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Droit de Suite: The Applicable Law in Cross-Border Resales of Works of Art under Directive 2001/84/EC [*]

di *Matthias Weller*

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1. Introduction

Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art intends to "meet the need for providing creators with an adequate and standard level of protection" [1] and to remove "distortions of competition as well as displacement of sales within the Community" [2] that arise from the "disparities with regard to the existence of the resale right and its application by the Member States" which "have a direct negative impact on the proper functioning of the internal market" [3] - a "situation" [4] that triggers the competency of the European Community for a measure for "approximation of laws" under article 95 EC in the first place.

Given this objective of harmonization of the law on resale right, in light of Recital 4 that declares the need to provide for a "standard level of protection" and in particular in the absence of a provision expressly defining a minimum level of protection such as in the case of most EC Directives on consumer protection [5], the Directive must be interpreted as fully harmonizing the resale right [6].

The Member States are therefore not allowed under article 249(3) EC to grant the author any protection beyond or below the level of the Directive's protection. However, as opposed to EC Regulations under article 249(2) EC, the Directive has to and does in fact leave to the Member States considerable choices as to the "form and method" how to achieve the "results" defined by the Directives on the harmonization of the resale right, and the Member States do make use of this margin of choice in their implementation legislations [7].

In respect to cross-border resales of artworks the crucial question therefore arises which implementation legislation applies. Despite the fact that cross-border transactions are in the heart of the very purpose of the EC internal market as defined in articles 3(1)(c), 14 EC, despite the fact that the Directive expressly [8] takes into account cross-border copyright cases decided by the European Court of Justice [9], despite the fact that there are not yet any harmonized choice of law rules on the level of Community law [10], and despite the fact that the currently applicable choice of law rules in the various legal systems of the Member States leave many questions open [11], the Directive does not provide for its own choice of law rules and thus jeopardizes its primary purpose of a removal of negative impacts on the proper functioning of the internal market by disparities in law.

Strangely enough, the Commission likes to include choice of law rules in its Directives on the protection of consumers [12], even though there are harmonized and quite sophisticated choice of law rules on consumer contract law [13]. Whereas the integration of these special choice of law rules into the general framework of consumer protection under choice of law causes major difficulties, the lack of any precise guidance as to the choice of law approach to be taken towards the resale right equally causes major difficulties, as may best be illustred by a case currently pending on appeal for errors of choice of law with the German Federal Court of

Justice (Bundesgerichtshof) on the old autonomous German resale right [14].

2. A Case Study

The Alfred Ahlers Aktiengesellschaft, a public limited company incorporated under German law, collected over decades leading works of German expressionist art including, *inter alia*, several works by Ernst Ludwig Kirchner and Franz Marc [15]. In 2001, the company decided to sell the entire collection of more than 100 works and reinvest the profit into a collection of modern art [16].

In a joint venture, Christoph Count Douglas, former managing director of Sotheby's Germany and at the time independent art market consultant in Frankfurt, and David Nash, former manager with Sotheby's, USA, incorporated unter the laws of New York the Douglas/Nash partnership that acquired the collection on the basis of a DM 120 million loan by the Deutsche Bank in order to avoid the publicity and transparency of pricing of a public auction because the business plan of the partnership was to resell the collection piece by piece in private transaction [17]. The sales contract was signed by the seller in Germany. The buyer signed the contract either in London or New York. Several months prior to the transaction the entire collection had been stored at a duty free storage in Switzerland.

