

Back to the Past: Old German Bonds and New U.S. Litigation

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Abstract

Bonds issued in the Weimar era by German public and communal bodies became entangled in a two-decades long prewar and wartime set of reformation, repudiation and cancellation events, followed by an equally varied and even longer set of revalidation, renegotiation and repayment events, whose legal consequences have not run their full course to this day. Disputes between states, between holders and states and between holders and issuers have occupied the courts and the executive and administrative agencies of the Federal Republic and a number of former Allied and neutral countries for this entire period. This article, exploring the legal resolution of these disputes in the Federal Republic and the United States, illuminates the role of legal acts and of legal doctrines developed to deal with the political consequences that the behavior of the Third Reich and the realities of the

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postwar division and later reunification of Germany created for these instruments, their issuers and their holders.

Introduction

A few recent cases in the US federal court system have pried open the door to a fascinating bit of international financial history – the fate of German public indebtedness incurred before World War II and left for repayment, settlement or repudiation thereafter. One appellate opinion in particular, *Mortimer Off Shore Services, Ltd v. Federal Republic of Germany*,¹ provides much of the background to this history and is the launching point for the narrative that follows.²

That case involves 351 dollar-denominated 30-year bearer bonds issued in 1928 by a consortium of German provincial and communal banks engaged in the financing of agricultural enterprises.³ The securities were traded on the New York Stock Exchange, and according to their terms could be presented at maturity in 1958 inter alia in New York. In 2005, Mortimer presented the bonds to the Federal Republic for payment, and on rejection of the demand brought this action. Mortimer is a vehicle owned by a Syrian-Lebanese investor earlier famous as a London gambler;⁴ how it had obtained the instruments is not discussed in the complaint.⁵ It claimed an amount due of approximately \$ 400,000,000, based on an original face value

¹ 615 F.3d 97 (2d Cir. 2010), cert. den. 131 S.Ct. 1502 (2011).

² See also *World Holdings, LLC v. Federal Republic of Germany*, 794 F.Supp.2d 1305 (S.D.Fla. 2011). A refiled complaint based on the same issues but alleging that a 1938 Third Reich (Prussia) action guaranteed these bonds and thus brought this action within the “commercial activity” exception of the US Foreign Sovereign Immunities Act recently was dismissed on issue-preclusion grounds as to the original plaintiff. See *Mortimer Off Shore Services, Ltd. v. Federal Republic of Germany*, 2012 WL 1067648 (D.Mass. 2012). A different plaintiff who filed an identical complaint in that same action first gained a deferral pending further briefing of this 1938 guarantee issue. After briefing, the court dismissed the complaint. See *Mortimer Off Shore Services, Ltd. v. Federal Republic of Germany*, 2012 WL 3600840 (D.Mass. 2012). Another case, *Kupfer v. Federal Republic of Germany*, 2011 WL 1672741 (S.D.N.Y. 2011) dismissed actions brought against the successors of the issuing institutions (the Federal Republic had not been served process and despite the case caption was not a defendant).

³ Some of the issuers were located in territory that after World War II became part of the Federal Republic, other in what became the German Democratic Republic – a distinction that is of central importance in the context of the applicable law.

⁴ See his homepage, <fouadalzayat.com>.

⁵ See *J. Westbrook, Al-Zayat Takes \$ 8 Billion German Bond Claim to U.S. High Court*, Bloomberg News, 17.2.2011, quoting its attorney to the effect that the plaintiff’s purchases began in the late 1990s.

of \$ 25,000,000. The Southern District of New York, in a decision upheld by the Second Circuit Court of Appeals, dismissed the action. The courts' opinions illuminate some of the thorniest questions surrounding these older German debt instruments, not least (though not only) questions concerning the circumstances accompanying the acquisition of these types of bearer instruments by their current holders.

This article explores the legal and political history surrounding these instruments. Part I discusses the issuance of various bonds in the interwar period that were intended for purchase by foreign holders.⁶ It then describes the treatment of those bonds during the Third Reich, in the aftermath of World War II, and in the period following German reunification. Part II turns to the *Mortimer* case itself and to an analysis of the issues that required resolution there. Part III analyzes more generally the web of private and public international law problems the described history of these four epochs presents. Part IV concludes with reflections on these events in their larger historical context.

The perspective from which this narrative is launched of course is that of a US observer. Some justifications for presenting this narrative to a broader audience, especially to its German cohort, are therefore worth mentioning. First, this bond history has a significant US pendant, one not well-known elsewhere, that sheds some new light on the broader history. Second, an external perspective on the arguments discussed in postwar, especially in the more recent post-reunification German litigation may provide some additional discursive points for any discussion of the fate of these obligations. Finally, even the German academic treatment of this sidestream of financial history was, with an exception to be noted, relatively sparse, with much of the analysis left to occasional, pointillistic discussion of particular events. All in all, thus, a recapitulation of the entire, now almost century-long history may be useful.

⁶ An even larger amount of bond issues denominated in Reichsmark were placed within the German Reich, but except incidentally are not the subject of this discussion. These local issues also were subject to the postwar legislative filters described below, though in part for other reasons than those that led to the validation processes applied to issues placed outside Germany.

I. The Origins

1. Weimar and the Third Reich: Issuance and Repudiation

After World War I two basic types of debt instruments destined for placement with foreign investors were issued by the German Reich, its provinces and its municipal and other public agencies. The first and best-known were the Reich bonds, denominated in various foreign currencies and issued by the national government in order to raise the funds needed for satisfaction of Allied reparations claims – the Young and later the Dawes Bonds.⁷ The second were foreign-currency denominated debt instruments issued by a multitude of lower-level public bodies. Together, these bonds, largely placed abroad through traditional financial intermediaries,⁸ were reported to have reached a face value of approximately [postwar] DM eight billion.⁹

After 1933, in the teeth of the Great Depression, the Weimar Republic in its last stages and the Third Reich in its early stages first struggled to avoid defaults. The latter then also engaged in conscious, partly concealed efforts to avoid its servicing and repayment obligations under these instruments.¹⁰ Some bonds were paid at their maturity upon surrender; others, especially

⁷ See to this transformation *J. W. Angell*, *The Recovery of Germany*, at 65 ff., 333 ff. In addition, bonds issued by the then-State of Prussia and one other set, the so-called *Kreuger* (Swedish Match Monopoly) Bonds, belong to this category as well. In the case of Prussia, this was because a substantial part of its prewar territory became a part of the Federal Republic. For a recent overview of the context which led *Ivar Kreuger* to use a German dollar-denominated bond issue to support his famous monopoly, and the justification for including these instruments in this postwar legislation, see *F. Partnoy*, *The Match King*, Chapter Nine.

⁸ One interesting and hitherto unexplored variation: Many (mainly Catholic) religious bodies also issued foreign-currency denominated bearer instruments, though in much smaller amounts per issue, almost all (approximately 300) in Dutch guilders and placed largely through a savings-and-loan bank in (Catholic) Nijmegen. Only three were placed as dollar instruments in New York. See these bonds' listings in *H.-G. Glasemann*, *Deutschlands Auslandsanleihen 1924-1945*.

⁹ *H.-G. Glasemann* (note 8), at 3 ff. In the German numbering system, eight trillion (Milliarden).

¹⁰ The most important Third Reich action was the imposition of a moratorium on foreign-exchange transfers enacted in 1934; see *RGBL*, I, 349. This and subsequent actions are briefly but adequately described in *A. Sayatz*, *Das Schicksal der Reichsmark-Wertpapiere und auf ausländische Währungen lautenden Deutschen Schuldverschreibungen nach 1945*, 50 ff. An excellent overview of these and the later referenced practices is provided in *A. Klug*, *The Economics of Buying Back German Debt in the 1930s*, in: *S. Eddie/J. Komlos* (eds.), *Selected Cliometric Studies in German Economic History*, 296. *Klug* provides evidence that 35 % of all dollar-denominated bonds had been reacquired by late 1936 through these various transactions. *A. Klug* (note 10), at 299 and n. 6.

those repurchased by their particular issuers and converted into RM denominations, then were placed in German secondary markets; yet others were returned to the issuers in exchange for post-1933 foreign- or Reichsmark-denominated debt instruments.¹¹ Many bonds also were purchased by the government in secondary markets at deep discounts. This interwar financial history was the subject of substantial public and academic literature at the time, which is not revisited here.¹² The postwar efforts of resolution of this situation, however, have not been explored as deeply.¹³ Parts 2 and 3 below take up that subject, examining first the initial period following the end of World War II and then the new disputes that arose following German reunification.

2. The First Postwar Period

For reasons having to do with the chaos accompanying the ending phase of World War II and the immediate postwar years, the disappearance of instruments issued by the Third Reich into the hands of thieves and fences was a matter of much concern to the Western Allies and the West German public authorities of that time. The origins of dubious secondary transac-

¹¹ The two principal pre-war debt instruments issued by the Third Reich – in partial and eventually repudiated settlement of earlier obligations – were those related to the Konversionskasse and those related to the so-called Standstill Agreements. The former scheme dealt with German debts of the private sector denominated in foreign currency, which debtors repaid in Reichsmark to the Central Bank, which then issued RM-conversion instruments to the foreign creditors in purported payment. The latter were more or less – and over time more and more less – voluntary arrangements with foreign banks, in essence rolling their short-term claims over as more debts were incurred. See *N. Forbes*, *London Banks, the German Standstill Agreements, and “Economic Appeasement” in the 1930s*, *Economic History Review* 40 (1987), 571 and *U. Rombeck-Jaschinski*, *Das Londoner Schuldenabkommen*, 34 ff. A useful more general overview is that of *H. James*, *The Reichsbank and Public Finance in Germany*.

¹² Two early postwar publications, *E. Borchard*, *State Insolvency and Foreign Bondholders* and *W. Wynne*, *Selected Case Histories of Governmental Foreign Bond Defaults and Debt Readjustments*, written before the London Debt Agreement resolved the prewar defaults, discuss these problems from a near-contemporaneous perspective. Some references to prewar literature on these practices also are provided in *U. Rombeck-Jaschinski* (note 11) and *U. Siebel*, *Rechtsfragen internationaler Anleihen*, 110 ff.

