Credit rating agency liability in Europe: Rating the combination of EU and national law in rights of redress

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4 Private International Law aspects

4.1 INTRODUCTORY REMARKS

Rules of Private International Law are of crucial importance to the functioning of Article 35a CRA Regulation. Indeed, disputes over credit rating agency liability between credit rating agencies and issuers or investors will often involve 'international elements', while Article 35a (4) CRA Regulation reserves a prominent place for the applicable national law.[1] Due to the global character of the credit rating industry, one can easily imagine a cross-border dispute in which, for instance, a credit rating agency established in France has rated an issuer established in Italy, while German investors invested in financial instruments of the Italian issuer in reliance on the credit rating published on the credit rating agency's website.

This Chapter centres around the three main questions of Private International Law: which national court has jurisdiction to decide on a claim based on Article 35a CRA Regulation? What law is applicable to a dispute over credit rating agency liability involving a claim based on Article 35a CRA Regulation? And, how can eventual judgments be enforced? Through this broad overview of the relevant Private International Law aspects, this Chapter mainly aims to answer the question of which issues occur, if any, in determining the competent court and the applicable national law in respect of claims based on Article 35a CRA Regulation.[2] Due to the crucial importance of Private International Law in an early stage of legal proceedings on credit rating agency liability, it was decided to discuss this topic prior to the legal comparison made in Chapter 5.

To start with, this Chapter pays attention to a preliminary matter: the characterisation of the rights and obligations under Article 35a CRA Regulation

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1 Deipenbrock strikingly described the role of Private International Law in the context of Article 35a CRA Regulation as '[t]he layer between the European law and national substantive private law' (Deipenbrock 2018, p. 561).

2 Prior to the publication of this dissertation, multiple contributions addressing these issues were published already. *E.g.* Heuser 2019, pp. 195 ff., Deipenbrock 2018, pp. 562-571, Dumont du Voitel 2018, pp. 156 ff., Wimmer 2017, pp. 96 ff. and 246 ff., Baumgartner 2015, pp. 593 ff., Happ 2015, Schantz 2015, pp. 342 ff., Steinrötter 2015, Dutta 2014, Gass 2014, pp. 52 ff. and Dutta 2013. The majority of the contributions followed the order of applicable Private International Rules. This dissertation follows this order as well, which explains similarities in terms of structure.

(section 4.2). Subsequently, sections 4.3 and 4.4 explain on which grounds a national court can assume jurisdiction and in which way a national court must determine the law applicable to disputes over credit rating agency liability involving claims based on Article 35a CRA Regulation, respectively. This Chapter discusses the topic of jurisdiction most thoroughly, as most case law exists in relation to jurisdiction. Subsequently, section 4.4 applies the findings relating to jurisdiction and, more in particular, relating to the location of the *Erfolgsort* of financial loss in the context of the assessment of the applicable national law. To complete the overview of the Private International Law aspects, section 4.5 briefly discusses the rules on the recognition and enforcement of judgments, which award compensation to issuers and investors.

This Chapter approaches the first and the second main questions of Private International Law from a European perspective. It departs from the assumption that issuers and investors start proceedings before the courts of Member States, and that national courts must apply European rules of Private International Law.[3] Furthermore, this Chapter assumes that the defendants are credit rating agencies established and registered in the EU.[4] In practice, however, legal proceedings on credit rating agency liability are not necessarily brought before Member State courts. Issuers and investors can start proceedings before the courts of third countries. Also, credit rating agencies could seek a declaratory judgment from the courts of third countries. This study, however, takes a European perspective on the topic of credit rating agency liability and, therefore, analyses the Private International Law aspects from a European perspective. Section 4.5 briefly investigates recognition and enforcement from a European perspective as well, assuming that an issuer or investor must enforce a judgment of a court of a Member State in a third country, in particular in the US.

3 The application of European or national rules of Private International Law depends on whether disputes involve 'international' elements. Although the analysis made in this Chapter is limited to European rules of Private International Law as a matter of principle, section 4.3.3.3 (a) discusses the application of the Hague Choice of Court Convention. Furthermore, it deserves to be remarked that this dissertation does not discuss the validity and effects of arbitration clauses. Finally, as this dissertation starts from the assumption that national courts must apply European rules of Private International Law, this section does not pay attention to rules and case law concerning national Private International Law rules in the context of credit rating agency liability (*e.g.* Bundesgerichtshof 13 December 2012, III ZR 282/11, *NJW* 2013, pp. 386-387, *BeckRS* 2013, 1088 (appeal of Oberlandesgericht Frankfurt 28 November 2011, 21 U 23/11, ECLI:DE:OLGHE:2011:1128.21U23.11.0A, *BeckRS* 2011, 27061)).

4 As concluded in section 3.5.3.1, the CRA Regulation applies to credit rating agencies established and registered in the EU only.

4.2 CHARACTERISATION

The characterisation of rights and obligations determines what rules and legislative instruments apply to establish jurisdiction and the applicable law.[5] In the context of Article 35a CRA Regulation, one must determine whether claims based on and obligations under Article 35a CRA Regulation qualify as matters relating to contract, as matters relating to tort, as contractual obligations or as non-contractual obligations. When a certain obligation qualifies as 'contractual', national courts can assume jurisdiction under Article 7 (1) (a) Brussels I Regulation (recast) and can determine the applicable law by means of the Rome I Regulation. When a certain obligation qualifies as 'tort' or 'non-contractual', national courts can assume jurisdiction under Article 7 (2) Brussels I Regulation (recast) and can determine the applicable law by means of the Rome II Regulation. The application of these rules can lead to different outcomes in respect of jurisdiction and applicable law.

For Private International Law purposes, this dissertation considers claims based on Article 35a CRA Regulation to be of a non-contractual nature, irrespective of the existence of an agreement between a credit rating agency and an issuer or an investor. Scholars have also often argued that claims based on Article 35a CRA Regulation qualify as matters relating to tort.[6] This qualification finds its basis in the fact that Article 35a CRA Regulation imposes statutory obligations upon credit rating agencies under Annex III CRA Regulation. As stated in the Recitals of the CRA III Regulation, issuers and investors can base a claim for damages on Article 35a CRA Regulation *irrespective* of the existence of a contractual relationship between the credit rating agency and the issuer or investor.[7] The obligations imposed upon credit rating agencies are hence not based on the existence of a contract and the remedy of the right to damages does not presuppose the existence of a

5 For Private International Law purposes, the terms of contractual and non-contractual obligations are interpreted autonomously. The characterisations under the applicable national law are not taken into consideration *e.g.* ECJ 17 June 1992, C-26/91, ECLI:EU:C:1992:268 (*Handte v TMCS*), para 10, CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 27, CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 37 and CJEU 21 January 2016, C-359/14, ECLI:EU:C:2016:40 (*Ergo Insurance SE*), para 43.

6 *See e.g.* Heuser 2019, pp. 82 and 195 ff., Deipenbrock 2018, p. 564, Dumont du Voitel 2018, pp. 158-159, Wimmer 2017, pp. 100-101, Deipenbrock 2015, p. 9, Steinrötter 2015, pp. 112-113, Berger & Ryborz 2014, p. 2246 and Dutta 2013, p. 1731. *Contra* Happ 2015, pp. 69-70, who characterised Art. 35a CRA Regulation as contractual and non-contractual matters, depending on the existence of a rating or a subscription contract. Due to this qualification, the dissertation of Happ also paid attention to the rules of Private International Law applicable to contractual obligations. *Contra* Miglionico 2019, no. 9.16.

7 Recital 32 CRA III Regulation. *Also* Heuser 2019, pp. 197-198 and Wimmer 2017, pp. 100-101.

voluntary act or a voluntary assumed obligation by a credit rating agency.[8] Therefore, claims based on Article 35a CRA Regulation are considered of a non-contractual nature for Private International Law purposes. The consequences of this characterisation are that section 4.3.5 on special jurisdiction discusses jurisdiction under Article 7 (2) Brussels I Regulation (recast) on special jurisdiction for matters relating to tort and that section 4.4 on applicable law discusses the application of the Rome II Regulation on non-contractual obligations.

The fact that claims based on Article 35a CRA Regulation are considered of a non-contractual nature for Private International Law purposes does not mean that an existing contractual relationship between a credit rating agency and an issuer or investor is not relevant for Private International Law purposes at all. As we will see, the existence of a contractual relationship is for instance of relevance because the contract can include a valid jurisdiction clause[9] and because the contract can trigger the escape clause under Article 4 (3) Rome II Regulation.[10]

4.3 JURISDICTION

4.3.1 Legal framework

At the start of legal proceedings, a national court must determine whether it is competent to decide on the particular claim(s). If proceedings are brought before a court of a Member State, the court has to decide on its jurisdiction under, for instance, international treaties as the Convention of 30 June 2005 on Choice of Courts Agreements (also known as the Hague Choice of Court Convention), the Brussels I Regulation (recast)[11] or the rules of Private International Law of the forum (*lex fori*). Claims for credit rating agency liability based on Article 35a CRA Regulation brought against EU credit rating agencies or EU subsidiaries before Member State courts will normally fall within the

8 *Cf. e.g.* Wimmer 2017, pp. 100-101, Deipenbrock 2015, p. 9 and Dutta 2013, p. 1731. As stated by Lehmann, a claim for damages however might be a matter relating to contract if the claim has been based 'on a rule to be found in case law or statute' which presupposes 'a voluntary act of the defendant' (Lehmann 2015a, no. 4.40). Similarly, in *ÖFAB v Koot*, obligations derived from a statutory rule were qualified as matters relating to tort without 'being dependent on the nature of the debts of the company concerned', *see* CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), paras. 39-41. *Cf. also* Baumgartner 2015, pp. 529, 605 and 612.

9 *See* section 4.3.3.

10 *See* section 4.4.4.

11 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 (recast).

formal, material and temporal scope of the Brussels I Regulation (recast).[12] Therefore, the framework of the Brussels I Regulation (recast) serves as a basis for this section on jurisdiction.[13] Depending on the circumstances of the case, a national court can assume jurisdiction under Article 25 (on jurisdiction agreements), Article 4 (1) (on the domicile of the defendant) or Article 7 (2) Brussels I Regulation (recast) (on matters relating to tort).

4.3.2 Formal, material and temporal scope of Brussels I Regulation (recast)

A national court can only base its competence on the Brussels I Regulation (recast) if the dispute falls within the formal scope, the material (subject matter) scope, and the temporal scope of the Regulation.[14]

In order to fall within the formal scope of the Brussels I Regulation (recast), a defendant (viz. a credit rating agency) must be 'domiciled' in a Member State.[15] If a defendant is not domiciled in a Member State, the jurisdiction of a court 'shall, subject to Article 18 (1), Article 21 (2) and Articles 24 and 25, be determined by the law of that Member State' (*lex fori*).[16] Consequently, unless one of these exceptions applies, the Brussels I Regulation (recast) only applies to credit rating agencies or their subsidiaries established in one of the Member States.[17] The Brussels I Regulation (recast) hence does not apply to claims for damages brought against the US holding companies of, for instance, Moody's and Standard & Poor's.[18] In such situations, Member State courts must apply their national rules of Private International Law.

In order to fall within the material (subject matter) scope of the Brussels I Regulation (recast), the dispute must concern a 'civil and commercial' matter under Article 1 (1) Brussels I Regulation (recast) and shall not fall under the categories described in Article 1 (2) Brussels I Regulation (recast).[19] The term 'civil and commercial matters' can involve 'an action between a public authority and a person governed by private law', except for situations in which 'the

12 Assuming the dispute is characterised by an international, cross-border element. *See* section 4.3.2.

13 Although section 4.3.3.3 (a) discusses the Hague Choice of Court Convention as well in the context of jurisdiction clauses.

14 Briggs 2013, p. 60 and *see generally* Strikwerda & Schaafsma 2019, no. 40.

15 *See* Art. 4, 5 and 6 Brussels I Regulation (recast). *Cf.* Baumgartner 2015, p. 593.

16 Art. 6 (1) Brussels I Regulation (recast).

17 For the domicile of a legal entity, see Art. 63 (1) Brussels I Regulation (recast). As a consequence, it will be complex to bring proceedings against a credit rating agency established in a third country before the courts of a Member State. For an argument in favour of extending the Brussels I Regulation (recast) to defendants not established or domiciled in the EU in the context of credit rating agencies, Risso 2016.

18 *Cf.* Happ 2015, p. 94.

19 *See also e.g.* Briggs 2013, p. 60 and Strikwerda & Schaafsma 2019, no. 40.

public authority is acting in the exercise of its public authority powers'.[20] Claims concerning the civil liability of credit rating agencies qualify as civil and commercial matters. This qualification equally applies to claims for damages brought by sovereign states or other governmental institutions (e.g. municipalities), as long as the particular state or governmental institution acts in its capacity of issuer or investor who suffered loss due to an affected credit rating.

Finally, a dispute has to fall under the temporal scope of the Brussels I Regulation (recast). Under Article 66 (1) Brussels I Regulation (recast), the Regulation applies to legal proceedings instituted on or after 10 January 2015. If legal proceedings were instituted before that date, the rules of the old Brussels I Regulation[21] apply.

As stated already, claims for credit rating agency liability based on Article 35a CRA Regulation brought against EU credit rating agencies or EU subsidiaries before Member State courts, will normally fall within the formal, material and temporal scope of the Brussels I Regulation (recast).[22] If so, Member State courts will apply the rules of the Brussels I Regulation (recast) to the dispute between the credit rating agencies and the issuer or investor.

4.3.3 Jurisdiction agreements

4.3.3.1 Remarks in advance

In concrete situations, credit rating agencies can have entered into jurisdiction agreements with issuers or investors.[23] Jurisdiction agreements can be included in contracts for solicited ratings or paid subscription contracts.[24] Furthermore, credit rating agencies can include jurisdiction clauses in their Terms of Use, which an investor (or another person) must accept before being able to access the part of the website that displays credit ratings.[25] The question can arise whether such agreements and clauses are binding upon issuers and investors. For the answer to this question, it is necessary to distinguish between jurisdiction agreements that confer jurisdiction upon the courts of

20 ECJ 16 December 1980, C-814/79, ECLI:EU:C:1980:291 (*Netherlands v Rüffer*), para 8.

21 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

22 Assuming the situation is characterised by an international, cross-border element.

23 Parties do not necessarily have to make explicit choices of forum. They can also tacitly agree on a choice of forum, for instance, under Art. 26 (1) Brussels I Regulation (recast), when the defendant appears before a court of a Member State and does not dispute the jurisdiction of the court. This dissertation, however, concentrates on explicit choices of forum only.

24 Steinrötter 2015, p. 112. *Cf. also* Dumont du Voitel 2018, pp. 186-187, Baumgartner 2015, p. 600 and Happ 2015, pp. 98 ff.

25 After having accepted the Terms of Use, the credit ratings are often available free of charge. This applies to Moody's, Standard & Poor's and Fitch.

Member States (section 4.3.3.2) and jurisdiction agreements that confer jurisdiction upon the courts of third countries (section 4.3.3.3).[26]

As noted in section 4.1, this Chapter is based on the assumption that the defendant is a credit rating agency established and registered in the EU. Any jurisdiction agreement for the purpose of this section is assumed to be concluded between an issuer or investor and an EU credit rating agency. One needs to be aware that this is not necessarily always the case. In disputes over credit rating agency liability, attention should be paid to the exact contracting parties. Are the defendant and the contracting credit rating agency the same party? Or, is the defendant credit rating agency the EU subsidiary and the contracting credit rating agency the (US) holding company? For the assignment of a credit rating meant to be used for EU regulatory purposes, an issuer can enter into a contract with an EU subsidiary of a credit rating agency, but also with a US credit rating agency. For instance, Standard & Poor's stipulates that 'S&P Global Ratings' business operations in the European Union are currently conducted through S&P Global Ratings Europe Limited', but also that newly assigned credit ratings are 'generally subject to' a rating contract concluded between the issuer and S&P Global Ratings.[27] In such situations, I would argue that the issuer can nevertheless bring a claim against the EU credit rating agency that eventually issued or endorsed the credit rating for EU regulatory purposes. If not, credit rating agencies could easily bypass the application of Article 35a CRA Regulation.

4.3.3.2 Jurisdiction agreements in favour of courts of Member States

A court of a Member State can assume jurisdiction based on a valid jurisdiction agreement that confers jurisdiction upon that court.[28] Under Article 25 (1) Brussels I Regulation (recast), credit rating agencies, issuers and investors are

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26 The distinction may suggest that jurisdiction agreements in favour of courts of Member States are always governed by the Brussels I Regulation (recast). Yet, one can think of situations in which the Hague Choice of Court Convention applies to jurisdiction agreements in favour of courts of Member States, as explained in footnote 726.

27 *See* www.standardandpoors.com/en_EU/delegate/getPDF?articleId=2097399&type=COMMENTS&subType=REGULATORY, last accessed at 31 August 2019. S&P Global Ratings headquartered in New York. *For a description of the group structure of S&P Global*, Simon 2017, pp. 14-16.

28 If, contrary to an exclusive jurisdiction clause, a claimant starts legal proceedings before a court of another Member State, the defendant must contest the jurisdiction of that court upon its appearance. Otherwise, the appearance is considered a tacit prorogation of jurisdiction so that the court seised is competent under Art. 26 (1) Brussels I Regulation (recast). Art. 26 (1) applies irrespective of whether an exclusive jurisdiction clause conferred jurisdiction upon the courts of a Member State or a third country. *E.g. in respect of Art. 24 (1) Brussels I Regulation*, CJEU 17 March 2016, C-175/15, ECLI:EU:C:2016:176 *(Taser International*), paras. 23-25.

generally allowed to decide that the courts of a Member State[29] are (exclusively) competent to settle disputes that might arise in connection with their particular legal relationship. As Article 25 (1) Brussels I Regulation (recast) does not impose any restrictions as to which parties can conclude jurisdiction agreements, parties domiciled in both Member States and third countries can confer jurisdiction upon the courts of Member States.[30] If a jurisdiction clause confers jurisdiction upon the courts of a Member State, a court must examine the validity and the enforceability of the clause (under (a) and (b), respectively). Furthermore, a court must examine the scope of the clause in order to determine whether it covers a claim for damages based on Article 35a CRA Regulation (under (c)).

(a) Validity

(i) – Formal validity

From the perspective of formal validity, jurisdiction agreements between credit rating agencies and issuers or investors must comply with the requirements under Article 25 (1) and (2) Brussels I Regulation (recast). These requirements serve to check whether there is an actual agreement between the parties.[31] Under Article 25 (1) Brussels I Regulation (recast), a jurisdiction agreement is valid if the agreement is: '(a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.' In the case of *El Majdoub v CarsOnTheWeb.Deutschland GmbH*, the CJEU held that courts must interpret these conditions restrictively, because a valid jurisdiction agreement precludes the jurisdiction of other courts under

29 Art. 25 (1) Brussels I Regulation (recast) applies only if the parties have conferred jurisdiction upon the courts of a Member State. However, jurisdiction clauses in the context of the credit rating industry will often confer jurisdiction upon the US courts. In such situations, it not always clear whether the other provisions of the Brussels I Regulation (recast) apply (*see* section 4.3.3.3 (b) in detail).

