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

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5 Interpretation and application Article 35a under Dutch, French, German and English law

5.1 INTRODUCTORY REMARKS

Article 35a CRA Regulation creates a right of redress for issuers and investors, which they can invoke directly against credit rating agencies. The Union legislature combined EU and national law in this right of redress: the conditions are set at the EU level and the interpretation and application of the majority of these conditions is left to the Member States under Article 35a (4) CRA Regulation (in detail, section 2.5.4.2). As a result of this structure, national courts cannot apply Article 35a CRA Regulation without assistance of the applicable national law. In fact, except for the infringements listed in Annex III, Article 35a CRA Regulation submits all terms used in the provision to the interpretation and application of the applicable national law. To be able to conclude whether Article 35a CRA Regulation has created an adequate right of redress for issuers and investors, an understanding of the meaning of its terms under Member State laws is, therefore, crucial.

Chapter 5 aims to contribute to this understanding by means of a legal comparison in respect of the interpretation and application of the terms of Article 35a CRA Regulation under four Member State laws. The object of this legal comparison is to explain how the requirements of Article 35a CRA can be interpreted and applied under the four national laws selected – namely Dutch, French, German and English law – and to compare the outcomes, concentrating on both similarities and differences. If the comparison reveals differences, this research aims to analyse to what extent these differences can lead to different outcomes in decisions of national courts on claims for compensation based on Article 35a CRA Regulation.

This rather voluminous Chapter essentially comprises four parts. Section 5.2 describes the research method adopted for the purpose of the legal comparison, and accounts for methodological choices made in respect of the legal comparison. Section 5.3 provides an analysis of the conditions and terms of Article 35a CRA Regulation. These conditions and terms form the main thread running through the legal comparison. At section 5.3, we thus pick up where we left off in the analysis of Article 35a CRA Regulation at the end of Chapter 3 (section 3.5.3 'Stakeholders defined and scope of application'). Subsequently, sections 5.4 – 5.7 present country reports for Dutch, French, German and English law. Each national law report starts by describing the main features of the legal system and the legal bases available in the legal system prior to

the introduction of Article 35a CRA Regulation in 2013. Afterwards, the national law reports concentrate on the interpretation and application of terms such as 'intention', 'gross negligence', 'impact', 'reasonably relied', 'due care', 'caused' and 'damages'. Finally, section 5.8 investigates which similarities and differences exist between the four national interpretations and applications and concludes whether any existing differences can lead to different decisions on civil liability claims based on Article 35a CRA Regulation.

5.2 METHODOLOGY

5.2.1 Approach

5.2.1.1 Three parts

Methods for legal comparative research are 'goal-oriented', in the sense that the object of the comparison largely determines which method shall be employed.[1] The goal of this Chapter is to explain how the requirements of Article 35a CRA Regulation be interpreted and applied under the four national laws selected – namely Dutch, French, German and English law – and to compare the outcomes, concentrating on both similarities and differences. Bearing this goal in mind, the reports of the national laws will involve three parts: (1) a general introduction into the national system of private law; (2) a description of the national rules relating to the civil liability of credit rating agencies and the remedies available to issuers and investors under the national legal system; and (3) the interpretation and application of the terms of Article 35a CRA Regulation under the national law. The first and second part are auxiliary to the third part. They explain the core principles of the national systems of private law and aim to clarify the national approach to credit rating agency liability and remedies available to issuers and investors in brief outline, respectively. The third part, on the interpretation and application of the terms of Article 35a CRA Regulation under that national law, must be read against the background provided by the first and second parts.

5.2.1.2 Part 2: Comparison through functional method

The research method applied in the second part of the national law reports is of a 'functional' nature. Having been developed by famous legal comparatists such as Zweigert and Kötz, 'functionality' was traditionally considered 'the

1 *The importance of the object of the comparison is emphasised by e.g.* Oderkerk 2015, p. 622 and Örücü 2012, p. 573. *The importance of the wording of the research question is emphasised by e.g.* Van Hoecke 2015, p. 29 and Adams & Bomhoff 2012, pp. 6-7.

basic methodological principle' of legal comparative research.[2] The functional method requires a legal comparatist to start from a specific problem or set of facts and to subsequently investigate how a legal system deals with that problem or what rules apply to that set of facts.[3] It takes as a starting point that countries experience similar problems and solve those problems in similar manners.[4] The functional method received severe criticism over the years, for presuming that states solve similar problems in similar manners and for concentrating on black letter law without taking (legal) culture and context into consideration.[5] Nevertheless, being aware of its pitfalls, the functional method suits the purpose of the second part of the legal comparison made in this dissertation best. In an attempt to avoid its pitfalls, a broad introduction of the underlying national principles of private law is provided and the analysis concentrates on both similarities and differences between the national laws.

The second part of the national law reports takes the broad factual situation as a starting point in which a credit rating agency issued an 'incorrect' or 'inaccurate' credit rating, as a consequence of which an issuer or investor has suffered (reputational or) pure economic loss. It is assumed that the incorrect or inaccurate credit rating was the result of a lack of reasonable care and skill exercised by a credit rating agency. The second parts involve analyses of various legal bases for compensation available under the four national laws. The second parts concentrate on common legal bases referred to in national academic literature and are not exhaustive.[6] They serve to provide background to the private law context in which the interpretation and application of the terms of Article 35a CRA Regulation must be read.

As announced in section 3.6.1, the national law reports distinguish between four basic factual situations. As regards claims for damages brought by issuers, this study makes a distinction on the basis of whether or not a contractual relationship exists between a credit rating agency and an issuer. In a similar manner, as regards claims for damages brought by investors, this study makes

2 Zweigert & Kötz 1998, p. 34. Although, prior to Zweigert & Kötz, Rabel's work already developed the first thoughts on functionality in comparative research, Dannemann 2006, p. 386.

3 Zweigert & Kötz 1998, pp. 34-35.

4 Zweigert & Kötz 1998, p. 34.

5 *E.g.* Siems 2018, pp. 33 ff., Van Hoecke 2015, pp. 9-11, Samuel 2014, pp. 79-81, Dannemann 2006, p. 388, Michaels 2006, p. 342 and Husa 2003, who criticised other aspects of the functional method as well. *For alternative methods see e.g.* Siems 2018, Van Hoecke 2015, p. 8, Örücü 2012, pp. 563-564, Michaels 2006, p. 341 and Husa 2003, p. 2.

6 This Chapter does not discuss legal bases for vicarious liability of credit rating agencies for loss caused by employees.

a distinction on the basis of whether or not a contractual relationship exists between a credit rating agency and an investor.[7]

5.2.1.3 Part 3: Comparison through terms and subjects

The third part of the national law reports is difficult to grasp in terms of a specific legal comparative method. It does not take a problem or specific set of facts as a starting point, but instead departs from the wording of Article 35a CRA Regulation, and investigates how the selected national laws interpret and apply certain terms and subjects in the context of credit rating agency liability. Following Article 35a (4) CRA Regulation, the description of the national laws will take the form of a *reversed* method of harmonious interpretation: EU law is interpreted and applied in light of national law.[8] One could also say that Article 35a CRA Regulation is treated as a general ground for civil liability that needs interpretation in order to be applied in practice, which forms a civil law approach.

The following terms and subjects form the main threads running through the four national law reports:

1. Article 35a (1):
   - Culpability: 'Intentionally' or 'with gross negligence'.
   - Causation: 'impact' and 'caused to', including claimant-specific requirements.
   - Loss and compensation: Investors and issuers must suffer 'damage' and can claim 'damages'.
2. Article 35a (3): Limitation of liability
3. Prescription

The national law reports focus on 'terms' and 'subjects', which may seem somewhat imprecise at first sight. It would, however, be artificial to concentrate only on the terms used by Article 35a CRA Regulation, and some general subjects could be discerned in the wording of Article 35a CRA Regulation.

This dissertation made a selection as to which 'terms' and 'subjects' would be compared. Such a selection was necessary, because, due to the fact that Article 35a (4) CRA Regulation refers all matters not covered by the CRA Regulation back to the applicable national law, a legal comparison could otherwise involve all sorts of different elements of national law relating to the civil liability of credit rating agencies. It was decided to restrict the comparison to terms and subjects mentioned by Article 35a CRA Regulation, with the

7 With regard to the legal bases for compensation available in the presence of contractual relationships, this dissertation will focus on general principles and norms of the national laws of contract, notwithstanding the power of the (commercial) parties involved to create their own terms that may expand the responsibility of credit rating agencies.

8 *As described in* section 2.5.4.2 (a). Lehmann described the structure of Art. 35a CRA Regulation as requiring 'nationally autonomous interpretation' (Lehmann 2016a, p. 75).

notable exception of the rules on prescription. The rules on prescription are dealt with because of their importance in practice and, moreover, because of the extremely short prescription period of one year introduced by the UK legislature in respect of claims based on Article 35a CRA Regulation.[9]

The substantive conditions for civil liability set by Article 35a CRA Regulation are closely related to aspects of civil procedure law. Article 35a CRA Regulation does not stipulate that the burden of proof in principle lies with issuers and investors as claimants, but only explicitly addresses a few specific aspects relating to the burden of proof and the standard of care.[10] The national law reports pay attention to evidentiary rules mainly in respect of the burden and standard of proof in respect of the condition of 'causation'. Due to the close connection between the substantive rules on causation and evidentiary law, it was decided to address the relevant rules together.

5.2.1.4 Presentation of the legal comparison

Choices had to be made on how the reports of national laws would be presented. In terms of structure, there are at least two different manners in which the legal comparison as a whole and the national law reports in particular could have been presented: successively and simultaneously. A successive presentation would involve: (1) a general introduction of the terms and subjects of Article 35a CRA Regulation; (2) four separate, complete reports of the national laws; and (3) a final comparative section structured per term or subject. A simultaneous presentation would first and foremost be structured per term or subject, with each term or subject involving an introduction, four (integrated) oversights of the national laws and comparative section per term or subject.[11] Both successive and simultaneous presentation have their advantages and disadvantages. The successive manner of presentation creates coherent oversights per national law, but the final comparative section needs to be read in strong conjunction with separate parts of the national law reports. The simultaneous manner of presentation can result in a clear comparison of the national laws per term or subject, but the general oversight of the national legal systems is rather easily lost. In light of the object of the legal comparison, this dissertation presents the reports on the national laws in a successive manner. The fact that the general terms and subjects investigated often relate to national doctrines which are strongly interrelated was of crucial influence

9 Art. 16 UK Implementing Regulations.

10 Art. 35a (2) CRA Regulation, for instance, places the burden of proof on issuers and investors in respect of the commitment of infringements and the impact of infringements on credit ratings. Courts may facilitate issuers and investors somewhat, as they are allowed to take into account that issuers and investors do not have access to information that is purely within the sphere of the credit rating agency. *See* section 5.3.1.3 (a).

11 *Cf.* Oderkerk 2015, p. 617.

in deciding to make use of the successive manner of presentation.[12] The alternative of discussing the national doctrines separately per term or subject bears the risk of taking these doctrines out of their national legal context. Instead, by offering four separate country reports, the reader is provided with a complete overview of the state of the law in each of the legal regimes investigated.

Despite the choice for a successive manner of presentation, the third parts of the national law reports nevertheless run the risk of taking national concepts out of their legal context. This risk follows from the fact that the third parts are structured in accordance with Article 35a CRA Regulation, while the structure of Article 35a CRA Regulation does not necessarily accord with the structure of the national legal systems investigated. The defence of contributory negligence can serve as an example. In all Member States investigated, a successful appeal to this defence entails a reduction of the amount of damages awarded to the claimant. However, the place of this defence in the systems of national tort law differs. Under French law, it would be apt to discuss this defence in the context of causation. French law considers contributory negligence to involve situations in which causation is shared between the claimant's and the defendant's conduct. Under English law, however, it would be apt to discuss this defence in the context of the calculation of damages. Hence, the successive manner of presentation could not avoid that choices in terms of structure had to be made for the purpose of the comparison, and that the systems of national tort law could not always be precisely reflected in the national law reports.

5.2.2 Legal systems involved

For the purpose of the legal comparison made in this Chapter, four national laws were selected: Dutch, French, German and English law.[13] The object of the comparison played an important role in selecting these national laws.[14] This dissertation takes Dutch law as a starting point, being the legal system the author is most familiar with. For the same reason, the report of the inter-

12 *In respect of this consideration cf.* Oderkerk 2015, p. 617.

13 This dissertation refers to the term 'English' law, but also refers to the UK legislature and to the Credit Rating Agencies (Civil Liability) Regulations 2013 as the UK Implementing Regulations. The United Kingdom involves the legal systems of England and Wales, Scotland and Northern Ireland. It was the legislature of the United Kingdom who implemented Art. 35a CRA Regulation in the UK Implementing Regulations, but this dissertation only looked at the interpretation and application of Art. 35a CRA Regulation from the perspective of the UK Implementing Regulations under the legal systems of England and Wales.

14 *For the importance of the comparison's object to determine which legal systems to include,* Oderkerk 2015, p. 604 and *cf.* Van Hoecke 2015, p. 5.

pretation and application of the terms and subjects under Dutch law eventually turned out to be the most extensive report. As this comparison aims to reveal similarities and differences in the interpretation and application of Article 35a CRA Regulation between the Member States and as it was impossible to investigate all Member State laws, it was decided to include the 'parent legal systems' that are representative of the European Union.[15] This decision led to the traditional selection of the civil law systems of France and Germany, and of the common law system of England.[16] This limited selection does not justify the conclusions of this dissertation to be generalised in respect of the European Union as a whole. At the same time, this limitation is not problematic in the context of this research, because the private law systems of other Member States are often based on French, German or English law or on a combination of these legal systems.[17] In a study on credit rating agency liability, Italian law could also provide interesting insights because, similar to German courts, Italian courts have dealt relatively often with cases on credit rating agency liability.[18] In the selection of the national laws for this study, however, Italian law was excluded because of the author's lack of knowledge of the Italian language.[19]

Upon the completion of this research on 3 September 2019, there was not yet certainty as regards the legal consequences of Brexit. Nevertheless, it was decided to include English law in this dissertation for two reasons. First, based on Article 3 (1) and Article 3 (2) (a) European Union (Withdrawal) Bill, the Regulations on credit rating agencies will form part of UK domestic law, so that Article 35a CRA Regulation and the national UK Implementing Regulations[20] will continue to exist at least for some time after Brexit.[21] One should

15 *In respect of this choice,* Oderkerk 2015, p. 608.

16 *See for this taxonomy e.g.* Zweigert & Kötz 1998, p. 41. *For an overview of taxonomies see* Siems 2018, p. 89. As part of UK law, this dissertation concentrates on the law of England. *For a more detailed explanation*, section 5.7.1.

17 *Cf.* Van Hoecke 2015, p. 24. In Dutch private law, for instance, elements of French, German and English law can be found, Van Hoecke 2015, p. 26.

18 *In civil proceedings e.g.* Tribunale di Roma 27 March 2015, Sez. Giurisprudenza, 13654 (on the standard of care and causation under Italian national private law), Tribunale Catanzaro 2 March 2012, no. 685, Sez. Giurisprudenza, 7041. *In civil proceedings on jurisdiction e.g.* Corte di Cassazione Civile, Sezioni Unite 22 March 2012, no. 8076 and Tribunale di Roma 7 February 2014. The Italian courts denied jurisdiction in both cases. *In criminal proceedings e.g.* Tribunale Penale di Trani 26 September 2017, no. 837/17 Reg.Sent. The Italian court rejected the criminal charges against analysts Standard & Poor's.

19 *For an Italian dissertation on credit rating agency liability e.g.* Picciau 2018a. *For a dissertation on credit rating agency liability involving a comparison between German and Italian law* Rinaldo 2017.

20 In full: The Credit Rating Agencies (Civil Liability) Regulations 2013 (2013 No. 1637), available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksi_20131637_en.pdf, last accessed at 31 August 2019.

21 The European Union (Withdrawal) Bill is available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf, last accessed at 31 August 2019.

note, however, that UK courts are no longer bound by decisions of the CJEU as from Brexit Day.[22] Second, the English approach to Article 35a CRA Regulation differs from the other national laws investigated and demonstrates how Member States can use their discretion under Article 35a CRA Regulation to limit its scope of application. Therefore, the English interpretation and application of Article 35a CRA Regulation forms an interesting study object.

5.2.3 Challenges in the field of legal sources and language

The variety in the types of legal sources available in the Member States and the different languages involved posed several challenges to this legal comparison. In respect of the legal sources used, the national law reports involve analyses of underlying national legal principles, statutory law, case law and academic legal literature. The reports describe the relevant general private law concepts and rules per term or subject first, and, subsequently, describe or predict their application in the context of credit rating agency liability as far as possible. The types and number of legal sources available in the field of credit rating agency liability varied from the one Member State to another, posing two main challenges.

First, the variety in the types of legal sources available made it challenging to make a well-balanced comparison between the national interpretations and applications of Article 35a CRA Regulation.[23] A multiplicity of examples illustrates this variety. Whereas the UK legislature adopted specific legislation in respect of credit rating agency liability, no such legislation exists under Dutch, French and German law. Furthermore, with the exception of German law, relevant case law is extremely scarce or simply non-existent. And although literature is available in all Member States investigated, German legal scholars produced by far the most in-depth analyses of Article 35a CRA Regulation and its interpretation and application.[24] As a consequence of this variety, the national law reports may put emphasis on statutory law and case law, or on academic literature predicting the interpretation and application of Article 35a CRA Regulation.

Second, the at times scarce amount of legal sources in the specific field of credit rating agency liability rendered it challenging to determine the exact interpretation and application of Article 35a CRA Regulation on some occasions. On such occasions, this study drew analogies with comparable factual situations in order to predict the way in which general private law rules may apply to disputes over credit rating agency liability. The scarcity of legal sources caused this approach to be commonly used among contributions in

22 Art. 6 (1) (a) and Art. 6 (2) European Union (Withdrawal) Bill.
23 *Cf. for this point in general* Dannemann 2006, p. 408.
24 *As explained in* section 5.6.2.

this field.[25] The comparable factual situations involve mostly other types of professional liability cases in which incorrect or incomplete information was disseminated to the public at large or to specific persons. Concrete examples involve the liability of credit scoring agencies, credit reference agencies, securities or financial analysts, auditors, valuers of property, issuers and banks in relation to misleading prospectuses and, occasionally, investment advisers and journalists. One should be cautious about deriving firm conclusions from these analogies. The extent to which it can be done depends on the exact circumstances of the case, and may also differ depending on the legal tradition. Sometimes, uncertainty on the application and interpretation continues to exist anyway. Needless to say, some uncertainty is inherent to a system of general rules that need to be applied to specific factual situations. But more general uncertainty relating to interpretation and application of Article 35a CRA Regulation will be considered in light of the normative framework employed in Chapter 6.

In respect of the languages involved, the comparative study required the translation of statutory law, case law and academic literature written in Dutch, French and German into the English language. Similar to other comparative research projects, this study had to face the challenge of providing adequate translations in English.[26] Difficulties arose in particular if English law and the other national laws investigated attached different meanings to the same English term or if the English language simply did not provide an adequate translation for a doctrine of another Member State investigated. To avoid national nuances from being lost in translation as much as possible, this dissertation often refers to terms in their original language and provides an accompanying translation in English. If the translation was derived from another source, reference to that source is made in the footnotes.

25 Most prominently in Dutch and English literature. *For Dutch literature e.g.* Atema & Peek 2013, De Savornin Lohman & Van 't Westeinde 2007 and Bertrams 1998. *For English literature e.g.* Getzler & Whelan 2017 and Ebenroth & Dillon 1992.

26 *This point was addressed by e.g.* Van Dam 2013, no. 103-3.

5.3 Terms and subjects of Article 35a

5.3.1 Article 35a (1)

5.3.1.1 Preliminary considerations

(a) Infringements[27]

Starting off the introduction of the terms and subjects involved in the legal comparison by paying attention to a part of Article 35a CRA Regulation that was actually harmonised at the EU level, might raise some eyebrows. Nevertheless, the infringements stated in Annex III of the CRA Regulation deserve special attention here, as claims for damages based on Article 35a (1) CRA Regulation must be first and foremost based on at least one of these infringements. This infringement-based liability provides Article 35a (1) CRA Regulation with its non-contractual character, as liability is linked to a violation of the Annex irrespective of whether a contract was concluded between issuers and credit rating agencies or investors and credit rating agencies.

Annex III CRA Regulation divides the infringements into three sections: (I) infringements related to conflicts of interest, organisational or operational requirements; (II) infringements related to obstacles to the supervisory activities; and (III) infringements related to disclosure provisions. Each of the infringements is linked to specific provisions of the CRA Regulation. The Union legislature formulated the infringements in accordance with the same pattern: the credit rating agency infringes a provision of the CRA Regulation by failures to adopt proceedings to avoid certain events from occurring or by failures to monitor its credit ratings, rating outlooks and rating analysts. For instance, infringement I.27 states that '[t]he credit rating agency infringes Article 7(1) by not ensuring that rating analysts, its employees or any other natural person whose services are placed at its disposal or under its control and who are directly involved in credit rating activities have appropriate knowledge and experience for the duties assigned'. Furthermore, infringement I.47 states that '[t]he credit rating agency infringes the second sentence of Article 8(5) by not establishing internal arrangements to monitor the impact of changes in macroeconomic or financial market conditions on credit ratings'. Hence, the infringements primarily relate to the conduct of the credit rating agency in general – e.g. not having established certain internal arrangements, and only in second instance to the conduct of the credit rating agency's employees and subordinates.

The infringements under Annex III serve two purposes, namely forming the basis for public enforcement by ESMA and forming the basis for private enforcement by issuers and investors. Initially, the infringements only served

27 *In more detail* Heuser 2019, pp. 124 ff., Dumont du Voitel 2018, pp. 105 ff., Wimmer 2017, pp. 130 ff. and Gass 2014, pp. 79 ff.

as a legal basis for fines imposed by ESMA under Article 36a (1) CRA Regulation. Upon the introduction of the third version of the CRA Regulation, the infringements also became the legal basis for civil liability under Article 35a (1) CRA Regulation. This double function explains why some of the infringements listed in Annex III mainly concern a credit rating agency's obligations towards ESMA and are not useful to issuers and investors in claims for civil liability.[28] Infringement II.5 for instance states that '[t]he credit rating agency infringes Article 11 (3), in conjunction with point 2 of Part I of Section E of Annex I, by not providing to ESMA a list of its ancillary services'. It is almost needless to say that this infringement is not useful for the purpose of private enforcement, as it is difficult to see how this infringement can impact a specific credit rating and can cause loss to issuers and investors.[29]

In the context of private enforcement, issuers and investors will concentrate on the infringements that can impact the height of a credit rating and can cause financial or reputational loss as a consequence. As discussed in the literature, infringements that issuers and investors can use in practice are for instance:

- Infringements I.19-I.22 on a credit rating agency's failure to identify, eliminate or manage and disclose actual or potential conflicts of interest that may influence the analyses of rating analysts.[30]
- Infringement I.27 on a credit rating agency's failure to ensure that its rating analysts have appropriate knowledge and experience for the duties assigned.[31]
- Infringement I.42 and I.42b on a credit rating agency's failure to take adequate measures to ensure that its credit ratings and rating outlooks are based on a thorough analysis of all available information relevant to its analysis according to the applicable rating methodologies, and on a credit rating agency's failure to ensure that a change in a credit rating complies with its published rating methodologies, respectively.[32]
- Infringement I.46 and I.46a on a credit rating agency's failure to monitor its credit ratings on an ongoing basis or at least annually, and on a credit rating agency's failure to monitor its sovereign ratings on an ongoing basis or at least every six months.
- Infringement I.47 on a credit rating agency's failure to create internal arrangements to monitor the impact of changes in macroeconomic or financial market conditions on credit ratings.[33]

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28 Gass 2014, p. 82.

29 *Cf.* Lehmann 2016a, pp. 73-74. *See also* section 5.3.1.3 (a) on the requirement of 'impact'. *As criticised by* Wimmer 2017, p. 403. *Cf. also, and for other examples,* Heuser 2019, p. 125 and Gass 2014, pp. 93 ff.

30 *As mentioned by* Van der Weide 2013, p. 216.

31 *As mentioned by* Van der Weide 2013, p. 216. *Also* Gass 2014, pp. 104-105.

32 *As discussed by* Lehmann 2016a, p. 73. *Also* Gass 2014, pp. 105-110.

33 *As discussed by* Lehmann 2016a, pp. 73-74.

The burden of proof with regard to the infringements is harmonised at the EU level and lies with issuers and investors pursuant to Article 35a (2) CRA Regulation. They must 'present accurate and detailed information indicating that the credit rating agency has committed an infringement of this Regulation, and that that infringement had an impact on the credit rating issued'. At the same time, courts may facilitate issuer claimants and investor claimants slightly, as they are allowed to take into consideration that the investor or issuer may not have access to information that is purely within the sphere of the credit rating agency.[34]

Yet although Article 35a (2) CRA Regulation allows courts to take the difficult position of issuers and investors into account, issuers and investors still face the heavy evidentiary task of having to prove the occurrence of an infringement and the required degree of culpability. Issuers and investors can consider basing follow-on actions on fines imposed upon credit rating agencies by ESMA. The fact that a fine was imposed at least proves that a credit rating agency negligently committed an infringement.[35] Yet, as discussed, not every infringement that can be fined by ESMA is useful in the context of civil liability, for the infringement may not be able to impact a credit rating assigned. This applies, for instance, to a fine imposed upon Moody's for infringements relating to the incorrect publication of rating methodologies and the incorrect manner in which a credit rating was presented (infringements III.3 and III.6)[36] and to a fine imposed upon DBRS for infringements relating to mistakes made in the establishment of a properly functioning compliance department within the credit rating agency (infringement I.11-I.14).[37]

(b) Circle of organs and persons that could commit infringements

Another topic that deserves attention prior to the introduction of the terms and subjects that will be compared, is the scope of the circle of organs and

34 The European Commission's Proposal for the CRA III Regulation initially proposed to introduce a presumption relating to the required impact in respect of investors: 'Where an investor establishes facts from which it may be inferred that a credit rating agency has committed any of the infringements listed in Annex III, it will be for the credit rating agency to prove that it has not committed that infringement or that that infringement did not have an impact on the issued credit rating', COM(2008) 704 final, p. 33. The current wording of Art. 35a (1) CRA Regulation hence places a heavier burden upon the investor.

35 Under Art. 36a (1) CRA Regulation, simple negligence is required only: 'Where, in accordance with Art. 23e(5), ESMA's Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2. […]'

36 Board of Supervisors 23 May 2017, ESMA41-137-1005, available at www.esma.europa.eu/sites/default/files/library/esma41-137-1005_decision_of_the_board_of_supervisors_to_adopt_a_supervisory_measure_and_impose_fines_with_respect_to_infringements_by_moodys_deutschland_gmbh_and_moodys_investors_service_limited.pdf, last accessed at 31 August 2019.

37 Board of Supervisors 24 June 2015, ESMA/2015/1048, available at www.esma.europa.eu/sites/default/files/library/2015/11/2015-1048.pdf, last accessed at 31 August 2019.

persons within a credit rating agency that can commit infringements. The infringements listed in Annex III impose obligations upon credit rating agencies in general. But as defined under Article 3 (1) (b) CRA Regulation, credit rating agencies are 'legal persons whose occupation includes the issuing of credit ratings on a professional basis', so that they cannot actually commit infringements themselves, let alone do so intentionally or with gross negligence.[38]

The question is who belongs to the circle of organs and persons that could commit infringements. The board and its members, managers, rating committees, lead analysts or 'normal' analysts can commit infringements, but it is the wording of a specific infringement that forms the decisive factor in answering this question. Taking a closer look at the infringements, the wording of some of them points at failures to take adequate (organisational) measures at the level of the management board or by managers, such as infringements I.19, I.20, I.27, I.42 and I.47. The wording of others suggests more substantive mistakes made by rating committees, lead analysts or normal analysts, such as infringements I.21, I.42a, I.42b, I.46 and I.46a. Infringement I.42a, for instance, stipulates that '[t]he credit rating agency infringes Article 8(2) by using information falling outside the scope of Article 8(2)'. Rating committees, lead analysts and normal analysts can commit this infringement. As a consequence of the approach taken in this dissertation that the wording of infringements determines the relevant circle of organs and persons, it is argued that this element of Article 35a CRA Regulation does not fall within the competence of Member States.

The question of whether determining the relevant circle of organs and persons is a matter of EU law or national law, however, has been answered differently as well. As appears from the UK Credit Rating Agencies (Civil Liability) Regulations 2013, the UK legislature considered it a matter of national law.[39] Indeed, the wording of Article 3 and 4 (2) UK Implementing Regulations strongly suggests far-reaching restrictions to the circle of organs and persons that can commit infringements. Article 3 stipulates that 'an infringement shall be considered to have been committed intentionally by the credit rating agency if the senior management of the credit rating agency acted deliberately to commit the infringement', while Article 4 (1) involves the same sort of provision

38 *See* Heuser 2019, p. 137.

39 *See also for a similar approach* Art. 5 Irish Implementing Regulations, European Communities (credit rating agencies) (civil liability) regulations 2015, S.I. No. 399 of 2015 available at www.irishstatutebook.ie/eli/2015/si/399/made/en/pdf, last accessed at 31 August 2019. The Irish Implementing Regulations acknowledge that other employees can commit infringements as well, but link the infringements to inadequate supervision: 'the infringement was committed by one or more employees or officers of the credit rating agency (not being members of senior management) and – (i) the infringement would not have occurred but for the absence of supervision and control of those employees or officers by one or more members of senior management, and (ii) that absence of supervision and control was reckless.'

in respect of gross negligence. For the definition of 'senior management', the UK Implementing Regulations refer back to Article 3 (1) (n) CRA Regulation that provides the following definition: 'the person or persons who effectively direct the business of the credit rating agency and the member or members of its administrative or supervisory board'. The UK Implementing Regulations hence do not literally state that only the senior management can commit infringements. However, Article 3 and 4 (1) will have this effect, as, on the one hand, Article 35a CRA Regulation inextricably links committing an infringement to the required degree of culpability of intent or gross negligence, while, on the other hand, the UK Implementing Regulations restrict intentional and grossly negligent conduct of the credit rating agency to intentional and grossly negligent conduct of the senior management alone. For that reason, the UK Implementing Regulations can be interpreted to restrict the scope of application of Article 35a CRA Regulation by entailing that in fact only the senior management can commit infringements actionable under the English interpretation of Article 35a CRA Regulation.

The wording of Article 3 and 4 (2) UK Implementing Regulations does not come straight out of the blue, but bears resemblance to Article 36a (1) CRA Regulation. Article 36a (1) CRA Regulation states that ESMA can impose a fine on a credit rating agency when it has intentionally or negligently committed one of the infringements listed in Annex III. Furthermore, an infringement has been committed 'intentionally' when ESMA finds objective factors which demonstrate that the credit rating agency *or its senior management* acted deliberately. Nevertheless, I strongly doubt that the scope of application of Article 35a CRA Regulation can be restricted in this manner by the applicable national law. First, Article 36a (1) CRA Regulation not only refers to the senior management but also to the credit rating agency in general. But, more importantly, the wording and spirit of the infringements must be leading in this regard.

The question of whether determining the relevant circle of organs and persons is a matter of EU law or national law was answered differently also by Gass. In his analysis of the interpretation and application of Article 35a CRA Regulation under Austrian law, Gass qualified determining the relevant circle of organs and persons as a matter of 'attribution' of conduct to credit rating agencies. He argued that attribution of conduct must be assessed by the applicable national law, because attribution of conduct is a question following upon the elements of 'intent' and 'gross negligence', which are also referred back to the applicable national law. Subsequently, he used the wording of the infringements and the Austrian rules on the attribution of conduct of organs to legal persons and the rules on vicarious liability of employees to argue that both the conduct of organs and employees must be attributed to credit rating agencies.[40]

40 Gass 2014, pp. 122-124. *For the same approach as Gass,* Dumont du Voitel 2018, pp. 130-131. Heuser implicitly considered the attribution a matter of German law, *see* Heuser 2019, p. 137.

Although I agree with the final conclusion drawn by Gass that a credit rating agency is liable for the conduct of organs and employees, I do not agree that national law is necessary to reach this conclusion. Questions regarding the relevant circle of organs and persons do not, as Gass suggests, follow upon an analysis of intentional or grossly negligent conduct. Instead, the relevant circle of organs and persons must be clear from the outset, prior to assessing whether these organs or persons have acted intentionally or with gross negligence. And, as described, the wording and spirit of the infringements determines the relevant circle of organs and persons. Moreover, an actual application of national rules on attribution and vicarious liability often feels artificial, especially since national rules on vicarious liability create separate legal bases for risk-based liability for the acts and omissions of others, while Article 35a CRA Regulation creates a legal basis for fault-based liability of the credit rating agency itself.[41] National rules on risk-based liability hence cannot be directly applied in the scope of Article 35a CRA Regulation, and can only serve as a source of inspiration revealing the national approach to matters such as attribution and vicarious liability. For these reasons, it was decided not to include a legal comparison of the rules on attribution and vicarious liability of the Member States investigated.

41 *Cf. national grounds for vicarious liability under* Art. 6:170 BW, Art. 1242 CC and § 831 BGB. If Member States apply the doctrine of attribution broadly, analysing the rules on attribution in the context of Art. 35a CRA Regulation feels less artificial because the conduct of natural persons is attributed and counts as the conduct of the credit rating agency itself. The credit rating agency can then be held responsible 'for its own conduct'. For instance, Dutch law applies the concept of attribution broadly; unlawful conduct can qualify as unlawful conduct of a legal person if the conduct counts as the conduct of the legal person according to generally accepted standards (*in het maatschappelijk verkeer*), the *Babbel*-criterion (Hoge Raad 6 April 1979, ECLI:NL:HR:1979:AH8595, *NJ* 1980/34 annotated by C.J.H. Brunner (*Kleuterschool Babbel*). *See also* Hoge Raad 11 November 2005, ECLI:NL:HR:2005:AT6018, *NJ* 2007/231 annotated by J.B.M. Vranken (*Ontvanger v Voorsluijs*), para 3.6. *E.g.* Katan 2017, no. 119-120, Asser/Hartkamp & Sieburgh 6-IV 2015/326-328, Hoekzema, *Groene Serie Onrechtmatige Daad*, note VIII.7.1.1.3 and De Valk 2009, pp. 48-49). Under German law, the conduct of boards, board members, other constitutionally appointed representatives and leading subordinates can be attributed under § 31 BGB (Bundesgerichtshof 30 October 1967, *Entscheidungen des Bundesgerichtshofes*, Band 49, p. 21. *As referred to by e.g.* Palandt/Ellenberger 2019, BGB § 31, no. 6 and Hoekzema 2000, pp. 134-135, *also* MüKoBGB/Leuschner, 8. Aufl. 2018, BGB § 31, no. 12-13 and *cf.* Dumont du Voitel 2018, p. 131). *Cf. in the context of credit rating agency liability under German law* Heuser 2019, p. 137. In comparison, under French law, only the conduct of directors and organs will be attributed (*see e.g. with respect to organs* Cour de Cassation (Chambre Civile 2) 17 July 1967, Bulletin 1967, II, no. 261. *See also* Cour de Cassation (Chambre Civile 2) 27 April 1977, 75-14761, Bulletin 1977, II, no. 108, p. 74. *Cf. also* Bacache-Gibeili 2016, no. 197 and Sotiropoulou 2012, no. 491), so that the separate ground for risk-based liability under Art. 1242 CC plays a more important role.

5.3.1.2 'Intentionally' or 'with gross negligence'

The third part of the national law reports begin with analyses of the terms 'intentionally' and 'with gross negligence'. Article 35a (1) CRA Regulation does not involve fault-based liability in the form of simple negligence. Instead, the Union legislature increased the threshold for civil liability by requiring a credit rating agency to have committed an infringement intentionally or with gross negligence.[42] This degree of culpability relates to committing infringements listed in Annex III, instead of causing loss to issuers and investors.

The Union legislature found this high threshold for liability justified by the 'fundamentally forward looking' character of credit ratings and the fact that 'the activity of credit rating involves a certain degree of assessment of complex economic factors and the application of different methodologies may lead to different rating results, none of which can be considered as incorrect'.[43] Furthermore, the high threshold was considered legitimate because a claim based on Article 35a (1) CRA Regulation, if awarded, potentially exposes credit rating agencies to unlimited liability.[44] However, these justifications do not preclude that from an evidentiary law point of view, this high threshold is difficult to prove for investors and issuers, even if the burden of proof can be mitigated slightly in favour of investors and issuers by national courts under Article 35a (2) CRA Regulation.

The interpretation and application of 'intentionally or with gross negligence' is left to the applicable national law.[45] What constitutes 'grossly negligent' conduct can only be assessed concretely in relation to a specific case, so that the analyses that will be made in the national law reports will remain somewhat abstract. The European Commission's Proposal for the third version of the CRA Regulation aimed to provide some guidance, by submitting that '[a] credit rating agency acts with gross negligence if it seriously neglects duties imposed upon it by this Regulation'.[46] This explanation, however, was not included in the final version of the CRA III Regulation.

42 In contrast, ESMA can impose fines upon credit rating agencies if they committed infringements intentionally or negligently under Art. 36a (1) CRA Regulation. *Also* Heuser 2019, pp. 136-137.

43 Recital 33 CRA III Regulation.

44 Recital 33 CRA III Regulation.

45 The reference to the term 'intention' is in contradiction to the wording of Art. 35a (4) CRA Regulation and Recital 35 CRA III Regulation that terms that have not been defined in the CRA Regulation should be interpreted under the applicable national law, because the term 'intention' is defined under Art. 36a (1) CRA Regulation. Therefore, it seems not justified for the term 'intention' to be interpreted under the applicable national law. However, as Art. 35a (4) CRA Regulation explicitly stipulates that this term needs national interpretation, the national law reports will pay attention to this term anyway.

