of the assets in accordance with the terms of the trust'; this duty is enforceable through the contractual relationship between the *Treuhänder* and the *Treugeber*.<sup>39</sup>

Due to the nature of German property law, a party must be able to fully enjoy his or her property under Article 14 of the Constitution. Yet, the *Treuhand* clashes with this notion. As a result of the contractual clauses that the parties have between each other relating to the treatment of the property, the *Treugeber* has some power to define the management of the trust; however, the *Treugeber* does not have the full power to decide over the possible future uses of a property. Again this leaves some room for ambiguity. So, in order to answer whether a *Treuhand* can be classified as a trust according to the Hague Convention's characteristics, this paper argues that the *Treuhand* is more of a trust-like device rather than a full-blown trust. This can be concluded because its characteristics are too ambiguous as a result of the lack of a system of equity, as well as the clash with existing principles of ownership in German law. It seems that the *Treuhandanstalt* was created to deal with a political and economic issue by means of interpreting the law in a manner which was appropriate to those extraordinary times.

#### 4.2.2 The common law notion of ownership

In order to fully grasp the distinction between the civil and the common law, a rather brief introduction to the history of ownership under common law is required. For the concept of ownership in common law, it is essential to look at the times of the First Crusade in the 12<sup>th</sup> century. Before the Crusader knights departed to the Holy Land, many knights entered into agreements with relatives or friends to care for their lands while they were gone.<sup>40</sup> The common problem that various Crusader knights faced was that, upon their return, those people to whom the knights had entrusted their property simply denied the existence of any form of trusteeship, arguing instead that the property was now theirs. This was a thorn in the side for the

35 Ibid.

36 K. Schmidt, 'Trusts a Legislative Challenge: Bipolar Relation vs Quasi-Corporate Status? – Basis Trust Models in Legal Practice, Theory, and Legislation', (1992) 24 *European Review of Private Law*, no. 6, pp. 995-1029.

37 Basic Law for the Federal Republic of Germany 2012, Art. 14.

38 K. Hailbronner & M. Kau, 'Constitutional Law', in M. Reimann & J. Zekoll (eds.), *Introduction to German Law* (2005) pp. 53-85.

39 See the treaty cited at note 15, supra.

40 See Gallagher, supra note 2.

Chancellor, an office tasked with acting as the conscience of the King,<sup>41</sup> and so the trust was created. This newly adopted legal concept brought some peculiarities with it that had not been seen in the European legal systems since the Roman *fideicommissum*, an early form of trust that was kept in force by mere social control.<sup>42</sup> One of the major implications that the trusts brought with them was that ‘ownership may be fragmented without restriction’, implying that there may be various parties holding a legal title over the property.<sup>43</sup> It is noteworthy that there is a different classification in the forms of rights which may be held, as one party holds the actual legal title, the trustee, while the creator of the trust, respectively the settlor, holds the equitable title to the property.<sup>44</sup> The institution of equity is based upon the notion of fairness and the sense that justice ought to be done, whilst being standardized through equitable maxims.<sup>45</sup> Relating these maxims to ownership, one can conclude that there is no such notion as the indivisibility of property rights in the common law system, thereby separating the notion of ownership in the civil and common law legal systems. The question of the existence of a system of *numerus clausus* in English law has to be answered in the affirmative. Similar to the civil law notion of ownership, the property right that one exercises must be one which is laid down in common law.<sup>46</sup> Moreover, in its structure English law adheres to the division of the law of property and the law of obligations, thereby contributing to the doctrine of *numerus clausus*. In contrast to the civil law legal systems, it ought to be noted that there is a profound difference in the structuring of the property rights that one holds and, as a result of the authority of case law, consequently only law that already exists can halt the development of further property rights. This results in more freedom in creating new rights when it comes to the interpretation of the *numerus clausus* doctrine.<sup>47</sup>

There are many differences between the development and the use of the trust compared to the *Treuhand*. Where the trust is used in the (former) Anglo-American world in order to ensure the continuity of a legacy and to ensure that equity is served, the modern-day *Treuhand* is used to protect third parties in German law. Since the trust is a mediaeval English legal concept, the legitimacy of the trust according to the Hague Convention is not required and so the existential crisis that the *Treuhand* has faced is of no concern for the hard-core trust.