30 Garcimartín 2015, no. 9.10. *In the context of credit rating agencies* Happ 2015, p. 99. Concurrence between the Brussels I Regulation (recast) and the Hague Choice of Court Convention occurs when one or both of the parties that confer jurisdiction upon a court of a Member State is or are domiciled in a third state that is a party to the Hague Choice of Court Convention. In those situations, the Hague Choice of Court Convention applies under Art. 26 (6) Hague Choice of Court Convention and Art. 71 (1) Brussels I Regulation (recast). Art. 25 (1) Brussels I Regulation also allows these parties to confer jurisdiction upon a court of a Member State. This section only discusses the application of Art. 25 Brussels I Regulation (recast). Section 4.3.3.3 (a) discusses the application of the Hague Choice of Court Convention.

31 CJEU 7 July 2016, C-222/15, ECLI:EU:C:2016:525 (*Höszig*), para 37.

the rules for general and special jurisdiction.[32] If contracts are concluded online, the requirement that a jurisdiction agreement must be in writing or evidenced in writing is replaced by Article 25 (2) Brussels I Regulation (recast), which stipulates that '[a]ny communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing' [under Article 25 (1) (a) Brussels I Regulation (recast)]'.

For jurisdiction clauses included in general terms and conditions to be binding upon the other party, the electronic communication must include an explicit reference to the general terms and conditions.[33] Furthermore, under Article 25 (2) Brussels I Regulation (recast), the other party should be able to make a durable record of the terms. According to Garcimartín, the other party must be able to access and save the terms prior to the conclusion of the contract. A reference on a website that cannot be downloaded does not suffice for this purpose.[34] In the case of *El Majdoub v CarsOnTheWeb.Deutschland GmbH*, the CJEU held that the formal requirements under Article 23 Brussels I Regulation are met if 'it is possible to create a durable record of an electronic communication by printing it out or saving it to a backup tape or disk or storing it in some other way'.[35] The validity of the terms does not depend on whether such durable record has actually been made.[36]

From the perspective of formal validity, credit rating agencies are hence able to include jurisdiction clauses in contracts for solicited ratings and in standard terms and conditions of subscription contracts, as long as they comply with the conditions explained above. Furthermore, jurisdiction clauses included in general Terms of Use of a website can be valid as well, as long as an express reference to the general terms is made and a durable record of the general terms can be made prior to the registration.[37]

(ii) – Material validity

Furthermore, courts must assess the material validity of a jurisdiction clause. Courts will do so in accordance with the applicable national law. Indeed, under Article 25 (1) Brussels I Regulation (recast), a jurisdiction agreement shall not be 'null and void as to its substantive validity under the law of that Member

32 CJEU 21 May 2015, C-322/14, ECLI:EU:C:2015:334 (*El Majdoub v CarsOnTheWeb.Deutschland GmbH*), para 25, in respect of Art. 23 Brussels I Regulation. *Cf.* Magnus & Mankowski 2016, p. 605.

33 *Cf.* Garcimartín 2015, no. 9.43.

34 Garcimartín 2015, no. 9.43. *See also* Magnus & Mankowski 2016, pp. 650-651 and Tang 2015, pp. 124-125.

35 CJEU 21 May 2015, C-322/14, ECLI:EU:C:2015:334 (*El Majdoub v CarsOnTheWeb.Deutschland GmbH*), paras. 33-34.

36 CJEU 21 May 2015, C-322/14, ECLI:EU:C:2015:334 (*El Majdoub v CarsOnTheWeb.Deutschland GmbH*), paras. 33-34.

37 In order to register and access credit ratings, often, the relevant box on the website must be clicked, confirming that the person who wishes to register accepted the general terms and conditions.

State', viz. under the law of the Member State designated in the agreement including its rules of Private International Law.[38]

If a credit rating agency and an investor concluded a paid subscription contract that included a jurisdiction clause under the general terms used by the credit rating agency, an investor can attempt to dispute the substantive validity of such a jurisdiction clause under the Unfair Terms in Consumer Contracts Directive.[39] The Unfair Terms in Consumer Contracts Directive applies to contracts concluded between sellers or suppliers and consumers.[40] In practice, the Directive will only be of limited relevance in disputes over credit rating agency liability, because it applies only to investors who qualify as 'consumers' under Article 2 (b) Unfair Terms in Consumer Contracts Directive. If at all, investors qualify as consumers only if they are natural persons who do not act in the scope of their profession or business.[41]

Under the Unfair Terms in Consumer Contracts Directive, '[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.[42] Member States need to ensure that unfair terms are not binding upon consumers.[43] A term is not individually negotiated if it has been drafted in advance and if the consumer had no influence on the

38 Recital 20 Brussels I Regulation (recast). *Also* Garcimartín 2015, no. 9.32 and 9.55 and Tang 2015, p. 129. Under the concept of severability (Art. 25 (5) Brussels I Regulation (recast)), the validity of a jurisdiction clause and the law applicable to it shall be assessed irrespective of the validity of and the law applicable to the main contract. When determining the applicable national law, it must be kept in mind that the Rome I Regulation does not apply because jurisdiction clauses have been excluded from the scope of the Rome I Regulation under Art. 1 (2) (e) Rome I Regulation. Therefore, the applicable law has to be determined in accordance with national rules of Private International Law. At first sight, Art. 25 (1) Brussels I Regulation (recast) seems to have established a clear rule as regards the substantive validity of jurisdiction clauses. However, a close reading of the provision reveals that the applicable national law will only be used to determine whether a jurisdiction clause is null and void, while it remains unclear whether other aspects of substantive validity have to be determined autonomously or in accordance with the applicable national law. As Magnus & Mankowski indicated, if national law would apply as a whole, unclear doctrines, such as the doctrine of consideration under English law, would have to be considered in order to determine matters of jurisdiction, which would lead to complications and uncertainty. Magnus & Mankowski 2016, p. 628.

39 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. *Cf. in the context of electronic contracts and consumers* Tang 2015, pp. 129-130 and Gillies 2008, p. 99. Gargantini remarked that the relationship between the Brussels I Regulation (recast) and the Unfair Terms in Consumer Contracts has not been clarified by means of an express provision, Gargantini 2016, p. 22. *Cf. also* Knigge 2012, p. 95, Gillies 2008, p. 100 and Kuypers 2008, p. 707.

40 Art. 1 (1) Unfair Terms in Consumer Contracts Directive.

41 Art. 2 (b) Unfair Terms in Consumer Contracts Directive.

42 Art. 3 (1) Unfair Terms in Consumer Contracts Directive.

43 Art. 6 (1) Unfair Terms in Consumer Contracts Directive.

term.[44] Therefore, general terms and conditions used by credit rating agency that have to be accepted in order to complete a paid subscription can fall within the scope of the Unfair Terms in Consumer Contracts Directive. Yet, the simple fact that certain terms falls within the scope of the Unfair Terms in Consumer Contracts Directive, does not automatically entail that those terms are unfair.[45] Terms, and more specifically, jurisdiction clauses qualify as unfair if they fall into one of the categories listed in the Annex of the Unfair Terms in Consumer Contracts Directive. For instance, under Annex 1 (q), terms that have the objective or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy' might be unfair if they cause a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer and contrary to the requirement of good faith.[46]

In the case of *Océano Grupo Editorial and Salvat Editores*, the CJEU held that an exclusive jurisdiction clause conferring jurisdiction upon the courts of the principal place of business of the seller or supplier, while the consumer was domiciled in another place, had to be considered unfair within the meaning of Article 3 (1) Unfair Terms in Consumer Contracts Directive and, contrary to good faith, caused a significant imbalance in the parties' rights and obligations.[47] The imbalance was caused by the fact that the jurisdiction clause required the consumer to start legal proceedings a long way from his domicile. The claim against the defendant concerned a small amount of money, especially in relation to the travel costs that needed to be made to appear before the courts designated in the jurisdiction clause. The CJEU concluded that these travel costs hindered the claimant in seeking any legal remedy.[48] In concrete disputes over credit rating agency liability, it will depend on the circumstances of the case whether one could apply the reasoning of *Océano Grupo Editorial and Salvat Editores*. Only in exceptional situations, it might occur that natural persons, who wish to start legal proceedings against a credit rating agency for relatively small claims, are hindered in seeking a legal remedy by a jurisdiction clause that requires them to start proceedings before the courts of another Member State.

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44 Art. 3 (2) Unfair Terms in Consumer Contracts Directive.

45 *See* Tang 2015, p. 130.

46 Art. 3 (3) Unfair Terms in Consumer Contracts Directive. As the Annex constitutes an indicative and non-exhaustive list, other clauses can also be considered unfair under the Directive. Tang 2015, p. 130.

47 ECJ 27 June 2000, C-240/98, ECLI:EU:C:2000:346 (*Océano Grupo Editorial and Salvat Editores*), para 24. Tang 2015, p. 130. The CJEU confirmed its approach in subsequent decisions e.g. CJEU 9 November 2010, C-137/08, ECLI:EU:C:2010:659 (*VB Pénzügyi Lízing*), paras. 53-55 and ECJ 4 June 2009, C-243/08, ECLI:EU:C:2009:350 (*Pannon GSM*), paras. 40-44.

48 ECJ 27 June 2000, C-240/98, ECLI:EU:C:2000:346 (*Océano Grupo Editorial and Salvat Editores*), para 22.

(b) Enforceability

Even if the jurisdiction agreement is valid, the designated court cannot assume jurisdiction if another court has exclusive jurisdiction under Article 24 Brussels I Regulation (recast) or if one of the jurisdiction grounds under Chapter II, section 3, 4 or 5 of the Brussels I Regulation (recast) applies.[49] These sections create special grounds of jurisdiction for disputes in which weaker parties – policyholders of insurance, consumers or employees – are involved. If such a weaker party is involved, jurisdiction clauses are allowed only if the conditions under Article 15, 19 and 23 Brussels I Regulation (recast) have been satisfied.

In the context of credit rating agency liability, the special grounds of jurisdiction under Chapter II, section 3, 4 or 5 of the Brussels I Regulation (recast) do not play a large role in relation to claims for damages based on Article 35a CRA Regulation. It is only when an investor, who qualifies as a consumer,[50] entered into a paid subscription contract with a credit rating agency that one can wonder whether the special rules relating to consumer contracts (Section 4 Brussels I Regulation (recast)) apply. Scholars however assumed that Article 17 Brussels I Regulation (recast) does not cover claims based on Article 35a CRA Regulation, because Article 17 involves matters relating to contract instead of matters relating to tort.[51] As claims based on Article 35a CRA Regulation qualify as matters relating to tort, this approach accords with the system of the Brussels I Regulation (recast). At the same time, however, this approach feels artificial, because the claim based on Article 35a CRA Regulation is closely connected to the existence of the paid subscription in this particular case.

(c) Scope

Finally, a national court must determine whether the valid jurisdiction clause covers claims based on Article 35a CRA Regulation. Under Article 25 (1) Brussels I Regulation (recast), jurisdiction clauses cover disputes 'which have arisen or which may arise in connection with a particular legal relationship'. As appeared from the CJEU's decision in *Powell Duffryn plc*, the effect of jurisdiction clauses is limited in order to avoid that a party is surprised that jurisdiction has been conferred upon a certain court.[52] Furthermore, the scope of a jurisdiction clause depends on the intention of the parties and wording of the clause[53] and, if the wording leaves room for interpretation, the interpretation

49 *Cf.* Gargantini 2016, p. 20, Magnus & Mankowski 2016, pp. 592 ff., Tang 2015, pp. 131 ff. and Knigge 2012, p. 97.

50 Dutta questioned when subscribers qualified as consumers, Dutta 2014, p. 36.

51 *See e.g.* Steinrötter 2015, p. 112 and Dutta 2013, p. 1731.

52 ECJ 10 March 1992, C-214/89, ECLI:EU:C:1992:115 (*Powell Duffryn plc v Wolfgang Petereit*), para 31. *Cf.* Briggs 2008, no. 7.89.

53 Magnus & Mankowski 2016, p. 655.

of the clause under the applicable national law.[54] Tort claims arising in connection with the relationship between a credit rating agency and an issuer or investor could fall under the scope of broadly formulated jurisdiction agreements.[55] For instance, if an issuer brings a claim for damages based on Article 35a CRA Regulation while the issuer had concluded a contract for a solicited rating with a credit rating agency, which contains a valid jurisdiction agreement, the claim for damages can be covered by the jurisdiction agreement.

Overall, this section analysed the validity, enforceability and the scope of jurisdiction agreements in favour of the courts of Member States. In the context of credit rating agency liability, broadly formulated jurisdiction clauses in favour of the courts of Member States included in contracts for solicited credit ratings, can cover claims for damages brought by issuers under Article 35a CRA Regulation. Furthermore, broadly formulated jurisdiction clauses in favour of the courts of Member States and concluded in paid subscription contracts between credit rating agencies and professional investors, can cover claims for damages brought by those investors under Article 35a CRA Regulation. Retail investors may, however, be protected under the Unfair Terms in Consumer Contracts Directive. Credit rating agencies can include jurisdiction clauses in their Terms of Use, which an investor (or another person) must accept prior to being able to access the part of the website that displays credit ratings.

4.3.3.3 Jurisdiction agreements in favour of courts of third countries

Jurisdiction clauses can also confer jurisdiction upon the courts of third countries. In the context of the credit rating industry, the importance of this type of jurisdiction clause should not be underestimated. The big three credit rating agencies often include jurisdiction clauses in favour of the courts of New York in their general terms and conditions (of their websites).[56] Article 25 Brussels I Regulation (recast) does not determine the validity of jurisdiction agreements

54 *See* Briggs 2008, no. 7.89 and Garcimartín 2015, no. 9.87. The reference to the applicable national law might lead to differences between the Member States. For instance, English and French courts could be said to interpret jurisdiction clauses less broadly than other courts, Magnus & Mankowski 2016, p. 656.

55 *Cf.* Steinrötter 2015, p. 112. *Cf. generally* Magnus & Mankowski 2016, p. 660 and Garcimartín 2015, no. 9.88.

56 *See e.g.* the Terms of Use of Standard & Poor's' website, available at www.standardandpoors.com/en_US/web/guest/regulatory/termsofuse, which state that: 'The parties agree that the State and Federal courts of New York shall be the exclusive forums for any dispute arising out of this Agreement and the parties hereby consent to the personal jurisdiction of such courts', the Terms of Use of Moody's' website, available at www.moodys.com/termsofuseinfo.aspx (also involving an arbitration clause) and the Terms of Use of Fitch's website, available at www.thefitchgroup.com/site/termsofuse. The Terms of Use of DBRS submit jurisdiction to the courts of Ontario (Canada), www.dbrs.com/terms-and-conditions/. All websites were last accessed at 31 August 2019.

conferring jurisdiction upon the courts of third countries.[57] In such situations, the question arises of how the court seised has to determine its competence: in accordance with the other rules of the Brussels I Regulation (recast) or in accordance with national rules of Private International Law (under (b)). Yet another possibility is that the jurisdiction clause falls within the scope of the Hague Choice of Court Convention (under (a)).

(a) Hague Choice of Court Convention

The Convention of 30 June 2005 on Choice of Courts Agreements (also known as the Hague Choice of Court Convention) arranges, amongst others, for the international validity of exclusive jurisdiction clauses between the contracting states. The Convention stipulates that courts of the contracting states shall suspend or dismiss proceedings to which an exclusive jurisdiction agreement applies which confer jurisdiction upon the courts of another contracting state.[58] States, such as China, the US, Mexico, Singapore, and the EU signed the Convention, but, up to 1 April 2019, the Convention had only entered into force in the EU, Denmark, Mexico, Montenegro and Singapore.[59]

In the context of this dissertation, courts of Member States will often have to decide on jurisdiction clauses in favour of US courts. An important consequence of the fact that the Convention did not enter into force in the US, however, is that Member State courts are not required to deny jurisdiction under the Hague Choice of Court Convention when confronted with an exclusive jurisdiction clause in favour of the US courts. From this perspective, the Hague Choice of Court Convention currently does not have much practical implications in the area of credit rating agency liability. Yet the Hague Choice of Court Convention does have potentially far-reaching consequences in this regard and has already grown in importance as from 1 April 2019. On that date the Hague Choice of Court Convention entered into force in the United Kingdom of Great Britain and Northern Ireland.[60]

Even though the courts of contracting states are under the general obligation to respect exclusive jurisdiction in favour of the courts of other contracting states, the contracting states have multiple opportunities to derive from this general obligation. Under Article 6 Hague Choice of Court Convention, the

57 Strikwerda & Schaafsma 2019, no. 60.

58 Art. 6 Hague Choice of Court Convention.

59 *See* www.hcch.net/en/instruments/conventions/status-table/?cid=98 last accessed at 31 August 2019. Denmark separately joined the Hague Choice of Court Convention, because Denmark was excluded from the entry by the European Union. Denmark takes a special position in this respect as Denmark is not bound by European legislative measures to develop judicial cooperation in civil matters under Art. 81 TFEU. J.J. Kuipers, 'The European Union and the Hague Conference on Private International Law – Forced Marriage or Fortunate Partnership', in: H. de Waele & J.J. Kuipers, *The European Union's Emerging International Identity*, Leiden: Brill Nijhoff 2013, pp. 177-178.

60 *See* www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn, last accessed at 31 August 2019.

courts do not need to stay or dismiss proceedings when: '(a) the agreement is null and void under the law of the State of the chosen court; (b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised; (c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised; (d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or (e) the chosen court has decided not to hear the case.' In particular, options (b) and (c) provide contracting states with a tool to limit the validity of jurisdiction agreements anyway.

(b) Brussels I Regulation (recast) or national rules of Private International Law?
When the Hague Choice of Court Convention and Article 25 Brussels I Regulation (recast) do not apply, the question arises of how the court seised must determine its jurisdiction. The Brussels I Regulation (recast) itself does not provide guidelines.[61] Under the current state of EU law, it is uncertain which rules apply when the defendant has its domicile (viz. if the credit rating agency is established) in a Member State: the other rules of the Brussels I Regulation (recast) or national rules of Private International Law.[62] This section provides a brief overview of the different approaches adopted by scholars.[63]

On the one hand, it is possible to take the approach that the Brussels I Regulation (recast) should not apply if the parties conferred jurisdiction upon third country courts.[64] Member State courts would then have to determine jurisdiction in accordance with their national rules of Private International Law. The CJEU seems to have adopted this approach in *Coreck Maritime GmbH v Handelsveem BV and Others*, where it held that: 'Article 17 of the Convention [currently article 25 Brussels I Regulation (recast)] does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits.'[65] In order to prevent each court from applying its

61 *E.g.* Kistler 2018, p. 67, Magnus & Mankowski 2016, p. 608 and *see* Briggs 2008, no. 7.98. Assuming the defendant is 'domiciled' in a Member State.

