

AN OVERVIEW OF LEGAL AND FINANCING ASPECTS FOR DOING BUSINESS IN HUNGARY, POLAND, AND THE CZECH REPUBLIC

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PREVIEW

- I. Introduction
 - A. Reasons For Choosing Hungary, Poland, and the Czech Republic
 - B. Goals of the Research
- II. Country By Country Analysis
 - A. Hungary
 - B. Poland
 - C. Czech Republic
- III. Assistance by the European Bank For Recovery & Development and World Bank
- IV. Multilateral Treaties
- V. Double Taxation Treaties
- VI. Effects of Import-Export
 - A. GATT
 - B. Restrictions on import-export
- VII. Conclusion

Authors' Note

Most of the original sources discussed in the article were written in languages read and spoken by neither of the authors. Thus, many of the sources are taken from Martindale that only sometimes cites reliable primary sources gleaned from English translations of the applicable codes, decree laws, statutes, and institutions prevalent in Hungary, Poland, and the former Czechoslovakia which is now the Czech Republic and Slovakia. In conjunction with Martindale, an article by Robert Drake was most helpful in gathering information on the different forms of legal entities and other aspects of each of these countries. Our subsidiary sources are generally: SCHLESSINGER ET AL., CASES, TEXT, AND MATERIALS ON COMPARATIVE LAW; FOLSOM, GORDON AND SPAGNOLE, INTERNATIONAL BUSINESS TRANSACTIONS and various articles published in the International Lawyer (a quarterly publication of the international law practice section of the ABA).

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Beyond the common law orbit, every country in Eastern Europe has adopted certain parts of the French, Swiss, German or Austrian Civil and Commercial Codes in existence before World War II. Moreover, the three countries in question, Hungary, Poland, and the Czech Republic, derive much of their post-Nazi Law both from the mix of these systems as well as socialist law. These legal frameworks, plus overlays from both European Economic Community (EC) law and what we might call the U.S. transactional laws forced the authors to rely upon rather more explanatory English footnotes than they would normally use to supplement the text. The reader must note that the cardinal rule for practicing law and for advising clients in these countries must always be to see that the U.S. lawyer is able to communicate with his or her foreign counterpart in two common languages; it is self evident that only one of these languages can be English.

I. INTRODUCTION

Despite disagreements among several commentators over the time frame required by Eastern European countries to become successful market economies,¹ few doubt that Hungary, Poland, and the Czech Republic are going through an era of substantial transition towards more democratic political systems and fundamental economic changes.² This paper focuses on these three nations as they attempt to dismantle the command economies of the past few decades in favor of market economies. This transition involves a change from state owned and controlled production in all key economic sectors to a system of mostly private ownership.³

A. Reasons For Choosing Hungary, Poland, and the Czech Republic

Hungary, Poland, and the Czech Republic have stimulated an increased level of interest world-wide due to their transitions to market economies and to their exponentially increasing levels of trade. In addition, they present special opportunities for the western business person. As pointed out in a recent report by London's Mintel,⁴ these countries attract western businesspersons who apply western sales techniques in these markets to obtain profits.⁵ Endorsement of the market and market practices is at times overwhelming. For example, when a German coffee maker, (Tchibo) offered consumers the chance to win a Volkswagen "Golf" in a sweepstakes in the

1. The term market economy refers to so-called supply and demand price determinations becoming feasible in these countries. Only then can economies of scale, normally associated with free markets become, meaningful.

2. RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL, 267-90 (4th ed. 1992).

3. *Id.*

4. *Hungary: Hungarians Like Promos*, Reuters Textline, Aug. 17, 1993, available in LEXIS, News Library, TXPRIM File.

5. *Id.*

Czech Republic, the company received 3 million entries from a population of only 10.4 million.⁶

Hungary, Poland, and the Czech Republic, have relatively developed economies in terms of skilled labor, infrastructure, and industrial tradition. This is in sharp contrast to other Eastern European countries like Bulgaria or Romania.⁷ The fledgling democracies of Eastern Europe want to quickly emulate western standards and hope to facilitate a transfer of capital, technology, and entrepreneurial spirit by encouraging western investors to form joint ventures with local enterprises. As a result, these countries enacted new legislation aimed at attracting western investment, primarily by way of joint ventures, but also in other various forms.⁸ In addition, privatization programs are under way, and governments are trying to enact laws, such as corporate and tax codes, which are needed in order to successfully conduct this transition. However, recently adopted laws are often quickly revised, adding to the difficulty of western investors seeking to implement their strategic business decisions.⁹ In addition, primarily as a result of the language barrier, western attorneys face the problem of accessibility of new legislation, and most domestic lawyers are poorly trained as well as inexperienced in handling complicated transactions.¹⁰

The aim of this article is to familiarize the reader with the legal and economic aspects of doing business in Hungary, Poland, and the Czech Republic. This article also analyzes the role of the World Bank, the IMF, and the impact of U.S. Bilateral Treaties with these countries. This will provide a "flavor" of the current status of progress that is taking place, and should help the western business person to determine which of these countries would be most adequate, from a legal and economic point of view, for the establishment of a particular business venture.

II. COUNTRY BY COUNTRY ANALYSIS

Hungary, Poland, and the Czech Republic all have several common factors. These include the fact that no permits are currently required to set up a joint venture,¹¹ and the fact that even if procedures differ in each of these countries, foreigners are able to convert their currency back into U.S. dollars.¹² However, while Hungary and Poland have had for some time treaties

6. *Id.*

7. Vincent J. Ella, *The Visegrad Countries of Central Europe - Integration or Isolation?*, 2 MINN. J. GLOBAL TRADE 229 (1993).

8. Richard C. Breeden, *The Globalization of Law and Business in the 1990s*, 28 WAKE FOREST L. REV. 509 (1993).

9. *Hungary : Budapest is Back in Business*, Reuter Textline Euromoney International Law, June 15, 1991, available in LEXIS, News Library TXPRIM File. See also Jerome Sloan, *An Observation of Hungarian Law and Development: Problems and Opportunities*, 5 TEMP. INT'L. & COMP. L.J. 77, 81-82 and n.12 (1991).

10. Sloan, *supra* note 9, at 81-82.

11. For example see Hungary Law Digest, MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, SELECTED INTERNATIONAL CONVENTIONS, HGRY-1 (1995).

12. *Id.*

with the United States, for the avoidance of double taxation only recently has one been ratified with the Czech Republic.¹³

A. Hungary

Enterprises that are owned by the state still constitute a large portion of the enterprises and business organizations that have been established in Hungary.¹⁴ These enterprises may be defined as "specially formed and operated for-profit corporations owned by the state."¹⁵

Types of Legal/Corporate Entities Found

The six major forms of business organizations in Hungary are regulated by the Act on Business Organizations (Act VI of 1988).¹⁶ Relevant aspects of each form of business organization include the following:

a) Limited Liability Companies or KFT (korlátolt felelősségi tarsaság)

As a similar entity to the German GmbH,¹⁷ the KFT's capital is divided into shares of predetermined value, which must be at least 100,000 forints for each share.¹⁸ The minimum capital requirements to set up a KFT are 1,000,000 forints.¹⁹ Its charter will specify whether each shareholder will pay his quota in cash or in kind, and the public may not participate in the purchase of these shares.²⁰ The managers of a KFT are all elected at the shareholders' meeting.²¹

13. The Czech Republic recently signed a double taxation treaty with the U.S. See *infra* note 259.

14. Hungary Law Digest, *supra* note 11, at HGRY-1. Any traveler to Eastern Europe is familiar with the pattern of privatization that has occurred in every country formerly ruled by the control economies of the former Soviet Block. See also Sloan, *supra* note 9, at 81-82 for an anecdotal account of how so called small businesses or, "ma and pa operations" have been privatized. See also Robert C. Drake, *Legal Aspects of Financing in Czechoslovakia, Hungary, and Poland*, 26 INT'L L. 505 (1992) (describing the enterprises and business organizations in Hungary).

