

# **BALANCING CONSUMER RIGHTS AND BUSINESS INTERESTS IN ONLINE CROSS-BORDER CONSUMER CONTRACTS**

European Private International Law as a Source of Inspiration for Indonesia and ASEAN

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## **Abstract**

Protection of consumers as weaker parties is an important goal in Indonesian society and in Indonesian law. The same applies to the EU Member States. When it comes to cross-border consumer contracts, special rules are needed to ensure this goal can still be achieved. In this regard the European Union developed rules on jurisdiction and applicable law which apply both to situations exclusively connected with EU Member States and to international situations connected with third countries. The Brussels I Regulation pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling the applicant to easily identify the court in which he may sue and the defendant reasonably to foresee before which court, he may be sued. The Rome I Regulation does the same for the law regulating the protection of the consumer. This way both the aims of protection of the weaker consumer and legal certainty on the side of the commercial party go hand in hand. Where legal certainty is an important precondition for international trade and thus for a nation's economy, clear rules are needed. By presenting the EU rules in the dynamics of the caselaw of the European Court of Justice, this article aims to contribute to the discussion on how future cross-border consumer protecting regulations could be shaped in Indonesia and ASEAN.

**Keywords:** *cross-border; consumer protection; European Union; Indonesia; private international law.*

## **I. INTRODUCTION**

The principle of consumer protection is anchored in Indonesian law in various ways. Bank Indonesia continuously strengthens the consumer protection ecosystem in Indonesia, since a solid and trusted consumer protection function will, in turn, support financial system stability and accelerate national economic

growth.<sup>1</sup> BI Governor Perry Warjiyo expects e-commerce transactions to reach Rp 530 trillion (US\$37 billion) in 2022.<sup>2</sup> This shows that consumer protection is at the centre of attention in Indonesia.

Whereas consumer contracts concluded between a consumer residing in Indonesia and a commercial party residing in Indonesia are subject to the consumer protection rules of Indonesia, this is not automatically the case when the commercial party operates from abroad. In such a situation, the commercial party will enter into the contract under its own terms and conditions, will usually apply its own law and will give the courts of its own country jurisdiction over any disputes with the consumer. The consumer has no choice but to agree to these conditions. After all, without this consent, the commercial party will not enter into the agreement and the consumer will not receive the desired products. Moreover, the consumer's attention will be focused on receiving the much-desired product as soon as possible and not on the legal consequences of agreeing to the contract and its general conditions.

It is now a well-established fact that consumer transactions increasingly take place online via the website of the commercial party or via a platform such as Alibaba or eBay. Also in that situation, the Indonesian consumer will be confronted with a binding choice for foreign law and will be bound to litigate before the foreign court in case of a dispute. The rules that protect the consumer residing in Indonesia will not be applicable in that case.

The question arises as to how consumer protection can be given shape in such international online consumer contracts. It is obvious that the Indonesian consumer also needs protection in international situations. This article explains how international online consumer protection in the European Union has been developed and on what principles the rules of international jurisdiction and applicable law on consumer contracts are established. This article aims to contribute to the discussion on how consumers in Indonesia can be protected in international situations and how the interests of the commercial party can be taken into account at the same time.

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<sup>1</sup> Bank Indonesia Deputy Governor, Doni P. Joewono, at the National Consumer Day, 20 April 2021. Bank Indonesia, "Press Release: Importance of Consumer Protection in the Digital Economy Era," 2021, [https://www.bi.go.id/en/publikasi/ruang-media/news-release/Pages/sp\\_239621.aspx](https://www.bi.go.id/en/publikasi/ruang-media/news-release/Pages/sp_239621.aspx).

<sup>2</sup> Elsy A. Eloksari, "Digital Transactions Forecast to Grow 31% Next Year: Bank Indonesia," Jakarta Post, 2021, <https://www.thejakartapost.com/business/2021/11/29/digital-transactions-forecast-to-grow-31-next-year-bank-indonesia.html>.

## II. BALANCING RIGHTS OF CONSUMERS AND INTERESTS OF COMMERCIAL PARTIES IN THE EU REGULATIONS<sup>3</sup>

In the domain of European international contract law, party autonomy is paramount. Recital 11 of the Rome I Regulation on the law applicable to contractual obligations<sup>4</sup> states: *‘The parties’ freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.’*

The contracting parties also have considerable freedom when it comes to the court that will be competent to rule on disputes arising between them. Recital 19 of the Brussels Ibis Regulation<sup>5</sup> states; *‘The autonomy of the parties to a contract, ..., should be respected ...’*. According to Article 25 Brussels Ibis Regulation: *‘If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, ...’*

Such party autonomy offers the entrepreneur doing business in the EU ample opportunities to influence the applicable law and the competence of the court. However, there is a category of contracts in which this freedom is significantly restricted, namely the contract concluded with a consumer.

