



Regulating Court Jurisdiction to Protect Weaker Parties: An Overview of the Indonesian Civil Justice System

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Abstract

It is necessary to facilitate easy access to courts to protect weaker parties. This can be achieved by regulating the personal jurisdiction of the court so that weaker parties can easily access it. In the Indonesian civil justice system, some regulations have been implemented to protect weaker parties through the jurisdiction of courts. This article elaborates on these regulations and their obstacles in protecting the access of consumers, workers, women and children, and foreigners to Indonesian courts. A statutory approach with reference to the general principles of the court's personal jurisdiction and the principles of access to justice for weaker parties. This article finds that some regulations related to the court's personal jurisdiction in Indonesia provide protection to weaker parties by allowing them to submit their claim to the court where they reside against the counterparty. However, a lack of consistency may hinder its implementation.

Keywords: Court Jurisdiction; Civil Procedure; Indonesian Civil Justice System; Legal Protection; Weaker Parties.

Introduction

In contract law or civil law relationships, there is often an imbalance in power between parties. The relative bargaining position, control of economic and information resources, dependency, psychological or physical condition, or social status of one party can be stronger than that of the other.¹ This imbalance may be caused by a party's stronger financial position, higher social status, or greater physical strength.² In the context of law enforcement, efforts have been made to

¹ Machteld W De Hoon, 'Power Imbalances in Contracts: An Interdisciplinary Study on Effects of Intervention' [2007] Tilburg University Legal Studies Working Paper.[4].

² Ewoud Hondius, 'The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis' (2004) 27 Journal of Consumer Policy.[245].

protect weaker parties, such as implementing strict liability, shifting the burden of proof, and regulating the personal jurisdiction of the courts so that weaker parties may obtain legal protection and justice.

This article analyses several Indonesian laws and regulations that protect weaker parties and encourage them to file lawsuits under the personal jurisdiction of the court. In general, weaker parties that are vulnerable to denied justice in civil or commercial relationships are consumers, workers, wives, children, and foreigners. Recent developments in several international legal instruments apply to the relationships between the insured (policyholder) and the insurer (insurance), and the distributor/agent and principal.³

This article primarily analyzes the regulation of the personal jurisdiction of the Indonesian courts as a form of state intervention to protect weaker parties.⁴ The statutory approach with reference to the general principles of the court 's personal jurisdiction and the principles of access to justice will be used to identify the sufficiency of the provision. The discussion begins with the main principles for determining the personal jurisdiction of Indonesian civil courts. The HIR and RBg⁵ (district court civil procedure regulations (RBg) regarding the personal jurisdiction of the courts are reviewed. Finally, this article expands on protections that allow weaker parties to obtain justice through the personal jurisdiction of civil courts.

General Principles in Determining the Personal Jurisdiction of Indonesian Civil Courts

Actor sequitur forum rei ('the plaintiff follows the matter's forum') is the main principle in determining the personal jurisdiction (*ratione personae*) of civil courts in most civil-law countries.⁶ This principle is derived from the Roman legal

³ Vesna Lazic, 'Procedural Justice for "Weaker Parties" in Cross-Border Litigation under the EU Regulatory Scheme' (2014) 10 Utrecht Law Review.[100].

⁴ De Hoon (n 1).[5].

⁵ R Benny Rijanto, *Sejarah, Sumber, dan Asas-Asas Hukum Acara Perdata* (Universitas Terbuka).[12-18].

⁶ Martin Wolff, *Private International Law* (Clarendon Press 1950).[62-63].

tradition.⁷ To initiate a civil lawsuit, the plaintiff must file in court with jurisdiction over the defendant's residence or domicile. In Indonesia, Article 118(1) HIR/142 (1) RBg stipulates that any civil lawsuit tried in the court of first instance shall be first submitted to the Chief of the District Court, whose jurisdiction covers the residence of the defendant.⁸ If the residence is unknown but the physical whereabouts of the person are known, then the defendant will be sued in a district court whose jurisdiction covers the place where he/she is located.⁹⁻¹⁰

The *actor sequitur forum rei* principle also appears in Article 118(2) of the HIR/142 (2) RBg. This article provides that if a case has more than one defendant, each of whom has a different residence not within the jurisdiction of a district court, then the plaintiff can file in the district court whose jurisdiction includes the residence of one of the defendants. The other defendants then followed the lawsuit in the district court chosen by the plaintiff. This provision implements the *actor sequitur forum rei* principle and avoids the legal uncertainty of imperfect lawsuits in which the defendants are incomplete (*plurium litis consortium*).¹¹ Article 118(2) HIR/142(2) RBg also states that if a lawsuit consists of a defendant as the debtor and another defendant as the guarantor, then it shall be filed in the district court whose jurisdiction covers the debtor's residence. In this case, the *actor sequitur forum rei* principle is implemented using the *forum connexitatis* approach, whereby the law considers the closeness of the legal relationship between the creditor and debtor, rather than the creditor and guarantor.¹²

Article 118(3) HIR/142(3) RBg does not implement the *actor sequitur forum rei* principle but rather *forum actoris*. This is an exception to the former principle,

⁷ Hélène Van Lith, 'International Jurisdiction and Commercial Litigation Uniform Rules for Contract Disputes, Den Haag' (Erasmus University 2009).[65].

⁸ Law No. 23/2006 on Population Administration as amended by Law No. 24/2013 stipulates the domicile of a person in Indonesia.

⁹ Article 17 of the Civil Code stipulates "If there is no such residence, then the real place of residence is considered as his dwelling".

¹⁰ Article 106 of the Population Administration Law repeals Article 106 17 of the Civil Code.

¹¹ M Yahya Harahap, *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan* (Sinar Grafika 2017).[63].