¹³ Some academic and professional commentary, usually specific to a regulatory or case development, did appear in the journal *Wertpapier Mitteilungen* (hereinafter “WM”), which as its name suggests was founded (in 1949) originally for the specific purpose of reporting on the postwar developments concerning these prewar debt issues.

tions are varied.¹⁴ Some of the bonds that had been surrendered after their payment upon maturity, or that had been exchanged for post-1933 debt instruments, were not returned for cancellation after the beginning of World War II. Others had been purchased by the German government after 1933, but could not be physically cancelled without the cooperation of the foreign trustees and thus rested uncanceled in the depositary's vaults.¹⁵ After 1945 many of these were seized or looted and over time turned up in a variety of West German, Allied and Neutrals' secondary markets – markets ranging from stock exchanges to taverns.¹⁶

The consequence of this turbulent situation was the enactment, first by the Western Allies' Occupation Authorities¹⁷ and after 1949 by the Federal Republic, of legislation designed to separate the wheat from the chaff – legislation culminating in the Law for the Validation of German Foreign Cur-

¹⁴ Some litigants have attempted to cast doubt on the entire factual basis underlying the more or less official narrative – see *Bleiser v. Bundesrepublik Deutschland*, 2010 WL 3947524 (N.D.Ill. 2010) for a strident pleading on this point – but that narrative became and remains the legal framework for postwar consideration of these debt claims. The basis for this standard approach of judicial deference to legislative (or treaty) fact-finding is well explained in *World Holdings, LLC v. Federal Republic of Germany* (note 2), at 1330 f. For an interesting analogous rejection, also in a postwar reparations setting, of factual challenges to treaty and legislative findings that underpinned the substantive rules then promulgated, see the decision of the German Federal Constitutional Court of 18.4.1996, BVerfGE 94, 12.

¹⁵ See the discussion of these circumstances in *J. Heintze*, Die Bereinigung der deutschen Auslandsbonds, WM 4 (1952), 367.

¹⁶ A German decision resolving a dispute between a buyer and seller of these instruments vividly describes this scenario: The defendant owned an inn in West Berlin. During 1946-47 many former bank and stock-exchange employees frequented it; there they also dealt in financial papers, since at the time there was no official exchange in Berlin. The defendant agreed to attempt to sell such securities in the Western Zones (of Occupation), and to this end made contact with “Z”, to whom an intermediary had referred him. “Z” did not ask the defendant about the provenance of the instruments, and neither asked for his ID nor for any official proof concerning his acquisition of these instruments. He also did not demand the “Western Zone” certification, required at that time, to the effect that the documents had been located in one of the three Western Zones since before 1.1.1945. BGH, Decision of 16.12.1952, 15 BGHZ, 223. For a US version of this context, see *Abrey v. Reusch*, 153 F.Supp. 337 (S.D.N.Y. 1957). A subcommittee of the Senate Committee on the Judiciary became involved in this matter on the suspicion that a similar situation was presented by *Abrey's* claim. See 85th Cong. 1st Session, Hearing of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, “Scope of Soviet Activity in the United States”, 5.2.1957. A newspaper report on the hearing led to an unsuccessful libel suit; see *Abrey v. New York World-Telegram Corp.*, 7 Misc.2d 413, 164 N.Y.S.2d 632 (N.Y.S.Ct. 1957).

¹⁷ In lieu of primary citations to these several promulgations see their listing, as to both the Bizonal and the first Länder-level laws, in *O. Schoele*, Die Wertpapierbereinigung, JR 4 (1950), 300.

rency Bonds.¹⁸ This legislative framework, adopted to establish a validation process for holders seeking to establish legitimate title to their securities, rested on two critical distinctions: 1) that between pre-World War II and post-World War II bond issues; and 2) that between securities whose issuers were located in territories that after World War II became part of the Federal Republic¹⁹ and those whose issuers were located in those that became part of the German Democratic Republic (GDR).

This legislation did not purport to change the substantive law applicable to the debt claims (with one exception noted below). Rather, it and its implementing regulations set forth the procedures pursuant to which the holders of these bearer instruments could obtain the validation of their title and with it current or future payment to the extent provided by other norms, in particular by the settlement and exchange processes undertaken pursuant to the multinational London Debt Agreement (LDA) of 1953.²⁰ The law and regulations distinguished among three types of holders: foreign holders, domestic (German) holders, and persons who had regained possession of earlier-expropriated securities (usually expropriated or sold under duress in the course of Third-Reich measures directed principally against Jewish property owners).

Foreign (non-German) holders of debt instruments – of both types of denominations – that on 1.1.1945 were located outside the German borders of 1.12.1937 generally obtained a validation certificate simply upon presentation of the bonds to the validation agencies. In the case of instruments that after 1945 had been restored to foreign residents in Allied countries (principally in the UK and US), from whom Allied authorities had temporarily confiscated them under wartime Alien Property regulations, an unimpeachable certificate of legitimate ownership also was issued simply upon proof of those instruments' return. In other words, the nature and legitimacy of their holders' prewar claim to title were not subject to challenge.

¹⁸ Bereinigungsgesetz für deutsche Auslandsbonds, BGBl. 1952 I, 553. A similar law focused on Reichsmark-denominated obligations; see its most important pre-unification formulation: Wertpapierbereinigungsschlussgesetz, 28.1.1964, BGBl. 1964 I, 45. The many statutory revisions and extensions up to the date of reunification are listed in the Unification Treaty's Annex, Annex I, Chapter IV (legislation under the administrative implementation of the Federal Ministry of Finance), Subject-Matter A: Regulation of the Consequences of War, Part I, items 1-10; most conveniently gathered in *K. Stern/B. Schmidt-Bleibtreu*, Vol. 2, Einigungsvertrag, at 374.

¹⁹ There were some exceptions, as discussed further below.

²⁰ Agreement on German External Debts of 27.2.1953, 333 U.N.T.S. 3. The German statute incorporating the LDA into its domestic legislation may be found at BGBl. 1953 II, 1200.

Reich and “West German” Instruments that on 1.1.1945 were held in the territory of what later became the Federal Republic of Germany (FRG),²¹ however, could be validated only if their holders could meet a heightened version of the generally applicable Civil Code requirements of legitimate ownership. Because of the problems associated with this category of property owners, whose predecessors in the chain of title might have been Jewish or other victims of Third-Reich persecution (or, as in the case of the occupied Netherlands, forced to accept repayment in Reichmarks at a questionable exchange rate), an additional evidentiary issue had to be faced in light of the fact that these instruments typically were bearer instruments. Ordinarily, claims based on good-faith acquisition enjoyed a German – indeed general Civilian – presumption of legitimate ownership. This presumption, however, was expressly rendered inapplicable by the statutory validation regime, given the typically involuntary circumstances under which these instruments had been originally transferred.

The third type of claim represented the other side of this coin and involved those victims. Debt instruments that under postwar restitution measures had been returned to claimants from whom they had been confiscated were granted validation certificates without further proof – the understandable consequence of the fact that these claimants had provided sufficient proof of their original ownership and confiscation to have regained possession of these instruments after 1.1.1945 under the general postwar restitution ordinances and statutes in the first place.

Holders of debt instruments issued after World War II by the Federal Republic, and thus not tainted by the mentioned problems of illegitimate acquisition, by definition had legitimate title. This particular category of bonds, however, consisted of instruments substituted for prewar bonds; indirectly, therefore, they too had been subject to the filtering process in the sense that the original instruments were required to pass through the described alternative validation procedures before these later instruments could be issued to their holders. It also will be relevant to the later discussion of the current litigation that the holders had accepted these postwar successor instruments through a compromise settlement arrangement that

²¹ Note that this foreshadows an East-West classification. Debt instruments of lower-level authorities located in what became the GDR were not eligible for validation let alone for the LDA settlement schemes. GDR subjects attempting to validate their ownership of Reich and lower-level “West German” issuers’ instruments were eligible to present them for validation, but had practical difficulties obtaining GDR support of their efforts, as discussed further below.

included a reduction of the amount due on their original claims.²² Specifically, under the terms of the London Debt Agreement of 1953,²³ the Federal Republic made settlement offers to the holders of these validated prewar instruments (principally the Dawes and Young Bonds and the mentioned Prussian and Kreuger Bonds), offers that basically extended their dates of maturity and lowered the original rates of interest. By 1960, at which time the previously described validation processes essentially had been completed, the large majority of holders of these validated bonds had accepted these offers and been issued these new instruments, so-called conversion bonds.²⁴ These traded in secondary markets until the last of them was redeemed in the mid-1980s.

Two other postwar instruments, representing interest arrearages for two specific time periods, are also part of the picture. One type, the so-called “shadow quota” certificates, represented the unpaid interest arrearage claims accrued between the time of original issue and the end of World War II. These were claims the LDA settlement offer had not addressed and that thus had been left unsatisfied. Some of these certificates were issued as coupons alongside the first-described conversion bonds, others of later vintage were issued as separate talons or as warrants exchangeable for the first two forms.

The second type of postwar debt issue representing another interest arrearage foreshadows the period of unification, and indirectly brings up the distinction between issuers located in what later became different Germanies. The London Debt Agreement had deferred any consideration of one particular set of unpaid interest claims until unification; namely, the interest that had accrued between the end of the war in 1945 and the effective date of the arrangements contemplated by the LDA itself, specifically 1952. This basket of interest accruals was reified in a new set of debt instruments issued much later, with an effective date of 3.10.1990 (the day of formal unification).²⁵ In summary, the story so far concerns the various substitute (conversion) instruments, the notes representing pre-1945 unpaid interest, and

²² *Mortimer* alleged that its (1928) bonds had not needed to pass through the validation procedure and thus by definition had not been submitted in response or subject to the LDA settlement offers. This issue will be discussed below.

²³ *Supra* note 20.

²⁴ So characterized because in essence they were the postwar substitutes for the instruments issued by the Konversionskasse during the Third Reich, which themselves substituted Reichsmark-denominated instruments for the deferred servicing of the various foreign-currency instruments issued during the Weimar period. For the details, see in particular *H.-G. Glasemann, Die Schuldtitel der Konversionskasse für Deutsche Auslandsschulden 1933-1945*.

²⁵ The process by which those holders to whom these instruments were to be issued in 1990 could be identified makes for an interesting story but a separate one.

the notes representing 1945-1952 unpaid interest. All three types of debt instruments were paid at various maturity dates; the last of them (representing the 1945-1952 arrearages) on 1.10.2010, almost 20 years to the day after reunification.²⁶

Finally, it is worth recalling that US agencies and courts also had been involved in the handling of claims that had to be validated if their holders wished to accept the LDA settlement offers. The London Debt Agreement provided a simplified validation procedure for dollar-denominated bonds originally placed in the United States.²⁷ Under the terms of a bilateral agreement supplementing the general validation procedures the LDA provided for settling a variety of prewar and postwar claims against the Federal Republic, a US Board for the Validation of German Bonds was established to which US-based holders could present their claims and evidence without having to resort to these processes in Germany.²⁸ The Board's findings were subject to review by a federal court, and substituted for the processes and decisions of the German authority in charge of these validation procedures. Its positive decisions were entitled to automatic recognition by the German office responsible for payment of the settled claims.²⁹

3. The Disputes Following German Reunification³⁰

The pre-war "East German" instruments and post-unification "East German" holders presented a yet different problem, one related to the Cold War and the division of Germany. As described above, holders of pre-war national or "West German" foreign currency-denominated bonds who

²⁶ See the report of the Law Library of Congress, archived at <<http://www.loc.gov>>, citing German journalistic sources.