46 COM(2011) 747 final, p. 33.

5.3.1.3 'Impact' and 'caused to', including claimant-specific requirements

Article 35a (1) CRA Regulation explicitly addresses four aspects of causation. First, the provision requires the infringement listed in Annex III to have had an impact on the credit rating, thereby building the first part of the bridge between an infringement and the eventual loss suffered by issuers and investors. Second, a causal relationship must exist between the infringement which resulted in the affected credit rating and the loss suffered by the claimant, thereby building the second part of the bridge between an infringement and the eventual loss suffered by issuers and investors. In addition, Article 35a (1) CRA Regulation introduced two claimant-specific requirements for issuers and investors to fulfil. Although Article 35a CRA Regulation treats these matters as separate conditions for civil liability, in essence they all concern causation. Therefore, the national law reports will address all aspects of causation under the same heading. Furthermore, because of the close connection between the substantive rules on causation and rules of civil procedure, it was decided to discuss both types of rules together. The national law reports, however, mainly concentrate on substantive private law.

(a) 'Impact'

Article 35a (4) CRA Regulation explicitly refers the term 'impact' back to the applicable national law. Although, therefore, the interpretation and application of the term 'impact' forms part of the legal comparison, this reference to the applicable national law is superfluous from a substantive law perspective. Irrespective of the substantive law approach to causation adopted under the national laws investigated, it seems a matter of common sense that an infringement will be considered to have had an impact on a credit rating if, without the infringement having occurred, the credit rating would have been different (higher or lower). A glance at the European Commission's Proposal for the CRA III Regulation supports this approach. The Proposal stated that '[a]n infringement shall be considered to have an impact on a credit rating if the credit rating that has been issued by the credit rating agency is different from the rating that would have been issued had the credit rating agency not committed that infringement'.[47] Moreover, if the infringement committed would not have brought any change to a credit rating, it is hard to imagine how issuers or investors can prove they have suffered loss due to the infringement. As put forward by Wimmer, it is difficult to see why the legal protection of issuers and investors would be justified if the credit rating was not affected by the infringement committed.[48]

Although Article 35a (4) CRA Regulation refers the term 'impact' back to the applicable national law, rules on the burden and standard of proof relating

47 COM(2011) 747 final, p. 33.
48 Wimmer 2017, p. 154.

to the requirement of 'impact' can be found under Article 35a (2) CRA Regulation. This section stipulates that it is for issuers and investors 'to present accurate and detailed information indicating that the credit rating agency has committed an infringement of this Regulation, and that that infringement had an impact on the credit rating issued'. At the same time, courts may facilitate the claimant, as they can take into consideration that the investor or issuer may not have access to information that is purely within the sphere of the credit rating agency.[49] Even though credit rating agencies must publish parts of their rating methodologies, models and key assumptions under Article 8 (1) CRA Regulation,[50] the requirement was criticised for placing a too heavy burden on issuers and investors.[51]

(b) 'Caused to', including claimant-specific requirements

(i) – Infringement – credit rating – loss

Concentrating on the wording of the second aspect of causation, it is remarkable that Article 35a (1) CRA Regulation requires the existence of a causal relationship between the infringement and the loss suffered, instead of the existence of a causal relationship between the affected credit rating and the loss suffered.[52] This construction must be understood in light of the system of Article 35a CRA Regulation. Indeed, the civil liability of a credit rating agency originates from the commitment of an infringement rather than from the assignment of an affected credit rating itself. However, taking the wording literally, this system does not entirely correspond with reality.[53] It requires a direct causal relationship between the infringement and the loss suffered, while in fact loss caused in the context of Article 35a CRA Regulation can be compared with a domino effect: the commitment of an infringement leads to an affected credit rating of a different category, which in turn eventually causes loss suffered by issuers and investors. Moreover, the causal link between the affected credit rating and the loss suffered is essential, because the impact justifies the protection of issuers and investors. It seems, therefore, apt to

49 *E.g.* A. de Montesquiou, 'Agences de notation: pour une profession règlementée (rapport)', 18 June 2012. *Also e.g.* Chacornac 2014, no. 1062, Clédat 2012, para II.E and Denis 2011, p. 77. The European Commission's Proposal for the CRA III Regulation initially proposed to introduce a presumption for the requirement of impact in respect of investors: 'Where an investor establishes facts from which it may be inferred that a credit rating agency has committed any of the infringements listed in Annex III, it will be for the credit rating agency to prove that it has not committed that infringement or that that infringement did not have an impact on the issued credit rating', COM(2011) 747 final, p. 33. The current wording of Art. 35a (1) CRA Regulation, thus, places a heavier burden upon investors.

50 Sections 3.3.2.2 and 3.4.3.

51 *Cf. e.g.* Heuser 2019, p. 269 and Wimmer 2017, pp. 403-404.

52 *As remarked by* Wimmer 2017, pp. 207-208 and Gietzelt & Ungerer 2013, p. 342.

53 *Cf.* Wimmer 2017, p. 210 and Gietzelt & Ungerer 2013, p. 342. Both contributions pointed out that requiring causation between the affected credit rating and the loss suffered would correspond better with reality.

explain the requirement of causation between the infringement and the loss suffered in such way that it is also linked to the affected credit rating.[54]

(ii) – Substantiating causation

The way in which the second aspect of causation is substantiated depends on the factual perspective chosen by issuers and investors, upon whom the burden of proof for causation rests.[55]

Issuers can argue that their increased funding costs and/or reputational loss would not have occurred without the infringement committed by the credit rating agency and the affected credit rating.[56] They can derive evidence, for instance, from expert reports showing the causal link between the height of a credit rating and the funding costs or from rating triggers in loan documentation.[57] Yet providing such evidence alone does not entitle issuers to compensation. In addition, Article 35a (1) CRA Regulation contains an issuer-specific requirement relating to causation: an issuer may not have caused the infringement itself by having provided misleading and inaccurate information to the credit rating agency directly or through information publicly available. When an issuer provided misleading and inaccurate information, the causal relationship between the infringement and the loss is broken. As a consequence, the issuer is not entitled to compensation under Article 35a CRA Regulation at all.[58]

In case of a claim for damages brought by an investor, there is a wider range of factual scenarios that can underlie the claim for damages and can substantiate the second aspect of causation.[59] Pijls and De Jong described these scenarios in the general context of the disclosure of misleading statements

54 *Cf.* Wimmer 2017, p. 210. French scholars automatically explained the requirement of causation in this manner, A. de Montesquiou, 'Agences de notation: pour une profession règlementée (rapport)', 18 June 2012 : '*puis établir que la notation est à l'origine de préjudice subi*'. *See also* Chacornac 2014, no. 1062 and Denis 2011, para II.B.

55 In the context of misleading statements disseminated to the financial markets in general, Pijls 2018, p. 174. See previously section 3.5.3.2 and 3.5.3.3 for further factual scenarios.

56 *Also* section 3.6.2. As will be shown, the burden of proof of causation initially lies with the claimant in the Member States investigated.

57 *Cf.* Sotiropoulou 2013, para 28. Thépot 2010, para B.2, however, remarked that the sole existence of a rating trigger does not render the loss suffered by the issuer foreseeable under French law. A description of the procedural methods investors can use to demonstrate the influence of credit ratings falls outside the scope of this research.

58 In the absence of Art. 35a (1) CRA Regulation, failures to meet this additional issuer-specific requirement could also have another effect. Such failures could alternatively give rise to defences, such as contributory negligence, as to reduce the amount of damages awarded to issuers. Yet as the wording of Art. 35a (1) CRA Regulation implies that damages can only be claimed if this issuer-specific requirement is fulfilled, the defences under the applicable national law hardly play a role.

59 *Also* section 3.6.3.

disseminated to the financial markets.[60] These factual scenarios are also relevant for disputes involving credit rating agency liability. The following paragraphs describe two possible scenarios, based on the situation in which an investor decided to purchase financial instruments. Similar lines of argument can be followed in case an investor decided to continue to hold its financial instruments or to sell its financial instruments.

First, the investor can base its claim for damages on the statement that had the credit rating agency complied with its obligations under the CRA Regulation, and had the credit rating not been affected, the investor would not have invested in these financial instruments or in this issuer at all. As described by Pijls in the general context of the disclosure of misleading statements disseminated to the financial markets, an investor's reliance can take multiple forms. Translated into the context of credit rating agency liability, investors can have relied directly on the affected credit rating and investors can have relied on investment advice that was based on the affected credit rating. The third form described by Pijls, that investors can have relied on a market sentiment caused by misleading information, is less relevant in the context of credit rating agency liability.[61] From a civil procedure law perspective, the investor must provide evidence that it relied upon the credit rating when making the investment decision and, in the absence of the affected credit rating, it would have made an alternative, better investment decision instead.[62] Hereafter, under (c) (i), the evidentiary problems associated with this burden of proof will be discussed.

Second, the investor can submit that had the credit rating agency complied with its obligations under the CRA Regulation, and had the credit rating not been affected, the market price of the financial instruments and the coupon rate or yield would have been more beneficial to the investor.[63] In contrast to the first line of reasoning, the investor does not claim to have relied on the credit rating itself. Instead, the investor claims to have relied on the 'integrity' of the financial markets.[64] From a procedural law perspective, the investor must provide evidence that the credit rating influenced the market price or the initial coupon rate.[65]

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60 *These factual scenarios were described by e.g.* Pijls 2018, p. 31 and De Jong 2010, pp. 44-46 in the context of the disclosure of misleading statements disseminated to the financial markets in general.

61 *Cf.* Pijls 2018, p. 177. *Cf. also on this factual scenario,* De Jong 2010, pp. 44-46. *In the context of credit rating agencies,* Wimmer 2017, p. 194.

62 *Cf.* Pijls 2018, pp. 176-179. *Cf. also on this factual scenario,* De Jong 2010, pp. 44-46. Under the legal systems investigated, the burden of proof of causation lies with the claimant as a matter of principle.

63 *In the context of credit rating agencies,* Wimmer 2017, p. 193.

64 *Cf.* Pijls 2018, pp. 174-176.

65 *See* section 3.3.4 on the influence of credit ratings on the prices and yields of financial instruments. A description of the procedural methods that investors can use to demonstrate the influence of credit ratings falls outside the scope of this study.

(c) Concentrating on 'reasonable reliance'

Article 35a (1) CRA Regulation does not only create an additional issuer-specific requirement, but also an additional investor-specific requirement. It stipulates that the investor 'may claim damages under this Article where it established that it has reasonably relied, in accordance with Article 5a(1) or otherwise with due care, on a credit rating for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating'. Hence, the Union legislature requires an investor to have reasonably relied on a credit rating and places the burden of proof of reasonable reliance on the investor.[66]

The way in which the Union legislature has framed the requirement of reasonable reliance under Article 35a (1) CRA Regulation is reminiscent of US securities law. Without diving into the details of US securities law, a claim for damages is subject to the requirement of reliance or transaction causation. In fraud-on-the-market cases, the requirement of reliance is explained as reliance on the integrity of the market prices. The investor does not need to prove direct reliance on the misleading information itself.[67] Yet, the investor must prove its reliance was 'reasonable'.[68] The investor-specific requirement of 'reasonable reliance' under Article 35a (1) CRA Regulation is reminiscent of the US requirement in that the reliance must have been 'reasonable'. However, in contrast to US securities law, the Union legislature did not facilitate an investor in providing evidence for reliance in the first place. Instead, the Union legislature did not distinguish between the question of whether the investor relied on a credit rating and of whether that reliance was reasonable.

The requirement of 'reasonable reliance' raises at least three important points, relating to the amount of successful claims based on Article 35a CRA Regulation (under (i)), the discretion of Member State laws to help investors meeting the requirement of reasonable reliance (under (ii)), and the different objectives the CRA Regulation aims to achieve (under (iii)). Furthermore, the wording of the requirement may also restrict the scope of application of Article 35a CRA Regulation to financial instrument ratings, as discussed in section 3.5.3.3 (b). Overall, the requirement of reasonable reliance and the corresponding burden of proof have significant influence on the scope of the right of redress created by Article 35a (1) CRA Regulation.

(i) – Limitations to successful claims

The requirement of 'reasonable reliance' and the burden of proof attached to this requirement limit the number of successful claims for damages based on Article 35a CRA Regulation.[69] Investors may have trouble proving they relied

66 This obligation is suggested by the fact that the Union legislature requires an investor to 'establish' reasonable reliance.

67 *Cf. in detail* Pijls 2018, pp. 136-140.

68 Pijls 2018, pp. 141-142.

69 *Cf. e.g.* Baumgartner 2015, pp. 525-526.

on credit ratings for their investment decisions. They can derive evidence, for instance, from transcripts of meetings or calls with investment advisers or the composition of the investment profile or the type of investment conduct.[70] Nevertheless, the reasons for investment decisions are not necessarily visible or noticeable from the outset, and it is often a combination of factors that determine investment decisions. An investor, therefore, may well have trouble providing evidence of direct reliance on a credit rating. Furthermore, a lack of reasonable reliance has drastic effects: it completely negates the causal relationship between the infringement and the affected credit rating and the loss completely. As will appear from the national law reports, one could imagine a lack of reasonable reliance to have less drastic effects as well. It could instead entitle a credit rating agency to a defence under the applicable national law, such as a defence based on contributory negligence. A successful defence reduces the amount of damages awarded to the investor, and does not lead to an all-or-nothing result.[71] Hence, as a result of potential evidentiary problems relating to reliance and of the drastic consequences of a lack of reasonable reliance, or evidence of such, the requirement of 'reasonable reliance' and the burden of proof attached to this requirement, limits the amount of successful claims for damages based on Article 35a CRA Regulation.

(ii) – Margin of discretion of national law

As investors may have trouble meeting the requirement of 'reasonable reliance', one can wonder whether and to what extent national laws are allowed to relax this requirement or to facilitate investors in meeting this requirement. Such relaxations or facilitations can lie in the sphere of substantive law or civil procedure law. An example of the former is the replacement of the requirement of reasonable reliance with the doctrine of loss of chance. An example of the latter is an evidentiary presumption of reasonable reliance.

The reference to 'reasonably relied' under Article 35a (4) CRA Regulation leaves room for debate as regards the discretion of Member States in respect of this requirement. On the one hand, a strictly grammatical interpretation of Article 35a (1) CRA Regulation suggests Member States cannot relax the requirement or facilitate investors; the provision clearly obliges investors to have reasonably relied on a credit rating and places the burden of proof of reasonable reliance on investors.[72] On the other hand, one can also interpret

70 *In the context of misleading statements and Dutch evidentiary law,* Pijls 2018, pp. 548-551 and De Jong 2010, p. 257. *Cf. also* Vandendriessche 2015, no. 339 on the relevance of the investor profile and investor sophistication.

71 This would be the case under Dutch law. See for a comparison between the effects of a lack of reasonable reliance under Dutch and US law, Pijls 2018, p. 142.

72 Heuser 2019, pp. 114-117. Heuser believed that concrete reliance – instead of abstract reliance on the integrity of market prices – is required under Art. 35a CRA Regulation. Contrary to Heuser, I would say this matter is left to the Member States. *See also on this topic* Heuser 2019, pp. 182-183.

the reference under Article 35a (4) Regulation as providing Member States with a large margin of discretion. This dissertation adopts the view that Member States have such as a large margin of discretion. Therefore, the requirement of 'reasonable reliance' is argued to apply in such way that Member States are allowed to relax the requirement of reasonable reliance and to facilitate investors in proving reasonable reliance. This flexible approach contributes to the full effect of the right of redress under Article 35a (1) CRA Regulation. Also, it accords with Article 35a (5) CRA Regulation, which stipulates that Article 35a CRA Regulation 'does not exclude further civil liability claims in accordance with national law'. One must realise, however, that the full effect of EU law and the principle of effectiveness cannot require Member States to adopt a flexible approach towards reasonable reliance. Member States can abide by the grammatical interpretation and apply Article 35a CRA Regulation restrictively.

(iii) – Conflicting objectives

The investor-specific requirement of reasonable reliance does not relate well to the objective to reduce overreliance on credit ratings, as expressed under Recital 9 CRA III Regulation.[73] The Union legislature was aware of the conflict arising between the requirement of reasonable reliance and the aim to reduce overreliance. It tried to reconcile both elements by explicitly stating that '[t]he fact that institutional investors including investment managers are obliged to carry out their own assessment of the creditworthiness of assets should not prevent courts from finding that an infringement of Regulation (EC) No 1060/2009 by a credit rating agency has caused damage to an investor for which that credit rating agency is liable' under Recital 36 CRA III Regulation.[74] Despite this attempt at reconciliation, however, the CRA Regulation nevertheless jumps back and forth between the aim of introducing an adequate right of redress and the aim of reducing overreliance on credit ratings.

5.3.1.4 Suffering 'damage' and claiming 'damages'

Article 35a (4) CRA Regulation refers the term 'damage' back to the applicable national law. Assessments as regards the existence of causation and loss, and the calculation of the amount of compensation cannot be strictly divided; on the contrary, the requirements of causation and loss are in fact often communicating vessels. The way in which the claimant frames the causal relationship determines the type or the amount of loss, and the other way around. For instance, when an investor claims it would not have bought the financial instruments had the infringement not been committed, the investor claims to have suffered loss to the extent of the full transaction costs. But when the

73 *As discussed by e.g.* Wimmer 2017, p. 394 and Van der Weide 2013, p. 217.
74 *As put forward by* Van der Weide 2013, p. 217.

investor approaches causation differently, and, for instance, argues that the impacted credit rating has affected the price of the financial instruments only, the investor's loss does not involve the full transaction costs but solely the extent to which the credit rating affected the price of the financial instruments. Due to this overlap, the divide between the sections on causation and damages can sometimes feel somewhat artificial, but it is necessary to draw a line to be able to compare the different national legal regimes investigated.

The different language versions show remarkable differences as regards the compensation that should be awarded to issuers and investors who fulfil the conditions of Article 35a (1) CRA Regulation. First, the English version deviates from the Dutch, French and German versions in respect of the available remedy. The English version entitles issuers and investors who suffered 'damage' as a consequence of the infringement to a right to claim 'damages'. This wording aligns with the typical approach under English law, whereas the main remedy under English law would be damages (a monetary sum). The other versions investigated use more generic terms to describe the remedy available, namely '*een belegger of uitgevende instelling [mag] een vordering wegens alle aan hem c.q. haar ten gevolg van die inbreuk toegebrachte schade tegen dat ratingbureau instellen*', '*un investisseur ou un émetteur peuvent demander réparation à cette agence de notation de crédit pour le préjudice qu'ils ont subi du fait de cette infraction*' and '*so kann ein Anleger oder Emittent von dieser Ratingagentur für den ihm aufgrund dieser Zuwiderhandlungen entstandenen Schaden Ersatz verlangen.*' The terms '*vordering wegens toegebrachte schade*', '*réparation'* and '*Ersatz*' are generic terms for compensation and do not point towards damages in the form of a monetary award directly – although compensation in the form of a monetary sum will be awarded in practice. Yet these differences are remarkable. Do they demonstrate that Article 35a CRA Regulation takes account of the fact that different language versions are used in different systems, or is it simply an example of hasty drafting? Second, the Dutch version deviates from the other versions investigated by stating that issuers and investors can submit a claim for 'all' loss suffered. It is not likely, however, that the Union legislature meant to suggest that compensation can be claimed for all loss suffered. So the difference in translation is peculiar and another example of hasty drafting.

Section 3.6 paid attention to the manners in which issuers and investors can suffer loss in the context of determining the competent court and the applicable law. Article 35a (4) CRA Regulation simply refers the term 'damage' back to the applicable national law. Recital 32 however provides some guidance as to what qualifies as an issuer's loss by explaining that '[c]redit ratings, whether issued for regulatory purposes or not, have a significant impact on investment decisions and on the image and financial attractiveness of issuers' and that a downgrade 'can impact negatively the reputation and funding costs of an issuer'. In respect of issuers, the CRA Regulation hence suggests that the damage can consist of both funding costs and reputational loss. The CRA

Regulation does not provide guidance on the question of what constitutes the loss of an investor exactly, so this question falls within the remit of the applicable national law. As a consequence, the national law reports will focus on what constitutes 'loss' and how compensation, i.e. the amount of damages, is calculated.[75]

In addition, the national law reports will focus on national legal mechanisms developed to limit the amount of damages awarded to issuers and investors. The reports concentrate on contributory negligence and mitigation. As stated in section 5.3.1.3, the claimant-specific requirements under Article 35a (1) CRA Regulation limit the relevance of the concept of contributory negligence, as failures to meet these requirements leave issuers and investors without a remedy at the EU level, while such failures could otherwise give rise to defences of credit rating agencies that could reduce the amount of damages. The claimant-specific requirements hence have the risk of barring tailor-made solutions by national courts in specific situations. The concept of contributory negligence can however still be relevant; for instance, when a credit rating agency has committed multiple infringements, while one of these infringements is caused partly by inaccurate information provided by the issuer. Furthermore, it can be questioned whether courts will not accept causation and reduce the damages due to contributory negligence in case an investor could have researched the risks of the investment more thoroughly to avoid an all-or-nothing approach.

5.3.2 Article 35a (3) – Limitations of liability in advance

Rating contracts, subscription contracts and terms of use of credit rating agencies' websites may well include clauses that aim to exclude or limit the civil liability of credit rating agencies. Article 35a (3) CRA Regulation provides little guidance on the admissibility of exclusion and limitation clauses in the area of credit rating agency liability:

> 'The civil liability of credit rating agencies, as referred to in paragraph 1, shall only be limited in advance where that limitation is:
> (a) reasonable and proportionate; and
> (b) allowed by the applicable national law in accordance with paragraph 4.
> Any limitation that does not comply with the first subparagraph, or any exclusion of civil liability shall be deprived of any legal effect.'

75 For a different approach to the recoverable loss, *see* Heuser 2019, pp. 144 ff. Heuser took as a starting point that the recoverable loss and the calculation of the amount of damages could be derived from the CRA Regulation itself.

Whereas the admissibility of limitation clauses is in fact left to the applicable national law, the use of exclusion clauses is thus completely prohibited. The initial proposal of the European Commission contained prohibitions of both exclusion and limitation clauses, but the prohibition of limitation clauses was not included in the final version of the CRA III Regulation.[76] The removal of this full prohibition corresponds with the approach taken in the first version of the CRA Regulation that the use of limitation clauses could be valid in certain situations, as appears from Recital 35 CRA I Regulation:

> 'In order to ensure the quality of credit ratings, a credit rating agency should take measures to ensure that the information it uses in assigning a credit rating is reliable. For that purpose, a credit rating agency should be able to envisage, inter alia, […] contractual provisions clearly stipulating liability for the rated entity or its related third parties, if the information provided under the contract is knowingly materially false or misleading or if the rated entity or its related third parties fail to conduct reasonable due diligence regarding the accuracy of the information as specified under the terms of the contract.'

Under Article 35a (3) CRA Regulation, the liability of credit rating agencies can be restricted in advance if such a limitation is reasonable and proportionate, and allowed by the applicable national law. Limitations that do not accord with these conditions or exclusions of civil liability 'shall be deprived of any legal effect'. The question arises as to where the line between exclusions and limitations can be drawn, and when a limitation can be considered to lead to a *de facto* exclusion of liability (which will unlikely be considered reasonable and proportionate).

Credit rating agencies can include limitations of liability in the terms of rating contracts and subscription contracts.[77] Furthermore, one can find limitations in general terms and conditions governing the use of credit ratings on credit rating agencies' websites. Some credit rating agencies submit the use of credit ratings to acceptance of their general terms in which a limitation of liability has been included. Limitations can take various forms; for instance, caps on the amount of damages in the form of a concrete sum or in the form of a certain percentage of the total value of the contract. A notice on the website of Standard & Poor's reads for instance: 'Notwithstanding the foregoing, to the extent permitted by law, the maximum liability of S&P, its affiliates, and their third party providers, to you for any damages with respect

76 *Also* De Pascalis 2015, p. 69. This section and the national law reports will not pay attention to disclaimers that would exclude or limit the obligations that follow from Art. 35a (1) and Annex III CRA Regulation, as it is expected that such disclaimers are not allowed under Art. 35a CRA Regulation for that would entirely deprive the provision from its effects.

77 This section and the national law reports do not determine the validity of limitations of liability included in contracts for solicited credit ratings that are directed towards investors and other possible users of credit ratings.

to the Web Site or Content related to access to or use of this site and its contents shall not exceed the greater of (a) the total amount paid by you to S&P for use of the Web Site during the 12 months immediately preceding the event giving rise to the alleged liability, or (b) U.S. $100.'

The complexity of the sections of the national law reports dealing with this matter lies in the fact that limitation clauses come in different sorts, while the circumstances of the case determine the validity of the clauses. Due to this wide range of possibilities, there is no way of stating whether and, if so, what limitations a legal system will allow exactly. However, the factors courts will take into account in assessing the admissibility of limitation clauses can be described more generally. In one respect, the legal systems investigated already converged: the Directive on unfair terms in consumer contracts arranged for a minimum level of consumer protection against unfair terms included in general or standard (i.e. not-individually negotiated) terms and conditions.[78] Rather little attention will however be paid to the national implementations of the Unfair Terms Directive, as its relevance in the context of credit rating agency liability is limited due to the fact that currently only one credit rating agency (Egan Jones) provides for paid subscriptions. But where an investor that qualifies as a consumer[79] is involved, any limitation of liability incorporated in general terms and conditions must be approached with caution. The limitation of legal rights, such as the right to damages, forms indeed part of the indicatory list of examples under the Unfair Terms Directive that may be regarded as unfair.[80]

5.3.3 Prescription

The final part of the legal comparison deals with the limitation periods of the selected legal systems. This subject cannot be explicitly linked to the terms referred back to the applicable national law under Article 35a CRA Regulation. The concrete reason why it was nevertheless decided to analyse the limitation periods adopted by the Member States is the extremely short limitation period of one year introduced by the UK Implementing Regulations.[81] This short

78 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. More specifically, Art. 8 Unfair Terms Directive for the character of minimum harmonisation.

79 Art. 2 (b) Unfair Terms Directive: ''consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;'.

80 Art. 3 (3) Unfair Terms Directive and Annex under (b) Unfair Terms Directive: 'inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;'.

81 Art. 16 UK Implementing Regulations.

period increases the attractiveness of English law for credit rating agencies, especially if other Member States employ longer limitation periods.

5.4 DUTCH LAW

5.4.1 National private law context

The first legal system addressed as part of this legal comparison is Dutch law. Dutch private law is an example of a civil law system. The codification of Dutch private law can mainly be found in the Burgerlijk Wetboek (BW, Dutch Civil Code), but rules of a private law nature have been codified in other statutes as well.[82] The first version of the Burgerlijk Wetboek dates from 1808 and was based on the French Code Napoleon.[83] Revised versions of the Burgerlijk Wetboek entered into force in 1838 and in 1992.[84] The latter revision provided the Burgerlijk Wetboek with its current 'layered' structure. Although the Burgerlijk Wetboek is rooted in the French Code Civil, the 'New' Burgerlijk Wetboek was influenced by other legal systems as well – most importantly by German law, but also by English law.[85]

One of the features of the Burgerlijk Wetboek is that it makes use of 'open norms', such as reasonableness and fairness (*redelijkheid en billijkheid*, Art. 6:2 and Art. 6:248 BW) and good faith (*goede trouw*, Art. 3:11 BW). Dutch courts must apply these open norms in concrete cases and can use them to alter unfair results in concrete cases.[86] An appeal to a limitation of a liability clause by the user of the clause must be in accordance with the principles of reasonableness and fairness under Article 6:248 (2) BW.[87] Another important example of an open norm can be found under Article 6:162 BW. Article 6:162 BW forms

82 Intellectual property law is codified in specific statutes, such as the Copyright Act (Auteurswet) and the Patents Act 1995 (Rijksoctrooiwet 1995). In the context of financial law, provisions of a private law nature are, for instance, Art. 1:25d Financial Supervision Act (Wet op het financieel toezicht) on the limitation of the civil liability of Dutch financial supervisors and Art. 4:61p Financial Supervision Act (Wet op het financieel toezicht) on the liability of depositaries, implementing the UCITS V Directive (no. 2014/91/EU) and AIFMD (no. 2011/61/EU).

83 As can be derived from the name 'Wetboek Napoleon, ingerigt voor het Koninkrijk Holland' (Code Napoleon, developed for the purpose of the Kingdom of the Netherlands). Asser/Scholten Algemeen deel* 1974, p. 173.

84 The date of 1992 is not entirely correct. The separate books of the Burgerlijk Wetboek have been adopted in the period between 1970-2012. In 1992, Book 3, 5, 6 and (a part of) 7 were adopted, which are the most important Books for the purpose of this dissertation. *As derived from the overview provided by* Smits 2012, p. 622.

85 *Cf. and for examples* Hartkamp 2017, no. 7. *Cf. also* Smits 2012, p. 620 and Taekema, De Roo & Elion-Valter 2011, pp. 20-21.

86 *Cf.* Hartkamp 2017, no. 15, Smits 2012, p. 622 and Taekema, De Roo & Elion-Valter 2011, pp. 270-271.

87 Section 5.4.4.

the general Dutch legal ground upon which aggrieved parties can base claims for non-contractual liability for unlawful acts. Dutch non-contractual liability law is not confined to a limited amount of unlawful acts or torts. Instead, one of the three types of 'unlawful acts' distinguished by Article 6:162 (2) BW involves situations in which a natural or a legal person acted contrary to, or omitted to take action contrary to, generally accepted standards or proper social conduct. Dutch courts must determine what constitutes an act or omission contrary to generally accepted standards in light of the specific circumstances of the case.[88] The open character of Dutch private law entails that it does not oppose the compensation of pure economic loss as a matter of principle.[89]

The Burgerlijk Wetboek divides Dutch private law into nine books. For the purpose of determining the interpretation and application of Article 35a CRA Regulation, this national law report makes use of the Dutch *vermogensrecht*[90] and, in particular, the Dutch law of obligations as codified in Book 6 BW on the law of obligations in general and in Book 7 BW on special contracts. At the basis of the Dutch law of obligations lies the rule that obligations can only result from the law, pursuant to Article 6:1 BW. Agreements (Art. 6:213 BW) and unlawful acts (Art. 6:162 BW) form important sources of obligations. On the basis of Article 6:74 BW (contractual liability) or Article 6:162 BW (non-contractual liability), a natural or legal person may owe an obligation to compensate loss suffered as a consequence of a breach of contract or an unlawful act or omission.[91] Dutch private law does not consider the concurrence of these bases for liability problematic. The aggrieved party can base its claim for compensation on both contractual and non-contractual liability, as long as the requirements of each ground are fulfilled.[92] Moreover, the outcomes of claims for damages based on contractual and non-contractual liability may be similar, because the Burgerlijk Wetboek involves a single set of rules on recoverable loss and the calculation of damages under Section 6.1.10 BW.[93]

88 *This example has been derived from* Taekema, De Roo & Elion-Valter 2011, p. 270.

89 *Cf. e.g.* Verschuur 2003, p. 13 and Barendrecht 1998, pp. 115 ff.

90 It is difficult to find a satisfactory English translation of the term '*vermogensrecht*'. Dutch '*vermogensrecht*' is an umbrella term that involves *goederenrecht* (property law) and *verbintenissenrecht* (the law of obligations).

91 *Cf.* Hartlief, Keirse, Lindenbergh et al. 2018, no. 2-3. Dutch non-contractual liability law starts from the principle that each party bears its own loss, unless the loss was brought about unlawfully.

92 *E.g.* Hoge Raad 26 March 1920, ECLI:NL:HR:1920:141, *NJ* 1920, pp. 476-479 (*Curiël v Suriname*), p. 476. *Cf.* De Graaff 2017, no. 39 and Hartlief, Keirse, Lindenbergh et al. 2018, no. 4.

93 Although differences continue to exist, *see* De Graaff & Bakker, *Groene Serie Onrechtmatige Daad*, note III.3.6 and De Graaff 2017, no. 40.

5.4.2 National rules on credit rating agency liability

5.4.2.1 Little attention to credit rating agency liability

Dutch private law lacks special provisions arranging for credit rating agency liability. As a consequence, prior to the introduction of Article 35a CRA Regulation, issuers and investors had to base claims for damages on the general grounds for liability codified in Book 6 of the Burgerlijk Wetboek on the law of obligations. Overall, the liability of credit rating agencies has not been a widespread topic of political and academic debate in the Netherlands.[94] The introduction of Article 35a CRA Regulation passed by the Dutch legislature almost unnoticed[95] and Dutch courts have hardly decided on any cases involving credit rating agency liability.[96] In terms of academic literature, Bertrams investigated the liability of credit rating agencies under Dutch private law in 1998, and only a few contributions have followed in the subsequent 20 years.[97] The contributions that do exist, and especially the ones published by Bertrams, De Savornin Lohman & Van 't Westeinde, Boersma and Atema & Peek, extensively investigate the civil liability of credit rating agencies under Dutch private law. Although these contributions do not all discuss the same liability grounds, a picture arises that claims for credit rating agency liability under Dutch law can be based on legal grounds for contractual liability and non-contractual liability and, more specifically, on the provisions with regard to unfair commercial practices and misleading and comparative advertising.

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94 Possibly due to the fact that credit rating agencies traditionally do not have established and registered themselves in the Netherlands.

95 In *Kamerstukken II* 2011/12, 22 112, 1298, no remarks were made with regard to credit rating agency liability. In *Kamerstukken I* 2011/12, 33 152, A, only the Progressive Liberal Democrats (D66) asked two questions on the requirement of reliance under Art. 35a CRA Regulation and on the interaction between Art. 35a CRA Regulation and Dutch private law.

96 The cases decided involved agencies that would not qualify as credit rating agencies under Art. 3 (1) (b) CRA Regulation. The services of these reference agencies involved checking the creditworthiness of third parties and disseminating the findings to their clients. In 2015, the District Court Amsterdam dismissed a claim for damages brought by GLS against 'credit rating agency' Graydon. It decided that Graydon had not breached its obligation to act with *zorgvuldigheid, deskundigheid and bekwaamheid* (due care, expertise and competence) as required under Art. 12.1 of the general terms and conditions of Graydon and as generally required under Dutch law (Rechtbank Amsterdam 14 January 2015, ECLI:NL:RBAMS:2015:6 (*GLS v Graydon*), para 4.3). In 2010, the District Court Rotterdam gave an interim judgment in a dispute between a rental company of fork-lift trucks and Dun & Bradstreet BV. The District Court Rotterdam never delivered a final judgment and the case was moved from the register ('*doorgehaald*') on the request of both parties. For the interim judgment, Rechtbank Rotterdam 29 December 2010, ECLI:NL:RBROT:2010:BP5369, *JOR* 2011/388 annotated by S.R. Damminga.

97 Bertrams 1998. *Furthermore e.g.* Jaakke 2014, Atema & Peek 2013, Brugman & Schonewille 2013, Haentjens & Den Hollander 2013, Van der Weide 2013, Duffhues & Weterings 2011, Boersma 2010, Van 't Westeinde 2009 and De Savornin Lohman & Van 't Westeinde 2007.

5.4.2.2 In the presence of a contractual relationship – issuers & investors[98]

Dutch private law qualifies contracts for solicited credit ratings and subscription contracts as 'agreements' under Article 6:213 (1) BW. Pursuant to Article 6:213 (1) BW, an agreement is a multilateral legal act ('*meerzijdige rechtshandeling*') by which a party or multiple parties take on obligations towards another or multiple other parties. When entering into rating contracts and subscription contracts, credit rating agencies and issuers, and credit rating agencies and investors take on obligations towards each other. More specifically, rating contracts qualify as '*overeenkomsten van opdracht*' (agreements for the provision of services) under Article 7:400 (1) BW.[99] A credit rating agency – as the provider of services – promises to assign a credit rating, which qualifies as agreeing to carry out activities that do not involve creating a work of a tangible nature, safekeeping items, publishing work or transporting persons or items as required under Article 7:400 (1) BW. The legal qualification of subscription contracts is less self-evident.[100] Dutch private law could qualify paid subscriptions as *koopovereenkomsten* (purchase agreements)[101] or as *overeenkomsten van opdracht* (agreements for the provision of services) under Article 7:400 (1) BW.[102] In my opinion, paid subscription contracts could qualify as agreements for the provision of services under Dutch law, because the business model of a credit rating agency that offers paid subscriptions is based on payments of investors for the assignment of credit ratings.

As a consequence of qualifying rating contracts and paid subscriptions as agreements for the provision of services, credit rating agencies are expected to exercise '*de zorg van een goed opdrachtnemer*' ('the care of a good provider of services') in the assignment of credit ratings pursuant to Article 7:401 BW.[103] Dutch courts approach this yardstick objectively and analyse what conduct could have been expected from a reasonable credit rating agency

98 Atema & Peek 2013, pp. 949-952, Duffhues & Weterings 2011, pp. 14-15, De Savornin Lohman & Van 't Westeinde 2007, pp. 9-10 and Bertrams 1998, pp. 357-359 and 364-365.

99 Atema & Peek 2013, p. 950, Duffhues & Weterings 2011, p. 14, De Savornin Lohman & Van 't Westeinde 2007, p. 9 and Bertrams 1998, p. 357.

100 The legal qualification of paid subscription contracts received little attention in Dutch academic literature. Duffhues & Weterings 2011, p. 14-15 and Bertrams 1998, p. 364.

101 *As defended by* Bertrams 1998, p. 364. It is questionable whether paid subscriptions qualify as 'purchase agreement' in the sense of Art. 7:1 BW, because purchase agreements can only involve the purchase of objects ('*zaken*') and property rights ('*vermogensrechten*'). However, the Dutch Supreme Court adopted a broad scope of application of Art. 7:1 BW, *see* Hoge Raad 27 April 2012, ECLI:NL:HR:2012:BV1301, *NJ* 2012/293 (*De Beeldbrigade v Hulskamp*), para 3.5. In this case, the Dutch Supreme Court qualified the purchase of software as a purchase agreement, because the agreement provided the purchaser with an individualised item for an unlimited period over which the purchaser could exercise factual power. Wessels 2015, no. 2.

102 *As defended by* Duffhues & Weterings 2011, pp. 14-15.

103 *In relation to rating contracts* Atema & Peek 2013, p. 950, Duffhues & Weterings 2011, pp. 14-15 and Bertrams 1998, p. 357.

placed in the same position as the defendant credit rating agency.[104] If a credit rating agency failed to exercise the care of a good provider of services in the assignment of a credit rating, the credit rating agency is liable. If the failure resulted in a breach of a credit rating agency's contractual obligations under the rating contract or the subscription contract, issuers and investors can base a claim for compensation on the general provision for contractual liability under Article 6:74 (1) BW.[105] If this failure resulted in an unlawful act, issuers and investors can also base a claim on Article 6:162 BW (discussed hereafter).