The German collecting society, the Verwertungsgesellschaft Bildkunst, learned about this deal from the media and sued under the then applicable sections 26(3) and 26(4) German Copyright Act [18] against Christoph Count Douglas for, firstly, information about any resale in the year 2001 in which he was involved and secondly, for the disclosure of the name and the address of the seller as well as the resale price of any transaction identified under the first claim. The defendant argues, *inter alia*, that no sufficient close connection of the resale transaction to Germany justifies the application of German copyright law including the provisions granting rights to obtain information because the only link of the transaction to Germany was the signature of the contract of sale on the part of the seller. On the grounds of this choice of law argument, the Regional Court (*Landgericht*) Frankfurt dismissed the second claim for "specific" information under section 26(4) [now (5)] German Copyright Act, but granted the first claim for "general" information under section 26(3) [now (4)] German Copyright Act [19]. On appeal to the Upper Regional Court (*Oberlandesgericht*) Frankfurt and in distinguishing this case from the decision of the Bundesgerichtshof in the *Beuys* case on the choice of law on the resale right itself, the claimant argued that in light of the Directive the provisions of the autonomous German law on the resale right should be interpreted as being applicable as soon as a significant part of the resale transaction took place in Germany and that the relevant resale transaction should be understood as comprising both the conclusion of the sales contract as well as the transfer of title. The Upper Regional Court followed this argument, granted the second claim for specific information, and would have granted the first claim, if its time bar had not already expired. Uncertain about its choice of law solution, the Court allowed further appeal to the Federal Court of Justice where the case now is pending. What is the lesson from this case?

3. Right to obtain information under the Directive

According to article 9 of the Directive, the Member States shall provide that for a period of three years after the resale, the persons entitled to resale royalties may require from any art market professional in the sense of the definition in article 1(2) Directive to furnish any information that may be necessary in order to secure payment of royalties in respect of the resale.

To put it differently, under the wording of article 9 of the Directive, only persons entitled to resale royalties are entitled to obtain information on a specific transaction the existence of which these persons need to prove before they will be able to exercise their right to obtain the necessary information for enforcing the claim for resale royalties. A Member State's implementation legislation that grants any further right, for example the right to obtain general information from any art market intermediary on whether at all relevant transactions have taken place thus violates the Directive in its objective to fully harmonize the resale right. Since a resale right without a collateral right to obtain general information from any art market intermediary causes quite severe difficulties in enforcing any claims for resaly royalty arising from private sales - an experience that motivated the German legislator to amend its own resale right shortly after its enactment [20], the European Court of Justice might be willing to construe article 9 of the Directive beyond its wording as allowing the Member States to introduce additional collateral rights to obtain information for the sake of the *effet utile* of the Directive.

Nevertheless, such interpretation would jeopardize the harmonizing effects that the Directive seeks to achieve by fully harmonizing the resale right, and prior to a decision of the European Court of Justice on this point in a reference under article 234 EC any additional rights to obtain information must be deemed a violation of the Directive. On the other hand, the right of persons entitled to resale royalties to obtain the necessary information for its collection under article 9 of the Directive can without any difficulty be interpreted as including the information necessary to identify the legal order under which the claim is to be raised - as long

as it is certain that the transaction falls within the applicability of an implementation legislation of a Member State. In turn it appears doubtful whether the right under article 9 of the Directive includes the information necessary to decide whether the resale took place outside or within the internal market.

4. Rights to obtain information under the implementation legislations

Yet, several implementation legislations grant additional rights to obtain information. For example, the Italian implementation converts the right to obtain general information known from section 26(4) German Copyright Act even into an obligation of any art market intermediary to notify the collecting society about each relevant transaction [21]. The French implementation legislation presumably imposes a similar obligation on the art market intermediary [22]. In addition to the right to obtain general information, German resale right grants, in article 26(7) German Copyright Act, another collateral right, the right to require the art market intermediary to undergo an audit of his books if there are doubts about the correctness of the information disclosed, and if the information then turns out to be wrong the art market intermediary has to pay for the audit. Other legislations merely implement the right to obtain information to the extent granted by article 9 of the Directive [23]. For example, the UK legislation grants, in Regulation 15, a "right to information" only to "a holder of resale right [24] and thereby seems to require the party claiming information to prove that it is in fact such a holder, and the request may only be made to a person who - "in relation to that sale" - acts as art market intermediary in the sense of Regulation 12(3)(a).