²⁷ It also had made similar arrangements for bonds placed elsewhere, but I do not discuss those analogous procedures here.

²⁸ As earlier mentioned, holders of these instruments who before 1.1.1945 had resided in the US received a validation certificate more or less automatically. It was persons now in the US who could not meet that earlier-residence standard and who had to present the full chain of title which the basic German legislation required who benefited from this US-venue alternative. See the *Abrey* case (note 16), that was something of a political cause célèbre at the time; see also, for the availability of arbitration as a remedy against a negative decision of the US Board, *Cavac Compania v. Board For Val. of German Bonds*, 189 F.Supp. 205 (S.D.N.Y. 1960).

²⁹ The modalities of those payments, less in cash than by the issuance of new debt instruments with annual redemption features, are reviewed below.

³⁰ An excellent presentation and analysis of these matters, fully and clearly detailed, is provided in *A. Sayatz* (note 10). As the title suggests, his treatment covers the entire postwar historical period.

could not meet these various requirements of legitimate ownership suffered their cancellation. That consequence, of course, assumed an application for validation had been made and rejected, or had not been made in a timely manner (though the prescription period was extended more than once). With the reunification of Germany and the reappearance of debt instruments that had not been eligible for the LDA settlement arrangements, however, new ownership claims were inevitable. And because the same problems of looted and voided but uncanceled instruments that led to the original legislation remained a concern after unification – indeed, were more of a concern –,³¹ the validation procedures long dormant and long barred through prescription by 1990 indirectly became problematic.³²

The Unification Treaty provided that both the domestic-currency and the foreign-currency validation statutes did not apply in the new states (Länder) of the former GDR. The brief legislative comment to this abrogation states only that by now these laws had achieved their purpose. So far as foreign and West German bondholders were concerned, that was in part correct in the sense that the applicable prescriptive periods had run by 1990, but with two exceptions. One, central to *Mortimer*, concerns bondholders who had rejected the LDA compromise and by the terms of that treaty had their claims deferred until all acquiescing bondholders had been satisfied upon maturity and payment of the mentioned substitute instruments. The other exception concerns East German holders of both RM- and foreign-currency instruments falling under the LDA; that is, the Reich, Prussian and Kreuger bonds as well as bonds issued by sub-state entities located in postwar West German territory. These bondholders had been eligible to participate in the validation and LDA processes but by and large had been prevented from

³¹ The reasons why this was an increased concern are vividly described in *T. Bezzenberger*, *Die vagabundierenden Reichsmark-Effekten aus der ehemaligen DDR und die Grenzen des Wertpapierrechts*, WM 46 (1992), 2081, at 2082. While, as the title indicates, he addresses those bonds not denominated in foreign currencies, the story here paraphrased applies to both types: From the 1950s on, large numbers of financial instruments of dissolved public and private issuers landed in the GDR state archives. In the 1980s, to procure foreign currency, these large collections were sold not in secondary exchange-like markets but to antique dealers specializing in historic financial papers.

³² “Indirectly” because as the following text explains, the two original validation laws were specifically declared inapplicable to debt issues stemming from what after 1945 were “East German” issuers; see Article 8 of the Unification Treaty, and Annex I, *supra* note 18, items 2, 9 and 10. The murky history of claims by “East German” holders for payment of either “West” or “East” issues, see especially *A. Sayatz* (note 10), has not been cleared up by later researchers. Searches in the relevant court records of Berlin, Cologne, Frankfurt and Munich disclosed a few docket entries of claims, but these do not identify the denominations, issuers or holders. The decisions themselves were not archived, and court and archive officials reported that they no longer exist.

doing so by the GDR. And lurking behind these problems was the revival of claims on “East German” bonds, ranging from Weimar era issuances of the states of Saxony and Anhalt down to single-municipality instruments (such as those of the city of Dresden, of which more below).

While instruments issued by bodies that had been located in the territory of what had become the German Democratic Republic could not be presented in the pre-unification era to the Federal Republic authorities, another narrow channel was available to US holders of these instruments. It arose as one of several compensation plans involving states that had expropriated the property of United States subjects in the aftermath of World War II. These persons could present claims to the US Foreign Claims Settlement Commission (FCSC) for certification, with eventual payment to be made following any later treaty-based settlement of reciprocal claims of the involved country and the United States.³³ That approach had its own peculiarities and problems when it was created for claims against the German Democratic Republic, and those issues are reviewed below. But to revisit them in context, an analysis of the *Mortimer* case now is called for.

II. The Current Context and Its Evaluation

1. The *Mortimer* Decision

The *Mortimer* claims presented a variegated and complex set of issues that the court had to consider under both choice-of-law principles and doctrines derived from public international law. These issues included the jurisdictional immunity of the foreign sovereign state, the liability of the state as successor to these Weimar era entities, the applicable statutes of limitations in both their substantive and choice-of-law aspects, and the well-known problem of repudiation of gold- and other indexation clauses. It is to these issues and to their disposition in the *Mortimer* (and in the other, in part still pending) litigation that the following analysis turns.

Mortimer had not submitted these bonds for validation under either the German procedure (which had been extended beyond its original expiration date by later decree) or under the alternative US-based process based on the LDA. Nor did it provide an explanation for its failure to do so – which might have entitled its late claims to consideration. These explanations, be-

³³ See Title VI of the International Claims Settlement Act of 1949, as amended by Public Law 94-542, 90. Stat. 2509, codified at 22 U.S.C. § 1644.

ing relevant to the German treatment of late claims, might have been relevant under private international law principles in the US litigation. Instead, it relied on a different section of the German statute, one that speaks to the rights of those bondholders who had refused the settlement offer of the London Debt Agreement. That section, however, while leaving the door open to later consideration of their claims once those accepting the arrangement had been paid, did not excuse these “non-assenters” from the statutory validation requirements. Only those who had (timely) submitted their holdings to that process were even eligible to have them considered at that later date, when holders who had accepted the deferred and adjusted payouts of the LDA arrangement could no longer be prejudiced by consideration of the non-assenters’ claims.

The reason why the *Mortimer* bonds were subject to the validation process in the first place rests on a specific feature of this issuer consortium. As earlier mentioned, the claim was based on bearer bonds issued in 1928 by an umbrella organization of governmental banks, the Deutsche Landesbankenzentrale AG, under the designation “German Provincial and Communal Banks Consolidated Agricultural Loan – Secured Sinking Fund Gold Bonds Series A”. These securities had been placed on the US market and traded on the New York Stock Exchange, and according to their terms could be presented at maturity in the Borough of Manhattan. The individual banks within this issuer consortium were incorporated in what later were both Federal Republic and German Democratic Republic localities. Because of that particularity, this debt issue was among those identified in the appendix to the Federal Republic’s validation statute as permitting (and thus in essence requiring) submission to that process despite the fact that some of its members were “East German”; i.e., as individual issuers would not have been within the reach of the statute.

As just pointed out, the German Unification Treaty and accompanying statutes did not carry the original validation legislation of the Western Occupation Powers and the Federal Republic forward to cover these “East German” instruments;³⁴ nor, as also indicated, did the LDA arrangement

³⁴ For details, see *R. Welter*, Commentary to § 367, Münchner Kommentar zum Handelsgesetzbuch (2nd ed. 2009) sec. 25. Citing *A. Sayatz* (note 10), *Welter* points out that at least the old instruments denominated in Reichsmark thus were not invalidated – at least at this point – in consequence of the earlier screening legislation. The RM instruments were, however, later voided (in the same manner old “Western” ones earlier were voided) by new legislation that then required their bearer to make an individual application demonstrating legitimate ownership. Even this legislation, however, did not apply in full severity to foreign-currency denominated instruments, whose holders under the applicable 1994 statute (Entschädigungs- und Ausgleichsleistungsgesetz, 27.9.1994, BGBl 1994 I, 2624) could for some time after unifi-

extend to them. The German decision discussed in *Mortimer* applied only to the bonds ascribable to those members of the umbrella organization based in what later was the territory of the Federal Republic. The other category of bonds – GDR bonds *avant la lettre* – might have been similarly handled, although the applicability of the original validation procedure turns out to be a question of Ptolemaic complexity under both German law and US choice of law norms. Thus, any filtering process had to rely on other bases.³⁵

One doctrinal basis, in fact used in one US decision, rests on another provision of the Validation Law requiring instruments of a single issuing entity that both before and after unification was situated at least in part within the boundaries of the Federal Republic to submit to the validation process.³⁶ Many privately owned entities headquartered in what became East German territory had assets in the Federal Republic. In the context of resolving claims by creditors against those assets, under the unique legal doctrine of the *Spaltgesellschaft* – the doctrine allowing the West German facilities to be recognized as a separate legal entity –, the GDR refusal to recognize any liability for the debts of the original entity after its liquidation and the transfer of its East German assets to the state was consistently treated as a “concealed factual expropriation”. A 1960 US-Federal Republic of Germany treaty extending the settlement obligations of the LDA to a small set of bonds issued by “East German” entities was based on this concept.³⁷ This approach was not applicable in *Mortimer*, however, since as the

cation claim a hardship exception to toll the otherwise applicable prescription rules; see *A. Sayatz* (note 10) at 193 f., and for his views on the questionable constitutionality of this effort at closure, 184 ff.

³⁵ *R. Welter* (note 34), states (my translation): It is worth pointing out that foreign-currency denominated instruments of East German issuers, despite the wartime turbulence and their dubious value during the period of the GDR’s existence, retained their character as debt instruments and their trading capacity. They could and still can be acquired in good faith and still maintain their function [to legitimate the rights inherent therein]. Because of the expropriation of private issuers in the Soviet Zone of Occupation and the GDR, this concerns interwar-period issuances of regional public bodies.

³⁶ See *Kupfer* (note 2), at 3:

Where a bond has multiple issuers, Article 73 of the Validation Law specifies that the jurisdiction of the bond is determined by the seat of the designated examining agency. The bonds in question are clearly “West German”. As such, *Kupfer*’s argument that, even if the West German portion of the bond is subject to the Validation Law, the East German portion is not, is unavailing. Regardless of the percentage of the debt attributable to the East German banks, the bonds at issue are subject to the Validation Law because the examining agency was located in West Germany. Of course, this rationale would not apply to instruments issued by an entity at the time located solely in what became the GDR.