15. Hungary Law Digest, *supra* note 11, at HGRY-7.

16. *Id.* at HGRY 4-6. See also Drake, *supra* note 14.

17. The GmbH (*gesellschaft mit beschränkter Haftung*) is a German corporation with limited liability. Germany Law Digest, MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, Ger-1, Ger-6 (1995). Analogs to these two corporate forms are found in virtually every country of the world following the non-common law orbit. That is, every country beyond Great Britain and its former colonies, dependencies, or dominions and the United States.

18. Hungary Law Digest, *supra* note 11, at HGRY-6. 100,000 forints corresponds to approximately \$1,000 U.S. dollars. *Currency Trading*, WALL ST. J., Feb. 4, 1994, at C15.

19. Hungary Law Digest, *supra* note 11, at HGRY-6. On February 3, 1994, the exchange rate between the forint and the U.S. dollar was 101.78 to U.S. \$1.00. This minimum capital requirement in dollars using this exchange rate is \$10,000. *Currency Trading*, *supra* note 18, at C15.

20. Hungary Law Digest, *supra* note 11, at HGRY-6.

21. Drake, *supra* note 14, at 513.

b) Companies Limited by Shares or RT (reszvenytarsaság)

An RT matches the German AG²² and its capital is divided into shares with a predetermined nominal value.²³ Foreign persons or entities may own only registered shares, but shares of an RT may be issued in either bearer or registered form.²⁴ The types of shares issued may include ordinary shares, preference shares, and convertible bonds.²⁵ The shareholders elect the directors, the members of the supervisory board,²⁶ and the auditor.²⁷

c) Joint Enterprise or KV (kozós vallalat)

A KV is a for-profit, unlimited liability corporation.²⁸ All partners are liable for the debts and obligations of the KV in proportion to their share.²⁹ A KV is a separate legal entity.³⁰

d) General Partnership or KKT (kozkereseti tarsaság)

In Hungarian law, the KKT qualifies as a business corporation,³¹ but it is very similar to the American notion of general partnership.³² Partners of a KKT have full joint and several liability for the obligations of the KKT.³³ They are also entitled to manage and represent the partnership unless the partners agree otherwise in the contract of association.³⁴

22. *Id.* The German AG (*aktiengesellschaft*) is a German corporation that is limited by the number of shares that the corporation can issue. Germany Law Digest, *supra* note 17, at Ger-5.

23. *Id.*

24. *Id.*

25. *Id.*

26. The notion of the European supervisory board can be distinguished from a board of directors of a U.S. corporation. The supervisory board votes on the election of the directors. Also important is the fact that 1/3 of the supervisory board is often made up of worker representatives or workers themselves. The remainder of the supervisory board consists of management representatives.

27. Drake, *supra* note 14, at 513. See also Hungary Law Digest, *supra* note 11, at HGRY-6.

28. Hungary Law Digest, *supra* note 11, at HGRY-6. BLACK'S LAW DICTIONARY defines a joint enterprise corporation as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking... However, unlike a "regular" corporation where liability of shareholders is limited, a joint enterprise subjects its partners to unlimited liability, or liability beyond the share that they invested in it. BLACK'S LAW DICTIONARY 342 (6th ed. 1990).

29. Drake, *supra* note 14, at 513.

30. *Id.*

31. Hungary Law Digest, *supra* note 11, at HGRY-6. A business corporation generally refers to a corporation formed in order to transact business in the widest sense of that term, including every form of commercial and industrial activity with a pecuniary purpose, as opposed to other corporations, such as religious or charitable, which are grouped as "non-profit."

32. In the United States general partnership is one in which all of the partners carry on their trade or business for the joint benefit and profit of all the parties concerned. All of the partners share in the management, profits, and losses of the partnership. BLACK'S LAW DICTIONARY, *supra* note 28, at 1009.

33. *Id.*

34. *Id.* See Drake, *supra* note 14, at 514.

e) *Limited Partnership or BT (beteti tarsaság)*

This form has one or more limited partners.³⁵ As in the KKT, there is no requirement for a minimum amount of stated capital and procedures for its distribution.³⁶ Here, at least one partner must have unlimited liability and at least one partner must have limited liability.³⁷ The limited partner's liability is limited to the amount of capital contribution.³⁸ Full partners must actively participate in the activities of the BT and limited partners may not manage the BT.³⁹

f) *Business Association*

Although less important,⁴⁰ this form of business entity refers only to non-profit, non-limited (full or joint) liability corporations organized for purposes of lobbying, organizing, and coordinating joint activity in the interest of someone's business.⁴¹

2) The Hungarian Commercial Code

Hungarian commercial law is not incorporated in a single code.⁴² The Business Corporation Act (BCA)⁴³ regulates for-profit business organizations.⁴⁴ This act is based mainly on Swiss and German models, and does not affect corporations that were formed prior to its enactment.⁴⁵ In addition, the BCA governs private entrepreneurs,⁴⁶ including the business person's legal relations.⁴⁷ Foreign trade is regulated by the Act⁴⁸ as well as by several post communist executive orders.⁴⁹ Domestic trade, on the other hand, is governed by the BCA of 1978:I.⁵⁰

Fund Raising:

a) *Loans*

Domestic Hungarian organizations may borrow freely from domestic banks or foreign joint venture parties.⁵¹ Pursuant to the Code of the Planned

35. Hungary Law Digest, *supra* note 11, at HGRY-6.

36. *Id.* at HGRY-7.

37. Drake, *supra* note 14, at 514.

38. *Id.*

39. *Id.*

40. Hungary Law Digest, *supra* note 11, at HGRY-6.

41. *Id.*

42. *Id.* at HGRY-3.

43. The Business Corporation Act refers to the Act of 1988:IV, as amended several times.

44. Hungary Law Digest, *supra* note 11, at HGRY-3.

45. *Id.* at HGRY-5.

46. The BCA of 1990:V.

47. Hungary Law Digest, *supra* note 11, at HGRY-5.

48. The BCA of 1974:III.

49. Hungary Law Digest, *supra* note 11, at HGRY-5.

50. *Id.* at HGRY 6-8.

51. Drake, *supra* note 14, at 517.

Foreign Exchange Management⁵² and the Decree of the Minister of Finance,⁵³ all Hungarian organizations need permission from the National Bank of Hungary to accomplish the following:

- (a) to borrow from foreign financial institutions or other lenders outside Hungary (such a loan is called a *financ hitel*); (b) to enter into leases with foreign financial institutions or other lessors outside Hungary; and (c) to grant a mortgage over any of their real property in Hungary to foreign persons or entities.⁵⁴

b) *Equity Capitalization and the Secondary Market*

Raising money in foreign capital markets is an important aspect of doing business in Eastern European countries. When Hungarian companies want to issue shares to the public outside of Hungary, the prior permission of both the Securities Supervisory Board⁵⁵ and the National Bank of Hungary is required.⁵⁶ However, to deal with securities outside of Hungary the securities must be listed in Hungary.⁵⁷

c) *Foreign Companies*

Companies based outside of Hungary may issue securities in Hungary.⁵⁸ Securities that are issued outside of Hungary may be traded in Hungary if permission is obtained from the Securities Supervisory Board and the National Bank of Hungary.⁵⁹

d) *Offers of Securities that are Made to the Public*

Offers of securities may be made through a prospectus that has been approved by the Securities Supervisory Board.⁶⁰ The prospectus must contain, among other things, information relating to its management and business, financial information not older than six months, and certified by domestic auditors,⁶¹ information on the current and any previous issue, and an assessment of the major risk factors in the company's business.⁶² Misleading statements in the prospectus will result in liability for the company, its directors, and its brokers.⁶³

52. Law Decree No. 1 of 1974.

53. No. 1/1974 (I/17).

54. Hungary Law Digest, *supra* note 11, at HGRY 7-10. See Drake, *supra* note 14, at 526.

55. See *supra* note 26 and accompanying text.

56. Drake, *supra* note 14, at 516.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* See Hungary Law Digest, *supra* note 11, at HGRY-11.