¹² Trevor C Hartley, *International Commercial Litigation* (Cambridge University Press 2010).

the *forum actoris* principle, which regulates the filing of a lawsuit in a district court whose jurisdiction covers the domicile of the plaintiff or one of the plaintiffs. *Forum actoris* applies if the defendant's domicile or physical whereabouts are unknown, or if the defendant is not recognized.¹³ This application of *forum actoris* is intended as legal protection for plaintiffs whose rights to obtain justice will be hampered if the *actor sequitur forum rei* principle is applied.¹⁴

Article 118(3) HIR/ 142(5) of the RBg regulates the jurisdiction of the court over immovable properties. This article describes the *forum rei sitae* principle. This principle stipulates that the *in rem* jurisdiction of the court is the place where the subject matter is situated.¹⁵

However, Article 118(3) HIR. One interpretation is that *forum rei sitae* is implemented conditionally, meaning it is implemented if the residence of the defendant is unknown and the cause of the action concerns immovable property. If the residence of the defendant is known, the *actor sequitur forum rei* principle must be applied.¹⁶ The other interpretation is that, as long as the cause of action concerns immovable property, the lawsuit must be filed in the district court whose jurisdiction covers the location of the object, so that *forum rei sitae* is applied absolutely.¹⁷ These differences in interpretation create legal uncertainties. In a decision that adheres to the *forum rei sitae* principle, the Indonesian Supreme Court held that ‘... since the fields and the plantations as the objects of the lawsuit are located beyond the jurisdiction of Takalar District Court, then the District Court has no jurisdiction to try the case. Therefore, the lawsuit must be declared inadmissible.’¹⁸

¹³ Harahap (n 11).[31].

¹⁴ JP Verheul, ‘The Forum Actoris and International Law’, *Essays on International & Comparative Law* (Springer 1983) .196-209].

¹⁵ Harahap (n 11) [198-200] see also Van Lith (n 7).[12, 16, 70].

¹⁶ Harahap (n 11) [199] See also Supreme Court of the Republic of Indonesia, *Pedoman Pelaksanaan Tugas Dan Administrasi Pengadilan* (2nd edn, MPR RI 1994) [116] Basuki Rekso Wibowo, *Pokok-Pokok Bahasan Hukum Acara Perdata, Lecture Module* (Faculty of Law Airlangga University 2008).[24].

¹⁷ Subekti, *Pokok-Pokok Hukum Perdata* (Intermasa 2002) [37] R Soepomo, *Hukum Acara Perdata Pengadilan Negeri* (Pradnya Paramita 2002).[23].

¹⁸ Supreme Court of the Republic of Indonesia, Case Number 1382 K/Sip/1971, November 4, 1975.

Article 118(4) HIR/142(4) RBg enables parties to insert a choice of a forum agreement into a written contract. However, even though the parties have agreed to a certain district court in their contract, the article allows the plaintiff to file a lawsuit concerning the contract in the district court where the defendant resides. Therefore, the *actor sequitur forum rei* principle may prevail.¹⁹ Article 118(4)/ 142(4) RBg requires that the choice of a forum in a contract must be in written form, either as a clause in the main agreement or as a separate agreement.²⁰

Article 118 HIR/ 142 RBg is a general provision to determine the jurisdiction of district courts over civil disputes and therefore serves as *lex generalis* (the general law).²¹ Theoretically, the personal jurisdiction of a court, known as relative competence in the Indonesian legal system²², requires that the connecting factors between the court (forum) and the facts of the dispute (cause of action)²³ be examined.²⁴ The facts of the dispute may include the parties (subject), legal relationship, time when the legal event occurred, and object of dispute.²⁵

Actor sequitur forum rei, as a general principle to determine the personal jurisdiction of the court, can be applied in any situation. According to this principle, a defendant can be sued at any time and in any situation in a court whose jurisdiction covers the defendant's residence (country or domicile). This principle is based on relational theory, under which the jurisdiction of the court – as an authority – arises from the defendant's personal attachment as a citizen who must comply with and be loyal to the authority (lord–tenant relations); therefore,

¹⁹ Harahap (n 11).[200].

²⁰ *ibid.*

²¹ Kunti Kalma Syita, 'Penerapan Prinsip Pembuktian Hukum Perdata Formil Dalam Arbitrase Berdasarkan Undang-Undang Nomor 30 Tahun 1999' (2014) 29 *Yuridika*. [23].

²² Marieke van Hooijdonk and Peter V Eijssvoogel, *Litigation in the Netherlands: Civil Procedure, Arbitration and Administrative Litigation* (Kluwer Law International BV 2009).[19].

²³ Bryan A Garner, *The Chicago Guide to Grammar, Usage, and Punctuation* (10th edn, Univ of Chicago+ ORM 2016).[266-267].

²⁴ Kurt Lipstein, *Principles of the Conflict of Laws: National and International* (Brill Archive 1981).[18].

²⁵ Silas A Harris, 'What Is a Cause of Action?' (1928) 16 *California Law Review*. [459] <<http://www.jstor.org/stable/3475330>>.

the authority will provide protection and justice.²⁶ Relational theory also explains the court's authority when *forum actoris* is implemented in a situation where the defendant's residence is unknown. This is a form of legal protection that allows citizens to obtain justice as plaintiffs.

Forum rei sitae, as the basis for the court's authority over immovable objects located within its jurisdiction, is based on the power theory. A court is an institution of power that has the authority to regulate social order, including applying and enforcing the law on every object within its jurisdiction. Thus, the court asserted its jurisdiction over cases concerning immovable properties located within its jurisdiction.²⁷

The jurisdiction of the court based on the choice of the forum (*forum electus*) originates from contract theory. The relationship is no longer between the ruler and the people, but between free and equal people who agree.²⁸ Contract theory postulates that a court's jurisdiction is based on explicit or implicit agreements between parties.²⁹ *Forum electus* gives jurisdiction to the court chosen by the parties in a written agreement.

