AG Opinion in Case “Deko Marty Belgium”

Yesterday, the opinion by *Advocate General Ruiz-Jarabo Colomer* in case C-339/07 (*Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium N.V.*) has been released.

The case concerns the delimitation of Regulation (EC) No. 1346/2000 (Insolvency Regulation) and Regulation (EC) No. 44/2001 (Brussels I Regulation) or – more precisely – the question of whether Art. 3 (1) Insolvency Regulation covers actions to set a transaction aside in the context of insolvency, although they are not mentioned explicitly.

The background of the case is as follows: The debtor, a German private limited company, paid an amount of 50.000 EUR to a Belgian company (defendant). Even though it was a Belgian company having its registered office in Belgium, the money was paid into an account in Germany. The day after, the debtor applied successfully for the opening of the insolvency proceedings at a German local court. In the following, the insolvency administrator (claimant) reclaimed the 50.000 EUR from the defendant by means of an action to set a transaction aside.

The Regional Court (LG Marburg, 2 August 2005 – 2 0 209/04) as well as the Higher Regional Court (OLG Frankfurt, 26 January 2006 – 15 U 200/05) held that the Brussels I Regulation had to be applied and consequently stated that German courts lacked international jurisdiction since the defendant’s registered office was in Belgium.

In the following, the German *Bundesgerichtshof*, regarding the interpretation of Art. 3 (1) Insolvency Regulation and Art. 1 (2) lit. b) Brussels I Regulation as being ambiguous, referred – with decision of 21 June 2007 (IX ZR 39/06) – the **following questions** to the ECJ for a preliminary ruling:

> *On interpreting Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and Article 1(2)(b) 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, do the courts of the*

Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation (EC) No 1346/2000 in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?
If the first question is to be answered in the negative:

Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation (EC) No 44/2001?

Now, Advocat General *Ruiz-Jarabo Colomer* **suggests** in his **opinion** to answer these questions as follows:

> ***Art. 3 (1) Regulation (EC) No. 1346/2000 has to be interpreted as meaning that the court of a Member State before which insolvency proceedings are pending has jurisdiction with regard to an action in the context of insolvency to set a transaction aside against an addressee of avoidance having its registered office in another Member State.***

(*Approximate translation from the German version of the opinion.)*
In his opinion, the Advocate General first gives an overview of the historical development of the a*ctio pauliana* before outlining the Court's previous judgments in the present context – *Reichert* and *Gourdain*. Here, the Advocate General summarises that the Court has held so far that actions to set aside are considered as bankruptcy or analogous proceedings – and are therefore excluded from the scope of the Brussels I Convention/Regulation – if they are closely connected with those proceedings. The question whether a close connection in this terms exists, is answered in view of the action's structure in the respective national legal system (para. 39).

In the following, the Advocate General examines whether the entry into force of the Insolvency Regulation has led to any changes in this respect. He argues that the judgment in *Gourdain* is still valuable since it shows that – due to the fact that Community law does not provide for a uniform action to set a transaction aside – the legal nature of the action is of high significance with regard to the question whether it is covered either by the Brussels I or the Insolvency Regulation (para. 55). The fact that the (German) action to set a transaction aside in the context of insolvency is so closely connected with insolvency leads – in the light of *Gourdain* – to the result that it is not covered by the general Community rules on jurisdiction, i.e. the Brussels l Regulation (para. 58). Since, however, an

examination of Regulation (EC) No. 1346/2000 shows the Council's intention to regulate the proceeding with regard to the action to set a transaction aside in the context of insolvency (para. 50), the Advocate General supports the view that Art. 3 (1) Insolvency Regulation establishes the jurisdiction of the insolvency court (para. 51). Due to the particularities of actions to set a transaction aside in the context of insolvency, the insolvency court's jurisdiction should be, according to the Advocate General, a relative exclusive jurisdiction, i.e. it is for the insolvency administrator to choose the court which appears to be – in view of the insolvency asset – the most suitable one (para. 69).

The full text of the opinion can be found, inter alia, in Italian, French and Spanish at the ECJ's website.

See with regard to the reference and the background of the case also our previous post which can be found here and our previous post on a related article which can be found here.