The European legislator protects the consumer as the weaker contracting party through numerous European directives. In addition to this protection under substantive law, the weaker position of the consumer is also taken into account at the level of international jurisdiction and applicable law. Under the Brussels Ibis Regulation, in relation to consumer contracts, the weaker party is protected by rules of jurisdiction more favourable to his interests than the general jurisdiction rules.<sup>6</sup> At the same time, the Rome I Regulation provides protection to consumers by applying the rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country.<sup>7</sup>

Consumer protection in the area of jurisdiction (Article 17 Brussels Ibis-Vo.) takes place as much as possible along the same lines as consumer

<sup>3</sup> Parts of this text refer to Chapter 4 in Mathijs H. ten Wolde and Kirsten C. Henckel, *Business and Private International Law in the EU* (Paris: Europa Law Publishing, 2021), 154.

<sup>4</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008, L 177.

<sup>5</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is applicable from 10 January 2015, OJ 2012, L 351.

<sup>6</sup> Recital 18, Brussels Ibis Regulation.

<sup>7</sup> Recital 25, Rome I Regulation.

protection in the area of applicable law (Article 6 Rome I Regulation). This creates synchronicity between jurisdiction and applicable law.

### III. INTERNATIONAL JURISDICTION OVER CONSUMER CONTRACTS

#### III.A. The regime of Articles 17, 18 and 19

Jurisdiction over consumer contracts is regulated by Articles 17, 18 and 19 of the Brussels Ibis Regulation.<sup>8</sup> These provisions apply in matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession. Article 17 stipulates that in these cases jurisdiction shall be determined if:

- a) it is a contract for the sale of goods on instalment credit terms;
- b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

Articles 17, 18 and 19 of the Brussels Ibis Convention are based on the principle of consumer protection. They offer the consumer protection in a number of ways.

First of all, pursuant to Article 18(1) a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled. The consumer therefore has the choice between suing the other party in the *forum rei* (place of domicile) or in the *forum actoris* (place of domicile of the consumer). The *forum rei* applies irrespective of the domicile of the other party. A party domiciled outside the EU can be sued in the courts of the consumer's domicile. This rule is thus an exception to Article 4. On the other hand, the consumer may be sued by the other party only in the courts of the Member State in which the consumer is domiciled (Article 18(2)). If the consumer moves to another Member State after conclusion of the contract, the action will have to be brought there.<sup>9</sup> The decisive factor is the place of residence at the time when the action is brought. Unlike the consumer, the

<sup>8</sup> According to Article 66, the Regulation applies only to legal proceedings instituted on or after 10 January 2015.

<sup>9</sup> Case C-98/20 *mBank S.A. v PA* [2020] ECLI:EU:C:2020:672.

other party to the contract has no *forum actoris* (Article 18(2)). An exception to this rule is, however, made when a counterclaim is made in an action brought by the consumer before his own *forum actoris* (Article 18(3)).

Furthermore, the consumer is protected by the fact that a choice of forum is only possible after a dispute has arisen (Article 19 (1)), whereas in the absence of a choice of forum, the forums that were available to the consumer in advance cannot be frustrated by such a choice (Article 19 (2)). It should be noted, however, that on the basis of Article 19(3) a choice of forum before the court of the country in which both the consumer and the other party to the contract have their domicile or habitual residence at the time of conclusion of the contract is binding. If the consumer transfers his claim to another consumer or to a commercial party, the latter shall not be protected by Articles 17, 18 and 19.<sup>10</sup>

If there is no consumer contract or the requirements outlined above are not met, the general jurisdiction rules of the Regulation apply.

### III.B. Interpretation of Article 17(1) by the European Court of Justice

In accordance with the case law of the ECJ, Article 17(1) Brussels Ibis Regulation applies if three conditions are met: First, a party to a contract is a consumer who is acting in a context which can be regarded as being outside his or her trade or profession. Second, the contract between such a consumer and a professional has been concluded. Third or last, such a contract falls within one of the categories referred to in Article 17(1)(a) to (c). All those conditions must be fulfilled, with the result that, if one of those three conditions is not met, jurisdiction cannot be determined under the rules relating to consumer contracts.<sup>11</sup>

It is settled case-law of the European Court of Justice that the concept of ‘consumer’ must be given an autonomous and restrictive interpretation.<sup>12</sup> That interpretation must also take account of the interpretation of that concept in other rules of EU law, to achieve the objectives of the EU legislature in consumer contracts and to ensure the coherence of EU law.<sup>13</sup>

<sup>10</sup> Case C-498/16, *Maximilian Schrems v Facebook Ireland Limited* [2018] ECLI:EU:C:2018:37, paras 42 ff.

<sup>11</sup> Case C-208/18, *Jana Petručová v FIBO Group Holdings Limited* [2019] ECLI:EU:C:2019:825, para 39. Case C-500/18 *AU v Reliantco Investments LTD* [2020] ECLI:EU:C:2020:264, para 45.

<sup>12</sup> These principles are consistently reiterated by the court. See, for example Case C-630/17 *Milivojević v Raiffeisenbank* [2019] ECLI:EU:C:2019:123, para 86 and para 87.

<sup>13</sup> Case C-508/12, *Vápeník v Thurner* [2013] ECLI:EU:C:2013:790, para 25, Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* ECLI:EU:C:2018:37, paras 42 ff, Case C-208/18 *Jana Petručová v FIBO Group Holdings Limited* [2019] ECLI:EU:C:2019:825, para 61.