Having analysed the mediaeval English concept of a trust allows us to analyse the content and workings of the *Treuhandanstalt* of the 1990s and to investigate whether the holding corporation had its legal basis in the trust of the modern-day *Treuhand*.

### 4.3 Communist law of ownership

#### 4.3.1 Ownership under Marxism

The late 19<sup>th</sup> century saw the extortion and the subsequent rebellion of ordinary factory workers in various major European cities. This is the time when Marx published his *magnum opus Das Kapital*, thereby creating an ideology that gripped the world for more than a century. In this part of the paper, the property rights of the communist ideology will be analysed, since this ideology laid the foundations for the legal systems of the various socialist states in the 20<sup>th</sup> century.

It is an understatement to say that Marx was opposed to the Western concept of law; according to Marx, law was merely a superstructure enabling the wealthy to command society, thereby making the law a means to oppress exploited workers.<sup>48</sup> Moreover, the philosopher went as far as to say that ‘legal relations (...) have their roots in the material conditions of life’, meaning that laws – in the Marxist ideology – are essentially founded on material gains.<sup>49</sup> Now, Marx’s teachings allow for ownership to be divided into two

41 C. Howard, ‘Trust Funds In Common Law And Civil Law Systems: A Comparative Analysis’, (2006) 13 *U Miami Int'l & Comp L Rev*, no. 343.

42 D. Johnston, *Roman Law in Context* (1988).

43 A. Di Robilant, ‘Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law’, (2014) 62 *American Journal of Comparative Law*, no. 367.

44 See Gallagher, *supra* note 2.

45 *Ibid.*

46 See Akkermans, *supra* note 3.

47 *Ibid.*

48 See David & Brierley, *supra* note 17, p. 189.

49 K. Marx & F. Engels, *Selected Works* (1973), p. 503.

groups, on the one hand there is public ownership and, on the other, private ownership. For the purpose of this paper this division is the most important distinction with regard to the form of ownership that Marx preached. Analysing this division of ownership is of importance as this division strongly inspired socialist states around the world to adopt a similar division of their ownership scheme.

In a Marxian Utopia there is a clear distinction between public and private ownership, whereas in the capitalist system, according to Marx's teachings, public property is plundered and is subsequently called private property. This phenomenon led the philosopher to call this process the 'expropriation of the people', in which law is used to grab property from the general public.<sup>50</sup> In order to counter this, Marx proposed – and subsequently every socialist state went on to implement – the idea that means of production should be held in public ownership, and this was backed up by Marx's statement that 'the beginning [of the socialist movement] must be to get the means to socialising the means of production'.<sup>51</sup> Around the globe, socialist states implemented this ideology by creating SOEs, where the state owned the means of production, e.g. farms, mines and factories.<sup>52</sup> In the transitional 'Fifth phase', socialist law had to ensure that there would not be a relapse into the capitalist system in which private ownership would take precedence over public ownership.

This analysis of the more political-theoretical side of the creation of law is merely a glimpse of what Marx established in his various works.