5. The applicable law to the resale right in cross-border cases

In the absence of any special choice of law rules in the Directive and any general choice of law rules harmonized on the level of Community law, it is part of the regulatory framework of the Directive that the Member States apply their autonomous choice of law rules in cross-border cases. Given that the Commission of the European Communities intends to build its future harmonized choice of law rule for obligations arising out of copyrights on the "universally recognised principle of the *lex loci protectionis*, meaning the law of the country in which protection is claimed" [25], adverse effects on the Directive's harmonization objective do not arise from any major disparities in the choice of law rules of the various Member States, but rather from the uncertainty about how to apply this "universally recognized" but quite imprecise principle to the atypical coypright of an artist's resale right.

5.1. Characterization

In the interest of its overall objective to provide a Community wide "standard level of protection" [26], the Directive itself requires the Member States to characterize the resale right according to the characterization by the substantive Community law on the resale and thus as copyright [27]. Any characterization under the autonomous choice of law methodology against the substantive law provided for by the Directive, e.g. as a right arising from unjust enrichment [28] or as part of a right *in rem*, as such governed by the *lex rei sitae* [29], would be precluded by Community law.

5.2. Connecting Factor

The *lex loci protectionis* selects the "law of the country in which protection is claimed" [30]. Protection of copyrights can only be sought against certain actions. The connecting factor of the *lex loci protectionis* therefore must be understood as being the place of the action against which protection is sought. Since the resale right atypically does not grant to the author any right to exclude the resale, the resale right resembles a licence of right rather than a copyright against whose infringement protection is sought. The relevant action as connecting factor therefore cannot be seen in an infringement action but in the actions legally constituting the resale transaction. Given that the Directive focuses on the "resale" rather than on the acquisition of a work of art as the relevant commercial activity that triggers the right to resale royalties, it appears in conformity with the spirit of the Directive to limit the connecting factor to the reseller's actions legally constituting the resale transaction. The advantage of such limitation is that the number of implementation legislations selected by the *lex loci protectionis* in cross-border resales is considerably reduced because any actions on the part of the buyer contributing to the resale transaction in another state than the one in which the seller acts do not render the law of the buyer's state applicable. For, the Directive's harmonization purpose to eliminate a "direct negative impact on the proper functioning of the internal market" by "disparities with regard to the existence of the resale right and its application by the Member States" [31] requires the Member States to avoid or at least reduce as much as possible the uncertainty that arises from the applicability of more than one implementation legislation: it is not the purpose of the Directive to multiply the author's right to resale royalty but to "provide creators with and adequate and standard level of protection" [32].

To put it briefly, the choice of law rule that best serves the Directive's objective to harmonize the law of resale right within the internal market is the one that selects one and only one implementation legislation in cross-

border cases with connections only to Member States, but at the same time selects an implementation legislation - no matter which one - as soon as the resale has connections to third states but also to the internal market. If this intepretation of the Directive is correct, and the case law of the European Court of Justice on the effects of fully harmonizing Directives on choice of law rules seems to point to such an approach [33], the application of the *lex loci protectionis* to cross-border resales within the internal market requires further limitation by connecting factors supplemental to the place where the reseller acts in order to legally accomplish the resale transaction such as e.g. the center of gravitiy in the case of auctions in a Member State or e.g. habitual residence in the case of private cross-border sales, i.e. transactions where the reseller acts in two different Member States in order to legally accomplish the resale. On the other hand, in transactions involving links to third states the *effet utile* of the Directive suggests a choice of law rule that selects the implementation legislation of a Member State quite quickly. It therefore appears in conformity with the Directive to abstain from any supplemental limitation of the connecting factor under the *lex loci protectionis* and consider sufficient any action on the part of the reseller within the territory of a Member State that is necessary to legally accomplish the resale transaction.

Given the different language versions of the key term "resale" that partly point to the conclusion of the sales contract as the relevant action (e.g. "revente" in the French version, "vendita successiva" in the Italian version, "resale in the English version), partly point to the transfer of title (e.g. "Weiterverþu§erung" in the German version) and given that some Member States' legal systems consider the title to ownership passing by virtue of the conclusion of the sales contract [34] and that other legal systems require a transaction distinct to the conclusion of the sales contract in order to pass title [35], the best approach to reconcile the concept of the Directive of full harmonization with these fundamental disparities in the Member States' legal systems outside the reach of the harmonizing power of the Directive might be to consider relevant as connecting factor any action on the part of the reseller contributing to the legal completion of the resale transaction, be it under a system that follows the principle of distinction between sale and transfer of title, be it under another system - depending, according to the *lex rei sitae*, on the place where the *res* is situated at the time of the transaction. The last word in these matters of interpretation of a Community law instrument is of course up to the European Court of Justice, to be addressed with this question by reference under article 234 EC.