³⁷ See Second Agreement between the Federal Republic of Germany and the United States of America Regarding Certain Matters Arising from the Validation of German Dollar Bonds,

decision pointed out, the consortial issue held by plaintiff did not fit this definition (of course, since that issue was for other, already mentioned reasons eligible for validation, this was a moot point).

Had the *Mortimer* opinion stayed with this evaluation, the analysis would have been less tortured. The mixed consortial bonds were subject to the Validation Law and eligible to participate in the LDA settlement; they had not been validated; the validation was necessary to preserve the right of these irredentists to resubmit their claims at least in 2010 if not already in 1990; not having taken advantage of what would have been a tolling of the statute of limitations their claim now was prescribed; and that would have been the end of the matter. Instead, the opinion split the consortial bonds into their individual members' East and West domiciles. It thus had to resolve both the limitations and the successor-liability questions that claimants who had not been eligible for the processes provided by the Federal Republic before unification had to face in the post-1990 era for which validation legislation no longer existed.

The court instead embarked on an approach that coupled a dubious but dispositive use of foreign sovereign immunity with a choice of law analysis of the liability of the successor governmental entities for these Weimar era debts of their predecessors. The German government's claim of jurisdictional immunity was denied as to the "West German" category of bonds,³⁸ based on the court's holding that the Foreign Sovereign Immunities Act (FSIA) commercial-activity exception applied to these transactions. This threshold ruling thus led to the analysis of the validation process and ultimately to dismissal of these claims, as previously discussed. The claim based on the "East German" category of bonds, however, did not get past the jurisdictional gate.

The court's ruling on that issue is short enough to justify quotation:

While we have our misgivings as to whether successor state liability is even applicable in this case, we need not reach that question. Even if we were to find successor state liability, *Mortimer's* cause of action would nevertheless not lie because it would fail to allege an 'action ... based upon a commercial activity'. Accession to liability by the rules of customary international law entails no action by the successor state with respect to the commercial activity at issue – the as-

12 U.S.T.S. 944 (1961). The seven issuers included within the obligation were *Spaltgesellschaften* with significant assets in the Federal Republic or with West German parent-company guarantors of these issues.

³⁸ For another recent case denying the Federal Republic's claim of foreign sovereign immunity in the same context, see *World Holdings, LLC v. Federal Republic of Germany*, 613 F.3d 1310 (11th Cir. 2010). On the merits, however, this case raises yet other issues, discussed below.

sumption of liability.³⁹ The state performs no action when it automatically assumes liability. This stands in sharp contrast to a country's assumption of liability through an explicit act, such as West Germany did here.⁴⁰

As for acts that the plaintiff argued did demonstrate an affirmative assumption of liability had been made, the best case for this argument was based on Article 25 of the London Debt Agreement, calling for the post-reunification review of the LDA to make its provisions applicable to the debts of persons residing in [East Germany].⁴¹ To this the court simply responded:

Although anticipating West and East Germany's reunification and the need to "mak[e] equitable adjustments", respecting debts incurred in the territory of East Germany, ... Article 25 and the remainder of the Accord refrained from delineating those possible adjustments, let alone imposing liability upon West Germany for any of East Germany's debts.⁴²

In a sense, then, the state-succession question was treated as following the sovereign-immunity question. The court's further discussion of succession, however, turned the sequence around and in essence made sovereign immunity rest on the resolution of the succession issue. That is apparent

³⁹ Professor *Roger Alford*, who notes that he also appeared as *amicus curiae* in support of the plaintiff in *Mortimer*, argues in an *Opinio Juris* blog of 23.8.2010 that this quoted approach ignores the original "commercial activity" FSIA-exception involved in the prewar issuance of these bonds. See <<http://opiniojuris.org>>. In my view, this conclusion, even if itself correct, cannot be extricated from the question of state succession, as the following discussion suggests.

⁴⁰ *Mortimer* (note 1), at 109 f. Of course, it bears recalling that these were not debts incurred by the GDR, but Weimar era debts of German public bodies that during the postwar division were part of the GDR.

⁴¹ This referred to the issuers, not the holders. As earlier mentioned, GDR subjects who held prewar national or "West German" bonds were entitled to apply for a validation certificate and were eligible to join in the LDA settlement offers. See the official if retrospective statement to this effect in Bundesministerium der Finanzen, Fragen und Antworten zum Vermögensgesetz Entschädigungs- und Ausgleichsgesetz NS-Verfolgtenentschädigungsgesetz (n.d. [2007?]) at 42, and similar explanations by the Federal Office for Central Services and Unresolved Property Issues (Bundesamt für zentrale Dienste und offene Vermögensfragen [BADV]), available at <<http://www.badv.bund.de/index.html>>. See also *J. Heintze*, *Der Stand der Wertpapierbereinigung*, *Zeitschrift für das gesamte Kreditwesen* 3 (1950), 559. If their instruments, as was often the case, had been deposited with East German financial institutions, however, these institutions soon were prohibited from delivering them to their owners. Thus it is likely that the majority of these holders were not, before 1990, in a position even to enter the validation process. See to this, though with some qualifications concerning possible assignments to West German presenters, *W. Kreuer*, *Wertpapierbereinigung und Lastenausgleich*, *Zeitschrift für offene Vermögensfragen* 2 (1992), 78 and *A. Sayatz* (note 10) Chapters Five and Six.

⁴² *Mortimer* (note 1), at 112.

from a second argument brought forward by the claimants, which tried to recharacterize the claim as one against the Federal Republic.

That claim, presented as a second major basis for the argument of express succession to these obligations, was based on Article 23(6) of the Unification Treaty, which provided that the FRG “shall take over the sureties, guarantees and warranties assumed by (East Germany) and debited to its state budget prior to unification”. This basis was rejected in *Mortimer* because the underlying premise; namely, that the German Democratic Republic itself first had accepted successor liability for bonds issued by governmental or private entities based in what became its territory, was deemed and in fact was wrong.⁴³ Though the court itself did not raise the point, the GDR had at the least never accepted, and in some only partly distinguishable situations indeed expressly repudiated these prewar debts.

The larger issue, however, briefly discussed but not fully developed in *Mortimer*, is the unusual though not unique definition of state succession the German courts consistently have maintained concerning the unified German state’s responsibilities for any prewar obligations of public entities located (postwar) within the boundaries of the former German Democratic Republic. While any discussion of that larger issue moves into territory that extends beyond *Mortimer* itself, it is worth visiting if only because a large proportion of state-succession disputes of course do involve financial obligations of predecessor regimes.

2. State Succession and the Post-Unification Federal Republic

The case most closely on point involved 30-year gold-protected dollar-denominated bonds issued in 1925 by the City of Dresden (an “East German” issuer in our context), three/fourths of which had been placed in the United States.⁴⁴ The Federal Supreme Court rejected the holder’s claim on the ground that the current City of Dresden, whose legal identity had been eliminated as part of the GDR’s original communal reorganization, was not the legal equivalent of the prewar issuer; nor did the municipal reorganization accompanying the 1990 reunification reestablish that legal continuity. In addition, the 1930 conversion of Dresden’s municipal operation of the utilities, to which the proceeds of the issue had flowed, into a private-law corporation left the city at most with a repayment obligation towards that corporation but not with a direct obligation towards the bondholders. Fur-

⁴³ And this view, in turn, supported the ruling on foreign sovereign immunity.

⁴⁴ BGH, Decision of 25.10.2005, 164 BGHZ 361.

ther – and this, as discussed below, has in later cases become a general argument against successor liability –, there is no direct connection between the assets of these facilities and the debt obligation since the loan proceeds did not represent a specific asset applied to specific administrative functions.

Finally, as if these considerations did not suffice, the four-year limitations period for each interest coupon (1934-1945 in this case) and even the 30-year prescription from the time of maturity of the original bond issue in 1945 (i.e., by 1975) had run. Lest the reader wonder about any possible tolling for the period after 1945, during which East German law precluded any recourse, the court ruled in lapidary fashion that this was not the responsibility of the municipality. The harshness of this conclusion was substantially mitigated, however, by the court's acceptance of the possibility of a timely complaint in the years immediately following unification. Here the jurisprudence concerning a possible "equitable" fact-specific exception and its grounding in commercially reasonable and honorable (*redlich*) behavior was applicable; but an 11-year delay in bringing the action could not even under that jurisprudence be deemed to fall within this exception.

a) The Role of Private International Law

An interesting second problem, and the one with which the parties in *Mortimer* had most intensively engaged, involved the choice of law for these prescription questions. In *Dresden*, the Bundesgerichtshof (BGH) had applied German law on the intriguing ground that under the law of the time neither a state nor a public municipality "wanted" to submit itself to any law other than its own. It recognized that the bond's acceptance of New York as a place of payment, the use of the dollar as the measure and medium of payment, and the bond's formulation of the loan conditions were weighty indications in favor of an implied submission to "US" law. Objectively viewed, however, these indicia were held by the court to be relevant only to the payment transactions themselves, not to the substance of the claim; indeed, the bond's specific formulation that all acts relevant for the validity of the obligation had been taken pursuant to the constitution and laws of the German Reich was taken to support this view.

The resulting depeçage, the court further found, was possible and permissible under the law of the time of issue. In support of this holding, the BGH cited the (at the time) famous *Serbian and Brazilian Loan Cases* decision of

the Permanent Court of International Justice (PCIJ).⁴⁵ If anything, however, that well-known decision stood for the converse of the conclusion reached by the BGH. While the PCIJ agreed that different choice-of-law considerations might apply to different aspects of this kind of dispute –

The distinction which seems indicated for the purposes of this case is more particularly that between the substance of the debt and certain methods for the payment thereof.⁴⁶

– that conclusion permitted the PCIJ to apply the law of the place of payment; namely, the French law that as to international loans preserved the validity of gold clauses (though invalidating them when used in domestic contracts).⁴⁷ This approach thus preserved the right of the bondholders to demand payment in “gold francs”, a matter the chosen Serbian law apparently did not address (and thus might have prohibited).⁴⁸ The German court’s approach, purportedly based on this case, permitted the opposite outcome, since it accepted the application of the US prohibition to these value-maintenance clauses. In fact, a better or at least more respectable approach leading to a similar conclusion was available from the Scandinavian and Finnish pre-World War II jurisprudence involving the analogous fact situation; namely, recourse to the law of the currency rather than the law of the place of issuance, when the former – after issuance of the instruments – abrogated gold-clause or similar protection. It would extend this discussion unduly to review these cases in detail; a reference will suffice.⁴⁹

Speaking perhaps too generally, it does seem clear from the tortured grappling with these issues in the primary and secondary publications of the time that the public interest in removing the sword of the gold clause and its kin was too important – at least in the courts of the many countries facing

⁴⁵ *Case Concerning the Payment of Various Serbian Loans Issued in France*, Decision of 12.7.1929, in Publications of the PCIJ, Series A, Nos. 20-21.