#### 4.3.2 Ownership in Soviet Russia

Owing to the communist Russian Revolution of 1917, Soviet Russian law was heavily influenced by Marxist theory. In order to consolidate their power, the revolutionary authorities used law extensively to facilitate the transition from a capitalist to a communist society. In the intermediary stage of socialism, Soviet law served three purposes: the first being national security by means of consolidating the power of the state, then there was the element of the economic development of production along socialist lines. Lastly, there was the education of the citizens, as law could be used as an effective instrument to destroy the inclination of citizens to engage in capitalist behaviour, such behaviour being anti-social behaviour and selfishness. Hence, it can be said that Soviet law was focused less on the private person, in contrast to law in the capitalist countries, and was instead used to advocate the interest of society as a whole.<sup>53</sup>

Friedmann argued that the property which was subject to state ownership was in fact being held in trust, rather than the state having full ownership. Concerning property under collective ownership, Friedmann stated that 'state enterprises hold the assets which they administer in 'trust' rather than in full ownership'.<sup>54</sup> Owing to the socialist nature of the legal system, all forms of private law were rejected, thereby making private trusts impossible.<sup>55</sup> Yet, using Friedmann's argument, the way in which the state acted as a trustee was quite similar to the initial goal of the German *Treuhandanstalt* by means of using the Germanic concept of the *Treuhand*, namely as an agency through which the state assured that the beneficiaries – being the people – received what was due to them as a result of their labour.

Next to personal ownership and collective ownership in Russia, there is the Soviet concept of state ownership – the form of ownership on which this paper will focus.<sup>56</sup> Here one is inclined to pose the following question: 'who actually owns the property'? According to David & Brierley, this is not the right question to ask, one rather has to ask by *whom* and *how* such property is exploited.<sup>57</sup> The main purpose of state ownership was that no individual enrichment through labour and the exploitation of others could take place.<sup>58</sup> The scope of state ownership was laid down in Article 95 of the Constitution of Soviet Russia

50 W. Yifeng, 'Theory of property rights: comparing Marx with Coase', (2008) *XXIX Social Sciences in China*, no. 2, pp. 5-17.

51 See Marx & Engels, *supra* note 49, p. 394.

52 See Yifeng, *supra* note 50, pp. 5-17.

53 See David & Brierley, *supra* note 17, p. 191.

54 W. Friedmann, *Law in a Changing Society* (1959) p. 106.

55 *Ibid.*, p. 286.

56 See David & Brierley, *supra* note 17, p. 294.

57 *Ibid.*

58 See Butler, *supra* note 1, p. 288.

(hereafter the Russian Constitution), which stated that property subject to state ownership could be roughly divided into: industrial mining, state farms, public housing and raw materials.<sup>59</sup> These were again subdivided according to the nature of the forms of capital that they represented. On the one hand, there was fixed capital under Article 96 of the Russian Constitution,<sup>60</sup> e.g. buildings, machinery, soil et cetera, and, on the other hand, there was circulating capital mainly concerning raw materials and any or all goods mentioned in Article 97 of the Russian Constitution.<sup>61</sup> The reason for this separation of forms of capital could be found in the intention of the capital, the former was intended for its use, the latter to be disposed of.<sup>62</sup> Rather than owning goods, the SOEs of Soviet Russia were allocated the goods, as the SOEs were subject to the rigorous planning of the Communist Party. This system was known as ‘operative management’, a system according to which an SOE could use or dispose of the property according to the nature of that property.<sup>63</sup> That is to say that mines, for instance, would dispose of the raw materials in favour of production plants, which in turn would use the machinery that was attributed to them to produce products, and these products would in turn be disposed of in favour of ‘the people’, thereby completing the cycle. Since the entire Russian economy was planned, goods could be transferred interchangeably between various SOEs free of charge, as long as this circulation was according to the purpose of those goods.<sup>64</sup>

It can therefore be concluded that state ownership was not a form of ownership as is known in Western capitalist states. Rather, state ownership could be attributed to state administration, thereby differing from the concept of ownership in capitalist states.

Now, the question posed at the beginning of this section can be answered by stating that the state both exploited and chose the purpose of the goods that were used and disposed of, thereby evidencing an economic command economy rather than a legal doctrine. Yet, arguing from Friedmann’s perspective, the former Russian socialist SOEs did act as a trust for the people in general. This is due to the fact that the Russian Government owned these SOEs with the aim of eliminating taxes by replacing them with the profits from the SOEs, as is common in socialist systems,<sup>65</sup> thereby effectively making Russian civilians the beneficiaries of the profits of the companies held on trust by the Government.

