French Code of Private International Law

Michel Attal, who lectures and practices in Toulouse, and Julie Bauchy, a doctoral student at Toulouse I University, edited the first French code of private international law last year.

The book is not an official code but rather an academic entreprise which purports to gather all applicable rules (statutes, international treaties, European regulations and directives) of private international law.

More information on this useful pocketbook is available here.

Brand on UNCITRAL Online Dispute Resolution Project

Ronald A. Brand (University of Pittsburgh School of Law) has posted Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project on SSRN.

> *The United Nations Commission on International Trade Law (UNCITRAL) has directed its Working Group III to prepare instruments that would provide the framework for a global system of online dispute resolution (ODR). Negotiations began in December 2010 and have produced an as-yet-incomplete set of procedural rules for ODR. It is anticipated that three other documents will be prepared, addressing substantive principles to be applied in ODR, guidelines and minimum requirements for ODR providers and neutrals, and a cross-border mechanism for enforcement of the resulting ODR decisions on a global basis.*
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> *The most difficult issues in the ODR negotiations are centered on the coordination of the ODR process with national rules of private international law (conflict of laws), national rules of consumer protection, and the international*

arbitration law framework. If any global system of ODR is to be successful, it must avoid difficult questions about the application of national mandatory rules of law, it must be considered to provide fair procedures and results for consumers, and the results obtained must be enforceable across borders. This will only happen if the system respects the ability of individual parties (regardless of category) to enter into binding ODR agreements at the time they form the basic contract for an online transaction.

This article reviews international efforts at constructing an acceptable system of ODR for low-value high-volume online transactions, and addresses the role of party autonomy in the success of any resulting ODR system. The ODR project will fail if parties are denied the autonomy to opt into the resulting system of dispute resolution. Party autonomy is key to the difficult issues of consumer protection, applicable law, and enforcement within the existing international litigation and arbitration regimes. It makes no sense to design a system states agree is fair to all and then, through rules that require reference to national or regional laws, prevent the use of that system.

The paper is forthcoming in the *Loyola University Chicago International Law Review*.

Yearbook of Private International Law, Vol. XIII (2011)

The latest issue of the Yearbook of Private International Law (Volume XIII – 2011) has recently been published. Edited by *Andrea Bonomi,* Professor at the University of Lausanne, and *Gian Paolo Romano*, Professor at the University of Geneva, the volume focuses, among others, on recent developments in European private international law.



The official announcement reads as follows:

> *The current volume of the "Yearbook of Private International Law" includes three special sections: The first one is devoted to the recent European developments in the area of family law like the proposal on the matrimonial property régimes in its relation with other EU instruments, such as Brussels IIbis or Rome III. Another special section deals with the very hotly debated question of the treatment of and access to foreign law. The third one presents some recent reforms of national Private International Law systems. National reports and court decisions complete the book.*
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> *Recent highlights include:*
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> - *multiple nationalities in EU Private International Law*
> - *the European Court of Human Rights and Private International Law*
> - *parallel litigation in Europe and the US*
> - *arbitration and the powers of English courts*
> - *conflict of laws in emission trading*
> - *res judicata effects of arbitral awards*

The *Yearbook* includes the following contributions:

Doctrine

- Stefania Bariatti, Multiple Nationalities and EU Private International Law – Many Questions and Some Tentative Answers

- George A. Bermann, Parallel Litigation: Is Convergence Possible?
- Patrick Kinsch, Private International Law Topics Before the European Court of Human Rights – Selected Judgments and Decisions (2010-2011)
- Jonathan Hill, The Powers of the English Court to Support an Arbitration in "Foreign Seat" and "No Seat" Cases
- Christa Roodt, Border Skirmishes between Courts and Arbitral Tribunals in the EU: Finality in Conflicts of Competence
- Koji Takahashi, Conflict of Laws in Emissions Trading
- Thomas Kadner Graziano, The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law as You Find It