e) *Budapest Stock Exchange*

The Budapest Stock Exchange was reopened in 1990⁶⁴ and very few shares are currently listed.⁶⁵ It must be noted that the Exchange Index showed overall returns of more than 100% in 1993.⁶⁶ The Act of 1990:VI regulates the stock exchange.⁶⁷

To be listed on the stock exchange at least 25% of the value of a company's share capital must be subscribed for by the public.⁶⁸ Each listed company must maintain a minimum of 5,000 floating shares and a minimum market capitalization amount of 200 million forints,⁶⁹ (approximately \$2 million U.S. dollars).⁷⁰

4) Professional Infrastructure

a) *Accountants*

In order to gain international acceptance, recent legislation includes accounting standards that are modeled on EC accounting principles and international accounting standards.⁷¹ These requirements include mandatory bookkeeping, annual reporting, and often, publication of accounting information which provides a "realistic" picture of the business organization's financial position.⁷² Many western accounting firms are in the process of establishing offices in Hungary. However, after the switch to western accounting standards, *Budapest Week* found that there are only approximately 500 qualified accountants competent to handle the substantial workload required by the new accounting standards.⁷³

b) *Lawyers*

Lawyers in Hungary suffer from an affliction common to lawyers in most state-run economies: they are only trained to practice law to the extent required by the locality or the state.⁷⁴ Some attorneys speak one or more languages, although the accuracy of their fluency is disputed.⁷⁵ Legal resources, such as libraries and legal secretaries (very few of which speak second lan-

64. The Act of 1990:VI regulates the stock exchange. Drake, *supra* note 14, at 516.

65. Drake, *supra* note 14, at 516.

66. *Market Watch* (CNBC Network broadcast, Mar. 19, 1994).

67. Drake, *supra* note 14, at 516.

68. *Id.*

69. *Id.* See *Hungary Law Digest*, *supra* note 11, at HGRY-11.

70. *Currency Trading*, *supra* note 18, at C15.

71. Chris Clarke, *Hungary: EC Principles and International Standards Influence New Accounting Law*, Reuter Textline: ACCOUNTANCY, Jan. 5, 1992, available in LEXIS, News Library, TXPRIM File.

72. *Id.*

73. Nigel Ash, *Hungary: Privatization Programme Needs an Overhaul*, Reuter Textline: EUROMONEY SUPPLEMENT, Apr. 15, 1992, available in LEXIS, News Library, TXPRIM File.

74. *Hungary: Budapest is Back in Business*, *supra* note 9.

75. Sloan, *supra* note 9, at 81-82

guages), seem unequipped to support business from the west.⁷⁶ However, as in other Eastern European nations, more and more law firms from the west are opening offices in Hungary to facilitate the ever-increasing number of international business transactions.⁷⁷ While there are considerable expenses and obstacles associated with the start-up of a foreign office, several firms believe they gain more credibility by being in Hungary and are better able to serve their clients doing business in the country.⁷⁸

5) *Privatization Programs*

State-owned enterprises may be transformed into forms of business organizations.⁷⁹ This process is governed by the Act on Transformation of State-Owned Enterprises and Economic Associations.⁸⁰ The State Property Agency⁸¹ supervises the transformation process.⁸²

The programs of privatization of state-owned property include the following:

- 1) A privatization program launched in 1990 managed by the State Property Agency, focusing on obtaining investments from foreign investors in the pharmaceutical, hotel, department store, tourist bureau, and manufacturing sectors.⁸³
- 2) The means for the privatization of small state-owned operations in the fields of retail sales, hospitality, and consumer services.⁸⁴
- 3) A program where state-owned enterprises and assets can be privatized on an ad hoc basis by foreign investors purchasing state-owned enterprises or assets from the State Property Agency.⁸⁵

One way for individuals to participate in privatization is through the Compensation Act. The Act allows individuals who can prove that they suffered an economic loss as a result of the nationalization of land and other

76. *Id.*

77. *Hungary: Budapest is Back in Business*, *supra* note 9. Examples of such law firms include Weil, Gotshal, and Manges; Baker & McKenzie, and Shearman and Sterling from the United States, and some Austrian firms, notably Weiss-Tessbach and Benn-Ibler, and London's McKenna and Co. *Id.*

78. *Id.*

79. Drake, *supra* note 14, at 515.

80. *Id.* Act XIII of 1989.

81. Drake, *supra* note 14, at 515. The state property agency owns all the property formally belonging to the state and sells some of it in various privatization plans and supervises this transformation process. See also *Hungary Law Digest*, *supra* note 11, at HGRY-8.

82. Drake, *supra* note 14, at 515.

83. *Id.*

84. *Id.* This is provided in the Act No. LXXIV of 1990.

85. *Id.* at 516. See *Hungary - Privatization*, NAT'L TRADE DATA BASE, Mar. 1994. See A. Harmathy, *The Right to Own Property*, Human Rights in Today's Hungary, Mazon KFT, Budapest 1990. The problem is seemingly simple: after the Nazis, the Soviets, and the local government ceased various private properties the now post-Communist government is desirous of making retribution to the dispossessed. The result is that virtually every piece of land in Hungary, as well as every business, is now in the process of privatization in one form or another. Included in the privatization process is dealing with claims some of which are over 50 years old. Additionally, many claimants have long since passed away.

capital assets to be eligible to receive compensation vouchers.⁸⁶ These vouchers can be used to purchase shares in privatized state-owned enterprises and land set aside by the government for this purpose.⁸⁷

6) Foreign Investment

Because of Hungary's emphasis on foreign capital in its restructuring, neither investments nor services are subject to major restrictions. Foreign investments enjoy favorable tax treatment.⁸⁸ Moreover, foreign investors are not bound by certain central regulations on capital repatriation.⁸⁹

a) Joint Ventures

Establishment of a joint venture does not require permits.⁹⁰ Since foreign individuals and firms generally remain excluded from purchasing land, joint ventures with Hungarian partners are commonly used for this purpose.⁹¹

b) How Foreign Firms Acquire Assets

Generally, there are no restrictions for a foreign person or corporation to buy shares in an existing business organization even if the level of foreign ownership is 100%.⁹² However, both limited liability companies and joint stock companies must be registered at the Court of Registration and must meet their minimum capitalization requirements.⁹³

7) Currency Exchange

The forint is not freely convertible, but Hungarian officials have noted their interest in making convertibility a long term objective.⁹⁴ However, foreign investors do not need permission to transfer dividends or the proceeds from the sale or liquidation of an investment in the same currency in which the investment was made to an account in a bank outside Hungary.⁹⁵ Foreign employees of a joint venture do not need a permit to convert and transfer outside of Hungary up to 50% of their after tax income in their currency of permanent domicile.⁹⁶

86. Drake, *supra* note 14, at 515-16.

87. *Id.* at 514.

88. See *infra* notes 119-24 and accompanying text for a discussion of that tax structure in Hungary.

89. *Hungary: Trade Services Guide*, Reuter Textline: EUROMONEY SUPPLEMENT, Mar. 1993, at 18.

90. Drake, *supra* note 14, at 516.

91. *Id.* at 518.

92. *Id.* at 516.

93. *Hungary: Trade Services Guide*, *supra* note 89.

94. *Hungary - Economic Policy and Trade Practices*, NATIONAL TRADE DATA BANK, Feb. 1991, available in LEXIS, Europe Library, Hungary File.