Actor sequitur forum rei and *forum actoris* are the principles that determine the personal jurisdiction of the court in disputes concerning *in personam* rights. These principles require a close connection between the court as a *forum* and the defendant's domicile (for *actor sequitur forum rei*), or the plaintiff's domicile (for *forum actoris*).

Doctrine to Determine Jurisdiction to Protect Weaker Parties

The civil justice system is part of the law enforcement regulated by civil procedures.³⁰ There has been a shift in civil procedures to implement the concept of access to justice, which provides greater opportunities to those seeking justice.

²⁶ Arthur von Mehren, 'Adjudicatory Authority in Private International Law: A Comparative Study', *Adjudicatory Authority in Private International Law* (Brill Nijhoff 2007).[18].

²⁷ *ibid.*

²⁸ *ibid.*[18-19].

²⁹ *ibid.*

³⁰ *ibid.*

New procedures, including class action, citizen lawsuits, and the legal standing of NGOs to protect vulnerable groups, have been recognized in the Indonesian civil justice system. However, in certain situations, the implementation of the general principle of court jurisdiction in civil procedures may hinder vulnerable groups from obtaining justice and pose an obstacle to court access.³¹ The protection for the weaker parties through jurisdiction is necessary because: (1) the weaker parties are usually unaware of their rights, and even they are, they may not know how to claim the; (2) litigation may be very costly and time consuming; and (3) when they have to claim according to the general principles of personal jurisdiction, the claim must be submitted to the court out of their domicile, which may harm their rights.³² Therefore, another effort to protect vulnerable groups involves regulating court jurisdiction, so that they may easily access the courts.

Jurisdiction in Consumer Disputes

The legal relationship between consumers and businesses is regarded as unbalanced. Consumers are on the weaker or more vulnerable side because businesses have a relatively stronger position in terms of capital and knowledge about the mechanisms of production and distribution compared with consumers. The legal protection of consumers is implemented by measures such as the product liability of businesses and the shifting of the burden of proof, requiring businesses to prove that they are not liable for consumer losses. Businesses must prove that they have carried out their production properly and carefully, according to good manufacturing practices. By contrast, consumers only need to prove their losses due to the production of businesses without proving the fault of the businesses.³³

The modern civil justice system applies the *forum actoris* principle in consumer disputes. Based on *forum actoris*, the court with jurisdiction to try the

³¹ Julinda Beqiraj and Lawrence Joseph McNamara, 'International Access to Justice: Barriers and Solutions: Bingham Centre for the Rule of Law Report' (2014).[21-25].

³² Beatriz Añoveros Terradas, 'Restrictions on Jurisdiction Clauses in Consumer Contracts within the European Union', (2003) Oxford U Comparative L. Forum 1 at ouclf.law.ox.ac.uk.

³³ Jill Shukla, 'Good Manufacturing Practice' (2017).

consumer case is the court whose jurisdiction covers the consumer's domicile.³⁴ The principle of *forum actoris* was adopted in Article 23 of Law No. 8/1999 on Consumer Protection. In this article, if a business refuses, does not respond to, or does not fulfil a consumer's claim for compensation, the consumer may submit a complaint to the Consumer Dispute Resolution Agency or file a lawsuit against the business in the district court where the consumer is domiciled. *Forum actoris* cannot be avoided by choosing a forum in a consumer contract. Thus, any agreement between consumers and businesses, which is generally stated in a standard contract, to choose a particular court forum that impedes the implementation of the *forum actoris* for the consumer must be considered null and void.³⁵

The *forum actoris* principle only applies if businesses act purposefully (which must be proven by their actions) to make the consumer's domicile a product marketing area. If there is no intention to do so, the court cannot implement *forum actoris* to enforce its jurisdiction over consumer disputes.³⁶

The implementation of *forum actoris* will face a problem if the transactions are made online by consumers. A consumer might buy a product from outside the jurisdiction of the consumer's state, whereas the manufacturer or seller does not have a branch office or representative in that state. The fact that the manufacturer or seller places its information online on a server, so consumers from various countries can access information about its products, does not mean that the manufacturer or seller avails itself of various jurisdictions where the information about their products can be accessed.³⁷ Likewise, the state in which the server is located has no jurisdiction over disputes arising from online transactions.³⁸ On the other hand, if a business deliberately sends an email containing information about a product that is offered to a consumer, it is sufficient evidence that the business avails itself of the

³⁴ Vesna Lazić, 'Procedural Position of a 'Weaker Party' in the Regulation Brussels Ibis', *Brussels Ibis Regulation* (Springer 2017).[54,56].

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ U.S. Supreme Court, 'Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102' (1987).

³⁸ 'Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So2d 1351 (Fla. App. 3d Dist. 1994)' (1994).

court whose jurisdiction covers the domicile of the consumer.³⁹

In the Anglo-American system, to declare that a court has jurisdiction over persons who are not domiciled in its jurisdiction, which can occur in disputes arising from online transactions, the court must consider the following connecting factors between the dispute and the forum^{40,41}

1. The defendant intentionally initiated transactions that led directly to the plaintiff who was domiciled in the jurisdiction of the forum.⁴²
2. Whether the defendant visited the jurisdiction of the forum related to the implementation of negotiations before the agreement was reached was agreed upon.⁴³
3. Whether the defendant was physically present in the jurisdiction of the forum when it entered the agreement.⁴⁴
4. Whether the defendant performed its obligation under all or part of the agreement in the forum territory.⁴⁵
5. Whether the agreement established a relationship and ongoing obligations between the plaintiff and defendant.⁴⁶

Jurisdiction in Labour Disputes

An imbalance of power between employees and employers often requires state intervention as an authority with regulatory power.⁴⁷ State intervention

³⁹ Herliana Herliana and Sujayadi Sujayadi, 'International Jurisdiction of the Indonesian Court in Private International Law Litigation', *International Conference on Sustainable Innovation on Humanities, Education, and Social Sciences (ICOSI-HESS 2022)* (Atlantis Press 2022).[62].