(1) A Contract for a Purpose Being Outside His Trade or Profession

Article 17(1) requires that the consumer is acting in a context which can be regarded as being outside his trade or profession. Only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules laid down by the regulation to protect the consumer as the party deemed to be the weaker party.<sup>14</sup> The burden of proof for the existence of a consumer contract shall be on the alleged consumer, with the other party having the right to submit counter evidence.<sup>15</sup>

The ECJ ruled that Section 4 of Chapter II of the Brussels Ibis Regulation governing jurisdiction in respect of consumer contracts extends to all types of contracts, except that specified in Article 17(3).<sup>16</sup>

The question arises as to how to proceed when determining whether the person is acting in a context outside his trade or profession. According to the European Court of Justice, this must be done based on the position of the person in a particular contract. The court must take into account not only the content, nature and purpose of the contract, but also all relevant factual elements that are objectively apparent from the file. On the other hand, circumstances, or elements of which the other party could have been aware at the time of the conclusion of the contract should be taken into account only if the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the impression in good faith that he was acting for professional purposes (*Gruber v Bay Wa*).<sup>17</sup>

Are the value of the transaction and the extent of the risks involved relevant factors for the (dis)classification of the contract as a consumer contract? These issues were addressed in the *Petruchová* case.<sup>18</sup>

On 2 October 2014 Ms Petruchová, resident in the Czech Republic, remotely concluded a framework contract with FIBO, a brokerage company incorporated under Cypriot law, which operates as a 'professional' in the field of securities. Ms Petruchová was a university student and worked part-time. According to her statements, she concluded those contracts outside her

<sup>14</sup> Case C-419/11, *Ceská sporitelna* [2013] ECLI:EU:C:2013:165. Case C-500/18 *AU v Reliantco Investments LTD* [2020] ECLI:EU:C:2020:264, para 48.

<sup>15</sup> Case C-464/01, *Gruber v Bay Wa* [2005] ECLI:EU:C:2005:32, para 46.

<sup>16</sup> Case C-208/18, *Jana Petruchová v FIBO Group Holdings Limited* [2019] ECLI:EU:C:2019:825, para 48.

<sup>17</sup> Case C-269/95, *Benincasa v Dentalkit* [1997] EU:C:1997:337 and Case C-464/01 *Gruber v Bay Wa* [2005] ECLI:EU:C:2005:32, para 52: 'That would be the case, for example, where an individual orders, without giving further information, items which could in fact be used for his business, or uses business stationery to do so, or has goods delivered to his business address, or mentions the possibility of recovering value added tax.'

<sup>18</sup> Case C-208/18, *Jana Petruchová v FIBO Group Holdings Limited* [2019] ECLI:EU:C:2019:825, para 61.

professional activity. The purpose of the framework contract was to enable her to make transactions on the international FOREX (foreign exchange) market, by placing orders to buy and sell the base currency, which FIBO would carry out by means of its online trading platform. To that end, the framework contract provided for the conclusion, between Ms Petruchová and FIBO, of individual contracts, classified as financial contracts for differences ('CFDs'), which are financial instruments the objective of which is to make profit on the difference between the exchange rates applicable to the purchase and sale respectively of the base currency in relation to the quote currency. On 3 October 2014, Ms Petruchová concluded a CfD with FIBO. Due to the processing of a long series of orders in the FIBO trading system, this was executed by FIBO with a delay of 16 seconds, during which a fluctuation in the USD/JPY exchange rate occurred on the FOREX market. As a result, the purchase by FIBO of the amount of United States dollars ordered by Ms Petruchová was made at a USD/JPY exchange rate different from that which Ms Petruchová had accepted when confirming her purchase order. According to Ms Petruchová, if her purchase order for the base currency had been executed on time, and not with a delay, she would have made three times the profit. Ms Petruchová brought an action before the Regional Court, Ostrava, Czech Republic, claiming the unjust enrichment of FIBO.

The ECJ held that the scope of the provisions of Section 4 of Chapter II of the Brussels Ibis Regulation is not limited to particular amounts. Should Articles 17, 18 and 19 be interpreted as not applying when for instance significant funds are invested, the investor would not be able, in the absence of an express threshold set in that regulation, above which the amount of a transaction is regarded as being significant, to know whether he will be afforded the protection of those provisions, which would be contrary to the intention of the EU legislature as expressed in recital 15, according to which the rules of jurisdiction should be highly predictable.<sup>19</sup>

The Brussels I Regulation pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued.