95. Drake, *supra* note 14, at 517.

96. *Id.*

If a foreigner invests capital in a joint venture, the joint venture may hold the currency in a foreign exchange account, or it may be used to pay for the imported goods.⁹⁷ However, permission of the National Bank is needed before a Hungarian organization may open a bank account outside of Hungary.⁹⁸ Thus only commercial banks with ties to the specific business venture are authorized to deal with foreign exchange transactions, and only they may open bank accounts outside Hungary for their customers.⁹⁹

8) Property Law

The Civil Code¹⁰⁰ and the Act on Land¹⁰¹ regulate real property ownership.¹⁰² They provide that 1) a foreign entity may acquire real estate after obtaining permission of the Ministry of Finance,¹⁰³ and 2) a joint venture can acquire or lease real property in connection with the operations specified in its constitutional documents.¹⁰⁴

9) Pledgeability of Assets

A security may be taken over any negotiable or transferable assets, whether tangible or intangible.¹⁰⁵ To create the security, an instrument must be in writing.¹⁰⁶ In order to evidence the execution of such instruments it is advisable to notarize the instruments,¹⁰⁷ including the underlying agreement.¹⁰⁸ To provide security, the pledgor must grant a pledge and deliver the physical possession of the pledged assets to the pledgee or to a mutually acceptable third party or grant an assignment by way of security.¹⁰⁹ However, a pledge cannot be granted over only part of an asset.¹¹⁰ There cannot be

97. *Id.*

98. *Id.* at 518.

99. *Id.*

100. CODE CIVIL art. IV.

101. LAND ACT art. I.

102. Drake, *supra* note 14, at 517.

103. *Id.*

104. *Id.* In a civilian legal system, the constitutional documents would include the charter of the venture together with, where applicable, relevant documents of the constitutive nature such as powers of attorney (or *vollmacht* in German law) that interested parties may find in either the Commercial Register or the Land Register, or in both.

105. *Id.* at 518.

106. *Id.*

107. The "notary" concept in Hungary, Poland, the Czech Republic and other countries differs considerably from the United States use of notaries. While most people without legal training are able to hold a title of notary in the United States, in other countries they must study law before they can become a notary. Notaries in these countries do not argue in court. They are members of the notary association, they set up structures of incorporation, prepare wills and pre-nuptial agreements, and are registrants of all sorts — they have possession of a number of original documents, including wills and corporate charters.

108. Drake, *supra* note 14, at 518.

109. *Id.*

110. *Id.*

more than one pledge for each pledged asset.¹¹¹ This is different from the U.S. practice where different security interests can be created in the same item.¹¹² To determine priorities between security interests, one must look at the respective times at which competing securities were created.¹¹³ However, the law has no public procedure or place where pledges or assignments by way of security can be registered other than for the registration of mortgages in the land registry.¹¹⁴ This system may create a lack of efficiency in the method used for determining priorities.¹¹⁵

10) Real Property

Mortgages may be created and must secure a stated maximum amount of money.¹¹⁶ They are rendered null and void if they entitle the mortgagees to possess, use, or collect the proceeds from the mortgaged properties for any reason other than a default in payment.¹¹⁷ Mortgages must be filed with the appropriate land registry.¹¹⁸

11) Withholding Taxes

The Personal Income Tax Act of 1988 calls for withholding taxes when a dividend is paid on shares, or interest is paid on loans, bonds, or other debt instruments.¹¹⁹ The payer must deduct and pay an amount equal to 20% of such dividends or interest.¹²⁰ Moreover, Hungarian organizations conducting business in Hungary must pay corporate tax on profits earned in Hungary at a 40% rate.¹²¹ However, tax incentives are offered to foreign investors that own more than 30% of an organization.¹²² If a company has 50 million or more forints and operates in certain defined areas of major economic importance (including certain areas of the tourism, telecommunications, electronics, engineering, vehicle manufacture, and pharmaceutical industries), it will enjoy a full tax break for the first five years and a 60% reduction on its tax bill for the following five years.¹²³ Additionally there are

111. *Id.*

112. U.C.C. at art. IX and e.g. cars, tires, and radios.

113. *Id.*

114. *Id.* at 518-19.

115. This article only touches upon specific facts concerning the related subjects of real property, mortgage lending, privatization laws, joint ventures requisites, the acquisition by foreign firms' local assets, the pledgeability of those assets and related enforcement rules concerning procedures involving arbitration, bilateral or multilateral treaties, investment guarantees or conflict of law rules to be applied to dispute resolutions, a more detailed study can be found in Van Gorp, *Comments of Collateral in Eastern Europe*, 28 INT'L LAW. 83 (1994).

116. Drake, *supra* note 14, at 519.

117. *Id.*

118. *Id.* See Hungary Law Digest, *supra* note 11, at HGRY-11.

119. Drake, *supra* note 14, at 520.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

treaties for the avoidance of double taxation with the United States and with some EC countries such as France, Germany, Italy, Luxembourg, and Great Britain.¹²⁴

12) Choice of Law

Business agreements involving one or more foreign persons may provide for the choice of law and submission to a foreign jurisdiction.¹²⁵ This is as long as the law chosen is that of a place having substantial relationship to the parties and to the transaction, and is not contrary to a strong public policy of the place where the suit is brought.¹²⁶ Also, local law permits prorogation clauses.¹²⁷

B. Poland

Poland has retained much of the law on the books such as it was in the 1930s.¹²⁸ Since both the civil and commercial codes were largely adaptations from the German and French Codes, those codes offered no place for judicial interpretations of those laws which would have binding effect in future cases. That is, Polish lawyers are not in the habit of nor are required to cite cases. Amendments to either of the codes are, by tradition, left entirely up to the legislature, whose acts are not subject to interpretation by any court, or the executive which can in certain cases only change the code by decree.¹²⁹

1) Types of Legal/Corporate Entities Found

While most of the laws that govern Polish business and commerce have been adopted only recently, fundamental aspects of company and commercial life continue to be governed by the Polish Commercial Code of 1934.¹³⁰ The Polish legal system recognizes two major types of business corporations: (1) the joint stock company, and (2) the limited liability company.¹³¹ The Polish version of both types of companies is based on the continental European model developed prior to World War II.¹³² Both have legal personality, and in each case, the liability of investors is limited to the amount of their contribution to the company's equity.¹³³ A limited liability company may

124. See Hungary Law Digest, *supra* note 11, at HGRY-10.

125. Drake, *supra* note 14, at 520.

126. *Id.*

127. *Id.* See Hungary Law Digest, *supra* note 11, at HGRY-10.

128. Drake, *supra* note 14, at 522.

129. See Poland Law Digest, MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, at POL-6, 15.

130. *Id.*

131. *Id.* at POL-9.

132. Drake, *supra* note 14, at 522. The structure of Polish companies will be familiar to western lawyers and business people largely because the Polish Commercial Code has survived World War II and has been intact from 1939 until the present with some additions made in 1989. Poland Law Digest, *supra* note 129, at POL-1.

133. *Id.*

have one or more shareholders.¹³⁴ Companies can be established by one or more persons. They are managed by a board of directors and in limited area specified by the Codes, by the shareholders.¹³⁵ The management of a joint stock company is overseen by a supervisory board¹³⁶ elected by the shareholders.¹³⁷

These two types of companies are incorporated by registration of their statutes in the Commercial Company Register.¹³⁸ The Company Statute is a document that is signed by the subscribing shareholders and supervised by a Polish Notary before it is submitted to the Commercial Registration Court for approval.¹³⁹ The Statute must be properly notarized, otherwise it will be considered null and void and thereby negate the company's legal status.¹⁴⁰

2) Fund Raising

Joint stock companies may raise equity capital either by issuing shares to the public or by private placement.¹⁴¹ Polish law has no regulation of private placements of shares other than the essential general provisions related to issue and registration of shares found in the Commercial Code.¹⁴² Methods other than the traditional loans and notes from local banks are available in Poland in order to raise funds necessary for business ventures. These include the ability to raise equity capital for joint ventures, equity capital for foreign companies, or loans by foreign banks.