⁴⁰ Yee Fen Lim, *Cyberspace Law: Commentaries and Materials* (Oxford University Press, Inc 2007).[64].

⁴¹ *ibid.*[369].

⁴² 'Keeton v. Hustler Magazine Inc., 465 U.S. 770' (1984); 'Roth v. Garcia Marquez, 924 F.2d 617 (9th Cir)' (1981); 'Hagar v. Zaidman, 797 F.Supp. 132 (D. Conn. 1992)'.

⁴³ 'A.S.C. Leasing, Inc. v. Porter, 651 F.Supp. 384 (D. Md. 1987); 'Internar Overseas, Inc. v. Argocean SA, 117 App. Div. 2d 492, 503 N.Y.S. 2d 736 (1st Dept. 1986)'.

⁴⁴ 'Sunbelt Corp. v. Noble, Denton & Associates, 5 F.3d 28 (3rd Cir. 1993); 'Watrall v. Murphy Diesel Co., 358 F.Supp. 968 (E.D. Wis 1973); 'Trans-Continent Refrigerator Co. v. A Little Bit of Sweden, Inc., 658 P.2d 271 (Colo. CT.App. 1982). 'Cavalier Label Co. v. Polydam, Ltd., 687 F.Supp. 872 (S.D. N.Y. 1988)'.

⁴⁵ 'Radiation Researchers, Inc. v. Fisher Industries, Inc., 70 F.R.D. 561 (W.D.Okla. 1976); 'Cavalier Label Co. v. Polydam, Ltd., 687 F.Supp. 872 (S.D. N.Y. 1988); 'Wells American Corp. v. Sunshine Electronics, 717 F.Supp. 1121 (D.S.C. 1989)'.

⁴⁶ 'Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985); 'Travelers Health Association v. Virginia, 339 U.S. 643, 648 (1950)'.

⁴⁷ John W Budd and Devasheesh P Bhave, 'The Employment Relationship: Key Elements, Alternative Frames of Reference, and Implications for HRM' in Adrian et al Wilkinson (ed), *The Sage handbook of human resource management* (Sage Publis 2019).[52-53].

in the legal relationship between employees and employers is the enactment of labor regulations that protect workers' interests (e.g., employment requirements, minimum wage, normative rights of workers, freedom to form and join labor unions, and requirements for termination of work).⁴⁸

In Indonesia, legal protection for workers in labor disputes is regulated by Law No. 2/2004 of the Settlement of Industrial Relations Disputes. Based on this provision, labor disputes between workers and employers can be resolved through industrial relations courts, which have subject matter jurisdiction over such disputes. The *ad hoc* judges on the courts show a preference for the legal protection of workers as they are appointed by the labor union and employers' organization (Article 60 (1): b in conjunction with Article 63(2) Law No. 2/2004). The personal jurisdiction of the court over labor disputes is determined by Article 81 of Law No. 2/2004, which provides:

“The claim of the industrial dispute is submitted to the Industrial Relations Court at the District Court which jurisdiction covers the workplace of the worker/ labourer”.

Therefore, Law No. 2/2004 adopted *forum laboris* to determine the personal jurisdiction of the court in labor disputes. This principle protects laborers, so it may be easier for them to defend their rights against the employer. However, implementation of the *forum laboris* principle in Law No. 2/2004 by some parties is still deemed ineffective in protecting workers' access to justice. The Industrial Relations Court is located only in the capital city of the province, so laborers still encounter difficulties in defending their rights before the court.⁴⁹ *Forum laboris* cannot be ruled out with the choice of a forum in the work agreement between workers and employers; any clause that does so shall be deemed non-binding.

In some cases, difficulties in implementing *forum laboris* can arise, such as when employees work within the jurisdiction of different courts (i.e., in more than

⁴⁸ *ibid.*

⁴⁹ Christina NM Tobing, 'Menggagas Pengadilan Hubungan Industrial Dalam Bingkai Ius Constituendum Sebagai Upaya Perwujudan Kepastian Hukum Dan Keadilan/Initiating an Industrial Relations Court in the Framework of Ius Constituendum as an Effort to Realize Legal Certainty and Justice' (2018) 7 Jurnal Hukum dan Peradilan.[297].

one place) or when they work remotely in their domicile per their employment agreement. Using the European Union as an example, the European Court of Justice considers that if workers carry out their work in several places, each of which is within the jurisdiction of a different court, then the court with the most appropriate jurisdiction must be determined.⁵⁰ Such considerations prevent the overlapping of judicial powers, avoid conflicting decisions, and facilitate the recognition and implementation of court decisions. Under Article 5, paragraphs (1) and (5) jo. Article 18 EC Regulation 44/2001,⁵¹ the European Court of Justice, uses several approaches to determine an employee's habitual place of work and the most competent court, based on the *forum laboris* principle:⁵²

1. An employee's habitual place of work is the place where or from which the worker is considered to have fulfilled obligations to the employer.⁵³
2. The employee's habitual place of work is where the worker has a center to carry out activities and where or from which the worker carries out an essential part of obligations to the employer.⁵⁴
3. If there is no place as the center for carrying out activities, then the place where the worker spends the most time carrying out obligations to the employer is considered the employee's habitual place of work.⁵⁵

Jurisdiction in Family Cases

Male domination can be found in almost all communities and in many respects, including access to justice.⁵⁶ Specific measures must be taken to provide women with access to justice when men dominate the control of resources. The

⁵⁰ *Mulox IBC Ltd v Hendrick Geels*, (Case C-125/92) [1993] ECR I-4075, I-4105.

⁵¹ EC Regulation 1215/2012.

