



## Protective fora for consumer contracts

- Typical characteristics of protective fora in European civil procedure
  - protection of structurally weaker against structurally stronger party
  - weaker parties can sue at their own domicile
  - protection of weaker parties from lawsuits outside the State where they are domiciled
  - restrictions for jurisdiction agreements
  - only the weaker party personally is protected
  - rules on protective fora as “closed systems”



## Protective fora for consumer contracts

- Material scope of application of consumer fora
  - matter relating to a contract
  - B2C situation – contract between consumer and trader
  - contract covered by Article 15(1)(a-c) LC / Article 17(1)(a-c) Brussels I *bis* Regulation
  - no limitation to “everyday contracts”/small claims
  - exclusion of transport contracts (with the exception of package travel)



## Protective fora for consumer contracts

- extended territorial/personal scope of application
  - Article 15(2) LC/Article 17(2) Brussels I *bis* Regulation: trader domiciled in a third state is deemed to be domiciled in a MS/CS where they have a branch, agency, or other establishment for disputes arising out of the operations of that establishment
  - Article 6(1) Brussels I *bis* Regulation: protective fora for consumers and employees also apply to third-state traders and employers



## Protective fora for consumer contracts – Case 1



*Where can H sue N for payment?*



## Protective fora for consumer contracts – Case 1

- material scope of application of LC/Brussels I *bis* Regulation (civil/commercial matter, no exclusion from scope)
- no exclusive jurisdiction
  - hotel accommodation contract is not a “tenancy of immovable property” under Article 22.1 LC; short-term letting only falls within the scope of Article 22.1 LC if the contract relates **only to the use and occupation** of the immovable property (ECJ *Rösler/Rottwinkel*)
- territorial/personal scope of application of consumer fora
  - consumer domiciled in a CS/MS – [at least] if the consumer is the defendant
    - unclear whether the rules on consumer contracts under Article 15(1)(a-b) LC/Article 17(1)(a-b) Brussels I *bis* Regulation also apply to cases where a third-state consumer sues a CS/MS trader, or whether Articles 2 & 5 ff. LC/Articles 4 & 7 ff. Brussels I *bis* Regulation apply to such cases
  - if the trader is the defendant, specific rules in Article 15(2) LC/Articles 6, 17(2) Brussels I *bis* Regulation



## Protective fora for consumer contracts – Case 1

- material scope of application of protective fora for consumer contracts disputes
  - N as consumer (natural person acting outside their trade or profession)
  - consumer contract under Article 15(1)(c) LC/Article 17(1)(c) Brussels I *bis* Regulation?
    - contract within the scope of H’s commercial activity
    - direction of H’s commercial activity towards the Netherlands?
      - trader must have manifested the **intention to establish commercial relations with consumers from one or more other CS/MS, including the state of the consumer’s domicile**
        - criteria for websites: see ECJ *Pammer and Hotel Alpenhof*
    - not required: distance contract (ECJ *Mühlleitner/Yusufi*)
    - not required: causality (ECJ *Emrek/Sabranovic*)
    - But: [option to conclude] distance contract/causality as potential indicators for “direction”