ECJ: Judgment in Case "Grunkin and Paul"

Today, the ECJ delivered its judgment in case C-353/06 (*Grunkin and Paul*) which has been awaited with high interest.

As reported in previous posts, the background of the case is as follows: The case concerns a child who was born in Denmark having, as well as his parents, only German nationality. The child was registered in Denmark – in accordance with Danish law – under the compound surname *Grunkin-Paul* combining the name of his father (*Grunkin*) and the name of his mother (*Paul*), who did not use a common married name. After moving to Germany, German authorities refused to recognise the surname of the child as it had been determined in Denmark, since according to German private international law (Art.10 EGBGB) the name of a person is subject to the law of his/her nationality, i.e. in this case German law, and according to German law (§ 1617 BGB) parents who do not share a married name

shall choose *either* the father's or the mother's surname to be the child's surname.

The Local Court *(Amtsgericht) Niebüll* which was called to designate the parent having the right to choose the child's surname, sought a preliminary ruling of the ECJ on the compatibility of Art.10 EGBGB with Articles 12 and 18 EC-Treaty. However, the ECJ held that it had no jurisdiction to answer the question referred since the referring court acted in an administrative rather than in a judicial capacity (judgment of 27 April 2006, C-96/04). In the following, the parents applied again – without success – to have their son registered with the surname *Grunkin-Paul*. The parents' challenge to this refusal was heard, by virtue of German procedural law, by the *Amtsgericht Flensburg*. The *Amtsgericht Flensburg* held that it was precluded from instructing the registrar to register the applicants' son under this name by German law. However, since the court had doubts as to whether it amounts to a violation of Articles 12 and 18 EC-Treaty to ask a citizen of the European Union to use different names in different Member States, the court referred with decision of 16th August 2006 (69 III 11/06) the **following questions** to the ECJ for a **preliminary ruling:**

> *In light of the prohibition on discrimination set out in Article 12 of the EC Treaty and having regard to the right to the freedom of movement for every citizen of the Union laid down by Article 18 of the EC Treaty, is the provision on the conflict of laws contained in Article 10 of the EGBGB valid, in so far as it provides that the right to bear a name is governed by nationality alone?*

Thus, the referring court essentially asked whether Artt. 12, 18 EC preclude authorities of a Member State from refusing to recognise a surname which has been determined and registered in a second Member State in which the person – who has only the nationality of the first Member State – was born and has been resident.

The **Court** now **answered** the question referred by the *Amtsgericht Flensburg* as follows:

> ***In circumstances such as those of the case in the main proceedings, Article 18 EC precludes the authorities of a Member State, in applying national law, from refusing to recognise a child's surname, as determined and registered in a second Member State in which the child***

– who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth.

In its reasoning, the Court first (para. 16) states that the case falls within the **scope of the EC-Treaty**. The Court stresses that even though the rules governing a person's surname fall within the competence of the Member States, the latter have to, when exercising their competence, comply with Community law (unless the case concerns an internal situation without any link with Community law).

In the following, the Court holds with regard to **Art. 12 EC**, that the child is not discriminated against on grounds of nationality (para. 19 et seq.).

However, with regard to **Art. 18 EC**, the Court states that "[h]aving to use a surname, in the Member State of which the person concerned is a national, that is different from that conferred and registered in the Member State of birth and residence is liable to hamper the exercise of the right, established in Article 18 EC, to move and reside freely within the territory of the Member States." (para. 22)

The Court refers in this context to its judgment in *Garcia Avello* and sets forth that – also in the present case – **serious inconveniences** may be caused due to the discrepancy in surnames (para. 23 et seq.). Thus, according to the Court "[…] every time the child concerned has to prove his identity in Denmark, the Member State in which he was born and has been resident since birth, he risks having to dispel doubts concerning his identity and suspicions of misrepresentation caused by the difference between the surname he has always used on a day-to-day basis, which appears in the registers of the Danish authorities and on all official documents issued in his regard in Denmark, such as, inter alia, his birth certificate, and the name in his German passport." (para. 26)