⁵² Ulrich Magnus and Peter Mankowski, *European Commentaries on Private International Law* (Sellier European Law Publishers 2015).[335-337].

⁵³ *Herbert Weber v Universal Ogden Services Ltd*, (Case C-37/00) [2002] ECR I-2013, I-2049.

⁵⁴ *Petrus Wilhelmus Rutten v Cross Medical Ltd*, (Case C-383/95) [1997] ECR I-57, I-77.

⁵⁵ *Mulox IBC Ltd. v. Hendrick Geels*, (Case C-125/92) [1993] ECR I-4075, I-4105 (n 50).

⁵⁶ Nancy Levit, Robert RM Verchick and Martha Minow, *Feminist Legal Theory: A Primer*, vol 74 (NYU Press 2016).[11-40].

Indonesian Supreme Court has developed an outreach program in which judges visit remote villages to enable women and children to access justice, especially in family cases concerning the legalization of marriage, divorce, and the status of children born from unregistered marriages.⁵⁷

Regarding divorce cases, Article 39 of Law No. 1/1974 on Marriage states that divorce motions can only be heard before a court. Divorce motions for Moslems fall under the jurisdiction (absolute competence) of the religious court, whereas for other religions, the district court has jurisdiction.⁵⁸ Divorce motion procedures are stipulated in Government Regulation No no.9/1975. Article 20 of Government Regulation No 9/1975 provides for the jurisdiction of district courts in divorce motions as follows:

- (1) A divorce motion is filed by the husband, wife, or their attorney to court that jurisdiction covers the residence of the defendant.
- (2) In the event that the residence of the defendant is unclear or unknown or does not have a permanent residence, a divorce motion is submitted to the court at the residence of the plaintiff.
- (3) In the event that the defendant lives abroad, the divorce suit is filed in court at the residence of the plaintiff. The Chief Judge submits a request to the defendant through a local Representative of the Republic of Indonesia.

This provision demonstrates that the *actor sequitur forum rei* principle still applies. Therefore, if the wife is willing to file for divorce, the motion must be filed in a court whose jurisdiction includes the husband's domicile as the defendant. *Forum actoris* only applies if the defendant is domiciled abroad (Article 20 (3) Government Regulation No. 9/1975).

A different provision regulates the personal jurisdiction of religious courts in divorce cases involving Moslem couples. The term *talaq* divorce is used

⁵⁷ Cate Sumner and Tim Lindsey, 'Courting Reform: Indonesia's Islamic Courts and Justice for the Poor' (2011) 4 International Journal for Court Administration.[3].

⁵⁸ Indonesian Law No. 7/1989 on Religious Justice as amended several times, the latest by Law No. 50/2009.

when the applicant for the divorce motion is the husband. The application for *talaq* divorce in accordance with Article 66 (2) of the Law on Religious Courts is submitted to a religious court whose jurisdiction covers the residence of the wife (respondent), except if the respondent deliberately leaves the joint residence without her husband's consent.

In contrast, if the wife files the divorce motion, it must be filed in a religious court whose jurisdiction covers the residence of the wife (plaintiff) unless she has left her residence without her husband's consent. Article 73 of the Law on Religious Courts provides the following.

- (1) A divorce motion filed by the wife or her attorney to a court whose jurisdiction covers the residence of the plaintiff, unless the plaintiff deliberately leaves the joint residence without the consent of the defendant.
- (2) If the plaintiff lives abroad, the divorce motion is filed in the court whose jurisdiction covers the residence of the defendant.
- (3) If the plaintiff and defendant live abroad, the divorce motion is filed to the court whose jurisdiction covers the place where their marriage was held or to the Religious Court of Central Jakarta.

Articles 73 (2) and (3) of the Law on Religious Courts apply when the wife as a plaintiff is domiciled abroad or if both husband and wife are domiciled abroad. In these situations, the personal jurisdiction of the divorce motion is the jurisdiction of religious courts in Indonesia. The *actor sequitur forum rei* principle applies when the wife, as a plaintiff, is domiciled abroad, while the husband is in Indonesia. If both live abroad, the religious court whose jurisdiction covers the place where the wedding was held (*forum celebrationis*) or the Religious Court of Central Jakarta may have jurisdiction over the divorce motion.

These provisions were created to assist Indonesian citizens living abroad to divorce according to Islamic law, as some secular countries do not have a judicial system that provides a special court applying Islamic law to civil matters

for Moslems.⁵⁹ Meanwhile, in accordance with Article 77-79 of Presidential Regulation No 25/2008, any divorce judgments obtained by Indonesian citizens from foreign courts or authorities shall be registered with the local agency and reported to the Indonesian representatives where the judgments were obtained. Upon return, Indonesian citizens must report divorce to the civil registry, where they are domiciled.

The court that decides divorce motions, as regulated by Article 24 (2) of Government Regulation No. 9/1975, also has jurisdiction to decide related matters that follow the divorce motion, such as claims regarding the separation of property, distribution of joint assets, determination of child custody, and allocation of child support or alimony. Articles 66 (5) and 86 (1) of the Law on Religious Courts regulate claims for child custody, child support or alimony, allowances for wives, and the distribution of family properties. These claims can be filed together with the divorce application or after the court has ruled on divorce.

In cases involving children, Indonesia refers to the UN Convention on the Rights of the Child (UNCRC) in Law No. 36/1990 on the Rectification of the Conventions on the Rights of the Child. The implementation of the UNCRC in Indonesia regarding jurisdiction of the court is regulated by Law No. 23/2002 on Child Protection, as amended by Law No. 35/2014 ('Law of the Child Protection'). Article 39 (1) of the Law of the Child Protection stipulates that a request for child adoption can only be granted when it is in the best interests of the child and takes into account local customs and applicable laws and regulations. Furthermore, adoption among Indonesian citizens and between Indonesian citizens and foreigners is regulated by Government Regulation No. 54/2007 on Procedure on Child Adoption. The Court's jurisdiction for child adoption is regulated by Supreme Court Regulation No. 6 of 1983, in conjunction with Supreme Court Regulation No. 2 of

⁵⁹ Julie Macfarlane, 'Family Dispute Processes among North American Muslims Sorting Reality from Fake News' [2018] *Dispute Resolution Magazine*. [8] <https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/fall-2018/family-dispute-processes-among-north-american-muslims.pdf>.