If the choice of law approach suggested here were applied to the case studied *supra* [36] (after the implementation legislations of the involved Member States have entered into force, i.e. Germany), Swiss law applied to the *res* as the *lex rei sitae*. Swiss law requires a transaction distinct to the conclusion of the sales contract in order to validly pass title to ownership [37]. Since also third states are involved (New York; Switzerland), the *lex loci protectionis* considers sufficient any action taken on German territory by the seller in order to accomplish the resale transaction, be it the conclusion of the sales contract according to the prerequisites under the *lex contractus* to be determined according to articles 3 *et seq.* of the Rome Convention [38], be it the transfer of title (according to the prerequisites of Swiss law). The German seller signed the contract in Germany. Consequently, the German implementation legislation on the Community law resale right applied.

6. The applicable law to collateral rights to obtain information in cross-border cases

On the assumption that article 9 of the Directive grants a right to obtain information from any art market professional necessary in order to secure payment of royalties in respect to a particular resale including the information necessary to identify the applicable law, the core issue of the case studied supra arises: which are the actions that, under the lex loci protectionis [39], select the law applicable to the right to obtain information. Two modifikations to the choice of law approach suggested here appear to be required in order to secure the effet utile of the Directive: even in cross-border cases involving exclusively Member States any action on the part of the seller should be held sufficient in order to render applicable the right to information under the implementation legislation of the Member State where this action took place. To put it differently, whereas in respect to the resale right itself the lex loci protectionis needs to be further limited in cross-border cases within the internal market in order to identify the one and only applicable implementation legislation, the right to information must be available as soon as any relevant action occurs on the territory of a Member State. In addition, actions relevant in this sense should be deemed to include the actions by anyone who will be considered, in light of this action, as art market intermediary involved in the resale in question and thus potentially subject to the right to provide for information about this transaction. Consequently, as opposed to the choice of law rule governing the resale right itself, there is no need to draw a distinction between cross-border resales involving third states and those involving only Member States. Obviously, it is ultimately again up to te European Court of Justice to decide this further matter of interpretation of article 9 of the Directive. Provided that this approach were correct, the German collecting society in the case studied supra could rely on the rights to obtain information as granted under the German implementation legislation because the seller signed at least the sales contract in Germany. Alternatively, the German collecting society could raise claims against the buyer under English implementation law if the society proves that the buyer signed the contract in London. However, since the buyer is a partnership incorporated under the laws of New York and not situated in Germany, the German collecting society can seize the German court with this matter only if there is a ground

of international jurisdiction for the claim against the partnership. Since the defendant here is situated and has acted outside Germany [40], one additional ground of jurisdiction available under the Brussels I-Regulation in resale right cases involving several art market intermediaries in different states might be article 6 no. 1. This provision allows to sue a defendant in the courts of the state of the domicile of another defendant provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

It appears uncertain whether there is any risk of irreconcilable judgments in the case of claims against two different persons to obtain information. At any rate, the provision is not applicable in the case studied *supra*, since it only applies to defendants domiciled in Member States. The German collecting society might of course want to resort to article 5 no. 3 Brussels I-Regulation and argue that any art market intermediary involved in the transaction contributed to the act "committed" by one of them in Germany and can thus be sued in Germany as a joint "tortfeasor". However, whether such an extension of jurisdiction in the case of tortfeasors is at all in conformity with the Brussels I-Regulation is a matter of doubt [41]. The German collecting society may well be required to sue at the place where the action in fact took place that gives rise to the claim for information. It is therefore with good reason that the German collecting society in the case studied *supra* sued the German art market intermediary in Germany, thereby avoiding many challening issues of international jurisdiction not yet considered for the application to the resale rights under the Directive.