This **obstacle to free movement** could only be **justified** if it was based on "objective considerations and was proportionate to the legitimate aim pursued" (para. 29). **This is, however, according to the Court, not the case.** Thus, the Court does not regard the arguments brought forward by the German Government such as, inter alia, that the connecting factor of nationality constituted "an objective criterion which makes it possible to determine a person's surname with certainty and continuity" (para. 30) as sufficient. Rather

the Court states that "[n]one of the grounds put forward in support of the connecting factor of nationality for determination of a person's surname, however legitimate those grounds may be in themselves, warrants having such importance attached to it as to justify […] a refusal by the competent authorities of a Member State to recognise the surname of a child as already determined and registered in another Member State in which that child was born and has been resident since birth." (para. 31)

See with regard to this case also our previous post on Advocate General Sharpston's opinion which can be found here as well as our post on the referring decision of the Amtsgericht Flensburg which can be found here and the post on the first judgment in this case (then known as Standesamt Stadt Niebüll) which can be found here.

BIICL Research Fellowship in International Private Law

The British Institute of International and Comparative Law is seeking to appoint a Senior Research Fellow in International Private Law.

The advertisement can be found here and a full job description can be found here. The post is a research post, with no teaching duties. The fellow will be appointed for five years and be expected to lead the Institute research and events programme in international private law.

The closing date for applications is November 10.

Japan Accedes to CISG

We do not usually report on uniform law, but Japan was one of the few major trading powers which had not acceded to the CISG.

The report of the United Nations Information Service is here.

Is the UK next?

EC Commission Presents a Proposal for a Directive on Consumer Rights

On 8 October 2008, Commissioner Meglena Kuneva (DG Health and Consumers) presented a new Proposal for an EC directive on consumer rights (COM(2008) 614) (see the Consumer Acquis webpage).

The proposal aims to revise four existing directives on consumer contracts (the cornerstones of EC legislation in the field: Dir. 85/577/EEC on contracts negotiated away from business premises, Dir. 93/13/EEC on unfair terms in consumer contracts, Dir. 97/7/EC on distance contracts, Dir. 1999/44/EC on consumer sales and guarantees) merging them into a single horizontal instrument based on full-harmonisation (i.e. Member States cannot maintain or adopt provisions diverging from those laid down in the Directive), which regulates the common aspects “in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps”.

The minimum harmonisation approach (i.e. Member States may maintain or adopt stricter consumer protection rules), adopted in the previous EC legislation in the field, was abandoned in order to avoid fragmentation in the level of consumer protection in the Member States (Impact Assessment Report, p. 8):

The effects of the fragmentation are felt by business because of the conflict-of law rules, and in particular the Rome I Regulation, which obliges traders not to go below the level of protection afforded to foreign consumers in their country. As a result of the fragmentation and Rome I, a trader wishing to sell cross-border into another Member State will have to incur legal and other compliance costs to make sure that he is respecting the level of consumer protection in the country of destination. These costs reduce the incentive for businesses to sell cross-border, particularly to consumers in small Member States. Such costs are eventually passed on to consumers in the form of higher prices or, worse, businesses refuse to sell cross-border. In both cases consumer welfare is below the optimum level.

Quite interestingly, under a conflict-of-laws perspective, one of the main concerns of the Commission was to achieve a sound coordination between the proposed directive and the Rome I Regulation.

All the policy options which were assessed to draft the proposed legislation took into account the recent adoption of the regulation on the law applicable to contractual obligations (see the 6 options listed in the Explanatory Memorandum of the Commission, p. 5, and analysed in the Impact Assessment Report, p. 16 ff., and in the Annexes, p. 18 ff.):

1. *Policy option 1: Status Quo or baseline scenario, including the effects of Rome I and forthcoming legislation.*
2. *Policy option 2: Non legislative approaches, including information campaigns and financial contributions and the effects of Rome I.*
3. *Policy option 3: Minimum legislative changes (harmonisation of basic concepts where benefits clearly outweigh costs), including the effects of Rome I.*
4. *Policy option 4: Medium legislative changes (including PO 3 plus and the effects of Rome I).*
5. *Policy option 5: Maximum legislative changes (including PO 4 plus far-reaching proposals granting new consumer rights as well as the effects of Rome I).*
6. *Policy option 6: Minimum legislative changes (PO 3) or Medium legislative changes (PO 4) combined with an internal market*

clause applying to the non-fully harmonised aspects (such as general contract law aspects outside the scope of the Consumer Acquis).