5.4.2.3 In the absence of a contractual relationship

(a) Issuers – Article 6:162 BW[106]

In the absence of a contractual relationship between a credit rating agency and an issuer, an issuer can base a claim for compensation relating to pure economic or reputational loss on Article 6:162 BW if a credit rating agency did not exercise reasonable care and skill in the assignment of the inaccurate unsolicited credit rating. Moreover, issuers can also base a claim for compensation on Article 6:162 BW in relation to solicited credit ratings, if the breach of contract also constituted an unlawful act. Article 6:162 (1) BW forms the general legal basis for non-contractual liability under Dutch private law.[107] The provision requires the commitment of an unlawful act, which can be attributed to the party who committed the unlawful act and which caused loss to the aggrieved party: '*Hij die jegens een ander een onrechtmatige daad pleegt, welke hem kan worden toegerekend, is verplicht de schade die de ander dientengevolge lijdt, te*

104 *In relation to rating contracts* Atema & Peek 2013, p. 950, who also pointed out that the provisions of the CRA Regulation can be used to substantiate the standard of care required by Art. 7:401 BW. *Also* Bertrams 1998, p. 358. *Cf. in general* Asser/Tjong Tjin Tai 7-IV 2018/93-94. This dissertation does not focus on the power of the parties involved to agree to specific responsibilities.

105 *In relation to rating contracts* Atema & Peek 2013, pp. 949-950. *Cf. in general* Asser/Tjong Tjin Tai 7-IV 2018/197.

106 *Discussed by* De Savornin Lohman & Van 't Westeinde 2007, pp. 10 and 17-18 and Bertrams 1998, pp. 359-360.

107 In theory, Art. 6:162 BW could be used by a broader category of aggrieved parties than issuers and investors alone, but only in as far as the violated norm aims to protect the interests of those aggrieved parties in accordance with the requirement of relativity under Art. 6:163 BW. One could think of situations in which competitors of an issuer were disadvantaged by a too positive credit rating assigned to the issuer. Atema & Peek, however, pointed out that it is questionable whether a credit rating agency owes a duty of care to competitors (Atema & Peek 2013, p. 960). As Dutch law does not involve special provisions for defamation, claims relating to reputational loss must be based on Art. 6:162 BW as well. *As can be derived from* Hartkamp 2016, p. 185 and De Savornin Lohman & Van 't Westeinde 2007, pp. 17-18.

vergoeden.'[108] Article 6:162 (2) BW distinguishes three categories of unlawful acts. The party who caused the loss must have (1) violated the aggrieved party's rights; (2) acted or omitted to take action contrary to its legal duties; or (3) acted or omitted to take action contrary to generally accepted standards or proper social conduct.[109]

An issuer can argue that a credit rating agency has committed an unlawful act belonging to each of the three categories listed above. As an example of the first category, an issuer could argue that the negligent assignment of an inaccurate credit rating resulted in a violation of its personality rights.[110] An example of the second category is a situation in which a credit rating agency has breached its obligations under Annex III CRA Regulation – although, in order to eventually succeed in a claim for damages, the issuer must fulfil the requirement of relativity under Article 6:163 BW.[111] An example of the third category is a situation in which a credit rating agency has failed to exercise reasonable care and skill in the assignment of a solicited credit rating and committed a so-called professional error.[112] The standard of care expected from professional parties is that they conduct themselves as can be expected from *een redelijk bekwaam en redelijk handelend beroepsbeoefenaar* (a reasonably competent and reasonably acting professional).[113] The concrete circumstances of a case determine what can be expected from a reasonably competent and reasonably acting professional party. The standard of care is equal to the standard of care under Article 7:401 BW, which provides that a professional party must exercise the care of a good provider of services.[114]

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108 If a subordinate of a credit rating agency, for instance an employee, committed an unlawful act in the scope of the exercise of its tasks, an issuer can also base a claim for compensation against the credit rating agency on Art. 6:170 BW for vicarious liability. This legal basis for civil liability will not be discussed in this dissertation.

109 *On the basis of* Art. 6:162 (2) BW: *'Als onrechtmatige daad worden aangemerkt een inbreuk op een recht en een doen of nalaten in strijd met een wettelijke plicht of met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt, een en ander behoudens de aanwezigheid van een rechtvaardigingsgrond.*' Asser/Hartkamp & Sieburgh 6-IV 2015/39 and 43.

110 De Savornin Lohman & Van 't Westeinde 2007, p. 17, who suggested the issuer can bring a claim based on defamation under Art. 6:162 BW.

111 This dissertation assumes that the obligations under Annex III CRA Regulation can have direct horizontal effect through Article 35a CRA Regulation. If that would not be the case, issuers are not able to invoke these obligations directly vis-à-vis credit rating agencies in national legal proceedings based on Art. 6:162 BW (*cf.* Asser/Hartkamp & Sieburgh 6-IV/44.1).

112 *Cf. in general* Asser/Hartkamp & Sieburgh 6-IV 2015/67.7.

113 Asser/Tjong Tjin Tai 7-IV 2018/200. *For this standard see e.g. with regard to accountants* Hoge Raad 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2008/528 annotated by C.C. van Dam (*Deloitte Touche e.a. v Vie d'Or*), paras. 5.3 and 5.4.2 and *with regard to lawyers* Hoge Raad 9 June 2000, ECLI:NL:HR:2000:AA6159, *NJ* 2000/460 (*S. v V.*), para 3.3.

114 *As stated by* Asser/Tjong Tjin Tai 7-IV 2018/200.

The norm of reasonable care and skill in the assignment of a credit rating applies to the assignment of unsolicited credit ratings as well.[115] The absence of a contractual relationship between a credit rating agency and an issuer does not discharge a credit rating agency from this obligation under Dutch law. This conclusion was derived from the approach of Dutch courts in cases concerning the unlawfulness of publications on products and legal entities.[116] In this type of case, a contractual relationship does not exist between the publisher and the producer or other legal entity. Dutch courts balance the freedom of speech of the publisher against the economic interests of the producers and legal entities. A publisher enjoys a wide margin of discretion, but its freedom is not absolute. Hence, a publication will not easily be considered wrongful, but it must be the result of professional (*deskundig*), objective (*objectief*) and clear (*duidelijk*) investigations. Because of the societal importance of these publications, Dutch courts set high standards on the prudence (*zorgvuldigheid*) exercised by the publisher.[117] Similar considerations apply to the publication of unsolicited credit ratings. The freedom of speech of a credit rating agency must be balanced against the economic interests of the issuer, while credit ratings are of high societal relevance. A credit rating agency enjoys a wide margin of discretion in the assignment of the credit rating, but the credit rating must be the result of professional (*deskundig*), objective (*objectief*) and clear (*duidelijk*) investigations. Dutch courts are expected to set high standards for the prudence (*zorgvuldigheid*) exercised by a credit rating agency.

(b) Investors

(i) – Article 6:193b & 6:194 BW

As described under (a), Article 6:162 BW forms the general legal basis for non-contractual liability under Dutch private law. This ground for civil liability will discussed hereafter, under (ii). First, this section pays attention to the possibilities for investors, who relied on a solicited credit rating attached to specific financial instruments, to base a claim for damages on Article 6:193b of the Section on Unfair Commercial Practices or on Article 6:194 BW of the Section on Misleading and Comparative Advertising included in the Burgerlijk

115 Bertrams also argued that no difference should be made between the obligations of a credit rating agency in respect of solicited and unsolicited credit ratings (Bertrams 1998, p. 360).

116 *As referred to by* Bertrams 1998, p. 360.

117 Hoge Raad 9 October 1987, ECLI:NL:HR:1987:AC1068, *NJ* 1988/537 annotated by C.J.H. Brunner (*Consumentenbond v Westerkamp Haweka*), para 3.3. *Repeated in* Rechtbank Amsterdam 8 September 2016, ECLI:NL:RBAMS:2016:5698 (*X v De Persgroep Nederland*), paras. 4.1-4.2 and Rechtbank Den Haag 30 September 2015, ECLI:NL:RBDHA:2015:11224 (*ANWB v Consumentenbond*), paras. 4.2-4.3. *Cf.* Rechtbank Den Haag 6 November 2018, ECLI:NL:RBDHA:2018:13142 (*Australian Gold LLC v Consumentenbond*), paras. 4.2-4.3.

Wetboek.[118] Contributions by Atema & Peek and De Savornin Lohman & Van 't Westeinde extensively investigated the possibilities for credit rating agencies being held liable by investors under these Sections already.[119]

Article 6:193b BW on unfair commercial practices and Article 6:194 BW on misleading advertisements serve to protect parties against unfair practices employed by professional parties or by persons acting on behalf of those professional parties. These provisions are *lex specialis* of Article 6:162 BW.[120] It is attractive for investors to try to base a claim on these *leges speciales*, because they allow investors to benefit from reversals of the burden of proof under the Sections on Unfair Commercial Practices and Misleading and Comparative Advertising.[121] These reversals deviate from the general rule under Article 150 Wetboek van Burgerlijke Rechtsvordering (Dutch Code of Civil Procedure), which stipulates that the burden of proof rests upon the claimant.[122]

Article 6:193b BW aims to protect consumers against unfair commercial practices conducted by traders.[123] In order to fall within the scope of this provision (1) the investor shall qualify as a 'consumer'; (2) the credit rating agency shall qualify as a 'trader'; and (3) the credit rating activity shall qualify

118 Section 3a and Section 4 of Title 3 Book 6 BW. Section 3a forms the implementation of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'). Section 4 forms the implementation of Directive 2006/114/EC concerning misleading and comparative advertising. Franx 2017, pp. 137 and 140-141.

119 Atema & Peek 2013, pp. 952-959 and De Savornin Lohman & Van 't Westeinde 2007, pp. 10-15. *See also* Franx 2017, pp. 341-344, Jaakke 2014, pp. 192-193, Van der Weide 2013, p. 217, Boersma 2010, pp. 21-22, Van 't Westeinde 2009, pp. 62-64 and Coskun 2008, pp. 612-613. The contribution of De Savornin Lohman & Van 't Westeinde related to Art. 6:194 Ancient BW. The scope of this provision used to be broader and covered both claims brought by consumers and parties acting in their business capacity.

120 *In respect of Art. 6:193b BW Kamerstukken II* 2006/07, 30928, 3, p. 14, De Graaff, *Groene Serie Onrechtmatige Daad*, note III.8.14 and note III.8.16. *Cf. in the context of prospectus liability e.g.* Asser/De Serière 2-IV 2018/452 and Timmerman 2013, p. 648.

121 *Already discussed by* Franx 2017, pp. 342-343, Jaakke 2014, p. 193, Atema & Peek 2013, pp. 954 and 959, Boersma 2010, p. 22, Van 't Westeinde 2009, p. 64 and De Savornin Lohman & Van 't Westeinde 2007, p. 15. *Cf. in general* Verkade 2011, no. 61-63 and 67 and Krans 2010, pp. 50-52.

122 Under Art. 6:193j (1) BW, consumer-investors must state that a credit rating was incorrect, upon which the credit rating agency must prove that the credit rating was correct. If the credit rating agency acted wrongfully under Art. 6:193b BW, the unfair commercial practice is attributed to the credit rating agency subject to proof to the contrary (Art. 6:193j (2) BW, Verkade 2016, no. 49 and 52). The Section on Misleading and comparative advertising provides for similar reversals of the burden of proof under Art. 6:195 (1) and (2) BW. The reversals apply only to persons or entities who determined the content of the misleading statement.

123 Art. 6:193b (1) BW – '*Een handelaar handelt onrechtmatig jegens een consument indien hij een handelspraktijk verricht die oneerlijk is.*'

as 'unfair commercial practice'. An investor can fall within the definition of a consumer under the Section on Unfair Commercial Practices if he qualifies as a natural person who does not act in the exercise of his profession or business.[124] This legal basis for liability, hence, does not apply to institutional investors.

The question arises whether a credit rating agency qualifies as a trader under Article 6:193b BW. Pursuant to Article 6:193a (1) (b) BW, the term 'trader' involves any natural or legal person acting in the course of its profession or business and anyone acting on behalf of a trader. As an example of 'anyone acting on behalf of a trader', Dutch parliamentary history refers to the legal concept *volmacht* (power of attorney).[125] However, an attorney is not the only example of a person that can act on behalf of a trader.[126] A credit rating agency can qualify either as a legal person acting in the course of its profession or business or, arguably, as a legal person acting on behalf of a trader (an issuer) when publishing a solicited credit rating on its website or when a credit rating is published in a prospectus.[127]

Furthermore, the question arises whether the publication of a credit rating can qualify as an unfair commercial practice. Under Article 6:193a (1) (d) BW, for the purpose of the Section on Unfair Commercial Practices, commercial practices involve all practices directly relating to the promotion, sale or supply of products to consumers. Pursuant to Article 6:193b (2) BW, commercial practices are unfair if they are contrary to the requirements of professional diligence and distort (or can distort) the ability of an average consumer to take an informed decision.[128] Commercial practices are particularly unfair if they qualify as 'misleading' in the sense of Article 6:193c BW. Under this provision, a commercial practice is misleading if it spreads factually incorrect information or information that can mislead the average consumer in respect of, for instance, the existence or the nature of the product and the main characteristics of the product.

The publication of credit ratings can fall within the definition of 'unfair commercial practice'. One can imagine a credit rating agency acting contrary to the requirements of professional diligence. Furthermore, due to the importance of credit ratings on the financial markets, one can imagine that an inaccurate credit rating could distort the ability of an average consumer investor[129]

124 Art. 6:193a (1) (a) BW.

125 *Kamerstukken II* 2006/07, 30928, C, p. 9. *Also* T&C BW, commentary on Art. 6:193a BW and Verkade 2016, no. 16.

126 *See* Rechtbank Rotterdam 23 May 2013, ECLI:NL:RBROT:2013:CA0879 (*Goltex v Autoriteit Consument & Markt*), in which a legal person that sent invitations for bus trips was considered to act on behalf of the trader who offered the bus trips (para 9.1). *Derived from* Verkade 2016, no. 16.

127 Franx 2017, p. 343.

128 *Translation based on* Warendorf et al.

129 Regarding this concept, see, hereafter, Art. 6:194 BW.

to take an informed investment decision in concrete cases. As explained by Atema & Peek, such a situation can occur especially in relation to structured finance ratings, because those credit ratings directly relate to the sale of financial instruments by the issuer and relate to financial products that could have a complex structure.[130] More in general, it can also be argued that the publication of solicited credit ratings assigned to issuers and financial instruments directly relates to the promotion and sale of financial instruments to consumer investors, due to the information function of credit ratings on the financial markets. An issuer can indeed request a credit rating to signal a certain level of creditworthiness to the financial markets. This will especially be the case if the solicited credit rating was included in a prospectus of financial instruments.[131] It seems, however, not possible to argue that an unsolicited credit rating directly relates to the promotion, sale or supply of products, because a request for the assignment of a credit rating of the issuer is lacking.

Article 6:194 BW aims to protect professional parties against the publication of misleading statements by a provider of goods or services acting in the course of its profession or business or by anyone acting on behalf of such a provider.[132] In order to fall within the scope of this provision: (1) the investor shall act in the exercise of its profession or business; (2) the credit rating agency shall have publicly issued a credit rating relating to financial instruments (which qualify as 'goods'[133]) on behalf of the issuer; (3) the issuer shall act in its professional or business capacity; and (4) the credit rating shall qualify as misleading. Following De Savornin Lohman & Van 't Westeinde and Atema & Peek in respect of the third condition, the publication of credit ratings attached to financial instruments on a website or in a prospectus qualifies as making information publicly available.[134] Article 6:194 BW will only find application in relation to solicited credit ratings, because it is required that

130 Atema & Peek 2013, p. 955.

131 Franx 2017, p. 343.

132 Art. 6:194 (1) BW – '*Hij die omtrent goederen of diensten die door hem of degene ten behoeve van wie hij handelt in de uitoefening van een beroep of bedrijf worden aangeboden, een mededeling openbaar maakt of laat openbaar maken, handelt onrechtmatig jegens een ander die handelt in de uitoefening van zijn bedrijf, indien deze mededeling in een of meer opzichten misleidend is, zoals ten aanzien van: a. de aard, samenstelling, hoeveelheid, hoedanigheid, eigenschappen of gebruiksmogelijkheden; […]*'.

133 Atema & Peek 2013, p. 957 and De Savornin Lohman & Van 't Westeinde 2007, p. 14. Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*) in which Art. 6:194 BW was applied to a case concerning prospectus liability. De Savornin Lohman & Van 't Westeinde (2007, p. 15) limit the application of Art. 6:194 BW to credit ratings included in a prospectus. Otherwise, they argue, 'such a rating does not concern a statement regarding goods or services that are offered'.

134 Atema & Peek 2013, p. 957 and De Savornin Lohman & Van 't Westeinde 2007, p. 13. The term 'publication' must be interpreted broadly, as held by the Dutch Supreme Court in Hoge Raad 2 December 1994, ECLI:NL:HR:1994:ZC1562, *NJ* 1996/246 annotated by D.W.F. Verkade (*ABN AMRO v Coopag Finance*), para 4.1. De Savornin Lohman & Van 't Westeinde 2007, pp. 13-14.

a credit rating agency must have acted on behalf of the issuer when assigning and publishing the credit rating.[135]

A core requirement of Article 6:194 BW is that the information published must be misleading. The misleading character of information can, for instance, relate to the nature, composition, quality or characteristics of the goods or services offered.[136] In *VEB v World Online*, the Dutch Supreme Court provided guidance on the misleading character of statements included in a prospectus.[137] One must approach the question whether a statement included in a prospectus is misleading from the perspective of the so-called '*maatmanbelegger*' (the average investor). According to the Dutch Supreme Court in *VEB v World Online*, a statement is misleading if it is reasonably plausible that the statement was of material importance for the investment decision of the average investor. The Dutch Supreme Court did not require that an investor was actually acquainted with the statement, but only that the statement was of material importance for the investment decision of an average investor so that it could have influenced the economic conduct of an investor.[138]

The question then arises whether the economic conduct of an average investor would be influenced by a credit rating. Depending on the concrete situation, credit ratings could have such influence. For instance, structured finance ratings may well influence the economic conduct of an average investor; credit ratings are indeed indispensable in structured finance in order to sell the products in the financial markets. More in general, it can also be argued that the publication of solicited credit ratings assigned to issuers and financial instruments can influence the economic conduct of an average investor, especially if the credit rating is gravely inaccurate or borders on the line between investment grade and speculative grade.[139]

(ii) – Article 6:162 BW

Investors can also base a claim for damages on the general provision for civil liability under Article 6:162 BW. The general remarks made in respect of Article 6:162 BW under section 5.4.2.3 (a) already apply in the context of investors as well. If an investor suffered loss as a consequence of an incorrect credit rating, it can argue that a credit rating agency has committed an unlawful act belong-

135 *As explained by* Verkade, Art. 6:194 BW does not apply to information disseminated by persons or entities that do not offer goods or services or do not act on behalf of persons or entities that offer goods or services, Verkade 2011, no. 16. This hence explains why Art. 6:194 BW does not apply to the publication of unsolicited credit ratings. *See* De Savornin Lohman & Van 't Westeinde 2007, p. 18 and Atema & Peek 2013, p. 957.

136 Art. 6:194 (1) (a) BW. *Translation derived from* Warendorf et al.

137 *For this analogue application* Atema & Peek 2013, pp. 957-958.

138 *Cf.* Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), para 4.10.4, *as referred to by* Atema & Peek 2013, p. 958.

139 Atema & Peek 2013, p. 958.

ing to the second category (the violation of legal duties) or the third category (the violation of generally accepted standards) listed under Article 6:162 (2) BW.[140] The second category covers situations in which a credit rating agency breached its obligations under the CRA Regulation – although, in order to eventually succeed in claiming damages, the investor must meet the requirement of relativity under Article 6:163 BW.[141] Apart from violations of their legal obligations under the CRA Regulation, credit rating agencies may owe a duty of care to investors under Dutch private law.[142] A breach of that duty of care can constitute an unlawful act of the third category.

The statement that credit rating agencies may owe a duty of care vis-à-vis investors in the absence of a contractual relationship deserves further explanation. In the absence of Dutch case law addressing this matter specifically, a credit rating agency's duty of care vis-à-vis investors can only be constructed by drawing analogies with other situations in which professional parties were held to owe a duty of care to third parties.[143] Whether a professional party owes a duty of care to a third party ultimately depends on the concrete circumstances of a case. In her dissertation, Van den Akker distilled Dutch case law into more general guidelines to determine whether a professional party owes a duty of care to a third party, including: (1) the capacity and the societal standing (*maatschappelijke positie*) of the professional; (2) whether the professional exercised a public task or statutory duty; (3) whether it was foreseeable that third parties would rely on the professional's conduct and whether that reliance was justified (*gerechtvaardigd vertrouwen*); and (4) whether the purpose of any existing agreement between the professional and its client was to serve the third party's interests.[144]

The meaning of these guidelines becomes clearer when looking at concrete examples of professional liability under Dutch law, such as the civil liability of accountants vis-à-vis parties other than the audited legal entity itself. An important consideration for the scope of a duty of care is the type of task performed by the accountant; whether the accountant performed a statutory

140 De Savornin Lohman & Van 't Westeinde 2007, p. 10.

141 This dissertation assumes that the obligations under Annex III CRA Regulation can have direct horizontal effect through Article 35a CRA Regulation. If that would not be the case, issuers are not able to invoke these obligations directly vis-à-vis credit rating agencies in national legal proceedings based on Art. 6:162 BW (*cf.* Asser/Hartkamp & Sieburgh 6-IV/44.1).

142 *E.g.* Franx 2017, p. 343, Boersma 2010, pp. 19-20, Van 't Westeinde 2009, p. 63, De Savornin Lohman & Van 't Westeinde 2007, pp. 15-16 and Bertrams 1998, p. 362. *In contrast,* Coskun 2008, pp. 612-613.

143 *An extensive construction was made by* Boersma 2010, pp. 19-22.

144 Van den Akker 2001, pp. 160-163, 163-165, 165-169, 169-171, respectively.

obligation or an individually agreed service.[145] In *Deloitte Touche e.a. v Vie d'Or*, the question arose whether the accountant of former insurer Vie d'Or was liable towards the former policy holders of Vie d'Or. The Dutch Supreme Court considered that the circle of parties that has an interest in the adequate performance of an accountant's task is broader than the audited legal entity alone. Third parties may expect in principle that financial information and statements required by law to be published, to the independent and objective opinion of the accountant, adequately reflect the status of the legal entity and comply with European and national law and with the general norms and standards of accounting. Moreover, third parties are allowed to base their conduct on the financial information and statements and to assume the financial information and statements are not misleading.[146] The case of *Deloitte Touche e.a. v Vie d'Or* concerned the control and approval of annual financial statements, which is often required by law and to which great public importance is attached. Therefore, the Dutch Supreme Court set high standards for the prudence (*zorgvuldigheid*) exercised by the accountant.[147] In contrast, when performing individually agreed services at the request of private parties, accountants do not fulfil a public task and, in principle, only owe a duty of care towards their clients.[148] Ultimately, the question of whether an accountant owes a duty of care towards third parties, however, depends on the concrete circumstances of the case. Even if an accountant performs individually agreed services, the scope of its duty of care can extend to third parties if the services are performed to the benefit of third parties or if the accountant can reasonably foresee that third parties will rely on the services provided.[149]

The considerations that play a role in the context of accountant's liability also play a role in the context of the duty of care owed by other types of

145 *Cf.* Parket Hoge Raad 14 October 2016, ECLI:NL:PHR:2016:1021, para 3.4. This case was eventually dismissed by the Dutch Supreme Court on the basis of Art. 81 Wet op de rechterlijke organisatie, Hoge Raad 16 December 2016, ECLI:NL:HR:2016:2876. An example of a statutory obligation is the control and approval a legal person's annual financial statements under Art. 2:393 BW and the publication of these statements under Art. 2:394 BW (*for other examples* Van den Akker 2001, p. 73). An example of an individually agreed service is the valuation of legal entities at individual requests (Van den Akker 2001, p. 74).

146 *Cf.* Hoge Raad 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2008/528 annotated by C.C. van Dam (*Deloitte Touche e.a. v Vie d'Or*), para 5.4.1.

147 Hoge Raad 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2008/528 annotated by C.C. van Dam (*Deloitte Touche e.a. v Vie d'Or*), para 5.4.1.

148 Parket Hoge Raad 14 October 2016, ECLI:NL:PHR:2016:1021, para 3.4. This case was eventually dismissed by the Dutch Supreme Court on the basis of Art. 81 Wet op de rechterlijke organisatie, Hoge Raad 16 December 2016, ECLI:NL:HR:2016:2876. *Also* Van den Akker 2001, p. 74.

149 Parket Hoge Raad 14 October 2016, ECLI:NL:PHR:2016:1021, para 3.4. This case was eventually dismissed by the Dutch Supreme Court on the basis of Art. 81 Wet op de rechterlijke organisatie, Hoge Raad 16 December 2016, ECLI:NL:HR:2016:2876. *Also* Van den Akker 2001, p. 75.

professional parties.[150] The societal importance of notarial deeds entails that third parties can often hold a notary liable for the inadequacy of notarial deeds.[151] Furthermore, a solicitor does not owe a duty of care to the opposite party in negotiations,[152] but owes a duty of care to a third party when providing a so-called third party opinion on its client to that third party.[153] And, due to their important societal standing, banks even owe a special duty of care (*bijzondere zorgplicht*) that can extend to third parties.[154] According to Kramer, a key factor in the scope of the duty of care owed by professional parties to third parties is the foreseeability of reliance by those third parties. A professional party is more likely to owe a duty of care towards third parties when it is foreseeable that third parties will act upon statements made by the professional party and that those third parties may suffer loss as a result of those acts.[155]

In the context of credit rating agency liability, a Dutch court must balance the considerations outlined above against each other. On the one hand, a credit rating agency does not perform a statutory task when assigning credit ratings. A credit rating agency instead assigns credit ratings on its own motion or performs a service as agreed with the issuer. In principle, therefore, one could argue that a credit rating agency is liable towards issuers only for failures to exercise reasonable care and skill in the assignment of credit ratings. On the other hand, the existence of an obligation to exercise reasonable care and skill

150 At this point, this dissertation does not consider the possibilities to exclude or limit the obligations owed by professional parties vis-à-vis third parties.

151 *In detail* Kramer 2017b, pp. 319-320. *See also* Asser/Tjong Tjin Tai 7-IV 2018/204 and Van den Akker 2001, pp. 139 ff.

152 *In detail* Van den Akker 2001, pp. 101-103. *See also* Asser/Tjong Tjin Tai 7-IV 2018/204.

153 *Cf.* Van Dijk 2016, no. 127 and Van den Akker 2001, p. 111.

154 *On the special duty of care owed by banks in general e.g.* Hoge Raad 9 January 1998, ECLI:NL:HR:1998:ZC2536, *NJ* 1999/285 annotated by W.M. Kleijn (*MeesPierson v Ten Bos*). *On the special duty of care owed to third parties e.g.* Hoge Raad 23 December 2005, ECLI:NL:HR:2005:AU3713, *NJ* 2006/289 annotated by M.R. Mok (*Safe Haven*), Hoge Raad 27 November 2015, ECLI:NL:HR:2015:3399, *NJ* 2016/245 annotated by T.F.E. Tjong Tjin Tai (*ABN AMRO v Van den Berg*) and Gerechtshof Amsterdam 14 May 2019, ECLI:NL:GHAMS:2019:1611 (*ING v Foodlocker*). *Cf.* Asser/Tjong Tjin Tai 7-IV 2018/204.

155 Kramer 2017b, p. 321. Kramer based these general conclusions on the decisions of the Gerechtshof Arnhem-Leeuwarden 16 June 2015, ECLI:NL:GHARL:2015:4385, *NJ* 2017/97 and Gerechtshof Arnhem-Leeuwarden 23 September 2014, ECLI:NL:GHARL:2014:7353, *NJ* 2016/483 (*Rabobank v X*). Both cases were eventually dismissed by the Dutch Supreme Court on the basis of Art. 81 Wet op de rechterlijke organisatie on the basis of Art. 81 Wet op de rechterlijke organisatie, Hoge Raad 16 December 2016, ECLI:NL:HR:2016:2876 and Hoge Raad 9 September 2016, ECLI:NL:HR:2016:2044 (*Rabobank v X*), respectively. The professional party can limit its duty of care by explicitly stipulating in the contract with its client that the information may not be used by third parties. As held by the Court of Appeal Arnhem-Leeuwarden, however, such limitation will not work if the professional knows the information will still be used by third parties and fails to take any measures against this use. Gerechtshof Arnhem-Leeuwarden 23 September 2014, ECLI:NL:GHARL:2014:7353, *NJ* 2016/483 (*Rabobank v X*), para 3.10, *as derived from* Kramer 2017b, pp. 321-322.

in the assignment of credit ratings vis-à-vis investors can be justified by the important function of credit rating agencies as gatekeepers, and by the important functions of credit ratings for financial markets. Market participants indeed still use credit ratings as external opinions on creditworthiness to make investment decisions and attach much importance to credit ratings as such. Moreover, credit ratings are meant to be used by third parties when issuers request credit ratings to be able to attract investments, as well as when issuers use credit ratings to comply with regulatory requirements.[156] As stated by Van 't Westeinde as well, these functions are not altered by the fact that credit rating agencies present credit ratings as mere opinions and limit the permitted use of credit ratings.[157] Consequently, it is reasonably foreseeable for credit rating agencies that credit ratings will be relied upon by investors and may cause them loss, so that the existence of a duty of care owed to investors could be adopted under Dutch private law.[158]

Finally, it must be assessed what conduct would constitute a breach of the duty of care. In the area of professional liability, professionals breach their duty of care if they fail to act as can be expected from a reasonably competent and reasonably acting professional.[159] What can be expected of a reasonably competent and reasonably acting professional must be determined in the concrete circumstances of the case. This standard of care is equal to the standard of care under Article 7:401 BW, namely that a professional must exercise the care of a good provider of services.[160]

5.4.3 Article 35a (1)

5.4.3.1 'Intentionally' or 'with gross negligence'

The Dutch version of Article 35a CRA Regulation translates the required degree of culpability as '*opzettelijk of met grove nalatigheid*'. The Burgerlijk Wetboek does not define these terms. Under Dutch law, conduct qualifies as intentional (*opzettelijk*) if a person deliberately and consciously acted or omitted something with the purpose of causing loss. In addition, conduct qualifies as intentional

156 Moreover, credit rating agencies are aware of that goal, Van 't Westeinde 2009, p. 63. *Also* Boersma 2010, p. 20 and Bertrams 1998, p. 362.

157 *Cf.* Van 't Westeinde 2009, p. 63.

158 *See* Boersma 2010, pp. 19-20, Van 't Westeinde 2009, p. 63 and Bertrams 1998, p. 362.

159 Asser/Tjong Tjin Tai 7-IV 2018/200. *For this standard see e.g. with regard to accountants*, Hoge Raad 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2008/528 annotated by C.C. van Dam (*Deloitte Touche e.a. v Vie d'Or*), paras. 5.3 and 5.4.2 and *with regard to lawyers* Hoge Raad 9 June 2000, ECLI:NL:HR:2000:AA6159, *NJ* 2000/460 (*S. v V.*), para 3.3.

160 *As stated by* Asser/Tjong Tjin Tai 7-IV 2018/200. Due to credit rating agencies' discretion in assigning credit ratings, Bertrams argued that credit rating agencies should only be liable in case of '*grove, aan roekeloosheid grenzende onzorgvuldigheid*' (Bertrams 1998, p. 364. Van 't Westeinde 2009, p. 63 is of the same opinion).

as well if a person accepted that its conduct would cause loss or had a significant chance of resulting in loss, but carried on anyway.[161] In the context of credit rating agency liability, it is required that a credit rating agency deliberately and consciously committed an infringement or accepted that its conduct would result in committing an infringement or created a significant chance of committing an infringement.

It is challenging to construct the exact interpretation and application of 'gross negligence' under Dutch private law. The Dutch version of Article 35a CRA Regulation translates gross negligence as '*grove nalatigheid*', while *grove nalatigheid* is neither a term the Burgerlijk Wetboek commonly uses,[162] nor a term Dutch legislation in general commonly uses.[163] Dutch statutes in the field of private law instead employ terms such as '*roekeloosheid*', '*bewuste roekeloosheid*' and '*ernstige verwijtbaarheid*'. So, for the purpose of interpreting Article 35a CRA Regulation, should one follow the path of *grove nalatigheid* or should one try to connect with other relevant Dutch legal concepts such as *grove schuld*, *(bewuste) roekeloosheid* and *ernstige verwijtbaarheid*? The answer to this question is relevant, because the concepts have different meanings that may differ depending on the legal context in which they are used. The fact that it is necessary to pose this question demonstrates a weakness in Article 35a CRA Regulation. What is the legal status of the terms used by Article 35a CRA Regulation, and is there a relationship with national legal concepts? Did the Union legislature deliberately choose the term *grove nalatigheid*, though it is not a concept that is commonly used under Dutch law? And, if so, could this choice be explained by the fact that the Dutch translation of the CRA Regulation is not only relevant to Dutch law, but also to Belgian law? These questions cannot be answered with certainty, but they are relevant in properly predicting the interpretation and application of Article 35a CRA Regulation.

Article 35a CRA Regulation is not the first provision of EU law that makes use of the term *grove nalatigheid*. Within the Burgerlijk Wetboek, three provisions that originate from EU law use the term *grove nalatigheid*: Article 4:187 (3) BW in the field of inheritance law and Article 7:527 (2) and Article 7:529 (2) BW in the field of financial law. The instruments of EU law underlying these provisions do not define the meaning of *grove nalatigheid*. Instead, they mostly leave the interpretation and application of this term to the applicable national law. For the purpose of Article 35a (1) CRA Regulation, it is interesting to

161 This explanation is based on criminal law and insurance law, in which the term *opzet* was developed. *E.g. in the context of insurance law,* Asser/Wansink, Van Tiggele & Salomons 7-IX* 2012/456-457. *For a similar explanation in the context of payment services*, Van Esch 2013, p. 1056.

162 *In the context of payment services cf.* Van Esch 2013, p. 1055.

163 The term *grove nalatigheid* does not occur more than ten times in Dutch Acts (*wetten in formele zin*), *e.g.* Art. 42d Elektriciteitswet 1998 (Electricity Act 1998), Art. 42 Wet buitengewoon pensioen 1940-1945 (Special Pensions (1940-1945) Act) and Art. 11.25 Wet luchtvaart (Aviation Act).

investigate how the Dutch legislature and Dutch courts approach *grove nalatigheid* on these occasions, although one must be aware of differences in the use of the term and in the legal areas in which the term is used.

Under Article 4:187 (1) BW, someone who has acted upon a certificate of inheritance[164] is assumed to have acted in good faith, unless, under Article 4:187 (3) BW, that person knew or due to gross negligence (*grove nalatigheid*) did not know that the certificate was not in accordance with reality.[165] The Explanatory Memorandum stipulates that the underlying ratio of Article 4:187 (3) BW is that a person who should have reasonably known that the certificate of inheritance was incorrect should not have acted upon it.[166] Hence, it seems that the conduct of the person who acted upon the declaration of inheritance will be approached from the objective perspective of a reasonable person placed in the same position.[167] Whether a person acted with '*grove nalatigheid*' depends on the answer to the question whether the person should have realised that the declaration might have been incorrect, not on whether the person did in fact realise that the declaration might have been incorrect (state of mind), but did not check upon the correctness of the declaration.

Furthermore, in the field of financial law, Article 7:527 (2) and Article 7:529 (2) BW contain the term *grove nalatigheid*. These provisions belong to Title 7.7.B BW on payment transactions, the Dutch implementation of the Payment Services Directive II ('PSD II'[168]). Under this Title, a payment services provider (for instance, a bank) must in principle reimburse a payment services user (for instance, a consumer) for unauthorised payment transactions.[169] However, under Article 7:529 (2) BW, a payment services provider is not liable if a payment services user has intentionally or with gross negligence failed to fulfil its obligations under Article 7:524 BW.[170] PSD II – similar to its predecessor

164 A certificate of inheritance is a notarial deed that provides information on an inheritance. For instance, it indicates who the beneficiaries are and whether they accepted their share (Art. 4:188 (1) (a) BW).

165 Art. 4:187 (1) BW was amended in light of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

166 *Kamerstukken II* 2013/14, 33851, 3, p. 17.

167 The Dutch legislature hardly paid attention to this point, because it expected that the added value of the term gross negligence was little compared to the status of Dutch law at that time, *Kamerstukken II* 2013/14, 33851, 3, p. 17.

168 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC. Reference is made to the research of Van Esch 2013, who extensively investigated the meaning of the term *grove nalatigheid* under Dutch law in this context.

169 Art. 7:528 (1) BW. Rank, in: T&C Burgerlijk Wetboek, Art. 7:528 BW, note 1 and 2.

170 *Also* Rank, in: T&C Burgerlijk Wetboek, Art. 7:529 BW, note 2. In addition, under Art. 7:527 (2) BW, '[i]f a payment service user denies consent for an executed payment transaction, the fact that the use of a payment instrument was not registered by the payment service

PSD I – leaves the application and the interpretation of the term gross negligence to the applicable national law.[171] The recitals of PSD II provide little guidance: 'while the concept of negligence implies a breach of a duty of care, gross negligence should mean more than mere negligence, involving conduct exhibiting a significant degree of carelessness; for example, keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties.'[172] The Dutch version translates 'a significant degree of carelessness' as '*een aanzienlijke mate van onvoorzichtigheid*'. Although it is not stated explicitly, this example may indicate that the state of mind of the payment services user is not decisive, so that it is not decisive whether the user was conscious of the risks he took but rather that he took in fact significant risks.