Foreign companies may offer shares in Poland.¹⁴³ Public offerings must first obtain the consent of the Ministry of Industry and the Securities Commission.¹⁴⁴ Foreign banks may make loans to Polish government-owned entities and privately-owned entities.¹⁴⁵ Local businesses may also borrow up to the equivalent of one million U.S. dollars.¹⁴⁶ These loans will most likely be made in, and must be repaid in the currency of the country where the foreign lending banks are located.¹⁴⁷ However, Polish borrowers must convert loans that are made in foreign currency into local currency.¹⁴⁸ Before repayment of the loan, Polish borrowers may reconver the Polish currency into the currency of their indebtedness.¹⁴⁹

134. *Id.*

135. Drake, *supra* note 14, at 522.

136. *Id.*

137. See *supra* note 26 and accompanying text.

138. Drake *supra* note 14, at 522.

139. *Id.*

140. *Id.*

141. *Id.* at 523.

142. *Id.*

143. *Id.* at 524.

144. *Id.*

145. *Id.* at 527.

146. *Id.*

147. *Id.*

148. *Id.*

149. Poland Law Digest, *supra* note 129, at POL-12.

3) Professional Infrastructure

a) Accountants

U.S. accounting firms in Warsaw have increased the quality of accounting services for U.S. businesses in Poland.¹⁵⁰ As put by Neil Yeomans at the Warsaw office of the accounting firm of Arthur Andersen, "the Polish accounting system, in terms of catching data, is very good. But there is a series of steps needed to put it into a format that can be understood."¹⁵¹ Recent legislation seeks to bring Polish accounting in line with Western standards.¹⁵² Firms must be regulated differently in private enterprise than in a centrally planned economy, and accountants also play a different role.¹⁵³ The evolution towards an efficient accounting system in Poland will take time to develop. Western business people are horrified at the lack of basic information available about the activities and performance of these companies, such as determining the "cost of production" of a given product line.¹⁵⁴

b) Lawyers

Although Poland's legal system is limited because of its state-run economy, a panel of European lawyers recently investigated improvements in Poland's commercial arbitration law.¹⁵⁵ This panel found that the country's handling of trade disputes met high standards. This is interpreted as a signal that foreign business people can expect fair treatment.¹⁵⁶ This is no reason, however, to rush to do business in Poland. Due to the relative novelty of the market, there remains a lack of legal expertise in international trade. Nevertheless, as trade continues to increase, more U.S. and major Western European countries will establish law offices in Poland. This will facilitate access to competent legal advice in Poland. Legal education in Poland is also undergoing numerous changes in order to adjust to a market economy.¹⁵⁷

Foreign business people with immediate needs can engage foreign law firms with offices in Poland.¹⁵⁸ However, legal advice will be limited for some time, given that western firms must often rely on the advice of local

150. See Lucy Kimbell, *Accountancy: Adding Up the Western Way*, THE WARSAW VOICE, Mar. 22, 1992, available in LEXIS, Europe Library, Poland File. See Poland - Country Marketing Plan FY '94, NAT'L TRADE DATA BANK, Oct. 1993, available in LEXIS, Europe Library, Poland File.

151. Gavin Gray, *Poland: Waiting For Good Assets*, Reuter Textline, EUROMONEY CENTRAL EUROPEAN, June 1, 1992, available in LEXIS, Txtline Library, Txtree File.

152. Kimbell, *Accountancy: Adding Up the Western Way*, *supra* note 150.

153. *Id.*

154. *Id.*

155. Jerzy Wandecki, *European Arbitration Group: Solving Continental Spats*, THE WARSAW VOICE, Dec. 12, 1993, available in LEXIS, Europe Library, Poland File.

156. *Id.*

157. See Zbigniew Gostynski & Alan Garfield, *Taking The Other Road: Polish Education During the Past Thirty Years*, 7 TEMP. INT'L & COMP. L.J. 243 (1993).

158. See Ludwik Allerhand, *Real Estate Development: Tips For the Foreigner*, THE WARSAW VOICE, Feb. 20, 1994, available in LEXIS, Europe Library, Poland File. Among these are Salans Hertzfeld & Heilbronn, as well as Wardynski and Partners. *Id.*

counsel. Until the Polish legal system is fully developed and its lawyers and staff become more accustomed to international trade and concerns of foreign investors, efficiency will be scarce and legal advice given by purely local counsel cannot be taken with great confidence.

4) Privatization

The Privatization Act, adopted in July 1990, helps achieve the Polish government's stated goal of privatizing all of its state-owned enterprises.¹⁵⁹ Privatization can occur in a number of ways as listed below.

a) Sales of Shares

When privatization of a state-owned enterprise is effected through the sale of shares, the enterprise is generally transformed into a limited liability company or a joint stock company.¹⁶⁰ The shares of each newly formed company will be held by the State Treasury.¹⁶¹ Later, the shares are sold either: (i) on an auction basis, (ii) on a public offer basis, (iii) on a negotiated basis following a public invitation to tender.¹⁶² Once a company has been privatized and transformed, the company is governed by and subject to all the provisions of the Commercial Code.¹⁶³

All Polish citizens living in Poland are entitled to receive "privatization vouchers" to be used to acquire shares of joint-stock companies created through the transformation of state-owned enterprises.¹⁶⁴ Poles may redeem the vouchers to acquire shares in investment funds and thus acquire assets of the privatized enterprises.¹⁶⁵ This is somewhat similar to the Czech Republic and Hungary's program of issuing "coupons" to parties whose properties were expropriated and are now entitled to receive credits in the privatization process.¹⁶⁶ Holders of the "coupons" from these countries may elect to deposit them in mutual funds where their assessed coupon value will be invested in several areas of the economy and in several industries.¹⁶⁷

b) Liquidation

A state-owned enterprise may be liquidated and its assets disposed of by means of a sale, lease, or contribution to the capital of another existing or newly formed company after approval of the Minister of Ownership Changes.¹⁶⁸ Although originally intended for the privatization of small state

159. Poland Law Digest, *supra* note 129, at POL-20.

160. Drake, *supra* note 14, at 524.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 508.

168. *Id.* at 525.

enterprises, this method is generally quicker and simpler and it is increasingly applied to larger companies.¹⁶⁹

5) Foreign Investment

a) Joint Ventures

The Polish Government has created some new advantages for some foreign parties wishing to invest in Poland.¹⁷⁰ The Act on Companies with Foreign Participation further liberalizes the investment regime, although concerning taxes it favors larger enterprises and removes, in the case of smaller companies, the tax incentives previously available to all joint ventures with foreign participation.¹⁷¹ The Act attempts to remove some of the procedural obstacles that previously faced a foreign party wishing to form or invest in a Polish company, and to increase the amount of profit that the foreign investor can repatriate.¹⁷²

b) How Foreign Firms Acquire Assets

A foreign party is not required to obtain a permit to incorporate a Polish company or to acquire an existing company.¹⁷³ There are, however, permit requirements to those companies which will operate in the fields of: (1) operation of seaports and airports; (2) real estate development; (3) practice of law.¹⁷⁴

In addition, permits must be obtained if the shares of a foreign corporation are to be acquired by a state-owned firm, and this entity will make in-kind contributions in order to cover for the costs of the initial capitalization.¹⁷⁵ Otherwise, companies falling outside of these permits and foreign companies whose shares are bought by state-owned companies will no longer require a permit.¹⁷⁶ When a permit is necessary, the Minister of Ownership Change will provide one.¹⁷⁷

6) Currency Exchange

In Eastern Europe, Poland was the first to introduce the free internal convertibility of its currency.¹⁷⁸ As a result, the rate of exchange is subject to market forces though it fluctuates in a relatively narrow range.¹⁷⁹ Currently, the zlotys stands approximately 21,954 to the U.S. dollar.¹⁸⁰

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 525-26.

175. *Id.* at 526.

176. *Id.*

177. *Id.*

178. *Id.* See VanGorp, *supra* note 115, at 86.