The latter option (insertion of an internal market clause) was excluded, since it was considered to be in contrast with the protective conflict rule of Art. 6 of the Rome I Regulation (Impact Assessment Report, p. 24):

[A]n alternative to full harmonisation was put forth in the form of a minimum harmonisation approach combined with an Internal Market clause. This approach has been discussed during the consultation process.

Such an Internal Market clause could have taken the form of a mutual recognition clause or of a clause on the country of origin principle for the aspects falling within the scope of a future Directive and not subject to full harmonisation. A mutual recognition clause would give Member States the possibility to introduce stricter rules in their national law, but would not entitle a Member State to impose its own stricter requirements on businesses established in other Member States in a way which would create unjustified restrictions to the free movement of goods or to the freedom to provide services. A clause based on the country of origin principle would give Member States the possibility to introduce stricter consumer protection rules in their national law, but businesses established in other Member States would only have to comply with the rules applicable in their country of origin.

Both variants of the Internal Market clause met considerable opposition from several categories of stakeholders. […] Regulatory fragmentation combined with the Internal Market clause would achieve legal certainty for traders, but not for consumers, who would be subject to different laws with different levels of protection.

Finally, an Internal Market clause which would systematically subject the contract to the law chosen by the parties (which will normally be the law designated as applicable under the trader's standard contract terms) or to the law of the country of origin (i.e. the country where the trader is established) goes against the newly-adopted Rome I Regulation on the law applicable to contractual obligations. Indeed the clause would contrast with Article 6(1) of the Rome I Regulation, which provides that the law applicable to consumer contracts, in the absence of a choice made by the parties, is the law of the

> *country where the consumer has his habitual residence (i.e. the law of the country of destination). It would also be in contrast with Article 6(2) of the Regulation which provides that the law chosen by the parties (e.g. the law of the country of the trader) cannot deprive the consumer of the protection granted by the law of his country of residence. Such an Internal Market clause would not be acceptable by the great majority of Member States, as evidenced by the public consultation on the Green Paper.*

The text of the new directive, in the current version proposed by the Commission, should not, *prima facie*, interfere with the application of the conflict rules of the Rome I Regulation, avoiding problems such as those arising from the e-commerce directive or from clauses inserted in the previous consumer directives (see for instance Art. 6(2) of Directive 93/13 on unfair contractual terms). See Recital no. 10 and no. 59:

> *(10) The provisions of this Directive should be without prejudice to Regulation (EC) No 593/2008 of the European Parliament and of the Council applicable to contractual obligations (Rome I);*
>
> *(59) The consumer should not be deprived of the protection granted by this Directive. Where the law applicable to the contract is that of a third country, Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) should apply, in order to determine whether the consumer retains the protection granted by this Directive.*

Third Issue of 2008's Revue Critique Droit Int'l Privé

The third issue of French *Revue Critique de Droit International privé* for 2008 will be released shortly. It will include four articles, all relating to conflict issues.

In the first article, Charalambos Pamboukis, who is a professor at the university of Athens, Greece, explores the renewal and metamorphosis of recognition as a method to address conflicts problems (*La renaissance-métamorphose de la méthode de la reconnaissance*). The English abstract reads:

> *The recent renewal of a methodology of recognition is the result of two factors. First, a political factor. Globalisation requires international coherence for private relationships, while the construction of Europe reconstitutes a community of laws. A paradigm change emerges. Second, a technical factor. Traditional conflict rules are not adapted to the recognition of legal relationships which already exist. The characteristic of the method of recognition is its function of confirmation and reception, and its object, which is a concrete, pre-existing legal relationship. It excludes any recourse to the conflict rule, but it does not necessarily represent an underhand form of lex forism nor does it signify reverse discrimination. But its scope is still uncertain, since it covers relationships which have been consecrated by an official but created by private actors. The latter distinction could contribute to clarify the much debated issue.*