62 *Cf. e.g.* Kistler 2018, p. 94, Van Bochove 2017, p. 4, Magnus & Mankowski 2016, p. 610 and Hartley 2013, no. 5.08 and no. 5.19.

63 *As based on recent overviews provided by* Kistler 2018 and Van Bochove 2017, pp. 4 ff. In the context of credit rating agency liability, *see also* the brief overview provided by Happ 2015, pp. 100-101.

64 *See e.g.* Garcimartín 2015, no. 9.13, Briggs 2008, no. 7.99 and the Schlosser Report 1979, para 176. *Cf.* Strikwerda & Schaafsma 2019, no. 60. *As described by e.g.* Kistler 2018, pp. 71 ff. and Van Bochove 2017, pp. 4-5. In the context of credit rating agency liability, Happ concluded that the validity of the jurisdiction clause must be determined under the applicable national law (Happ 2015, pp. 100-101).

65 ECJ 9 November 2000, C-387/98, ECLI:EU:C:2000:606 (*Coreck Maritime GmbH v Handelsveem BV and Others*), para 19. *See also* Kistler 2018, pp. 71-74 and Van Bochove 2017, pp. 4-5,

national rules of Private International Law – which could lead to differences between the Member States, some scholars have proposed awarding 'reflective effect' to Article 25 Brussels I Regulation (recast). Jurisdiction clauses in favour of the courts of third countries are then valid when they satisfy the requirements under Article 25 (1) Brussels Regulation (recast) anyway.[66]

On the other hand, the approach can be taken that the other provisions of the Brussels I Regulation (recast) apply if the defendant has its domicile in a Member State, irrespective of the existence of a jurisdiction clause in favour of the courts of a third country.[67] Then, the existence of a jurisdiction clause in favour of the courts of a third country would solely entail that Article 25 Brussels I Regulation (recast) does not apply to the dispute. Hartley stated that this approach might be derived from the opinion of the CJEU on the new Lugano Convention in 2006 – published subsequent to the CJEU's decision in *Coreck Maritime GmbH v Handelsveem BV and Others*. The CJEU stated: 'Thus, where the new Lugano Convention contains articles identical to Articles 22 and 23 of Regulation No 44/2001 and leads on that basis to selection as the appropriate forum of a court of a non-member country which is a party to that Convention, where the defendant is domiciled in a Member State, in the absence of the Convention, that latter State would be the appropriate forum, whereas under the Convention it is the non-member country'.[68] The CJEU hence seems to have indicated that, if parties made a jurisdiction choice in favour of the courts of a state that is a party to the Lugano Convention, the Lugano Convention entails that this court is competent, while, otherwise, the courts of the Member State where the defendant is domiciled would have jurisdiction. It could be derived from that statement that, if a jurisdiction clause has conferred jurisdiction upon the courts of a third country (viz. a country not party to the Lugano Convention), the courts of Member States might still be competent if the defendant is domiciled in a Member State, which would

Magnus & Mankowski 2016, p 609, Hartley 2015, p. 196, Briggs 2008, no. 7.98 and Fentiman 2006, p. 708.

66 *This approach was described by e.g.* Kistler 2018, p. 89, Van Bochove 2017, p. 5, Hartley 2013, no. 5.05 and Fentiman 2006, pp. 721-722. In favour of reflective effect: Magnus & Mankowski 2016, p 610 and Garcimartín 2015, no. 9.15. Against reflective effect: Briggs 2008, no. 7.103 and Kuypers 2008, p. 229.

67 *See* Hartley 2015, pp. 196-198 and Hartley 2013, no. 5.12-5.15 and no. 5.19. *This approach was described by* Van Bochove 2017, pp. 5-6. Kistler 2018, p. 76 stated 'there is the strong presumption that third state choice-of-court agreements are regulated by the BRR'.

68 ECJ 7 February 2006, Opinion 1/03, [2006] ECR I-1145, para 135. Hartley 2015, pp. 196-198. *As described by* Van Bochove 2017, p. 5. *Also* Kristler 2018, pp. 80 ff. The Lugano Convention (the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in 2007) is concluded between the Member States and Iceland, Norway and Switzerland. There is no agreement upon whether the practice of the CJEU has changed after *Coreck Maritime GmbH v Handelsveem BV and Others*, *see* Briggs 2008, no. 7.99-7.101.

justify Hartley's conclusion that the other provisions of the Brussels I Regulation (recast) continue to apply.

Fentiman found support for the latter approach in the CJEU's more recent case law. He referred to the CJEU's ruling in *Andrew Owusu v N.B. Jackson*.[69] In *Andrew Owusu v N.B. Jackson*, the CJEU held that a national court cannot decline jurisdiction under Article 2 Brussels Convention (Art. 4 Brussels I Regulation (recast)) if the defendant is domiciled in that Member State 'on the ground that a court of a non-Contracting State would be a more appropriate forum' to deal with the case.[70] The CJEU did not clarify the relationship between *Owusu* and *Coreck Maritime*,[71] so that the effect of the CJEU's decision in *Owusu* on jurisdiction clauses in favour of third countries remained uncertain. However, this judgment can be argued to show that the application of the rules of the Brussels Convention (and the Brussels I Regulation (recast)) is mandatory, even if the courts of a third country could be regarded as a more appropriate forum (for instance, because of a jurisdiction clause in favour of the courts of that third country).[72]

This conclusion was, to some extent, confirmed by the decision of the CJEU in *Ahmed Mahamdia v People's Democratic Republic of Algeria*.[73] The CJEU held that the special rules on the protection of employees apply despite the existence of a jurisdiction clause in favour of the courts of a third country. In *Ahmed Mahamdia*, Mahamdia (domiciled in Germany) had concluded a contract of employment with the Ministry of Foreign Affairs of Algeria. The employment contract contained an exclusive jurisdiction clause for the courts of Algeria.[74] When Mahamdia was dismissed in 2007, he started proceedings before the *Arbeitsgericht* Berlin, contrary to the jurisdiction clause.[75] The German lower court referred to the CJEU for a preliminary ruling on the question whether the exclusive jurisdiction clause could fall under the scope of Article 21(2) Brussels I Regulation (old) and whether it could preclude the German courts from assuming jurisdiction based on Articles 18 and 19 Brussels I Regulation (old).[76] Under Article 21(2) Brussels I Regulation (old), a jurisdiction agreement stipulated in an employment contract is valid if it 'allows the employee to bring proceedings in courts other than those indicated in [Article 19 Brussels I Regulation (old)]'. Hence, the German lower court asked whether an

69 Fentiman 2006, p. 712. *See also* Van Bochove 2017, p. 5, fn. 51.
70 ECJ 1 March 2005, C-281/02, ECLI:EU:C:2005:120 (*Andrew Owusu v N.B. Jackson*), para 46. Fentiman 2006, p. 712.
71 Fentiman 2006, p. 714.
72 *Cf.* Fentiman 2006, pp. 714-715. Briggs argued strongly against this conclusion, Briggs 2008, no. 7.99 and no. 7.100.
73 CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*). *Cf.* Kistler 2018, pp. 75 and 83.
74 CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*), paras. 18-19.
75 CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*), paras. 22-23.
76 CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*), para 36.

exclusive jurisdiction agreement for a third country could set aside the protection under Article 18 and 19 Brussels I Regulation (old).

The CJEU held that 'it does not follow either from the wording or from the purpose of article 21 of Regulation No 44/2011 [Article 23 Brussels I Regulation recast] that' a jurisdiction agreement 'may not confer jurisdiction on the courts of a third State, provided that it does not exclude the jurisdiction conferred on the basis of the articles of the regulation'.[77] Hence, a jurisdiction clause can confer jurisdiction upon the courts of a third country, but that it cannot exclude the jurisdiction of the courts of a Member State under the special rules for the protection of employees.[78] More broadly, *Ahmed Mahamdia* might entail that a jurisdiction agreement in favour of the courts of a third country cannot exclude the application of the special rules on the protection of weaker parties under the Brussels I Regulation (old)/(recast).[79] However, it seems a bridge too far to conclude that *Ahmed Mahamdia* entails that all other provisions of the Brussels I Regulation (old)/(recast) (such as the rules for general and special jurisdiction under Chapter III Section 1 and 2, respectively) continue to apply.[80] Thus, at present, it is still not entirely clear in which way national courts have to deal with jurisdiction clauses in favour of the courts of third countries.

In the context of the credit rating industry, the current lack of certainty in this respect is unfortunate, because agreements concluded by credit rating agencies will often include jurisdiction clauses in favour of the US courts.[81] Moreover, in practice, it can make a difference whether a national court applies the other rules of the Brussels I Regulation (recast) or its national rules of Private International Law. If the other provisions of the Brussels I Regulation (recast) apply, a court can base its jurisdiction on the other grounds of the Brussels I Regulation (recast), without giving effect to the choice of the parties. It can however be seriously questioned whether this approach accords with the system of the Brussels I Regulation (recast), that attaches great importance to the autonomy of the parties and to the principle of legal certainty.[82] Alternatively, national courts determine jurisdiction in accordance with their national rules of Private International Law. Although, in general, courts of the Member

77 CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*), para 65.

78 *Cf.* CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*), para 66. Magnus & Mankowski 2016, p. 609.

79 *Cf.* Hartley 2013, no. 5.18-5.19.

80 *Cf.* Magnus & Mankowski 2016, p. 610.

81 See, for instance, the Terms of Use of Standard & Poor's, available at www.standardandpoors.com/en_US/web/guest/regulatory/termsofuse, which state that: 'The parties agree that the State and Federal courts of New York shall be the exclusive forums for any dispute arising out of this Agreement and the parties hereby consent to the personal jurisdiction of such courts', last accessed at 31 August 2019.

82 *Cf.* Fentiman 2006, p. 721. *On the importance of party autonomy, see also* Kistler 2018, pp. 85-86.

States seem to uphold jurisdiction clauses,[83] the particularities of each legal system might constitute differences between the Member States and cause uncertainties. The main advantage of this approach is that national courts can decide to respect the autonomy of the parties so that jurisdiction agreements are not sidestepped by applying the other provisions of the Brussels I Regulation (recast).

Overall, this section analysed the validity of jurisdiction clauses conferring exclusive jurisdiction upon the courts of third countries. Member State courts must investigate whether the Hague Choice of Court Convention applies. If so, courts must respect the exclusive jurisdiction clause and cannot assume jurisdiction. Currently, the importance of the Hague Choice of Court Convention is still rather limited in the context of credit rating agency liability and contracting states have several possibilities to derive from the general obligation to respect exclusive jurisdiction clauses. If the Hague Choice of Court Convention is not applicable, it is uncertain how Member State courts must determine the validity of a jurisdiction agreement. Should a national court (1) apply the other remaining provisions of the Brussels I Regulation (recast) or (2) apply its national rules of Private International Law? The different approaches can lead to different decisions on the validity of exclusive jurisdiction clauses in favour of the courts of third countries. Whereas the first approach sidesteps party autonomy, the second approach respects party autonomy. Consequently, it is currently difficult for parties to predict whether a jurisdiction clause in favour of the courts of a third country is valid.

4.3.4 General ground for jurisdiction

In the absence of a (valid) jurisdiction agreement, a national court is competent when the defendant is domiciled in the Member State of that court. Under the general rule of Article 4 (1) Brussels I Regulation (recast), the defendant

83 For instance, under Dutch, English, French and German law, jurisdiction clauses are likely to be upheld. For the Dutch rules on jurisdiction clauses, see Art. 8 and 9 Wetboek van Burgerlijke Rechtsvordering (*see also* Strikwerda & Schaafsma 2019, no. 60 and Kuypers 2008, pp. 232 ff.). Under English law, jurisdiction clauses will usually be upheld 'in the absence of strong reasons for departing from it' (*Donohue v Armco* [2001] UKHL 64, [2002] 1 All ER 749, [2002] 1 All ER (Comm) 97, [2002] 1 Lloyd's Rep 425, para 24 by Lord Bingham). Under French law, a jurisdiction clause can be upheld as long as it has been made in the context of an international dispute ('*un litige internationale*') and as long as it is not contrary to the '*compétence territoriale impérative*' of the French courts (Cour du Cassation (Chambre Civile 1) 17 December 1985, 84-16338, Bulletin 1985, I, no. 354, p. 318 (*CSEE v SORELEC*) and Audit & d'Avout 2013, no. 454, Loussouarn, Bourel & De Vareilles-Sommières 2013, no. 714 and *see also* Kuypers 2008, p. 238). For the German rules on jurisdiction clauses, see § 38-39 Zivilprozessordnung (ZPO). Under § 38 ZPO, a jurisdiction clause will be allowed if the parties have complied with several conditions. The conditions vary depending on the specific circumstances of the situation (*see* Kuypers 2008, p. 237).

shall be summoned to appear before the court that is based in the Member State in which the defendant has its domicile (*forum rei*). If the defendant is a legal person, the domicile is considered to be the place where the legal person has its statutory seat, its central administration or its principal place of business under Article 63 (1) Brussels I Regulation (recast).[84]

In the context of credit rating agency liability, it is important to note that the CRA Regulationprovides for a mechanism that ensures issuers and investors can sue credit rating agencies before the national courts of Member States. As discussed in section 3.5.3.1, the CRA Regulation requires credit rating agencies to be established and registered in a Member State in order for their credit ratings to be allowed to be used for regulatory purposes (by, amongst others, credit institutions, investment firms and insurance undertakings).[85] In order to apply for registration, under Article 14 (1) CRA Regulation, a credit rating agency must be 'a legal person established in the Community'. As stated by Recital 55 CRA I Regulation, credit rating agencies headquartered outside the EU must establish subsidiaries in the EU in order to be able to apply for registration.[86] Hereby, credit rating agencies have an incentive to establish separate legal entities with their statutory seats in the EU. Hence, if a claim is brought against a credit rating agency established and registered in the EU in the sense of the CRA Regulation,[87] the courts of the Member State in which the credit rating agency is established can assume jurisdiction on the basis of Article 4 (1) jo. Article 63 (1) Brussels I Regulation (recast).

4.3.5 Special ground for jurisdiction

4.3.5.1 Matters relating to tort

If a defendant credit rating agency is registered and established in a Member State, national courts can assume jurisdiction on the basis of the 'special'

84 *Also e.g.* Heuser 2019, p. 251, Baumgartner 2015, p. 596 and Happ 2015, pp. 169-170.

85 Art. 4 (1) CRA Regulation. Pursuant to Art. 3 (1) (g) CRA Regulation, the term 'regulatory purposes' means 'the use of credit ratings for the specific purpose of complying with Union law, or with Union law as implemented by the national legislation of the Member States'. *See in more detail* section 3.4.2.1 (a). *Cf. also* Wimmer 2017, p. 247.

86 *See* Recital 55 CRA I Regulation. *See also* Dutta 2014, p. 34 and Dutta 2013, p. 1732. *Cf.* Gietzelt & Ungerer 2013, p. 339.

87 The CRA Regulation uses the term 'established' to indicate that a (separate) legal entity needs to be established at European territory. This use of the term 'established' must be distinguished from the meaning of the term 'establishment' in the context of Article 7 (5) Brussels I Regulation (recast), which does not necessarily require a separate legal entity to be established. Article 7 (5) Brussels I Regulation (recast) creates a special ground for jurisdiction in case a dispute arises out of 'the operations of a branch, agency or other establishment' when the main legal entity is domiciled in the EU. In particular circumstances, this rule could be relevant in disputes concerning credit rating agency liability. This dissertation, however, does not discuss this rule in further detail.

ground for jurisdiction regarding matters relating to tort under Article 7 (2) Brussels I Regulation (recast).[88] Article 7 Brussels I Regulation (recast) creates bases for jurisdiction that exist alongside the general ground for jurisdiction under Article 4 Brussels I Regulation (recast). A claimant can choose to start proceedings before the courts competent under Article 4 or under Article 7 Brussels I Regulation (recast).[89] As Article 7 Brussels I Regulation (recast) forms an exception to the general ground for jurisdiction, the special grounds have to interpreted restrictively.[90] National courts can only assume jurisdiction based on Article 7 Brussels I Regulation (recast) if there is 'a close connection between the court and the action or in order to facilitate the sound administration of justice'.[91] The requirement of a close connection is meant to 'ensure legal certainty' and to enhance foreseeability, so that the defendant will not be sued in a court 'he could not reasonably have foreseen'.[92]

Under Article 7 (2) Brussels I Regulation (recast), disputes involving matters relating to tort can be heard in the courts of the place where the harmful event occurred or may occur. As held by the CJEU, the place where the harmful event occurred must be understood 'as being intended to cover both the place where the damage occurred [the *Erfolgsort*] and the place of the event giving rise to it [the *Handlungsort*]'.[93] The claimant may choose to start proceedings before the courts of the *Handlungsort* or the *Erfolgsort*.[94] The term 'damage' under Article 7 (2) Brussels I Regulation (recast) covers direct loss only. National courts cannot base their jurisdiction on Article 7 (2) Brussels I Regulation (recast) if indirect or consequential (financial) loss occurred within their territory, which was in fact the result of initial loss suffered in another Member State.[95]

The types of loss that issuers and investors could suffer as a result of an affected credit rating, does not form an obstacle for the application of Article 7 (2) Brussels I Regulation (recast). Financial loss and reputational loss can flow directly from affected credit ratings, and both do not qualify as indirect loss

88 The special grounds for jurisdiction do not apply to credit rating agencies established in third countries. *Also* Baumgartner 2015, pp. 597 ff.

89 Dumont du Voitel 2018, p. 188, Lehmann 2015a, no. 4.02 and Strikwerda & Schaafsma 2019, no. 44.

90 ECJ 27 September 1988, C-189/87, ECLI:EU:C:1988:459 (*Kalfelis v Bank Schröder*), para 19.

91 Recital 16 Brussels I Regulation (recast).

92 Recital 16 Brussels I Regulation (recast). Special jurisdiction does not serve to protect the claimant or the defendant, CJEU 25 October 2012, C-133/11, ECLI:EU:C:2012:664 (*Folien Fischer AG*), paras. 45-46.