It follows, as a corollary to the foregoing, that the fact that the conclusion of CfDs is likely to involve, for an investor, significant risks in terms of financial

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<sup>19</sup> *Ibid.*, para 51.

losses is, as such, irrelevant to the question of the classification of the investor as a ‘consumer’ within the meaning of Article 17(1) of that regulation.<sup>20</sup>

Are factors such as the knowledge and information of the natural person relevant factors for the (dis) characterisation of the contract as a consumer contract? Since the concept of ‘consumer’, within the meaning of Article 17(1), is defined by contrast to that of an ‘economic operator’, it is objective in nature and it is distinct from the knowledge and information that the person concerned actually possesses.<sup>21</sup> According to the ECJ, in that regard, the fact of considering that the status as a consumer of a contracting partner may depend on the knowledge and information he possesses in a given field, and not on whether or not the contract he has concluded is intended to satisfy his personal needs, would amount to referring to the subjective situation of that contracting partner. The status of a person as a ‘consumer’ must be examined solely in the light of his position in each contract, taking into account its nature and purpose (*Petruchová*).<sup>22</sup>

Another relevant question is whether the (active) conduct of the person in the context of the performance of the contract influences the classification of that person as a consumer. That question was addressed in the *Petruchová* case as well. The ECJ held that it is appropriate to point out that the active conduct, on the FOREX market, of a person who places orders through a brokerage company and thus remains responsible for the return on his investments is, as such, irrelevant to the classification of that person as a ‘consumer’ within the meaning of Article 17(1).<sup>23</sup> Article 17(1) namely, does not require the consumer to behave in a particular way in the context of a contract concluded for use outside his professional activity.<sup>24</sup>

Is the fact that the consumer carried out a high volume of transactions within a relatively short period or invested significant sums in those transactions a factor to take into consideration? In line with the *Petruchová* case the ECJ decided this to be irrelevant to the question of the classification of the investor as a ‘consumer’ within the meaning of Article 17(1) of that regulation (*AU v Reliantco Investments LTD*).<sup>25</sup>

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<sup>20</sup> *Ibid.*, para 53.

<sup>21</sup> See Case C-110/14 *Costea* [2015] EU:C:2015:538, para 21, Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [2018] EU:C:2018:37, para 39, Case C-208/18 *Jana Petruchová v FIBO Group Holdings Limited* [2019] ECLI:EU:C:2019:825, para 55.

<sup>22</sup> Case C-208/18 *Jana Petruchová v FIBO Group Holdings Limited* [2019] ECLI:EU:C:2019:825, para 56.

<sup>23</sup> *Ibid.*, para 57.

<sup>24</sup> *Ibid.*, para 58.

<sup>25</sup> Case C-500/18 *AU v Reliantco Investments LTD* [2020] ECLI:EU:C:2020:264, para 54.

### AU v Reliantco Investments LTD

On 15 November 2016, AU opened a trading account on the online platform UFX, owned by Reliantco Investments, with a view to trading in financial instruments such as financial contracts for differences (“CFDs”). On 11 January 2017, AU concluded a contract with Relianco Investments, relating to the profits emanating from the trade in financial instruments, indicating that he had read, understood and accepted the terms and conditions of the offer. Under that contract, any dispute arising out of the contract as concluded or in connection with it must be brought before the Cypriot courts, and that contract and all the trade relations between the parties are governed by Cypriot law. On 13 January 2017, AU placed a number of limit orders on the online UFX platform by which he speculated on a fall in the price of petrol and claimed that, following those transactions, he had lost the entire sum being held in the frozen trading account, that is, 1,919,720 US dollars (USD) (around EUR 1,804,345). On 26 April 2017, AU brought an action before the Specialist Court, Cluj, Romania, against Reliantco Investments. He claims that he was a victim of a manipulation which resulted in the loss of the sum afore mentioned. Does the court have jurisdiction under Article 17(1) Brussels Ibis Regulation?

Therefore, in principle, factors such as the value of the transactions carried out under the contract, the extent of the risks of financial loss associated with the conclusion of the contract, the knowledge or expertise of the person, if any, or the active behaviour of the person in the performance of the contract are not relevant as such for the purposes of qualification. Also, the fact that the person carried out a high volume of transactions within a relatively short period is, as such, in principle irrelevant.<sup>26</sup>

How should it be assessed when the alleged consumer enters into a contract both for his private life and for his own business? For example, what about the farmer who buys a batch of roof tiles for the business and residential parts of his farm?<sup>27</sup> In *Gruber v Bay Wa*, the Court of Justice considered that from the objective of Articles 13 to 15 of the Brussels Convention (now Articles 17 to 19 Brussels Ibis Regulation), namely to properly protect the person who is presumed to be in a weaker position than the other party to the contract, clearly follows that the benefit of those provisions cannot, as a matter of principle, be relied on by a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it. It would be otherwise only if the link between the contract

<sup>26</sup> Case C-500/18 *AU v Reliantco Investments LTD* [2020] ECLI:EU:C:2020:264, para 57.

<sup>27</sup> Case C-464/01 *Gruber v Bay Wa* [2005] ECLI:EU:C:2005:32.

and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety.<sup>28</sup>

In line with this, the ECJ ruled in *Milivojević v Raiffeisenbank*<sup>29</sup> that a borrower who has concluded a credit agreement in order to renovate a residential property, the main purpose of which is to provide accommodation for tourists, cannot be classified as a ‘consumer’. Not even if he will not carry out this work until sometime in the future (*AU v Reliantco Investments*).<sup>30</sup> The situation is different if, taking into account the context of the transaction – considered as a whole – for which it was concluded, that contract is so separate from that professional activity that it is clear that it was concluded primarily for private purposes, as the ECJ stated.