European Family Private International Law

- Cristina González Beilfuss, The Proposal for a Council Regulation on the Property Consequences of Registered Partnerships
- Ilaria Viarengo, The EU Proposal on Matrimonial Property Regimes – Some General Remarks
- Andrea Bonomi, The Interaction among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions
- Beatriz Campuzano Díaz, The Coordination of the EU Regulations on Divorce and Legal Separation with the Proposal on Matrimonial Property Regimes
- Simone Marinai, Matrimonial Matters and the Harmonization of Conflict of Laws: A Way to Reduce the Role of Public Policy as a Ground for Non-Recognition of Judgments

Application of Foreign Law

- Carlos Esplugues Mota, Harmonization of Private International Law in Europe and Application of Foreign Law: The "Madrid Principles" of 2010
- Shaheeza Lalani, A Proposed Model to Facilitate Access to Foreign Law

News from Brussels

- Mel Kenny / Lorna Gillies / James Devenney, The EU Optional Instrument: Absorbing the Private International Law Implications of a Common

European Sales Law

News from Rome

- Alessandra Zanobetti, UNIDROIT's Recent Work: An Appraisal

National Reports

- Yasuhiro Okuda, New Provisions on International Jurisdiction of Japanese Courts
- Tomasz Pajor†, Introduction to the New Polish Act on Private International Law of 4 February 2011
- Mathijs H. ten Wolde, Codification and Consolidation of Dutch Private International Law: The Book 10 Civil Code of the Netherlands
- Seyed N. Ebrahimi, An Overview of the Private International Law of Iran: Theory and Practice (Part Two)
- Nikolay Natov / Boriana Musseva / Teodora Tsenova / Dafina Sarbinova / Zahari Yanakiev / Vasil Pandov, Application of the EU Private International Law
  Instruments in Bulgaria
- William Easun / Géraldine Gazo, Trusts and the Principality of Monaco

Court Decisions

- Michael Bogdan, Defamation on the Internet, *forum delicti* and the E-Commerce Directive:
  Some Comments on the ECJ Judgment in the *eDate* Case
- Michel Reymond, The ECJ *eDate* Decision: A Case Comment
- Matthias Lehmann, Exclusive Jurisdiction under Art. 22(2) of the Brussels I Regulation:
  The ECJ Decision *Berliner Verkehrsbetriebe v JPMorgan Chase Bank* (C-144/10)
- Jan von Hein, Medical Malpractice and Conflict of Laws: Two Recent Judgments by the German Federal Court of Justice
- Kun Fan, The Risks of Apparent Bias when an Arbitrator Acts as a Mediator – Remarks on Hong Kong Court's Decision in *Gao Haiyan*

Forum

- Jeremy Heymann, The Relationship between EU Law and Private

International Law Revisited: Of Diagonal Conflicts and the Means to Resolve Them
- Ilaria Pretelli, Cross-Border Credit Protection against Fraudulent Transfers of Assets – *Actio pauliana* in the Conflict of Laws

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ICC and Civil Reparations

Many thanks to Assistant Professor Nicolás Zambrana (University of Navarra, Spain), author of this comment on the ICC decisions against Lubanga.

First Decision on Civil Reparations by the International Criminal Court

Last 14 of March, the International Criminal Court (ICC) issued its first judicial decision ever, declaring Thomas Lubanga guilty of the crime of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities in the Democratic Republic of Congo. The following 10 of July, another decision, sentencing Lubanga to 14 years in prison, was issued by the same tribunal. Finally, last 7 of August a decision on reparations for the victims has been issued by the ICC. The first thing to be observed is that there does not seem to be a declaration by the tribunal concerning the **civil liability** of Lubanga in any of the three decisions, even if art 75 of the Rome Statute foresees that the ICC may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Furthermore, Lubanga is believed by the court to have no known assets, so no monetary fines have been imposed and no monetary reparations will be exacted from him, although the tribunal foresees that he should provide an apology to the victims as part of the reparations. If the person condemned by the ICC has assets with which to satisfy the fines imposed or the amounts of the reparations decided by the court, the Rome Statute foresees, in article 109.1, that **State Parties** (i.e. parties to the Rome Statute) **shall give effect to those fines or forfeitures** ordered by the Court without prejudice to the rights of *bona fide* third parties, and in accordance with the procedure of their national law. This article can be complemented by article 93 of