In its turn, the Dutch legislature left the interpretation and application of gross negligence to financial supervisors and courts.[173] For the way in which Dutch lower courts apply the term gross negligence in the context of payment services, reference is made to the case law analysis of Van Esch – conducted in 2013, before PSD II entered into force. Van Esch concluded that Dutch courts did not give sufficient insight in their reasoning and did not indicate what the desirable conduct of the payment services user would have been, so that it remained unclear where the exact line between negligence and gross negligence could be drawn.[174] He formulated several indicators that could help to qualify conduct in a concrete situation as *grof nalatig*, such as whether the payment services user was aware of the risk, the height of the chance that the conduct would result in loss and whether the payment services user had been warned of concrete dangers.[175] He concluded that it is not required that the payment services user was actually conscious of the chance that its conduct would result in loss.[176] More recent decisions of Dutch lower courts support the findings of Van Esch. In order to decide whether conduct qualifies as *grof nalatig*, Dutch lower courts compared actual conduct with the conduct that could have been expected from a regularly informed and reasonably attentive payment services user (an objective perspective). It was not decisive whether the payment services user was conscious of the chance that its conduct could result in loss. Dutch courts instead seem to consider the blameworthiness of

provider will not necessarily constitute conclusive evidence that the payor consented to the payment transaction or that the payor acted fraudulently or did not perform any of his obligations under Article 524 intentionally or with gross negligence.' *Translation derived from* Warendorf et al.

171 Recital 33 PSD I and Recital 72 PSD II.

172 Recital 72 PSD II.

173 *Kamerstukken II* 2017/18, 34813, 3, pp. 42-43.

174 *Cf.* Van Esch 2013, p. 1066.

175 *Cf.* Van Esch 2013, pp. 1068-1069.

176 Van Esch 2013, p. 1068.

the conduct as a whole in comparison with the conduct that could be expected from a regularly informed and reasonably attentive payment services user.[177]

Furthermore, the term *grove nalatigheid* can be found under Article 5:23 (1) BW in the area of property law.[178] This provision does not originate from EU law. Under Article 5:23 (1) BW, '[w]here an object or animal is found on the land of another person, otherwise than through the wilful conduct or gross negligence of its owner, the owner of the land must, upon request, permit the owner of the object or the animal to search for and remove it'.[179] The Parliamentary History of this provision explains that it would be *grof nalatig* if, for example, someone turns his garden into a tennis court or hockey pitch without taking measures to avoid tennis or hockey balls ending up in his neighbour's garden.[180] As explained by Van Esch, this example does not clarify whether the state of mind of the person who turned his garden into a tennis court or hockey pitch is relevant, viz. whether that person was conscious of or should have been conscious of the chance that the balls would end up in his neighbour's garden. One could conclude therefore that it is not required that the owner of the object or the animal was in fact conscious of the risks he was taking.[181]

Article 4:187 (3), Article 7:527 (2), Article 7:529 (2) BW and Article 5:23 (1) BW use the term *grove nalatigheid* in three entirely different contexts. However, generally the interpretation and application of *grove nalatigheid* show three similarities. First, the Dutch legislature and the courts do not seek a link with legal concepts such as *grove schuld* and *(bewuste) roekeloosheid* used more commonly under Dutch law. Second, whether certain conduct qualifies as *grof nalatig* depends on the concrete circumstances of the case so that it is difficult to capture *grove nalatigheid* in an abstract definition.[182] Third, for conduct to qualify as *grof nalatig*, it does not seem to be required that the party who acted with gross negligence was aware of the potential consequences of its conduct. It seems that courts will analyse the conduct from an objective perspective, analysing whether the party should have reasonably been aware of its potential consequences.

The other possible translation of gross negligence is '*grove schuld*'. I would be hesitant to move away from the term *grove nalatigheid*, because the Union legislature chose this term and the Dutch legislature and courts did not seek

177 *Cf. explicitly* Rechtbank Rotterdam 5 November 2015, ECLI:NL:RBROT:2015:9378 (*X v Rabobank*), para 5.4. *Also* Gerechtshof Den Haag 7 August 2018, ECLI:NL:GHDHA:2018:1865 (*X v ING Bank*), para 5.5 and Gerechtshof Amsterdam 23 May 2017, ECLI:NL:GHAMS:2017:1960 (*Hama Holding v ABN AMRO*), para 3.6.

178 *An example derived from* Van Esch 2013, p. 1058.

179 *Translation derived from* Warendorf et al.

180 Van Zeben, Du Pon & Olthof 1981, p. 132. Van Esch 2013, p. 1058. *See also* Stolker, in: *T&C BW* 2015, Art. 5:23 BW and Ploeger, *Groene Serie Zakelijke Rechten*, Art. 5:23 BW, note 1.

181 Van Esch 2013, p. 1058.

182 *As remarked by* Van Esch 2013, p. 1056.

a link with other concepts in comparable situations either – although I realise only a very limited amount of examples is available. Moreover, seeking a link with the term *grove schuld* does not necessarily provide a clearer perspective. As we will see below, the use of terms in Dutch legislation and case law in this area can sometimes be compared to a magic trick using words.

The term *grove schuld* was used in the Burgerlijk Wetboek on multiple occasions prior to the 1990s. Since then, the Dutch legislature has replaced the term *grove schuld* with other terms, such as (*bewuste*) *roekeloosheid*, but it has failed to do so in a consistent manner.[183] In the context of property law, the term *grove schuld* is still used by Article 5:54 (3) BW. The Dutch Supreme Court defined *grove schuld* in this context to mean whether an *ernstig verwijt* could be made (whether the defendant could be seriously blamed), a yardstick reminiscent of Article 2:9 BW on the internal liability of directors or legal persons.[184] And, in relation to the liability of Dutch financial supervisors where Dutch legislation refers to the term *grove schuld* without further explanation,[185] Dutch lawyers do not agree on its meaning. The key question in the debate is whether *grove schuld* covers conscious recklessness (*bewuste roekeloosheid*) only, or both conscious recklessness and unconscious recklessness (*onbewuste roekeloosheid*). The difference between these terms is that conscious recklessness requires someone to be conscious of the substantial chance that his or her conduct will result in loss, but is under the impression that the loss will not occur anyway; while unconscious recklessness requires a substantial chance that loss will occur, while the person responsible for the loss did not think of that chance, but should have thought of that chance.[186] Hence, depending on the legal context, different terms are in use to describe the required degree of culpability.

In Dutch case law, the term *grove schuld* developed more towards the term *bewuste roekeloosheid* over the years in the context of exclusion and limitation clauses. In *Codam 75 v Merwede* in 1954, the Dutch Supreme Court explained *grove schuld* as negligence, which comes close to intent in terms of blameworthiness ('*een in laakbaarheid aan opzet grenzende schuld*').[187] The Dutch Supreme Court analysed the conduct of the defendant, who was acting in his

183 *See for overviews e.g.* De Graaf 2006, pp. 17-18, Van Dunné 2005, p. 89 and Haazen 2004. In labour law, *grove schuld* was replaced by *bewuste roekeloosheid* in Art. 6:170 (3), Art. 7:658 (2) and Art. 7:661 BW, *Kamerstukken II* 1993/94, 23438, 3, pp. 39 and 41. In transport law, *grove schuld* was replaced by the phrase reckless, with the knowledge that loss would probably occur, *e.g.* Art. 8:111 (1) BW. In insurance law, *grove schuld* was replaced by the term *roekeloosheid*, *Kamerstukken II* 1999/2000, 19529, 5, p. 31.

184 Hoge Raad 28 March 2008, ECLI:NL:HR:2008:BC1242, *NJ* 2008/353 annotated by F.M.J. Verstijlen (*Nelemans v Scheepswerf*), para 3.3. *See, on the yardstick of Art. 2:9 BW,* Westenbroek 2016.

185 Art. 1:25d Wet op het Financieel Toezicht (Wft).

186 Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, para 2.28. *Cf.* De Graaf 2006, p. 19 (for an overview of the discussion) and Mendel 1993, pp. 116-117 (in the area of insurance law).

187 Hoge Raad 12 March 1954, *NJ* 1955/386 (*Codam 75 v Merwede*).

capacity of captain of a ship, and concluded that his conduct should never have occurred because it was reckless towards another ship.[188] The Dutch Supreme Court analysed the defendant's conduct in general and did not pay attention to his state of mind. This approach changed in 1997, in *Stein v Driessen*, where the Dutch Supreme Court equated *grove schuld* and *bewuste roekeloosheid* (conscious recklessness).[189] It has been argued that the Dutch Supreme Court thereby switched from a more objective to a more subjective approach, as conscious recklessness implies that a party realised that he was taking a risk, but anticipated that it would not materialise.[190] This subjective approach was also adopted in *UAP v Van Woudenberg*, in which the Dutch Supreme Court held that the term *grove schuld* under Article 3 *Loodsenwet* (Pilotage Act) can be understood as reckless conduct with the knowledge that it would probably result in loss.[191]

The term conscious recklessness, however, is not always interpreted subjectively either. In *Telfort v Scaramea*, the Dutch Supreme Court was said to have interpreted conscious recklessness in a more objective manner.[192] The Dutch Supreme Court qualified Telfort's conduct as *bewust roekeloos*, because Telfort had failed to verify whether KPN could actually deliver the corresponding interconnection capacity needed by Scaramea – while Telfort had reason to doubt whether KPN could deliver the interconnection capacity – and Telfort omitted to take relatively simple measures to prevent Scaramea from suffering a large amount of loss.[193] The Supreme Court's decision that Telfort's failure to take relatively simple preventive measures qualified as *bewuste roekeloosheid* caused Dutch scholars to conclude that the Dutch Supreme Court had shifted towards a more objective approach. As analysed by AG Van Peursem in a subsequent case, the decision of the Dutch Supreme Court was not based on what Telfort knew or was aware of, but instead on what a reasonable con-

188 *Cf.* Hoge Raad 12 March 1954, *NJ* 1955/386 (*Codam 75 v Merwede*), p. 692. According to Van Dunné, the mistakes made by the captain did not concern errors in judgment or stupid mistakes, but rather structural mistakes (Van Dunné 2005, p. 93).

189 Hoge Raad 12 December 1997, ECLI:NL:HR:1997:ZC2524, *NJ* 1998/208 (*Gemeente Stein v Driessen*), para 3.6.1. *See e.g.* Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, para 2.25 and Van den Brink 2000, p. 96.

190 Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, para 2.28 and Opinion AG 30 November 2011, ECLI:NL:PHR:2012:BX8442, para 2.7. Although it was not agreed upon that the term conscious recklessness added a subjective component, *cf. for the discussion* Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, paras. 2.26-2.27 and De Graaf 2006, pp. 18-19.

191 Hoge Raad 4 February 2000, ECLI:NL:HR:2000:AA4731, *NJ* 2000/429 annotated by K.F. Haak (*UAP v Van Woudenberg*), para 3.5. In transport law, this wording is commonly used, *cf.* Art. 8:111 (1) BW. However, the scope and effects of this decision are uncertain, *cf.* Van den Brink 2000, p. 96.

192 *See* Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, paras. 2.29 and 2.31.

193 *Cf.* Hoge Raad 5 September 2008, ECLI:NL:HR:2008:BD2984, *NJ* 2008/480 (*Telfort v Scaramea*), para 3.5.

tractor should have done in the concrete circumstances of the case.[194] In summary, over the years, the Dutch Supreme Court replaced the term *grove schuld* by conscious recklessness, but this term was in turn approached more objectively in *Telfort v Scaramea*, leading to the somewhat strange result that a subjective term is interpreted in an objective manner. The question remains what this tangled web of altered definitions means for the way in which *grove schuld* is interpreted and applied nowadays.

With these remarks in mind, it is difficult to ascertain what conduct qualifies as *grove schuld* in the absence of any further explanation. Article 1:25d Wet op het Financieel Toezicht (Wft, the Dutch Financial Supervision Act) demonstrates the existing uncertainty. Article 1:25d Wft excludes the liability of the Dutch financial supervisors for loss caused by their supervision, unless the loss was caused for a significant part by the intentional or grossly negligent (*grove schuld*) inadequate performance of their tasks. The Explanatory Memorandum does not provide sufficient guidance on the yardstick for determining *grove schuld*. It only states that the conduct of the supervisor must be to such a blameworthy and indifferent extent that it entails a significant chance that the supervisor will not fulfil its tasks properly. In addition, it refers to the Dutch Supreme Court's interpretation of *grove schuld* in *Codam 75 v Merwede*.[195]

In Dutch academic literature, scholars do not agree as to whether the term *grove schuld* covers solely conscious recklessness or both conscious recklessness and unconscious recklessness in this context. On the one hand, according to De Serière, Van Rossum and Sahtie, the term *grove schuld* must be interpreted subjectively, so that it only covers conscious recklessness.[196] De Serière and Sahtie based their position on the development in Dutch private law from the term *grove schuld* to conscious recklessness (as discussed).[197] On the other hand, Affourtit & Lubach take the approach that the Dutch legislature should not have used the term *grove schuld*, because, in their eyes, that term implies that a supervisor cannot be held liable for conduct committed with unconscious recklessness. They prefer a more objective approach towards *grove schuld*.[198] Van Praag adopted a similar approach and argued that the Explanatory

194 Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, para 2.31. Many scholars analysed *Telfort v Scaramea* and each of them explained and interpreted the decision slightly differently. Overall, however, most of them agreed that the Dutch Supreme Court interpreted and applied the term conscious recklessness in an objective manner, *see e.g.* Duyvensz 2011, Kraaipoel 2009 and Hoge Raad 10 June 2011, ECLI:NL:HR:2011:BP9994, *NJ* 2012/405 annotated by T.F.E. Tjong Tjin Tai, para 3 (*Van den Hoek v Pots*).

195 *Kamerstukken II* 2011/12, 33058, 3, p. 5.

196 Asser/De Serière 2-IV 2018/908, Van Rossum 2014, p. 184 and Sahtie 2012, p. 275. *For an overview of the discussion, see also* Tegelaar 2016, p. 713.

197 Asser/De Serière 2-IV 2018/908 and Sahtie 2012, pp. 274-275. Van Rossum referred to the position of Sahtie in this respect (Van Rossum 2014, p. 184).

198 Affourtit & Lubach 2012, pp. 176-178.

Memorandum does not require that the supervisor was aware of 'the improper character' of its conduct. Instead, according to Van Praag, the emphasis lies on the blameworthiness of the conduct. He attaches importance to the fact that the Explanatory Memorandum states that *Codam 75 v Merwede* still involves a leading interpretation of *grove schuld*.[199] Overall, however, because the Explanatory Memorandum does not provide much guidance and academic opinions differ, it remains to be seen how Dutch courts will interpret and apply the term *grove schuld* under Article 1:25d Wft.[200]

Even after analysing quite a number of examples, it remains difficult to comprehend the exact way in which Dutch law will approach gross negligence under Article 35a (1) CRA Regulation in abstract terms. This difficulty lies in the first place in the wording of Article 35a (1) CRA Regulation, as the provision does not seek a link with commonly used Dutch legal concepts. The current tangled web of different terms and definitions used in Dutch law does not help either, although it will always remain difficult to describe a term that depends so much upon the exact circumstances of the case. In an attempt to move past these uncertainties, I would argue that the interpretation and application of *grove nalatigheid* under Article 35a (1) CRA Regulation be explained under Dutch law in accordance with the examples of Article 4:187 (3), Article 7:527 (2), Article 7:529 (2) and Article 5:23 (1) BW. This choice is motivated by the fact that the EU legislature chose this term and that the Dutch legislature and the courts did not seek a link with legal concepts such as *grove schuld, (bewuste) roekeloosheid* and *ernstige verwijtbaarheid* either in relation to Article 4:187 (3), Article 7:527 (2) and Article 7:529 (2) BW – although I realise this reasoning is based on a limited amount of examples. As a consequence, in the context of credit rating agency liability, *grove nalatigheid* may be approached objectively so that the conduct of the credit rating agency will be compared with the conduct of a reasonable credit rating agency placed in the same position. The minimum threshold for grossly negligent conduct does not involve that the credit rating agency was aware of the potential consequences of its conduct – i.e. that it would result in committing an infringement – but thought that the consequences would not occur. Instead, conduct may also qualify as grossly negligent if a credit rating agency was not aware of the potential consequences, but should have been aware of the fact that its conduct involved the risk of committing one the infringements listed in Annex

199 Van Praag 2013, p. 900.

200 In April 2018, the Dutch Supreme Court decided the case *GSFS v DNB* on the liability of financial supervisor DNB. Pension fund GSFS started proceedings against DNB based on Art. 6:162 BW for a decision of DNB to remove GSFS from the Dutch Register for pension funds in 2013. The Dutch Supreme Court did not provide a useful yardstick to assess grossly negligent conduct. It only decided that, if DNB in hindsight did not possess certain powers, the simple fact that it had already exercised those powers did not entail that DNB neglected its tasks with gross negligence. Hoge Raad 9 March 2018, ECLI:NL:HR:2018:309 (*GSFS v DNB*), para 3.3.5.

III CRA Regulation. Dutch courts would hence rather analyse the blameworthiness of the conduct than the subjective state of mind of the credit rating agency.

5.4.3.2 'Impact' and 'caused to', including claimant-specific requirements

(a) General approach under Dutch law

As stated in section 5.3.1.3, the terms 'impact', 'caused to' and the claimant-specific requirements relate to causation, and are therefore discussed together. But prior to doing so, the general approach to causation under Dutch law must be explained in order to explain how Dutch law approaches the terms 'impact' and 'caused to' under Article 35a (1) CRA Regulation.

In Dutch private law, causation is divided into two 'stages': the stage of the establishment of liability (*vestigingsfase*),[201] and the stage of the scope of liability, i.e. the calculation of the amount of damages awarded (*omvangsfase*). These two stages can be described as causation in fact and causation in law, respectively. At the first stage, Dutch courts assess from a factual perspective whether a breach of contract or tort generated the loss suffered, by application of the *condicio sine qua non* test.[202] It is in light of this first stage that Dutch courts will consider the terms 'impact' and 'caused to', namely as requirements for establishing the liability of the credit rating agency. The Dutch interpretation and application of 'impact' and 'caused to' therefore concentrates on the *condicio sine qua non* test. At the second stage of causation in law, Dutch courts assess whether the loss can be attributed to the defendant, by the *leer der redelijke toerekening* (the theory of objective attribution) as codified under Article 6:98 BW.[203] The theory of objective attribution plays an important role in the calculation of damages under Dutch law, so this topic will be discussed under section 5.4.3.3 (b).

(b) Establishment of causation

To start with, this section concentrates on the first stage of the establishment of causation. The translation of '*condicio sine qua non*' gives away that the *condicio sine qua non* test determines whether an event was the necessary condition of the loss. The test is described as a '*wegdenkoefening*' in Dutch academic literature;[204] the requirement of factual causation is not fulfilled

201 For instance, 'causation' – in the sense of factual causation – is one of the requirements of Art. 6:162 BW, the general provision for non-contractual liability discussed under section 5.4.2.3.

202 *See* Asser/Sieburgh 6-II 2017/50 and Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 1.4.

203 *See* Asser/Sieburgh 6-II 2017/50 and 57 and Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 4.1.

204 The term '*wegdenkoefening*' was derived from Klaassen 2012, p. 3. *See, for the term 'wegdenken', also e.g.* Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 4.1 and Van Dijk 2013, p. 61.

when the loss would also have occurred in the absence of the event.[205] The burden of proof lies with the party that invokes the provision and its legal consequences under Article 150 Wetboek van Burgerlijke Rechtsvordering (Rv, the Dutch Code of Civil Procedure). It is up to the claimant to allege that the *condicio sine qua non* test has been fulfilled. If the defendant materially contests the allegations, the claimant is also expected to prove them.[206] The standard of proof is a reasonable degree of probability ('*redelijke mate van waarschijnlijkheid*').[207]

In the context of credit rating agency liability, issuers need to allege (and prove if materially contested) that had the infringement not occurred: (1) the credit rating would have been different; and (2) the issuer would not have been confronted with increased funding costs and/or reputational loss. Investors need to allege (and prove if materially contested) that: (1) had the infringement not occurred, the credit rating would have been different; and (2) had the infringement not occurred, the investor would not have suffered pure economic loss. In the context of misleading statements on the financial markets in general, De Jong identified two 'links' ('*schakels*'): the causal link between the misleading statement and (the conditions of) the transaction ('transaction causation') and the causal link between the misleading statement and the loss.[208] Pijls did not explicitly identify these two links, but the approaches do not differ substantially from each other.[209] The factual perspective underlying the investor's claim for damages determines the elements of transaction causation.[210] If an investor claims it would not have bought the financial instruments at all, it must allege (and prove if materially contested) that it would have taken a different investment decision and that the affected credit rating caused its loss.[211] If an investor claims it would have bought the financial instruments against another price, it must allege

205 The application of the *condicio sine qua non* test is problematic in situations where the loss was caused by two independent causes ('multiple causation'). The test then does not appoint any of the two events as the cause of the loss. Art. 6:99 BW provides a solution for such situations by stating that the parties responsible for these causes will be joint and severally liable. Asser/Sieburgh 6-II 2017/86 ff. and Giessen & Rijnhout 2017, p. 265. See in detail on multiple causation in general Tjong Tjin Tai 2018.

206 Klaassen 2012, p. 4. *Also* Pitlo/Rutgers & Krans 2014, no. 32-33. *Cf. also* Boonekamp, *Stelplicht & Bewijslast*, commentary on Art. 6:98 BW and Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 2.5.1-2.5.2 and Asser 2004, no. 18 and 23.

207 *E.g.* Pijls 2018, pp. 41 and 542, Klaassen 2017, no. 20.1, Snijders, Klaassen & Meijer 2017, no. 199, Klaassen 2012, p. 6 and De Jong 2010, p. 253.

208 De Jong 2010, pp. 44-46.

209 Pijls 2018, pp. 186-187. This dissertation does also not strictly divide between the two links of causation distinguished by De Jong 2010, pp. 44-46.

210 *On the importance of the factual perspective chosen by the investor,* Pijls 2018, p. 173.

211 *In the context of misleading information of the financial markets in general,* Pijls 2018, p. 544. *See, for the investor's options to provide evidence,* Pijls 2018, pp. 548 ff. *Cf. also* De Jong 2010, p. 44.

(and prove if materially contested) that the affected credit rating affected the price of the financial instruments bought.[212]

(c) Possibilities to deal with causal uncertainty concerning investor's reliance

(i) – Friction

The structure of Dutch private law does not fit the structure of Article 35a (1) CRA Regulation as regards the investor-specific requirement of reasonable reliance. As described in section 5.3.1.3 (c), Article 35a (1) CRA Regulation frames the requirement of reasonable reliance as an essential part of the causal link between an infringement and an affected credit rating and an investor's loss. The burden of proof rests upon the investor. Dutch private law, however, distinguishes between the elements of *reliance* and the *reasonableness* of the reliance from each other. The element of reliance forms part of the causal link, which is to be established by the claimant as a matter of principle.[213] The element of the 'reasonableness' of the reliance would, however, not be considered at the stage of the establishment of causation. When an investor's reliance is unreasonable, the credit rating agency involved is entitled to the defence of contributory negligence under Article 6:101 BW.[214] The burden of proof then rests upon the credit rating agency. The Dutch approach to reasonable reliance hence differs from the approach taken by Article 35a CRA Regulation in two aspects: a lack of reasonable reliance does not necessarily break the causal link between a credit rating and an investor's loss completely, and the burden of proof regarding *unreasonable* reliance rests upon the credit rating agency.[215] The application of the requirement of 'reasonable reliance', therefore, causes friction within the structure of Dutch national private law.

(ii) – Possibilities to deal with causal uncertainty concerning investor's reliance

'Causal uncertainty' and evidentiary problems relating to reliance do not uniquely exist in relation to credit rating agency liability. They also arise in other situations, of which prospectus liability is a commonly used example. Dutch courts can employ several methods to 'solve' uncertainties in this type of cases.[216] They can, for instance, lighten the burden of proof resting upon claimants under Article 150 Rv by applying the *jurisprudentiële omkeringsregel*

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212 *In the context of misleading information of the financial markets in general,* Pijls 2018, pp. 542-547. *Cf. also* De Jong 2010, p. 44.

213 See, hereafter, section 5.4.3.2 (c).

214 See, hereafter, section 5.4.3.3 (c).

215 *Cf. in the context of a comparison between US law and Dutch law,* Pijls 2018, pp. 141-142.

216 *See, for the classification of the four tools, the overview provided by* Giesen & Maes 2014 *who distinguished between procedural and substantive legal facilitations in relation to informed consent cases. In relation to the adoption of causation as a starting point,* Pijls & Van Boom 2010, no. 6 speak of an '*EU-conforme interpretatie van art. 150 Rv*'. *See, in general on deviations from Art. 150 Rv*, Asser 2004, no. 26-28. This dissertation only provides a limited overview of the relevant Dutch case law in this regard.

(reversal of the burden of proof) or by adopting the existence of causation as a starting point ('*het tot uitgangspunt nemen van causaal verband*'). This section will pay further attention only to situations in which courts adopt causation as a starting point under Dutch law under (iii), as a successful appeal to the *jurisprudentiële omkeringsregel* is not granted easily by Dutch courts.[217] Furthermore, from a substantive law perspective, courts can apply the doctrine of *proportionele aansprakelijkheid* (proportional liability) or the doctrine of *verlies van een kans* (loss of chance), thereby distributing the consequences of causal uncertainty among the parties which leads to the partial compensation of aggrieved parties. The Dutch Supreme Court distinguished these doctrines from each other in the case *Deloitte Belastingadviseurs v H&H Beheer* in 2012.[218] Although Dutch academic literature did not always support this distinction, this report adopts the distinction made by the Dutch Supreme Court[219] and only discusses the application of the doctrine of loss of chance, which is more likely to be relevant in the context of credit rating agency liability than the doctrine of proportionate liability.[220]

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217 The *omkeringsregel* only applies when a rule was violated that aims to protect against a specific type of loss, while the infringement enlarged the danger of incurring that loss, Hoge Raad 29 November 2002, ECLI:NL:HR:2002:AE7345, *NJ* 2004/304 (*TFS v NS*), para 3.5.3, Hoge Raad 29 November 2002, ECLI:NL:HR:2002:AE7351, *NJ* 2004/305 annotated by W.D.H. Asser (*Kastelijn v Achtkarspelen*), para 3.6 and *cf.* Hoge Raad 19 December 2008, ECLI:NL:HR:2008:BG1890, *NJ* 2009/28 (*Smeets v Gemeente Heerlen*), para 3.3. *See also* Asser/Sieburgh 6-II 2017/77. It was assumed that, under the current state of the law, the *omkeringsregel* mostly applies to the breach of *verkeersnormen* or *veiligheidsnormen* (traffic or safety standards). *See, for instance*, Hoge Raad 19 December 2008, ECLI:NL:HR:2008:BG1890, *NJ* 2009/28 (*Smeets v Gemeente Heerlen*), para 3.4. *See also e.g.* Pijls 2018, p. 45, Giesen & Maes 2014, p. 223 and Akkermans & Van Dijk 2012, p. 166.

218 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), paras. 3.5.1-3.6.

219 The distinction was criticised by *e.g.* Van Velthoven 2018, pp. 111-112. Van Velthoven considered both concepts to be especially the same, because the methods of calculating damages would eventually be the same. The distinction was supported by *e.g.* Cox 2016, pp. 272-273, Castermans & Den Hollander 2013, p. 193 and Hillen 2013, p. 124-126. *In respect of the distinction* Nuninga 2019 and Den Hoed 2018, pp. 198-199.

220 The doctrine of proportionate liability has a very limited scope of application. It applies when the existence of a causal relationship is inherently uncertain and the chance that the defendant caused the loss is neither very small nor very large, while the nature of the violated rule and nature of the loss render it unacceptable to let the aggrieved party carry the risk of the uncertain causal relationship. In such extreme situations, the defendant is liable to the extent of the chance that its conduct caused the loss. *See* Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.5.2, *as decided in* Hoge Raad 31 March 2006, ECLI:NL:HR:2006:AU6092, *NJ* 2011/250 annotated by T.F.E. Tjong Tjin Tai (*Nefalit v Karamus*), para 3.13. In *Fortis v Bourgonje*, a case concerning the special duty of care owed by banks, the Dutch Supreme Court held that proportional liability must be applied restrictively only, because it bears the risk of holding a party responsible that is not responsible for the loss at all. *See* Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.5.2, *as decided in* Hoge

(iii) – Evidentiary presumption VEB v World Online

On multiple occasions, the Dutch Supreme Court adopted the existence of a causal relationship as a starting point ('*het tot uitgangspunt nemen van causaal verband*'), also qualified as an 'evidentiary presumption'.[221] In decisions concerning securities lease agreements (investment advice cases), the Dutch Supreme Court assumed that if the bank had not breached its special duty of care, the investor would have taken a different investment decision.[222] In the prospectus liability case *VEB v World Online*, the Dutch Supreme Court required that the investors directly or indirectly relied on the misleading statement,[223]

Raad 24 December 2010, ECLI:NL:HR:2010:BO1799, *NJ* 2011/251 annotated by T.F.E. Tjong Tjin Tai (*Fortis v Bourgonje*), paras. 3.7-3.8. *See also* Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 2.10 and Giesen & Maes 2014, pp. 225-226. According to De Jong (De Jong 2016, p. 128), the concept of proportional liability will not be often applied in cases concerning investment loss, but the application is not impossible either. *Cf. also* Pijls 2018, pp. 576-577 who did not think the Dutch Supreme Court would apply the doctrine of proportional liability to cases concerning investment loss. Cases concerning claims for credit rating agency liability brought by investors rather resemble situations covered by the doctrine of loss of chance than by the doctrine of proportional liability. The uncertainty lies in the hypothetical course of events in the absence of an affected credit rating, i.e. whether the investor would have taken a better investment decision in the absence of the affected credit rating. The investor could argue that the *condicio sine qua non* relationship exists between the affected credit rating and their chance of having taken a properly informed investment decision.

221 The Dutch Supreme Court did not explicitly use the term 'evidentiary presumption', but only stated that causation should be adopted as a starting point, Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), para 4.11.2. Pijls & Van Boom 2010, p. 194 qualified this construction as an evidentiary presumption and their approach has been followed since by e.g. Giesen & Reinhout 2017, p. 264 and Giesen & Maes 2014, p. 228.

222 Hoge Raad 5 June 2009, ECLI:NL:HR:2009:BH2815, *NJ* 2012/182 annotated by J.B.M. Vranken (*De Treek v Dexia*), paras. 5.5.2 and 5.5.3, Hoge Raad 5 June 2009, ECLI:NL:HR:2009:BH2811, *NJ* 2012/183 annotated by J.B.M. Vranken (*Levob v Bolle*), paras. 4.7.9 and 4.7.10. *Confirmed by* Hoge Raad 8 February 2013, ECLI:NL:HR:2013:BX7846, *NJ* 2014/495 annotated by Jac. Hijma (*Van Lanschot Bankiers v Grove*), paras. 3.7.1 and 3.7.2, *as stated by* Van Giesen & Maes 2014, p. 229.

223 *As concluded by e.g.* Pijls 2018, p. 212 and De Jong 2010, pp. 159-160 – although they did not agree with the Dutch Supreme Court that an investor must have been influenced by the misleading information as a starting point. Prior to the decision in *World Online*, it was not entirely clear whether the Dutch Supreme Court required (in)direct reliance. For overviews of the Dutch case law prior to the decision in *World Online*, reference is made to e.g. Pijls 2018, pp. 200 ff. and De Jong 2010, pp. 155 ff. For instance, in the decision *Aeilkema v Veenkoloniale Bank* of 1931, the Dutch Supreme Court did not require Aeilkema (the investor) to have relied on misleading information on the state of the Veenkoloniale Bank for purchasing *pandbrieven* (freely translated as mortgage bonds), *see* Hoge Raad 11 December 1931, *NJ* 1932, p. 161 (*Aeilkema v Veenkoloniale Bank*). To assume the existence of a causal relationship, the Dutch Supreme Court held that: '*daarvoor niet beslissend is, dat Aeilkema tot zijne daad niet is bewogen door kennisneming van de jaarstukken der Bank […];*' (hence, that it is not decisive for the purposes of causation that Aeilkema was not influenced in its decision to purchase the mortgage bonds by the misleading information).

but accepted an evidentiary presumption in favour of the investors.[224]

In *VEB v World Online*, the Dutch Supreme Court held that claimants – in this case, investors – must allege and prove the existence of a *condicio sine qua non* relationship as a matter of principle. At the same time, the Dutch Supreme Court acknowledged that investors can experience evidentiary problems, not only because it is difficult to prove an investment decision was influenced by misleading information, but also because investors may be indirectly influenced by misleading information which created a certain market sentiment or reached them indirectly through their advisors. The Dutch Supreme Court held that courts are allowed to assume that a causal relationship between a misleading statement and an investment decision exists, because, in the absence of such a presumption, evidentiary problems could render investor protection in prospectus liability cases illusory. In light of the European principle of effectiveness and Article 6 (2) Prospectus Directive, which require Member States to 'ensure that their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus', a presumption of causation is justified, the Dutch Supreme Court argued. The evidentiary presumption entails that Dutch courts can assume that a *condicio sine qua non* relationship exists between the misleading statement and the investment decision, but investors shall nevertheless prove the *condicio sine qua non* relationship between their investment decision and the loss. Furthermore, the Dutch Supreme Court stated that the presumption applies to retail investors and professional investors, but that the presumption can be rebutted more easily if a professional investor was involved. In any case, it is up to the defendant to provide evidence to the contrary.[225]

The exact scope of application of the evidentiary presumption is the subject of debate in Dutch academic literature. On one side, scholars such as Klaassen and De Bie Leuveling Tjeenk suspected that the evidentiary presumption has a limited '*uitstralingseffect*'[226] outside cases concerning the special duty of care of banks in securities lease agreements and cases concerning prospectus liability will be limited. According to Klaassen, the decisions in the securities lease and prospectus liability cases were driven by the specific features of these cases. She argued that the securities lease cases were test cases to settle mass claims, so that the Dutch Supreme Court needed to decide on a high level of

224 Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), paras. 4.11.1-4.11.2. *See on these cases e.g.* De Jong 2016, pp. 123-124, Giesen & Maes 2014, p. 227, Klaassen 2013, De Jong & Pijls 2012, Klaassen 2012, pp. 10-12, De Jong 2010, pp. 155 ff. and Pijls & Van Boom 2010.

225 Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), paras. 4.11.1-4.11.2, in particular: '*Met het oog op die effectieve rechtsbescherming en gelet op de met de prospectusvoorschriften beoogde bescherming van (potentiële) beleggers tegen misleidende mededelingen in het prospectus, zal tot uitgangspunt mogen dienen dat condicio sine qua non-verband tussen de misleiding en de beleggingsbeslissing aanwezig is.*'

226 Klaassen 2013, p. 147 and Klaassen 2012, p. 12.

abstraction. Furthermore, *VEB v World Online* would be based on the effectiveness of EU law, which is a justification that is not necessarily present in cases involving national law only.[227] De Bie Leuveling Tjeenk agreed with Klaassen and argued that it is only justified to assume the existence of a causal relationship in cases on the settlement of mass claims.[228]

On the other side, scholars such as Pijls and Van Boom, De Jong and Busch did not rule out the possibility of a broader application of the evidentiary presumption. Pijls & Van Boom stated that '*in algemene zin een lans is gebroken voor een EU-conforme interpretatie van art. 150 Rv*' in *VEB v World Online*. They did not exclude the possibility that Dutch courts will apply the evidentiary presumption on the basis of EU law, especially where a professional party breached a European duty of information towards a consumer.[229] Furthermore, De Jong argued that the Dutch courts might also adopt a presumption if misleading statements were disseminated in the context of the Transparency Directive and the former Market Abuse Directive.[230] Busch adopted a similar approach and considered it arguable that Dutch courts will assume causation between misleading information or statements and investment decisions in cases concerning violations of the Market Abuse Regulation. He expected that the influence of the European principle of effectiveness would be substantial, even when EU law has not explicitly obliged Member States to apply their rules of civil liability. Busch based this expectation on the fact that the principle of effectiveness is a fundamental principle of EU law and that the legal protection of investors could otherwise become illusory.[231] In his dissertation, Pijls took a more cautious approach. Although he concluded that Dutch courts could adopt a presumption if misleading statements were disseminated in the context of the Transparency Directive, he considered it uncertain whether Dutch courts will do so in the context of the Market Abuse Regulation. Pijls

227 Klaassen 2012, pp. 13-15. *And, although less restrictively,* Klaassen 2013, p. 150.

228 De Bie Leuveling Tjeenk 2014, p. 319.

229 Pijls & Van Boom 2010, no. 10. *Although they explicitly pointed at the ongoing uncertainty,* Giesen & Maes 2014, p. 229 *concluded in this regard*: '*er gloort hoop voor de in bewijsnood verkerende niet-geïnformeerde consument*.'

230 De Jong 2016, p. 125, De Jong 2011, p. 373 and De Jong 2010, pp. 271-272. Arons was of a different opinion in relation to the liability of securities analysts under the regime of the old Market Abuse Directive (MAD). He would not apply the rule of *VEB v World Online* to the liability of securities analysts under the old MAD regime. In his opinion, investors who relied on the recommendations of securities analysts do not necessarily deserve the same protection as investors in prospectus liability cases (1) because the MAD does not oblige Member States to apply their rules of civil liability to persons responsible for the reports of securities analysts; and (2) because the MAD only provides a general prohibition on the distribution of misleading reports, while the Prospectus Directive provides detailed information on the content of prospectuses so that its rules would have horizontal effects and the European principle of effectiveness would apply. Arons 2013, pp. 816-818.

231 Busch 2016, pp. 534-535.

based this conclusion on the fact that the Market Abuse Regulation does not include a provision equivalent to Article 6 (2) Prospectus Regulation.[232]

The question that must be answered here is whether this evidentiary presumption also applies in the case of claims for credit rating agency liability brought by investors. The possibility of an analogue application of the evidentiary presumption of *VEB v World Online* already came up in other Dutch contributions on credit rating agency liability as well.[233] To begin with, one can question whether and under what circumstances Dutch courts would consider credit ratings misleading for the *maatman-belegger* (the average investor). Indeed, in *VEB v World Online*, the Dutch Supreme Court assumed the existence of the causal relationship while, as discussed in section 5.4.2.3 (b) (i), having first concluded that the statements had a misleading character on the average investor. Could a credit rating be misleading in the sense that it is material to the investment decision of the average investor? The answer to this question depends, amongst other circumstances, on the gravity of the impact of the infringement on the level of the credit rating and on the type of issuer or financial instrument to which the credit rating was assigned.[234] One can imagine that the publication of solicited credit ratings assigned to issuers and financial instruments can influence the economic conduct of an average investor, especially if the credit rating is gravely inaccurate or borders on the line between investment grade and speculative grade. Furthermore, structured finance ratings may well influence the economic conduct of the average investor; credit ratings are indeed indispensable in structured finance in order to sell the products in the financial markets.[235]

Assuming that the credit rating is considered misleading to the average investor, multiple similarities exist between prospectus liability and credit rating agency liability that justify arguing in favour of applying the evidentiary presumption to cases concerning credit rating agency liability. Article 6 (2) Prospectus Directive and Article 35a CRA Regulation have similar goals: the compensation of investors when provisions of EU law are infringed by another private party. The right of redress must be ensured before national courts and, to a more or lesser extent, under the applicable national law. The evidentiary problems possibly experienced by investors are similar in cases concerning prospectus liability and credit rating agency liability. In both cases, a restrictive application of the *condicio sine qua non* test can require investors to provide evidence of the influence of information on an internal decision. In the absence of facilitations, the right of redress and the protection of investors under Article

232 Pijls 2018, pp. 223 and 561-563.

233 Atema & Peek observed that it is not certain whether the presumption applies (Atema & Peek 2013, pp. 961-962), while Giesen & Rijnhout explained in somewhat more detail why the presumption could be applied (Giesen & Rijnhout 2017, p. 264).