#### 4.3.3 Ownership in the German Democratic Republic

As a result of the Russian invasion of Eastern Germany, the former ally gained considerable influence in the occupied area of its former foe, which in turn led to the formation of the German Democratic Republic in 1949. As a republic situated within the sphere of influence of Soviet Russia, it was forced to accept the ideology of the victor.<sup>66</sup> Although it was not formally pushed by Soviet Russia, Germany began to nationalize its means of production. Next to the nationalization of various sectors of the economy, the Russian influence resulted in Germany copying Russia’s forms of the administration of state industry, thereby transforming production sectors into SOEs.<sup>67</sup>

Emulating the laws of Soviet Russia, the GDR established co-operations and SOEs soon after the Russian military administration ended in 1949. On the one hand, there was the *Volkseigentum* or people’s property – comparable with the Russian state ownership, and, on the other hand, there were the cooperatives – along the lines of collective ownership in Russia.<sup>68</sup> Both these forms of property were explicitly mentioned in the 1974 Constitution of the GDR under Article 10(1), covering the economic foundations of the economy.<sup>69</sup>

Similar to the Russian state ownership, this paper will focus on the *Volkseigentum* as mentioned in Article 10(1) of the GDR Constitution. The property which was subject to this form of ownership was laid

59 Civil Law Code of the Russian Soviet Federated Socialist Republic 1965, Art. 95.

60 Ibid., Art. 96.

61 Ibid., Art. 97.

62 See David & Brierley, *supra* note 17, p. 294.

63 See Butler, *supra* note 1, p. 288.

64 Ibid.

65 B. Naughton, *The Chinese Economy: Transitions and Growth* (2007).

66 The editors of the *Encyclopædia Britannica*, ‘Yalta Conference’ (*Encyclopedia Britannica*, 7 October 2014), accessed 12 February 2017.

67 See Hazard, *supra* note 6.

68 S. Supranowitz, ‘The Law of State-Owned Enterprises in a Socialist State’, (1961) 26 *Law and Contemporary Problems*, no. 4, pp. 794-801.

69 *Verfassung der Deutschen Demokratischen Republik* 1974, Art 10(1).

down in Article 12(1) of the GDR Constitution of 1974. The goods which were subject to Article 12(1) were subdivided into production facilities e.g. mines, industrial plants and state farms, as well as transportation, financial institutions and, lastly, there were natural resources.<sup>70</sup> Based on Marxist and Russian teachings, the state held all means of production for the benefit of the proletariat. Most notably, this form of ownership was almost a direct copy of its Russian counterpart, with the command economy setting targets in the production plan, the interchanging of goods between SOEs and the various liberties that the owners of the production plants had over production in theory.<sup>71</sup> Article 12(2) of the GDR Constitution of 1974 emphasizes the importance of state ownership as it stated: ‘the socialist state ensures the use of nationally-owned property for the greatest benefit of society’, thereby legitimizing the confiscation of industrial plants from private individuals.<sup>72</sup> The wording of the article in question might seem very familiar to the wording of the ‘socialist trust’ as Friedmann describes it. This is because the two descriptions indicate the same outcome: Article 12 of the GDR Constitution creates a fiduciary duty towards society by the state in the same manner as a trust would.

Overall, it can thus be concluded that the East German law of ownership draws its inspiration from the Constitution of Soviet Russia rather than the Marxist viewpoint of ownership. Similar to the Russian model, the East German model recognised three separate forms of ownership whereas Marxism only recognised state ownership of the means of production. This deviation from the ideological ideal can be attributed to the fact that Marx did not elaborate on the administrative side of the abolition of property, whereas the lawmakers in the actual states did have to abide by the will of the people. Furthermore, the German model was rather similar to the Russian model owing to the influence that the Russians had on the German Government due to the fact that Russia had the most weight within the USSR. Hence, the properties that were due to be privatized by the *Treuhandanstalt* were basically to the same as their Russian equivalents, meaning that, once again, a form of trust existed on part of the Government towards the people. Thus, the former SOEs transformed from one odd form of trust to the Western counterpart of an odd trust in the form of the *Treuhand*, if one is to adhere to Friedmann’s theory.