the Statute, which declares the obligation by countries to abide by orders of the ICC requesting seizures of property under the law of the country. This procedure seems, at least as regards its goals, rather similar to a common ***exequatur* system of recognition and enforcement of foreign judgements**, only this time there is no foreign country where the judicial decision originates but an international tribunal. Nevertheless, it could be anticipated that, as it happens with the **enforcement of decisions issued by human rights courts** such as the European Court of Human Rights, even if the international obligation to abide by the decision of the international tribunal is clear, nothing is foreseen in case the enforcing State delays or altogether refuses to comply with the decision. This may be easily done since the compliance with the ICC's decision on fines and seizures of property of the person condemned has to be carried out in accordance with the law of the country and few countries may have already adapted their legislation on enforcement of foreign judgments to the Rome Statute. It is also peculiar that, even if the person condemned has no assets with which to satisfy his or her civil liability, the Rome Statute foresees (art. 75.2) that the reparations can still be made "through" a **Trust Fund** funded by the States. This Trust Fund operates in such a way that the ICC only needs to find somebody guilty of one of the crimes established by its Statute in order to set in motion an elaborated machinery that will try to repair all kind of damages, individual or communitarian, physical or psychological, caused by the crimes (art. 97 of the Rules of the Rules of Procedure and Evidence of the ICC). However, the most interesting part of the 7 August decision is the set of principles elaborated by the ICC in order to "calculate", design and distribute the reparations. It is worth noting that these principles are only valid for the Lubanga case, as the Rome Statute foresees that in every case the ICC will establish the principles needed to establish the reparations. Even if this almost one hundred pages decision sets out those principles, **it does not quantify the reparations** or even determine their exact nature, leaving that for the Trust Fund, which will have great discretion for this task, being only monitored by a Chamber of the ICC. One interesting feature of these principles is that they do not limit the reparations to victims present at the trial but to any person, community or entity that is found to have suffered from the crimes adjudicated. Therefore, the principles choose to make the victims a "class", as in the **US class action system**. Another interesting feature is that the ICC Lubanga principles state that victims may obtain reparations also under other mechanisms, according to national or international law. Another one of the principles will sound familiar to civil and common lawyers because it says that

Restitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed. This is certainly a landmark decision because it opens the way to non punitive redress for the victims of egregious international crimes.

Regulation 44/01, Entry into Force and Due Process

A rather non-suprising decision of the ECJ, adopted on June 21, has been published in today's OJ.

The reference for a preliminary ruling concerned the interpretation of Article 66(2) of Council Regulation (EC) No 44/2001, in a dispute on the recognition of an Austrian judgment of April 2003, ordering the defendant to pay a claim brought against it. The claimant, Wolf Naturprodukte, applied to the Okresní soud ve Znojm (District Court, Czech Republic) seeking, on the basis of Regulation No 44/2001, for that judgment to be declared enforceable in the Czech Republic and inter alia for assets of the defendant to be seized for that purpose. The Court dismissed the application on the ground that Regulation No 44/2001 was binding on the Czech Republic only from the accession of that State to the European Union, namely 1 May 2004. Wolf Naturprodukte appealed against that decision to the Krajský soud v Brn (Regional Court, Brno, Czech Republic), which dismissed the appeal and confirmed the decision at first instance. Wolf Naturprodukte thereupon appealed on a point of law to the Nejvyšší soud (Supreme Court, Czech Republic). Since it considered that the wording of Article 66 of Regulation No 44/2001 did not allow a clear determination of the temporal scope of that regulation, the Nejvyšší soud decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

"Must Article 66(2) of [Regulation No 44/2001] be interpreted as meaning that for that regulation to take effect it is necessary that at the time of delivery of a judgment the regulation was in force both in the State whose court delivered the

judgment and in the State in which a party seeks to have that judgment recognised and enforced?"