93 ECJ 30 November 1976, C-21/76, ECLI:EU:C:1976:166 (*Handelskwekerij Bier v Mines de Potasse d'Alsace*), para 24.

94 CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 51.

95 ECJ 19 September 1995, C-364/93, ECLI:EU:C:1995:289 (*Marinari v Lloyd's Bank*), paras. 20-21. Furthermore, Art. 7 (2) Brussels I Regulation does not apply to indirect victims (ECJ 11 January 1990, C-220/88, ECLI:EU:C:1990:8 (*Dumez France and Others v Hessische Landesbank and Others*), para 20).

resulting from another source of initial loss. In this context, however, reference should be made to an Italian decision of 2012 on credit rating agency liability, in which the Italian Court of Cassation incorrectly seems to have qualified financial loss suffered by Italian investors as a consequence of credit rating activities as indirect loss.[96] The Italian Court of Cassation held that the Italian courts could not assume jurisdiction based on Article 5 (3) Brussels I Regulation in a case in which Italian investors purchased financial instruments in London. It considered irrelevant both the place of establishment of the bank where the financial instruments were deposited (Bologna) and the place where the credit rating was issued for determining jurisdiction.[97] From the assumption that Article 5 (3) Brussels I Regulation does not cover the place of future consequence of initial loss, the Italian Court of Cassation concluded that Italian courts did not have jurisdiction over claims for the compensation of financial loss caused by an incorrect credit rating for financial instruments purchased outside of Italy, brought against a credit rating agency which was not established or active on Italian territory.[98] This position of the Italian Court of Cassation does not seem apt in the context of case law of the CJEU[99] or, at least, was superseded by case law of the CJEU. As discussed in section 4.3.5.2, the place where the credit rating was issued could be relevant to determine the *Handlungsort*. As discussed in section 4.3.5.3 and 4.3.5.4, the place of financial loss or reputational loss (issuer's only) is relevant to determine the *Erfolgsort*.

4.3.5.2 Handlungsort

When a claim for damages has been based on Article 35a CRA Regulation, the *Handlungsort* can be determined by locating the act or omission that caused the losses suffered by an issuer or investor. For that purpose, it has to be identified whether a liability claim is based on (1) an issue of an initially

96 Corte di Cassazione Civile, Sezioni Unite 22 March 2012, no. 8076.

97 Corte di Cassazione Civile, Sezioni Unite 22 March 2012, no. 8076, p. 6.

98 Corte di Cassazione Civile, Sezioni Unite 22 March 2012, no. 8076, p. 6: '*In conclusione, va affermato il principio secondo cui l'art. 5, n. 3, del Regolamento CE n. 44 del 2001 (il quale stabilisce il criterio di collegamento per individuare la giurisdizione in materia di illeciti civili dolosi o colposi nel "luogo in cui l'evento dannoso è avvenuto o può avvenire") va interpretato nel senso che per tale luogo deve intendersi quello in cui è avvenuta la lesione del diritto della vittima, senza avere riguardo al luogo dove si sono verificate o portano verificarsi le conseguenze future di tale lesione; ne consegue che l'azione proposta contro una società di "rating", che non ha sede e non opera in Italia, per il risarcimento del danno conseguente all'ipotizzato errore nella valutazione di titoli finanziari acquistati fuori dal territorio nazionale è sottratta alla giurisdizione del giudice italiano.*'

99 In 2012, one could already doubt whether the decision of the Italian Court of Cassation was correct in light of the decision in *Kronhofer v Maier* in 2004 (ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*). In this case, the ECJ decided were the *Erfolgsort* of financial loss could not be located but did not treat the financial loss as indirect loss. *See* section 4.3.5.3.

incorrect credit rating; or (2) a failure to have adjusted a credit rating in time. As a consequence, the *Handlungsort* shall be located in (1) the place where the credit rating has been issued; or (2) the place where an adjustment of the credit rating should have been decided on. Even though these places can coincide, the underlying difference between these types of claims should not be neglected.

(a) Acts

If a credit rating agency has issued an incorrect credit rating, the *Handlungsort* can be located in the place where the credit rating was issued. A credit rating is deemed to have been issued 'when the credit rating has been published on the credit rating agency's website or by other means or distributed by subscription'.[100] Commonly, credit rating agencies issue their credit ratings through press releases on their websites. A press release contains the exact date of release and the credit rating agency (or the exact subsidiary) that issued the credit rating. Therefore, the *Handlungsort* will be located in the place where the credit rating agency that issued the credit rating is established and registered.[101] In such situations, the application of Article 7 (2) Brussels I Regulation (recast) might not have added value to the general ground for jurisdiction under Article 4 (1) Brussels I Regulation (recast).

A credit rating agency that is established and registered in the EU can issue credit ratings through a branch established in a third country. A credit rating agency established and registered in Ireland can for instance issue a credit rating by a Russian branch. However, according to Guidelines and Recommendations on the scope of application of the CRA Regulation published by ESMA, credit ratings issued by branches are deemed issued by their EU parent, as branches 'do not have a separate legal personality from their parent'.[102] The fact that a credit rating was issued by a branch hence does not seem to affect the location of the *Handlungsort* in the place where an EU credit rating agency is established and registered.

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100 Art. 4 (2) CRA Regulation.

101 *Cf.* Steinrötter 2015, p. 113. *Cf. also* Dumont du Voitel 2018, p. 188 and Happ 2015, p. 195. In relation to credit rating agencies headquartered outside the EU which have subsidiaries in the EU, two situations must be distinguished. First, if an EU subsidiary released its own credit rating, the press release will state which subsidiary issued the credit rating. The *Handlungsort* will be the place where that subsidiary has been established and registered. Second, an EU subsidiary can endorse credit ratings issued initially by the parent company under Art. 4 (3) CRA Regulation (see section 3.4.2.1 (a)). Under Art. 4 (4) and (5) CRA Regulation, the subsidiary is fully responsible for endorsed credit ratings, because the endorsed credit rating is considered to have been issued by the subsidiary itself. Therefore, the *Handlungsort* of an endorsed credit rating might be the place where the credit rating agency that endorsed the credit rating is established and registered.

102 ESMA, Guidelines and Recommendations on the Scope of the CRA Regulation, para 16, available at www.esma.europa.eu/sites/default/files/library/2015/11/2013-720_en.pdf, last accessed at 31 August 2019.

(b) Omissions

Furthermore, issuers and investors can suffer losses if a credit rating agency has failed to adjust an existing credit rating (in time). Such a failure can occur if a credit rating agency omits to monitor and update a credit rating (in time). In such situations, the *Handlungsort* of an omission has to be determined.

To that end, national courts must locate the 'place of the relevant inactivity' by assessing the place where the 'activity ought to have taken place'.[103] For instance, in *ÖFAB v Koot*, creditors brought a claim against a member of the board and the main shareholder of the company Copperhill 'on the ground that they neglected their legal obligations with respect to that company'.[104] They alleged that the defendants had omitted to fulfil their legal obligation to monitor the financial situation of the company.[105] The CJEU located the *Handlungsort* in the place where the information on the financial situation and activities of Copperhill – which the defendants would have needed to fulfil their legal obligations – should have been available.[106]

In accordance with *ÖFAB v Koot*, the place where a credit rating should have been adjusted seems relevant. But how do you locate the place where a credit rating should have been adjusted? As mentioned in section 3.3.2.1, after publication, credit rating agencies monitor issuers and their financial instruments in order to keep credit ratings up to date.[107] Usually, the team of rating analysts that prepared the initial credit rating is responsible for the monitoring of that rating as well.[108] If such a monitoring team decides that the rating must be changed or reconsidered, a rating committee is called upon to decide on the proposal of the monitoring team.[109] Hence, the place where the activity ought to have taken place could be situated in the place where the relevant monitoring team operates, because the information needed to decide on whether a credit rating has to be adjusted is available and concentrated at that place.

As Article 7 (2) Brussels I Regulation (recast) only provides a ground for jurisdiction for Member State courts, the provision may not be useful if an EU credit rating agency has endorsed a credit rating while the monitoring team of that credit rating is established in the third country. However, it could also be argued that, as the EU credit rating agency is fully responsible for the endorsed credit rating, the *Handlungsort* could be located in the place where the EU credit rating agency is established and registered because the EU credit

103 Van Calster 2016, p. 162 (who refers to CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 54) and Magnus & Mankowski 2016, p. 287.
104 CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 52.
105 CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 53.
106 CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), paras. 53-54.
107 *See* Langohr & Langohr 2008, pp. 174-175.
108 Garciìa Alcubilla & Ruiz del Pozo 2012, p. 22 and Langohr & Langohr 2008, p. 175.
109 Garciìa Alcubilla & Ruiz del Pozo 2012, p. 22.

rating agency should have ensured that the endorsed credit rating remained up to date.

In concrete cases, it does not always make a difference whether a claim for damages is based on an act or omission of a credit rating agency. In both situations, the *Handlungsort* will often be located in the place where a credit rating agency is established and registered.[110] Consequently, Article 7 (2) Brussels I Regulation will not always add value compared to the general ground for jurisdiction under Article 4 (1) Brussels I Regulation (recast).

4.3.5.3 Erfolgsort – financial loss

In relation to claims based on Article 35a CRA Regulation, national courts must determine the *Erfolgsort* by locating the place where financial loss suffered by an issuer or investor occurred. The location of financial loss is, however, a complex exercise; not only because financial loss is hard to pin down to a physical place,[111] but also because one can differ on the exact moment in time financial loss occurs. Location and timing are to some extent intertwined. If one considers financial loss to occur at the moment the occurrence of the loss become ineluctable ('out of pocket money loss'), the relevant connecting factor could be the place at which a contract was signed or another event which caused the loss to become ineluctable. If one considers financial loss to occur when a credit rating is published or changed, the relevant connecting factor could be the location of the financial market in which the affected securities are traded. If one considers financial loss to occur when it physically materialises, the relevant connecting factor could be the location of the securities account.

The CJEU provided some decisions on the location of financial loss. Hereafter, this section pays attention to the decisions in the cases *Kronhofer v Maier*,[112] *Kolassa v Barclays Bank*,[113] *Universal Music*[114] and *Helga Löber v Barclays Bank* (under (a)).[115] Subsequently, it discusses the current approach to the location of financial loss under (b) and attempts to construct the *Erfolgsort* in cases concerning credit rating agency liability under (c).

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110 *For a similar approach* Heuser 2019, p. 256.

111 *In the words of* Garcimartín 2011, p. 452: 'their location is fictitious.' *Cf. also* Heuser 2019, p. 222 and, *in general on financial loss,* Haentjens & Verheij 2016, p. 346.

112 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier). Cf. also in the context of credit rating agency liability* Heuser 2019, pp. 223-226, Deipenbrock 2018, p. 568 and Happ 2015, pp. 192 ff.

113 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*). *Cf. also in the context of credit rating agency liability* Heuser 2019, pp. 223-226 and Deipenbrock 2018, p. 568.

114 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*). *Cf. also in the context of credit rating agency liability* Deipenbrock 2018, pp. 568-569.

115 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

(a) Case law CJEU

(i) – Kronhofer v Maier

In *Kronhofer v Maier*, Maier (domiciled in Germany) persuaded Kronhofer (domiciled in Austria) to enter into a call option contract relating to shares, but failed to warn him against the risks of his investment. Kronhofer transferred money to an investment account in Germany and, afterwards, the money was invested in highly speculative call options in London. Eventually, the investment turned out to be a failure and Kronhofer suffered huge financial losses.[116] Kronhofer brought a claim before an Austrian court against Maier for the sustained losses. He argued that the Austrian court was competent under Article 7 (2) Brussels I Regulation (recast) because the losses occurred in his centre of assets, that could be located in his domicile. The Austrian *Oberster Gerichtshof* referred to the CJEU for a preliminary ruling on the following question:

> 'Is the expression "place where the harmful event occurred" contained in Article 5 (3) of the Convention ... to be construed in such a way that, in the case of purely financial damage arising on the investment of part of the injured party's assets, it also encompasses in any event the place where the injured party is domiciled if the investment was made in another Member State of the Community?'[117]

The CJEU interpreted the question to be whether the *Erfolgsort* can be qualified as the place where the claimant is domiciled and where 'his assets are concentrated'.[118] The CJEU concluded that 'the place where the harmful event occurred' could not be considered the place where the claimant is domiciled or where his assets are concentrated 'by reason only of the fact that he has suffered financial damages there resulting from the loss of part of his assets which arose and was incurred in another Contracting State'.[119] Thus, the CJEU decided which court could not assume jurisdiction, but did not clarify where the *Erfolgsort* could be situated. It could be derived from the reasoning of the CJEU that the *Erfolgsort* could be situated in Germany as the investment account could be located there.[120]

(ii) – Kolassa v Barclays Bank

More than ten years later, in 2015, the CJEU decided again on the question of how financial losses could be located in prospectus liability cases. In *Kolassa v Barclays Bank*, Barclays Bank Plc (registered in the UK register of companies

116 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier*), paras. 5-6.
117 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*, para 10.
118 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*, para 11.
119 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*, para 21.
120 Haentjens & Verheij 2016, p. 348. *See also* ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)* annotated by P. Vlas, *NJ* 2006/335, para 4.

and maintaining a branch office in Frankfurt am Main, Germany)[121] issued certificates that, in principle, could only be purchased by institutional investors. When the certificates had been sold to institutional investors, they could be sold on to private investors.[122] Kolassa (domiciled in Austria) invested in the certificates through the online bank *direktanlage.at* (established in Austria). *Direktanlage.at* had ordered the certificates from its parent company DAB Bank AG (established in Germany) which had purchased them from Barclays Bank. The certificates acquired by Kolassa were credited to a securities account held by *direktanlage.at* with DAB Bank. Kolassa could solely claim 'the delivery of the certificates from the corresponding share of the covering assets', which the CJEU explained to mean that 'those certificates could not be transferred into his name'.[123]

After a trading manager had injected the capital invested in the certificates into a pyramid fraud system,[124] the certificates became worthless and Kolassa suffered financial losses. Kolassa brought a claim against Barclays Bank before an Austrian court (the *Handelsgericht Wien*). The *Handelsgericht Wien* referred to the CJEU for a preliminary ruling on the interpretation and application of Article 7 (1), 7 (2) and 17 (1) Brussels I Regulation (recast). For the purposes of this dissertation, the second part of the third preliminary question is most relevant:

> 'Is the wording "the place where the harmful event occurred or may occur" in Article 5(3) of Regulation No 44/2001 to be interpreted as meaning that, when a security is purchased on the basis of deliberately misleading information, […] the place where the damage occurred is taken to be the domicile of the person suffering the loss, being the place where his assets are concentrated?'[125]

The CJEU held that special jurisdiction based on Article 7 (2) Brussels I Regulation (recast) must be justified by a close connection between the action and the court of the Member State for the place where the harmful event occurred.[126] Furthermore, it emphasized that 'the place where the harmful event occurred' cannot be located in the applicant's place of domicile 'by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Member State',[127] showing the reluctance of the CJEU to accept jurisdiction of the *forum actoris.* Subsequently, the CJEU considered that the court of the

121 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 12.
122 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 15.
123 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 15.
124 Opinion AG 3 September 2014, C-375/13, ECLI:EU:C:2014:2135 (*Kolassa v Barclays Bank*), para 19.
125 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 19.
126 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 46.
127 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 48.

applicant's domicile has jurisdiction 'if the applicant's domicile is in fact the place in which the events giving rise to the loss took place or the loss occurred'.[128] With regard to the place where the damages occurred or might occur, the CJEU held:

> 'The courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, in particular when that loss occurred itself directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts.'[129]

The CJEU's reasoning was criticised for being vague.[130] Scholars were divided upon whether the CJEU, by making use of the term 'bank account', meant to refer to the cash account from which the securities were paid or the securities account on which the securities were credited.[131] Cash accounts and securities accounts could be held with the same bank and could be located in the same place; however, their locations do not necessarily coincide.[132]

On the one hand, Lehmann has argued that the CJEU meant to refer to Kolassa's cash account.[133] First, Lehmann remarked that the term 'bank account' is commonly used to refer to a cash account.[134] Second and more importantly, Lehmann argued that financial losses resulting from an incorrect prospectus do not occur in a securities account, but in a cash account, because, when an investor purchases securities, their 'intrinsic value is already diminished'.[135] So if the value of the securities decreases eventually, the decrease could simply be considered the 'revelation of their worthlessness by the public'.[136] Therefore, an investor suffers losses immediately when the securities are purchased so that the losses can be located in the cash account.

On the other hand, Arons and Haentjens & Verheij have argued that the CJEU meant to refer to Kolassa's securities account.[137] This conclusion accords with the CJEU's decision in *Kronhofer v Maier*, where the CJEU indicated that the place of the cash account would not be a relevant connecting factor, by stating that the *Erfolgsort* could not be located in the place where the claimant is domiciled or where his assets are concentrated 'by reason only of the fact that he has suffered financial damages there resulting from the loss of part

128 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 50.
129 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 55.
130 *See* Haentjens & Verheij 2016, pp. 352-354.
131 For the opinion that the CJEU meant to refer to the term cash account *e.g.* Lehmann 2016b, p. 330. For the opinion that the CJEU meant to refer to the term bank account *e.g.* Haentjens & Verheij 2016, pp. 352-353 and Arons 2015, p. 379.
132 Haentjens & Verheij 2016, pp. 352-353.
133 Lehmann 2016b, pp. 329-330.
134 Lehmann 2016b, pp. 329-330.
135 Lehmann 2016b, p. 330.
136 Lehmann 2016b, p. 330.
137 Haentjens & Verheij 2016, p. 352 and Arons 2015, p. 379.

of his assets which arose and was incurred in another Contracting State'[138] Furthermore, Haentjens & Verheij argued that the losses materialised 'most directly in respect of the certificates themselves' which were credited on the securities account.[139] As a consequence, the loss could be said to have materialised for the first time at the place of the securities account. The debate in legal doctrine, however, fell silent after the decisions in *Universal Music* and *Helga Löber v Barclays Bank.*

(iii) – Universal Music

In June 2016, the CJEU decided on how financial loss should be located in *Universal Music*. Contrary to *Kronhofer v Maier* and *Kolassa v Barclays Bank*, *Universal Music* did not concern prospectus liability. In *Universal Music*, Universal Music concluded a contract with B&M according to which Universal Music would purchase the shares of B&M. In respect of part of the shares,[140] Universal Music and the shareholders of B&M entered into a share purchase option agreement, which was drafted by the Czech law firm Burns Schwartz International.[141] As a result of a mistake made by an employee of Burns Schwartz International (Bro_), the price of the shares under the share purchase option agreement was set five times higher than the price Universal Music was prepared to pay to B&M's shareholders.[142] In subsequent arbitration proceedings, Universal Music and the shareholders of B&M concluded a settlement according to which Universal Music had to pay EUR 2,654,280.03 to the shareholders.[143] In the *Universal Music* case, Universal Music attempts to recover its financial losses from Bro_ and two ex-partners of Burns Schwartz International before the Dutch courts.