1979 on the Examination of Application for Child Adoption. The Supreme Court Regulation stipulates that the district court, whose jurisdiction covers the domicile or habitual residence of the child, shall have jurisdiction over the application for child adoption.⁶⁰ This procedure follows Article 21 (a) of the UNCRC, giving the district court the authority to ensure compliance with the adoption requirements set out in the law and regulations.

Jurisdiction in Disputes Involving Non-Residents in the Event of a Denial of Justice

The principles of international law require a state to provide foreigners with access to justice within its territory through a national court. If the state does not provide adequate access, foreigners reserve their right to obtain protection from their country of origin through a diplomatic channel.⁶¹ International law stipulates that legal protection for foreigners through national courts is available if the cause of an action is closely connected to the state's territory. This principle then became one of the bases for the recognition and exercise of foreign court decisions.⁶²

If foreigners suffer losses due to an unlawful act within the territory of a state, the national court where the unlawful act occurred has the jurisdiction to conduct the trial. The jurisdiction of the court is based on the *forum delicti commissi* principle, which has two criteria: (1) an act that is detrimental to the foreigner is qualified as an unlawful act according to the substantive law of the state and (2) the unlawful act occurs within the territory of that state (*locus commissi delicti*).⁶³

Based on the personal jurisdictional provisions in Article 118 HIR/Article 142 RBg, Indonesian courts do not acknowledge the doctrine of *forum delicti commissi*.

⁶⁰ Ex-parte Judgment of Moberu City District Court No 77/PdtP/2018/PNKtg in the application case of Abdul Halib Hondango and Irfani Marada.

⁶¹ Francesco Francioni, 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007). [75]. <<https://doi.org/10.1093/acprof:oso/9780199233083.003.0001>>.

⁶² Adrian Briggs, *Civil Jurisdiction and Judgments* (6th edn, Informa Law from Routledge 2015) [716] <<https://www.taylorfrancis.com/books/9781317566571>>.

⁶³ Francioni (N 61).[131].

In *M Achsan v M Balandi Sutadipura, Mayor of Bandung et al*, the Indonesian Supreme Court held that the court of first instance (the district court) incorrectly stated that it had jurisdiction to try the case on the basis that the cause of the action occurred in its territory.⁶⁴ The jurisdiction of the district court is not *locus delicti* as in criminal cases.⁶⁵ The Indonesian Supreme Court refuses to apply *forum delicti commissi* as the basis of jurisdiction in cases of unlawful acts; instead, the Court applies *actor sequitur forum rei* as stipulated in Article 118 of the HIR.

Foreigners can also be given access to the national civil justice system through *quasi in rem* jurisdiction. In certain situations, a court may establish jurisdiction on the basis that the defendant's property is within its jurisdiction, even though the cause of action has no connection with the property in question.⁶⁶ *Quasi in rem* jurisdiction is generally found in connection with the following interests:

1. The plaintiff is trying to secure a lawsuit filed in another forum regarding the property of the defendant located in the territory of the court with *quasi in rem* jurisdiction, or to secure it from any attempts that may be filed by other parties.
2. The plaintiff filed a stand-alone lawsuit – not subject to examination of other forums – by using the defendant's assets in court with *quasi in rem jurisdiction* as collateral.⁶⁷

The criteria for *quasi in rem* jurisdiction must be narrowed to avoid 'forum shopping,' as follows:

1. The aim of *quasi in rem* jurisdiction is to secure the defendant's property located in another state in which the court trying the case cannot reach the property in question, and the property under conservatory measure is insufficient to satisfy the claim of the plaintiff. In addition, the court's final judgment is legally enforceable by the court where the defendant's property is located.⁶⁸

⁶⁴ *M Achsan v M Balandi Sutadipura* (1974) Case No. 312 K/Sip/1974.

⁶⁵ Harahap (n 11).[193].

⁶⁶ George B Fraser Jr., 'Actions in Rem' (1948) 34 Cornell L. Rev.[36].

⁶⁷ David H Vernon, 'Single-Factor Bases of in Personam Jurisdiction--A Speculation on the Impact of *Shaffer v. Heitner*' [1978] Wash. ULQ.[273].

⁶⁸ van Hooijdonk and Eijvoogel (n 22).[17].

2. The court may try the case based on *quasi in rem* jurisdiction only if the court of another country, which is supposed to have *in personam* jurisdiction, has refused to examine and decide the case without a proper legal basis. In this situation, the plaintiff must prove to the court with *quasi in rem* jurisdiction that:
 - a. The court has denied that justice should have jurisdiction over the case.
 - b. the defendant's property is within the court's jurisdiction.⁶⁹

The Indonesian civil justice system does not implement *quasi in rem* jurisdiction. In a lawsuit involving the properties of foreigners located in Indonesia, the lawsuit is usually addressed to collective defendants, in which at least one of the defendants is an Indonesian citizen or legal entity, while the other defendants are foreign citizens or legal entities, to satisfy Article 118(2) HIR/Article 146(2) RBg. However, according to Article 223 of Law No. 17/2008 on shipping, any foreign vessel within the territory of the Republic of Indonesia that is related to a shipping claim in foreign courts may be arrested by the order of an Indonesian court. According to Article 71 in conjunction with Article 79 of Law No. 1 of 2009 on Aviation, Indonesian courts also have jurisdiction to issue an order for interim measures against any aircraft within the territory of the Republic of Indonesia, which is granted the security interest of another state.⁷⁰

Another issue related to the right to access justice for foreigners or citizens abroad is the denial of justice.⁷¹ In the Harvard Draft on State Responsibility for Injuries to Aliens, denial of justice occurs when

“ There is a denial, unwarranted delay or obstruction of access to court, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment”.⁷²

⁶⁹ *ibid.*

⁷⁰ Article 79 of Law No 1 of 2009 on Aviation.