How should a long-term contract that starts out as a consumer contract, but increasingly takes on a commercial character over the years, be assessed? This issue arose in the *Schrems v Facebook* case.<sup>31</sup> Schrems had opened a Facebook account for private purposes. In the years that followed, however, he gradually developed into a ‘professional litigator in consumer affairs’<sup>32</sup> and used this account in conjunction with publishing books, giving lectures and acquiring funds, including for litigation against Facebook. The ECJ considers and reasons as follows. In the context of a restrictive interpretation of the concept of ‘consumer’, account must be taken, in particular, of the subsequent use made of services of a digital social network, where those services are used for a long period. That interpretation implies, in particular, that a natural person who uses such services may rely on the status of consumer only if the essentially non-professional use for which he initially entered into the contract has not subsequently acquired a substantially professional character. However, neither the knowledge and information actually possessed by the person concerned, nor his expertise acquired over time, nor his efforts to represent the rights and interests of Facebook users deprive him of the status of ‘consumer’.

<sup>28</sup> Case C-464/01 *Gruber v Bay Wa* [2005] ECLI:EU:C:2005:32, para 39.

<sup>29</sup> Case C-630/17 *Milivojević v Raiffeisenbank* [2019] ECLI:EU:C:2019:123.

<sup>30</sup> Case C-500/18 *AU v Reliantco Investments LTD* [2020] ECLI:EU:C:2020:264, para 49: ‘the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character’.

<sup>31</sup> Case C-498/16 *Schrems* [2018] EU:C:2018:37.

<sup>32</sup> AG Bobek, para 3 of his opinion, [2017] , C-498/16, *Maximilian Schrems v Facebook Ireland Limited* ECLI:EU:C:2017:863.

## (2) A Contract Between a Consumer and a Professional Actually Concluded *The Professional*

The professional must be a person acting in the exercise of his trade or profession. A counterparty who, like the consumer, does not act in a business or professional capacity obviously does not qualify as a professional. In that situation there is no weaker party that needs protection and therefore no consumer agreement.<sup>33</sup> For example, the situation in which a natural person A domiciled in the Netherlands buys a second-hand fishing boat for his own use from a natural person B domiciled in France.

Also, the agreement between two persons acting in a commercial or professional capacity is logically not covered by Article 17.<sup>34</sup> Not even if one party is in a clearly weaker position. It is required that the contract between the consumer and the professional is actually concluded.

### *Pursuing commercial or professional activities in or directing such activities at the Member State of the consumer's domicile*

Once the existence of a consumer contract has been established, the specific situation should still fall within the definition of Article 17(1)(c).<sup>35</sup> For this provision to apply, it is required that the professional has established a sufficiently close connection with the consumer's country of domicile. What is required is that (a) the consumer's professional other party pursues commercial or professional activities (b) in the Member State of the consumer's domicile, or (c) directs such activities to that Member State by any means, and (4) the contract falls within the scope of such activities.

#### a) Pursuing commercial or professional activities in the Member State of the consumer's domicile

For the engaging in commercial activities in the consumer's country of residence it is not required that the professional has a business in that country. It is sufficient that the professional is 'fishing' for clients in the consumer's country of domicile. By fishing for customers, a link is created with the consumer's country that justifies the application of that country's law. The burden of proof here is also on the consumer. The pursuit of commercial or professional activities may take place through direct approaches to consumers at the door or through advertising. In those cases, the professional counterparty is actively taking part in the economic traffic in the consumer's country.

<sup>33</sup> Case C-508/12 *Vapenik v Thurner* [2013] ECLI:EU:C:2013:790.

<sup>34</sup> Case C-89/91 *Shearson Lehman Hutton* [1993] ECLI:EU:C:1993:15.

<sup>35</sup> Sub a and b are not addressed in this context.

b) In the Member State of the consumer's domicile

Usually, the consumer who is approached by the foreign professional will conclude a contract in his own country of domicile, but also in the event that he enters into the contract in another Member State, for example in the country of domicile of the professional, Article 17 applies. The condition for this remains that the commercial activities are carried out in the country of residence or are aimed at this by any means whatsoever.

c) Directing commercial or professional activities at the Member State of the consumer's domicile

It is required that the professional counterparty directs his commercial or professional activities 'by any means' to the Member State of the consumer's domicile. Such means may also be directed at several Member States at the same time, including the Member State of the consumer's residence. What do the words 'by any means' refer to? It is clear from the (unofficial) explanatory memorandum to this provision that it refers to all means of inducing the consumer to contract: advertising by post, in the media of the Member State of domicile of the consumer, and via the Internet. In each case the active intervention of the professional counterparty is required. The use of third parties who, in return for remuneration, search for customers for the professional concerned also implies active targeting of the consumer's country of domicile. A mere recommendation of the business of the professional by a private person however is insufficient. Similarly, the mere provision of order forms by an intermediary is not sufficient; that only changes when the intermediary starts to develop canvassing activities.