All elements of the case could be situated in the Czech Republic. Universal Music, however, was established in Baarn (the Netherlands) and paid the costs of the arbitration proceedings and the settlement costs by transfer from an account that Universal Music held in the Netherlands.[144] For that reason, Universal Music claimed that the Dutch courts could assume jurisdiction under Article 7 (2) Brussels I Regulation (recast). The Dutch Supreme Court (*Hoge Raad*) referred to the CJEU for a preliminary ruling on the question whether:

138 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*, para 21.
139 Haentjens & Verheij 2016, pp. 352-353.
140 Universal Music would acquire 70% of the shares directly and the remaining 30% of the shares in 2003. CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 8.
141 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), paras. 9-11.
142 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 13.
143 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 14.
144 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 14.

> 'Must Article 5(3) of Regulation No 44/2001 be interpreted as meaning that the 'place where the harmful event occurred' can be construed as being the place in a Member State where the damage occurred, if that damage consists exclusively of financial damage which is the direct result of unlawful conduct which occurred in another Member State?'[145]

The Dutch Supreme Court asked whether the *Erfolgsort* of financial losses could be located at the place where the bank account is held at which the losses have materialised. Advocate General Szpunar proposed to answer the question in the negative. The Advocate General argued that the difference between *Handlungsort* and *Erfolgsort* should not automatically be employed in cases concerning financial losses.[146] In such cases, the *Erfolgsort* often depends on the place where the financial assets are situated 'which is usually the same as the place of residence or, in the case of a legal person, the place in which it has its registered office'.[147] As the Advocate General argues, this place 'is often uncertain and connected with considerations which are unrelated to the events at issue'.[148]

The CJEU took a less radical approach than the Advocate General, but eventually came to the same conclusion: in the absence of other connecting factors, the 'place where the harmful event occurred' (the *Erfolgsort*) shall not be construed as being the place in a Member State where the damage occurred (under Art. 7 (2) Brussels I Regulation (recast)), 'when that damage consists exclusively of financial damage which materialises directly in the bank account of the applicant and is the direct result of an unlawful act committed in another Member State'.[149]

Contrary to the Opinion of the Advocate General, the CJEU appears to continue to apply the distinction between *Handlungsort* and *Erfolgsort*,[150] but refuses to locate the *Erfolgsort* in the place where the bank account is held in the absence of other connecting factors with the Member State of that place. The CJEU argues that the place where the bank account is held not necessarily qualifies as a relevant nor a reliable connecting factor, because companies such as Universal Music could have 'the choice of several bank accounts from which

145 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 20.
146 Opinion A-G M. Szpunar, ECLI:EU:C:2016:161, para 38, with CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
147 Opinion A-G M. Szpunar, ECLI:EU:C:2016:161, para 38, with CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
148 Opinion A-G M. Szpunar, ECLI:EU:C:2016:161, para 38, with CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
149 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 40.
150 *Cf.* Van Bochove 2016, p. 458.

to pay the settlement amount'.[151] Instead, the CJEU seems to have implicitly located the *Erfolgsort* in the Czech Republic, by stating that the damage occurred in the Czech Republic because the settlement was concluded there and the obligation to pay placed an irreversible burden on Universal Music's assets as from the conclusion of the settlement.[152]

The Advocate General and the CJEU explicitly stated that the decision in *Universal Music* does not overrule the decision in *Kolassa v Barclays Bank*. The CJEU stated that the outcome in *Kolassa v Barclays Bank* was based on the specific context of the case[153] and, along the same lines, the Advocate General considered that it would not be possible to deduce a general rule from *Kolassa v Barclays Bank*.[154] When reading the Opinion, it seems that the decision in *Kolassa v Barclays Bank* is justified because the defendant (Barclays Bank) published the prospectus of the certificates in Austria and because an Austrian bank sold the certificates to the claimant.[155] In other words, the decision in *Kolassa v Barclays Bank* might have distinguished itself from the situation in *Universal Music* because there were other connecting factors that could be situated in Austria. Yet, the CJEU neglected another Dutch component in the case of *Universal Music*, namely that Universal Music was established in Baarn. This neglect may demonstrate the reluctance of the CJEU to accept jurisdiction of the *forum actoris*.

The decision in *Universal Music* leaves the impression that the CJEU intends to return to the initial justification of the special ground for jurisdiction. Therefore, the most important rule that can be derived from this decision is that the special ground for jurisdiction under Article 7 (2) Brussels I Regulation (recast) shall not lead to the jurisdiction of courts that lack a close connection with the claim, the competence of which is accidental or the competence of which can be manipulated by one of the parties.

(iv) – Helga Löber v Barclays Bank

The CJEU again emphasised the importance of the initial justification for the existence of special grounds for jurisdiction in its decision in *Helga Löber v Barclays Bank*, which was another case on the question of how national courts shall locate financial loss in prospectus liability cases.[156] Similar to Kolassa,

151 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 38.

152 *See* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 31.

153 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 37.

154 Opinion A-G M. Szpunar, ECLI:EU:C:2016:161, para 45, with CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).

155 Opinion A-G M. Szpunar, ECLI:EU:C:2016:161, para 45, with CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).

156 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

Löber (domiciled in Vienna) invested in certificates issued by Barclays Bank on the secondary markets that lost their value because of a pyramid fraud scheme. Löber invested in the certificates through two Austrian banks, with seats in Salzburg and Graz.[157] The Supreme Court of Austria turned to the CJEU again with the question of how 'the place where the harmful event occurred or may occur' under Article 5 (3) Brussels I Regulation must be determined in case of prospectus liability.

As remarked by Advocate General Bobek, reading the CJEU's judgments in *Kronhofer v Maier*, *Kolassa v Barclays Bank* and *Universal Music* all together left uncertainties on how the *Erfolgsort* must be determined in prospectus liability cases.[158] Advocate General Bobek applied the reasoning of the CJEU in *Universal Music* to prospectus liability cases.[159] He concentrated on the specific event that triggered the loss and the nature of the alleged wrong, which was the tort of misrepresentation resulting in the claimant's investment decision.[160] As investors are protected against 'harm in the sense of *direct* damage […] consists in making an investment decision based on misleading information that the person would not have taken had he been in possession of the correct information', Advocate General Bobek concluded that 'the direct damage appears at the moment (and in the place) when, based on misleading information in the prospectus, the investor enters into a legally binding and enforceable obligation to invest in the financial instrument in question'.[161] He suggested that the CJEU qualify the place where the damage occurred as the place where 'a legally binding investment obligation is factually assumed'.[162] This approach is hence in line with the idea of the 'irreversibility' of the loss as expressed already in *Universal Music*.

The CJEU did not follow the approach of Advocate General Bobek. It held that the place where the damage occurred is the place 'where the alleged damage actually manifests itself'.[163] The CJEU aimed to unite the decision in *Kolassa v Barclays Bank* with the decision in *Universal Music*, by explaining that the outcome in the former case must be considered 'within a specific

157 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), paras. 9-10.

158 Opinion A-G M. Bobek, ECLI:EU:C:2018:310, para 45, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

159 *Cf.* Opinion A-G M. Bobek, ECLI:EU:C:2018:310, para 74, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

160 Opinion A-G M. Bobek, ECLI:EU:C:2018:310, para 50, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

161 Opinion A-G M. Bobek, ECLI:EU:C:2018:310, paras. 70 and 72, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

162 Opinion A-G M. Bobek, ECLI:EU:C:2018:310, para 78, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

163 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 27, *referring to* CJEU 21 May 2015, C-352/13, ECLI:EU:C:2015:335 (*CDC Hydrogen Peroxide*), para 52.

context, the distinctive feature of which was the existence of circumstances contributing to attributing jurisdiction to those courts'.[164] The CJEU hence confirmed that the fact that a bank account is located at a certain place forms an insufficient connecting factor to assume jurisdiction, but did not explain what these circumstances involved exactly in *Kolassa v Barclays Bank*.

In the specific case of *Helga Löber v Barclays Bank*, the CJEU considered that 'taken as a whole, the specific circumstances of the present case contribute to attributing jurisdiction to the Austrian courts'.[165] The CJEU subsequently enumerated the specific factors of the case: Helga Löber was domiciled in Austria, all payments for the investment were made from Austrian bank accounts, the certificates were acquired on the Austrian secondary market, the prospectus of the certificates was notified with the Austrian supervisory bank and the contract 'obliging her to make the investment' and which 'resulted in a definitive reduction in her assets' was signed in Austria.[166] Contrary to the proposition of Advocate General Bobek, the securities purchase contract is only one of the relevant circumstances to determine jurisdiction. According to the CJEU, jurisdiction of the Austrian courts meets the objectives set out in the recitals of the Brussels I Regulation of a predictable place of jurisdiction, proximity between the competent court and the dispute and the sound administration of justice.[167] Furthermore, with this outcome, the objective of Regulation No 44/2001 – to strengthen 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 in which court he may be sued – is met by upholding as the place where the damage occurred the place where the bank is established in which the applicant possessed the bank account in which the damage occurred.'[168]

(b) From tracing bank accounts to a helicopter view

The location of financial loss for the purposes of the *Erfolgsort* has occupied the CJEU for many years. Subsequent to the cases of *Kronhofer v Maier* and *Kolassa v Barclays Bank*, the discussion concentrated on the tracing of cash accounts and securities accounts as connecting factors to find the place where financial loss materialised. *Universal Music* put the importance of bank accounts as connecting factor into perspective, and, although implicitly, on the moment

164 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), paras. 28-30.

165 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 31.

166 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), paras. 32-33.

167 *Cf.* CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 34.

168 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 35.

at and the place in which the financial loss became irreversible. In *Helga Löber v Barclays Bank*, the CJEU added yet another shade to its reasoning in *Universal Music* by stating that the courts of an investor's domicile can be competent if the financial loss 'occurred directly in that investor's bank account with a bank established within the jurisdiction of those courts' and 'the other specific circumstances of that situation also contribute to attributing jurisdiction to those courts'.[169]

The CJEU hence refused to appointment a single, decisive connecting factor for locating the *Erfolgsort* of financial loss. As the dividing decisions of the CJEU and conclusions of the Advocate Generals show, it is simply impossible to find a single, satisfying solution for the location of financial loss. In its latest decisions, one could say that the CJEU returned to the basic principles underlying special jurisdiction and looked at cases from a helicopter view, so as to conclude whether the national court was closely connected to the action brought before it.[170] The decision in *Helga Löber v Barclays Bank*, read in conjunction with the other decisions of the CJEU and, in particular, *Universal Music*, provides several insights:

- Special jurisdiction must be justified by the objectives of the Brussels I Regulation (recast), so that national courts can only assume jurisdiction based on Article 7 Brussels I Regulation (recast) if there is 'a close connection between the court and the action or in order to facilitate the sound administration of justice'.[171] The close connection must ensure legal certainty and foreseeability, so that the defendant is not sued in a court 'he could not reasonably have foreseen'.[172]
- A combination of specific circumstances must justify the assumption of special jurisdiction, so that (1) the locations of bank accounts themselves, whether cash or securities accounts, do not justify jurisdiction in the absence of other connecting factors; and (2) claimants' domiciles themselves do not justify jurisdiction in the absence of other connecting factors.

This helicopter view guarantees the underlying ratio of special jurisdiction under Article 7 (2) Brussels I Regulation (recast) prevails. It puts the close connection between the court and the claim at the forefront in determining special jurisdiction. Moreover, by requiring a combination of relevant connecting factors, the helicopter view diminishes the risk that special jurisdiction is purely coincidental and can be easily manipulated by the parties – mostly by the claimants. Indeed, relevant connecting factors such as the place where

169 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 36.

170 In Dutch doctrine, Rutten described the approach as an '*omstandigheden catalogus*' (catalogue of circumstances), *JOR* 2018/307, para 9. Lehmann used the term 'multi-factor test', Lehmann 2018, p. 18.

171 Recital 16 Brussels I Regulation (recast).

172 Recital 16 Brussels I Regulation (recast).

financial instruments have been purchased and the location of bank accounts can easily be coincidental or subject to manipulation.

Another interesting observation is that the helicopter view may often point to the jurisdiction of the courts of the claimant's domicile or place of establishment. For instance, in case of retail investors in prospectus liability cases, the relevant specific circumstances can often coincide with the domiciles or places of establishment of claimants. In this way, the legal protection of retail investors is strengthened as they can start proceedings before the courts of the Member States in which they are domiciled. Although the CJEU justified this approach by requiring the combination of relevant factors, this approach remains somewhat remarkable in light of earlier decisions such as *Kronhofer v Maier* in which the CJEU strongly denied the competence of the *forum actoris*.[173]

Universal Music and *Helga Löber v Barclays Bank* however do not form a conclusive framework for the location of financial loss. The CJEU did not provide guidance on what circumstances qualify as 'specific circumstances' and what combination of specific circumstances lead to jurisdiction. In the context of prospectus liability, the CJEU looked, amongst other things, at the place where financial instruments were bought, the countries in which a prospectus was notified, the place where any relevant contracts were concluded so that the loss became in fact irreversible, the domicile of the claimant and the location(s) of the bank account(s) employed.[174] Yet, in different factual circumstances, these circumstances may not be present or relevant. Moreover, the CJEU did not make a fundamental decision on where to locate the financial loss.[175] Advocate General Bobek suggested applying the 'irreversibility' test, but the CJEU did not follow this approach in *Helga Löber v Barclays Bank.* Because of the lack of a fundamental decision, the helicopter view does not provide a solution for cases in which connecting factors are spread over multiple countries. One can, however, question whether it was the CJEU's task to make such a fundamental choice, or whether the CJEU should leave such fundamental choices to the Union legislature.[176] In addition, one can question whether it is possible to make a fundamental choice on the location of financial loss at all.

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173 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*, para 21.

174 As concluded by Van Bochove 2016, p. 459 in relation to *Universal Music*. In *Universal Music*, the CJEU has located the *Erfolgsort* in the Czech Republic because the settlement was agreed there and, from that moment on, the obligation to pay 'placed an irreversible burden on Universal Music's assets'. CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 31.

175 *Cf. in the context of credit rating agency liability* Deipenbrock 2018, p. 569.

176 *Cf. in the context of credit rating agency liability* Deipenbrock 2018, p. 569.

(c) Application to credit rating agency liability

Assuming that the helicopter view applies by analogy in the context of credit rating agency liability, what effect does this view have on the way in which national courts determine the *Erfolgsort* of financial loss relating to claims brought by issuers and investors against credit rating agencies?

(i) – Claims brought by issuers

From a factual perspective, claims based on Article 35a CRA Regulation brought by issuers show most resemblance with the case of *Universal Music*. In the absence of other connecting factors, the general rule of *Universal Music* applies so that the 'place where the harmful event occurred' (the *Erfolgsort*) shall not be construed as being the place in a Member State where the damage occurred (under article 7(2) Brussels I Regulation (recast)), 'when that damage consists exclusively of financial damage which materialises directly in the bank account of the applicant and is the direct result of an unlawful act committed in another Member State'.[177] Two crucial questions arise when determining jurisdiction: (1) which and how many connecting factors justify that the place of the bank account is identified as the *Erfolgsort*?; and (2) if the place of the bank account is not relevant for the purposes of determining the *Erfolgsort* due to the absence of other connecting factors, how should the *Erfolgsort* then be located? Under the current state of the law, it is difficult to answer these questions. The main problem is that *Universal Music* only clarifies where the *Erfolgsort* cannot be located, while there are no useful guidelines on where the *Erfolgsort* can be located instead.

An analogue application of the helicopter view could render a combination of the following connectors relevant to determine the *Erfolgsort*:

- the place where the issuer is established, especially because the credit rating was attached to that issuer or one of its financial instruments;
- the place of the cash account in which the loss materialised;
- the place of the market(s) on which the financial instruments were sold; and
- if applicable, the place where the credit rating agency and the issuer entered into a contract for the assignment of a solicited credit rating or the place where the obligation to pay increased funding costs began to rest unequivocally upon the issuer, viz. the moment the issuer entered into a contract with an investor that stipulates certain interest rates and clauses on the interest rates.

These connecting factors are foreseeable to both issuers and credit rating agencies, as the relationship between a credit rating agency and an issuer is characterised by a certain degree of proximity. Most importantly, the credit

177 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 40.

rating agency chooses to which issuers or financial instrument it attaches credit ratings. In ordinary situations, the *Erfolgsort* of the financial loss will hence locate in the place, or, more in general, the country of establishment of the issuer.

Yet if the connecting factors are spread over multiple Member States, the helicopter view does not indicate which connecting factor is decisive. In *Universal Music*, the CJEU seems to have attached much importance to the place where the loss became irreversible.[178] In relation to claims brought by issuers, the place where the loss puts an irreversible burden on the assets of the issuer can be the moment and the place where the obligation to pay increased funding costs began to rest unequivocally upon the issuer. But, when and where would that moment be: (1) at the moment the credit rating is issued – which is in fact the *Handlungsort*; (2) or at the moment the issuer entered into a contract with an investor that stipulates certain interest rates and clauses on the interest rates? However, both options do not provide a relevant and reliable connecting factor and can be manipulated by one of the parties.[179] Therefore, it is uncertain whether, when confronted with such a case, the CJEU would accept the place where parties entered into a contract as the place where the loss occurred.

(ii) – Claims brought by investors

From a factual perspective, claims based on Article 35a CRA Regulation brought by investors show most resemblance with the prospectus liability or securities litigation cases of *Kronhofer v Maier*, *Kolassa v Barclays Bank* and *Helga Löber v Barclays Bank*. A single infringement committed by a credit rating agency caused loss to a potentially large group of investors spread over multiple countries. From this perspective, claims brought against credit rating agencies by investors differ from the case of *Universal Music*, in which the tort of the defendant duped the claimant only. A difference with the prospectus liability or securities litigation cases is that, in the context of credit rating agency liability, the investors' losses were not caused by the issuer, but by the credit rating agency as a third party.

An analogue application of the helicopter view could render a combination of the following connectors relevant to determine the *Erfolgsort*:

- the domicile or place of establishment of the investor;
- the location(s) of the bank account(s) employed by the investor;
- the primary or secondary market in which the financial instruments were bought (or sold?);

178 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 31.

179 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by M.F. Müller, *NJW* 2016, p. 2170.

- the place where any relevant contracts were concluded as a consequence of which the loss became irreversible (i.e. the contract by which the relevant financial instruments were bought or sold); and
- the place where the credit rating agency and the investor entered into a contractual relationship (if applicable).