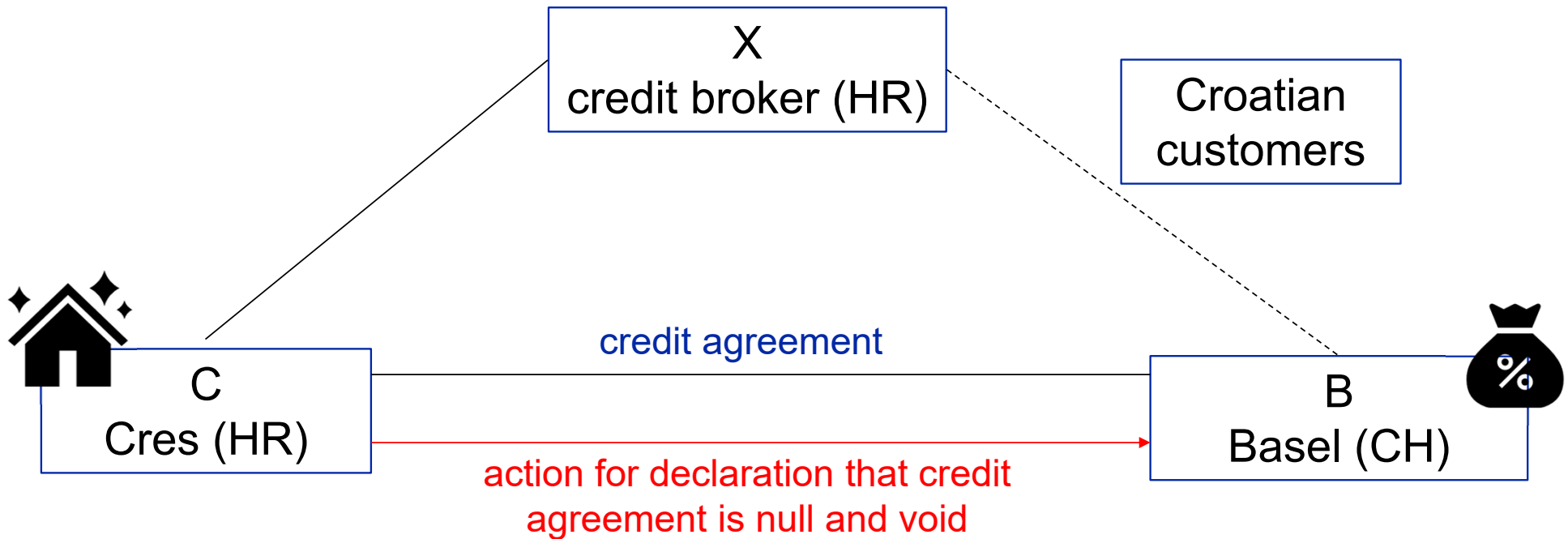


## Protective fora for consumer contracts – Case 1

- if direction (+): Article 16(2) LC/Article 18(2) Brussels I *bis* Regulation (+)
  - international jurisdiction of Dutch courts; local jurisdiction governed by Dutch law
- if direction (-): Article 16(2) LC/Article 18(2) Brussels I *bis* Regulation (-)
  - Article 2(1)LC/Article 4(1) Brussels I *bis* Regulation: international jurisdiction of Dutch courts, local jurisdiction governed by Dutch law
  - alternative forum under Article 5.1(b) LC
    - contract for the provision of services
    - place of the performance at the place where the services were provided = V



## Protective fora for consumer contracts – Case 2



*Jurisdiction of the courts for Cres for C's action?*





## Protective fora for consumer contracts – Case 2

- material scope of application of LC/Brussels I *bis* Regulation (civil/commercial matter, no exclusion from scope)
- no exclusive jurisdiction
- territorial/personal scope of application of consumer fora
  - trader's domicile, branch, agency, or other establishment in a CS (Switzerland)
    - [if consumer is domiciled in an EU MS and trader is domiciled in a non-Lugano third state, consumer can sue under Article 18(1) Brussels I *bis* Regulation or under national law]
  - unclear whether consumer's domicile in a CS/MS is also required if the consumer is the plaintiff



## Protective fora for consumer contracts – Case 2

- material scope of application of consumer fora
  - **Problem 1:** C as consumer (natural person acting outside their trade or profession)?
    - a person concluding a contract with a view to pursuing a trade or profession in the future is not a consumer (*ECJ Benincasa/Dentalkit*)
    - in the case of a dual-purpose contract, the rules on consumer fora only apply if the contract is essentially for private purposes and the trade or professional purpose is negligible (*ECJ Gruber/BayWa, Milivojević*)



## Protective fora for consumer contracts – Case 2

- material scope of application of consumer fora (cont.)
  - **Problem 2:** consumer contract under Article 15(1)(c) LC/Article 17(1)(c) Brussels I *bis* Regulation?
    - contract within the scope of B's commercial activity
    - direction of B's commercial activity towards Croatia?
      - trader must have manifested the **intention to establish commercial relations with consumers from one or more other CS/MS**, including the **state of the consumer's domicile**
      - accepting referrals from an independent credit broker as directing commercial activity to the state where the customers are domiciled?



## Protective fora for consumer contracts – Case 2

- if C qualifies as a consumer and direction (+):
  - jurisdiction agreement invalid (does not comply with the requirements of Article 17 LC)
  - international and local jurisdiction of the courts for C's under Article 16(1) LC (+)
  - alternatively: international jurisdiction of Swiss courts under Article 16(1) LC, local jurisdiction subject to Swiss national law
- if C does not qualify as a consumer and/or direction (-):
  - international and local jurisdiction of the courts for Basel under Article 23(1) LC