⁴⁶ *Case Concerning the Payment of Various Serbian Loans Issued in France* (note 45), at 41.

⁴⁷ The case is authoritatively explained and criticized in *A. Nussbaum*, *Money in the Law*, 417 ff. (rev. ed.). See also the discussion of this French approach (the so-called “jurisprudence *Matter*” named after its academic proponent) in *N. Horn*, *Das Recht der internationalen Anleihen*, 271 ff. (with citations to the origins of the concept).

⁴⁸ More specifically, *A. Nussbaum* (note 47), at 427, points out that the Serbian and Brazilian governments did not plead such invalidity, so that “the outcome ... would have been the same, namely, to hold the debtor governments liable for the full gold value”.

⁴⁹ See *H. Babr*, *The Norwegian Gold Clause Case*, *Am. J. Comp. L.* 12 (1963), 1.

similar financial troubles – to be left to refined applications of possible alternatives derived from doctrines of private international law.⁵⁰

As to the issue of prescription as a choice-of-law matter, the *Mortimer* opinion basically ignored it, since it viewed the succession issue – still to be further discussed – as dispositive. The recent *World Holdings* decision,⁵¹ however, did delve into that issue, leading it first to the choice of the New York law of limitations. It followed that march up the hill back down, however, by looking to the guarantee provisions of the bond instrument and their legal consequences under German law in order then to choose the shorter of two potentially applicable New York statutes of limitation – the one that had run by the time the plaintiff’s suit had been filed.

b) The Role of Public International Law and Policy

The plaintiff in *World Holdings*, as earlier mentioned, also presented some bonds that allegedly had been validated.⁵² That led the Court to public international law by way of a detailed and indeed important disquisition on a major issue of treaty interpretation. This inquiry became the dispositive point on the statute of limitations issue and thus does justify a more detailed evaluation here. That evaluation begins with Article 10 of the London Debt Agreement, which in intent and effect put pressure on private holders of prewar German debt instruments to accept the settlement hammered out by the negotiating parties. It did so by precluding any payment to non-assenting creditors “until the discharge or extinction of all obligations under

⁵⁰ The most persuasive testimony to this effect remains the magisterial work of *A. Nussbaum* (note 47), especially at 429 ff., 443 ff.; see also *G. van Hecke*, *Problèmes Juridiques des Emprunts Internationales*. One late and little-noticed interwar effort to grapple with these issues is League of Nations, Report of the Committee for the Study of International Loan Contracts, C.145.M.93.1939.II.A. (1939) (published in the Publications Series of the League, in II. Economic and Financial 1939. II.A.10).

⁵¹ *World Holdings, LLC v. Federal Republic of Germany* (note 2), at 1348 ff. The Court first ruled, in my view appropriately, that the Federal Republic was not a “person” in the context of the six-year prescription for actions on a bond issued or guaranteed by “any person ... and secured only by a pledge of the faith and credit of the issuer”. It then pointed to the revenue streams these bonds were assigned to enable their servicing, as well as their characterization under German law, in order to conclude after equally exquisite analysis that these rights went beyond a mere full-faith-and-credit pledge and thus could justify use of the six-year provision. All of this (and more, which I omit) turned out to be obiter dicta only, however, as the Court also recognized that even the 20-year statute had run by the time of the filing of the suit.

⁵² The German government disputed this fact but the resolution of the disagreement was unnecessary given the Court’s disposition.

the present Agreement”.⁵³ Since those obligations, as we have seen, ran until 2010, the present actions clearly would have been timely filed – if the quoted provision applied.

But Article 10 continued:

“This provision does not apply to debts arising from marketable securities payable in a creditor country.”

The presented claims fit that description. Nonetheless, it was apparent, and the plaintiffs provided a number of contemporaneous statements so demonstrating, that even semi-official descriptions of the procedures to be followed ignored that sentence and either assumed or explicitly stated that no claim of a non-assenting bondholder could be paid until the conclusion of the payments to assenting creditors. That reading suggests though it does not compel a tolling conclusion.⁵⁴ The *World Holdings* court, however, while acknowledging that the “official” Meeting Minutes of the Conference proceedings could be consulted in case of a dispute of interpretation of the treaty text, simply concluded, without significant analysis, that there was no dispute as to the meaning of the sentence. Hence no argument relating to tolling could be made, and under the Court’s analysis the prescription period began to run in 1964 when the Dawes Bonds reached maturity and in 1965 when the Young Bonds did.

This deserves further analysis. It is apparent, of course, that the availability of an exit through a functioning secondary market offered these bondholders the opportunity to receive payment immediately; indeed, that is the sole explanation offered by an otherwise exhaustive contemporaneous commentary on the LDA.⁵⁵ It was not, however, in the context of the time (1953), a fully convincing one. So far as US secondary markets were concerned, the Securities and Exchange Commission (SEC) had prohibited any trading in these securities some years earlier (for reasons already discussed and having to do with the potentially dubious nature and ownership of

⁵³ The analogous effort to pressure holders of Argentine state obligations through similar strategies is worth noting. For an excellent example, see *EM Ltd. v. Republic of Argentina*, 865 F.S.2d 415 (S.D.N.Y. 2012).

⁵⁴ “Does not compel” in the sense that the liquidity available through such secondary markets was a contemporaneous substitute for acquiescence in the settlement scheme (but at what discount relative to that of this arrangement?), and thus could justify the simultaneous running of the applicable statute of limitations.

⁵⁵ See *H. Gurski*, *Das Abkommen über Deutsche Auslandsschulden*, 275 (1955, w/supp’s). He cites to the parliamentary explanation of the legislative intent to support this point; but it too turns out to be so sparse as not to do justice to the consequences of the exception. See *Deutscher Bundestag*, BT Drs 1/4260, 13.4.1953, at 161.

these instruments).⁵⁶ That prohibition was not lifted until after a number of agreements and statutes implementing the LDA were promulgated; even then, of course, the question of validation had to be faced by those holders choosing to accept immediate payment at whatever discounted valuation existed on those markets. Under these circumstances, the question of prescription and its tolling was more nuanced than the court indicated. In the end, however, it probably is reasonable to argue that since trading in “East German” bonds was not absolutely prohibited in these markets,⁵⁷ not to mention in less regulated Swiss and other European secondary markets, notice of some prescription risk was given by this element of LDA § 10.⁵⁸

This focus on public international law also justifies a return to the issue of state succession, since the question, whether a forum state need honor another state’s constitutional or administrative law view of state succession, is not clear-cut. The *Mortimer* opinion did consider this matter briefly, and concluded that neither customary nor conventional norms of public international law were dispositive; it therefore basically accepted the German municipal law on the matter. This issue, too, deserves a bit more comment.

While for the first 30 years after World War II the Federal Republic always claimed to be the exclusive successor to the prewar state, it made one important exception in the context of the already discussed London Debt Agreement. Without using its only partial territorial control in a direct legal sense to justify the distinctions there negotiated, it did use that reality to exclude from the settlements provided in that Agreement the prewar obligations of those sub-state governmental divisions now outside its control. With unification, however, that situation had to be faced. Succession to the obligations of the Weimar Republic’s obligations was not the problem; we have seen that those (and those of Prussia) had been accepted as the respon-

⁵⁶ See the SEC Release of 11.1.1954, adopting Rule X-15C2-3, which terminated the wartime suspension of trading in German (and other Axis) securities for those bonds of German private- and public-sector issuers that passed through the new validation procedures: in CCH, FSLR-Selected Releases (1940-1972). The Release provides considerable background information, and goes on to make the following declaration: “The Commission has no information when validation procedures will be established for dollar securities of issuers in that part of Germany under the control of the Soviet or Polish [sic] Governments. Therefore, the Commission ... requests that brokers and dealers continue to abstain from any activities which would tend to create a public market in these securities.”

⁵⁷ In two senses: the SEC only “requested” brokers and dealers not to make a public market; and at least with US recognition of the GDR in 1971, trading from then on might have created some renewed though diminished liquidity.

⁵⁸ It is interesting, nonetheless, that post-reunification German decisions concerning these bonds did not rely on § 10 for this prescription argument. See especially the *City of Dresden* case’s discussion of prescription, *supra* in text at note 44.

sibility of the Federal Republic from the beginning. The problem was succession at the provincial, communal and public agency levels.⁵⁹ Those became the subject of a major Chapter of the Unification Treaty between the Federal and the German Democratic Republic.

c) The Post-Unification Administrative-Law Framework

Three articles of the Treaty were central to the question.⁶⁰ Article 21 concerned those assets (perhaps better, properties) of the GDR that directly related to governmental services, and converted these to federal assets; those related to Land, communal and other agencies' services were transferred to those bodies that after unification were charged with providing these services. Article 22 dealt with financial assets of these various GDR bodies. They were transferred to the Federal Government in a trustee capacity; 50 % thereof to remain with it but to be used in support of its public missions in the new Länder. The other half, which went directly to the Länder pursuant to a population-based formula, was to be available also to those units' communal organizations.

Critical, of course, was the question of succession to the obligations of these Land, communal and agency bodies. This was regulated in Article 23 of the Treaty. It is both complex and extremely illuminating of the micro-surgery that rejoined these two German bodies politic. For present purposes the following paraphrase will suffice: The overall debt of the GDR financial household was accepted into a "special property fund" (*Sondervermögen*), a unit without separate legal capacity but for whose obligations the Federal Republic was liable. This unit was permitted to borrow funds for the purpose of meeting these transferred obligations and was to function until the end of 1993. Thereafter the federal and Länder govern-

⁵⁹ The liability of postwar "West German" municipalities was never challenged on this ground of succession once the LDA had included them in its scope. An indirect confirmation hereof is the UK litigation involving the pre- and postwar City of Munich bonds at issue in *Lively Ltd. v. City of Munich*, (1976) 1 W.L.R. 1004 (C.A. 1976) (resolving a dispute concerning the exchange rate to be applied given the unclear wording of LDA article 13).

⁶⁰ The following distinction between assets directly devoted to governmental/administrative functions (*Verwaltungsvermögen*) and assets that are not in service to specific administrative functions (*Finanzvermögen*) reflects the traditional German categorization based on budgetary considerations. See, e.g., *H.-J. Papier*, *Recht der öffentlichen Sachen*, Part VII of *Allgemeines Verwaltungsrecht* (H.-U. Erichsen/D. Ehlers [eds.], 14th ed.). This "direct/indirect" distinction clearly drives the resolution of the successor-liability problems next discussed.

ments were to carry any continuing obligations under a similar population-based formula.