In *Helga Löber v Barclays Bank*, the CJEU attached great importance to the interest of the defendant as well: 'In this connection, given that the issuer of a certificate who does not comply with his legal obligations in respect of the prospectus must, when he decides to notify the prospectus relating to that certificate in other Member States, anticipate that inadequately informed operators, domiciled in those Member States, might invest in that certificate and suffer damage, the objective of Regulation No 44/2001 – which is to strengthen 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 in which court he may be sued – is met by upholding as the place where the damage occurred the place where the bank is established in which the applicant possessed the bank account in which the damage occurred […].'[180] Hence, in prospectus liability cases, the notification of the prospectus caused the *Erfolgsort* to be foreseeable to the defendant as well and justified the jurisdiction of the Austrian courts.

As opposed to the prospectus liability cases decided on by the CJEU, these connecting factors are not necessarily highly foreseeable and predictable to credit rating agencies. Indeed, there is often no contact or any form of relationship between the credit rating agency and investors at all. These concerns are mitigated somewhat by the fact that the credit rating agency deliberately issued its credit ratings for the European markets, by establishing and registering in a Member State in order for their credit ratings to be allowed to be used for regulatory purposes by certain issuers (e.g. credit institutions, investment firms and insurance undertakings).[181] It remains however doubtful whether this is sufficient justification for Member State courts to assume jurisdiction.[182]

Furthermore, if the relevant circumstances referred to spread over multiple Member States, the helicopter view does not indicate the relationship between these circumstances and which circumstance is decisive. The decision in *Helga*

180 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 35.

181 Art. 4 (1) CRA Regulation. Pursuant to Art. 3 (1) (g) CRA Regulation, the term 'regulatory purposes' means 'the use of credit ratings for the specific purpose of complying with Union law, or with Union law as implemented by the national legislation of the Member States'.

182 In his Opinion for the Dutch case *VEB v BP*, Advocate General Vlas did not consider the fact that oil company BP directs itself to investors worldwide is a sufficient specific circumstance to justify special jurisdiction under Art. 7 (2) Brussels I Regulation (recast). Opinion A-G P. Vlas, ECLI:NL:PHR:2019:115, para 2.18. The same could apply to the fact that credit rating agencies establish themselves and register in the EU.

Löber v Barclays Bank provides no guidance in this regard, except for that bank accounts and claimant's domiciles are not decisive. In *Universal Music*, the CJEU seems to have attached much importance to the place where the loss became irreversible. Applying the 'reversibility test'[183] to loss suffered by investors in the context of credit rating agency liability, the loss can be located at two places: (1) the place where the investor entered into the contract to purchase the financial instruments;[184] or (2) the place where the investor lost control over his assets in the performance of the contract to purchase the financial instruments, viz. the cash account from which the financial instruments where paid for.[185] As the latter connecting factor lost its independent importance after *Universal Music* and *Helga Löber v Barclays Bank*, the place where the investor entered into the contract to purchase the financial instruments seems then the most important connecting factor. Yet, the place of the contract does not necessarily provide a relevant and reliable connecting factor and can be manipulated by one of the parties.[186] Moreover, in *Helga Löber v Barclays Bank*, the CJEU did not follow the approach of Advocate General Bobek who suggested qualifying the place where the damage occurred as the place where 'a legally binding investment obligation is factually assumed'.[187] Consequently, it is uncertain whether, if confronted with such a case, the CJEU would accept the place where parties have entered into a contract as the place where the loss occurred.

In conclusion, with regard to both claims brought by issuers and investors, the decisions of the CJEU in *Universal Music* and *Helga Löber v Barclays Bank* point national courts back to the basic principles underlying special jurisdiction, without providing a single, decisive connecting factor in cases concerning financial loss. This multi-factor approach or helicopter view is comprehensible in light of all disadvantages associated with choosing a single, decisive connecting factor. At the same time, it is still impossible to derive a clear and certain rule from the case law in relation to financial torts such as Article 35a CRA Regulation. In itself, the reasoning of the CJEU in *Universal Music* and *Helga Löber v Barclays Bank* resulted in reasonable outcomes, but, in particular cases, the lack of a fundamental decision as to how and where the *Erfolgsort* can be located can be problematic in future cases. The most important lesson that can be derived from *Universal Music* and *Helga Löber v Barclays Bank*, is that the underlying ratio of the special ground for jurisdiction of Article 7 Brussels I Regulation (recast) must be kept in mind when determining jurisdiction. However, at present, it is not clear, foreseeable and predictable where the

183 Van Bochove 2016, p. 459 and Dickinson 2008, no. 4.67.
184 *Cf.* Dickinson 2008, no. 4.67.
185 *Cf.* Dickinson 2008, no. 4.67.
186 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by M.F. Müller, *NJW* 2016, p. 2170.
187 Opinion A-G M. Bobek, ECLI:EU:C:2018:310, para 78, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

Erfolgsort of financial loss suffered by issuers and investors due to incorrect credit ratings must be located in situations in which relevant connecting factors are spread over different Member States.[188]

4.3.5.4 Erfolgsort – reputational loss

In addition or as an alternative to financial loss, issuers could argue that an impacted credit rating caused reputational loss. Although it may be complex to quantify reputational loss, this opportunity should not be ruled out in advance.[189] National courts may find locating reputational loss for the purpose of the *Erfolgsort* complicated.[190] Due to the fact that credit ratings are commonly published on the Internet, incorrect credit ratings are available all over the world after publication and reputational loss might spread all over the world.[191] For example, if a credit rating agency (established in France) downgrades a credit rating attached to Italian government bonds as a result of infringing Annex III CRA Regulation, the Italian government might suffer reputational loss amongst investors domiciled all over the EU. When considering how national courts should determine the *Erfolgsort* of reputational loss, one could wonder whether to draw parallels with the CJEU's case law on the location of the *Erfolgsort* of reputational loss caused by physical and online defamatory publications.[192]

In the case of *Shevill and Others v Presse Alliance* – on reputational loss caused by a libel by a newspaper article distributed on paper in several Member States, the CJEU held that the victim of the libel could claim damages (1) before the courts of the Member State where the publisher is established for the total amount of loss (the *Handlungsort*); and (2) before the courts of each Member State in which the loss occurred for the part of the loss that has been suffered in that Member State (the *Erfolgsort*).[193] Following this general rule, an issuer can, hence, bring a claim against a credit rating agency before the courts of each Member State in which the loss occurred; however, only for

188 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by I. Bach, *NZG* 2016, p. 795.

189 Especially because Recital 32 CRA III Regulation implies that both types of loss fall under the scope of Art. 35a CRA Regulation by stating that it is important to provide issuers with a right of redress as an impacted credit rating 'can impact negatively the reputation and funding costs of an issuer.'

190 *For a similar analysis with an opposite conclusion,* Happ 2015, pp. 150 ff. Section 3.6.2 on reputational loss suffered by issuers.

191 *Cf.* Happ 2015, p. 151.

192 Although, as stated in section 4.4.1 as well, I would not equate infringements of Annex III CRA Regulation with violations of rights relating to personality (such as defamation).

193 ECJ 7 March 1995, C-68/93, ECLI:EU:C:1995:61 (*Shevill and Others v Presse Alliance*), para 33.

the part of the loss that has been suffered in that Member State.[194] As a consequence, an issuer may have to start proceedings in several Member States if it wishes to sue in the courts of the *Erfolgsorts*. Before the courts of the Member State where the credit rating agency is established, the issuer can bring a claim for the total amount of loss (the *Handlungsort*).[195]

In respect of online publications, the CJEU formulated a different rule for jurisdiction in the case of *eDate Advertising and Others.* In this case, the CJEU decided where a victim – a natural person – can hold a publisher liable for reputational loss suffered in various states and caused by a publication spread over the Internet.[196] The CJEU held that a victim cannot only claim damages for all its loss before the court of the place where the publisher is established, but also before the court of the place in which the victim has its centre of interests. The CJEU justified this exception to the rule of *Shevill and Others v Presse Alliance* by the difference in the manner of publication: in contrast to the case of *Shevill and Others v Presse Alliance*, the publication in *eDate Advertising and Others* was spread online.[197] In line with *Shevill and Others v Presse Alliance*, a victim can still bring a claim before the courts of each Member State in the territory of which content placed online is or has been accessible; however, 'those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised'.[198] Uncertainty existed on the scope of application of the exception made in *eDate Advertising and Others*, such as whether the exception applied to natural persons only, or to natural and legal persons.

In the case of *Bolagsupplysningen and Ilsjan*, the CJEU confirmed that the rule of *eDate Advertising and Others* can apply to legal persons.[199] The CJEU held that a legal person who claims its personality rights were infringed by an online publication of incorrect information – the claimant was put on an online 'blacklist' of the defendant stating that it carried out acts of fraud and

194 *Cf.* ECJ 7 March 1995, C-68/93, ECLI:EU:C:1995:61 (*Shevill and Others v Presse Alliance*), para 33. *Also* Lehmann 2015a, no. 4.111.

195 *For this general rule of Shevill and Others v Presse Alliance*, Lehmann 2015a, no. 4.111.

196 CJEU 25 October 2011, C-509/09 and C-161/10, ECLI:EU:C:2011:685 (*eDate Advertising and Others*). Baumgartner, Happ and Dutta also discussed the application of *eDate Advertising and Others* in the context of credit rating agency liability (Baumgartner 2015, p. 597, Happ 2015, pp. 152-155 and Dutta 2014, p. 38).

197 CJEU 25 October 2011, C-509/09 and C-161/10, ECLI:EU:C:2011:685 (*eDate Advertising and Others*), paras. 46-48.

198 CJEU 25 October 2011, C-509/09 and C-161/10, ECLI:EU:C:2011:685 (*eDate Advertising and Others*), para 52.

199 CJEU 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen and Ilsjan*). Prior to the decision of the CJEU, the Dutch Supreme Court already applied the rule of *eDate Advertising and Others* to a legal person in Hoge Raad 3 June 2016, ECLI:NL:HR:2016:1054, *NJ* 2016/354 annotated by Th.M. de Boer (*A. v Dahabshiil*) and Happ already concluded that it could not be derived from the case law of the CJEU that such a broad application to legal persons (as in the context of credit rating agency liability) was not allowed (Happ 2015, p. 155).

deceit[200] – can bring a claim for damages before the courts of the Member State in which its centre of interests is located.[201] The centre of interests of a legal person lies in the place where the commercial reputation 'is most firmly established and must, therefore, be determined by reference to the place where it carries out the main part of its economic activities.'[202] However, the exception of *eDate Advertising and Others* does not apply if it is not possible to locate the main part of the legal person's economic activities in a certain Member State.[203] The case of *Bolagsupplysningen and Ilsjan*, hence, clarified that the capacity of the victim is not decisive for the application of the exception made in *eDate Advertising and Others*.

The rule formulated in *eDate Advertising and Others*, however, does not apply to all types of loss caused online and is confined to infringements of personality rights only. The CJEU refused to apply the rule of *eDate Advertising and Others* in the case of *Wintersteiger*, which concerned loss caused by the online violation of a trade mark.[204] The CJEU explained that the exception of *eDate Advertising and Others* does not apply to infringements of intellectual property rights such as those at stake in *Wintersteiger*, because such an application would not lead to a foreseeable solution.[205] In this context, Advocate General Cruz Villalón remarked that intellectual property rights differ from personality rights because they are 'protected on a territorial basis and are concerned with the commercial exploitation of a product'.[206]

Eventually, the application of the rule of *eDate Advertising and Others* to claims for credit rating agency liability brought by issuers under Article 35a CRA Regulation stands or falls on the answer to the question of whether reputational loss caused by an impacted credit rating qualifies as the violation of an issuer's personality right. Although one can draw parallels between the two situations, one cannot escape the impression that a commercial case concerning credit rating agency liability based on Article 35a CRA Regulation fundamentally differs from typical defamation cases such as *eDate Advertising and Others* and *Bolagsupplysningen and Ilsjan*. The exact scope of 'personality rights' is not clear, but it seems that violated personality rights involve cases of defamation (libel and slander) (caused by the mass media) and not com-

200 CJEU 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen and Ilsjan*), para 10.
201 CJEU 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen and Ilsjan*), para 44.
202 CJEU 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen and Ilsjan*), para 41.
203 CJEU 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen and Ilsjan*), para 43.
204 CJEU 19 April 2012, C-523/10, ECLI:EU:C:2012:220 (*Wintersteiger*).
205 CJEU 19 April 2012, C-523/10, ECLI:EU:C:2012:220 (*Wintersteiger*), paras. 23-24 and Opinion AG 16 February 2012, C-523/10, ECLI:EU:C:2012:90 (*Wintersteiger*), para 20.
206 Opinion A-G P. Cruz Villalón, ECLI:EU:C:2012:90, para 20, with CJEU 19 April 2012, C-523/10, ECLI:EU:C:2012:220 (*Wintersteiger*).

mercial disputes on the violation of regulatory obligations under Annex III CRA Regulation. Hence, although reputational loss caused by incorrect credit ratings is to some extent comparable to reputational loss in defamation cases, the rule of *eDate Advertising and Others* seems not to apply to claims for credit rating agency liability based on Article 35a CRA Regulation.[207] Therefore, this section concludes that an issuer can only hold a credit rating agency liable for the total amount of reputational loss before the courts of the Member State in which the credit rating agency has been established (*Handlungsort*). Furthermore, an issuer can only hold a credit rating agency liable before courts of other Member States for the amount of reputational loss that occurred within that Member State in case the reputational loss occurred in various countries (the *Erfolgsorts*). This result can be criticised for leading to a fragmentation of claims and, therefore, one could argue that application by analogy of the rule of *eDate Advertising and Others* is desirable, but this does seem to be the way in which the law currently stands.

4.4 Applicable law – Rome II Regulation

4.4.1 Scope of application

If a Member State court has assumed jurisdiction, it must decide which law is applicable to the dispute and, in the particular context of this dissertation, to a dispute over credit rating agency liability involving a claim based on Article 35a (1) CRA Regulation. Especially because Article 35a (4) CRA Regulation stipulates that terms and subjects not defined in the CRA Regulation must be interpreted and applied in accordance with the applicable national law, the assessment of the applicable national law is of crucial importance for the functioning of Article 35a CRA Regulation.

Which legislative instrument a national court must apply to determine the applicable national law depends on the characterisation of the rights and obligations involved in a concrete dispute.[208] For Private International Law

207 Dutta rejected the application of the rule of *eDate Advertising and Others*, because he considered credit rating agency liability to concern a financial tort rather than a violation of a personality right (Dutta 2014, p. 38). *Contra* Happ 2015, p. 155: '*Wie soeben erörtert, hat der EuGH allgemeine Grundsätze zur Bestimmung des Deliktsgerichtsstands bei Persönlichkeitsrechtsverletzungen aufgestellt. Diese sind mithin auch grundsätzlich bei der Geltendmachung eines Reputationsschadens gegenüber der Ratingagentur anzuwenden.*' *Also* Happ 2015, pp. 157-158. *Contra* Baumgartner 2015, p. 597, who concluded that the rule of *eDate Advertising and Others* does apply in case of credit rating agency liability.

208 Section 4.2. For Private International Law purposes, the terms of contractual and non-contractual obligations are interpreted autonomously. The characterisations under the applicable national law are not taken into consideration, *e.g.* ECJ 17 June 1992, C-26/91, ECLI:EU:C:1992:268 (*Handte v TMCS*), para 10, CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 27, CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa*

purposes, this dissertation qualified the obligations of credit rating agencies under Article 35a CRA Regulation as non-contractual obligations.[209] Non-contractual obligations in civil and commercial matters fall within the scope of the Rome II Regulation.[210] Therefore, Member State courts must determine the law applicable to disputes over credit rating agency liability involving claims based on Article 35a CRA Regulation in accordance with the provisions of the Rome II Regulation.[211] In advance, two remarks must be made on the application of the Rome II Regulation in the context of credit rating agency liability.[212]

The first remark to be made is that the 'regulatory' and 'Private International Law' elements of Article 35a CRA Regulation lead to uncertainty in the assessment of the applicable national law.[213] On the one hand, from a regulatory perspective, Article 35a (1) CRA Regulation applies to credit rating agencies established and registered in the EU, as entailed by the general scope of application of the CRA Regulation (section 3.5.3.1). The CRA Regulation, hence, entitles issuers and investors to base a claim for compensation on Article 35a CRA Regulation against credit rating agencies established and registered in the EU. On the other hand, from a Private International Law perspective, Article 35a (4) CRA Regulation requires national courts to determine 'the applicable national law as determined by the relevant rules of private international law'.

The existence of potential complications becomes clear when taking into account that the Rome II Regulation has 'universal application', so that it applies 'whether or not' the law specified by the Rome II Regulation is the

v Barclays Bank), para 37 and CJEU 21 January 2016, C-359/14, ECLI:EU:C:2016:40 (*Ergo Insurance SE*), para 43.

209 Section 4.2. *See* Deipenbrock 2018, p. 564, Wimmer 2017, p. 101, Deipenbrock 2015, p. 10, Steinrötter 2015, p. 114, Dutta 2014, pp. 37-40, Dutta 2013, p. 1731 and Gietzelt & Ungerer 2013, p. 338. The Rome I Regulation (on the law applicable to contractual obligations) is not applicable to obligations flowing from Art. 35a CRA Regulation, but can be applicable to claims for damages for breach of contract, for instance, in case of a solicited rating (Dutta 2014, p. 37) or subscriptions. As this dissertation concentrates on liability claims based on Art. 35a CRA Regulation, this Chapter does not discuss the rules of the Rome I Regulation.

210 Art. 1 (1) Rome II Regulation (in full: Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations). If a harmful event took place before 11 January 2009, the rules of the Rome Convention (in full: the Convention on the law applicable to contractual obligations of 19 June 1980, 80/934/EEC) will apply to the dispute.

211 This dissertation assumes Art. 35a CRA Regulation does not qualify as an 'overriding mandatory provision' under Art. 16 Rome II Regulation. Under Recital 32: 'Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. […]' The application of this provision is reserved for a limited number of situations.