179. Drake, *supra* note 14, at 527.

180. This figure is accurate as of February 4, 1994. *Currency Trading*, *supra* note 18, at C15.

7) Property Law

Poland has a comprehensive legal regime dealing with land transfer, including mortgages and a well-developed system of land registration and transfer.¹⁸¹ Foreign parties may not acquire land, but Polish companies that have one or more foreign minority shareholders may do so with the permission of the Ministry of the Interior.¹⁸²

8) Pledgeability of Assets

Poland is considering comprehensive legislation to provide for the granting and enforceability of a security interest. Currently, security interests can be created over tangible, intangible, and real property.¹⁸³ Security may be taken by a creditor over shares by way of lien or with the certificates held by the creditor.¹⁸⁴ Also, real property that has survived in private ownership can be mortgaged.¹⁸⁵ A mortgage over privately-owned land can be registered against the title to such land in the land registry in the district in which the land is located.¹⁸⁶ Priorities of competing mortgages are determined by the respective dates on which they were created.¹⁸⁷

9) Withholding Taxes

The maximum rate of tax withholdings is 30%.¹⁸⁸ However, double taxation treaties provide that withholding tax on interest paid to investors outside Poland may be reduced or eliminated.¹⁸⁹

10) Choice of Law

Parties to a contract are free to choose any law to regulate their contract as long as such law is related to an obligation of the parties.¹⁹⁰ Choice of law is also guaranteed by the regulations of arbitration (including international law or choice of law clause and prorogation clauses).¹⁹¹ Specific rules apply in cases where parties failed to specify their choice of law.¹⁹² For example, if the parties are domiciled within the same jurisdiction, the law of that jurisdiction applies.¹⁹³ If not, the law of the country where the contract was consum-

181. Drake, *supra* note 14, at 527.

182. *Id.* at 527-528.

183. *Id.* at 528; see Poland Law Digest, *supra* note 129, at POL-17, POL-19.

184. Poland Law Digest, *supra* note 129, at POL-19.

185. Drake, *supra* note 14, at 529.

186. *Id.*

187. *Id.*

188. *Id.* at 527.

189. *Id.* See also *infra* note 261 and accompanying text discussing "Treaties for the Prevention of Double Taxation With the United States."

190. Poland Law Digest, *supra* note 131, at POL-7.

191. *Id.*

192. *Id.* at POL-7-8.

193. *Id.*

mated applies, providing that it is consistent with that country's public policy.¹⁹⁴

C. Czech Republic

1) Types of Legal/Corporate Entities

The limited liability company (*spolecnost s rucenim omezenym*) and the joint stock company (*akciová společnost*) are the most used corporate entities.¹⁹⁵ The shareholders in a limited liability company are not personally liable to the company's creditors.¹⁹⁶ The only obligation of shareholders of a limited liability company is limited liability to any amounts unpaid for by their shareholdings.¹⁹⁷ Other entities that are less commonly used include both a public commercial company (*verejna obchodni' spolecnost*), and a limited partnership (*komanditni' spolecnost na akcie*) which is equity capitalized and operates under general partner management.¹⁹⁸

Limited liability companies and joint stock companies can have only one shareholder, but at least two shareholders are required for both a partnership and a public commercial company.¹⁹⁹ Different people can manage public commercial companies and limited liability companies.²⁰⁰ Management can include directors, executive officers, or shareholders, as determined by the shareholders.²⁰¹ However, there is a Commercial Code requirement that the joint stock company be governed by a supervisory board, while a limited liability company is not required to appoint a supervisory board.²⁰²

2) The Czech Republic's Commercial Code

As discussed above, the Commercial Code regulates corporate entities. Enacted on January 1, 1992, it has limited retroactive application.²⁰³ This Code has replaced several other codes including the existing Economic Code, the Joint Stock Company Act, the Foreign Trade Code, and the Act on Enterprises with Foreign Company Participation (generally known as Joint Venture Law).²⁰⁴ Prior to its enactment, the laws were very brief and silent on many issues that are usually addressed by other jurisdictions.²⁰⁵

194. *Id.*

195. Drake, *supra* note 14, at 505.

196. *Id.* at 506.

197. *Id.*

198. *Id.* at 505.

199. *Id.* at 506.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 505.

204. *Id.*

205. *Id.*

3) Fund-Raising

The Czech Republic does not have a stock exchange, but the legislation providing for the establishment and operation of one is currently being prepared.²⁰⁶ However, foreign companies may offer shares to Czech persons.²⁰⁷ Also, a company can provide financial assistance to investment firms financing for the acquisition of the shares in such companies.²⁰⁸ Lastly, state-owned enterprises and privately owned companies may borrow money from foreign banks.²⁰⁹ Amounts borrowed in foreign currencies must, however, be converted into the local currency.²¹⁰

4 Professional Infrastructure

a) Accountants

The Czech Republic, like most other Eastern European states, must redefine the role of accounting in order to assist the economic and political transition. When the state controlled all business activities, Czech accountants had never attempted to reflect the economic reality of the actual operations and the financial status of an enterprise.²¹¹ Financial health was indeterminate, and unproductive or unprofitable areas were not liquidated or closed in order to maximize shareholder value.²¹² In an effort to facilitate transactions for western business persons, some western firms are starting to set up offices in the Czech Republic.²¹³

b) Lawyers

Western firms operating in the Czech Republic take a pessimistic view of Czech lawyers because Czech lawyers are neither trained nor equipped to facilitate western business transactions.²¹⁴ There is an over-abundance of general practice, and too few commercial law practices.²¹⁵ Moreover, the

206. *Id.*

207. *Id.*

208. *Id.* at 507.

209. *Id.* at 509.

210. *Id.*

211. Anthea Rose, *Eastern Europe: Training For A New Market World Order*, Reuter Textline, ACCOUNTANCY AGE, Sept. 26, 1991, available in LEXIS, Txtline Library, Txtline File.

212. *Id.*

213. See *Czechoslovakia - Distribution*, NAT'L TRADE DATA BANK, Apr. 1993, available in LEXIS, Europe Library, Czecho File. Price Waterhouse, KPMG, DRT International, Ernst and Young, Coopers & Lybrand and Arthur Andersen all now have offices in Prague to assist western business people. *Id.*

214. See *Czechoslovakia - Prague Here We Come*, Reuter Textline: EUROMONEY INT'L FIN. L., Jun. 15, 1991, available in LEXIS, Txtline Library, Txtline File.

215. *Czechoslovakia: Private Practice in Czechoslovakia One Step Behind*, [hereinafter *Czechoslovakia: Private Practice*] Reuter Textline: EUROMONEY INTERNATIONAL FINANCIAL LAW, July 12, 1990, available in LEXIS, Txtline Library, Txtline File.

few attorneys that have commercial law experience lack international experience.²¹⁶

Moreover, the legal profession is divided along regional lines. Both the Czech and Slovak Republics have their own bar.²¹⁷ Yet there are few substantive differences between the two states. However, attorneys from either country²¹⁸ can appear before all the courts in both states.²¹⁹

5) Privatization

a) How Privatization Law Affects Large Business

Legislation²²⁰ has recently been passed which establishes a framework under which it is anticipated that the foreign investment process will be sharply accelerated, and a large proportion of the Czechoslovak economy will be transferred into private ownership.²²¹ Before any transfer of property is made under the Large Privatization Law, an approved privatization project must be prepared for each enterprise.²²² The following information is required for each project: (1) a description of the enterprise and the property that is subject of the proposed privatization; (2) details of the way the state acquired the property; (3) details of any restitution claims from previous owners; (4) a valuation of the property; (5) the proposed manner of privatization; (6) details of the company that will take over the business and assets; and (7) a timetable for the implementation of the privatization transaction.²²³ The Large Privatization Law also uses investment coupons, which are non-transferable securities that will be issued to all Czechoslovak citizens above the age of eighteen who are residents entitling the holder to purchase shares in certain Czechoslovak enterprises.²²⁴ Subordinate legislation sets out the necessary procedures.²²⁵

b) How Privatization Law Affects Small Business

The Act on Small Privatization Law is used for the privatization of small businesses such as shops, restaurants, and roadside stalls that are controlled by the state and run by state employees.²²⁶ Seventy-five regional committees facilitate small private transactions, which they effect through auctions.²²⁷

216. *Id.* Together with reform of the legal system, the Czech legal profession is expected to follow the Austrian and German model of small partnership. *Id.*

217. See *Czechoslovakia: Private Practice*, *supra* note 215.

218. See *supra* note 107 for a description of the difference between attorneys and notaries, which is significant in these countries.