*Targeting the consumer's Member State via the Internet*

When does a professional target the consumer's Member State of domicile via the Internet? A joint declaration<sup>36</sup> of the Council of Europe and the European Commission on the Brussels I Regulation notes in this respect that a consumer who becomes aware of the possibility to buy goods or obtain services from a 'passive' internet site of a professional counterparty and who subsequently orders those goods or services from that site does not fall within the protective scope of Articles 17 et seq. The European Court of Justice (*Pammer Alpenhof*)<sup>37</sup> has confirmed that the mere accessibility of a website does not demonstrate the professional's intention to target the consumer's country of domicile.<sup>38</sup> It is

<sup>36</sup> Joint declaration of the Council and the Commission at the time of the adoption of Regulation No 44/2001, reproduced in recital 24 in the preamble to Regulation No 593/2008.

<sup>37</sup> Case C-585/08 *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof v Heller* [2010] ECLI:EU:C:2010:740.

<sup>38</sup> *Ibid.*, paras 80 and 94.

necessary to examine whether, before the conclusion of the contract with this consumer, there were indications that the trader intended to engage in business dealings with consumers in one or more other Member States, including the one in which the consumer is domiciled, in the sense that he was prepared to conclude a contract with these consumers.

Such evidence does not include mention on a website of the trader's email address or geographical address, or of its telephone number without an international code. Mention of such information does not indicate that the trader is directing its activity to one or more other Member States, since that type of information is, in any event, necessary to enable a consumer domiciled in the Member State in which the trader is established to make contact with it. As the ECJ stated,<sup>39</sup> by virtue of a European directive, some of that information has even become mandatory in the case of services offered by the trader online if its activity is directed solely to the Member State in which the trader is established.

Therefore, when is there a clear expression of this will 'to direct' by the entrepreneur? According to the ECJ,<sup>40</sup> among the evidence establishing whether an activity is 'directed to' the Member State of the consumer's domicile are all clear expressions of the intention to solicit the custom of that State's consumers. Clear expressions of such an intention on the part of the trader include mention that it is offering its services or its goods in one or more Member States designated by name. The same is true of the disbursement of expenditure on an internet referencing service to the operator of a search engine to facilitate access to the trader's site by consumers domiciled in various Member States, which likewise demonstrates the existence of such an intention.

However, the qualification of an activity as being 'directed' towards other Member States does not depend solely on the existence of such clear indications. Other items of evidence, possibly in combination with one another, can demonstrate the existence of an activity 'directed to' the Member State of the consumer's domicile. The following list of features, which is not exhaustive, would constitute evidence of an activity 'directed to' one or more other Member States within the meaning of Article 17(1)(c):

‘the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which

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<sup>39</sup> *Ibid.*, para 78, referring to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p 1).

<sup>40</sup> *Ibid.*, paras 80 and 81.

the trader is established, for example ‘.de’, or use of neutral top-level domain names such as ‘.com’ or ‘.eu’; the description of itineraries from one or more other Member States to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers.<sup>41</sup>

So far as concerns the language or the currency used, they do not constitute relevant factors for the purpose of determining whether an activity is directed to one or more other Member States where they correspond to the languages generally used in the Member State from which the trader pursues its activity and to the currency of that Member State. If, on the other hand, the website permits consumers to use a different language or a different currency, the language and/or currency can be taken into consideration and constitute evidence from which it may be concluded that the trader’s activity is directed to other Member States.<sup>42</sup>

What applies if the trader uses an intermediary, such as an agent, while his own website is limited to the territory of his own Member State? For this situation the ECJ stated that the fact that the website is the intermediary company’s and not the trader’s site does not preclude the trader from being regarded as directing its activity to other Member States, including that of the consumer’s domicile, since that company was acting for and on behalf of the trader. It is for the court to ascertain whether the trader was or should have been aware of the international dimension of the intermediary company’s activity and how the intermediary company and the trader were linked. On the other hand, the mere accessibility of the trader’s or the intermediary’s website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established.<sup>43</sup>

If the trader makes use of an internet platform, like alibaba.com, or an internet trading place like ebay.com, then this international element and intention to direct the activities to other countries is undeniable.

### (3) The Contract Falls within the Scope of Such Activities.

The consumer enjoys the protection of Articles 17, 18 and 19 Brussels Ibis only if the contract falls within the scope of the commercial or professional

<sup>41</sup> *Ibid.*, paras 80 and 83.

<sup>42</sup> *Ibid.*, paras 80 and 84.

<sup>43</sup> *Ibid.*, paras 80 and 89.

activities of the professional counterparty in the consumer's country of residence. Does this imply that the contract must have been concluded at a distance? This issue was addressed in the case of *Mühlleitner v Yusufi*.<sup>44</sup> The case was as follows. Daniela Mühlleitner, who is domiciled in Austria, searched on the internet for a passenger car of a German make that she wanted to buy for private use. On the German website 'www.mobil[e].de', she entered the make and model she wanted and obtained a list of cars with the required characteristics.