A year and a half later, the ECJ concluded that

Article 66(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, for that regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed.

The grounds for the ruling are mainly explained in recitals 26

> It follows that the application of the simplified rules of recognition and enforcement laid down by Regulation No 44/2001, which protect the claimant especially by enabling him to obtain the swift, certain and effective enforcement of the judgment delivered in his favour in the Member State of origin, is justified only to the extent that the judgment which is to be recognised or enforced was delivered in accordance with the rules of jurisdiction in that regulation, which protect the interests of the defendant, in particular by providing that in principle he may be sued in the courts of a Member State other than that in which he is domiciled only by virtue of the rules of special jurisdiction in Articles 5 to 7 of the regulation.

and 29

> Furthermore, Regulation No 44/2001 contains certain mechanisms which protect the defendant's rights during the original proceedings in the State of origin, but they apply only if the defendant is domiciled in a Member State of the Union.

As said, the ECJ's ruling does not come as a surprise. The referred question might, though. Or, for that matter, the basis on which the applicant's legal counsel asked for the enforcement of the Austrian decision in the Czech Republic .

Word Class Actions (ed. by P.G. Karlsgodt, OUP)

Class action and other group litigation procedures are increasingly being adopted in jurisdictions throughout the world, as more countries deal with the realities of increased globalization and access to information. As a result, attorneys and their clients face the ever-expanding prospect of a class or group action outside their home jurisdictions. This book intends to be a guide to group and representative actions around the Globe for attorneys and their clients. It helps lawyers navigate and develop strategies for litigation and risk management in the course of doing business abroad, or even in doing business locally in a way that impacts interests abroad.Part I of the book provides a jurisdiction-by-jurisdiction survey of the class action, group, collective, derivative, and other representative action procedures available across the globe. Each chapter is written from a local perspective, by an attorney familiar with the laws, best practices, legal climate, and culture of the jurisdiction.Part II provides guidance from the perspective of international attorneys practicing in foreign jurisdictions and the art of counseling and representing clients in international litigation. It also covers a variety of topics related to transnational, multi-jurisdictional, and class or collective actions that involve international issues and interests, such as:
Chapter 26 Prosecuting Class Actions and Group Litigation

Chapter 27 Multijurisdictional and Transnational Class Litigation: Lawsuits Heard ‘Round the World’

Chapter 28 International Class Action Notice

Chapter 29 International Class Actions Under the U.S. Alien Tort Claims Act

Chapter 30 International Class Arbitration

Chapter 31 Representing Clients in Litigation Abroad

Each chapter offers practice tips and cultural insights helpful to an attorney or litigant facing a dispute in a particular part of the world. Many of the chapters introduce key books, treatises, articles, or other reference materials to foster

further research. Its focus on international class and group litigation law from a practitioner's perspective makes World Class Actions an essential guide for the lawyer or client.

Court Agreements in favour of Third States (still on aff. C-154/11)

The contract of employment between Mr. Mahamdia and the Ministry of Foreign Affairs of the People's Democratic Republic of Algeria (see previous post) contained an agreement on jurisdiction which read as follows:

'VI. Settlement of disputes

In the event of differences of opinion or disputes arising from this contract, the Algerian courts alone shall have jurisdiction.'

As already said in the previous post, Mr. Mahamdia appealed against the judgment of the Arbeitsgericht Berlin (2 July 2008) to the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin and Brandenburg). By its judgment of 14 January 2009 the Landesarbeitsgericht Berlin-Brandenburg rejected the agreement on jurisdiction, considering that it did not satisfy the conditions laid down in Article 21 of Regulation 44/2001, as it had been concluded before the dispute arose and referred the employee to the Algerian courts exclusively.

The People's Democratic Republic of Algeria appealed to the Bundesarbeitsgericht (Federal Labour Court). By judgment of 1 July 2010, the Bundesarbeitsgericht set aside the judgment appealed against and remitted the case to the Landesarbeitsgericht Berlin?Brandenburg. The second question referred to the ECJ for a preliminary ruling by this national court was as follows

2. (…) Can an agreement on jurisdiction, reached before the dispute arises, confer jurisdiction on a court outside the scope of Regulation 44/2001, if, by virtue of the

agreement on jurisdiction, the jurisdiction conferred under Articles 18 and 19 of Regulation 44/2001 would not apply?'