219. See *Czechoslovakia: Private Practice*, *supra* note 215.

220. See Drake, *supra* note 14, at 507.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 508. See *CZECH REPUBLIC LAW DIGEST*, MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, at CZR-12 (1993).

226. Drake, *supra* note 14, at 507.

227. *Id.* at 507. See also *CZECH REPUBLIC LAW DIGEST*, *supra* note 225, at CZR-12.

6) Foreign Investment

a) Joint Ventures

A foreign company may enter into a joint venture with a Czech company.²²⁸ Having a Czech company as a partner can provide certain procedural advantages.²²⁹ Having the Czechoslovak company contribute assets to the joint venture, prior to registration eliminates the need to obtain the permission from the Ministry of Finance.²³⁰

b) Acquisition of assets:

A foreign company wishing to acquire the assets of a Czech company must first obtain approval from the appropriate government department.²³¹ For instance, if assets of an engineering company were to be acquired, the approval of the Ministry of Civil Engineering and Construction would be necessary.²³²

7) Exchangeability of Currency

Foreign exchange laws are contained in the Foreign Exchange Act. This Act introduced the concept of "internal convertibility," under which Czech nationals involved in import activities, who are registered in a Companies Register, receive the right to have any amount of Czechoslovak crowns exchanged for hard currency.²³³ This is a considerable disadvantage in that any hard currency earned by a Czech person from export activities must be converted by the appropriate Czech bank into Czech Crowns. i.e., check can be converted to crowns for dollars to invest but must be converted back to crowns if profits are repatriated by the business.²³⁴

8) Property Law

Private parties were generally not permitted to own real estate before the revolution of November 1989.²³⁵ Foreign persons may not own land directly, although they may own land through a Czech company.²³⁶ Moreover, land that is privately owned may only be used for the purposes of the owner's business.²³⁷

228. Drake, *supra* note 14, at 508.

229. *Id.*

230. *Id.* at 509.

231. *Id.*

232. *Id.* at 508.

233. *Id.* at 509.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

9) Pledgeability of Assets

Assets of a company can be pledged as security. However, due to doubts relating to the ability to collect on such collateral, it is uncommon for banks or financiers to securitize company assets. The Commercial Code establishes liens and retention rights as the legal basis for securing assets between Czech entities.²³⁸ Priority is established according to the respective times of the registration of the competing security interests.²³⁹

10) Withholding Taxes

A withholding tax is levied at the rate of 25% on dividends, interest, royalties, and rent paid to foreign person(s); and is subject to Double Taxation Agreements.²⁴⁰ Double Taxation Agreements have been entered into with eighteen countries, not including the United States.²⁴¹ However, agreements with more than twenty other countries have been signed, with ratification pending.²⁴² Agreements currently being ratified include those with the United Kingdom, the United States, Switzerland, and Australia.²⁴³

11) Choice of Law

Parties to a contract in the Czech Republic may choose the law for that contract.²⁴⁴ Applicable law with respect to transactions, arrangements, and contracts entered into when no law is selected is determined according to the conflict rules relating to the particular type of transaction.²⁴⁵

III. ASSISTANCE OF EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT AND BY THE WORLD BANK

On April 15, 1991, the European Bank for Reconstruction and Development was formed to assist Eastern Europe's transition to market economies, to promote private and entrepreneurial initiatives, and to encourage investment in Eastern Europe.²⁴⁶ The Bank has an operating budget of 10 million European Currency Units (ECU), of which 70% is held in reserves and 30% is loaned out immediately.²⁴⁷ Public and Private sector allocation is 40% and

238. *Id.* at 510. As far as their rules and system of priorities (in chattels), they would greatly benefit by refining their system by looking at our Art. IX of the U.C.C. *Id.*

239. *Id.*

240. *Id.* at 511.

241. *Id.*

242. *Id.* These agreements will be ratified when the legislatures of the countries involved pass laws enacting them. *Id.*

243. *Id.* See NAT. TRADE DATA BANK: MARKET REPORTS, *Czechoslovakia*, Apr. 14, 1993.

244. *Id.*

245. *Id.* Such contracts include sale/purchase agreements, claim for compensation for damages or trade agency agreements. *Id.*

246. Ella, *supra* note 7, at 234.

247. *Id.*

60% respectively.²⁴⁸ In 1993, Hungary received the equivalent of a \$100 million loan from the World Bank.²⁴⁹

In addition, in 1993, the Group of 7 (G-7)²⁵⁰ industrialized countries approved Poland's use of a \$1 billion loan by the IMF to stabilize the economy, to capitalize the banking industry and to finance exports.²⁵¹ The Czech Republic has received loans in excess of \$780 million.²⁵² The Czech Republic also receives assistance from the World Bank by sale of state-owned banks to the International Finance Corporation (IFC) (a private sector affiliate of the World Bank).²⁵³

IV. MULTILATERAL TREATIES

Hungary, Poland, and the Czech Republic are signatories of GATT.²⁵⁴ In addition, Hungary and Poland are signatories of the U.N. Convention on Contracts for the International Sale of Goods, and of Treaties for the Prevention of Double Taxation.²⁵⁵ The most important treaties signed by these countries individually include:²⁵⁶

1. Hungary²⁵⁷

- a) Constitution de l'Union Postale Universelle - UPC.
- b) Hague Convention for the Peaceful Settlements of Disputes.
- c) Agreement for Protection of Investments with US.
- d) Agreement with the Overseas Private Investment Corporation (OPIC).
- e) Convention establishing the Multilateral Investment Guarantee Agency (MIGA).

2. Poland²⁵⁸

- a) Bern Convention on Protection of Literary and Artistic Works (as amended in Berlin in 1908 and Rome in 1928).
- b) Geneva Universal Convention on Copyright of 1962.
- c) Paris Convention on Protection of Industrial property.
- d) U.N. Convention for the International Sale of Goods (1980)

248. *Id.*

249. Hue Hall, *Developments in Banking Law: International Banking*, 12 ANN. REV. BANKING L. 189, 203-07 (1993). The National Bank of Hungary will transfer the funds to participating banks who in turn will loan the money to the private sector. *Id.*

250. The G-7 consists of: Italy, Germany, United Kingdom, France, Canada, United States, and Japan.

251. Hall, *supra* note 249, at 207.

252. *Czech National Bank Issues 1993 Monetary Report*, May 2, 1994, available in Reuter Textline: CSTK Ecoservice.

253. *Id.*

254. Ella, *supra* note 7, at 232.

255. *Id.*

256. The following treaties and conventions are listed in Martindale Hubbell and as mentioned in the author's note have not been individually verified.

257. Hungary Law Digest, *supra* note 11, at HGRY-11.

258. Poland Law Digest, *supra* note 129, at POL-23.

- e) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes and Income.
- f) General Agreements on Tariffs and Trade (GATT) on Customs Valuation but not of the Government Procurement Code or the Subsidies Code.

3. Czech Republic²⁵⁹

- a) Paris Convention for the Protection of Intellectual Property.
- b) Bern Convention.
- c) Universal Copyright Convention.
- d) Vienna Convention and Consular Relations.
- e) Geneva Protocol on Arbitral Clauses in Commercial Matters.
- f) General Agreements on Tariffs and Trade (GATT).