#### 4.4 Sub-conclusion

With regard to the laws of trusts in various legal systems, it can be observed that the trust in each legal system differs in its characteristics and workings. Thus, as a result of the profoundly different notion of ownership in various legal systems, the existence of the trust – or a similar legal instrument – is often difficult to refute. By applying the Hague Convention’s characteristics of a trust, it has been found that the *Treuhand* could not be identified as a full trust according to a treaty due to the fiduciary relationship between the *Treuhänder* and the *Treugeber*. All in all, it appears that the German notion of a *Treuhand* can best be interpreted as a semi-trust that acts on a fiduciary contractual basis between two parties – rather than the Anglo-American multi-party relationship based on equity. This can be attributed to the absence of the institution of equity in the law in which the *Treuhand* was created so that it was able to rule over the equitable ownership of the property placed under the supervision of the *Treuhandanstalt*. In the Germanic systems of both East and West Germany it appears that the concept of the *Treuhand* was not a legal concept that had been borrowed from another legal system. What does appear to have been borrowed from a foreign legal system, however, is the Soviet ‘trust’, as Friedmann describes it. Since the socialist Government held that SOEs were for the benefit of the people as a whole, it seems that the West German interference in the former East German SOEs has been for the benefit of the people especially those living in East Germany. As a result, the trust in these systems mainly revolves around the concept of a trust in the sense that property is held by one party with the objective being for the beneficiary of that property to receive the fruits that the property produces. Comparing the transition of the political and economic systems of East Germany in relation to that of other former Soviet satellite states, it is evident that the German system is much more social in its approach to a

70 Ibid., Art. 12(1).

71 See Supranowitz, *supra* note 68, pp. 794-801.

72 See Thomerson, *supra* note 8, pp. 123-143.

transitional economy. Knowing that East Germany was going to be opened up to the West German market economy, it is highly likely that the GDR legislators sought a manner of transition that would least affect the East German citizenry. After all, it is known that the GDR legislators tried to preserve some socialist property. But, the question remains, to what lengths would the socialist legislators have gone in order to ensure that the economic transition would not become a capitalist hangover?

### 5. *Treuhand* and the *Treuhandanstalt*

This section of the paper will analyse what sort of law the *Treuhandanstalt* actually adhered to. When the West German Government took over the trust agency, the initial demand was to distribute the profits that the agency would make with the sale of the SOEs among the people; this initiative, however, was quickly dismissed.<sup>73</sup> If the Government had adopted a measure such as this, it would have been incredibly interesting from a legal point of view, since it would have created a relationship between three parties rather than the traditional two in a *Treuhand*.<sup>74</sup> Moreover, a construction in which the distribution of the profits from the sale of a company that a state holds temporarily in the interest of that company, with the monetary benefits of that sale flowing to the people, appears to be very similar to an Anglo-American trust – in which there is a settlor-trustee-beneficiary relationship between the parties.<sup>75</sup> Even though the people did not take the role of the beneficiary, the FRG altered the law in such a fashion that the similarities with the Anglo-American trust cannot be neglected.