7. Conclusion

The concept of "full harmonization" is a *contradictio in adjecto*: an EC Directive's harmonization of law will never and must not be "full" according to article 249(3) EC but has to leave margins of choice to the various Member States as is well demonstrated by Directive 2001/84/EC and the respective differences in the Member States' implementations. As the example of the Directive's right to obtain information under its article 9 and the related case study from German resale law practice illustrates, difficulties arise not only in respect to draw the line between making use of the margin of choice and transgressing this margin. In addition, the issue of choice of law remains crucial even in cases with links only within the internal market. Nevertheless the Directive does not even address this latter issue and, in the current absence of harmonized general choice of law rules and any consent as to the precise interpretation of the future choice of law rules under Community law respectively, the Directive jeopardizes its overall objective of harmonization more than necessary and thus puts into question its very legitimacy. The Commission should take the chance under the revision clause of article 11 to amend the Directive and to develop a convincing choice of law rule.

Note

[*] The following text largely builds on the author's presentation at the seminar "Artist's Resale Right" of the Institute of Art and Law, Leicester, in association with Tarlo Lyons Solicitors, London, at London on 30th November 2006.

[1] Recital no. 4 of Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, O.J. L. 272 of 13 October 2001, p. 32 (henceforth: "Directive").

[2] Recital no. 9 Directive.

[3] Recital no. 10 Directive.

[4] Recital no. 10 Directive.

[5] See e.g. article 8 Directive 93/13/EEC (Unfair Terms); article 14 Directive 97/7/EC (Distance Selling); but compare Directive 2002/65/EC (Distance Selling of Financial Services); for an account of the latter's concept of consumer protection by full harmonization and the problematic implications see e.g. *Boris Schinkels*, in *Gebauer/Wiedmann*, Zivilrecht unter europþischem Einfluss, Stuttgart 2005, Chapter 7 no. 14.

[6] See e.g. *Christian Handing*, Neuer Wein in alten Schlþuchen des Folgerechts - Die geplante Anpassung aufgrund der europþischen Folgerechtsrichtlinie, Zeitschrift fŸr Urheber- und Medienrecht (ZUM) 2006, p. 546.

[7] See e.g. Germany: section 26 Copyright Act (Urheberrechtsgesetz), amended by the Fifth Copyright Act Amendment Act (FŸnftes Gesetz zur €nderung des Urheberrechtsgesetzes) of 10th November 2006, Official Journal (Bundesgesetzblatt of, 2006 I, S. 2487), entered into force on 16 November 2006; Austria: section 16(b) Copyright Act (Urheberrechtsgesetz), amended by the Copyright Act Amendment Act 2005, Official Journal No. 22/2006 of 16 February 2006, entered into force on 1 January 2006; Italy: articles 144 to 155 Legge 22 aprile 1941, n. 633 (Copyright Act), as amended by Decreto legislativo 13 febbraio, n. 118, GU n. 71 of 25th march 2006, entered into force on 9th June 2006; United Kingdom: Artist's Resale Right Regulation 2006, S.I. 2006 No. 346 of 13 February 2006, entered into force on 14th February 2006; France: article L. 122-8 du code de la propriété intellectuelle (Copyright Act), as amended by article 48 Lois no. 2006-961 of 1 August 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information, J.O. of
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3 August 2006; Irland: European Communities (Artist's Resale Right) Regulations 2006, S.I. no. 312 of 2006, entered into force on 13 June 2006; for an overview on the contents of these and other implementation legislations see *Simon Stokes/Matthias Weller*, in *Simon Stokes*, Artist's Resale Right (Droit de Suite): Law & Practice, Chapter 6 "International Aspects", London 2006.

[8] Recital no. 6 Directive.

[9] ECJ, judgment of 20 October 1993, joint cases C-92/92 and 326/92 - *Phil Collins*.

[10] However, the European Community is currently moving towards harmonizing the choice of law rules applicable to non-contractual obligations including obligations arising in connection with copyright, see Commission of the European Communities, Amended proposal for a European Parliament and Council Regulation on the law applicable to the non-contractual obligations ("Rome II") of 21 February 2006, COM(2006) 83 final.