After choosing the passenger car that best met her search criteria, she was directed to an offer by Ahmad and Wadat Yusufi (the defendants), who operate a car retail business through Autohaus Yusufi GbR ('Autohaus Yusufi'), a company established in Hamburg (Germany). Mühlleitner, wishing to obtain further information about the passenger car offered on the abovementioned website, telephoned the defendants at the telephone number indicated on Autohaus Yusufi's website, which contained an international prefix. The applicant was informed that the car in question was no longer available, and the defendants offered her another car, the specifics of which were later sent to her by email. She was also informed that her Austrian nationality did not prevent her from purchasing a car from the defendants.

Sometime later, Mühlleitner went to Germany and, on 21 September 2009, signed a contract in Hamburg with the defendants for the purchase of the passenger car concerned for the price of € 11,500, taking immediate possession of the vehicle. Back in Austria, Mühlleitner discovered that the vehicle had serious defects and requested that the defendants repair it. Since the defendants refused to repair the vehicle, Mühlleitner brought an action for dissolution of the contract for the sale of the vehicle before the court in her place of residence, namely the Landesgericht Wels (Austria). She claimed to have concluded this contract as a consumer with Autohaus Yusufi, a company whose commercial or professional activity was directed towards Austria, a situation referred to in Article 15(1)(c) of the Brussels Convention (now Article 17(1)(c) Brussels Ibis Regulation).

The defendants disputed that Mühlleitner was a 'consumer' and that the Austrian courts had international jurisdiction. In their view, the dispute should be brought before the competent German courts. They further argued that their activities were not directed towards Austria and that the applicant had concluded the contract at the registered office of their company in Germany, whereas Article 15 (now 17) requires that the contract be concluded at a distance. However, the Court considered that Article 15(1)(c) of the Brussels

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<sup>44</sup> Case C-190/11 *Daniela Mühlleitner v Ahmad Yusufi Wadat Yusufi* [2012] ECLI:EU:C:2012:542.

I Regulation must be interpreted as not requiring the contract between the consumer and the trader to be concluded at a distance.

The essential condition to which the application of Article 15(1)(c) (now 17(1)(c)) is subject is that relating to a commercial or professional activity directed to the State of the consumer's domicile. In that respect, both the establishment of contact at a distance, as in *Yusufi vs Mühlleitner*, and the reservation of goods or services at a distance, or *a fortiori* the conclusion of a consumer contract at a distance, are indications that the contract relates to such an activity. However, the conclusion at a distance is not a requirement. The contract concluded between Mühlleitner and Autohaus Yusufi is therefore also covered by the commercial activities pursued by Yusufi.

If it is not required that the contract be concluded at a distance, is it required that there be a causal link between the means - an Internet site used to direct the commercial or professional activity to the Member State of the consumer's residence and the conclusion of the contract with that consumer? This question was central to the *Emrek* case.<sup>45</sup> The facts were as follows. Emrek, who lived in Saarbrücken (Germany), was looking for a second-hand car. Through acquaintances, Emrek learned of a trade in second-hand vehicles under the trade name Vlado Automobiles Import-Export. This company was operated by Sabranovic in Spicheren (France), close to the German border. Emrek then went to the company in Spicheren and, as a consumer, concluded a written agreement with Sabranovic at the latter's premises for the purchase of a used vehicle. Sometime later, Emrek sued Sabranovic before the Amtsgericht Saarbrücken (Germany) in respect of a warranty claim.

He took the view that that court had international jurisdiction under Article 15(1)(c) of Regulation No 44/2001 to hear his claim, since the structure of Sabranovic's internet site showed that his commercial activity was also directed towards Germany. Prior to and at the time of the purchase of the car, Sabranovic had an internet site on which the details of his business were set out, including French telephone numbers and a German mobile phone number with their respective international prefixes. However, Mr Emrek was unaware of the existence of that website prior to and at the time of his purchase. The German court then referred the following question to the European Court of Justice:

In cases in which a trader's Internet site is directed to the Member State of the consumer, does Article 15(1)(c) of Regulation No 44/2001 require, as a further unwritten condition, that the consumer was induced to enter into

<sup>45</sup> Case C-218/12 *Emrek* [2013] ECLI:EU:C:2013:666.

the contract by the website operated by the trader and, consequently, that the Internet site has a causal link with the conclusion of the contract?

The Court considers as follows. First of all, it must be held that Article 15(1)(c) does not expressly require such a causal link for its application. An additional, unwritten condition of a causal link would be contrary to the purpose of that provision, which is to protect the consumer as the weaker party to the contract with a trader. Also, the requirement of prior consultation of a website by the consumer could create difficulties of proof, where the contract has not been concluded at a distance through that website. In such a case, the difficulties in proving a causal link between the means used to direct the activity towards a market - a website - and the conclusion of a contract may discourage consumers from seeking redress before national courts on the basis of Articles 15 and 16 of Regulation No 44/2001 and weaken the protection of consumers sought by those provisions, the Court stated.

Having regard to the foregoing considerations, the answer to the question is that Article 15(1)(c) of Regulation No 44/2001 must be interpreted as meaning that it does not require the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile, namely an internet site, and the conclusion of the contract with that consumer.<sup>46</sup> It is therefore sufficient that the trader directs his activities at the state of the consumer's habitual residence; a direct link between this targeting and that consumer is not required.