V. DOUBLE TAXATION TREATIES

A. Czech Republic

While treaties to prevent double taxation between the Czech Republic and several nations have been signed, no treaty had been signed between the Czech Republic and the United States until very recently.²⁶⁰

B. Hungary

Hungary has signed agreements on avoidance of double taxation with a number of countries, including the United States. According to the Convention on Double Taxation,²⁶¹ incomes received by United States residents for personal services rendered as independent contractors in Hungary are exempt from income tax upon the following conditions: First, contractors not residing in Hungary for more than 183 days in a given year, and second, contractors not having a fixed base or permanent residence in Hungary. Income for labor or independent personal services is exempt upon three conditions: (1) the U.S. supplier of services has not stayed in Hungary for more than 183 days in one year, (2) if services were paid by or on behalf of a nonresident (foreign) employer, and (3) not having permanent residency in Hungary.

C. Poland

The U.S. and Poland have signed a treaty for the prevention of double taxation based on three principles. First, in Poland, U.S. residents may deduct from their Polish tax liability their corresponding amounts of tax paid in the United States. Second, in the United States, resident entities may deduct from their U.S. tax the corresponding amounts of tax paid in Poland. United States companies that hold more than a 10% interest in a Polish company may also deduct from their U.S. taxes any amounts paid by the Polish company to the Polish tax authorities.

259. Czech Republic Law Digest, *supra* note 225, at CZR-14.

260. *Id.*

261. Hungary Law Digest, *supra* note 11, at HGRY-11.

VI. EFFECTS OF IMPORT AND EXPORT

A. GATT

Being among the smallest nations of Eastern Europe, Hungary, Poland and the Czech Republic have slowly gained acceptance into the GATT. Poland and Hungary were allowed to join the GATT in 1967 and 1973, partially due to political pressure by the U.S to reduce Soviet influence in these countries.²⁶² Czechoslovakia joined prior to 1948 and remained a member until its division into the Czech Republic and Slovakia on December 31, 1992.²⁶³

In addition, the European Community deals with state-run economies with special mechanisms under GATT.²⁶⁴ For example, quantitative restrictions are set from Eastern European products to ensure reciprocal gains in trade with the centrally planned economies of Eastern Europe, and to protect western industries.²⁶⁵ Moreover, during the Cold War era, Western countries imposed restrictions of sale of technologically sensitive goods as a security measure.²⁶⁶

B. Restrictions on Import and Export

1) Poland

Poland exported an average of US\$700 million, in goods to the European Community per month in 1992.²⁶⁷ Also, since 1992 Poland's total foreign exports have soared to US\$14 billion, from US\$8 billion, with 8% of this year's sales going to western countries (including Western Europe, the U.S. and Canada).²⁶⁸ Pursuant to the Central European Free Trade Agreement (CEFTA), the majority of the exports, go to the other "Visegrad countries", which include Hungary, the Czech Republic and Bulgaria.²⁶⁹

2) Hungary

Eighty percent of Hungary's GNP is accounted for by foreign trade.²⁷⁰ Most of this trade was with the Soviet Union until 1989.²⁷¹ Currently, the majority of the exports go to Poland, the Czech Republic and Bulgaria, again, pursuant to CEFTA.²⁷² Also, Hungary seeks to increase exports by reducing tariffs in accord with GATT outlines.²⁷³

262. Czech Republic Law Digest, *supra* note 225, at CZR-14.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 236.

267. Poland Law Digest, *supra* note 129, at POL-23.

268. Robert Harris, *Goin' Down the Road Feeling Bad: U.S. Trade Laws' Discriminatory Treatment of the East European Economies in Transition to Capitalism*, 31 COLUM. J. TRANS-NAT'L L. 403, 403-410 (1993).

269. Ella, *supra* note 7, at 240.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

3) Czechoslovakia: (and Czech Republic):

Before its division, Czechoslovakia derived 33% of its national income from foreign trade, and trade with the West accounted for 20% of this total.²⁷⁴ The break-up of the Soviet Union has had a considerable impact on the Czech exports (which was mostly based on barter trade).²⁷⁵ However, because it is a signatory of CEFTA it is likely that the Czech Republic's exports to Hungary, Poland, and Bulgaria will increase.²⁷⁶

The Central European Free Trade Agreement (CEFTA) was created and will hopefully spur Central European trade by allowing both increased specialization and economies of scale among its members.²⁷⁷ As a result, Poland predicts that reducing tariffs by 33% will result in a 10% increase in Polish exports to Hungary and the Czech Republic, and that a 66% reduction of tariffs will increase exports by 30%.²⁷⁸

Given that these countries seek to eventually become members of the European Union,²⁷⁹ there is a trend towards reduction and elimination of quotas and bans on imports.²⁸⁰ Restrictions in steel, coal, agriculture, and textiles have led to much friction between the EC and these three countries.²⁸¹

CONCLUSION

Since the fall of the Soviet empire, Eastern Europe has undergone significant political and economic reforms in shedding its communist legacy. All of the newly elected governments have attempted to privatize their state-owned enterprises as an integral part of the transition from command to market economic systems. Continued economic reform and further institutionalization of these democratic systems depends upon economic revitalization. In order to achieve economic revitalization, these countries require foreign investment and capital.

In order to attract the needed foreign investment, Poland, Hungary and the Czech Republic are making changes to their laws, regulations, and professional infrastructure. This has increased opportunities for western businessmen who want to penetrate these markets. However, there remains uncertainty as to the long-term likelihood of success. For real success to occur, substantial improvements are necessary in almost all aspects of the law and commerce.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 239.

278. *Id.*

279. Hungary and Poland each made formal application to join the EUI April 1994. See Christopher Matthews, Press & Public Affairs, The European Commission, Eurocom Monthly Bulletin of European Union Economic and Financial News 6, No. 4, (Apr. 1994).

280. Ella, *supra* note 7, at 246-47.

281. *Id.*

Because of the substantial differences in the conduct of business in these countries as compared to that of the United States and Western Europe, business persons need be careful in obtaining qualified legal and accounting advice. Fortunately, both accountants and attorneys from both the United States and Western Europe have set up offices in these countries to deal specifically with international transactions. Moreover, these countries have tried to create a favorable climate through advantageous, and continuously updated foreign investment policies and taxation laws.

COMMENTS

SALE v. HAITIAN CENTERS COUNCIL AND ITS AFTERMATH: A PROBLEMATIC GAP IN INTERNATIONAL IMMIGRATION LAW

I. INTRODUCTION

The United Nations Declaration of Human Rights guarantees freedom of movement to individuals outside their countries of citizenship.¹ The Declaration specifically enumerates similar rights for individuals who flee countries in pursuit of asylum from persecution.² These asylum rights are so vital that the United Nations drafted a separate Convention Relating to the Status of Refugees (Refugee Convention).³ The Refugee Convention ensures uniform determination of refugee status and guarantees both minimum rights and equitable treatment to people who qualify as refugees.⁴ The Refugee Convention's recommendation that all governments willingly receive refugees into their territories and cooperate in refugee resettlement best characterizes its broad goal.⁵ These rights and objectives, however, are challenged daily.

Domestic strife induces the mass transnational migration of individuals seeking asylum from various types of persecution.⁶ This characterizes the

1. U.N. Doc. A/811, art. 13 para. 2 (1948).

2. *Id.* at art. 14 para. 1.

3. Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 137. The United States became a signatory to this Convention in 1968 when it signed the Protocol Relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

4. 189 U.N.T.S. 137, at pmb., art. 1.

5. G.A. Res. 429 (V), U.N. Doc. A/CONF.2/1, para. IV(D) (1950).

Several authors have recently written about the Haitian refugee crisis and characterized the U.S. immigration "ideal" by the inscription on the Statue of Liberty:

Give me your tired, your poor,
your huddled masses yearning to breathe free,
the wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door.

EMMA LAZARUS, THE NEW COLOSSUS (1883).

Interestingly, these articles argue that current U.S. immigration policy is discriminatory. See Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 GEO. IMMIGR. L.J. 747 (1993); Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269 (1993); Juan C. Montes, Note, *Haitian Interdiction on the High Seas: A U.S. Policy of Bias and Inconsistency*, 5 ST. THOMAS L. REV. 557 (1993).

6. See David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 287 (1992)(discussing international impact of domestic affairs).