234 Section 5.4.2.3 (b) (i).

235 *Cf.* Atema & Peek 2013, p. 958.

35a (1) CRA Regulation becomes illusory in practice. Along the same lines, Giesen & Rijnhout pointed out that the line of reasoning of *VEB v World Online* could also apply to Article 35a CRA Regulation, 'because the EU introduced this regulation to protect parties against unfair ratings and also that this protection would be illusory when the CSQN is not presumed'.[236] One can, hence, argue that Dutch courts would apply an evidentiary presumption in some cases concerning credit rating agency liability, in which the credit rating is considered misleading to the average investor. Finally, it should be remarked that the evidentiary presumption is most relevant in relation to investors who do no act in the scope of their profession or business. In combination with the additional European requirement under Article 5 (a) (1) CRA Regulation and the fact that the presumption can be rebutted more easily if a professional investor was involved, professional investors are less likely to benefit from the evidentiary presumption.

(iv) – Loss of chance

Dutch courts can apply the doctrine of loss of chance when the *condicio sine qua non* relationship between an event – a breach of contract or an unlawful act – and the loss is uncertain, because the hypothetical course of events in the absence of the defendant's conduct is uncertain. In loss of chance cases, uncertainty exists as to whether a chance at a better result would have been realised in the absence of a certain event.[237] This type of situation occurs for instance when a lawyer neglects to lodge an appeal, while it is not certain whether its client would have won the case in appeal. One could say that the course of events is uncertain – winning or losing the case – and that, therefore, the loss is uncertain. In this type of situation, the application of the doctrine of loss of chance causes courts to approach the notion of loss in a different way. The claimant must still allege (and prove) the existence of a *condicio sine qua non* relationship, but, more specifically, between the defendant's act or omission and the lost chance of achieving a more favourable, hypothetical result. To be eligible for compensation, a lost chance must be realistic.[238] Dutch courts determine the height of the lost chance by balancing 'good and

236 Giesen & Rijnhout 2017, p. 264.

237 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.5.3 *as decided in e.g.* Hoge Raad 24 October 1997, ECLI:NL:HR:1997:AM1905, *NJ* 1998/257 annotated by P.A. Stein (*Baijings v Mr. H*), para 5.2. *Cf. also in respect of this decision e.g.* Den Hoed 2018, Giesen & Maes 2014, p. 229, Castermans & Den Hollander 2013, Hillen 2013, p. 124 and Akkermans & Van Dijk 2012, p. 159.

238 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.8.

bad chances' ('*goede en kwade kansen*') and calculate the amount of damages by multiplying the total loss with the lost chance.[239]

The scope of application of the doctrine of loss of chance under Dutch law is not entirely clear yet. As it is often possible to rephrase a case in terms of lost chances, the doctrine potentially has a wide scope of application. Over the past years, the Dutch Supreme Court has expanded the application of the doctrine of loss of chance from cases concerning the liability of negligent lawyers to cases concerning the liability of negligent tax advisors and to medical delay cases.[240]

In the case of *Deloitte Belastingadviseurs v H&H Beheer*, the Dutch Supreme Court applied the doctrine of loss of chance to a claim for damages relating to incorrect tax advice provided by a tax advisor to the claimant. The Dutch Supreme Court awarded damages for a lost chance of 60% that had the advice of the tax advisor to the claimant been correct, the Dutch tax authorities would have accepted an alternative tax strategy of the claimant.[241] In this case, the uncertainty on the hypothetical course of events was related to the hypothetical conduct of the Dutch tax authorities. Hence, the Dutch Supreme Court applied the doctrine of loss of chance in the context of negligent tax advice, in which the uncertainty lay in the conduct of a third party. The decision did not provide much further guidance on the scope of application of the doctrine of loss of chance. The Dutch Supreme Court stated that there is no reason to apply the doctrine restrictively, because a *condicio sine qua non* relationship exists between the defendant's conduct and the claimant's lost chance.[242]

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239 Hoge Raad 24 October 1997, ECLI:NL:HR:1997:AM1905, *NJ* 1998/257 annotated by P.A. Stein (*Baijings v Mr. H*), para 5.2.

240 *For the liability of negligent lawyers, see* Hoge Raad 24 October 1997, ECLI:NL:HR:1997:AM1905, *NJ* 1998/257 annotated by P.A. Stein (*Baijings v Mr. H*). *For the liability of negligent tax advisors, see* Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*). *For medical delay cases, see* Hoge Raad 23 December 2016, ECLI:NL:HR:2016:2987, *NJ* 2017/133 annotated by S.D. Lindenbergh (*Baby Esther*) and Hoge Raad 27 October 2017, ECLI:NL:HR:2017:2786, *NJ* 2017/422 (*X v AZM*). In addition, the Dutch Supreme Court applied the doctrine of loss of chance when a municipality informed the claimant that it would draft a zoning plan – which needed to be agreed upon by other bodies as well – in a certain way, but forgot to do so. The claimant succeeded in its claim for damages based on loss of chance, arguing that the omission of the municipality caused him to lose a chance that the zoning plan would have been accepted by third parties to its benefit. Hoge Raad 19 June 2015, ECLI:NL:HR:2015:1683, *NJ* 2016/1 annotated by T.F.E. Tjong Tjin Tai (*Overzee v Gemeente Zoeterwoude*), para 3.5.3.

241 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.8.

242 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.7. *For a critical approach to the reasoning of the Dutch Supreme Court, see* De Jong 2016, p. 127 and Giesen & Maes 2014, p. 230. In Asser/Sieburgh 6-II 2017/80a, it was warned that a broad application of the doctrine of loss of chance has far reaching consequences for Dutch private law. For a theory on the scope of application of the doctrine of loss of chance, Nuninga 2019, pp. 45 ff.

Furthermore, the Supreme Court remarked that the doctrine applies in 'some' (*sommige*) situations in which the causal uncertainty relates to the realisation of a certain chance, but it did not elaborate further on this point.[243]

In October 2018, the Court of Appeal of the Hague applied the doctrine of loss of chance in a situation in which the uncertainty lay in the hypothetical conduct of the claimant itself. In *X v Stichting Wijdezorg*, a medical case manager failed to provide the claimant with adequate information on his options to hire a medical case manager for the care of one of his parents. The Court of Appeal decided that this failure constituted a breach of the care manager's duty of care for which her employer Stichting Wijdezorg was liable.[244] The Court of Appeal considered that the case manager had deprived the claimant of the opportunity to have hired a case manager. It estimated the chance that had the information provided been adequate, the claimant would have hired a case manager at 50%.[245] Hence, in this case, the doctrine of loss of chance was applied in a situation in which the defendant failed to provide adequate information and in which the uncertainty lay in the conduct of the claimant itself.

The question that must be answered here is whether investors can successfully invoke the doctrine of loss of chance in a dispute over credit rating agency liability under Dutch law. From an investor's perspective, it is worth framing a claim for damages in terms of loss of chance. The investor can do so by arguing that the impacted credit rating deprived the investor of a chance or an opportunity to have taken a completely well-informed investment decision.[246] Building on the decision of the Court of Appeal of the Hague in the case of *X v Stichting Wijdezorg*, one could argue that the doctrine of loss of chance conceptually fits cases of credit rating agency liability in which the uncertainty also relates to the hypothetical conduct of the claimant itself. The case of *X v Stichting Wijdezorg*, however, concerned a completely different context and involved a situation in which the relationship between the defendant and the claimant was more proximate. In any case, the application of the doctrine of loss of chance in credit rating agency liability requires a broad and far-reaching application of the doctrine.[247] Therefore, in the absence of case law confirming this matter, it is doubtful that courts would

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243 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.5.3. Den Hoed 2018, p. 196.

244 Gerechtshof Den Haag 9 October 2018, ECLI:NL:GHDHA:2018:2558 (*X v Stichting Wijdezorg*), para 12.

245 Gerechtshof Den Haag 9 October 2018, ECLI:NL:GHDHA:2018:2558 (*X v Stichting Wijdezorg*), para 16.

246 *In the context of misleading statements on the financial markets in general, cf.* Pijls 2018, p. 577.

247 Pijls did not expect the doctrine of loss of chance to apply in the context of investment loss (Pijls 2018, pp. 567-577). He considered the disadvantages of the doctrine of proportional liability and loss of chance to be similar: both doctrines bear the risk of holding a party liable that did not cause the loss. Therefore, he considered it 'not probable' that the Dutch Supreme Court would apply the doctrine of loss of chance to investment loss cases.

apply the doctrine of loss in the field of credit rating agency liability under Dutch law.

5.4.3.3 Suffering 'damage' and claiming 'damages'

Dutch courts will determine the extent of the recoverable loss and the award of damages in relation to claims based on Article 35a CRA Regulation in accordance with the rules of Section 6.1.10 Burgerlijk Wetboek on '*wettelijke verplichtingen tot schadevergoeding*' ('legal obligations to the compensation of loss'). This Section contains general rules on compensable loss and on the calculation of the amount of damages, and applies to legal obligations to pay damages codified both inside and outside the Burgerlijk Wetboek.[248] Concepts such as objective attribution ('*leer der redelijke toerekening*', discussed under (b)), contributory negligence and mitigation (discussed under (c)) and the deduction of collateral benefits[249] can reduce the defendant's obligation to compensate the claimant's loss.

(a) Nature of reparable loss and calculation of the amount of damages
Section 6.1.10 Burgerlijk Wetboek does not define the term loss (*schade*) as such. Article 6:95 BW does explain that *vermogensschade* (economic loss) and *ander nadeel* (other disadvantages) are eligible for compensation, although other disadvantages are only eligible for compensation as far as permitted by law.[250] Dutch law does not oppose the compensation of pure economic loss, reputational loss and lost chances as a matter of principle. The Dutch law of damages starts from the principle of full compensation.[251] In principle, it must be determined in what position the claimant would have been in the absence of the infringement, by comparing the actual sequence of events with the alleged hypothetical sequence of events.[252] The moment at which the loss materialises is used in principle as the reference date for the calculation of damages.[253] However, there could be multiple possible hypothetical sequences of events and one could debate the exact moment at which loss has materialised.[254] It is up to the claimant to allege (and prove) the existence

248 Hartlief, Keirse, Lindenbergh et al. 2018, no. 198. Dutch courts can determine the award of damages in separate legal proceedings, *schadestaatprocedures,* under Art. 612 Rv.
249 Under Art. 6:100 BW. This dissertation does not pay attention to this concept.
250 Lindenbergh 2014, no. 40 and Hartlief, Keirse, Lindenbergh et al. 2018, no. 199.
251 Lindenbergh 2014, no. 11. Although there are many exceptions to this general principle (Lindenbergh 2014, no. 12).
252 Klaassen 2017, no. 4-5. *Explicitly in the context of financial litigation* Hoge Raad 3 February 2012, ECLI:NL:HR:2012:BU4914, *NJ* 2012/95, *JOR* 2012/116 annotated by S.B. van Baalen (*Rabobank Vaart en Vecht v X*), para 3.9.1.
253 Klaassen 2017, no. 4.
254 In case of claims brought by investors, for instance, at the time the investor bought the shares, at the time the investor sold the shares or at the time the credit rating turned out to be affected?

of the loss and the hypothetical sequence of events. For the proof of causation and loss, the following methods can be used: expert studies showing the hypothetical (price) development of financial instruments and interest rates, witness testimonies and analyses of (previous) investment conduct.[255] Although the burden of proof lies with the claimant, Dutch courts have a wide margin of appreciation in the assessment of the extent of the loss.[256] Under Article 6:97 BW, courts 'shall assess the [loss] in a manner most appropriate to its nature' and '[w]here the extent of the [loss] cannot be determined precisely, it shall be estimated'.[257]

In the context of credit rating agency liability, courts must calculate in what position the issuer or investor would have been in the absence of the infringement, by comparing the actual sequence of events with the alleged hypothetical sequence of events.[258] The hypothetical factual sequence of events chosen by the issuer and the investor, and the way in which they frame their claim for damages are again of crucial importance.[259]

In respect of investors, one can think back to the possible lines of argument discussed under the introduction to the requirement of causation (section 5.3.1.3 (b) (ii)). The investor who states he would not have bought the financial instruments at all claims to have suffered greater loss as compared to the investor who states he would have bought the financial instruments anyway, but for another (lower) price or against another interest rate. The hypothetical course of events differs: the first scenario concentrates on alternative investment decisions made[260] and the second scenario concentrates on the development of the prices of the financial instruments in the absence of the infringement and the affected credit rating. Hence, the assessment of the loss and the calculation of the amount of damages cannot be separated from the requirement of causation; they depend on the approach taken in the stage of causation by the parties, and on whether the Dutch courts end up applying the *condicio sine qua non* test, the evidentiary presumption or the doctrine of loss of chance to claims for damages brought by investors. Application of the evidentiary

255 *As stated in the context of deficient market disclosures by* De Jong 2010, pp. 238 ff. and 257. This dissertation will not assess in detail in which manner claimants could exactly provide evidence for the hypothetical scenario. *For another detail analysis in this regard, see* Pijls 2018.

256 Klaassen 2017, no. 6 and Hartlief, Keirse, Lindenbergh et al. 2018, no. 206.

257 *Translation derived from* Warendorf et al. This requires Dutch courts in principle to calculate the loss in the concrete circumstances of each case; yet, an abstract calculation of loss is also permitted in certain situations.

258 Klaassen 2017, no. 4-5. *Explicitly, in the context of financial litigation,* Hoge Raad 3 February 2012, ECLI:NL:HR:2012:BU4914, *NJ* 2012/95, *JOR* 2012/116 annotated by S.B. van Baalen (*Rabobank Vaart en Vecht v X*), para 3.9.1.

259 *As emphasised in the context of the attribution of economic loss to directors by* Pijls 2017, p. 450 and, *in relation to prospectus liability, from* Arons & Pijls 2010, p. 473. Both emphasised the importance of the factual approach chosen in the context of causation.

260 Would the investor have made a more beneficial decision? Or, would the investor not have invested the financial instruments at all? *See* De Jong 2010, p. 177.

presumption in principle entitles the claimant to full compensation, whereas an application of the doctrine of loss of chance entitles the claimant to compensation to the extent of the lost chance. Courts can estimate the height of the lost chance under Article 6:97 BW. As stated by Pijls, it is difficult to determine the exact height of the chance. Courts can estimate the chance by assessing the investment profile and the investment conduct of the claimant.[261] If Dutch courts applied the doctrine of loss of chance, the damages are calculated by multiplying the height of the lost chance with the total loss.[262] The total loss depends again on the factual scenario on which the investor has based its claim for damages.[263]

(b) Legal causation – Objective attribution ('leer der redelijke toerekening')

As stated, the extent of the loss suffered is not necessarily equal to the extent of the loss that must be compensated by the defendant. At this point, we can pick up where we left off in the analysis of causation under Dutch law: causation in law or the theory of objective attribution (*'leer der redelijke toerekening'*)[264] as codified under Article 6:98 BW. Under Article 6:98 BW, '[r]eparation of [loss] can only be claimed for [loss] which is related to the event giving rise to the liability of the obligor, which, also having regard to the nature of the liability and of the [loss], can be attributed to him as a result of such event'.[265] The defendant must prove the facts demonstrating that the loss cannot be attributed to him under the general rule of Article 150 Rv.[266] The application of this theory can hence lead to a limitation of the loss attributed to the credit rating agency and can decrease the amount of damages awarded to issuers and investors accordingly.

Whether or not to attribute loss does not only depend on the nature of the liability and the nature of the loss, as explicitly referred to under Article 6:98 BW, but also on other factors (a multifactor approach[267]). Dutch scholars have developed taxonomies for the factors relevant under Article 6:98 BW. In 1981, the Dutch scholar Brunner developed four rules on attribution (*'de*

261 Pijls 2018, pp. 578-579.
262 De Jong 2010, p. 298.
263 Pijls 2018, p. 579.
264 *For this term e.g.* Hartlief, Keirse, Lindenbergh et al. 2018, no. 216 and Lindenbergh 2014, no. 13.
265 *Translation derived from* Warendorf et al. Even if Dutch courts would facilitate investors in proving causation by means of an evidentiary presumption, Art. 6:98 BW continues to apply unabatedly. Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), para 4.11.3: *'Opmerking verdient ten slotte dat ten aanzien van het bestaan en de omvang van de schade, alsmede het causaal verband als bedoeld in art. 6:98 BW, in beginsel de gewone bewijsregels blijven gelden, waarbij de rechter ingevolge art. 6:97 BW bevoegd is de schade te begroten op de wijze die met de aard van deze schade in overeenstemming is, of de schade te schatten indien deze niet nauwkeurig kan worden vastgesteld.'*
266 *Cf.* Boonekamp, *Stelplicht & Bewijslast*, commentary on Art. 6:98 BW.
267 *E.g.* Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 4.1 and Dijkshoorn 2011.

deelregels van Brunner'): (1) if the loss is more foreseeable, broader attribution of loss is justified; (2) if the chain of events is shorter, broader attribution of loss is justified; (3) the nature of the responsibility entails broad or limited attribution, for instance, the aim of the infringed norm must justify attribution and a higher degree of negligence or intent entails a broader attribution of loss; and (4) the nature of the loss entails broad or limited attribution.[268] In response to Brunner, Hartlief proposed three rules in the context of attribution: (1) if an event is a normal and to be expected consequence of the unlawful act, it should be attributed to the wrongdoer; (2) if an event is an abnormal or not to be reasonably expected consequence of the unlawful act, attribution to the wrongdoer deserves additional justification; (3) the additional justification could be found in the nature of the liability, the nature of the loss or a high degree of culpability.[269] Furthermore, Boonekamp distinguished (somewhat freely translated) relevant factors such as the nature of the liability, the nature of the loss, the foreseeability of the loss,[270] the nature of the violated norm, the nature of the defendant's conduct, whether a created risk has been realised, the length of the chain of causation, the defendant's attitude during the proceedings, the nature of the relevant activity, the financial strength of the parties and the possibilities of insurance.[271] The multifactor approach under Article 6:98 BW has the advantage that it provides courts with flexibility in concrete cases.[272] At the same time, the flexibility entails that court decisions are of a factual nature, so that they have little predictive value for future cases. One should therefore be very careful in making general predictions about the attribution of loss.

In the context of disputes over credit rating agency liability based on Article 35a CRA Regulation, the attribution of increased funding costs and reputational loss suffered by issuers to credit rating agencies does not generally cause any problems. The attribution of these types of loss can be justified by the fact that Article 35a CRA Regulation aims to protect issuers from these types of loss, that it is reasonably foreseeable that infringements leading to impacted credit ratings cause loss to issuers and that there is a high degree of culpability on the side of the credit rating agency – because Article 35a CRA Regulation requires intention or gross negligence on the side of the credit rating agency.

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268 *Cf.* Brunner 1981, pp. 213-216. *See with regard to these sub rules e.g.* Asser/Sieburgh 6-II 2017/64-66, Klaassen 2017, no. 34 ff. and Holthuijsen-van der Kop 2015.

269 Hartlief 2014, p. 2917.

270 In Hoge Raad 10 February 2017, ECLI:NL:HR:2017:214, *NJ* 2018/115 (*Avi Cranes Ltd. v Van Adrighem*), para 4.1.2, the Dutch Supreme Court stated that, in the application of Art. 6:98 BW, '*ook wat naar objectief inzicht voorzienbaar of waarschijnlijk was, een rol kunnen spelen (Parl. Gesch. Boek 6, p. 345)*'.

271 Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 4.3. *See also* Klaassen 2017, no. 34 ff. and Holthuijsen-van der Kop 2015. *See also* Dijkshoorn 2011, *who analyses the application of the multifactor approach in Dutch case law.*

272 *E.g.* Asser/Sieburgh 6-II 2017/58 and Klaassen 2017, no. 33.

The potential effects of the theory of objective attribution are especially interesting in situations in which an investor based its claim for damages on the factual perspective that in the absence of the infringement and the impacted credit rating, it would not have bought the financial instruments at all. Would Dutch law award damages for the lost value of the investment and missed benefits that could have resulted from another investment? Or, would Dutch law only award damages for lost yields and the inflated price of the financial instruments that can be linked directly to the affected credit rating? In the context of credit rating agency liability, Bertrams rejected the full compensation of investors for the nominal value of the financial instruments bought. Emphasising the responsibility of investors for their investment decisions, he pleaded to limit the amount of damages to the difference between the actual interest rate and the hypothetical interest rate had the credit rating been correct.[273] This approach hence filters out the loss caused by price movements due to, for instance, other incorrect or incomplete information, overreactions on the financial markets and general declines of the financial markets. The same approach can be discerned in the context of liability for the violation of disclosure obligations and prospectus liability under Dutch law. De Jong and Pijls provided extensive contributions in this regard.[274] In a simplified outline, De Jong and Pijls argued that the amount of damages should be capped at the inflation of the securities price caused by incorrect or incomplete information or misleading prospectuses. In their view, except for the difference between the actual and the hypothetical price, loss should remain at the expense of the investor.[275]

As stated by De Jong, decisions of the Dutch Supreme Court in this area provide little direction.[276] Court decisions are highly influenced by the factual circumstances of cases, so that they have little predictive value for future cases. In *TMF v De Boer et al.*, for instance, De Boer et al. (hereafter 'De Boer') invested in a project of the company HSI for the development of a thermal

273 Bertrams 1998, p. 365. Giessen & Rijnhout 2017, p. 264 and Atema & Peek 2013, p. 962 only briefly refer to the attribution of loss under Art. 6:98 BW, but do not take a stand on the matter.

274 *E.g.* Pijls 2018, Pijls 2017, De Jong 2016, De Jong & Pijls 2013, De Jong 2010 and Pijls 2009.

275 De Jong 2016, pp. 128-129 and De Jong 2010, pp. 183, 189 and 294, Pijls 2009, p. 135. De Jong and Pijls were also concerned with the question of whether investors must have relied directly or indirectly on incorrect or incomplete information, or whether investors can also claim damages when they relied on the soundness of market prices. As De Jong and Pijls only wished to compensate the extent to which the misleading information inflated the market price of the financial instruments, they did not require the investor to prove that it relied on the misleading information for its investment decision (*cf.* Pijls 2018, p. 319 and De Jong 2010, p. 273).

276 De Jong 2016, p. 128.

bath in Spain, relying on a brochure produced by financial advisor TMF.[277] The project failed and De Boer claimed damages from TMF for a misleading advertisement under Article 6:194 BW. De Boer alleged that TMF's conduct caused them to invest in the thermal bath while that project was in fact not viable from the start.[278] The Court of Appeal of Amsterdam limited the award of damages to the difference between the investment and the actual value of the shares,[279] suggesting a limited attribution of the loss to TMF. The Dutch Supreme Court, however, overturned the decision of the Court of Appeal of Amsterdam. The Court of Appeal of Amsterdam had limited the award of damages because TMF was not involved in the project after having made the brochure, but, according to the Dutch Supreme Court, the Court of Appeal of Amsterdam should have included the argument of De Boer that the project was not viable from the start in its reasoning. The Dutch Supreme Court held that '*[i]n dat licht bezien valt zonder nadere motivering, die evenwel ontbreekt, niet in te zien dat het verlies van de geïnvesteerde bedragen niet meer als een gevolg van het onrechtmatig handelen van TMF aan haar kan worden toegerekend*'.[280] The Dutch Supreme Court hence does not generally disapprove of the limitation, but the reasoning of the Court of Appeal of Amsterdam was inadequate, which renders it impossible to derive general conclusions on the application of Article 6:98 BW at this point.[281]

Article 6:98 BW's effect on the attribution of loss caused by impacted credit ratings can only be determined on a case-by-case basis, especially because Dutch courts have considerable freedom in balancing the relevant circumstances of the case. The question of objective attribution is especially relevant in situations in which investors argue that they would not have bought the financial instruments at all and wish to receive compensation to the extent of the full cost of their transaction. Dutch scholars have argued that in the context of credit rating agency liability, liability for the violation of disclosure obligations and prospectus liability, Dutch courts should lean towards a restrictive attribution of loss so that investors do not receive compensation for the full cost of the transaction. Under Article 35a CRA Regulation, however, this approach leads to the situation that an investor must, on the one hand, have reasonably relied on the credit rating, while, on the other hand, will only

277 Hoge Raad 30 May 2008, ECLI:NL:HR:2008:BD2820, *NJ* 2010/622 annotated by J.B.M. Vranken (*TMF v De Boer*), para 3.1. *This case was described in this context by* De Jong 2010, pp. 180-183. Pijls 2018, p. 263 and Pijls 2017, p. 451 fn. 13 *also discuss TMF v De Boer et al. as an example of a case where the specific facts determined the outcome of the case.*

278 Hoge Raad 30 May 2008, ECLI:NL:HR:2008:BD2820, *NJ* 2010/622 annotated by J.B.M. Vranken (*TMF v De Boer*), para 3.2.

279 Hoge Raad 30 May 2008, ECLI:NL:HR:2008:BD2820, *NJ* 2010/622 annotated by J.B.M. Vranken (*TMF v De Boer*), para 3.3.4.

280 Hoge Raad 30 May 2008, ECLI:NL:HR:2008:BD2820, *NJ* 2010/622 annotated by J.B.M. Vranken (*TMF v De Boer*), para 4.8.

281 *Cf.* De Jong 2010, p. 181.

be compensated to the extent of the difference between the actual and the hypothetical price or between the actual and hypothetical yield of the financial instruments or loans.

(c) Contributory negligence & mitigation of loss

Dutch courts can reduce the wrongdoer's obligation to compensate the aggrieved party under Article 6:101 BW. This provision establishes rules on contributory negligence on the side of the aggrieved party, in situations where the loss was caused by events that fall within the sphere of risk of the aggrieved party and on failures to mitigate loss on the side of the aggrieved party.[282] This broad scope of application stems from the way in which Article 6:101 BW is formulated. The provision states that the wrongdoer's obligation to compensate loss can be reduced 'where circumstances which can be attributed to' the aggrieved party have contributed to the loss suffered.[283] The wording and place of Article 6:101 BW in Section 6.1.10 Burgerlijk Wetboek presume that the provision will only be applied when the liability of the defendant has been established.[284] It is up to the defendant, as the party who wishes to benefit from Article 6:101 BW, to invoke the provision.[285] The consequence of a successful defence based on Article 6:101 BW by the defendant is that courts reduce the amount of damages awarded to the aggrieved party. Dutch courts weigh the degree to which the respective parties contributed to the loss and reduce the amount of damages accordingly.[286] But where fairness ('*billijkheid*') so requires, courts are allowed to adapt the apportionment. On this basis, courts can decide to completely release the defendant from its obligation to pay damages or to completely preserve the defendant's obligation to pay damages.[287]

As stated in section 5.4.3.2 (c) (i), the 'reasonableness' of an investor's reliance on a credit rating would not be considered in the stage of the establishment of causation under Dutch law. When an investor's reliance is unreasonable, a credit rating agency can be entitled to the defence of contributory

282 Art. 6:101 BW is often referred to as the provision on contributory negligence or '*eigen schuld*', but that description is too narrow. The provision covers situations in which the aggrieved party itself has caused the loss and situations in which other events caused the loss that fall within the sphere of risk of the aggrieved party. Boonekamp, *GS Schadevergoeding*, Art. 6:101 BW, note 1.2 and Hartlief, Keirse, Lindenbergh et al. 2018, no. 226.

283 *Translation derived from* Warendorf et al.

284 Keirse & Jongeneel 2013, no. 20.

285 *Cf.* Boonekamp, *Stelplicht & Bewijslast*, commentary on Art. 6:101 BW and Keirse & Jongeneel 2013, no. 63.

286 Keirse & Jongeneel 2013, no. 113.

287 Hartlief, Keirse, Lindenbergh et al. 2018, no. 229 and Keirse & Jongeneel 2013, no. 113. As appears from the wording of Art. 6:101 BW, 'a different apportionment shall be made or the obligation to repair the damage shall be extinguished in its entirety or maintained if it is fair to do so on account of varying degrees of seriousness of the faults committed or any other circumstances of the case'. *Translation derived from* Warendorf et al.

negligence under Article 6:101 BW. The Dutch private law approach to reasonable reliance hence differs from Article 35a CRA Regulation in two aspects: the burden of proof lies with the credit rating agency and a lack of reasonable reliance does not necessarily break the causal link between the credit rating agency's conduct and the loss suffered by the investor completely.[288] The application of the requirement of 'reasonable reliance' hence causes friction within the structure of Dutch national private law.

5.4.4 Article 35a (3) Limitations of liability in advance

5.4.4.1 General system

The legal basis for determining the admissibility of a limitation clause under Dutch law depends on whether the limitation clause is covered by Section 6.5.3 Burgerlijk Wetboek on general terms and conditions (*algemene voorwaarden*). The description of the Dutch law approach to limitation clauses is divided into three parts: (i) the binding force of terms and conditions through offer and acceptance; (ii) the substantive test for general terms and conditions under Article 6:233 BW;[289] and (iii) the general substantive test for appeals to terms and conditions which are contrary to reasonableness and fairness under Article 6:248 (2) BW.

(a) Are the conditions binding upon the other party?
In order for the other party to be bound by a limitation clause, the clause must have been offered by the user and accepted by the other party.[290] Dutch law does not impose requirements of form (*vormvereisten*) upon the offer and the acceptance.[291] Consequently, the user can offer a limitation orally, in writing in a contract or through a written notice, while the other party can accept a limitation both expressly and tacitly.[292] These remarks also apply to agreements concluded online. Users can bind their counterparties by submitting the conclusion of an agreement to the explicit acceptance of the general terms and conditions (by 'box ticking').[293]

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288 *Cf. in the context of a comparison between US law and Dutch law,* Pijls 2018, pp. 141-142.
289 Limitations of liability will often be included in general terms and conditions. Most of the literature used relates to general terms and conditions.
290 Under Art. 6:217 (1) BW. *In the context of general terms and conditions*, Hijma 2016, no. 19 and Van Wechem 2007, no. 34.
291 Under Art. 3:33 BW in conjunction with Art. 3:37 (1) BW. *In the context of general terms and conditions*, Hijma 2016, no. 19.
292 *Cf. in the context of general terms and conditions* Loos 2018, no. 58, Jongeneel 2017a, pp. 126-131, Hijma 2016, no. 19-20 and Van Wechem 2007, no. 35 ff.
293 Jongeneel 2017a, p. 128 and Siemerink, Van Eijk & Van Esch 2006, pp. 145-146.

The acceptance of general terms and conditions is more difficult when the standard terms of use are shown under a subpage of the website, but where no explicit acceptance is required.[294] The question arises whether the user of the website tacitly accepted the terms by using the website. Jongeneel answered this question in the negative, especially because the user of the general terms and conditions can easily ask the user of the website for explicit acceptance. His opinion does not differ if the website itself states that use of the website implies acceptance of the standard terms of use.[295] In this context, Siemerink, Van Eijk and Van Esch pointed towards the decision of the District Court Rotterdam in the case *Netwise Publications v NTS Computers*.[296] In this case, a professional party who used a website was bound to the general terms and conditions, notwithstanding the fact that it had not explicitly agreed to them. The District Court Rotterdam held:

> *'Zelfs indien moet worden aangenomen dat op de openingspagina van de site niet was vermeld 'door in deze gids te zoeken stemt u in met de voorwaarden', doch dat slechts een button 'voorwaarden' werd getoond en dat door het aanklikken van die button de voorwaarden konden worden geraadpleegd, moet worden aangenomen dat NTS door de gids te raadplegen zich aan die voorwaarden heeft gebonden. Immers, van een professionele bezoeker van de site mag worden verwacht dat hij begrijpt dat de 'voorwaarden' waar hij op eenvoudige wijze kennis van kan nemen, (onder meer) voorwaarden zijn die Netwise aan het gebruik van de gids wenst te verbinden.'*[297]

From this quotation, it can be derived that the capacity of the user of the website and the ease with which the general terms and conditions could have been consulted were decisive in concluding that the user of the website was bound by the general terms and conditions. However, it has been argued that, usually, the user of a website will not be bound so easily to general terms and conditions. Lodder emphasised that, generally, and especially where consumers are involved, the user of the website must be put more clearly in the position to consult the general terms and conditions.[298] Also, Siemerink, Van Eijk & Van Esch considered it doubtful whether the District Court Rotterdam would have come to the same conclusion if the user of the website had been a consumer instead of a professional party.[299] Overall, the binding force of a limitation to which the user of a website has not explicitly agreed is thus not necessarily provided for under Dutch law.

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294 Jongeneel 2017a, p. 128 and Siemerink, Van Eijk & Van Esch 2006, pp. 146-147.
295 Jongeneel 2017a, p. 128.
296 Rechtbank Rotterdam (vzr.) 5 December 2002, ECLI:NL:RBROT:2002:AF2059, *Computerrecht* 2003, p. 149 annotated by A.R. Lodder (*Netwise Publications v NTS Computers*). Siemerink, Van Eijk & Van Esch 2006, p. 148.
297 Rechtbank Rotterdam (vzr.) 5 December 2002, ECLI:NL:RBROT:2002:AF2059, *Computerrecht* 2003, p. 149 annotated by A.R. Lodder (*Netwise Publications v NTS Computers*), para 3.1.
298 *Computerrecht* 2003, p. 149 annotation Lodder, no. 7.
299 Siemerink, Van Eijk & Van Esch 2006, p. 148.

In the context of credit rating agency liability, if the limitation is included in individually negotiated or general terms and conditions of rating contracts concluded between credit rating agencies and issuers or subscription contracts concluded between credit rating agencies and investors, offer and acceptance of the limitation are not problematic. The same applies to the use of disclaimers or standard terms of use on credit rating agencies' websites to which an investor has explicitly agreed by clicking in agreement.[300] Some credit rating agencies make use of this method by subjecting the access to credit ratings on their websites to explicit acceptance of standard terms of use that also include a limitation. More problematic is the binding force of disclaimers on websites to which the investor has not explicitly agreed; for instance, if the standard terms of use are shown under a subpage of the website, but where no explicit acceptance is required. In *Netwise Publications v NTS Computers*, the capacity of the user of the website and the ease with which the general terms and conditions could have been consulted were decisive for the District Court Rotterdam to hold that the user of the website was bound by the terms of use. However, no general guidance in respect of consumers can be derived from these cases.

(b) Substantive tests for voidable general terms and conditions

The fact that a party is bound to a general term or condition stipulating a limitation of liability, does not automatically mean that such a limitation clause is valid. If the limitation clause is included in general terms and conditions and the other party is not a legal person in the sense of Article 6:235 BW (meaning that the other party is a consumer or a 'smaller' company[301]), the rules of Section 6.5.3 Burgerlijk Wetboek must be complied with. Within Section 6.5.3 Burgerlijk Wetboek, Article 6:233 BW provides for an *inhoudstoetsing* or substantive test of the clauses.[302] Under section (a) and (b), clauses are voidable if they are 'unreasonably onerous to the other party' ('*onredelijk bezwarend voor de wederpartij*') or 'if the user has not given the other party a reasonable opportunity to take note of the general terms and conditions' ('*indien de gebruiker aan de wederpartij niet een redelijke mogelijkheid heeft geboden om van de algemene voorwaarden kennis te nemen*'), respectively.[303] The latter requirement

300 *Example inspired by* Jongeneel 2017a, p. 128 and Siemerink, Van Eijk & Van Esch 2006, pp. 145-146.

301 Art. 6:235 BW: 'The grounds for nullification referred to in Articles 233 and 234 may not be invoked by **a.** a legal person referred to in Article 360 of Book 2 which, at the time of entry into the contract, has recently published its annual accounts or a legal person in respect of which, at that time, Article 403 (1) of Book 2 has recently been applied; **b.** a party to which the provision in subparagraph a does not apply, if, at the aforementioned time, fifty or more persons work for it or if, at that time, a declaration pursuant to the Handelsregisterwet 2007 (Commercial Registry Act 2007) shows that fifty or more persons work for it.' *Translation derived from* Warendorf et al.

302 *E.g.* Jongeneel 2017b, p. 388 and De Graaf 2006, p. 8. *Also in detail* Loos 2018, no. 169 ff.

303 *Translations of the terms derived from* Warendorf et al.

touches upon the issues discussed under section (i) to some extent,[304] and will not be addressed further. For the purpose of determining in which circumstances a limitation of liability is admitted under Dutch law, the following paragraph concentrates on the question of whether the limitation is unreasonably onerous to the other party.