In the second second article, Marie-Elodie Ancel wonders what the Rome I Regulation will change for distribution contracts (*Les contrats de distribution et la nouvelle donne du règlement Rome I*). The author, who is a professor of international private law at Paris Val-de-Marne (Paris XII) university, has kindly provided the following abstract:

> *According to French case law, distribution contracts are governed by the law of the manufacturer in the absence of a choice of law and the forum contractus is determined under Article 5.1 a) of the Brussels I Regulation. This study examines how the French Cour de cassation has been led to these solutions and how Article 4.1 and Recital 17 of the Rome I Regulation take the opposite course.*

The third article is a comprehensive study of the Rome II Regulation by Geneva professor Thomas Kadner Graziano (*Le nouveau droit international privé communautaire en matière de responsabilité extracontractuelle*).

Finally, the fourth article is an essay on class actions in international private law

building on the American *Vivendi Universal* case (*Régulation de l'économie globale et l'émergence de compétences déléguées : sur le droit international privé des actions de groupe (à propos de l'affaire* Vivendi Universal)). Its author is Horatia Muir Watt, who teaches at Paris I university.

At the present time, I do not have an English abstract for the last two pieces.

Book: Liber Amicorum Hélène Gaudemet-Tallon

The French publisher Dalloz has recently published a very rich collection of essays in honor of **Hélène Gaudemet-Tallon**, Professor Emeritus at the University of Paris II and Associate Member of the *Institut de Droit International*, one of French leading scholars in the field of conflicts of laws and jurisdictions (among her recent works, see *Le pluralisme en droit international privé, Richesses et faiblesse (le funambule et l'arc en ciel)*, General Course held in 2005 at the Hague Academy of International Law, and the forthcoming fourth edition of her authoritative book on the Brussels I reg., *Compétence et exécution des jugements en Europe*).

The volume, ***Vers de nouveaux équilibres entre ordres juridiques. Liber amicorum Hélène Gaudemet-Tallon***, includes 50 articles on almost all fields of Private International Law, written by leading academics.

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(Many thanks to Gilles Cuniberti and Etienne Pataut)

ECJ on Hassett v South Eastern Health Board and Art 22(2) Brussels I

The European Court of Justice handed down judgment in ***Hassett v South Eastern Board*** on 2nd October 2008. It doesn't make for particularly interesting reading, so I'll be brief. The Irish Supreme Court referred the following question to the ECJ:

> *Where medical practitioners form a mutual defence organisation taking the form of a company, incorporated under the laws of one Member State, for the purpose of providing assistance and indemnity to its members practising in that and another Member State in respect of their professional practice, and the provision of such assistance or indemnity is dependent on the making of a decision by the Board of Management of that company, in accordance with its Articles of Association, in its absolute discretion, are proceedings in which a decision refusing assistance or indemnity to a medical practitioner practising in the other Member State pursuant to that provision is challenged by that medical practitioner as involving a breach by the company of contractual or other legal rights of the medical practitioner concerned to be considered to be proceedings which have as their object the validity of a decision of an organ of that company for the purposes of Article 22, [point] 2, of [Regulation No 44/2001] so that the courts of the Member State in which that company has its seat have exclusive jurisdiction?*

Which the ECJ took to mean:

> *By that question, the national court is essentially asking the Court whether point 2 of Article 22 of Regulation No 44/2001 is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles*

> *of Association, concern the validity of the decisions of the organs of a company within the meaning of that provision.*

And to which they answered:

> *Point 2 of Article 22 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 is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, do not concern the validity of the decisions of the organs of a company within the meaning of that provision.*

The reasoning, such that it was, centred on the fact that allowing all disputes involving a decision by an organ of a company to come within Article 22(2) of the Brussels I Regulation (which is primarily there, so says the Jenard Report, to prevent conflicting judgments) would mean that it would apply to those disputes where conflicting judgments would *not* arise. That is beyond the scope of Article 22(2). As the doctors had not challenged the validity of a decision before the national courts (they were instead challenging the process (or lack thereof) of that decision, and so did not come within the defined scope of Art 22(2). Fair point, really.

(Hat-tip to Andrew Dickinson.)