As already mentioned, the civil law tradition operates on the principles of *numerus clausus* and the indivisibility of ownership rights. The latter principle proved to be a liability for the trust agency due to the rigid system of transfers in which the business had to be transferred to a new owner in its entirety, which would be less favourable for selling some virtually bankrupt East German companies. Under the same law, the partition of a company was possible, but for the sale of a component of a company all the assets belonging to that part had to be sold through individual contracts, meaning that separate contracts had to be drawn up between the buying and selling parties regarding all the assets of the company.<sup>76</sup>

This rigid system would in turn make companies less attractive, as the *Treuhandanstalt* was tasked with rapidly transferring former SOEs. In order to counter this problem the Division Law – *Gesetz über die Spaltung der von der Treuhandanstalt verwalteten Unternehmen* – was passed in 1991 by the West German Government. This law allowed for the temporary (until December 31 1994) and regional – as the law only applied to the five new *Länder* – suspension of Article 613(a) of the German Civil Code.<sup>77</sup> This amendment allowed for the transfer of a part of a company in its entirety, making the transfer much easier and the sale of profitable parts of companies more attractive. Under the Division Law a branch of a company could either be split from the mother company in order to form a subsidiary company, or a branch of the company could be directly split in order to be resold to a new owner. The latter implication meant that various owners could hold a title to a company – albeit parts of it – whilst the *Treuhandanstalt* continued to hold full ownership over the company in its entirety.<sup>78</sup> This temporary system meant that the doctrine of the indivisibility of ownership rights was breached. By allowing for the division of branches of a company to be sold to various buyers whilst the *Treuhandanstalt* held the ownership of the company as a whole implied that the trust agency could no longer use and dispose of a company as it wished, as is the norm under civil law and as is reaffirmed by Article 14 of the German Constitution. Instead, the buyers of the branches of the companies, as well as the trust agency held a legal title to the company at the same time, although the institution of equity which is so prevalent in the common law system was absent in German law, suggesting that it was possible – by virtue of the temporary alternation of the law – to have multiple legal claims to one property.

73 J. Roesel, 'Privatisation in Eastern Germany Experience with the Treuhand', (1994) 46 *Europe-Asia Studies*, no. 3, pp. 505-517.

74 See Schmidt, *supra* note 36.

75 See Gallagher, *supra* note 2.

76 M.E. Elling, 'Privatization in Germany: A Model For Legal and Functional Analysis', (1992) 25 *Vanderbilt Journal of Transnational Law*, pp. 581-642.

77 See Sugar & Jasper, *supra* note 5.

78 See Elling, *supra* note 76, pp. 581-642.

It appears that the German legislators turned to a foreign legal doctrine on the interpretation of a trust, namely the Anglo-American trust. It can be concluded that the *Treuhand* operates according to a fiduciary relationship between two parties, whereas the Anglo-American trust allows for the division of ownership among a numerous amount of equitable owners. In the German situation of the 1990s, various buyers could hold a legal title to parts of a company, meaning that during the brief period after the reunification companies in the former East Germany were subject to a system that had the characteristics of an Anglo-American trust, as more than one party had legal titles to a property. As discussed earlier in this paper, it is difficult to make a viable comparison with Soviet law due to the ideological nature of the legal system that neglects the transfer of ownership. It appears that the operations of the trust agency do not correspond with the theories of Friedmann on the trust relationship that the state has over the companies in relation to the people as a whole. This is because the SOEs simply had to be sold as quickly as possible in order to ensure a smooth transition from socialism to capitalism. If the German Government would have opted for a system in which the profits from the companies which had been sold would have found their way to the people, a case could be made that a form of socialist trust existed, as the agency would have had the companies in trust for the benefit of the people. However, this is difficult to argue and a comparison with Soviet law does not seem to fit the *modus operandi* of the *Treuhandanstalt*.