Following the wording of Article 6:233 (a) BW, for determining whether a clause qualifies as unreasonably onerous, one must take into account 'the nature and the further content of the contract, the manner in which the terms and conditions were established, the mutually apparent interests of the parties and the other circumstances of the case'.[305] It has been argued in Dutch academic literature that this test does not substantially differ from the test applied to determine whether an appeal to a limitation clause is unreasonable under Article 6:248 (2) BW.[306] For the purpose of avoiding unnecessary reiteration, the relevant circumstances will be discussed in detail under section (c) only. However, for investors who qualify as consumers, Section 6.5.3 does provide additional rules in the form of the so-called black and grey list. The black and grey list contain examples of terms deemed to be unfair and presumed to be unfair, respectively.[307] The exclusion and limitation of liability of a consumer's right to damages are included in the grey list. Consequently, limitations of liability are presumed to be unfair, but the user of the terms can put forward counter-evidence in order to prove that the limitation was in fact not unreasonably onerous.[308] In a more general context, Jongeneel has however analysed that providing counter-evidence will often be very difficult. Counter-evidence could, according to him, be provided for instance by economic reports demonstrating that the user of the general terms and conditions cannot insure against certain risks or cannot reasonably produce the goods or services in the absence of the limitation.[309]

(c) Appeals contrary to reasonableness and fairness

In a concrete case, a user of terms and conditions may not invoke a limitation clause if that appeal is contrary to the principles of reasonableness and fairness under Article 6:248 (2) BW.[310] This road can be travelled by all parties, i.e., in case of concurrence between Article 6:233 BW and Article 6:248 (2) BW, a party can choose on which legal basis to attempt to escape from the application of the limitation clause.[311]

304 *See* Jongeneel 2017a, p. 123.
305 *Translation derived from* Warendorf et al.
306 *E.g.* De Graaf 2006, p. 10. *Implicitly* Hijma 2016, no. 26.
307 Art. 6:236 BW and Art. 6:237 BW, respectively.
308 Art. 6:237 (f) BW. *See in detail on this provision* Loos 2018, no. 290 ff.
309 Jongeneel 2017b, pp. 400-401.
310 *In the words of* De Graaf 2006, p. 8 and Jongeneel 2017b, p. 388, an '*uitoefeningstoets*'.
311 *In detail, also on the development of this rule*, Loos 2018, no. 186, Jongeneel & Pavillon 2017, pp. 174-175, Hijma 2016, no. 27, De Graaf 2006, pp. 7-9 and Rijken 1983.

The reasonableness and fairness test originates from the decision of the Dutch Supreme Court in *Saladin v HBU*.[312] The Dutch Supreme Court held that whether the user of a term can appeal to that term depends on many circumstances: '*O. dat het antwoord op de vraag in welke gevallen* […] *een beroep op dit beding niet vrijstaat, afhankelijk kan zijn van de waardering van tal van omstandigheden, zoals: de zwaarte van de schuld, mede i.v.m. de aard en de ernst van de bij enige gedraging betrokken belangen, de aard eb de verdere inhoud van de overeenkomst waarin het beding voorkomt, de maatschappelijke positie en de onderlinge verhouding van pp., de wijze waarop het beding is tot stand gekomen, de mate waarin de wederpartij zich de strekking van het beding bewust is geweest.*'[313] The relevant circumstances that have to be balanced against each other are hence, *inter alia*:

- The gravity of the user's conduct. For example, did the user act intentionally, with (conscious) recklessness or with simple negligence?
- The nature and further content of the agreement concluded. For instance, what are the other (general) terms and conditions of the agreement, did the other party pay a reasonable price in relation to the exclusion or limitation?[314]
- The positions of the parties and their interrelationship relationship. For instance, does the other party qualify as a consumer, a professional or an expert?[315]
- The manner in which the terms and conditions were established. For instance, did the parties negotiate or were general terms and conditions applied?[316]
- The mutually apparent interests of the parties. For instance, how does the user's interest to limit and be able to insure its liability risks relate to the other party's interest in full compensation?[317,318]

These circumstances have been addressed together as the '*omstandigheden catalogus*'. With regard to each limitation, the specific circumstances must be taken into consideration in order to determine whether invoking the term is admissible. The circumstance of the gravity of the user's conduct is of particular importance in relation to the admissibility of limitation clauses. Invoking

312 Hoge Raad 19 May 1967, ECLI:NL:HR:1967:AC4745, *NJ* 1967/261 annotated by G.J. Scholten (*Saladin v HBU*). At the time *Saladin v HBU* was decided, the reasonableness and fairness test did not exist yet and the question was whether an appeal to the term was contrary to the principle of good faith. Jongeneel 2017b, p. 388.

313 Hoge Raad 19 May 1967, ECLI:NL:HR:1967:AC4745, *NJ* 1967/261 annotated by G.J. Scholten (*Saladin v HBU*).

314 *In detail, in the context of general terms and conditions,* Loos 2018, no. 208 ff.

315 *In detail, in the context of general terms and conditions,* Loos 2018, no. 229.

316 *In detail, in the context of general terms and conditions,* Loos 2018, no. 215 ff.

317 *In detail, in the context of general terms and conditions,* Loos 2018, no. 221 ff. and, *in particular*, no. 224-225.

318 *See, for the explanation of all of these circumstances and examples, also e.g.* Schelhaas 2017, pp. 72-75, Hijma 2016, no. 26, De Graaf 2006, Duyvensz 2003, pp. 19-35 and Rijken 1983, p. 97.

terms that aim to limit liability for loss caused intentionally or due to conscious recklessness (*opzettelijk of met bewuste roekeloosheid*) by the user of the terms or employees who are charged with the management of the user is generally not permitted.[319] Invoking terms that aim to limit liability for loss caused intentionally or due to conscious recklessness by employees or subordinates is not generally inadmissible, but might nevertheless be so in light of other relevant circumstances.[320] As has been discussed in more detail in section 5.4.3.1, the exact meaning of the term conscious recklessness is debatable. But at this point, it suffices to say that since the decision of the Dutch Supreme Court in *Telfort v Scaramea* in 2008, it is clear that the term conscious recklessness covers both '*waarschijnlijkheidsbewustzijn*' and '*mogelijkheidsbewustzijn*' of the possible occurrence of loss on the side of the user.[321] The term hence covers both situations in which the user of the limitation was aware that its acts could cause loss and situations in which the user of the limitation was aware that its omission could cause loss.

5.4.4.2 Limitations of liability in relation to issuers and investors

Depending on whether a limitation clause has been included in general terms and conditions or has been negotiated on an individual basis, the admissibility of an appeal to the limitation clause must be assessed in accordance with Section 6.5.3 Burgerlijk Wetboek and/or Article 6:248 (2) BW. An application of the general statutory framework to the admissibility of limitations clauses in relation to issuers and investors then leads to the following general guidelines:

- If Section 6.5.3 Burgerlijk Wetboek applies, by means of general terms and conditions, a credit rating agency cannot limit its liability if that would be 'unreasonably onerous' to the issuer or investor under Article 6:233 (a) BW. If limitations of liability are presumed to be unfair under Article 6:237 (f) BW, it will be difficult for credit rating agencies to provide proof rebutting this presumption. This Section will only apply in a limited amount of situations, namely in relation to contracts concluded with investors acting as consumers and small companies under Article 6:235 BW.

319 *E.g.* Hoge Raad 5 September 2008, ECLI:NL:HR:2008:BD2984, *NJ* 2008/480 (*Telfort v Scaramea*) and Hoge Raad 12 December 1997, ECLI:NL:HR:1997:ZC2524, *NJ* 1998/208 (*Gemeente Stein v Driessen*). *E.g.* Loos 2018, no. 228, Jongeneel 2017b, p. 403, Schelhaas 2017, p. 73, De Graaf 2006, pp. 13 ff. and Duyvensz 2003, p. 98.

320 De Graaf 2006, pp. 29 and 45 ff. De Graaf argued that conduct and state of mind of employees and subordinates will not easily be attributed to the user of the terms. For a situation in which an appeal to an exclusion of liability was allowed, *e.g.* Hoge Raad 31 December 1993, ECLI:NL:HR:1993:ZC1210, *NJ* 1995/389 annotated by C.J.H. Brunner (*Matatag v De Schelde*). *Cf. also* Duyvensz 2003, p. 98.

321 Hoge Raad 5 September 2008, ECLI:NL:HR:2008:BD2984, *NJ* 2008/480 (*Telfort v Scaramea*), para 3.5. Jongeneel 2017, pp. 408-410.

- In general, a credit rating agency cannot invoke a limitation clause if the appeal is contrary to the principles of reasonableness and fairness under Article 6:248 (2) BW.
- The reasonableness and fairness test involves a balancing act of the relevant circumstances of the case, whereby the gravity of the conduct of the credit rating agency as user of the general or individually negotiated terms and conditions, the insurability of the risks on the side of the credit rating agency, the capacity and expertise of the issuer or investor and the price paid for the agreement by the issuer or investor can be of particular importance with regard to the admissibility of limitations of liability. It follows from this test that by means of (general) terms and conditions, a credit rating agency cannot limit its liability for loss caused by intentional or consciously reckless conduct.

Article 35a CRA Regulation requires credit rating agencies to have committed an infringement intentionally or with gross negligence. Although the meaning of gross negligence cannot be determined with certainty under Dutch law, I have argued in section 5.4.3.1 that the threshold set by gross negligence is lower than the threshold set by *bewuste roekeloosheid* or conscious recklessness. As a consequence, under Dutch law, if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a credit rating agency would still have some room to limit its liability if it acted with gross negligence but not with conscious recklessness.[322]

5.4.5 Prescription of claims

Dutch rules on the prescription periods of claims (‘*rechtsvorderingen*’) can be found in Section 3, Title 4 on the acquisition and loss of claims of Book 3 of the Burgerlijk Wetboek. The general rule of Article 3:306 BW involves a prescription period of twenty years, but many special prescription periods apply to different types of claims.[323] Relevant in the context of claims for damages brought by investors and issuers based on Article 35a CRA Regulation, are the rules on the prescription of claims for damages under Article 3:310 BW.

322 As stated under section 5.3.1.1 (b), the attribution of conduct and state of mind is a matter of EU law and is determined by the wording of the infringements. However, it would have been better if the wording of Art. 35a and Annex CRA Regulation had been more precise in this regard.

323 Art. 3:306 BW – ‘*Indien de wet niet anders bepaalt, verjaart een rechtsvordering door verloop van twintig jaren*.’ Due to the tremendous amount of exceptions, Art. 3:306 BW has been described as ‘safety net’, *see* Koopmann, *GS Vermogensrecht*, Art. 3:306 BW, note 2.A2 and Koopmann 2010, p. 5. *See, for similar remarks*, Asser/Sieburgh 6-II 2017/397.

Article 3:310 (1) BW states that '*[e]en rechtsvordering tot vergoeding van schade of tot betaling van een bedongen boete verjaart door verloop van vijf jaren na de aanvang van de dag, volgende op die waarop de benadeelde zowel met de schade of de opeisbaarheid van de boete als met de daarvoor aansprakelijke persoon bekend is geworden, en in ieder geval door verloop van twintig jaren na de gebeurtenis waardoor de schade is veroorzaakt of de boete opeisbaar is geworden.*' Issuers and investors hence lose their right to claim damages: (1) 5 years after the moment that the issuer or investor (as aggrieved party) became acquainted with both the loss and the party responsible for the loss (this period starts to run from the day after the aggrieved party became acquainted); but at the latest (2) 20 years after the event occurred that caused the loss. Koopmann qualifies these periods as the 'subjective' and the 'objective' yardstick, respectively, as the 5-year prescription period takes into account the specific circumstances relating to the aggrieved party while the 20-year prescription period only takes the event that caused the loss into account.[324]

The yardstick for the 5-year prescription period of acquaintance ('*bekendheid*') with the loss and the party who caused the loss is interpreted as *actual* acquaintance ('*daadwerkelijke bekendheid*').[325] The notion of actual acquaintance was given substance in Dutch case law. The holder of the right must actually be able to bring proceedings against the party who caused the loss.[326] For that purpose, the holder of the right must be sufficiently (but not absolutely) certain that the loss was caused by wrongdoing of the other party.[327] Suspicions and presumptions in this respect alone are not sufficient for the prescription period to start running, even when the circle of potential parties who could have caused the loss was small.[328] Overall, the impression is that the prescription period does not start to run swiftly and that Dutch law does not require a proactive attitude from the holder of the right in this respect.

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324 Koopmann 2010, p. 5. *And, on the yardstick of the twenty-year period,* Asser/Sieburgh 6-II 2017/413.

325 *E.g.* Hoge Raad 31 October 2003, ECLI:NL:HR:2003:AL8168, *NJ* 2006/112 annotated by C.E. du Perron (*Saelman*), para 3.4 and Hoge Raad 6 April 2001, ECLI:NL:HR:2001:AB0900, *NJ* 2002/383 annotated by H.J. Snijders (*Vellekoop v Wilton Feijenoord*), para 3.4.2. *Recently repeated by* Hoge Raad 31 March 2017, ECLI:NL:HR:2017:552, *NJ* 2017/165 (*Mispelhoef v Staat*), para 3.3.2. *Also e.g.* Asser/Sieburgh 6-II 2017/411 and 415 and Koopmann 2010, pp. 44-45. These contributions discussed the case law referred to in this paragraph in detail and provide far more extensive overviews of relevant case law in this area.

326 Hoge Raad 31 October 2003, ECLI:NL:HR:2003:AL8168, *NJ* 2006/112 annotated by C.E. du Perron (*Saelman*), para 3.4.

327 Hoge Raad 31 October 2003, ECLI:NL:HR:2003:AL8168, *NJ* 2006/112 annotated by C.E. du Perron (*Saelman*), para 3.5 and Hoge Raad 31 March 2017, ECLI:NL:HR:2017:552, *NJ* 2017/165 (*Mispelhoef v Staat*), para 3.3.2.

328 *As can be derived from* Hoge Raad 31 March 2017, ECLI:NL:HR:2017:552, *NJ* 2017/165 (*Mispelhoef v Staat*), para 3.3.2. This decision has been approved and disapproved of, *see, respectively*, Fluitsma & Lubach 2017 and Burgers 2017, while Smeehuijzen (annotation *JA* 2017/93) did not consider the decision groundbreaking, though instructive.

5.4.6 Concluding remarks

The liability of credit rating agencies has not been a widespread topic of political and academic debate in the Netherlands. The introduction of Article 35a CRA Regulation passed by the Dutch legislature almost unnoticed,[329] Dutch courts have hardly decided on any cases involving credit rating agency liability[330] and contributions from Dutch scholars are rather scarce.

Dutch private law contains multiple grounds on which issuers and investors can base claims for liability. Depending on the existence of a contractual relationship, issuers can base claims on Article 6:74 BW and/or Article 6:162 BW. Credit rating agencies breach a duty of care if they fail to act as can be expected from *een redelijk bekwaam en redelijk handelend* (a reasonably competent and reasonably acting) credit rating agency.[331] What can be expected from a credit rating agency must be determined in the concrete circumstances of the case. This standard leaves a margin of discretion to credit rating agencies, but forms a lower threshold for liability than the requirement of intention or gross negligence imposed by Article 35a CRA Regulation. Depending on the existence of a contractual relationship and on the particular circumstances of the case, investors can base claims on Article 6:74 BW, Article 6:193b BW, Article 6:194 BW and Article 6:162 BW. It is attractive for investors to base a claim for damages on Article 6:193b BW or Article 6:194 BW, because these provisions allow them to benefit from a reversal of the burden of proof in respect of the inadequacy of the credit rating.

Dutch law does not provide explicit guidance on the interpretation and application of Article 35a CRA Regulation, so that the interpretation and application has been constructed in accordance with the general principles of Dutch private law. This report demonstrated that under Dutch law, quite a number of uncertainties exist on the interpretation and application of Article 35a CRA Regulation. For instance, the term 'gross negligence' translated as '*grove nalatigheid*' is not sufficiently clear for the purposes of Dutch private law. One can make an educated guess as to the meaning of this term, but it is hard to determine the exact degree of culpability required, because '*grove nalatigheid*' is not a term used commonly in Dutch private law. Moreover, other

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329 In *Kamerstukken II* 2011/12, 22 112, 1298, no remarks were made about credit rating agency liability. In *Kamerstukken I* 2011/12, 33 152, A, only the Progressive Liberal Democrats (D66) asked two questions on the requirement of reliance under Art. 35a CRA Regulation and on the interaction between Art. 35a CRA Regulation and Dutch private law.

330 The cases decided only involved agencies that would not qualify as a credit rating agencies under Art. 3 (1) (b) CRA Regulation, Rechtbank Amsterdam 14 January 2015, ECLI:NL:RBAMS:2015:6 (*GLS v Graydon*) and Rechtbank Rotterdam 29 December 2010, ECLI:NL:RBROT:2010:BP5369, *JOR* 2011/388 annotated by S.R. Damminga.

331 *Cf.* Asser/Tjong Tjin Tai 7-IV 2018/200. *For this standard see e.g. with regard to accountants*, Hoge Raad 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2008/528 annotated by C.C. van Dam (*Deloitte Touche e.a. v Vie d'Or*), para 5.3 and 5.4.2 and *with regard to lawyers*, Hoge Raad 9 June 2000, ECLI:NL:HR:2000:AA6159, *NJ* 2000/460 (*S. v V.*), para 3.3.

uncertainties manifest themselves in respect of the requirement of causation in relation to claims brought by investors. It is not clear whether Dutch courts would facilitate investors in proving that they had relied on an affected credit rating for the purpose of their investment decision. In the context of prospectus liability and incorrect tax advice, Dutch courts can employ several tools to facilitate investors or parties that acted upon advice, respectively. Although one can argue that these tools should find application in the context of credit rating agency liability, any application requires an extension of their scope of application. If Dutch courts facilitate investors, they will most likely do so by applying an evidentiary presumption in relation to the causal link between the impacted credit rating and an investment decision in relation to investors who do no act in the scope of their profession or business. Finally, Dutch case law provides little guidance on the question of whether and, if so, how the full compensation of investors will be limited by means of the theory of objective attribution under Article 6:98 BW. On certain occasions, therefore, these uncertainties render it difficult to provide an accurate overview of the interpretation and application of Article 35a CRA Regulation under Dutch law.

5.5 FRENCH LAW

5.5.1 National private law context

This national law report concentrates on the interpretation and application of Article 35a CRA Regulation under French law. French private law is the most important legal system of the Romanist civil law tradition. The main codification is formed by the Code Civil (CC, French Civil Code), that served as a source of inspiration for many other legal systems.[332] The Code Civil was introduced during the reign of Napoléon in 1804, and was mainly based on Roman law and French 'post-revolutionary' ideas.[333] Its content was strongly influenced by the credo of the French revolution '*liberté, égalité, fraternité*' (freedom, equality, fraternity), traces of which can be found in the importance attached to the 'autonomy of the will' in contract law for example.[334] Although parts of the Code Civil were subject to revision and the protection of weaker parties was increased over the years, up to February 2016, most provisions remained very similar to their introduction in 1804.[335] By *Ordonnance* n° 2016-131 of 10 February 2016, however, the French law of

332 *E.g.* Van Dam 2013, no. 301-2.
333 *See* Whittaker 2008, p. 296.
334 *See e.g.* Steiner 2018, p. 214, Van Dam 2013, no. 301-1, Fauvarque-Cosson & Fournier 2012, p. 344 and Whittaker 2008, p. 296.
335 Fauvarque-Cosson & Fournier 2012, p. 346. *Cf. also e.g.* Van Dam 2013, no. 301-1. *For an overview of developments, see* Whittaker 2008, pp. 298 ff.

obligations and, in particular, French contract law were revised. In respect of French non-contractual liability law, this revision only involved a renumbering.[336] The *Projet de réforme de la responsabilité civile Mars 2017* may be the harbinger of substantive changes to French liability law, both to the provisions on contractual and non-contractual liability.[337] As the future of this reform project was still unclear when this study was finalised, only brief references to this proposal will be made in the footnotes of this report.

French private law is characterised by the use of general notions and concepts and by a certain degree of vagueness and uncertainty.[338] The French legislature used general notions and concepts in the drafting of the Code Civil.[339] The Code Civil contains few provisions in respect of civil liability and the existing provisions are formulated broadly. As an example, Article 1240 and 1241 CC do not include specifications of concepts such as fault, causation and harm.[340] The use of general notions and concepts provides French civil liability law with an 'open' character. It allows for the compensation of all types of loss and does not object to the compensation of pure economic loss as a matter of principle.[341] Yet, the use of general notions and concepts also entails that, in the words of Viney, courts are left with 'the job of resolving innumerable questions' in concrete cases.[342] French case law does not necessarily mitigate the rather vague and uncertain character of French private law. Indeed, French courts do not tend to extensively motivate their decisions[343] and the French legal system does not officially involve a system of legal precedent.[344] The latter position, however, does not entirely correspond with reality, because decisions of French courts in general and of the French Supreme Court in particular are of high authority in practice.[345] The French approach to the judiciary explains these characteristics of French case law and of the French legal system. Traditionally, French courts are

336 Bénabent 2016, no. 511. *Ordonnance* n° 2016-131 is available at www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004939&categorieLien=id, last accessed at 31 August 2019.

337 *See* www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_1303 2017.pdf and for the English version www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf, last accessed at 31 August 2019.

338 *Cf.* Van Dam 2013, no. 610-4.

339 *Cf.* Van Dam 2013, no. 610-4.

340 The *Projet de réforme de la responsabilité civile Mars 2017* proposes more detailed provisions on loss and causation under Art. 1235 ff. and Art. 1239 ff., respectively.

341 *See e.g.* Quézel-Ambrunaz 2017, p. 242, Van Dam 2013, no. 710-2, Viney, Jourdain & Carval 2013, no. 251, Sotiropoulou 2012, no. 483 and Whittaker 2008, p. 364.

342 Viney 2008, p. 237. *See also* Van Dam 2013, no. 301-2 and no. 610-4.

343 Van Dam 2013, no. 301-3. *Cf.* Steiner 2018, pp. 139-140, Fauvarque-Cosson & Fournier 2012, p. 347 and Bell 2001, p. 70.

344 Steiner 2018, pp. 68-69 (*also for exceptions*), Van Dam 2013, no. 301-3 and Bell 2001, pp. vii and 66.

345 Van Dam 2013, no. 301-3 and Fauvarque-Cosson & Fournier 2012, p. 346. *Cf.* Steiner 2018, p. 71 and Bell & Boyron 2008, p. 31.

considered not more than '*la bouche qui prononce les paroles de la loi*'. They must apply the law to a case at hand and should not sit on the legislature's seat.[346] Consequently, French courts are considered bound by law only and not by prior court decisions[347] and French courts do not provide an insight in policy arguments that influenced decisions, because that is considered to belong to the realm of the legislature.[348]

The French Code Civil consists of five Books, involving the rules on, for instance, persons (Book 1), goods and different forms of property (Book 2) and the way in which property can be obtained (Book 3). For the purpose of constructing the interpretation and application of Article 35a CRA Regulation, the French law of obligations under Book 3, Title III ('*des sources d'obligations*') was primarily used. More specifically, the study concentrates on the general notions and concepts underlying both contractual liability under Article 1231-1 CC and non-contractual liability under Article 1240 CC ff. Although the conditions for both contractual and non-contractual liability are similar to some extent,[349] French law employs a strong divide between contractual and non-contractual liability under the principle of *non-cumul*. The principle of *non-cumul* entails that parties who wish to bring a claim for compensation in private law may not choose to base their claim on breach of contract (*responsabilité contractuelle*) or fault (*responsabilité délictuelle* or *responsabilité extracontractuelle*).[350] If a contractual obligation has been breached, the aggrieved party must bring a claim for compensation based on contractual liability and is not permitted to claim compensation based on non-contractual liability.[351] The ratio behind this strict divide is that the rules relating to contractual and non-contractual claims may differ, for instance in respect of the validity of limitation clauses (see section 5.5.4), but this is subject to criticism in French academic literature.[352]

In contrast to the other legal systems investigated in this dissertation, French law distinguishes between 'two types' of loss, namely *dommage* (harm) and *préjudice* (loss).[353] In concrete cases, harm and loss suffered by the aggrieved party can overlap, but harm and loss do not necessarily consist of the same components. For example, a car accident can result in the aggrieved

346 Montesquieu 1748, p. 327. *As stated by e.g.* Steiner 2018, pp. 65-66, Van Dam 2013, no. 301-3 and Bell 2001, pp. vii-viii.

347 Steiner 2018, pp. 68-69, Van Dam 2013, no. 301-3.

348 Steiner 2018, p. 140.

349 *Cf.* Whittaker 2008, p. 361.

350 *See e.g.* De Graaff 2017, no. 17-18, Bénabent 2016, no. 507 and Chacornac 2014, no. 1058. *E.g.* Cour de Cassation (Chambre Civile 1) 11 January 1922 (*Pelletier v Doderet*) and Cour de Cassation (Chambre Civile 2) 9 June 1993, 91-21650, Bulletin 1993, II, no. 204, p. 110.

351 *Cf. e.g.* Bénabent 2016, no. 507, Charcornac 2014, no. 1058 and Tallon 2008, p. 231.

352 *E.g.* Moron-Puech 2017.

353 English translations derived from the English version of the *Projet de réforme de la responsabilité civile Mars 2017*, available at www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf, last accessed at 31 August 2019.

party having broken his leg and in loss of income because the aggrieved party is temporarily not able to work. French law qualifies the broken leg, as a direct consequence of the accident, as harm and the loss of income as prejudice. This distinction cannot always be made so easily in other situations as well. In this national law report, reference is mainly made to the term 'loss' (*préjudice*). If necessary in a particular context, reference is made to the term 'harm' (*dommage*).

5.5.2 National rules on credit rating agency liability

5.5.2.1 Liability regime prior to 2018

(a) Art. L. 544-5 and L. 544-6 Code monétaire et financier

Until the beginning of 2018, French private law was known for its special rules on the civil liability of credit rating agencies under Article L. 544-5 and L. 544-6 Code monétaire et financier. As the only national legislature of the Member States investigated in this dissertation, the French legislature codified special rules on the liability of credit rating agencies and on the validity of jurisdiction and exclusion clauses in the French Code monétaire et financier in 2010, in response to the CRA I Regulation. However, in January 2018, the French legislature abolished the special provisions as a somewhat late response to Article 35a CRA Regulation.[354]

Article L. 544-5 Code monétaire et financier was generally understood not to have created a special regime for liability, but rather to have made explicit that general provisions of the French law of obligations apply when a credit rating agency makes a fault in or falls short of ('*fautes et manquements*') the implementation of its obligations under the first version of the CRA Regulation.[355] Article L. 544-5 (1) Code monétaire et financier stipulates that:

> '*Les agences de notation de crédit mentionnées à l'article L. 544-4 engagent leur responsabilité* délictuelle et quasi délictuelle*, tant à l'égard de leurs* clients *que des* tiers*, des conséquences dommageables des* fautes et manquements *par elles commis dans la mise en œuvre des obligations définies dans le règlement (CE) n° 1060 / 2009 du Parlement européen et du Conseil, du 16 septembre 2009, précité.*'[356]

With this provision, French law was considered to provide for a more stringent liability regime than Article 35a CRA Regulation, because the threshold for fault under French non-contractual liability law constitutes simple negligence which

354 Assemblée Nationale 14 January 2018, no. 907, Art. 32.

355 Prorok 2016, no. 467, Cappelie 2014, para 2.1, Chacornac 2014, no. 1055, Merville 2013, no. 12, Sotiropoulou 2013, no. 6 and P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010. *Cf.* Denis 2011, p. 77.

356 Emphasis added [DJV].

is lower than 'intention' or 'gross negligence' as required by Article 35a CRA Regulation.[357] Nevertheless, Article L. 544-5 is not considered an easy road towards compensation. Rapporteur for the Sénat Marini explained: '*[…] les cas dans lequels le régime de responsabilité pour faute fondé sur l'article L. 544-5 pourra être invoqué avec succès seront sans doute rares mais pas inexistants. Cet article constitue cependant un signal important à destination des agences de notation, eu égard aux enjeux pour les investisseurs et les sociétés concernées.*'[358]

In order to strengthen the liability regime in the Code monétaire et financier, the second part of Article L. 544-5 forbade the use of exclusive jurisdiction clauses in favour of third countries (non-Member States):

> '*Tout accord ayant pour effet de soumettre,* par avance et exclusivement, aux juridictions d'un Etat tiers à l'Union européenne *un différend relatif aux dispositions du règlement (CE) n° 1060 / 2009 du Parlement européen et du Conseil, du 16 septembre 2009, précité, alors que les juridictions françaises auraient été compétentes pour en connaître à défaut d'un tel accord,* est réputé nul et non écrit.'[359]

Furthermore, Article L. 544-6 prohibited credit rating agencies from using clauses that exclude their liability completely: '*Les clauses qui visent à* excludé la responsabilité *des agences de notation de crédit mentionnées à l'article L. 544-4 sont* interdites et réputées non écrits.'[360] Initially, the legislative proposal prohibited the use of both exclusion and limitation clauses. During the legislative proceedings, the French *Sénat* however decided that the use of limitation clauses should be allowed; first, because limitation of liability is permitted under Recital 35 CRA I Regulation;[361] and, second, because a prohibition would discourage credit rating agencies from establishing and registering in France.[362]

(b) Doctrinal debate and criticism

The introduction of Article L. 544-5 and L. 544-6 Code monétaire et financier received a great deal of attention and criticism in French academic literature, which is in sharp contrast to the silence that surrounded the abolition of the provisions in January 2018.

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357 Cappelie 2014 and Sotiropoulou 2013, no. 30.

358 P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010.

359 Emphasis added [DJV]. A provision prohibiting exclusive jurisdiction clauses in favour of other Member States would not have been in compliance with Art. 25 (1) Brussels I Regulation (recast). Denis 2011, p. 75.

360 Emphasis added [DJV].

361 P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010. *See also* Tchotourian 2011, no. 13.

362 *Cf.* J. Chartier, 'Rapport fait au nom de la commission des finances, de l'économie générale et du contrôle budgétaire sur le projet de loi, modifié par le Sénat, de régulation bancaire et financière (no. 2833) no. 2848', 7 October 2010, p. 40.

To begin with, the 'legal' nature of Article L. 544-5 was the subject of debate in French academic literature. Article L. 544-5 stipulated that credit rating agencies '*engagent leur responsabilité délictuelle et quasi délictuelle, tant à l'égard de leurs clients que des tiers*'. The wording of Article L. 544-5 hence suggested that claims for damages must be based on non-contractual liability, irrespective of whether a contractual relationship exists between the credit rating agency and the issuer or investor.[363] French authors were however taken by surprise by the fact that credit rating agency liability would always qualify as non-contractual, pointing out that this qualification conflicts with the French principle of *non-cumul*.[364] Indeed, in the absence of Article L. 544-5, the principle of *non-cumul* would have required an issuer or investor that concluded a rating or subscription contract with a credit rating agency to base a claim for damages on contractual liability.[365] Instead, by connecting liability to faults committed in the implementation of obligations under the first version of the CRA Regulation, and by explicitly using the terms '*délictuelle et quasi délictuelle*', Article L. 544-5 reverses the 'legal hierarchy' that would otherwise follow from the principle of *non-cumul*, leaving a subordinate role for contract law in credit rating agency liability.[366]

Yet different, positive voices can be heard in French academic literature as well. Sotiropoulou considered the choice of the French legislature well-considered ('*délibéré et réfléchi*'), precisely because it created a more protective regime based on the contents of violated obligations rather than on the quality of the aggrieved party.[367] Furthermore, a completely different perspective is offered by Moron-Puech, who uses Article L. 544-5 as an example to argue that in fact contractual and non-contractual liability are of the same nature and that the principle of *non-cumul* has no foundation in the Code Civil. Moron-Puech builds upon the report of Marini, which states that:

> '*Nous nous étions principalement concentrés, jusque-là, sur la responsabilité contractuelle, c'est-à-dire la relation entre l'agence de notation et son client. Or il est toujours délicat de trop s'immiscer dans les relations contractuelles, dès lors que deux parties contractent dans un cadre communautaire qui les autorise à choisir le droit sous lequel elles se placent. Par conséquent, à l'issue de ce nouveau travail, j'ai proposé à la commission de replacer la réflexion sur le terrain de la responsabilité délictuelle, afin de nous intéresser à la*

363 Merville 2013, no. 17.

364 *See e.g.* Prorok 2016, no. 468, Charcornac 2014, no. 1058, Thépot 2010, para II. *Cf. also* Clédat 2012, para II.B. A neutral descriptive approach is given by Merville 2013, no. 17.

365 The relationship between issuer and credit rating agency in the course of a rating contract is qualified as a '*contrat de louage d'ouvrage*' or '*contrat d'entreprise*' (agreement for services, Art. 1708 and 1710 CC). Thépot 2010, para II.B.1 and Dondero, Haschke-Dournaux & Sylvestre 2004, no. 23.

366 *See, in detail about this subordinated role,* Sotiropoulou 2013, no. 8-13. *Also* Merville 2013, no. 13.

367 Sotiropoulou 2013, no. 15.

responsabilité des agences de notation à l'égard de l'ensemble de la communauté financière et du marché.'

Moron-Puech concludes from this quotation that the choice in favour of the wording '*délictuelle*' demonstrates the general nature of non-contractual liability in the Code Civil.[368] Were his approach to be followed, a discussion on the 'legal' nature of Article L. 544-5 would no longer be relevant.

Furthermore, the need to introduce Article L. 544-5 was questioned. Chacornac posed the question of why it was necessary to introduce Article L. 544-5 at all, as the provision only explicitly subjects credit rating agencies to French non-contractual liability law instead of having introduced a special liability regime.[369] According to Daigre, the wording of L. 544-5 '*est en soi curieuse car elle pourrait donner le sentiment d'une immunité antérieure*'.[370] As will be discussed in sections 5.5.2.2 and 5.5.2.3 as well, credit rating agencies were indeed already subject to liability under French contract and non-contractual liability law prior to 2010. In addition, Article L. 544-5 was criticised for not having improved the feasibility of claims for damages, because the provision lacks special rules that facilitate claims against credit rating agencies.[371] As examples of possible special rules, Prorok referred to legal presumptions that help claimants to prove fault, causation or harm.[372] Although it does not necessarily justify the lack of special rules, the conclusion of Marini cited above that claims based on Article L. 544-5 will seldom be successful already prepared for this criticism and, in the words of Clédat, shows that the French legislative draftsmen '*étaient conscients de cette faiblesse*'.[373]

Not only the first, but also the second part of Article L. 544-5 – on the invalidity of exclusive jurisdiction clauses – led to discussion. Clédat, for instance, questioned the provision's capacity to subject disputes to '*jurisdictions françaises, selon les règles de droit français*'. Two reasons why he questions this capacity are that Article L. 544-5 does not prohibit a choice in favour of courts of other Member States and that Article L. 544-5 allows for non-exclusive jurisdiction clauses in favour of the courts of third countries.[374] The former reason to doubt this capacity could however not have been avoided by the

368 Moron-Puech 2017, p. 8, *as referring to JORF. Débats parlementaires. Sénat. Compte rendu intégral*, 1 October 2010, p. 7256, available at www.senat.fr/seances/s201010/s20101001/s20101001.pdf, last accessed at 31 August 2019.

369 Charcornac 2014, no. 1055.

370 Daigre 2011, p. 115 (*mentioned by* Chacornac 2014, no. 1055 and Prorok 2016, no. 467). *Cf. also* Clédat 2012, para II.B, who stated that the confirmation may seem surprising.

371 *Cf.* Prorok 2016, no. 467. *See also* Denis 2011, p. 77 who claimed that Art. L. 544-5 has made it more difficult to prove a credit rating agency made a fault and Clédat 2012, para I.B who claimed that Art. L. 544-5 does not develop credit rating agency liability.

372 Prorok 2016, no. 467.

373 P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010. Clédat 2012, para II.E.

374 Clédat 2012, para II.A. *Cf. also* Cappelie 2014, para 2.3 and Denis 2011, p. 75.

French legislature. A national prohibition to submit a dispute to the jurisdiction of another Member State would not have been in compliance with Article 25 (1) Brussels I Regulation (recast) that explicitly allows for such choice.[375] As another reason to doubt its effectiveness, Clédat pointed out that Article L. 544-5 remains silent on the topic of choice of law allowing parties to agree to apply another (non-French) law to their dispute.[376] Indeed, a prohibition of exclusive jurisdiction clauses differs from a prohibition of choice of law and Article L. 544-5 hence does not promote the application of French law.[377]

Similar criticism in terms of effectiveness has been formulated against Article L. 544-6, which forbids credit rating agencies from completely excluding their liability through exclusion clauses. In order to preclude credit rating agencies from evading this prohibition by including choice of law clauses in their contracts ('*délocalisation des contrats*'), several authors point out that, in first instance, the French *Sénat* adopted an amendment stating that Article L. 544-6 constituted an overriding mandatory provision ('*loi de police*') under Article 9 (1) Rome I Regulation.[378] As a consequence, parties would not be able to escape the application of Article L. 544-6 by making a choice of law since, under Article 9 (2) Rome I Regulation, nothing in the Rome I Regulation 'shall restrict the application of the overriding mandatory provisions of the law of the forum'. As indicated by Prorok, Clédat and Denis, however, this amendment was not included in the final version of L. 544-6, so that parties could still escape the prohibition of exclusion clauses by choice of law.[379] Yet, since Article 35a (3) CRA Regulation currently prohibits exclusion clauses, this loophole has at least partly been closed.[380]

Finally, the system of Article L. 544-5 and Article L. 544-6 displays an inconsistency. On the one hand, according to the first part of Article L. 544-5, claims for damages must allegedly be based on non-contractual liability law. The existence of a contractual relationship between a credit rating agency and an issuer or an investor is hence not taken into consideration. On the other hand, by stating rules on jurisdiction and exclusion clauses, the second part of Article L. 544-5 and Article L. 544-6 in fact acknowledge that some sort of contractual relationship can exist between them. This recognition of the contractual relationship can also be derived from the explicit substantive prohibition of exclusion clauses under Article L. 544-6. As explained by Clédat, '*[s]i la responsabilité des agences de notation devait avoir un caractère exclusivement*

375 Denis 2011, p. 75.
376 Clédat 2012, para II.A. *Cf. also* Denis 2011, p. 75.
377 *Cf.* Denis 2011, p. 75 and Thépot 2010, p. 26.
378 P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010. *As pointed out by* Prorok 2016, no. 468, Clédat 2012, para II.A, Denis 2011, pp. 74-75 and Tchotourian 2011, no. 13.
379 Prorok 2016, no. 468, Clédat 2012, paras. II.A and II.D and Denis 2011, pp. 74-75. *Cf. also* Cappelie 2014, para 2.2.
380 *Cf.* Prorok 2016, no. 468, fn. 1129.

délictuel ou quasi délictuel, ces [i.e. Article L. 544-6] *stipulations seraient […] inutiles*',[381] because French tort law already generally forbids the exclusion and limitation of liability.[382] The somewhat peculiar result then seems to be that a claim for damages is governed by non-contractual liability law, except for the exclusion and limitation of liability which is governed by contract law if a contractual relationship between the credit rating agency and the issuer or the investor exists.