212 Heuser made the same remarks in his dissertation (Heuser 2019, pp. 208-215).

213 *Cf. for the same remark from a slightly different perspective* Heuser 2019, pp. 208-209.

law of a Member State.[214] This universal application entails that if a Member State court has jurisdiction to decide on a dispute, the law applicable to that dispute is not necessarily the law of a Member State. In the concrete context of credit rating agency liability, as stated by Heuser as well, one can imagine situations in which an issuer or investor based a claim against an EU credit rating agency, while a Member State court concludes that the law of a third country applies to the dispute.[215] For example, when the dispute involves investors or issuers not domiciled or established in the European Union, who bring claims against EU credit rating agencies.[216] The question then arises what a national court should do: (1) using the non-Member State law to interpret and apply the claim based on Article 35a CRA Regulation; (2) applying the non-Member State law so that the claim based on Article 35a CRA Regulation is no longer on the table.[217]

The CRA Regulation does not provide guidance in this regard. From a regulatory perspective, one could argue in favour of the former approach, because the right of redress under Article 35a CRA Regulation should have a broad scope of application and Article 35a (4) CRA Regulation provides no restrictions in this regard.[218] From a Private International Law perspective, one could argue in favour of the latter approach, because the substantive rules of a third country law apply to the dispute. Even though the latter approach limits the scope of application of Article 35a CRA Regulation, I would argue in favour of the latter approach from a dogmatic point of view.[219] If the applicable private law is the law of a third country, Article 35a CRA Regulation does not form part of the national legal system of that country and should not find application – even though that is difficult to reconcile with the scope of application of Article 35a CRA Regulation to EU credit rating agencies. Moreover, the European Commission already seemed to have realised the importance of the applicable law being the law of a Member State in the stage of the Impact Assessment:

> 'An efficient right of redress under this option (and also option 2) presupposes that the applicable law under private international law rules (Rome II Regulation) would be the law of a Member State. Under Art. 4 of Rome II the applicable law is the law of the country where the damage occurs, which could be in case of

214 Art. 3 Rome II Regulation. *Also* Heuser 2019, pp. 208-209.
215 Heuser 2019, p. 208.
216 If the loss occurred in a non-Member State under Art. 4 (1) Rome II Regulation (section 4.4.3).
217 *Cf. for the latter scenario* Heuser 2019, pp. 208-209.
218 *Cf. for the latter argument* Heuser 2019, p. 209.
219 *Contra* Heuser 2019, p. 212. Although Heuser doubted whether the Union legislature intended not to limit the applicable national law, Heuser took the position that the law of a third country can apply to claims based on Art. 35a (1) CRA Regulation. In contrast, to my opinion, if the law of a third country applies, the claim based on Art. 35a (1) CRA Regulation is no longer on the table at all.

> financial instrument purchases either the place of purchase, the place where the securities are deposited or where the account is located. Following these criteria purchases by EU investors on EU markets will in most cases lead to the application of the law of a Member State which will ensure an efficient right of redress under this option.'[220]

The second remark to be made is that some attention should be paid to the applicability of the Rome II Regulation to situations in which issuers claim compensation for reputational loss caused by an incorrect credit rating.[221] Under Article 1 (2) (g) Rome II Regulation, claims for non-contractual liability arising 'out of violations of privacy and rights relating to personality, including defamation' are excluded from the scope of the Rome II Regulation. As the situation in which an issuer has suffered reputational loss shows some resemblance to the situation of a victim of defamation, one can question whether claims for reputational loss brought by issuers fall inside or outside the scope of the Rome II Regulation. However, it seems unlikely that credit rating agency liability claims for reputational loss brought by issuers are excluded from the scope of application of the Rome II Regulation.[222] Reputational loss suffered by issuers can result from infringements of regulatory obligations under Annex III CRA Regulation, which are not framed as 'rights relating to personality' as meant under Article 1 (2) (g) Rome II Regulation.[223] An indication can also be found in the proposal of the Rome II Regulation of the European Commission. This proposal initially involved a conflict of laws rule on violations of privacy and rights relating to personality under Article 6, which was 'particularly' meant for defamation by the mass media.[224] Eventually, Article 6 was not adopted and resulted in the limitation under Article 1 (2) (g) Rome II Regulation. It seems, however, that this limitation – with a similar scope of application as the initial proposal for Article 6 Rome II Regulation – means to exclude from the scope of the Rome II Regulation claims relating to other types of situations than credit rating agency liability. Therefore, the location of reputational loss under Article 4 (1) Rome II Regulation will be discussed in section 4.4.3.2. If claims of issuers for reputational loss were to fall outside the scope of the Rome II Regulation, the applicable national law must be

220 SEC(2011)1354 final, p. 47, fn. 119.

221 *As done in the context of credit rating agency liability by* Heuser 2019, pp. 212-215, Wimmer 2017, p. 102 and Happ 2015, pp. 223-233.

222 *Cf.* Heuser 2019, pp. 212-215 (who argued the exception under Art. 1 (2) (g) Rome II Regulation does not apply) and Wimmer 2017, p. 102 (who argued the exception under Art. 1 (2) (g) Rome II Regulation does not apply). *Contra* Happ 2015, pp. 223-233 (who argued the exception under Art. 1 (2) (g) Rome II Regulation does apply, so that claims for reputational loss brought by issuers fall outside the scope of the Rome II Regulation).

223 *See* Heuser 2019, pp. 214-215. *See also* section 4.3.5.4.

224 Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), 22 July 2003, COM(2003) 427 final, p. 17. *Also* Dickinson 2008, no. 3.226.

determined in accordance with the national rules of the *lex fori*, which differ widely at this point.[225]

4.4.2 Choice of law agreement

Under Article 14 (1) Rome II Regulation, parties can agree to submit their dispute to the law of a certain country as long as their choice has been expressed or demonstrated with reasonable certainty by the circumstances of the case. This provides parties involved in a dispute on credit rating agency liability with the opportunity to submit their dispute to the law of a certain country[226] and, thereby, with the opportunity to manipulate the interpretation of Article 35a CRA Regulation.

Article 14 Rome II Regulation imposes some limitations on the ability of parties to choose the law that applies to their dispute. It provides that a choice of law agreement can be entered into only after the event that gave rise to the damages occurred.[227] An exception has been made for commercial parties that can enter into a freely negotiated choice of law agreement before the event that gave rise to the damages occurred.[228] By imposing these limitations, the Rome II Regulation balances the objective of party autonomy against the objective of protecting weaker parties against each other.[229]

As a consequence of these rules, credit rating agencies can agree with other commercial parties (most likely issuers[230] or institutional investors[231]) to submit future disputes to the laws of a (non-)EU country. For instance, a rating contract for a solicited credit rating can stipulate that any disputes involving non-contractual liability will be solved in accordance with English law.[232] However, one should keep in mind that choice of law clauses must be freely negotiated. Therefore, choice of law clauses in the standard Terms of Use of

225 Final Report of a Comparative Study on the Situation in the 27 Member States as regards the Law Applicable to Non-Contractual Obligations arising out of Violations of Privacy and Rights relating to Personality, JLS/2007/C4/028, Final Report, February 2009, p. 6, available at http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/09/study_privacy_en.pdf, last accessed 31 August 2019. *Contra* Happ 2015, p. 232, who concluded that the Rome II Regulation does not apply when an issuer claims to have suffered reputational loss due to an affected, unsolicited credit rating.

226 As Art. 14 Rome II Regulation does not impose any restrictions, parties can choose to submit their dispute to the law of a third country.

227 Art. 14 (1) (a) Rome II Regulation.

228 Art. 14 (1) (b) Rome II Regulation.

229 Mandery 2014, pp. 96-97. Under Art. 14 (2) and Art. 14 (3) Rome II Regulation, additional rules have been established in order to protect weaker parties.

230 *See* Deipenbrock 2015, p. 11 and Steinrötter 2015, p. 114.

231 *See* Steinrötter 2015, p. 114. *Cf. also* Happ 2015, pp. 253-254.

232 *Cf. also on choice of law clauses and credit rating agency liability*, Deipenbrock 2018, pp. 565-566.

credit rating agencies might not be valid under the regime of the Rome II Regulation.

4.4.3 General rule

4.4.3.1 Financial loss

(a) Main rule and helicopter view

If parties have not concluded a valid choice of law agreement, a national court must determine the law applicable to a claim for credit rating agency liability in accordance with the general rule of Article 4 (1) Rome II Regulation. Under Article 4 (1) Rome II Regulation, the law applicable to the dispute is the law of the country in which the damage occurs (the *loci damni* or *Erfolgsort*). It is irrelevant where the event giving rise to the damage occurred (the *Handlungsort*) and where indirect damage occurred.[233] The general rule under Article 4 (1) Rome II Regulation assumes loss can always be located at a physical place. However, the same problems arise as compared to Article 7 (2) Brussels I Regulation Recast, because it is often complex, if not impossible, to locate intangible financial loss in a physical place.[234]

The yardstick of the *Erfolgsort* under Article 7 (2) Brussels I Regulation and the *loci damni* under Article 4 (1) Rome II Regulation are similar. The case law of the CJEU in the context of Article 7 (2) Brussels I Regulation (recast) is therefore used for interpreting Article 4 (1) Rome II Regulation as a matter of principle.[235] Section 4.3.5.3 (a) involved an analysis of the case law of the CJEU in respect of the *Erfolgsort* of financial loss – *Kronhofer v Maier*,[236] *Kolassa*

233 *In the context of credit rating agencies,* Deipenbrock 2018, p. 567. *See in general* Strikwerda & Schaafsma 2019, no. 241 and Fröhlich 2008, pp. 40 ff. If both parties to the dispute have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply under Art. 4 (2) Rome II Regulation. This provision can be useful if the losses occurred in another country than in the country in which the investor/issuer and the credit rating agency are established. For instance, if the securities account is located in another country.

234 *Cf.* Haentjens & Verheij 2016, p. 346. *In the context of credit rating agencies cf.* Deipenbrock 2018, p. 567 and Wimmer 2017, p. 107.

235 *Cf.* Recital 7 Rome II Regulation, where it is explained that the EU legislature aimed to create consistency between the substantial scope and the provisions of the Brussels I Regulation and the Rome II Regulation. *Also* CJEU 21 January 2016, C-359/14 and C-475/14, ECLI:EU:C:2016:40 (*ERGO Insurance*), para 43, *as repeated in e.g.* CJEU 28 July 2016, C-191/15, ECLI:EU:C:2016:612 (*Verein für Konsumenteninformation*), para 36. However, some caution should be exercised, *cf.* CJEU 16 January 2014, C-45/13, ECLI:EU:C:2014:7 (*Kainz v Pantherwerke*), para 20, where the CJEU held that 'the objective of consistency' of Recital 7 Rome II Regulation cannot lead to an interpretation of the Brussels I Regulation that is not connected to the scheme and objectives of the Brussels I Regulation. This could also apply to the interpretation of the Rome II Regulation in light of the Brussels I Regulation (recast).

236 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier).*

v Barclays Bank,[237] *Universal Music*[238] and *Helga Löber v Barclays Bank*.[239] In the most recent decisions of *Universal Music* and *Helga Löber v Barclays Bank*, the CJEU did not appoint a single, decisive connecting factor, and refrained from making fundamental choices as regards the way in which financial loss must be located. Instead, the CJEU returned to the basic principles underlying special jurisdiction and looked at cases from a helicopter view so as to conclude whether a certain national court was closely connected to the action brought before it.

Following the reasoning of the CJEU in *Universal Music* and *Helga Löber v Barclays Bank*, one should take the objectives underlying Article 4 (1) Rome II Regulation as a starting point. Recital 16 of the Rome II Regulation provides that '[u]niform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability'. Translating the helicopter view to the context of applicable law, a combination of multiple connecting factors must indicate the loss was suffered in a particular Member State whilst respecting the general objectives of foreseeability and a reasonable balance between the interests of claimants and defendants. Bank accounts alone, whether cash or securities accounts, do not form a relevant connecting factor in the absence of other connecting factors and claimants' domiciles (*forum actoris*) alone do not form a relevant connecting factor.

(b) Claims brought by issuers

From a factual perspective, claims based on Article 35a CRA Regulation brought by issuers show most resemblance with the case of *Universal Music*. An analogue application of the helicopter view renders a combination of the following connecting factors relevant to determine the *loci damni* under Article 4 (1) Rome II Regulation:

- the place where the issuer is established, especially because the credit rating was attached to that issuer or one of its financial instruments;
- the place of the cash account in which the loss materialised;
- the place of the market(s) on which the financial instruments were sold; and
- if applicable, the place where the credit rating agency and the issuer entered into a contract for the assignment of a solicited credit rating or the place where the obligation to pay increased funding costs began to

237 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*).
238 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
239 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

rest unequivocally upon the issuer, viz. the moment the issuer entered into a contract with an investor that stipulates certain interest rates and clauses on the interest rates.

As the relationship between credit rating agencies and issuers is characterised by more proximity, these connecting factors are foreseeable to both credit rating agencies and issuers. In particular, the helicopter view will not cause problems in relation to sovereign ratings, attached to sovereign states or their financial instruments: the loss will probably locate within that sovereign state. This outcome is foreseeable to both parties and strikes a reasonable balance between the interests of both the credit rating agency and the sovereign state.

Yet, when the connecting factors referred to are spread over multiple Member States, the helicopter view does not indicate which connecting factor is decisive. In *Universal Music*, the CJEU seems to have attached much importance to the place where the loss became irreversible.[240] In relation to claims brought by issuers, the place where the loss puts an irreversible burden on the assets of the issuer can be the moment and the place where the obligation to pay increased funding costs began to rest unequivocally upon the issuer. But, when and where would that moment be: (1) at the moment the credit rating is issued – which is in fact the *Handlungsort*; (2) or at the moment the issuer entered into a contract with an investor that stipulates certain interest rates and clauses on the interest rates? Both options, however, do not provide a relevant and reliable connecting factor and can be manipulated by one of the parties.[241] Therefore, it is uncertain whether, when confronted with such a case, the CJEU would accept the place where parties have entered into a contract as the place where the loss occurred as the decisive connecting factor.

(c) Claims brought by investors

In respect of claims brought by investors against credit rating agencies, the Impact Assessment stated that '[u]nder Art. 4 of Rome II the applicable law is the law of the country where the damage occurs, which could be in case of financial instrument purchases either the place of purchase, the place where the securities are deposited or where the account is located'.[242] This approach benefits EU based investors, but has become obsolete subsequent to the CJEU's latest decisions. An analogue application of the general guidelines described above renders a combination of the following connecting factors relevant to determine jurisdiction:

240 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 31.

241 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by M.F. Müller, *NJW* 2016, p. 2170.

242 SEC(2011) 1354 final, p. 47, fn. 119.

- the domicile or place of establishment of the investor;
- the location(s) of the bank account(s) employed by the investor;
- the primary or secondary market in which the financial instruments were bought;
- the place where any relevant contracts were concluded as a consequence of which the loss became irreversible (i.e. the contract by which the relevant financial instruments were bought); and
- the place where the credit rating agency and the investor entered into a contractual relationship (if applicable).

Yet, as opposed to the facts of *Universal Music* and *Helga Löber v Barclays Bank*, these connecting factors are not necessarily foreseeable to credit rating agencies because there will often be no contact and any form of relationship between the credit rating agency and investors at all. These concerns are however somewhat mitigated by the fact that the credit rating agency deliberately issued its credit ratings for the European markets, by establishing and registering in a Member State in order for their credit ratings to be allowed to be used for regulatory purposes by certain issuers (e.g. credit institutions, investment firms and insurance undertakings).[243]

When the connecting factors are spread over different Member States, the question still arises of what connecting factor is decisive. The decision in *Helga Löber v Barclays Bank* provides no guidance in this regard, except for the fact that bank accounts and claimant's domiciles are not decisive. In *Universal Music*, the CJEU seems to have attached much importance to the place where the loss became irreversible. Applying the 'reversibility test'[244] to loss suffered by investors in the context of credit rating agency liability, the loss can be located at two places: (1) the place where the investor entered into the contract to purchase the financial instruments;[245] or (2) the place where the investor lost control over his assets in the performance of the contract to purchase the financial instruments, viz. the cash account from which the financial instruments were paid for.[246] As the latter connecting factor lost its independent importance after *Universal Music* and *Helga Löber v Barclays Bank*, the place where the investor entered into the contract to purchase the financial instruments then seems the most important connecting factor. Yet, the place of this contract does not necessarily provide a relevant and reliable connecting factor and can be manipulated by one of the parties.[247] Moreover, one can question

243 Art. 4 (1) CRA Regulation. Pursuant to Art. 3 (1) (g) CRA Regulation, the term 'regulatory purposes' means 'the use of credit ratings for the specific purpose of complying with Union law, or with Union law as implemented by the national legislation of the Member States'.

244 Van Bochove 2016, p. 459 and Dickinson 2008, no. 4.67.

245 *Cf.* Dickinson 2008, no. 4.67.

246 *Cf.* Dickinson 2008, no. 4.67.

247 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by M.F. Müller, *NJW* 2016, p. 2170.

whether this approach is foreseeable to credit rating agencies and strikes a reasonable balance between the interests of both the credit rating agency and investors. Therefore, it is uncertain whether, if confronted with such a case, the CJEU would accept the place where parties have entered into a contract as the place where the loss occurred.

In conclusion, with regard to both claims brought by issuers and investors, an analogue application of the decisions of the CJEU in *Universal Music* and *Helga Löber v Barclays Bank* points national courts back towards the basic principles underlying the rules of the Rome II Regulation, without providing a single, decisive connecting factor in cases concerning financial loss. This multi-factor approach or helicopter view is comprehensible in light of all the disadvantages associated with choosing a single, decisive connecting factor. At the same time, it is still impossible to formulate a clear and certain rule in relation to financial torts such as Article 35a CRA Regulation. However, at present it is not clear (or foreseeable) where the *Erfolgsort* of financial losses suffered by issuers and investors due to incorrect credit ratings shall be located in situations in which relevant connecting factors are spread over different Member States.[248]

4.4.3.2 Reputational loss

As described in section 4.4.1, this study takes the position that civil liability claims brought by issuers in relation to reputational loss fall within the scope of application of the Rome II Regulation. If they do, and the credit rating agency and the issuer have not made a choice of law, the place where the damages have occurred (*lex loci damni*) must be located in order to determine the applicable law under Article 4 (1) Rome II Regulation. Section 4.3.5.4 made a more detailed analysis of the location of reputational loss for the purposes of the *Erfolgsort* under Article 7 (2) Brussels I Regulation and solely the main conclusions will be repeated here.[249] As credit ratings are issued online and investors and suppliers can be domiciled all over the world, reputational loss suffered by issuers can spread over the world. For the purpose of Article 4 (1) Rome II Regulation, the loss can therefore occur all over the world as well.

248 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by I. Bach, *NZG* 2016, p. 795.

249 *Cf.* Recital 7 Rome II Regulation, which explains that the Union legislature aimed to create consistency between the substantial scope and the provisions of the Brussels I Regulation and the Rome II Regulation. *Also* CJEU 21 January 2016, C-359/14 and C-475/14, ECLI:EU:C:2016:40 (*ERGO Insurance*), para 43, *as repeated in e.g.* CJEU 28 July 2016, C-191/15, ECLI:EU:C:2016:612 (*Verein für Konsumenteninformation*), para 36. However, some caution should be exercised, *cf.* CJEU 16 January 2014, C-45/13, ECLI:EU:C:2014:7 (*Andreas Kainz v Pantherwerke AG*), para 20, where the CJEU held that 'the objective of consistency' of recital 7 Rome II Regulation cannot lead to an interpretation of the Brussels I Regulation that is not connected to the scheme and objectives of the Brussels I Regulation. This might also apply to the interpretation of the Rome II Regulation in light of the Brussels I Regulation (recast).