To which the ECJ (Grand Chamber), streching out once again the impact of the Regulation, said that

> "Article 21(2) of Regulation 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that provision in so far as it gives the employee the possibility of bringing proceedings, not only before the courts ordinarily having jurisdiction under the special rules in Articles 18 and 19 of that regulation, but also before other courts, which may include courts outside the European Union."

(Click here for the whole text).

On What an Embassy is (for the Purposes of Regulation 44/01)

Mr Mahamdia lives in Germany. On September 2002 he concluded with the Ministry of Foreign Affairs of the People's Democratic Republic of Algeria a contract of employment for a renewable period of one year, for work as a driver at the Algerian Embassy in Berlin. Mr Mahamdia had to drive guests and colleagues and, as a replacement driver, also the ambassador. In addition, he delivered embassy correspondence to entities in Germany and to the post office. Diplomatic post was received or passed on by a colleague at the embassy who for his part was driven by Mr Mahamdia.

On August 2007 Mr Mahamdia brought proceedings against the People's Democratic Republic of Algeria in the Arbeitsgericht Berlin (Labour Court, Berlin), seeking to be paid for overtime he claimed to have worked in the years 2005 to 2007. Sometime later Mr Mahamdia was dismissed as from 30 September 2007. Mr Mahamdia thereupon added to his principal claim before the Arbeitsgericht Berlin a claim for a declaration that the termination of his

employment contract had been unlawful and for him to be paid compensation for non-acceptance and to have his employment continued until the end of the dispute. In the proceedings concerning the dismissal, the People's Democratic Republic of Algeria raised the objection that the German courts had no jurisdiction, relying both on international rules on immunity from jurisdiction and on the agreement on jurisdiction in the employment contract.

By judgment of 2 July 2008, the Arbeitsgericht Berlin allowed that objection, and consequently dismissed Mr Mahamdia's claim. It took the view that, in accordance with the rules of international law, States enjoy immunity from jurisdiction in the exercise of their sovereign powers and the applicant's activities, which were functionally connected to the diplomatic activities of the embassy, were outside the jurisdiction of the German courts. The applicant in the main proceedings appealed against that judgment to the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin and Brandenburg), which by judgment of 14 January 2009 quashed in part the judgment of the Arbeitsgericht Berlin. It observed that, since the applicant was a driver at the embassy, his activities did not form part of the exercise of public powers by the defendant State, but constituted an activity that was ancillary to that State's exercise of sovereignty. The People's Democratic Republic of Algeria therefore did not enjoy immunity in this case. Moreover, it considered that the German courts had jurisdiction to hear the case, since the embassy was an 'establishment' within the meaning of Article 18(2) of Regulation No 44/2001. Consequently, the rules set out in Article 19 of the regulation applied. It pointed out that, while an 'establishment' is indeed normally a place where commercial activities are carried on, Article 18(2) of Regulation 44/2001 is applicable to an embassy since, first, that regulation does not contain any provision under which the diplomatic representations of States are excluded from its scope and, secondly, an embassy has its own management which concludes contracts independently, including contracts in civil matters such as employment contracts.

The People's Democratic Republic of Algeria appealed to the Bundesarbeitsgericht (Federal Labour Court). By judgment of 1 July 2010, the Bundesarbeitsgericht set aside the judgment appealed against and remitted the case to the Landesarbeitsgericht Berlin?Brandenburg. It ordered the Landesarbeitsgericht to assess the activities of Mr Mahamdia, in particular those relating to interpreting, in order to establish whether they could be regarded as

sovereign functions of the defendant State. In addition, should it emerge from the examination that that State did not enjoy immunity from jurisdiction, it instructed the Landesarbeitsgericht to determine the court with jurisdiction to hear the main proceedings, taking account inter alia of Article 18(2) of Regulation No 44/2001 and Article 7 of the European Convention on State Immunity, drawn up within the Council of Europe and opened to signature by the States in Basle on 16 May 1972.