⁷¹ Louwrens R Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (Springer 2014).[105].

⁷² Harvard Law School, 'Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners', in *Yearbook of the International Law Commission* (2nd edn, 1956) [229-230] See also Benedetta Ubetazzi, 'Intellectual Property Rights and Exclusive (Subject Matter) Jurisdiction: Between Private and Public International Law' (2011) 15 *Marq. Intell. Prop. L. Rev.* [357] and Francioni (n 61).[107].

In the event of a denial of justice by the court of a certain country, the courts of other countries are allowed – at the plaintiff’s request – to claim jurisdiction based on the doctrine of *forum necessitates*, which can be found in many legal orders.⁷³ In its proposed amendment to EC Regulation 44/2001, the European Union proposed implementing *forum necessitatis* in Article 8.⁷⁴ However, the European Union Parliament did not approve this proposal.⁷⁵ In Principle 2.2, of the Principles of Transnational Civil Procedure by the American Law Institute and UNIDROIT, *forum necessitatis* is an acceptable source of court jurisdiction when no other forum is available.⁷⁶

Two examples of *forum necessitatis* are *Friday Alfred Akpan, Vereniging Milieudéfensie v Royal Dutch Shell Plc, Shell Petroleum Development Company of Nigeria Ltd*⁷⁷ and *Fidelis Ayoro Oguru, Alali Efanga, Vereniging Milieudéfensie v Royal Dutch Shell Plc, Shell Petroleum Development Company of Nigeria Ltd*.⁷⁸ In these cases, the District Court of The Hague held that it had jurisdiction, even though the facts – unlawful acts in the form of environmental damage and human rights violations – occurred outside the jurisdiction of the Netherlands (i.e., Nigeria). The appellate court upheld the District Court’s findings, *inter alia*:

1. Royal Dutch Shell Plc is a limited-liability company in the Netherlands. Based on Article 2 of EC Regulation 44/2001, the Dutch court had jurisdiction over the Royal Dutch Shell Plc.⁷⁹

⁷³ Kiestra (n 71).[105].

⁷⁴ Ilaria Pretelli, ‘Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)’ [2011] SSRN [29] See also Stefania Bariatti, *Cases and Materials on EU Private International Law* (Bloomsbury Publishing 2011).[304].

⁷⁵ Vjekoslav Puljko, ‘Regulation (EU) No 1215/2012 On Jurisdiction And The Recognition And Enforcement Of Judgments In Civil And Commercial Matters With Special Reference To The Relationship Between The Regulation And Arbitration’ (2015) 11 *Interdisciplinary Management Research*. [739].

⁷⁶ American Law Institute/ UNIDROIT, *Principles and Rules of Transnational Procedures* (Cambridge University Press 2004).[20].

⁷⁷ *Alfred Akpan, Vereniging Milieudéfensie v Royal Dutch Shell Plc, Shell Petroleum Development Company of Nigeria Ltd* (2013) Case No. C/09/337050/HA ZA 09-1580.

⁷⁸ *Fidelis Ayoro Oguru, Alali Efanga, Vereniging Milieudéfensie v Royal Dutch Shell Plc, Shell Petroleum Development Company of Nigeria Ltd* (2011) Case No. 330891/HA ZA 09-0579.

⁷⁹ Cees De Groot, ‘The “Shell Nigeria Issue”: Judgments by the Court of Appeal of The Hague, the Netherlands’ (2016) 13 *European Company Law*. [98].

2. The Dutch court also had jurisdiction over the Shell Petroleum Development Company of Nigeria Ltd., a limited liability company incorporated in Nigeria, because the lawsuit had multiple defendants, one of whom was domiciled in the Netherlands and others who were domiciled outside the Netherlands. In this case, the Dutch court also had jurisdiction over a defendant domiciled outside the Netherlands.⁸⁰
3. Furthermore, the court considered that there were substantial obstacles for plaintiffs to obtain justice through court proceedings in Nigeria.⁸¹

Other examples include lawsuits filed by Nigerian citizens in American courts, based on the Alien Tort Statute. In *Ken Saro Wiwa et al v Royal Dutch Petroleum Co. et al*,⁸² the parties were resolved amicably. Meanwhile, in *Kiobel et al v Royal Dutch Petroleum Co. et al*, the Supreme Court of the United States held that American courts lacked jurisdiction because neither the facts nor the parties had a connection with jurisdiction or interests in the United States.⁸³

A court implements the *forum necessitatis* doctrine based on the following criteria: (1) a foreign court that should have jurisdiction declares its objection; (2) a connection between the case (object and subject) and the national court (forum); (3) the impossibility of, or obvious obstacles to, bringing the case to a foreign court; (4) the fairness of the plaintiff by submitting a lawsuit to the national court (forum); and (5) the absence of a fair litigation process in foreign courts.⁸⁴ In recent developments, the Netherlands has implemented two approaches to applying *forum necessitatis* and declaring the jurisdiction of the national court over a case.⁸⁵ The first approach does not require any connection between the case

⁸⁰ *ibid.*

⁸¹ Steef M Bartman and Cornelis De Groot, 'The Shell Nigeria Judgments by the Court of Appeal of the Hague, a Breakthrough in the Field of International Environmental Damage? UK Law and Dutch Law on Parental Liability Compared' (2021) 18 *European Company Law*. [105].