## **IV. THE LAW APPLICABLE TO THE CONSUMER CONTRACT**

### **A. Applicable Law in the Absence of a Choice**

The law applicable to the consumer contract<sup>47</sup> is stipulated in Article 6(1) of the Rome I Regulation:<sup>48</sup>

Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

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<sup>46</sup> However, the existence of such a causal link constitutes evidence of the connection between the contract and such activity.

<sup>47</sup> Article 6(4) excludes certain types of contracts.

<sup>48</sup> According to Article 28, the Regulation applies to contracts concluded after 17 December 2009.

- a. pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
- b. by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.

As regards contracts concluded with parties regarded as being weaker, the Rome I Regulation protects those parties by conflict of law rules that are more favourable to their interests than the general rules.<sup>49</sup> In particular in regard to consumer contracts, the conflict of law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques.<sup>50</sup>

According to Recital 25 of the Rome I Regulation, consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities. These considerations are in line with the system of Article 17 Brussels Ibis Regulation discussed above.

Recital 24 Recital 24 underlines the link between the Rome I Regulation and the Brussels I Regulation (Now Brussels Ibis Regulation) regarding consumers:

Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that ‘for Article 15(1) (c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer’s residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities’.

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<sup>49</sup> Recital 23 of the Rome I Regulation.

<sup>50</sup> Recital 24 of the Rome I Regulation.

The rules of jurisdiction concerning consumer protection are thus linked to the rules of applicable law. For the interpretation of Article 6 Rome I-Regulation, it is therefore assumed that, taking into account the difference in wording, reference can be made to the case law of the Court of Justice on the interpretation of Article 17 Brussels Ibis Regulation, while the opposite is equally true.<sup>51</sup> The schematic comparison below shows the similarities between Article 17(1)(c) Brussels Ibis Regulation and Article 6 Rome I Regulation

<b>Article 17(1)(c) Brussels Ibis Regulation</b>	<b>Article 6 Rome I Regulation</b>
a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession,	a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional)
c) in all other cases, the contract has been concluded with a person who  pursues commercial or professional activities in the Member State of the consumer's domicile or,  by any means, directs such activities to that Member State or to several States including that Member State,  and the contract falls within the scope of such activities.	provided that the professional:  pursues his commercial or professional activities in the country where the consumer has his habitual residence, or  by any means, directs such activities to that country or to several countries including that country,  and the contract falls within the scope of such activities.

Like Article 17(1)(c) of the Brussels Ia Regulation, Article 6 defines the consumer contract as a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional).

#### **IV.B. Consumer Contract and Choice of Law**

As stated in the introduction, party autonomy is the cornerstone of the Rome I Regulation. The freedom of the parties to designate the applicable law themselves is paramount (Article 3). At the same time, Recital 25 of the regulation indicates that consumers should be protected by such rules of the

<sup>51</sup> See also Recital 7 of the Rome I Regulation: 'The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'. Regulation 44/2001 is the predecessor of the Brussels Ibis Regulation.

country of their habitual residence that cannot be derogated from by agreement. In view of this, Article 6(2) Rome I Regulation stipulates that the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

A choice of law based on Article 3 is therefore permitted, but the protective rules of the country of habitual residence of the consumer continue to apply. In practice, therefore, it will be necessary to determine which rules of consumer law are protective rules that cannot be derogated from. The court will then have to apply two systems of law. The mandatory protective rules of the legal system of the consumer's place of habitual residence and the legal system chosen for the other aspects. This requires a thorough examination of both legal systems.

The above applies to all types of choice of law clauses, regardless of where they are included in the contract. Choice of law clauses are often included in general (sales) conditions. The seller must then be aware of the case *VKI v Amazon*.<sup>52</sup> This case concerned the application of Directive 93/13 on unfair terms in consumer contracts.<sup>53</sup> Pursuant to Article 3(1) of this directive, a contractual term which has not been individually negotiated must be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. In *VKI v Amazon* the European Court of Justice decided that Article 3(1) of Directive 93/13 must be interpreted as meaning that a term in the general terms and conditions of a seller or supplier which has not been individually negotiated, under which the contract concluded with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established, is *unfair* in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of the Rome I Regulation he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term.

<sup>52</sup> Case C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612.

<sup>53</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29-34.

## V. CONCLUDING REMARKS

Protection of consumers as weaker parties is an important goal in Indonesian society and in Indonesian law. The same applies to the EU Member States. When it comes to cross-border consumer contracts, special rules are needed to ensure that this goal can still be achieved. In this regard the European Union developed rules on jurisdiction and applicable law apply both to situations exclusively connected with EU Member States and to international situations connected with third countries. The Brussels I Regulation pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling the applicant to easily identify the court in which he may sue and the defendant reasonably to foresee before which court, he may be sued. The Rome I Regulation does the same for the law regulating the protection of the consumer. This way both the aims of protection of the weaker consumer and legal certainty on the side of the commercial party go hand in hand. Where legal certainty is an important precondition for international trade and thus for a nation's economy, clear rules are needed. May this article contribute to the discussion on how to further shape potential future consumer protecting regulations in Indonesia and ASEAN.

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