[11] See e.g. German Federal Court of Justice (*Bundesgerichtshof*), decision of 16 June 1994, Entscheidungssammlung des Bundesgerichtshofes in Zivilsachen (BGHZ) Vol. 126, p. 252 - *Beuys*, dealing with an auction in London of works of art by *Joseph Beuys*.

[12] See e.g. article 6(2) Directive 93/13/EEC (Unfair Terms); article 9 Directive 94/47/EC (Timesharing); article 12(2) Directive 93/7/EC (Distance Selling); article 7(2) Directive 1999/44/EC (Sale of Consumer Goods); article 12(2) Directive 2002/65/EC (Distance Selling Financial Services).

[13] Rome Convention on the Law Applicable to contractual Obligations of 19 June 1980, Official Journal C 27, of 26 January 1998, pp. 34-46.

[14] Upper Regional Court (*Oberlandesgericht*) Frankfurt, decision of 7 June 2005, Report der Entscheidungen des Oberlandesgerichts Frankfurt in Zivilsachen (OLGR) 2006, 208.

[15] *Christian Herchenršder*, Die Sammlung Ahlers steht zum Verkauf - Marktdiskretion statt Publizitþt, Handelsblatt, 2. Februar 2001.

[16] Frankfurter Allgemeine Zeitung v. 3. Februar 2001, S. 53, Sammlung Ahlers - Expressionisten auf dem Markt,

[17] *Ulrich Hansen*, Capital 9/2001, S. 98 f.

[18] Under the new implementation legislation now section 26 (4) and (5) German Copyright Act: "(4) The author is entitled, vis-à-vis any art dealer or auctioneer, to obtain information on whether, and if so, which works of art by the author had been sold unter participation of the dealer or auctioneer within the last three years prior to the raising of the claim for information. (5) The author is entitled to obtain, if necessary for the enforcement of his claim for resale royalty, from the art dealer or auctioneer the name and the address of the seller as well as the resale price. The dealer or auctioneer may refuse to disclose name and address if he himself pays the resale royalty due according the resale price".

[19] Regional Court (*Landgericht*) Frankfurt, 8 October 2003 - docket no. 2-6 O 523/02, unpublished; see *Jšrg Schneider-Brodtmann*, Joseph Beuys und die Folgen, Kunst und Recht (KUR) 2004, p. 147, at p. 149 *et seq.*

[20] See article 1 Copyright Act Amendment Act (Gesetz zur €nderung des Urheberrechtsgesetzes) of 10 November 1972, Official Journal (*Bundesgesetzblatt*) I Nr. 120 of 15 November 1972, p. 2081.

[21] Article 153 (1) Italian Copyright Act.

[22] Article L. 122-8(4) French Copyright Act; but compare the position of the French Sénat in the legislative process, Sénat, Session ordinaire de 2005-2006 no. 308, Annexe au procès-verbal de la séance du 12 avril 2006, Projet de loi relatif au droit d'auteur et aux droits voisins dans la société de l'information, Rapport fait au nom de la commission des Affaires culturelles sur le projet de loi, adopté par l'Assemblée Nationale, après déclaration d'urgence, relativ au droit d'auteur et aux droits voisins dans la société de l'information, par *Michel Thiollière*, sub III B 1: "Le nouvel article [L. 122-8] tend ainsi à (...) obliger les professionnels du marché de l'art à *tenir à disposition* [Italic added] de l'auteur ou ses mandataires les informations nécessaires à la liquidation des sommes dues au titre du droit de suite".

[23] See e.g. Section 87b(4) Austrian Copyright Act.

[24] Artist's Resale Right Regulations 2006, Regulation 15.

[25] Proposal of the Commission of the European Communities for a Regulation on the law applicable to non-contractual obligations ("Rome II") of 22 July 2003, COM(2003) 427 final, p. 20.

[26] Recital no. 4 Directive.

[27] Recital no. 1 Directive: "In the field of copyright, the resale right is an unassignable and inalienable right (...); see also Recital no. 4 Directive: "The resale right forms an integral part of copyright".