Spanish PIL periodicals (II): Anuario Español de Derecho

Internacional Privado

The Anuario Español de Derecho Internacional Privado is an annual magazine specialized in Private International law. It was born in 2000 on an ambitious initiative of Prof. Dr. José Carlos Fernández Rozas (Complutense University, Madrid), in order to provide the Spanish scientific community with accurate and updated information about conflicts of laws in a wide range of subjects, such as commercial arbitration, procedural law, contracts law, tort law, property rights or family and succession law. Besides doctrinal contributions, every volume includes reference to the latest legislative reforms, both Spanish or relating to the Community, and to the international agreements signed by our country in the field of Private International Law. Punctual news of the work in progress or achieved in different international forums (UNIDROIT, UNICUTRAL, The Hague Conference, etc) are also enclosed, as well as deep and critical studies of the jurisprudence and of the administrative Spanish practice on PIL.

The publication is constructed in different sections, some of which are fixed. Each issue begins with an ambitious doctrinal title that gathers relevant scientific contributions from Spanish and foreign authors -translated into Spanish. It is usually followed by a section on legislation (Textos legales), and another, quite exhaustive one, on case law (Jurisprudencia: each volume systematizes several hundreds of decisions of the Spanish courts). A third section reproduces practices materials (Materiales de la práctica española). The Anuario also reports on national and international congresses, meetings and seminars, and gives notice of the whole Spanish bibliography on PIL (research monographs as well as editorials), appeared throughout the year.

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Jurisdiction to Prevent the End of the World

Which court has jurisdiction to prevent the end of the world? Any, one would think: after all, the end of the world is likely to have serious consequences pretty much everywhere.

Is that why an American retired radiation safety officer and a Spanish science writer decided to initiate proceedings in Hawaï to stop the running of the new Large Hadron Collider, a giant particle accelerator operating on the Swiss-French border near Geneva? The plaintiffs fear that the Collider might create a black hole which would spell the end of the Earth. No doubt, that would have an impact even in Hawaï.

The defendants were the European Center for Nuclear Research (CERN), the U.S. Department of Energy, the U.S. National Science Foundation and the U.S. Fermi National Accelerator Laboratory (Fermilab). In an interview to the *New York Times*, one of the plaintiffs revealed that his strategy focused on American parties. He did not know whether CERN would show up, but he had added it as a party to save expenses. In any case, part of the project was funded by the Department of Energy and the National Science Foundation, and the magnets of the Collider are supplied and maintained by Fermilab.

The complaint argued that the defendants had failed to comply with American legislation, namely the National Environmental Policy Act (NEPA), and also with the European precautionary principle.

As the *New York Times* reported, on September 26, 2008, the Hawaï District Court declined jurisdiction.

The order of the Court, which can be found here, is disappointing from a conflict's perspective. This is because Judge Gillmor was able to dismiss the action solely on domestic grounds. In other words, she held that the court lacked jurisdiction within the American legal system, as a federal court, which is not to say that an

American state court would have lacked jurisdiction.

American federal courts are courts of limited jurisdiction. This means that this is for plaintiffs to demonstrate that the court has subject matter jurisdiction. Here, the plaintiffs solely argued that the court had federal question jurisdiction, i.e. that this was an action "arising under" U.S. federal law. The federal law that they put forward was NEPA. However, NEPA requires that there be a "major federal action significantly affecting the quality of the human environment" (42 USC §4332 (c)). The court finds that there was no such major federal action in that case. As a consequence, it rules that there is no federal question, and that it lacks jurisdiction on this ground as a U.S. federal court.

The court further rules that no other ground for subject matter jurisdiction were put forward by the plaintiffs and that they had the burden of doing so. Thus, there might have been other grounds to found the subject matter jurisdiction of the court. For instance, neither federal party jurisdiction, nor diversity jurisdiction are discussed.

Finally, the court rules that it does not need to address the issue of whether the plaintiffs had standing, given that their allegation of an injury was arguably "conjectural and hypothetical".

Meanwhile, a suit was also filed before the European Court of Human Rights (see the report of the *Telegraph* here). I don't know whether this action is more likely to be successful, but Strasbourg is certainly closer to Geneva than Honolulu.