French courts have never awarded damages based on Article L. 544-5 Code monétaire et financier. This may not come as a surprise considering the critical remarks discussed, which show that succeeding in a claim for damages under French law continues to be difficult for claimants. Article L. 544-5 Code monétaire et financier did clarify the principal position under French law: credit rating agencies could be held liable by issuers and investors on the basis of Article L. 544-5 in accordance with the conditions of French non-contractual liability law under Article 1240 and 1241 CC.

(c) Abolition

In January 2018, the French legislature abolished the special liability regime under Article L. 544-5 and L. 544-6 Code monétaire et financier in response to the introduction of Article 35a CRA Regulation.[383] The aim of the French legislature was to converge the French rules on credit rating agency liability with the European rules: '*L'objectif de cet amendment est de faire converger le régime français de responsabilité civile des agences de notation de crédit vers le régime européen de droit commun*.'[384] The French legislature considered that the French regime under Article L. 544-5 Code monétaire et financier subjected credit rating agencies to stricter rules, such as the possibility for issuers to hold a credit rating agency liable in tort in the absence of a rating contract, and the absence of the requirement to prove causation between an infringement and an affected credit rating. Furthermore, the French legislature considered that the EU regime provided sufficient protection.[385] Yet, the French legislature did not conceal its actual motive underlying this alignment: '*La France alignera en revanche sa législation sur le droit commun de l'Union européenne, rendant l'activité des agences de notation de crédit sur son territoire lisible et stable*.'[386] Hence, the alignment seems driven by the wish to keep the activities of credit rating agencies on French territory comprehensible and stable. As Chapter 6 will go on to discuss, these amendments to French law demonstrate how competition between the Member States can lead to a decreased level of issuer

381 Clédat 2012, para II.B.
382 Castermans, Dankers-Hagenaars & Dejean de la Batie 2017, p. 24, Leveneur-Azémar 2017, no. 77, Viney, Jourdain & Carval 2017, no. 355 and *cf.* Bénabent 2016, no. 510.
383 Assemblée Nationale 14 January 2018, no. 907, Art. 32.
384 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 1.
385 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 2.
386 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 2.

and investor protection in some Member States – as compared to the situation prior to the introduction of Article 35a CRA Regulation.[387]

The *Exposé sommaire* demonstrates at least two flaws in the reasoning of the French legislature. First, the French legislature emphasises that Article 35a CRA Regulation creates a unified regime for the liability of credit rating agencies. The only argument supporting this statement is that the French legislature itself decided to align French law with Article 35a CRA Regulation. However, by not referring to Article 35a (4) CRA Regulation in the *Exposé sommaire* at all, the French legislature ignores reality and does not provide a complete picture of the current rules on credit rating agency liability at the EU level. Second, the French legislature emphasises on the one hand that French law is aligned with the regime under EU law exactly because French law would otherwise be more stringent on credit rating agencies, but, on the other hand, that '*la suppression ainsi proposée ne conduirait pas à une reduction substantielle des droit protégés*' and hence that the abolition does not substantially reduce the protected rights of issuers and investors.[388] These statements, however, plainly contradict each other.

Furthermore, even though the *Exposé sommaire* states that the abolition will render credit rating agency activities on French territory comprehensible ('*lisible*'), the *Exposé sommaire* actually leaves uncertainty as regards the current state of credit rating agency liability under French law. Upon the introduction of Article L. 544-5 Code monétaire et financier, the question was raised by French scholars as regards the added value of the provision because credit rating agencies were already considered subject to French private law as a matter of principle.[389] Moreover, Article L. 544-5 Code monétaire et financier was accused of '*donner le sentiment d'une immunité antérieure*'.[390] The same question can be raised as regards the abolition: does the abolition not have any substantive effects because credit rating agencies are subject to French liability law anyway or does the abolition imply that credit rating agencies are not subject to French liability law? The *Exposé sommaire* does not provide proper guidance in this regard, which is problematic from the perspective of legal certainty. Under section 5.5.2.2 and 5.5.2.3, the general rules of French private law in the context of credit rating agency liability are discussed, but the remarks made in this paragraph must be kept in mind when reading those sections.

387 Section 6.3.1.4.

388 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 2.

389 Daigre 2011, p. 115 (*mentioned by* Chacornac 2014, no. 1055 and Prorok 2016, no. 467). *Cf. also* Clédat 2012, para II.B, who stated that the confirmation may seem surprising.

390 Daigre 2011, p. 115 (*mentioned by* Chacornac 2014, no. 1055 and Prorok 2016, no. 467).

5.5.2.2 In the presence of a contractual relationship – investors & issuers

Questions on contractual liability will only arise when a credit rating agency concluded an agreement with an issuer or an investor. Both rating contracts concluded between credit rating agencies and issuers, and subscription contracts concluded between credit rating agencies and investors qualify as 'agreements' under Article 1101 CC. More specifically, the relationship between a credit rating agency and an issuer in the course of a rating contract has been qualified as a '*contrat de louage d'ouvrage*' or '*contrat d'entreprise*' (agreement for the execution of work) under Article 1708 in conjuction with Article 1710 CC.[391] The precise legal qualification of subscription contracts between a credit rating agency and an investor hardly received any attention in French academic literature, and is mostly qualified as 'contractual'.[392]

When a party breaches its obligations under the agreement, it must compensate the harm caused by the breach and interests under Article 1231-1 CC, unless the breach was caused by a *force majeure*. In French law, the apportionment of the burden of proof depends on the type of obligation that has been violated: *une obligation de résultat* (an obligation to obtain a certain result) or *une obligation de moyens* (an obligation to make a certain effort).[393] In relation to *obligations de résultat*, the burden of proof lies with the party who breached its obligations. While, in relation to *obligations de moyens*, the burden of proof lies with the claimant.[394] In order to decide whether an obligation qualifies as an *obligation de résultat* or an *obligation de moyens*, the decisive criterion is whether the obligation is characterised by an 'uncertainty', for instance, whether the party has a certain margin of discretion when fulfilling its obligations.[395] Rating contracts and subscription contracts involve mixtures of *obligations de résultat* and *obligations de moyens*, but claims for damages relating to allegedly incorrect credit ratings are concerned with an *obligation de moyens*

391 *E.g.* Thépot 2010, II.B.1, Dondero, Haschke-Dournaux & Sylvestre 2004, no. 23 and Couret 2003, no. 9. In the report of Chartier, more specifically, rating contracts were qualified even more in particular as *contrats d'ouvrage et d'industrie* under Art. 1779 (3) CC – Art. 1779 CC qualifies the main types of *contrats d'ouvrage et d'industrie*. *See* M.J. Chartier, 'Rapport fait au nom de la commission des finances, de l'économie générale et du contrôle budgétaire sur le projet de loi de régulation bancaire et financière (no. 2165) no. 2550', 25 May 2010, p. 72. *See also* Leclerc 2010, p. 152.

392 *As concluded by* Seibold 2016, p. 86 *in her legal comparison as well*. Leclerc 2010, p. 150, *as derived from* Seibold 2016, p. 86. A precise legal qualification lacks, for instance, in Dondero, Haschke-Dournaux & Sylvestre 2004, no. 67.

393 Bénabent 2016, no. 406. *Cf.* Malaurie, Aynès & Stoffel-Munck 2018, no. 941-942 and Tallon 2008, p. 229. *In the context of credit rating agency liability, the importance of this distinction has been emphasised by* Merville 2013, no. 14, Sotiropoulou 2013, no. 8, Leclerc 2010, p. 152 and Dondero, Haschke-Dournaux & Sylvestre 2004, no. 69. *See also* Seibold 2016, p. 54.

394 Bénabent 2016, no. 408 and no. 407, respectively.

395 Bénabent 2016, no. 411.

of a credit rating agency.[396] Indeed, a credit rating agency has a margin of discretion in deciding what credit rating to assign. Hence, it is up to the issuer or investor to prove that the credit rating agency failed to perform its obligations under the rating contract or the subscription contract. As an *obligation de moyens* is characterised by the fact that it does not involve an obligation to achieve a certain result, the sole fact that the result has not been achieved is not sufficient proof of a failure to meet contractual obligations. Rather, in order to prove such a failure, the claimant must show that the credit rating agency did not employ all reasonable means, care and diligence to fulfil its obligations, as compared to what could have been expected from a reasonable credit rating agency.[397]

5.5.2.3 In the absence of a contractual relationship – investors & issuers

In principle, due to the French principle of *non-cumul*, non-contractual liability only comes into play in situations in which the claimant and the defendant did not enter into a contractual relationship with each other. In the case of credit rating agency liability, non-contractual liability is thus only relevant in relation to unsolicited credit ratings and in the absence of subscriptions.

The fact that rating activities fall within the remit of French non-contractual liability law was made explicit by Article L. 544-5 Code monétaire et financier, and the abolition of this provision caused doubt as to whether credit rating agencies still fall within the remit of French non-contractual liability law. But if we assume that the abolition means that we return to the situation in French law prior to the introduction of L. 544-5 Code monétaire et financier, one can say that credit rating agencies are subject to French non-contractual liability law and do not enjoy complete immunity because of their right to freedom of speech.[398] In this context, reference has often been made to the case *LVMH v Morgan Stanley* – decided by the Court of Appeal of Paris – on the non-contractual liability of financial analysts.[399] In this case, the company LVMH

396 *See* Leclerc 2010, p. 152 and Dondero, Haschke-Dournaux & Sylvestre 2004, no. 69-78.

397 *Cf. in general* Bénabent 2016, no. 407 and Malaurie, Aynès & Stoffel-Munck 2018, no. 942. *Cf. also* Viney, Jourdain & Caval 2013, no. 533-3. *In the context of credit rating agency liability,* Dondero, Haschke-Dournaux & Sylvestre 2004, no. 78. *Cf. also* Sotiropoulou 2013, no. 9, Merville 2013, no. 14 and Leclerc 2008, pp. 153-155. Some of these references still refer to the standard of conduct of the *bon père de famille*, but this standard was replaced by the standard of reasonableness in French legislation by Loi n° 2014-873, 4 August 2014 pour l'égalité réelle entre les femmes et les hommes, *cf. also* Malaurie, Aynès & Stoffel-Munck 2018, no. 943.

398 Chacornac 2014, no. 1055 and Daigre 2011, p. 115 (*mentioned by* Chacornac 2014, no. 1055 and Prorok 2016, no. 467). *Cf. also* Clédat 2012, para II.B, who stated that the confirmation may seem surprising.

399 Tribunal de Commerce Paris 12 January 2004, no. 2002/93985 and Cour d'Appel de Paris 30 June 2006, no. 04/06308 (*LVMH v Morgan Stanley*). *E.g.* Charcornac 2014, no. 1031-1040, Sotiropoulou 2013, no. 29, A. de Montesquiou, 'Agences de notation: pour une profession

Moët Hennessy Louis Vuitton (in short: LVMH) claimed damages for, amongst others, reputational loss from Morgan Stanley for incorrect statements published by Morgan Stanley in its capacity of financial analyst. The Court of Appeal of Paris held that Morgan Stanley enjoyed the right of freedom of speech, though this right is not absolute. The Court of Appeal stated that:

> *'Les parties reconnaissent, en outre, que l'analyste financier doit pouvoir justifier du sérieux des sources, s'abstenir de diffuser des informations fausses ou trompeuses sur les perspectives ou la situation d'un émetteur d'instruments financiers ou sur les perspectives d'évolution d'un instrument financier'*.[400]

Subsequently, Morgan Stanley was subjected to French non-contractual liability law. The same reasoning can be applied to credit rating agencies as well. On the one hand, credit rating agencies have a right to freedom of speech. On the other hand, this right is not absolute and does not grant immunity from civil liability to credit rating agencies.

The main provisions regarding non-contractual liability can be found in Article 1240 and Article 1241 CC, requiring: (1) the occurrence of a fault (*'une faute'*); (2) the existence of harm (*'un dommage'*); and (3) the existence of a causal relationship between the fault and the harm (*'un lien de causalité'*). French law does not restrict the type of loss for which compensation can be claimed, so that claims can be brought for both pure economic loss and reputational loss.[401] The Code Civil does not provide a definition of 'fault'.[402] The term 'fault' is generally approached from an objective perspective, comparing the wrongdoer's conduct with the conduct of a reasonable man (prior to 2014, *le bon père de famille*, see section 5.5.2.2).[403] In the context of professional liability, the professional wrongdoer's conduct is compared with the conduct of a reasonable professional in the same field.[404]

5.5.3 Article 35a (1)

5.5.3.1 'Intentionally' or 'with gross negligence'

The French version of Article 35a CRA Regulation translates the required degree of culpability as *'de manière intentionnelle ou par négligence grave'*. French law distinguishes different types of *fautes* (faults) that qualify the gravity of the

règlementée (rapport)', 18 June 2012, Denis 2011, p. 73 and P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010.

400 Cour d'Appel de Paris 30 June 2006, no. 04/06308 (*LVMH v Morgan Stanley*).

401 *See* Whittaker 2008, p. 364.

402 *As stated literally by* Bacache-Gibeili 2016, no. 143.

403 Bacache-Gibeili 2016, no. 146-147 and *cf.* Bénabent 2016, no. 528.

404 Bacache-Gibeili 2016, no. 147 and *cf.* Bénabent 2016, no. 535.

conduct of the defendant. The classification, however, is subject to debate.[405] Bénabent makes a division on the basis of the gravity of the fault. He distinguishes between *faute volontaires* or *délibérées* (involving *faute intentionnelle, faute inexcusable* and *faute dolosive* (including *faute lourde*)), *faute simple* and *faute légère*.[406] But the different types of faults could also be structured by motive, depending on whether the defendant must have intended its act and/or the loss to occur (*faute intentionnelle* and *faute dolosive*) or not (*faute inexcusable, faute lourde, faute simple* and *faute légère*).[407]

The exact meaning of some of the faults is also subject to debate.[408] In a simplified outline, the different types can be defined as follows.[409] The *fautes volontaires* or *délibérées* involve some sort of consciousness (but not necessarily intent) on the side of the defendant. To have committed a *faute intentionnelle*, the defendant must have deliberately committed or omitted something and must also have intended the loss to occur as a result.[410] To have committed a *faute inexcusable*, in the words of Bénabent, the defendant must have committed a fault of '[*une*] *exceptionnelle gravité*' '*caracterisée sinon par l'intention de causer le dommage, par la conscience de sa probabilité*',[411] which could be qualified, in the words of Leveneur-Azémar, as 'wilful misconduct'.[412] As opposed to other types of faults, the term '*faute inexcusable*' was introduced by the French legislature and plays a role in specific legal areas such as labour law and transport law.[413] To have committed a *faute dolosive*, the defendant must have deliberately committed or omitted something, without necessarily having intended to cause any loss to the claimant.[414]

Even though it has been written that the *faute dolosive* '*assimilait*' ('is similar to') the *faute lourde*[415] and even though the blameworthiness of both faults may be similar, the category of *faute lourde* does not involve intentional conduct on the side of the defendant. Rather, it involves extreme negligence which can be qualified as worse than the degree of negligence involved in *fautes simples*.[416] Providing a clear definition of the term *faute lourde* is difficult, because the French legislature and the French courts have not developed a

405 *Cf.* Viney, Jourdan & Carval 2013, no. 609.
406 Bénabent 2016, no. 413-417.
407 *As described by* Viney, Jourdan & Carval 2013, no. 609, who stated that this division is controversial.
408 *Cf. for faute inexcusable, faute dolosive* and *faute lourde* Leveneur-Azémar 2017, no. 503.
409 *See in detail* Leveneur-Azémar 2017 and Viney, Jourdan & Carval 2017.
410 *As defined by* Bénabent 2016, no. 413, *referring to e.g.* Cour de Cassation (Chambre Civile 1) 2 February 1994, 92-10844, Bulletin 1994, I, no. 37, p. 29.
411 Bénabent 2016, no. 413. *Cf. also* Leveneur-Azémar 2017, no. 538 and no. 540.
412 Leveneur-Azémar 2017, no. 535.
413 Leveneur-Azémar 2017, no. 534. *Cf. also* Bénabent 2016, no. 413. *See in detail* Viney, Jourdan & Carval 2013, no. 618 ff.
414 *As defined by* Bénabent 2016, no. 413. *See in detail* Viney, Jourdan & Carval 2013, no. 618 ff.
415 *E.g.* Leveneur-Azémar 2017, no. 503 and Bénabent 2014, no. 412.
416 *Cf.* Viney, Jourdan & Carval 2017, no. 379.

clear definition over the years.[417] The French Court of Cassation provided the following definition in the 1950s: '*une négligence d'une extrême gravité dénotant l'inaptitude du débiteur à l'accomplissement de la mission contractuelle qu'il a acceptée*'.[418] A *faute lourde* is hence characterised by misconduct of such an extent that it is demonstrated that the defendant is not competent to perform its tasks. The conduct of the defendant is compared to the conduct of a reasonable party placed in the position of the defendant.[419] In relation to the definition provided by the French Court of Cassation, Leveneur-Azémar remarked: '*[L]e comportement particulièrement grave adopté par le débiteur caractérise la faute lourde. Il s'agit d'une grossière erreur, d'un comportement stupide, d'une négligence énorme.*'[420]

How can this overview of faults be translated into the terms '*intentionnelle*' and '*négligence grave*' under Article 35a CRA Regulation? The 'intention' of the credit rating agency must have been directed at causing the infringement and not necessarily at causing loss as well, so that 'intentional' as interpreted under French law mirrors the levels of gravity of the *faute intentionnelle* and *faute dolosive*. One could doubt whether *fautes inexcusables* are covered by the term 'intentional', but they will be considered at least a '*négligence grave*'. In conclusion, the terms 'intention' and 'gross negligence' under French law cover situations in which the credit rating agency: (1) intended the infringement and the consequences of its conduct to occur (derived from the *faute intentionnelle*); (2) intended the infringement to occur but not necessarily intended to cause any loss (derived from the *faute dolosive*); and (3) was conscious or should have been conscious of the possibility that loss would occur, but decided to carry on anyway (derived from the *faute inexcusable*). In addition, the French interpretation of gross negligence covers situations that French law describes as '*fautes lourdes*'; situations in which the credit rating agency did not intend to commit an infringement or was not conscious of potential risks, but acted with such a high degree of negligence compared to how a reasonable credit rating agency would have acted in the same position, that it is demonstrated that the credit rating agency was not competent to fulfil its tasks.[421]

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417 *Cf.* Leveneur-Azémar 2017, no. 522-523. *Cf. also* Viney, Jourdan & Carval 2013, no. 610.

418 Cour de Cassation (Chambre Commerciale) 17 December 1951, Bulletin, II, no. 396. *As derived from* Leveneur-Azémar 2017, no. 524. *Confirmed by the* Cour de Cassation (Chambre Mixte) 22 April 2005, 03-14112, Bulletin mixt. 2005, no. 4, p. 10: *'une faute lourde, caractérisée par une négligence d'une extrême gravité confinant au dol et dénotant l'inaptitude du débiteur de l'obligation à l'accomplissement de sa mission contractuelle.'* Leveneur-Azémar 2017, no. 526 and Viney, Jourdan & Carval 2017, no. 380.

419 *Cf.* Viney, Jourdan & Carval 2017, no. 379 and Viney, Jourdan & Carval 2013, no. 611.

420 Leveneur-Azémar 2017, no. 524 and sources cited there. As described by Leveneur-Azémar, a *faute lourde* is not necessarily constituted by a single event. A range of *fautes légères* can also add up to a *faute lourde*. Leveneur-Azémar 2017, no. 529, *referring to* Cour de Cassation (Chambre Civile 1) 5 February 1957, *D*. 1957, p. 232 and Viney, Jourdan & Carval 2013, no. 611-1.

421 Wimmer 2017, pp. 331-332 reached similar conclusions in her legal comparison.

5.5.3.2 'Impact' and 'caused to', including claimant-specific requirements

(a) General rules on causation

As stated in section 5.3.1.3, the terms 'impact', 'caused to' and the claimant-specific requirements are related to causation, and are therefore discussed together. French law has not adopted conceptualised, strict distinctions between different 'stages' of causation. The requirement of causation follows from the provisions on contractual and non-contractual liability under the Code Civil, but the Code Civil does not provide a precise definition of this requirement.[422] Article 1231-4 CC on contractual liability provides the most extensive description: '*Dans le cas même où l'inexécution du contrat résulte d'une faute lourde ou dolosive,* les dommages et intérêts ne comprennent que ce qui est une suite immédiate et directe de l'inexécution.'[423] Hence, the harm must be an immediate and direct result of the breach of contract.

The French basic test for causation is the *condicio sine qua non* test.[424] If the loss would not have occurred in the absence of the breach of contract or the fault, the *condicio sine qua non* test is fulfilled.[425] If multiple events together caused the harm, all events stand in a *condicio sine qua non* relationship to the harm. In such situations, the question arises whether French law makes a selection of relevant causal events. French doctrine distinguishes two main theories in this regard: the theory of equivalence and the theory of causal adequacy. According to the theory of equivalence, each event that fulfils the *condicio sine qua non test* is considered a legally relevant cause of the harm.[426] Under the theory of causal adequacy, only '*la cause efficiente, c'est-à-dire qui devait ou risquait normalement de produire un tel dommage*' – so an efficient cause which, so to say, normally causes or entails the risk of causing the harm – will be considered as the legally relevant cause of the harm.[427] French courts have not expressed a preference for either of these theories and apply them both depending on the exact circumstances of the case.[428]

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422 In relation to French non-contractual liability law, Bacache-Gibeili referred to Art. 1240 and 1241 CC. Art. 1240 CC: *'Tout fait quelconque de l'homme, qui* cause *à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.'* Art. 1241 CC: '*Chacun est responsable du dommage qu'il a* causé *non seulement par son fait, mais encore par sa négligence ou par son imprudence.'* Emphasis added [DJV]. Bacache-Gibeili 2016, no. 485. *Cf.* Bacache-Gibeili 2016, no. 492. The *Projet de réforme de la responsabilité civile Mars 2017* proposes to codify the requirement of causation under Art. 1239.

423 Emphasis added [DJV]. *See* Viney, Jourdain & Carval 2013, no. 348.

424 *Cf.* Bacache-Gibeili 2016, no. 489 and Viney, Jourdain & Carval 2013, no. 353.

425 Viney, Jourdain & Carval 2013, no. 353.

426 Bénabent 2016, no. 544, *cf.* Bacache-Gibeili 2016, no. 495, *cf.* and Viney, Jourdain & Carval 2013, no. 339 and *in detail* Quézel-Ambrunaz 2010, no. 19 ff.

427 Bénabent 2016, no. 544. *Cf. also* Bacache-Gibeili 2016, no. 497.

428 *Cf.* Bénabent 2016, no. 544, Bacache-Gibeili 2016, no. 501 and Van Dam 2013, no. 1105.

The burden of proof in respect of causation – and more in general – lies with the claimant as a matter of principle.[429] Yet French courts are free to appreciate the evidence of the *condicio sine qua non* relationship.[430] It is often difficult to provide conclusive evidence of the causal relationship, but, as described by Quézel-Ambrunaz, French courts tend to adopt a flexible approach.[431] They can facilitate the claimant by holding that several indications demonstrate the existence of the line of causation or by excluding other potential causes of the harm so that the cause at stake remains as cause of the harm.[432] If the causal relationship is inherently uncertain, French courts tend to apply the doctrine of loss of chance – as discussed under (b).

In the context of credit rating agency liability, issuers and investors hence need to satisfy the *condicio sine qua non* test in principle. Issuers must prove that (1) had the infringement not occurred, the credit rating would have been different (the requirement of 'impact'); and (2) had the infringement not occurred, the issuer would not have suffered additional funding costs and/or reputational loss. Proof of the latter element can, for instance, consist of rating triggers inserted in loan contracts and investment restrictions applicable to institutional investors.[433] Furthermore, investors must prove that (1) had the infringement not occurred, the credit rating would have been different (the requirement of 'impact'); and (2) had the infringement not occurred, the investor would not have suffered pure economic loss, i.e. the investor would not have purchased, maintained or sold the financial instruments.

Investors will often struggle with gathering proof of reasonable reliance. The case of *Pfeiffer v Société Eurodirect Marketing*, however, forms an example in which the claimant did succeed in proving reliance.[434] In this case, the management of the company Eurodirect Marketing published incorrect information on Eurodirect Marketing. At the time of the publication of the incorrect information, the claimant already possessed financial instruments

429 Bacache-Gibeili 2016, no. 506-507 and Bénabent 2016, no. 542. *For an example in French case law*, Cour de Cassation (Chambre Civile 2) 15 November 1989, 88-18310, Bulletin 1989, II, no. 206, p. 106: '*Que, de ces constatations et énonciations, la cour d'appel a pu déduire que la société des Remorques Cazenave* [the claimant] *n'apportait pas la preuve de l'existence d'un lien certain de causalité entre la projection prétendue d'étincelles et le déclenchement de l'incendie et, par ces seuls motifs, a justifié sa décision;*'. *In the context of civil liability and disclosure obligations,* Sotiropoulou 2012, no. 567.

430 *Cf.* Quézel-Ambrunaz 2010, no. 284.

431 *Cf.* Quézel-Ambrunaz 2010, no. 285. *See also* Van Dam 2013, no. 1107-2.

432 Quézel-Ambrunaz 2010, no. 286. *Cf. also* Bacache-Gibeili 2016, no. 508 and Van Dam 2013, no. 1107-2.

433 *Cf.* Sotiropoulou 2013, no. 28. Thépot 2010, para B.2 remarked that the sole existence of a rating trigger would not render the harm suffered by the issuer foreseeable under French law.

434 Cour d'Appel de Colmar 14 October 2003, no. 01/03432 (*Pfeiffer v Société Eurodirect Marketing*) and Cour de Cassation (Chambre Commerciale) 22 November 2005, 03-20600 (*Pfeiffer v Société Eurodirect Marketing*). *See* Prorok 2016, no. 214, Vandendriessche 2015, no. 338 (for a similar brief description of the facts) and Chacornac 2014, no. 890.

issued by Eurodirect Marketing. Subsequent to the publication of the information, the claimant checked the validity of the information with the directors of Eurodirect Marketing and purchased additional financial instruments in Eurodirect Marketing.[435] Under these circumstances, the Court of Appeal of Colmar and the French Court of Cassation accepted the existence of a causal relationship between the incorrect information and the purchase of the financial instruments. The dominant method to deal with this type of case under French law, however, is the application of the doctrine of loss of chance – as discussed under (b).

If the requirements for liability are fulfilled, a defendant can raise the defence of '*a cause étrangère*'.[436] As defined by Bacache-Gibeili, '*causes étrangères*' are events, actions or omissions that stand in a *condicio sine qua non* relationship to the harm, but do not relate to the conduct of the defendant.[437] If the *cause étrangère* was unforeseeable ('*imprévisible*') and irresistible ('*irrésistible*'), French law qualifies the cause as *force majeure*. A *force majeure* breaks the link of causation between the defendant's conduct and the harm completely and, as a consequence, absolves the defendant from liability.[438] If the *cause étrangère* lacks a *force majeure* character, causation can be shared between the conduct of the defendant and the *cause étrangère*. Such a situation occurs, for instance, when the harm was partly caused by the claimant's own fault. Then, the claimant will not be entitled to full compensation of its harm and the liability of the defendant will hence be reduced.[439] Even though this defence of contributory negligence is discussed in the context of causation under French law, this topic will be discussed in section 5.5.3.3 (c) for the purposes of the legal comparison.

(b) Opportunities to deal with causal uncertainty concerning reliance

As discussed in section 5.3.1.3, Article 35a (1) CRA Regulation requires investors to have reasonably relied on credit ratings. Gathering such evidence is however difficult and sometimes impossible, so that investors will often have trouble satisfying the *condicio sine qua non* test. As described under (a), French courts can approach the existence of a causal relationship with a certain flexibility. In addition, this section investigates whether French law leaves room to apply the doctrine of loss of chance in cases concerning credit rating agency liability claims brought by investors.

The doctrine of loss of chance or *perte de chance* has a broad scope of application in French private law. French courts have used the concept both

435 Cour d'Appel de Colmar 14 October 2003, no. 01/03432 (*Pfeiffer v Société Eurodirect Marketing*).
436 Bacache-Gibeili 2016, no. 529.
437 *See* Bacache-Gibeili 2016, no. 530.
438 *See* Bacache-Gibeili 2016, no. 532-533.
439 *See* Bacache-Gibeili 2016, no. 557-558.

to solve situations in which the causal relationship between the fault and the harm (*dommage*) was uncertain and situations in which the exact amount or magnitude of loss (*préjudice*) was uncertain. In the former situation, the doctrine of loss of chance serves to replace the harm suffered with the lost chance, so that the claimant must prove the causal relationship between the defendant's conduct and the lost chance. French law requires the claimant to prove that the conduct of the defendant caused the claimant to lose an actual and certain chance to avoid the occurrence of the harm.[440] In the latter situation, the doctrine of loss of chance serves as a tool to calculate the damages.

In the context of this dissertation, we are mainly concerned with the former application of the doctrine of loss of chance under French law. The first traces of this application of the doctrine of loss of chance by the French courts can be found in a case decided in 1889, in which the claimant lost a chance to win legal proceedings due to a fault made by a legal official.[441] Over the years, French courts expanded the application of the doctrine of loss of chance. The concept is currently applied to all sorts of situations in which the defendant breached its obligations to provide correct and complete information, for instance, in medical and financial law. For the purposes of this dissertation, we will concentrate on the application in the area of financial law in more detail.[442] French legal scholars have not always welcomed the broad application of loss of chance. On the one hand, the doctrine of loss of chance helps claimants and distributes the consequences of causal uncertainty between the parties. As the height of the award of damages depends on the size of the lost chance, the doctrine of loss of chance has been said to allow for a golden mean instead of an all-or-nothing approach.[443] On the other hand, French legal scholars severely criticised the broad application, especially in the field of medical law. The current broad application is sometimes considered flawed,

440 Cour de Cassation (Chambre Civile 1) 21 November 2006, 05-15674, Bulletin 2006, I, no. 498, p. 443. Rapport du Club des Juristes 2014, no. 17, with regard to this decision of the French Court of Cassation: '*Autrement dit, pour être réparable, la perte d'une chance doit être réelle et sérieuse et constituer par conséquent un préjudice certain*.' Note that the doctrine of loss of chance differs from causal presumptions. A presumption of causation transfers the burden of proof upon the defendant, while the doctrine of loss of chance only eases the burden of proof of the claimant.

441 Cour de Cassation req. 17 July 1889, *S.* 1891, 1, p. 399, *as derived from* Nuninga, Verheij, Kahn, Auvray & Borucki 2020 (forthcoming), no. 1 and no. 6.

442 As some background information, it can be remarked that French courts apply the doctrine of loss of chance broadly in medical law. The concept does not only find application in informed consent cases, but also in cases in which a doctor negligently treated a patient as a consequence of which the patient lost a chance at a better result concerning its health. In respect of the latter form of application, *see e.g.* Cour de Cassation (Chambre Civile 1) 14 October 2010, 09-69195, Bulletin 2010, I, no. 200 and Cour de Cassation (Chambre Civile 1) 14 December 1965, Bulletin 1965, I, no. 707.

443 *See* Bénabent 2016, no. 550.

because it also covers situations that, strictly speaking, should not be considered loss of chance cases.[444]

French courts apply the doctrine of loss of chance where an investor claims to have suffered harm caused by the purchase, preservation or sale of financial instruments based on incorrect or incomplete information.[445] As put forward in French literature, the doctrine of loss of chance was used for the first time in financial litigation in *Flammarion*.[446] In *Flammarion*, the investor claimants sold their financial instruments in the company Flammarion after a statement containing negative information was published by Flammarion. The statement, however, did not contain information on pending negotiations with an Italian investor for the acquisition of Flammarion. Five days after the claimants had sold their shares for EUR 41 per share, the Italian investor offered to buy the shares in Flammarion for EUR 78.20 per share.[447] The Court of Appeal of Paris held that the loss consisted of a loss of chance to sell the shares to the Italian investor: '*Considérant que le préjudice subi par les appelants est constitué par* la perte de chance *de céder leurs actions au groupe RCS* […].'[448]

In subsequent case law, the French courts expanded the application of the doctrine of loss of chance to situations in which damages were claimed for the purchase and preservation of financial instruments based on incorrect information.[449] Moreover, whereas the investors had lost a concrete chance in *Flammarion* to sell their shares for a better price, in subsequent case law, French courts accepted that investors lost a chance in the sense that they lost autonomy to make a more beneficial investment decision.[450] In *Sidel*, the investor claimants had based their investment decisions on balance sheets that did not mirror the actual state of the company Sidel.[451] The Court of Appeal of Paris solved the case by applying the doctrine of loss of chance:

> '*Que ceux-ci ont de ce fait, pendant la période de prévention et jusqu'au 11 avril 2001, date à laquelle les faits ont été publiquement révélés, été empêchés de prendre des décisions*

444 This argument is especially put forward in some cases of medical negligence, *see e.g.* Borghetti 2013. In the field of financial law, Sotiropoulou 2016. *Cf.* Nuninga, Verheij, Kahn, Auvray & Borucki 2020 (forthcoming), no. 7.

445 Chacornac 2016, no. 93 and Rapport du Club des Juristes 2014, no. 20. The line in the case law has mainly been derived from Chacornac 2016, Prorok 2016, Chacornac 2014 and Rapport du Club des Juristes 2014.

446 Prorok 2016, no. 218 and Chacornac 2016, no. 97. Cour d'Appel de Paris 26 September 2003, no. 2001/21885 (*Flammarion*) and Tribunal de Grande Instance de Paris 15 November 2001, no. 2000/18125 (*Flammarion*).

447 Cour d'Appel de Paris 26 September 2003, no. 2001/21885 (*Flammarion*). *See also* Prorok 2016, no. 218 and Dezeuze 2004.

448 Cour d'Appel de Paris 26 September 2003, no. 2001/21885 (*Flammarion*). Emphasis added [DJV].

449 *Cf.* Chacornac 2016, no. 95 and Rapport du Club des Juristes 2014, no. 20.

450 Sotiropoulou 2016, p. 51 and *cf.* Sotiropoulou 2012, no. 502.

451 Cour d'Appel de Paris 17 October 2008, no. 06/09036 (*Sidel*) and Tribunal Correctionnel de Paris (11th ch.) 12 September 2006, no. 0018992026 (*Sidel*).

sur la base d'informations sincères, qu'ils n'ont pu prendre en connaissance de cause leur décision d'investissement et ont été privés de la chance d'effectuer des arbitrages éclairés, de mieux investir leur argent*; Que le préjudice direct et personnel ainsi subi par les actionnaires,* en achetant ou conservant *une action aux perspectives prometteuses surévaluées, est distinct de celui subi par la société ellemême;*'[452]

In short, the Court of Appeal of Paris held that the investors were not able to take an investment decision on the basis of truthful information and were therefore deprived of the chance to take informed decisions and to invest their assets better. The lost chance actually consists of a loss of autonomy and does not concern a concrete opportunity that has been lost.

In *Gaudriot*, the French Court of Cassation confirmed that the doctrine of loss of chance can apply to cases concerning the liability for the incorrect or incomplete disclosure of information in the context of the financial sector, as already done by the Court of Appeal of Paris in *Sidel*.[453] In this case, the management of the company Gaudriot disseminated information providing an incorrect impression of the company Gaudriot. Initially, the Court of First Instance of Guéret qualified the loss suffered by the claimants (investors in the company Gaudriot) as a loss of chance.[454] On appeal, the Court of Appeal of Limoges reversed the decision and considered that the qualification of the Court of First Instance of Guéret was incorrect:

'*Attendu par ailleurs, sur le préjudice,* que si c'est improprement que le premier juge a considéré que le préjudice s'analysait en un perte de chance *d'investir ailleurs leurs économies, alors qu'il est en réalité, comme rappelé précédemment, au minimum de l'investissement réalisé ensuite des informations tronquées portées à la connaissance des actionnaires, sa décision mérite cependant confirmation sur le montant des sommes allouées à titre de dommages et intérêts;*'[455]

The Court of Appeal of Limoges hence instead analysed to what extent the incorrect information had actually influenced the investment decision of the claimant.[456] The French Court of Cassation, however, proceeded to reverse the decision of the Court of Appeal of Limoges. The French Supreme Court explicitly held that in this type of case, the claimant only suffers a loss of chance to make a fully and well-informed investment decision:

'*Attendu que celui qui acquiert ou conserve des titres émis par voie d'offre au public au vu d'informations inexactes, imprécises ou trompeuses sur la situation de la société émettrice*

452 Cour d'Appel de Paris 17 October 2008, no. 06/09036 (*Sidel*). Emphasis added [DJV].
453 Cour de Cassation (Chambre Commerciale) 9 March 2010, 08-21547 and 08-21793, Bulletin 2010, IV, no. 48 (*Gaudriot*). Chacornac 2016, no. 97, Chacornac 2014, no 867 and no. 881, Sotiropoulou 2016, p. 51 and Rapport du Club des Juristes 2014, no. 21.
454 *See* Prorok 2016, no. 248.
455 Cour d'Appel de Limoges 6 October 2008, no. 07/00286 (*Gaudriot*). Emphasis added [DJV].
456 Prorok 2016, no. 249.

> perd seulement une chance *d'investir ses capitaux dans un autre placement ou de renoncer à celui déjà réalisé;*'[457]

The French Court of Cassation held that the investor only lost a chance, so that full compensation was not possible.