Which obligations were to be taken over was the key question. Paragraph (6) of Article 23 specified that as of the date of the GDR “accession” (*Beitritt*) into the Federal Republic, the latter would stand in its place for all GDR pre-unification guaranties, warranties and related covenants; half of this outlay was in turn to be repaid to the federal government by the new Länder under the same formula. But as the *City of Dresden* case demonstrates, there was less to this than meets the eye. Two post-*Dresden* examples further confirmed that point and confirmed the (non-)succession jurisprudence,⁶¹ leading to a rejection of a general state liability of the state for harms; indeed, to support this argument the Supreme Court referred to the structure of state liability as it had existed in the legal system of the GDR.⁶²

⁶¹ BGH, Decision of 30.11.2005, 165 BGHZ 159, involved the effort of a “West German” heir of an “East German” predecessor to recover the estate’s value from the Federal Republic, successor to those assets “wrongfully” (as later held) seized by the GDR Treasury. This Article 22 claim was rejected since this obligation was not specifically connected to the seized assets but was only a delictual obligation and thus not subject to Article 22(1). The intemporal aspect of private international law is visible here but was not separately discussed. It has, however, been a bone of contention in other contexts, especially in those involving the categorization of the delictual aspects of the atrocities committed by the Third Reich. BGH, Decision of 7.2.2008, 175 BGHZ 332, involved a personal injury claim arising from the plaintiff’s exposure to radiation at a GDR military installation. Since these radar installations had become the property of the Federal Republic, obligations arising in connection with these properties also fell to it to satisfy. Following a number of other post-unification cases of greater or lesser salience, the court defined the connection between asset and liability as essentially one of contract and required the kind of “narrow and direct relationship” that exists when the acquisition or use of the asset serves a concrete, specific administrative obligation, and rejected the claim as not within that definition.

⁶² For detailed treatment of these GDR succession issues, see *L. Eckert, Öffentliches Vermögen der DDR und Einigungsvertrag*, (a doctoral dissertation included in the publication series of the Federal Ministry of Finance). Her exhaustive review of all succession and continuity issues bearing on the status of the post-1990 reconstituted Länder, *L. Eckert* (note 62), at 132 et seq., comes to the conclusion that their liability for their analogous predecessors’ debts remains uncertain. Since only two Weimar era states situated later in the GDR, Anhalt and Saxony, issued foreign-currency denominated bonds, the absence of litigation about their current versions’ liability is understandable, when contrasted with that involving cities like Dresden that had placed many such issues in foreign markets. It bears pointing out again that Weimar era debts incurred by municipalities located within the later West-German boundaries indeed were part of the LDA settlement; see, supra note 59.

d) The German Constitutional-Law Framework

Finally, two sets of rulings involving constitutional and international law bear on this succession problem at least in analogical terms. The German Federal Constitutional Court ruled in 1999 that the statutory exclusion of a right of restitution of real property, wrongfully expropriated by the GDR,⁶³ but later acquired by a private party in good faith [again, *redlich*], did not violate the equivalent of the due process and equal protection norms of German constitutional law.⁶⁴ And in a ruling concerning similar succession rights, claimed under the European Convention of Human Rights, the European Court of Human Rights also held against the original owner.⁶⁵

3. The Reception of the German Approach in the International Law Framework

How does the preceding discussion bear on the questions reserved from the earlier analysis of the *Mortimer* decision? Although this is not the place for a general discourse on the principles of customary or conventional public international law relevant to the issues of state succession,⁶⁶ in my opinion the core problem lies in the context of applying classic definitions of “state succession” to the specific case of the two postwar Germanies. Most modern state-succession issues concern states emerging out of a dissolving

⁶³ Note, again, the intemporal implications.

⁶⁴ See BGH, Decision of 23.11.1999, available at <<http://www.bverfg.de>>. Of course, in-lieu compensation was available; see R. M. Buxbaum, The von Maltzan Case: Property Rights After Three Generations, in: *Zivil- und Wirtschaftsrecht im Europäischen und Globalen Context* (FS Norbert Horn), 291, at 293 ff.

⁶⁵ *Prince Hans-Adam II of Liechtenstein v. Germany*, Decision of the Grand Chamber of the ECHR, 12.7.2001, available at <<http://cmiskp.echr.coe>>. See also *Case Concerning Certain Property (Liechtenstein v. Germany)*, ICJ, Decision of 10.2.2005, available at <www.icj.cij.org>.

⁶⁶ The exhaustive and valuable study of D. P. O’Connell, *State Succession in Municipal Law and International Law*, (two volumes) treats succession issues faced by the postwar Federal Republic of Germany but not the specific aspects of their bearing on the situation of the German Democratic Republic. Two relatively recent treatments bring these discussions into the current era and its examples, but neither provides definitive conclusions on the specific issue of continuing responsibility for predecessor-state debts. See P. Dumberry, *State Succession to International Responsibility*, (focused largely on delictual responsibility) and T.-H. Cheng, *State Succession and Commercial Obligations*. While the latter (whose author later was on an amicus curiae brief on behalf of plaintiff in the *Mortimer* case) also discusses the Draft Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1978 (U.N.Doc.A/CONF.117/14, 117/15 [vol. II]), which has not come into force, his treatment is largely about the political aspects of the treaty-making process.

earlier state (e.g., the Austro-Hungarian Empire, the Soviet Union, the Yugoslav Federation) or released by agreement or force of arms from dependent to independent entity status (e.g., Indonesia or Nigeria among many other cases of decolonization). At the other end of the spectrum lie states that continue unchanged from their previous incarnation after an interregnum created, typically, by an *occupatio belli* (e.g., Japan). The German case sits between these two types, and it is the interregnum itself – in this case one of 45 years – that placed it in the first category, but only for that period. Once rejoined⁶⁷ it returns to the second category. No precedents exist in customary or conventional international law allowing for a definitive conclusion as to the ongoing obligations of the newly reconstituted German state, and thus as to the legitimacy of the *Mortimer* court's argument.⁶⁸ This is a particularly difficult aspect of an already difficult general situation. As *Koskenniemi* succinctly puts it:

Doctrinal debate about treaty succession remains an intriguing play of rules and exceptions, presumptions and rebuttals ... The 1978 Convention can be used to support a position of continuity as well as rupture depending on whether one chooses to apply its main rule or its exception and on how one wants to characterize ... Moreover, ... it is always possible to oppose any rule it may seem to support by the point that custom in fact provides a different rule.⁶⁹

This clearly suggests the difficulty of determining whether the earlier-quoted *Mortimer* sentence –

Accession to liability by the rules of customary international law entails no action by the successor state with respect to the commercial activity at issue – the assumption of liability.

– is correct or not.

As if that were not enough, an additional complication the German history presents has to do with a state's internal status within a federal system. Again, without going into a full-scale discussion of that question, a brief contextual comment is necessary. Norms of public international law addressing foreign sovereign jurisdictional immunity distinguish subordinate

⁶⁷ Though of course not in the boundaries of the 1937 German Reich.

⁶⁸ The *Mortimer* court, opining in dicta (note 1, at 110) that no rule of public international law requires successor state assumption of a predecessor-state's debts, relies on *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000), thus ignoring or dismissing the salience of the distinction made in the text above.

⁶⁹ *M. Koskenniemi*, *State Succession: Codification Tested Against the Facts*, Hague Academy of International Law, Centre Studies and Research in International Law and International Relations, at 116.

political units of the state from the state itself, but the consequences of that distinction are not uniformly agreed upon. Indeed, the UN committee drafting the Articles on the Jurisdictional Immunities of States became engaged in an “intense debate regarding whether immunity should be extended to political subdivisions ... by reason of their entitlement to exercise sovereign authority, or by reason of their actual performance of such acts”.⁷⁰ Article 2(b)(ii) of the finally adopted Draft text of 2004 specifies what seems to be the consensus; namely, that the term “State” includes “constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity”.⁷¹ The US statute includes “political subdivisions” within the definition of “state”⁷² and is understood to cover the state of a federal system; but not more subordinate units such as municipalities. The pre-statutory jurisprudence was inconsistent,⁷³ suggesting that in the case of federal states the concept of “political subdivision” itself was to some degree open to varying interpretations.

In the present context, this suggests that while a hypothetical City of Dresden⁷⁴ could not have claimed sovereign immunity in a *Mortimer* setting, an equally hypothetical State of Saxony might have. This distinction leads to a recursive loop, however, as to the responsibility of the ultimate state sovereign, even when considered only as a matter of interstate political relations if not as a matter of personal jurisdiction. Thus *Fox* continues:

Differences have also surfaced as to whether the nature of constituent units of a federal State requires their recognition as a separate category, and the extent to which a claim against a State enterprise with segregated property [but sc. “a political subdivision” as well] affects the immunity of the State itself and its central funds.⁷⁵

In short, it well may be that the constitutional regime of that higher sovereign cannot alone serve to repel the demand of a foreign state on behalf of its subject-creditors for payment of at least the Saxony if not the Dresden

⁷⁰ *H. Fox*, *The Law of State Immunity*, 331.

⁷¹ United Nations Convention on Jurisdictional Immunities of States and Their Property (2004). It is not yet in force for lack of ratifications. Of the OECD member states only six have ratified it, only one (Switzerland) a federal state. Germany and the United States have not even signed it. See <<http://treaties.un.org>>.

⁷² 28 U.S.C. § 1603(a).

⁷³ Compare *Sullivan v. State of Sao Paulo*, 122 Fed. 355 (2d Cir. 1941) with *Molina v. Comision Reguladora del Mercado de Henequen*, 104 A. 450 (N.J. 1921).

⁷⁴ “Hypothetical” in the sense of a posited legal continuity of the 2004 city with that of 1925.

⁷⁵ *H. Fox* (note 70), at 331.

debts,⁷⁶ whether or not the parent state of these municipal subdivisions had pledged its full faith and credit in support of their former incarnations' debts.⁷⁷ Of course, the rejection of the commercial-activity exception in *Mortimer*, as it bears on Germany's obligations in the context of the "East German" bond issues, whether defensible or not, may have ended that private-litigation path to redress,⁷⁸ but does not end the matter in terms of international relations. On the other hand, whether the context in which these claims have shown up deserves the benign support of the claimants' state is a totally different matter, one that will be considered in Part IV below.

III. Foreign State Succession Issues and the U.S. Foreign Claims Settlement Commission

For the sake of comprehensiveness one other process arising in a different context but raising some of these same issues should be briefly discussed. These issues of state succession also appeared before U.S. courts, and again in the context of liability for prewar debts. A different channel had been available during the Cold War era for the presentation and payment in the United States of "East German" debt instruments. As it had in the case of other state-socialist expropriation events, the Congress legislated a process under the Foreign Claims Settlement Commission structure for the certification of claims by holders who already were US nationals at the time of expropriation of their foreign-held property, certifications that would ripen into (usually partial) payment when and if the US and that state entered into a treaty settling their respective claims.⁷⁹

⁷⁶ That seems to have been the view of US writers before World War II; see, e.g., *J. W. Garner*, *Questions of State Succession Raised by the German Annexation of Austria*, *AJIL* 32 (1938), 421, 430.