⁸² *Bowoto v Chevron*, 'Wiwa v. Royal Dutch Petroleum, 96 Civ. 8386' [30] See also Xiuli Han, 'The Wiwa Cases' (2010) 9 *Chinese Journal of International Law*. [433].

⁸³ *Kiobel et al v Royal Dutch Petroleum Co et al 133 S Ct.*

⁸⁴ *ibid.*

⁸⁵ Kiestra (n 71). [105].

and the forum,⁸⁶ whereas the second requires a connection between the facts of the case and the forum.⁸⁷

The application of *forum necessitatis* in Indonesian courts is permitted by Article 100 Rv,⁸⁸ which states that an Indonesian citizen may sue a foreigner who is not domiciled in Indonesia for the performance of obligations made in Indonesia or any other country with Indonesian citizens. Article 100 Rv, known as the *recht van overdaging* provision⁸⁹, contains the same provision as Article 126 Rv of the old Dutch Code of Civil Procedure, which adopted the *forum exorbitant* and was repealed after the Brussels regime entered into force.⁹⁰

Article 100 Rv does not provide any criteria for implementing a *forum exorbitant*. Case law from the Indonesian Supreme Court determined the following criteria for allowing a plaintiff in Indonesian courts to sue foreigners or foreign legal entities that are not domiciled in Indonesia:⁹¹

1. If the foreign defendant does not file an objection, timely at the first opportunity, of jurisdiction against the Indonesian court, then it is concluded that the defendant has voluntarily availed of the jurisdiction of the Indonesian court.⁹²
2. A foreign defendant can only be sued in an Indonesian court if there is a legal relationship between the plaintiff and defendant, whether contractual or non-contractual.⁹³

However, the implementation of these criteria remains inadequate because Article 100 Rv could be used for 'forum shopping.' Therefore, the plaintiff should be

⁸⁶ Antonius IM van Mierlo and CJJC Van Nispen, *Burgerlijke Rechtsvoordering* (Kluwer 2014) Article 9:b.

⁸⁷ *ibid* Article 9:c.

⁸⁸ Christoph James Schüssler, *Eenige Opmerkingen Naar Aanleiding van Art. 223 van Het Inlandsch Reglement* (SC van Doesburgh 1892).[54].

⁸⁹ Sudargo Gautama, 'Persetujuan Hukum Perdata Internasional antara Republik Indonesia dan Kerajaan Thailand Mengenai Kerjasama di Bidang Peradilan dalam Rangka Asean' (1978) 8 *Jurnal Hukum & Pembangunan*. [343].

⁹⁰ ML Hendrikse and AW Jongbloed, 'De Bevoegdheid van de Rechter. Over International, Absolute, Sectorale En Relatieve Bevoegdheid', *Burgerlijk procesrecht praktisch belicht.-3e dr.* (Kluwer 2005) .[35-57]. in Marcus Leonardus Hendrikse, *Burgerlijk Procesrecht Praktisch Belicht* (DeventerKluwer 2003).[62].

⁹¹ Iman Prihandono and Esty Hayu Dewanty, 'Litigating Cross-Border Environmental Dispute in Indonesian Civil Court: The Montara Case' (2015) 5 *Indonesia Law Review*. [14].

⁹² *Time Inc Asia et al v HM Soeharto, Case No 273 PK / Pdt / 2008.*

⁹³ *PT Pindo Deli Pulp and Paper Mills v New Page Corporation et al, Case No 871 K/Pdt/2010.*

burdened with proving jurisdiction at the preliminary examination stage based on the *forum necessitatis* the following: (1) there is no other (foreign) court that has jurisdiction or there is a foreign court that has jurisdiction but refuses jurisdiction; and/or (2) there is a substantial refusal or obstacle to taking the procedure to other courts.⁹⁴ In addition, Article 100 Rv is limited in that it can be used only if the plaintiff is an Indonesian citizen. Foreigners cannot use Article 100 Rv to initiate a lawsuit in which the facts have no connection to Indonesian jurisdiction.

Conclusion

In civil cases, the personal jurisdiction of the court is generally determined by the *actor sequitur forum rei* principle, which is based on the defendant's domicile. To protect weaker parties, Indonesia has implemented measures relating to personal jurisdiction, so weaker parties may easily access the courts and seek justice. *Forum actoris* applies to consumer disputes, enabling the consumer to submit a claim against a business in a district court where the consumer is domiciled. In labor disputes, the employee may file a claim against the employer in the industrial relations court where the employee performs his or her employment duties.

However, these regulations lack consistency in protecting women in divorce cases. Government Regulation No. 10/1975 applies *actor sequitur forum rei*, whereby the district court, which has jurisdiction over divorce motions for non-Muslim couples – where the defendant is domiciled – shall have jurisdiction. There is no procedural distinction as to whether the plaintiff is a husband or wife. A different provision is found in the Law of the Religious Court, which has jurisdiction over family disputes for Muslims. In such cases, the Religious Court where the wife is domiciled shall have jurisdiction.

Regarding foreigners' right to access Indonesian courts, as long as the defendant resides in Indonesia, foreigners can sue the defendant in Indonesian courts based on *actor sequitur forum rei*. According to international agreements,

⁹⁴ Chilenye Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) 30 Utrecht J. Int'l & Eur. L.[24].

Indonesian courts can apply the *forum arresti* principle if the case relates to vessels or aircraft registered in other countries, but located within Indonesian territory. Indonesian courts can use Article 100 Rv to implement *forum necessitatis* in case of a denial of justice by the court of another country that, according to law, should have jurisdiction over the case. The implementation of Article 100 Rv can only be carried out if the plaintiff is an Indonesian citizen, so the connection between the forum and the case is that the plaintiff is a citizen of the country of the forum (Indonesia). Foreign plaintiffs cannot use Article 100 Rv to access Indonesian courts in the context of *forum necessitatis*.

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