[28] *Kurt Siehr*, Joseph Beuys und das Internationale Folgerecht - Eine Zwischenbilanz, Praxis des internationalen Privat- und Verfahrensrechts (IPRax) 1992, p. 219.

[29] *Pierre Valentin*, Droit de Suite, European Intellectual Property Review 2006, p. 268, at p. 274.

[30] Proposal of the Commission of the European Communities for a Regulation on the law applicable to non-contractual obligations ("Rome II") of 22 July 2003, COM(2003) 427 final, p. 20.

[31] Recital no. 10 Directive.

[32] Recital no. 4 Directive.

[33] See ECJ, decision of 9 November 2000, Case 381/98, ECR 2000 I-9305 - *Ingmar GB Ltd. ./. Eaton Leonard Technologies*.

[34] See e.g. article 711 French Civil Code: "La propriété des biens s'acquiert (...) par l'effet des obligations"; article 1138 French Civil Code: "L'obligation de livrer la chose est parfait par le seul consentement des parties contractantes. Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dž livrée, encore que la tradition n'en ait point été faite (...)"; article 1583 French Civil Code: "La propriété est acquise de droit à l'acheteur à l'ègard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée"; see also e.g. article 1376 Italian Civil Code: "Nei contratti che hanno per oggetto il trasferimento della proprietà di una cosa determinata (...) la proprietà si trasmette e si acquista per effetto del consenso delle parti (...)."

[35] See e.g. the "principle of distinction (*Trennungsprinzip*)" under German law, section 929 sentence 1 German Civil Code: "Zur †bertragung des Eigentums an einer beweglichen Sache ist erforderlich, dass der EigentŸmer die Sache dem Erwerber Ÿbergibt und beide darŸber einig sind, dass das Eigentum Ÿbergehen soll".

[36] See supra sub II.

[37] Despite the wording of article 714 (1) Swiss Civil Code ("Zur †bertragung des Fahrniseigentums bedarf es des †berganges des Besitzes auf den Erwerber") the *traditio* is considered a contract, and the transfer of title thus requires a transaction distinct from the sales contract, see e.g. *Heinrich Honsell*, Tradition und Zession - kausal oder abstrakt?, in *Eugen Bucher* et al. (eds.), Norm und Wirkung, Beitrþge zum Privat- und Wirtschaftsrecht aus heutiger und historischer Perspektive; Festschrift fŸr Wolfgang Wiegand zum 65. Geburtstag, Berne 2005, pp. 939, at p. 942.

[38] Rome Convention on the Law Applicable to contractual Obligations of 19 June 1980, Official Journal C 27, of 26 January 1998, pp. 34-46, implemented by articles 27 *et seq.* of the German Introductory Law to the Civil Code.

[39] Under the currently applicable autonomous choice of law rules, rights to information are sometimes governed by the law applicable to the "main issue", sometimes, however, they are subject to their own choice of law rules, see e.g. *Haimo Schack*, Zur Qualifikation des Anspruchs auf Rechnungslegung im internationalen Urheberrecht, Praxis des internationalen Privat- und Verfahrensrechts (IPRax) 1991, p. 347, at p. 349 *et seq.* The Directive seems to consider the right to obtain information a right in substantive (Community) law. Given that the Directive furthermore requires the Member States to follow this characterization within their own autonomous choice of law system (see supra sub V 1, at note 26 and accompanying text), any deviating characterization of a right to obtain information as e.g. procedural and thus falling under the *lex loci* would violate the Member State's obligations under article 249(3), 10 EC.

[40] See articles 2 and 5 no. 3 in connection with article 60 Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Offical Journal L 12 of 16 Janury 2001 ("Brussels I Regulation").

[41] See e.g. *Matthias Weller,* Zur Handlungsortbestimmung im internationalen Kapitalanlegerproze§ bei arbeitsteiliger Deliktsverwirklichung, Praxis des internationalen und auslþndischen Privat- und Verfahrensrechts (IPRax) 2000, p. 202, at p. 205.

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