⁷⁷ It may not convince the reader, but to go further and ask whether the form of Germany's unification by means of a formal treaty between two states matters to this account of successor obligation for predecessor debts takes us into increasingly fruitless lines of inquiry.

⁷⁸ In other words, assuming a private action were brought in a US court against a German Land, the *Mortimer* analysis that led to the grant of jurisdictional immunity to Germany would presumably lead to the same outcome in favor of the Land. The dispositive finding of a lack of explicit repudiation of "its" prewar debts by the GDR undoubtedly fits the actions – or lack of actions – of any given postwar political subdivision thereof.

⁷⁹ See generally *R. Lillich*, *International Claims: Their Settlement by Lump Sum Agreements* and *R. Lillich/B. Weston/D. Bederman*, *International Claims: Their Settlement by Lump Sum Agreements 1975-1995*. The complex issues arising because property claims based on GDR expropriations could be presented both under the FCSC process and under the post-1990 German legislation lie beyond the scope of this article, although some bond claims did

The first claim filed under this 1979 program involved bonds issued by the Aktiengesellschaft Sächsische Werke (Saxon Public Works, Inc.), a Weimar era entity incorporated under ordinary corporation law but owned by the State of Saxony. The claimant, Medoff, a US subject, had not submitted the bonds for validation because this was not required for someone in her situation, in contrast with that of Abrey.⁸⁰ The issue, rather, was whether under the applicable legislation an expropriation of these bonds had occurred, expropriation being a condition of eligibility to submit a claim for certification and later payment.

Earlier programs under legislation governing other states' expropriations had been interpreted to require an express repudiation by the expropriating government, following nationalization of former private-sector issuers, of the relevant debt instruments. Since express repudiation was not always demonstrable even when service and repayment of the debts of these nationalized enterprises had ceased, uncertainty had arisen about the eligibility of such claims. The cases finally congealed around the distinction between postwar GDR treatment of prewar private-sector and of prewar state-sector enterprises. In the case of the former, their nationalization and subsequent non-payment was treated as a de facto expropriation and express repudiation was not additionally required.⁸¹ These claims were certified. In the case of public-sector issuers, restructuring of their formal status within the new governmental architecture was deemed not to be an act of nationalization since these issuers already were state-owned. As a result, "mere failure to pay" was insufficient. An express later repudiation of their obligation to service prewar debts was required in order to render these claims eligible for certification, this repudiation being deemed the equivalent of a separate act of expropriation. Typically, however, no act of express repudiation occurred and so these claims were rejected.

In a different and later country context, that of Cuba, the authorizing legislation did expressly specify that failure to service the debts of an originally state-owned issuer of this sort would be compensable without an express repudiation.⁸² Why this language was inserted into the Cuban claims

take advantage of this option. For a full review, see *J. Gruber*, Das Pauschalentschädigungsabkommen zwischen der Bundesrepublik Deutschland und den USA vom 13. Mai 1992 und seine Umsetzung in Deutschland, *ZaöRV* 64 (2004), 467 ff.

⁸⁰ *Supra* note 16.

⁸¹ Courts of the Federal Republic of course had dealt with many similar issues before the mutual recognition of the two states in 1971, and also in the context of expropriation. See the discussion of the *Spaltgesellschaft* (note 37).

⁸² It is a subtle distinction. Compare the otherwise identical language of the GDR and the Cuban statutes' definitional provisions: 22 USC § 1643A: (3) The term "property" means ...

statute⁸³ is something of a mystery, as the properties expropriated there typically had been privately owned. The post-expropriation failure to service their debts would have sufficed as an expropriation of their holders' property even under the FCSC's treatment of the German version of the process; thus their taking amounted to a compensable act in any event. Many of the GDR properties that figured in the German claims, however, had been owned by governmental units; there, in other words, the Cuban proviso would have had a significant effect.

This difference of treatment is even more puzzling when one considers the state-succession context. If, as seems clear,⁸⁴ customary norms of public international law do not obligate a successor state to assume the debts of a predecessor, it would be all the more necessary for a statute creating a claims process in a state-succession case to use a "Cuban" proviso. Otherwise those presenting a claim to their own state based on a foreign expropriation could not obtain access to the funds seized by that state to satisfy these claims – as indeed happened in this East German example. Perhaps the Congressional drafters of the GDR claims process statute simply were unfamiliar with the described problem of state succession and liability; alternatively, they may have accepted the exclusion of liability and thus of many of the claims from eligibility as a legitimate consequence of the relevant norms.⁸⁵ The usual aids to legislative intent provide no help in this instance.

debts owed by the Government of Cuba ... or by enterprises which have been nationalized, expropriated, intervened, or taken by the Government of Cuba ... and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba ... 22 USC § 1644A: (3) The term "property" means any ... debts owed by enterprises which have been nationalized, expropriated, or taken by the German Democratic Republic for which no restoration or no adequate compensation has been made to the former owners of such property. In *re Jolan Munk*, FCSC, Claim No. G-1732 (available in the archives of the Foreign Claims Settlement Commission) provides the best description of this distinction: "Under Title V of the [Cuba] Act, ... the express language '... debts owned [sic] by the Government of Cuba ...' was included in the definition of the term property ... No such language was placed in Title VI of the Act, authorizing adjudication of claims against the German Democratic Republic. It is therefore clear that neither the statutory language nor the legislative history ... indicates an intention on the part of Congress that the Commission should ignore the clear rule of international law that the non-payment of debt obligations by a foreign government does not constitute a nationalization or other taking of property under international law." Decision G-1732, 10.9.1980, 2 f.

⁸³ PL88-666, 78 Stat. 1110, codified in 22 USCS § 1643 ff.

⁸⁴ And seems to be the position of the US jurisprudence, see *supra* note 68.

⁸⁵ The total reorganization of the Land, Agency and Municipal governmental structures by the GDR created yet further complications concerning successor-entity responsibilities for debts of their geographically and functionally different predecessors, as the discussion in the *City of Dresden* case (note 44) and accompanying text, well demonstrates.

IV. Concluding Reflections

This story well illustrates the competing if not conflicting pulls and tugs of fidelity to doctrine and fidelity to admittedly vague concepts of justice. Perhaps the single aspect most salient to an appropriate resolution of these disputes is the one not articulated in any of the reviewed decisions: Can the claimants demonstrate or at least claim the benefit of the doubt concerning good faith. Putting aside the always looming question of validation, it is probable that most claimants are not original debt holders or their familial successors (including corporate successors to original corporate holders), but secondary purchasers or assignees. Is there a point over these almost epochal time periods when these claims may be considered extinguished, quite apart from prescription rules?

It is not an easy question. Secondary markets have a role to play and the “vulture” label does not per se trivialize that role.⁸⁶ Consider this fact: The original Cuban Claims bill contained a section providing that the amount determined to be due in any certification of a presented claim could not exceed the amount of consideration paid for the claim, a proviso clearly aimed at assigned or otherwise acquired claims transferred by the originally expropriated property holder.⁸⁷ That limitation did not survive to become part of the enacted statute, and its evaporation is significant. Consider also, however, the condition of the already mentioned and increasingly suspect secondary postwar markets in which these German bonds were variously available, let alone the dubious non-market channels along which these instruments traveled both in the first two postwar decades and then again in the later GDR and early post-unification periods.⁸⁸ The mutation of these venues from those resembling a curb market to those functioning as an “antiques and collectibles” store if not as a fences’ market suggests the dimin-

⁸⁶ Consider only the many current cases involving the Argentine and now the Greek defaults.

⁸⁷ See 88th Congress 2nd Session, (House) Report to Accompany H.R. 12259, 5 (quoting § 507(b) of the draft legislation).

⁸⁸ Two references buttress this comment. In addition to the previously mentioned “markets”, earlier private channels are vividly described in an account by a participant convicted for his role in their distribution; see *S. Stockdale*, *History’s Greatest Fraud*. And an investigative journalistic report of the machinations leading to the offer of these types of bonds from the vaults of the GDR suggests a good deal of fraudulent if not even criminal activity in the opening of these channels: *A. Förster*, *Schatzräuber*, “Aktien gegen Dollar” (Shares for Dollars).

ishing reasonableness of any effort to convert the revival of such dead instruments into a basis for legitimate claims.⁸⁹

That is not to say the late presentation of bonds by successors, in traditional heirship contexts, would be precluded.⁹⁰ That is, indeed, the situation that existed after unification, and as already mentioned it was resolved through administrative processes not necessarily under the earlier Federal Republic validation legislation,⁹¹ but by analogy thereto, an analogous process that included the application of typical Civil-Code prescription periods. The reports of the federal agency responsible for the review of these applications indicate that a substantial number of claims based on “East German” bond issues of the Weimar era were received and upon adequate proof of ownership paid.⁹² Whether this set of claims included claims by successors to instruments with proof of a good chain of title is not clear from these reports. That should not matter, so long as the original claimant’s title could pass muster in the terms of the earlier validation processes.⁹³

⁸⁹ It is only a thin analogy, but the classic distinction in US criminal law between the legitimacy of enacting an extension of a statute of limitations at a time when the affected persons still are under threat of prosecution under the existing one, and extending it when the affected persons have “come to rest” due to the running of the earlier prescription period comes to mind. See *United States v. Grunewald*, 353 U.S. 391 (1957). By the arrival of the new century, these bonds had come to their final resting place.

⁹⁰ In this non-market sense, the difference between financial assets and tangible real and personal property assets is irrelevant. Thus under the German statute guiding the role of the Property Commission created in the context of the Foundation for Remembrance, Responsibility and the Future, both types of assets, seized by German occupation authorities in the occupied countries, were eligible for compensation if the claims came from the usual chain of heirship. See Section 13, Gesetz zur Errichtung einer Stiftung “Erinnerung, Verantwortung und Zukunft” (Law on the Creation of a Foundation “Remembrance, Responsibility and Future”), 2.8.2000, BGBl. 2000 I, 1263.

⁹¹ The issue is a complicated one. The old validations laws continued to be operative for debt instruments issued by Weimar era units for whose debts the original Federal Republic had accepted responsibility, but not for issues of “East German” units (other than Prussia). For those, presentation was a possibility under ordinary Civil-Law provisions and in some instances under special statutes such as the Equalization of Burdens and the War Consequences statutes of the earlier postwar era. See hereto *W. Kreuer* (note 41). Even then the two additional major filters; namely, prescription and succession, as already described, seem to have been applicable.