Consequently, a situation can occur in which a civil liability claim brought by an issuer is governed by different national laws depending on the Member States in which the reputational losses were suffered,[250] creating a rather unclear and inconvenient situation for both issuers and credit rating agencies.

4.4.4 Escape clause

As an exception to the general rule of Article 4 (1) Rome II Regulation, Article 4 (3) Rome II Regulation provides an 'escape clause' if it is evident from all the circumstances of the case that the tort is 'manifestly more closely connected' with a country other than that indicated in Article 4 (1) or 4 (2) Rome II Regulation. If a manifestly closer connection with another country exists, the law of that country will apply. The European Commission emphasised that Article 4 (3) Rome II Regulation can only be used to ensure that the law of 'the centre of gravity of the situation' is applied.[251]

Article 4 (3) Rome II Regulation states that a manifestly closer connection can 'be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question'. Credit rating agencies and issuers frequently enter into contractual relationships. Hence, the escape clause can actually play a role in determining the applicable law to liability claims based on Article 35a CRA Regulation. For instance, in the case of a solicited rating, a dispute on non-contractual liability might strongly relate to a contractual relationship between the credit rating agency and the issuer. Then, the law that governs the contract might also govern the liability claim.[252]

4.5 Recognition and enforcement

4.5.1 A small sidestep to recognition and enforcement

As the final part of this Chapter, this section pays attention to the recognition and enforcement of European judgments that award damages to issuers and investors based on Article 35a CRA Regulation. This section does not seamlessly fit the main structure of this dissertation, because the topic of 'recognition and enforcement' falls outside the scope of the subquestion to be answered mainly in Chapter 4 – namely, which issues occur, if any, in determining the competent court and the applicable national law in respect of claims based on Article 35a CRA Regulation. Moreover, this section does not only concentrate

250 *Cf.* Dicey, Morris & Collins 2012, no. 35-027.
251 Dickinson 2008, no. 4.84. *See also* Lehmann 2016b, p. 339. *Cf. also* Lehmann 2018, p. 23.
252 *See, for the same approach,* Heuser 2019, p. 237 and Wimmer 2017, p. 110.

on EU rules of Private International Law, but also on US rules of Private International Law. It was decided to include this section nevertheless, because of its importance for the functioning of Article 35a CRA Regulation. Section 4.5.2 describes the rules on the recognition and enforcement of European judgments within the EU. Subsequently, section 4.5.3 elaborates on the legal consequences of practical issues that issuers and investors might experience if they wish to enforce a judgment against an EU credit rating agency: the depletion of assets of EU subsidiaries of credit rating agencies headquartered outside the EU.[253]

4.5.2 Enforcement within EU

The European rules on the recognition and enforcement of judgments awarding compensation to issuers and investors are rather straightforward. Article 36 Brussels I Regulation (recast) stipulates that Member States must recognise judgments provided in other Member States without special procedures being required. Therefore, judgments of Member State courts on credit rating agency liability will be automatically recognised by other Member States.[254] Furthermore, Article 39 Brussels I Regulation (recast) stipulates that judgments provided by Member State courts are enforceable in other Member States 'without any declaration of enforceability being required'. Hence, judgments of Member State courts awarding damages to issuers and investors will be automatically enforceable in other Member States.[255]

4.5.3 Depletion of assets in the EU

The enforcement of European judgments awarding compensation in the form of damages to issuers and investors is hindered if a European credit rating agency does not have sufficient assets available. Although examples are currently lacking, Lehmann feared that international credit rating agency groups would minimise the assets of their EU subsidiaries.[256] Lehmann's fear was exacerbated by the fact that the CRA Regulation does not oblige an EU subsidiary to hold a certain amount of assets.[257] Enforcement issues could occur, for example, when a Member State court provided a judgment awarding damages against an EU subsidiary whose parent is established in the United States. If the parent company were to deplete the EU subsidiary's assets, issuers

253 *As raised by* Lehmann 2016a, p. 81. *Cf. also* Dutta 2014, p. 40.
254 Except if a ground for refusal under Art. 45 (1) Brussels I Regulation (recast) applies.
255 Except if a ground for refusal under Art. 46 in conjunction with Art. 45 (1) Brussels I Regulation (recast) applies.
256 Lehmann 2016a, p. 81. *Cf. also* Dutta 2014, p. 40.
257 *See* Lehmann 2016a, p. 81.

and investors would need a new judgment directed at the parent company, which, subsequently, would need to be enforced in the US.

If a parent company actually depleted the assets of an EU subsidiary, issuers and investors face a complex road towards compensation. The options to attempt forcing credit rating agency groups to pay the damages awarded involve additional litigation, and hence more time and money. Moreover, they are likely to involve litigation with an unforeseeable outcome before third country courts. Issuers and investors can bring two types of claims in order to obtain a new judgment against the parent company: (1) a claim for non-contractual liability against the parent company before the courts of a third country (in our example, a US court); or (2) a claim for non-contractual liability against the EU subsidiary and the parent company before Member State courts. The wrongful act would consist of the depletion of assets of the EU subsidiary so that damages could not be paid to the issuer or investor. As the first option immediately requires litigation before third country courts, this section does not elaborate upon this option.

Concentrating on the second option, at first sight, might seem pointless: why would investors and issuers bring proceedings against an EU subsidiary, while the assets of that subsidiary were depleted? But by suing the subsidiary, investors and issuers can try to sue the parent company in a Member State as co-defendant, thereby keeping the legal proceedings before the courts of a Member State. As the grounds for jurisdiction under Article 4 and Article 7 Brussels I Regulation (recast) do not apply to defendants that are not domiciled in the EU,[258] whether it is possible to bring proceedings before the courts of a Member State in this type of cases depends on national rules of Private International Law.[259] If a Member State court assumed jurisdiction, it must

258 Art. 6 (1) Brussels I Regulation (recast). A national court can assume jurisdiction under Art. 26 (1) Brussels I Regulation (recast) if a defendant appeared before court voluntarily.

259 *See* Dutta 2014, p. 36. For instance, under Art. 6 (e) Wetboek van Burgerlijke Rechtsvordering, Dutch courts can assume jurisdiction in matters relating to obligations arising from wrongful acts, if the harmful event occurred or may occur in the Netherlands. Furthermore, Dutch courts can assume jurisdiction over other defendants if the claims against a defendant in relation to which the Dutch courts are competent and the other defendants are connected to such an extent that joint consideration is justified from the perspective of efficiency (Art. 7 (1) Wetboek van Burgerlijke Rechtsvordering). An EU Study on Residual Jurisdiction has shown that the legal systems of most Member States involve rules on the consolidation of claims, so that the opportunity could exist for issuers and investors to sue a parent company of a credit rating agency established in a non-EU country before the courts of a Member State together with the EU subsidiary (*cf.* General Report prepared by A. Nuyts, *Study on Residual Jurisdiction*, 3 September 2007, p. 50, available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf, last accessed at 31 August 2019). However, there are differences between the Member States. Under German law, for instance, the possibilities for the joinder of defendants are limited. The 'international joinder' of parties is allowed only in exceptional situations (the study on German law, p. 13, available at http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_germany_en.pdf, last accessed at 31 August 2019). But, see also on the jurisdiction of German courts in relation

determine the national law applicable to the claim under the Rome II Regulation. In the absence of European or international rules on group liability,[260] the national laws of Member States might differ in the area of group liability.[261] Overall, issuers and investors must overcome many hurdles to obtain a judgment awarding damages against the parent of an EU subsidiary of a credit rating agency headquartered outside the EU.

Subsequently, upon obtaining a European judgment against the parent company, issuers and investors must enforce a judgment against a parent company in the United States (according to the example provided at the beginning of this section). This all boils down to whether a judgment of a court of a Member State could be recognised and enforced in the US.[262] The recognition and enforcement of foreign 'money' judgments in the US is regulated by the 2005 Uniform Foreign Money-Judgments Recognition Act ('2005 Uniform Act') and by its former version, the 1962 Uniform Foreign Money-Judgments Recognition Act ('1962 Uniform Act'),[263] which have been implemented by the states. Considering the fact that the parent companies of Standard & Poor's and Moody's are established in the state of New York, the implementation of the 1962 Uniform Act in the Civil Practice Law & Rules of New York (2012) are most important in practice.

For a US court to consider the recognition of a foreign-country judgment, the judgment shall 'grant or deny recovery of a sum of money' and shall be final, conclusive and enforceable under the law of the foreign country.[264] The courts of New York can refuse to recognise foreign-country judgments on several grounds. For instance, because a foreign court did not have personal jurisdiction over the defendant.[265] § 5305 (a) Civil Practice Law & Rules of New York (2012) lists six categories of situations in which a court shall not refuse recognition for lack of personal jurisdiction.[266] The example described

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to claims brought against credit rating agencies established in third countries, Bundesgerichtshof 13 December 2012, III ZR 282/11, *NJW* 2013, pp. 386-387, *BeckRS* 2013, 1088 (appeal of Oberlandesgericht Frankfurt 28 November 2011, 21 U 23/11, ECLI:DE:OLGHE:2011:1128.21U23.11.0A, *BeckRS* 2011, 27061)). For an argument in favour of extending the Brussels I Regulation (recast) to defendants not established or domiciled in the EU in the context of credit rating agencies, Risso 2016.

260 *See* Olaerts 2014, p. 11.

261 For instance, under Dutch law, a parent company and a subsidiary company are separate legal entities, so that liability of a parent company must often find its basis in a wrongful act of the parent company (*cf.* Kroeze, Timmerman & Wezeman 2013, p. 230). If a parent company deliberately minimised the assets of its subsidiary in order to prejudice creditors, a victim might succeed in bringing a claim against a parent company based on Art. 6:162 BW (*see* Asser/Maeijer/Van Solinge & Nieuwe Weme 2-II* 2009/839).

262 This section provides only a brief overview of US Private International Law.

263 Brand 2018, pp. 11-12 and *cf.* Symeonides 2008, no. 730.

264 § 3 (a) 2005 Uniform Act and § 3 1962 Uniform Act.

265 § 5304 and § 5304 (a) (2) Civil Practice Law & Rules of New York (2012). *Cf.* Symeonides 2008, no. 735.

266 *Cf.* Symeonides 2008, no. 735.

above – in which a judgment has to be enforced against a parent company of a credit rating agency headquartered in New York – will, however, not often fall within one of these six categories.[267] Yet, the list of § 5305 (a) Civil Practice Law & Rules of New York (2012) is not exhaustive. On the contrary, courts may also recognise other 'bases of jurisdiction' under § 5305 (b) Civil Practice Law & Rules of New York (2012).[268] In the state of New York, this 'catch-all provision'[269] is understood to mean that the courts of New York are entitled to recognise a foreign-country judgment in situations in which the foreign court assumed jurisdiction based on a ground that is recognised in internal New York law as well.[270] In *Sung Hwan Co.*, the Court of Appeals of New York held that 'the inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares our notions of procedure and due process of law'.[271] Hence, the key question for recognition is whether the exercise of jurisdiction of the court of a Member State is consistent with New York law.

Overall, if a parent company of an EU subsidiary were to actually minimise the assets of its EU subsidiary, issuers and investors must overcome many hurdles to receive the damages awarded. Not only will they have to face more litigation, the legal proceedings may also take place before third country courts and have an unforeseeable outcome. As a result, the effects of Article 35a CRA Regulation would be hindered because issuers and investors are not able to easily enforce an EU judgment against an EU credit rating agency.

4.6 Concluding remarks

Through a broad overview of relevant Private International Law aspects, this Chapter aimed to answer the question of which issues occur, if any, in determining the competent court and the applicable national law in respect of claims based on Article 35a CRA Regulation. It must be emphasised that this Chapter was based on three assumptions. First, it was assumed that issuers and

267 For instance, under § 5305 (a) (5) Civil Practice Law & Rules (2012), if 'the defendant had a business office in the foreign country and the proceeding in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign country', recognition shall not be refused due to a lack of personal jurisdiction. However, as the parent companies of credit rating agencies have established subsidiaries (and not branches), the situation of credit rating agency liability will not fall within this category.

268 *See* Symeonides 2008, no. 735.

269 Sorkowitz 1991, p. 64.

270 Marino 2016, p. 4 in West's McKinney's Forms Civil Practice Law and Rules § 8:452 (CPLR art. 53) 2016.

271 *Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78, 83 (N.Y. 2006). *Cf.* Marino 2016, p. 4 in West's McKinney's Forms Civil Practice Law and Rules § 8:452 (CPLR art. 53) 2016, p. 4.

investors start proceedings before the courts of Member States, and that national courts must apply European rules of Private International Law. Second, it was assumed that the defendants are credit rating agencies established and registered in the EU. Third, for Private International Law purposes, this dissertation considers claims based on Article 35a CRA Regulation to be of a non-contractual nature, irrespective of the existence of an agreement between a credit rating agency and an issuer or an investor (section 4.2). The overview of relevant Private International Law aspects revealed multiple issues, which mainly originate from uncertainty as regards the application of general rules of Private International Law to disputes over credit rating agency liability and claims based on Article 35a CRA Regulation. Section 6.3.2 provides a more detailed analysis of these issues from the perspective of the normative framework.

Section 4.3 investigated on which legal basis Member State courts can assume jurisdiction in relation to claims based on Article 35a CRA Regulation. Depending on the concrete circumstances of the case, national courts can assume jurisdiction under Article 25 (1), Article 4 (1) or Article 7 (2) Brussels I Regulation (recast). It is, however, not always clear in which manner national courts must apply these rules to disputes over credit rating agency liability and to claims based on Article 35a CRA Regulation. Most issues – in terms of foreseeability and predictability for the stakeholders involved – will arise: (1) if a jurisdiction clause exists in favour of the courts of a third country (a non-Member State); and (2) if a national court must determine the *Erfolgsort* of financial loss under Article 7 (2) Brussels I Regulation (recast).

If a jurisdiction clause exists in favour of the courts of a third country, European rules of Private International Law do not provide guidance as to how national courts must assess the validity of such clauses: in accordance with national Private International Law or in accordance with the other – i.e. not Art. 25 Brussels I Regulation (recast) – provisions of the Brussels I Regulation (recast).[272] The latter option in fact ignores the existence of the jurisdiction clause and leads to the application of the other rules of the Brussels I Regulation (recast). The different options can lead to different decisions on the validity of exclusive jurisdiction clauses in favour of the courts of third countries. Whereas the first option leaves this matter to national rules of Private International Law, the second option sidesteps party autonomy. As contracts concluded by credit rating agencies can often include jurisdiction clauses in favour of the US courts, it is, hence, currently difficult for parties to predict whether Member State courts will uphold an exclusive jurisdiction clause in favour of third country courts. This lack of clarity is very unfortunate for credit rating agencies, issuers and investors.

272 Assuming that the Hague Choice of Court Convention does not apply.

In addition, uncertainty occurs if national courts must determine the *Erfolgsort* of financial loss under Article 7 (2) Brussels I Regulation (recast). The intangible nature of financial loss lies at the heart of the current uncertainty. Indeed, the main rule under Article 7 (2) Brussels I Regulation (recast) and the CJEU's distinction between *Handlungsort* and *Erfolgsort*[273] assume that loss occurs at a physical place, while the intangible nature of financial loss renders it difficult, if not impossible, to pin financial loss down to a physical place. In its recent decisions in *Universal Music*[274] and *Helga Löber v Barclays Bank*,[275] the CJEU did not designate a single, decisive connecting factor to locate financial loss. Instead, it emphasised that special jurisdiction under Article 7 (2) Brussels I Regulation (recast) must first and foremost be justified by a close connection between the national court and the action brought before it. Thereby, the CJEU returned to the basic principles underlying special jurisdiction and looked at the cases from a 'helicopter view'. This helicopter view provides room for manoeuvre and helps to avoid accidental and manipulated jurisdiction. Yet, applied to disputes over credit rating agency liability, its outcomes seem relatively favourable to issuers and investors. Other relevant connectors may indeed often coincide with the claimant's domicile or place of establishment, so that issuers and investors can bring proceedings before the courts of the Member States in which they are domiciled or established. Another problem associated with the helicopter view is that it does not help to solve cases in which the relevant connectors are spread over multiple countries, because it does not make a fundamental choice on the location of financial loss. In those situations, uncertainty continues as regards the manner in which national courts should locate the *Erfolgsort* of financial loss. As both issuer claims and investor claims based on Article 35a CRA Regulation involve financial loss, this uncertainty can also occur in cases involving credit rating agency liability and claims based on Article 35a CRA Regulation.

Section 4.4 investigated how national courts must determine the law applicable to claims based on Article 35a CRA Regulation. Whereas Article 35a (4) CRA Regulation refers to the applicable national law with ease, the analysis made in section 4.4 demonstrated that determining the applicable national law is anything but easy. Under the current state of the law, if parties have not made a choice of law, the law applicable to claims based on Article 35a CRA Regulation must be determined in accordance with Article 4 Rome II Regulation. Under Article 4 (1) Rome II Regulation, the law applicable to the dispute is the law of the state in which the losses occurred (*lex loci damni*), which corresponds to the connector of the *Erfolgsort* under Article 7 (2) Brussels

273 ECJ 30 November 1976, C-21/76, ECLI:EU:C:1976:166 (*Handelskwekerij Bier v Mines de Potasse d'Alsace*), para 24.

274 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).

275 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

Regulation (recast). The unforeseeability and unpredictability stemming from the CJEU's case law in the context of the *Erfolgsort* of financial loss has more problematic effects in relation to the assessment of the applicable national law, as the *loci damni* is the main rule. An analogue application of the case law of the CJEU in *Universal Music* and *Helga Löber v Barclays Bank* entails that national courts must return to the basic principles underlying the Rome II Regulation and must look at cases from a helicopter view. This helicopter view however does not help to solve cases in which the relevant connecting factors are spread over different countries, because it does not make a fundamental choice on the location of financial loss. In those situations, uncertainty continues. In the context of Article 35a CRA Regulation, the lack of certainty is unfortunate, as the applicable national law is the cornerstone for stakeholders to structure their claims and defences and is essential for stakeholders involved to assess whether a claim may be successful.

Slightly outside the scope of the main question posed in this Chapter, section 4.5 provided a brief oversight of issues that could occur at the stage of recognition and enforcement of European judgments awarding compensation in the form of damages to issuers and investors. As the CRA Regulation does not require credit rating agencies established and registered in the EU to hold certain amounts of capital, credit rating agency groups could hinder the enforcement of European judgments by minimising the assets of their EU subsidiaries. Investors and issuers might end up in new proceedings (possibly before third country courts) with unforeseeable outcomes, so that the effects of Article 35a CRA Regulation may be hindered. This issue is, however, not discussed further in the other parts of this dissertation.