The Landesarbeitsgericht Berlin-Brandenburg considered that, in accordance with Article 25 of the Basic Law of the Federal Republic of Germany, States can plead immunity from jurisdiction only in disputes concerning the exercise of their sovereignty. According to the case-law of the Bundesarbeitsgericht, employment law disputes between embassy employees and the State concerned are within the jurisdiction of the German courts where the employee has not carried out, for the State by which he is employed, activities forming part of the sovereign functions of that State. In the present case, the referring court 'presumes' that Mr Mahamdia did not carry out such activities, since the People's Democratic Republic of Algeria has not shown that he took part in those activities. That court further considers that the jurisdiction of the German courts follows from Articles 18 and 19 of Regulation 44/2001, but that, for the purpose of applying those articles, it must be established whether an embassy is a 'branch, agency or other establishment' within the meaning of Article 18(2) of that regulation. Only if that is the case may the People's Democratic Republic of Algeria be regarded as an employer domiciled in a Member State. On the basis of those considerations, the Landesarbeitsgericht Berlin-Brandenburg decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'1. Is the embassy of a State outside the scope of … Regulation No 44/2001 … which is situated in a Member State a branch, agency or other establishment within the meaning of Article 18(2) of Regulation 44/2001?

And the answer is "yes". This is what the ECJ, Grand Chamber, ruled on July 19, 2012 (see whole text here):

> Article 18(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an embassy of a third State situated in a Member State is an 'establishment' within the

meaning of that provision, in a dispute concerning a contract of employment concluded by the embassy on behalf of the sending State, where the functions carried out by the employee do not fall within the exercise of public powers.

New Hague Abduction Convention Case before the United States Supreme Court

The Supreme Court on Monday added one new case to its docket for the new Term. *Chafin v. Chafin* (docket 11-1347) concerns whether an appeal in a Hague Abduction Convention case becomes moot if the child involved has returned to his or her home country. As reported at SCOTUSBlog, this is a very rare mid-Summer order before the first formal Conference on the new Term on September 24. The order is linked here.

The newly granted case involves a U.S. Army sergeant and a Scottish woman he had married while stationed in Germany. The couple later moved to Alabama, and after their divorce, disputed the care of their daughter, who is now five years old. After obtaining a federal court order under the Hague Convention declaring that Scotland was the girl's country of habitual residence, Mrs. Chafin returned to Scotland with the child. Sgt. Chafin appealed that decision to the Eleventh Circuit, but that court dismissed the case as moot because the child had already returned to Scotland, and was outside the Court's jurisdiction. The federal appeals courts are split on the mootness issue under the Hague Convention, which led the Supreme Court to grant the case.

Petitioner's Brief is available HERE.

La Ley-Unión Europea, July 2012

A new article from Prof. Patricia Orejudo Prieto de los Mozos (Complutense University, Madrid) entitled "La nueva regulación de la ley aplicable a la separación judicial y al divorcio: aplicación del Reglamento Roma III en España" is to be found in the Spanish magazine *La Ley-Unión Europea* of July 31, 2012. The summary reflects the critical view of the author:

> The Rome III Regulation, the first instrument of enhanced cooperation adopted in the EU, seeks to provide "a clear and comprehensive legal framework on applicable law to divorce and legal separation. " However, it does not increase legal predictability, nor does it prevent (on the contrary, it could encourage) the so called "race to the courts." Furthermore, when applied in Spain it will add regulatory fragmentation and complexity to an already intricate situation, making it more difficult to manage for the Spanish legal operators. If we sum this to the democratic deficit inherent to the adoption process and with the fact that the Regulation serves best the conservative values of other Member States, the Spanish decision to participate is hard to understand.

A comment on the recent ECJ ruling *Oracle v. UsedSoft*, from Prof. Miguel Michinel (University of Vigo), has also been published in the same issue of the magazine.