⁹² See BADV (note 41). Direct evidence hereof, however, in the form of actual court decisions, is not available.

⁹³ As a clearly knowledgeable blogger put it in 2001, when the federal government began organizing this new process, proofs could include, in addition to the instruments themselves, public documents, proof of partial liquidation, bank certificates (of earlier holdings), excerpts from deposit confirmations, accounts of transactions or similar items (“Als Beweisunterlagen können neben den Anleiheniteln auch öffentliche Urkunden, Teilliquidationsnachweise und Bankbescheinigungen, Depotauszüge, Effektenabrechnungen oder ähnliches vorgelegt werden.”) Avator, Filhdonos, 4.6.2001, Contribution No. 3.

The question of limitations periods and their tolling becomes ever more significant in this larger policy sense. Two cases rejecting old claims though through different analyses illustrate this general problem. In *Jackson v. People's Republic of China*,⁹⁴ a suit brought in the late 1980s, the bonds in question were issued by the Imperial Government in 1911 and the opinion describes disputes concerning their renegotiation both in the 1930s and again after World War II, disputes the court did not have to resolve given its dispositive ruling but disputes typical of this kind of litigation.⁹⁵ In *Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*,⁹⁶ plaintiff, a prominent dealer in these types of securities, brought suit in the 1980s on bonds issued by the Imperial Government in 1916 that by their terms had matured in 1921. Again, given the dispositive ruling, no conclusion concerning staleness was reached, though a literary quotation with which the District Court began its opinion is worth recalling.⁹⁷ Since the Supreme Court's acceptance of the retroactive effect of the FSIA in *Altmann*,⁹⁸ however, at least indirectly challenging the basis on which both cases had been dismissed, the prescription question would come to the fore; indeed, as the earlier-reviewed *World*

⁹⁴ 794 F.2d 1490 (11th Cir. 1986), cert. den., 480 U.S. 917 (1987).

⁹⁵ "Plaintiffs introduced expert testimony in the district court attempting to show that the bonds were renegotiated in 1937 by an agreement between the Chinese Nationalist government and an American bondholders' committee representing the lenders, providing for an interim interest rate reduction and for amortization to begin again in 1949 and to be completed in 39 years from 1937, which would be 1976. Statements filed by the PRC say that renegotiation was discussed but no agreement reached. Plaintiffs say that the obligations under the bonds were "reaffirmed" by the Nationalist government just before its departure for Taiwan in 1948. The district court found that the renegotiation was never agreed upon, ... and that the bonds matured in 1951, the original maturity date." *Jackson v. People's Republic of China* (note 94), at 1491.

⁹⁶ 841 F.2d 26 (2d Cir. 1988), cert. den., 487 U.S. 1219 (1988).

⁹⁷ "- Yes well there was just one more thing here I, that I think you might ...
- That? My God, haven't seen one in years.
- No this isn't what I ... what is it.
- Russian Imperial Bond.
- You mean it isn't worth any, worth very ...
- Mister Bast, anything is worth whatever some damn fool will pay for it, only reason somebody can make a market in Russian Imperials is because some damn, somebody like your associate will buy them. Happen to know how he, how this associate of yours got into all this?
- By, well, buying and selling at first I think and then he had some stock in a company and was going to bring some kind of legal suit for, for his class, I mean he ...
- A class action?"

665 F.Supp. 323, 324 (S.D.N.Y. 1987) (quoting *William Gaddis*, JR(1975) 201). The *Carl Marks* case was, in fact, brought as a class action.

⁹⁸ *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

Holdings ruling demonstrates, has come to the fore.⁹⁹ And in the German unification context this kind of disposition (and its German judicial kin) is essentially a technical doctrinal mask for a deeper and understandable sense of ill ease about the disturbance of a long-sought repose.

This is not to say that political resolutions of these decades-old disputes do not occur.¹⁰⁰ Thus, in 1986 the United Kingdom and the Soviet Union agreed to settle pre-1939 property claims – in the case of the UK, on behalf of itself and its subjects – that included Czarist era government debt repudiated by the new Soviet government.¹⁰¹ And following agitation by bondholders' associations specializing in Czarist bonds (presumably held by the descendants of the many White Russians who fled the Bolshevik Revolution for French refuge), an even more elaborate Franco-Russian treaty was signed a decade later.¹⁰² Rejectionists immediately brought suit against the French state for limiting their claims to the fund established by the accord, but were unsuccessful.¹⁰³ On the other hand, possible efforts by these claimants to sue the foreign state directly would be another matter. In some regimes, the waiver typical of such arrangements (i.e., "waive on behalf of its nationals") would not necessarily bar direct actions by the individual claimants.¹⁰⁴ Thus, in an analogous context, the legislation establishing the

⁹⁹ But so would, and have, concerns about the outer limits of any reasonable application of norms analogous to the doctrine of equitable tolling. A good recent example of their review by the US Supreme Court is found in *Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S.Ct. 1414 (2012).

¹⁰⁰ In this connection, the theoretical debates over reasons of state compliance with norms of customary or conventional international law are illuminating, even if for the narrow purposes of this narrative I do not engage them.

¹⁰¹ Agreement ... (of 15.7.1986) concerning the Settlement of Mutual Financial and Property Claims arising before 1939, Treaty Series No. 65 (1986).

¹⁰² Labelled a Memorandum d'Accord, it was legislated expressis verbis by means of Décret no. 98-366 of 6.5.1998, JORF no. 112, 15.5.1998, 7378. It provided for the payment of US\$ 400,000,000 (n. specifically in US dollars), a sum immediately attacked as derisory, and the rejectionist French bondholders immediately commenced litigation against the state.

¹⁰³ See, e.g., Conseil d'Etat, Arrêt no. 226489, 21.2.2003, In *re M. Jean-Claude U.*

¹⁰⁴ While I put aside here the problem of the jurisdictional immunity of the foreign sovereign, it is interesting that the German Federal Constitutional Court, in the highly politicized context of claims against the Federal Republic by former slave and forced laborers who were subjects of states that had by treaty provided these waivers, ruled that the state waiver did not necessarily preclude direct private actions. See BVerfG, Decision of 13.5.1996, 94 BVerfGE 315, 331 ff. (finding that no norm of customary international law precludes victim's direct action, while reserving the question of a treaty's possible effect thereon, depending on its specific phrasing). Compare *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), cert. den.sub nom. *Suk Yoon Kim v. Ishikawajima Harima Heavy Industries, Ltd.*, 540 U.S. 820 (2003), finding the US-Japan treaty waiver provision a bar to private actions, even by subjects of a nation (Korea) that was not a party thereto. For an analysis of the international-law norms applicable to this recurring question of the agency of private parties see *R. Dolzer*, The Set-

Foreign Claims Settlement Commission certification and payments process typically and expressly stated that it did not preclude other collection efforts to obtain payment of any unpaid balance.¹⁰⁵

Finally, the gold-clause era and its treatment in the numerous decisions collected by *Nussbaum* and selectively reviewed earlier suggest another, deeper policy response. A point arrives at which the *raison d'état*, understandably discredited in reaction to its 19th Century abuse, arises in more modest garb when a state's unavoidable concern with how to dispense and ration justice for past wrongs reaches its limits. The political power of private claimants, and the politically driven considerations of the respondent state how to resolve past disturbed relationships with these claimants and their various state champions, may trump more fine-grained arguments of complete justice.¹⁰⁶ What begins as state-supported creditor-organized blocs battling a tainted and weakened state – the London Debt Agreement context is the perfect example – ends with politically feeble and perhaps politically disrespected ragtag bands hoping to hook the brass ring of equal justice through pseudo-Lockean justifications of market dignity. The catalogue of postwar German legislation bears witness to this struggle, of which the post-unification stage is only the last, less and less sensitive manifestation: Restitution laws, Compensation laws, Equalization of Burden laws, Consequences of War laws, Hardship laws, Financial Asset Validation laws, bilateral reparations treaties, Open Property-Questions laws – the list goes on and the moral energy to listen goes down.¹⁰⁷

tlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action – Lessons After 1945, *Berkeley J. Int'l L.* 20 (2002), 296.

¹⁰⁵ In lieu of detailed citations, see the most recent use of this authorization in *De Csepel v. Republic of Hungary*, 808 F.Supp.2d 113 (D.D.C. 2011), at 134 f. More generally, this also is true of the older versions of interstate agreements setting off the expropriated assets of one nation's subjects against the frozen assets of the expropriating state and its subjects, going back to the Litvinov Assignment of 1933 and to classic postwar agreements such as the Anglo-Soviet Claims Agreement of 1968. See *United States v. Pink*, 315 U.S. 203 (1942), and *R. Lillich*, *The Anglo-Soviet Claims Agreement of 1968*, *ICLQ* 21 (1968), 1 respectively. Some claims on pre-Soviet era bonds, if reduced to judgment by 1933, were paid (on a proportional basis) from the US proceeds under the Assignment, pursuant to Section 305(a) of the International Claims Settlement Act of 1949, 64 Stat. 13. See, e.g., *Erskine Rogers Claim*, USFCSC Decision of 27.2.1957, FCSC, 10th Report (1957) 180, as reported in *ILR* 26 (1958), 257 (apparently allowing compensation even in the absence of a prior judgment). Again, the availability of this route to partial satisfaction did not bar (unsuccessful) efforts to collect the balance through later litigation, as the facts of the *Carl Marks* case (note 96), suggest.

¹⁰⁶ *S. Eizenstat*, *Imperfect Justice*, (subtitle: *Looted Assets, Slave Labor, and The Unfinished Business of World War II*).

¹⁰⁷ For a fine-grained moral-philosophical treatment of this difficult point, see *N. Perez*, *Freedom from Past Injustices*, especially his conversation with *R. Epstein*, *Simple Rules for a Complex World*, in Part 5.A., "Forward-looking Considerations", at 100 et seq.

Given the eligibility criteria for pension payments to surviving spouses of pre-Third Reich civil servants who were expelled from their positions on grounds of religious or political persecution, the continuation of these obligations until approximately the year 2037 is plausible.¹⁰⁸ *Hobsbawm's* “twilight zone”¹⁰⁹ between the lived experience and the cold record of history still has not ended but its landmarks are less and less discernible.

¹⁰⁸ Since the basic compensation statutes make such a spouse or dependent eligible for pensions if born as late as early 1945 (i.e., now 67 years old), that date is actuarially speaking reasonable – and would mark the centennial year of the pre-expansion borders of the Third Reich, a date relevant for other eligibility determinations under those laws.

¹⁰⁹ *E. Hobsbawm*, *The Age of Empire* 3, (“For all of us there is a twilight zone between history and memory; between the past as a generalized record ... and the past as a remembered part of, or background to, one’s own life ...”).