Comparing the operations of the trust agency with the characteristics that the Hague Convention has set out, it is evident that the alteration of the law allowed for ownership to be both in the hands of the agency as well as the investors. While parts of the former SOEs were purchased by investors, as was made possible by the temporary Division Law, whereby a separate fund was maintained, the agency still held a full legal title to the companies. Moreover, the title to the trust assets was maintained by the trust agency until the company was ready to be sold and while this right was only temporary until the transfer to the investor, the company was nevertheless still in the name of the *Treuhandanstalt*.<sup>79</sup> Lastly, the agency had the power and the duty to manage the branches of the companies until an appropriate investor could be found. Besides, the agency had a fiduciary duty towards the people of East Germany as a whole to manage the companies in a socially considerate manner, as the insolvency of a company would have a profound impact on a community with regard to the livelihood of those people employed by those companies. Therefore, it can be concluded that the operations of the *Treuhandanstalt* resembled the Anglo-American notion of a trust, since a classical Germanic contractual relationship between two parties in a normal *Treuhand* does not fit within the actions of a trust agency.

Hence, it is evident that the German legislators of the FRG had opted for a foreign legal concept in order to solve an urgent economic problem that could potentially disrupt both the economy and civil life in the former DRG.

## 6. Conclusion

The *Treuhand* mechanism can be regarded as the ugly duckling of German law: it is rather strange and does not fit within conventional German law. Due to the rigid German ownership system, the fiduciary contractual basis between two parties known as the *Treuhand* is rather obscure. Although the *Treuhand* system operates on a customary law basis, its regulation is based upon contract law, since an instituted court of equity does not exist in the German legal system. This obscure provision of the law makes its study interesting; it raises questions with regard to its institutionalised operation under the *Treuhandanstalt*. All in all, why did the East German Government choose to opt for the institutionalisation of a legal device that was effectively foreign, as the characteristics of the trust used by the *Treuhandanstalt* are in line with those of the Anglo-American trust, rather than the Germanic *Treuhand*?

As a result of the reunification of Germany and the subsequent switching of political systems, a prospective crisis was imminent. It was evident that West German companies would cherry-pick those companies that could provide a profit, whilst the behemoth SOEs were destined to fail. In turn, this collapse

<sup>79</sup> See Sugar & Jasper, *supra* note 5.

would result in local crises that would have a profound impact on the livelihood of many East Germans. In order to facilitate a smooth transition, a solution had to be found. This left the German legislators with a problem. Owing to the rigid system of German ownership law, it was difficult to make companies, or branches of these companies, attractive to potential investors. The previous system was an administrative nightmare, because the assets of that branch of the Government had to be transferred separately to new owners, thereby making investment in the profitable branches less attractive to West German or foreign investors. The legislators found relief in a foreign legal concept.

It is highly unlikely that the legislators modelled the *modus operandi* of the *Treuhandanstalt* on the Anglo-American trust; however, after a closer inspection of the operations of the *Treuhandanstalt* it is evident that the systematics of the agency resembles the Anglo-American *pure sang* trust much closer than the Germanic *Treuhand* mechanism. This is the result of the Division Law, which was enacted in 1991; this temporary alteration of the law allowed for multi-party ownership of a company that had to be sold. The temporary system allowed for a form of ownership that is uncommon in German ownership law, whilst under Anglo-American law this concept of multi-party ownership is rather normal.

As a result of the Division Law, investors were able to buy a branch of a company while other branches of the same company were being bought or declared insolvent by the *Treuhandanstalt*. Simultaneously, the trust agency retained a legal title to the company as a whole, meaning that it could not freely use or dispose of the company as it pleased, due to the shared ownership. Having compared this legal norm's exception to the characteristics of a trust as set out by the Hague Conference, it becomes evident that the *Treuhandanstalt* operated as a trust rather than the trust-like *Treuhand*. Due to the bilateral contractual agreement that is characteristic of the German *Treuhand*, little similarity can be found in the operations of the trust agency's multi-party sale as multiple owners of parts of the company were created, a situation that was foreign to a bilateral contractual agreement. It can be debated if this temporary alternation of the law defeated the purpose of Article 14 of the German Constitution, as dual ownership, that was the result of the Division Law, limited the rights that one could exercise over a property.<sup>80</sup> Owing to the temporary nature of the Division Law, however, one cannot say that the creation and the workings of the *Treuhandanstalt* permanently changed German law.

Comparing the trust system of various socialist as well as capitalist legal systems was of great importance for this study, since this allowed for a study of the origins of the *Treuhandgesetz* that set out the framework on which the trust agency operated until 1994.<sup>81</sup> It should be clarified that the socialist systems have an awkward relationship with the concept of ownership. This makes the comparison with the West German system somewhat difficult. It is of great importance, however, that this comparison is made, because the *Treuhandanstalt* was created under the leadership of the GDR, which – at the time of the creation of the trust agency – was still under a socialist regime. Moreover, as a result of the Russian influence on East Germany for over half a century, the analysis of the Russian ownership system was inevitable. It has been found that the German socialist legislators initially intended to create the trust agency in order to ensure that some socialist forms of ownership were maintained. This form of ownership is similar to its Russian equivalent, and in this article it has been found that the concept of ownership in East Germany mimicked the Soviet Russian model. On the latter, Friedmann argued that a form of trust existed in the Soviet model. Friedmann argued this by analysing the purpose of an Anglo-American trust along socialist lines. He found that the Government held the means of production in the form of a trust with the people being the beneficiaries. As a result, the profits earned by these companies would flow back into the treasury, thereby benefiting the people as a whole. Although the intentions of the *Treuhandanstalt* were quite similar to the Soviet trust, as both systems sought to hold companies on trust for social objectives – either for the benefit of the people in the Soviet model, or for a smooth transition of systems which would result in stability in the German model. Moreover, the 'socialist trust' and the *Treuhand* are both profoundly different in their operation, whereas the *Treuhand* acted as a holding company over the former SOEs, the 'socialist trust' held 'the assets which

80 See Constitution cited at note 37, supra.

81 See Sugar & Jasper, supra note 5.

they administer in 'trust' rather than in full ownership'.<sup>82</sup> The origins of the *Treuhandanstalt* still remain uncertain, as it is evident that the operation of the trust agency was not based upon the Soviet model.

As for the civil law legal system of Germany – prior to the reunification in the 1990s, the law of the FRG was taken as the example – the *Treuhand* was a rather odd choice on which to base an agency. As has been mentioned the civil law legal systems hold the concepts of *numerus clausus* and the indivisibility of rights in high esteem, with normally no deviation being possible. The concept of the *Treuhand*, however, has proven to be somewhat odd in legal reasoning. Having developed out of uncertainty in ancient times, the trust-like device has survived over the ages and is still applied in contemporary society in which there is more certainty that one will eventually return from one's travels; after all, it seems unlikely that the Franks would have developed the *Treuhand* if they had had access to modern-day communication systems. But, in this paper, it has already been evidenced why the *Treuhandanstalt* did not follow the traditional *Treuhand*; hence, a further comparison of systems is needed.

Moreover, following the characteristics of trusts established by the Hague Convention, it has been found that the *Treuhand* behaves more as trust-like device, thereby creating a rift between the operations of the *Treuhandanstalt* and the classical notion of a *Treuhand*.

The system that more closely resembles the operation of the trust agency is the common law concept of a trust. The introduction of the Division Law allowed for various owners to lay a legal claim on the same property, as described above, thereby resembling the Anglo-American system in which ownership by more than one party is indeed possible. In the common law system, however, the institutionalised equitable ownership allows for more than one party to claim a property but due to the lack of such an institution in the German legal system, the common law system of trusts comes closest to the way in which the *Treuhandanstalt* worked. Although the *numerus clausus* exists on a case-by-case basis, it is not of importance in relation to the trust agency. Therefore it can be concluded that the German legislators opted, most probably unwittingly, for a foreign legal concept in order to make the *Treuhandanstalt* operate efficiently, as the domestic legal system did not allow for the rapid sale of the former SOEs to ensure a smooth transition from a socialist economy to a capitalist one. ■

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<sup>82</sup> See Friedmann, *supra* note 54, p. 106.