The French Court of Cassation again allowed the application of the doctrine of loss of chance in the case *Marionnaud*.[458] In *Marionnaud*, the investor – the company Afi Esca – purchased financial instruments issued by the company Marionnaud during a period in which Marionnaud published statements which did not correctly present Marionnaud's financial situation. The Court of Appeal of Paris awarded damages for loss of chance to Afi Esca.[459] The French Court of Cassation confirmed the decision of the Court of Appeal of Paris and allowed the application of the doctrine of loss of chance:

> '*que la société Esca avait été, de manière certaine, privée de la possibilité de prendre des décisions d'investissements en connaissance de cause et de procéder à des arbitrages éclairés, en particulier en renonçant aux placements déjà réalisés, la cour d'appel, qui n'avait pas à procéder à la recherche et pas davantage à répondre aux conclusions inopérantes invoquées par le moyen, a caractérisé le lien de causalité entre les fautes commises par la société et le préjudice, s'analysant en une perte de chance, subi par la société Esca; que le moyen n'est pas fondé;*'[460]

In conclusion, French law regularly applies the doctrine of loss of chance where an investor has suffered loss 'as a consequence' of the dissemination of incorrect or incomplete information to the financial markets. The doctrine applies to the purchase, preservation and sale of financial instruments. French courts have not required that the investor missed out on a concrete chance to take an alternative investment decision, but instead have allowed compensation for the investor's loss of autonomy. The issuer interfered in the investor's decision-making process and prevented the investor from the opportunity to make a fully and well-informed investment decision. An investor hence needs to establish causation between the issuer's fault and the lost chance, and not between the issuer's fault and the pure economic loss suffered on the investments. In this way, French law entitles investors to damages rather soon, but the compensation of the loss is partial only: the award of damages is capped at the height of the lost chance (see section 5.5.3.3 (b)). Moreover, as stated

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457 Cour de Cassation (Chambre Commerciale) 9 March 2010, 08-21547 and 08-21793, Bulletin 2010, IV, no. 48 (*Gaudriot*). Emphasis added [DJV]. *See also* Prorok 2016, no. 250, Chacornac 2016, no. 97, Vandendriessche 2015, no. 329 and no. 347 and Rapport du Club des Juristes 2014, no. 21.

458 *See* Chacornac 2016, no. 97, Prorok 2016, no. 256, Sotiropoulou 2016, p. 51 and Rapport du Club des Juristes 2014, no. 21.

459 Cour d'Appel de Paris 19 March 2013, 2011/06831 (*Marionnaud*).

460 Cour de Cassation (Chambre Commerciale) 6 May 2014, 13-17632 and 13-18473, ECLI:FR:CCASS:2014:CO00430, Bulletin 2014, IV, no. 81 (*Marionnaud*).

by Sotiropoulou, the cases of *Gaudriot* and *Marionnaud* imply that the French Court of Cassation prefers partially compensating investors through application of the doctrine of loss of chance to fully compensating the loss suffered by investors.[461]

In the context of credit rating agency liability, the question arises whether French courts would apply the doctrine of loss of chance to claims brought by investors against credit rating agencies. Caution must be exercised in the absence of case law confirming this matter, but French law leaves room to apply this doctrine to claims for damages brought by investors against credit rating agencies.[462] The fact patterns and corresponding evidentiary problems are similar, whether the investor must prove reliance on credit ratings or on incorrect or incomplete information disseminated by issuers. In both situations, the investor can argue to have lost an opportunity to make a completely and well-informed investment decision because the issuer or the credit rating agency affected their decision-making process by publication of certain information or a credit rating. French courts do not refuse to apply the doctrine of loss of chance when the hypothetical sequence of events – what would the claimant have done? – and the lost chance depend on the conduct of the claimant (the investor). On the contrary, the loss of the investor's autonomy is an interest protected by French private law. Hence, investors can frame their claim against a credit rating agency as a loss of chance case and French law leaves room to apply the doctrine of loss of chance to situations in which investors claim to have lost chances to take fully and well-informed investment decisions due to affected credit ratings.

5.5.3.3 Suffering 'damage' and claiming 'damages'

(a) Nature of reparable loss and calculation of the amount of damages

The Code Civil does not generally codify the French law of damages and, in the area of non-contractual liability law, the French law of damages is made up by general principles.[463] French law distinguishes between material loss ('*préjudice matériel*' or '*préjudice patrimonial*') and immaterial loss ('*préjudice moral*' or '*préjudice extrapatrimonial*'),[464] but does not restrict the compensation of

461 Sotiropoulou 2016, p. 52. *Cf. also in respect of Gaudriot,* Vandendriessche 2015, no. 329 and no. 347.

462 *Cf.* Sotiropoulou 2013, no. 25. *Although this option is not referred to by* Quézel-Ambrunaz 2017, pp. 242-243.

463 The *Projet de réforme de la responsabilité civile Mars 2017* proposes to codify part of the current French law of damages. Art. 1235 proposes a codification of the principle of full compensation, Art. 1238 proposes a codification of the doctrine of loss of chance and Art. 1258 proposes a codification of the method to calculate the loss. These proposed provisions do not provide for fundamental changes in comparison to the current state of the law as developed by the French courts.

464 Bacache-Gibeili 2016, no. 423 and Bénabent 2016, no. 656-657. For a slightly different distinction, Steiner 2018, pp. 259-260.

any type of loss as a matter of principle. All types of loss are eligible for compensation, as long as the loss is certain, direct, and legitimate.[465] The requirement of directness also filters out remote types of loss which were, for instance, unforeseeable to the defendant.[466] In fact, this requirement is closely connected to the requirement of causation that the loss must be an immediate and direct result of the defendant's wrongful conduct. So, as long as the requirements of 'certain, direct and personal, and legitimate' are met, the compensation of pure economic loss as well as of lost chance – as will be discussed under (b) – is not problematic under French law.[467]

The French law of damages builds upon *le principe de la réparation intégrale* (the principle of full compensation).[468] To that end, French courts must determine in what position the aggrieved party would have been in the absence of the breach of contract or the fault.[469] The hypothetical factual scenario brought forward by the aggrieved party is hence of great importance to determine in what position the aggrieved party would have been. French courts must assess the amount of damages in the concrete circumstances of each case and cannot simply award a fixed sum of damages.[470] French courts have considerable freedom in assessing the amount of damages.

In the context of credit rating agency liability, increased funding costs, pure economic loss and reputational loss are eligible for compensation, as long as the loss is certain, direct and personal, and legitimate. Issuers and investors are in principle entitled to full compensation which must be determined by comparing the actual sequence of events with the hypothetical sequence of events. Yet, investors can only receive full compensation, in the sense of the full transaction costs, if French courts do not apply the doctrine of loss of chance (as discussed under (b)), which is the common method for dealing with cases concerning the incorrect or incomplete dissemination of information to the financial markets under French law. The exceptional case of *Pfeiffer v Société Eurodirect Marketing* illustrates how the amount of damages can be calculated

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465 Bacache-Gibeili 2016, no. 373 and Bénabent 2016, no. 659. *Cf. also* Steiner 2018, pp. 259-262.

466 *See* Whittaker 2008, p. 413.

467 *Cf. in respect of pure economic loss* Steiner 2018, p. 260 and Viney, Jourdain & Carval 2013, no. 251.

468 Steiner 2018, p. 259, Bacache-Gibeili 2016, no. 596, Bénabent 2016, no. 680 and Rapport du Club des Juristes 2014, no. 12.

469 *E.g.* Cour de Cassation (Chambre Civile 2) 9 July 1981, 80-12142, Bulletin 1981, II, no. 156, Cour de Cassation (Chambre Civile 2) 7 December 1978, 77-12013, Bulletin 1978, II, no. 269, p. 207, Cour de Cassation (Chambre Civile 2) 8 April 1970, 68-13969, Bulletin 1970, II, no. 111, p. 87 and Cour de Cassation (Chambre Civile 2) 28 October 1954, Bulletin II, no. 328. Steiner 2018, p. 259, Bacache-Gibeili 2016, no. 597, Bénabent 2016, no. 680 and Rapport du Club des Juristes 2014, no. 13.

470 *E.g.* Cour de Cassation (Chambre Civile 1) 3 July 1996, 94-14820, Bulletin 1996, I, no. 296, p. 206 and Cour de Cassation (Chambre Civile 3) 3 December 2015, 13-22503, ECLI:FR:CCASS:2015:C301335. Rapport du Club des Juristes 2014, no. 15.

if an investor has managed to prove reliance.[471] The Court of Appeal of Colmar determined the amount of damages by the following method:

> *'Le préjudice dont se prévaut M. Michel X est constitué par la différence entre le prix d'achat et le prix de vente des actions et bons de souscriptions d'actions acquis postérieurement à la publication du communiqué du 7 avril 1998.'*[472]

The Court of Appeal of Colmar fully compensated the total loss suffered by the investor by calculating the difference between the claimant's purchase price and the claimant's selling price of the shares, and the difference between the claimant's purchase price of the shares and the purchase price of the shares after the incorrect information was corrected. Hence, the total loss consists of the decrease in value entailed by the dissemination of the incorrect or incomplete information.[473] Nevertheless, under French law the question arises as well whether all loss resulting from an investment decision can be considered as 'direct' loss, i.e. whether the defendant can be held responsible for all negative consequences flowing from an investment decision.[474] The French courts, however, tend to apply the doctrine of loss of chance in this type of situation, so that the investor is not entitled to full compensation in the sense of the full transaction costs, but only to a fraction of the total loss.

(b) Loss of chance

As described in section 5.5.3.2 (b), French law leaves room to apply the doctrine of loss of chance to claims brought against credit rating agencies by investors. The application of the doctrine of loss of chance is compatible with the general requirement that loss must have a 'certain' character in order to be eligible for compensation. In the words of Bacache-Gibeili, the requirement of the certainty of loss '*ne fait pas non plus obstacle à la réparation de la perte de chance*'.[475] The aggrieved party is entitled to compensation if it can prove that the lost chance itself was actual and serious, in the sense of a real chance, and certain.[476] Hence, as the lost chance is qualified as the compensable loss,

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471 Cour d'Appel de Colmar 14 October 2003, no. 01/03432 (*Pfeiffer v Société Eurodirect Marketing*) and Cour de Cassation (Chambre Commerciale) 22 November 2005, 03-20600 (*Pfeiffer v Société Eurodirect Marketing*).

472 Cour d'Appel de Colmar 14 October 2003, no. 01/03432 (*Pfeiffer v Société Eurodirect Marketing*). Sotiropoulou 2012, no. 502.

473 Prorok 2016, no. 215.

474 Spitz 2010, no. 440.

475 Bacache-Gibeili 2016, no. 377. *Cf. also* Rapport du Club des Juristes 2014, no. 17.

476 *E.g.* Cour de Cassation (Chambre Civile 1) 21 November 2006, 05-15674, Bulletin 2006, I, no. 498, p. 443. Rapport du Club des Juristes 2014, no. 17, with regard to this decision of the French Court of Cassation: '*Autrement dit, pour être réparable, la perte d'une chance doit être réelle et sérieuse et constituer par conséquent un préjudice certain.*' *Also* Cour de Cassation (Chambre Civile 1) 5 November 2009, 07-21442, Bulletin 2009, I, no. 220 in respect of a lost

the general requirement that the compensable loss must be certain is fulfilled by requiring that the lost chance must be certain. Actual and certain chances are not necessarily high chances; the French courts have awarded compensation for the loss of a chance of only 5%[477] and 10%.[478]

How do French courts calculate the award of damages if the loss concerns an actual and certain lost chance? As the claimant only lost a chance to prevent the loss from occurring, the claimant is not entitled to compensation to the full extent of its loss.[479] The Court of Appeal of Paris held in *Marionnaud*: '*Considérant que la réparation d'une perte de chance doit être mesurée à la chance perdue et ne peut être égale à l'avantage qu'aurait procuré cette chance si elle s'était réalisée*.'[480] The compensation must hence be measured as the lost chance, which French courts can do by multiplying the total loss with the lost chance.[481] The total loss depends on the hypothetical sequence of events put forward by the claimant. The hypothetical sequence of events concerns the situation in which the claimant would not have taken the detrimental investment decision.[482] The claimant could argue that the total loss involves, for instance, the profit it could have made by having invested its assets in another way.[483] In accordance with the general principles on compensation under French law, in a medical loss of chance case, the French Court of Cassation held that courts should not award a fixed sum of damages in loss of chance cases:

> '*Attendu, cependant, que, déterminée en fonction de l'état de la victime et de toutes les conséquences qui en découlent pour elle, l'indemnité de réparation de la perte de chance d'obtenir une amélioration de son état ou d'échapper à une infirmité,* ne saurait présenter un caractère forfaitaire;'[484]

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chance to win a horse race. *Also* Bacache-Gibeili 2016, no. 389, Bénabent 2016, no. 663 and Rapport du Club des Juristes 2014, no. 17.

477 Cour de Cassation (Chambre Civile 2) 1 July 2010, 09-15594, Bulletin 2010, II, no. 128 on a lost chance in respect of the outcome of negotiations.

478 Cour d'Appel de Paris 14 September 2007, no. 07/01477 (*Regina Rubens*).

479 *E.g.* Cour de Cassation (Chambre Civile 1) 27 March 1973, 71-14587, Bulletin 1973, I, no. 115, p. 105. Rapport du Club des Juristes 2014, no. 17.

480 Cour d'Appel de Paris 19 March 2013, no. 2011/06831 (*Marionnaud*). *E.g. also* Cour de Cassation (Chambre Civile 1) 16 July 1998, 96-15380, Bulletin 1998, I, no. 260, p. 181. Rapport du Club des Juristes 2014, no. 17.

481 *Cf.* Bénabent 2016, no. 663.

482 Spitz 2010, no. 379.

483 In the context of financial litigation, Vandendriessche 2015 stipulated that '[m]ore particularly, to value the lost chance, the probability of the plaintiff making another investment decision must be multiplied with the result that would have been obtained' (Vandendriessche 2015, no. 354). Yet, the decisions in *Flammarion* and *Regina Rubens* hereafter demonstrate that the calculation method depends on the circumstances of the case.

484 Emphasis added [DJV]. Cour de Cassation (Chambre Civile 1) 18 July 2000, 98-20430, Bulletin 2000, I, no. 224, p. 147, *derived from* Rapport du Club des Juristes 2014, no. 17.

The Report *l'Évaluation du préjudice financier de l'investisseur dans les sociétés cotées* of the *Club des Juristes*, however, created a different picture of the way in which French courts calculate the amount of damages in financial litigation. Instead of calculating the exact amount of damages by multiplying the lost chance with the total loss suffered, the Report demonstrated that French courts tend to award fixed sums of damages: a fixed sum per financial instrument or a fixed sum in total.[485] In *Sidel* and *Vivendi*, the French courts awarded EUR 10 damages per financial instrument.[486] The decision of the Court of Appeal of Paris in *Sidel* lacked motivation.[487] In *Vivendi*, the Correctional Tribunal of Paris only justified the amount generally by taking '*l'aléa inherent à toute operation boursière et du nombre limité de communications en cause*' into consideration.[488]

In *Flammarion*, *Regina Rubens* and *Marionnaud*, the French courts awarded fixed sums of damages to compensate the investor completely at once.[489] The clearest example of an award of a fixed sum of damages can be found in the decision *Marionnaud.* The Court of Appeal of Paris provided no substantive motivation for the award of damages, except for a general statement that, considering the existence of investment risks, the amount of damages would be fixed at EUR 30,000: 'Que tenant compte de l'aléa que comportent les opérations d'investissement en bourse, il convient de fixer à la somme de 30 000 euros *la réparation du préjudice subi par la société AFI ESCA*;'[490]

In the earlier decisions *Flammarion* and *Regina Rubens*, the courts motivated their decisions somewhat more extensively. The reasoning of the courts in these decisions comes closer to the 'traditional' way of calculating damages in case of loss of chance (by multiplying the total loss with the lost chance), even though the courts had not done so explicitly. In *Flammarion*, the Court of Appeal of Paris did not mention the lost chance explicitly, but one can construct the height of the lost chance by reconstructing the way in which the damages were calculated. The claimants had lost a chance to sell their financial instruments in the company Flammarion to an Italian investor for a guaranteed price. With regard to the calculation of the award of damages, the Court of Appeal of Paris held:

485 Rapport du Club des Juristes 2014, no. 24-26. The case law described in this section is derived from the Rapport du Club des Juristes. *Also* Vandendriessche 2015, no. 354.

486 Rapport du Club des Juristes 2014, no. 25 and Chacornac 2016, no. 99.

487 Cour d'Appel de Paris 17 October 2008, no. 06/09036 (*Sidel*): '*Que cette perte de chance sera évaluée à 10 euros par action détenue.*' Rapport du Club des Juristes 2014, no. 25.

488 *See, for the quotation,* Prorok 2016, no. 257 and Rontchevsky 2011, no. 4. Tribunal Correctionnel de Paris (11th ch.) 21 January 2011, no. 0220696051 (*Vivendi Universal*).

489 Rapport du Club des Juristes 2014, no. 26. *Cf. also* Chacornac 2016, no. 99.

490 Cour d'Appel de Paris 19 March 2013, no. 2011/06831 (*Marionnaud*). Emphasis added [DJV]. The French Court of Cassation did not grant the appeal of Marrionaud in respect of causation.

> '*Considérant que le préjudice subi par les appelants est constitué par la perte de chance de céder leurs actions au groupe RCS au prix de 78,20 €, c'est-à-dire pour le prix total de 78 200 € pour l'indivision Soulier au lieu de 40 722,85 €, et de 115 736 € pour la société Immobilière Tourangelle au lieu de 58 941,58 €; Qu'il y a lieu d'évaluer cette perte de chance qui, au vu des circonstances ci-dessus énoncées, était soumise à un aléa très faible, à la somme de 33 000 € pour l'indivision Soulier et à celle de 50 000 € pour la société Immobilière Tourangelle;*'[491]

The total loss of the claimants consisted of the price difference between the actual selling price and the guaranteed selling price. The first claimant, Soulier, hence suffered a total loss of EUR 37,477.15.[492] The second claimant, the company Immobilière Tourangelle, hence suffered a total loss of EUR 56,794.42.[493] The Court of Appeal of Paris held that the uncertainty in this situation was very weak ('*un aléa très faible*') and awarded EUR 33,000 damages to Soulier and EUR 50,000 damages to the company Immobilière Tourangelle. The lost chance was hence considered high, as the Court of Appeal of Paris reimbursed 88% of the total loss.[494]

In contrast, in *Regina Rubens*, the Court of Appeal of Paris considered the chance lost by the company LV capital (a professional investor[495]) to be small. The Court of Appeal of Paris estimated the total loss at EUR 3,000,000 by having calculated the difference between the purchase price and the actual value of the financial instruments ('*les dommages-intérêts s'apprécient à 3 MF, soit la différence entre le prix payé et la valorisation actuelle de ces actions*'[496]). With regard to the award of damages, the Court of Appeal of Paris held:

> '*Considérant qu'à cet égard, il doit être tenu compte tout à la fois de ce que:* – l'impact des manipulations comptables était relativement faible *au moment de l'acquisition, – si ces manipulations se sont largement développées au 2ème semestre 1999 et au cours de l'année 2000, elles ont eu pour but de masquer les pertes d'exploitation importante enregistrées durant cette période, mais ne sont pas directement à l'origine de ces pertes, lesquelles résultent de facteurs économiques ou conjoncturels peu favorables aux valeurs du secteur d'activité considéré; – même si elle avait alors eu connaissance de la situation véritable de Régina Rubens SA, LV capital n'aurait pu aisément céder sa participation dans Régina Rubens holding, les facteurs qui l'avaient conduit s'investir n'étant pas exclusivement des éléments d'ordre comptable;* qu'une estimation de cette perte de

491 Cour d'Appel Paris 26 September 2003, no. 2001/21885 (*Flammarion*). Emphasis added [DJV].
492 Namely EUR 78 200 – EUR 40 722,85 = EUR 37 477,15.
493 Namely EUR 115 736 – EUR 58 941,58 = EUR 56 794,42.
494 *Cf.* Rapport du Club des Juristes 2014, no. 26. Namely, as regards the damages awarded to Soulier (EUR 33,000 / EUR 37,477.15) x 100% = 88,12% and as regards the damages awarded to the company Immobilière Tourangelle (EUR 50,000 / EUR 56,794.42) x 100% = 88,04%.
495 In *Regina Rubens*, the Court of Appeal of Paris calculated the damages for the small investors differently. *See, in-depth,* Prorok 2016, no. 239.
496 Cour d'Appel de Paris 14 September 2007, no. 07/01477 (*Regina Rubens*).

> chance à 10% des sommes investies *apparait de nature à réparer justement le préjudice matériel de LV capital, à laquelle sera donc alloués la somme de 300 000€à titre de dommages-intérêts;'*[497]

The Court of Appeal of Paris hence analysed that the impact of the incorrect information had been small and explicitly estimated the lost chance at 10%.[498]

What general lines can be unravelled from these cases, which can then be applied to claims brought by investors against credit rating agencies? The case law analysed in the Report of the *Club des Juristes* demonstrates how French courts tend to award some sort of fixed amount of damages – per financial instrument or a fixed sum.[499] The loss of chance nature of the loss entails that the claimant is not entitled to full compensation so that the fixed amount will not extend to the total loss. The case law shows that French courts hardly motivate their decisions on the award of damages. Due to this lack of (proper) motivation, it is difficult to derive general guidelines from the case law which can help to predict how French courts will calculate the amount of damages in future cases.[500] Whereas the application of the doctrine of loss of chance helps to solve uncertainties regarding causation, the height of the lost chance and the amount of damages awarded form a source of new uncertainties. The height of the lost chance depends on the facts of the case and on estimations by the French courts. These considerations also apply to credit rating agency liability cases, where it has to be awaited how French courts will assess the chance that an investor in a concrete situation (subjective approach) would have made an alternative investment decision in the absence of the affected credit rating.

(c) Contributory negligence & mitigation of loss

French legal scholars normally discuss the topic of contributory negligence or '*faute de la victime*' in the context of causation.[501] However, for the sake of the legal comparison, the defence of contributory negligence is discussed here in the context of the calculation of damages. If the conduct of the aggrieved party stands in a *condicio sine qua non* relationship with the loss suffered, French law considers causation 'shared' between the fault of the aggrieved party and the fault or breach of the wrongdoer.[502] Shared causation justifies shared responsibility, allowing for a deviation of the principle of full

497 Cour d'Appel de Paris 14 September 2007, no. 07/01477 (*Regina Rubens*). Emphasis added [DJV].

498 Rapport du Club des Juristes 2014, no. 26. Prorok 2016, no. 238.

499 Rapport du Club des Juristes 2014, no. 24-26.

500 Rapport du Club des Juristes 2014, no. 26. *Similar criticism has been brought up by* Chacornac 2016, no. 99, Vandendriessche 2015, no. 354 and Sotiropoulou 2012, no. 502.

501 *E.g.* Bacache-Gibeili 2016, no. 557 ff. and Bénabent 2016, no. 553.

502 Bacache-Gibeili 2016, no. 536-537.

compensation.[503] If the defendant succeeds in a defence based on contributory negligence, French courts reduce the amount of damages awarded to the aggrieved party. In order to determine the exact reduction, French courts balance the seriousness of the faults made by the defendant and the claimant.[504]

The current French position regarding the mitigation of damages forms an exception within the EU. The Code Civil currently does not contain any duty to mitigate loss and the French Court of Cassation explicitly denied the existence of such duty.[505] The absence of such duty appeared clearly from two decisions of the French Court of Cassation in 2003 in non-contractual liability law: '*Attendu que l'auteur d'un accident doit en réparer toutes les conséquences dommageables;* que la victime n'est pas tenue de limiter son préjudice dans l'intérêt du responsable'.[506] The French Court of Cassation explicitly confirmed this position in 2014. It refused to reduce the amount of damages for a loss of chance suffered by an investor caused by incorrect advice of a notary for the reason that the notary had proposed measures to mitigate the loss suffered.[507] The aggrieved party thus has no duty to limit its loss in the interest of the wrongdoer, irrespective of whether the loss is of a purely economic nature.[508] The current position under French law hence allows the victim to sit back while its loss aggravates.[509] French courts justify their

503 *Cf.* Bacache-Gibeili 2016, no. 557 and Bénabent 2016, no. 553.

504 *See* Bacache-Gibeili 2016, no. 571, Bénabent 2016, no. 553 and Van Dongen 2014, pp. 348-349. *For the discretion of the French courts see* Cour de Cassation (Chambre Criminelle) 19 March 2014, 12-87416, ECLI:FR:CCASS:2014:CR01193, Bulletin criminel 2014, no. 86 and Cour de Cassation (Chambre Mixte) 28 January 1972, 70-90072, Bulletin criminel Chambre Mixte, no. 37, p. 86.

505 Steiner 2018, p. 259, Vandendriessche 2015, no. 293, Thiriez 2014, para I.B and Le Pautremat 2006, pp. 212-213. If the aggrieved party voluntarily mitigated its loss, it will not receive compensation for the loss that was avoided, Le Pautremat 2006, p. 206. The *Projet de réforme de la responsabilité civile Mars 2017* proposes change in this regard. Under the proposed Art. 1263, with the exception of cases involving personal injury, courts can reduce the award of damages if the aggrieved party failed to take safe and reasonable measures to avoid the aggravation of its loss.

506 Cour de Cassation (Chambre Civile 2) 19 June 2003, 00-22302, Bulletin 2003, II, no. 203, p. 171. *Also* Cour de Cassation (Chambre Civile 2) 19 June 2003, 01-13289, Bulletin 2003, II, no. 203, p. 171. Emphasis added [DJV]. *For a description of these cases,* Le Pautremat 2006, pp. 208-2010. *Cf. also* Bacache-Gibeili 2016, no. 561, Bénabent 2016, no. 423, Thiriez 2014, para I.A.1 and no. 564.

507 Cour de Cassation (Chambre Civile 1) 2 July 2014, 13-17599, ECLI:FR:CCASS:2014:C100826. *See also for a reiteration of the same basic position* Cour de Cassation (Chambre Civile 1) 6 September 2017, 16-19563, ECLI:FR:CCASS:2017:C100920.

508 Cour de Cassation (Chambre Civile 1) 2 July 2004, 13-17599, ECLI:FR:CCASS:2014:C100826, *cf.* Bacache-Gibeili 2016, no. 564.

509 Vandendriessche 2015, no. 293 and Le Pautremat 2006, p. 209.

decisions by reference to the principle of full compensation, although this position has been challenged by French legal scholars.[510]

Vandendriessche pointed out that the absence of the duty to mitigate loss does not necessarily mean that French courts will reach decisions that differ from those made by courts of others Member States that would apply the duty to mitigate.[511] Especially if the factual circumstances of the case resembled both a failure to mitigate and contributory negligence, French courts will apply the latter concept. In 2014, for instance, the French Court of Cassation reduced the damages for the reason of contributory negligence, while the facts of the case may also, if French law had been familiar with such a concept, have given rise to a duty to mitigate the loss.[512] The French Court of Cassation considered:

> '*qu'il relève encore que M. X... a pris des risques déraisonnables en investissant aussi massivement sur le marché des warrants et qu'il a été particulièrement imprudent en cherchant à compenser les pertes subies par des investissements de plus en plus importants*, qui n'ont fait qu'aggraver la situation débitrice de son compte; *que de ces constatations, faisant ressortir que M. X...* avait eu un comportement fautif ayant contribué à la réalisation de son propre préjudice, *la cour d'appel a pu déduire qu'il devait être tenu pour partiellement responsable de l'aggravation du solde débiteur de son compte;*'[513]

The French Court of Cassation states that the conduct of M. X has aggravated his loss, but qualifies that conduct as a fault which has contributed to the realization of the total amount of loss suffered by M. X. So that eventually one could derive from the reasoning of the French Court of Cassation that it reduced the damages for contributory negligence with regard to the realization of the total amount of loss. According to Viney, although the victim has no obligation to mitigate the loss, the French Court of Cassation makes a distinction between faults made by the victim which nevertheless lead to a reduction of the amount of damages and simple *faits* which do not justify a reduction of the amount of damages.[514] This distinction recalls the distinction made more generally in contributory negligence, where only faults (and not *faits*) lead to a reduction of damages. So it seems that if the victim has committed a fault and thereby contributed to the realization of the total amount of loss suffered, French courts can reduce the amount of damages even though the victim has no obligation to mitigate its loss.

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510 Thiriez 2014, para I.A.2 and Le Pautremat 2006, pp. 209 and 212-216. *Cf. also* Vandendriessche 2015, no. 293.

511 Vandendriessche 2015, no. 293.

512 Cour de Cassation (Chambre Commerciale) 4 November 2014, 13-24196, ECLI:FR:CCASS:2014:CO00971, Bulletin 2014, IV, no. 156. *See also* Viney 2014. *For other examples, see* Vandendriessche 2015, no. 293.

513 Cour de Cassation (Chambre Commerciale) 4 November 2014, 13-24196, ECLI:FR:CCASS:2014:CO00971, Bulletin 2014, IV, no. 156.

514 Viney 2014.

5.5.4 Article 35a (3) Limitations of liability in advance

5.5.4.1 General system[515]

The rules on the admissibility of limitation clauses under French law were mainly developed in French case law.[516] The French law approach towards limitation clauses differs depending on whether the liability is of a contractual or non-contractual nature.[517] In relation to contractual liability, limitation clauses are valid as a matter of principle. In relation to non-contractual liability, parties may not limit their liability in advance.

(a) Limitation clauses and contractual liability

As a general rule, French contract law allows for the limitation of liability by contract. Exceptions are made for limitation clauses that concern the user's essential obligations under the contract and that limit liability even when the defendant made a *faute lourde* or a *faute dolosive*.[518] The exception was developed by the French courts[519] and is nowadays derived from Article 1231 (3) CC: '*Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qui pouvaient être prévus lors de la conclusion du contrat, sauf lorsque l'inexécution est due à une faute lourde ou dolosive.*'

The terms *faute lourde* and *faute dolosive* have been discussed in section 5.5.3.1 with regard to the requirement of 'intention' or 'gross negligence' under Article 35a (1) CRA Regulation. As explained, a *faute lourde* is characterised

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515 The *Projet de réforme de la responsabilité civile Mars 2017* currently does not cause substantive changes to the analysis made in this section. Under Art. 1281, exclusion and limitation clauses are valid as a matter of principle. Under Art. 1282, in relation to contractual matters, exclusion and limitation clauses do not have effect in case of *fautes lourdes* or *fautes dolosives.* Under Art. 1283, in relation to non-contractual matters, liability cannot be excluded or limited for faults.

516 Prior to the withdrawal of Art. L. 544-5 and Art. L. 544-6 Code monétaire et financier, the latter provision explicitly stipulated that the clauses which completely exclude the civil liability of credit rating agencies were prohibited. The legislative proposal for Art. L. 544-6 initially introduced a prohibition on limitation clauses as well (P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010), but this prohibition was removed in a later stage of the legislative process (*cf.* J. Chartier, 'Rapport fait au nom de la commission des finances, de l'économie générale et du contrôle budgétaire sur le projet de loi, modifié par le Sénat, de régulation bancaire et financière (no. 2833) no. 2848', 7 October 2010, p. 40). As a consequence, the question of whether and to what extent limitation clauses were admissible under French law was already left to the general rules of French private law.

517 *Cf.* Castermans, Dankers-Hagenaars & Dejean de la Batie 2017, p. 22 and Viney, Jourdain & Carval 2017, no. 330.

518 Bénabent 2016, no. 434 and no. 431 and Leveneur-Azémar 2017, no. 55, *both referring to* Cour de Cassation (Chambre Commerciale) 15 June 1959, 57-12362, Bulletin Chambre Commerciale, no. 265, p. 231. *In the context of credit rating agency liability,* Tchotourian 2011, para II, Thépot 2010, para II.B.1 and Seibold 2016, p. 149.

519 *E.g.* Cour de Cassation (Chambre Commerciale) 15 June 1959, 57-12362, Bulletin Chambre Commerciale, no. 265, p. 231.

by such extreme misconduct that it is shown that the defendant is not competent to fulfil its tasks. The conduct of the defendant is compared to the conduct of a reasonable party placed in the position of the defendant.[520] Furthermore, the term *faute dolosive* was used to describe situations in which the defendant deliberately committed an act or omission, while it did not intend to cause loss to the claimant as a consequence of its conduct.[521] The ease with which this definition was presented there, does however not mirror the debate on the meaning of the term *faute dolosive* under French law. Until the decision of the French Court of Cassation in *Société des Comédiens français*, the terms *faute dolosive* and *faute intentionnelle* were considered '*synonymes*'.[522] Both *fautes dolosives* and *fautes intentionnelles* were assumed to also require an intention to commit an act or omission as an intention to cause loss as a consequence. However, in the decision *Société des Comédiens français*, the scope of *fautes dolosives* was enlarged:

> '*Vu l'article 1150 du Code civil: Attendu que le debiteur commet une faute dolosive lorsque, de propos délibéré, il se refuse a exécuter ses obligations contractuelles, même si ce refus d'est pas dicté par l'intention de nuire à son cocontractant*'.[523]

Hence, for a *faute dolosive*, it is required that that the defendant intended to commit an act or omission (here, to violate its contractual obligations), but it is not required that the defendant intended any loss to occur.[524] In the area of limitation clauses, the exact difference between *faute intentionnelle* and *faute dolosive* is however less important, because the minimum threshold to bar the effect of a limitation clause is a *faute lourde*.[525] For that reason, this topic will not be discussed in more detail.

Furthermore, the special rules under the Code de la consommation apply to limitation clauses included in general terms and conditions of consumer contracts.[526] Under Article L. 212-1 Code de la consommation, a term may be regarded as 'unfair' if 'it causes a significant imbalance in the parties' rights and obligations: '*Dans les contrats conclus entre professionnels et consommateurs*,

520 *Cf.* Viney, Jourdan & Carval 2017, no. 379 and *cf.* Viney, Jourdan & Carval 2013, no. 611 (who compare the conduct of the defendant with what he should have done).

521 *As derived from* Bénabent 2016, no. 413.

522 Viney, Jourdain & Carval 2017, no. 375 and Leveneur-Azémar 2017, no. 504. Cour de Cassation (Chambre Civile 1) 4 February 1969, 67-11387, Bulletin 1969, I, no. 60 (*Société des Comédiens français*).

523 Cour de Cassation (Chambre Civile 1) 4 February 1969, 67-11387, Bulletin 1969, I, no. 60 (*Société des Comédiens français*).

524 Leveneur-Azémar 2017, no. 508 and *cf.* no. 513, Viney, Jourdain & Carval 2017, no. 375 and Bénabent 2016, no. 413.

525 Leveneur-Azémar 2017, no. 515.

526 The Code de la consommation implements the Unfair Terms Directive in French law. The scope of the provisions on unfair terms under the Code de la consommation also apply to 'non-professionals' under Art. L 212-2 Code de la consommation. Art. liminaire: 'toute personne morale qui n'agit pas à des fins professionnelles;'.

sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat.'[527] The Code de la consommation stipulates a grey and a black list with examples of terms presumed to be unfair and deemed to be unfair, respectively.[528] The exclusion and limitation of liability of a consumer's right to damages are included in the black list.[529] French law hence regards a general term or condition that involves a limitation of liability in a consumer contract to be unfair, thereby even gold-plating the provisions under the Unfair Terms Directive.[530]

(b) Limitation clauses and non-contractual liability

French law approaches the validity of limitation clauses in relation to non-contractual liability with much restraint. Limitation of liability is generally not admitted because that would restrict the application of Article 1240 and 1241 CC,[531] which are considered public policy provisions ('*l'ordre public*').[532] Parties are therefore also not allowed to contract themselves out of this prohibition.[533] This restrictive approach is not explicitly addressed by the Code Civil, but has been established by the French Court of Cassation:

> '*que sont nulles les clauses d'exonération ou d'atténuation de responsabilité en matière délictuelle, les articles 1382 et 1383 du Code Civil étant d'ordre public et leur application ne pouvant être paralysée d'avance par une convention*'.[534]

5.5.4.2 Limitations of liability in relation to issuers and investors

In general, the admissibility of limitation clauses depends on whether the claim for damages concerns contractual or non-contractual liability. As a matter of

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527 Emphasis added [DJV]. Very similar to Art. 3 (1) Unfair Terms Directive.

528 Art. R. 212-2 and Art. R. 212-1 Code de la consommation, respectively.

529 Art. R. 212-1 (6) Code de la consommation. *Cf. on the incorporation in the black list* Seibold 2016, p. 156.

530 *See* Leveneur-Azémar 2017, no. 213. Under Art. 3 (3) and Annex (b) Unfair Terms Directive, the limitation of legal rights, as the right to damages, only forms part of the indicatory list of examples that may be regarded as unfair.

531 Art. 1382 and 1383 ancien CC. After the revision of the Code Civil of 10 February 2016, an exception has been made for limitation clauses regarding qualitative liability ('la responsabilité sans faute') under Art. 1281 and 1282 CC (Castermans, Dankers-Hagenaars & Dejean de la Batie 2017, p. 25 and *cf.* Viney, Jourdain & Carval 2017, no. 355). However, this exception is not relevant in the light of the system of fault-based liability introduced by Art. 35a CRA Regulation.

532 Castermans, Dankers-Hagenaars & Dejean de la Batie 2017, p. 24, Leveneur-Azémar 2017, no. 77, Viney, Jourdain & Carval 2017, no. 355 and Bénabent 2016, no. 510. *See, for a critical approach,* Leveneur-Azémar 2017, no. 82 ff.

533 Castermans, Dankers-Hagenaars & Dejean de la Batie 2017, p. 24 and Leveneur-Azémar 2017, no. 81. *Cf.* Bénabent 2016, no. 510.

534 Cour de Cassation (Chambre Civile 2) 17 February 1955, 55-02810, Bulletin 1955, II, no. 100, p. 59. *Derived from* Leveneur-Azémar 2017, no. 77.

principle, one can question whether Article 35a CRA Regulation concerns a matter of contractual or non-contractual liability law and whether limitations of liability would therefore be considered contrary to public policy under French law. However, in relation to claims based upon Article 35a CRA Regulation, it is not necessary to go this far. Regardless of any public policy nature of Article 35a CRA Regulation, under French private law, a credit rating agency cannot limit its liability for loss caused intentionally or by means of a *faute lourde* or a *faute dolosive*.[535] As described under section 5.5.3.1, one of the conditions for credit rating agency liability under Article 35a CRA Regulation is that the credit rating agency must have committed the infringement *de manière intentionnelle ou par négligence grave*. As the threshold for a *faute lourde* is in fact *négligence grave*, the level of 'fault' required under Article 35a CRA Regulation is comparable to the *faute lourde* under French law. The threshold for liability under Article 35a (1) CRA Regulation ('intention' or 'gross negligence' ('*de manière intentionnelle ou par négligence grave*')) and the threshold for singling out the effect of a limitation clause (*faute lourde* or a *faute dolosive*) hence boil down to the same minimum threshold: extreme misconduct on the side of the credit rating agency, showing that it is not able to fulfil its tasks. As a consequence, if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a limitation clause included in the contract will also not have any effect under French law.

5.5.5 Prescription

Prior to 2008, French law employed long limitation periods and the law was scattered in the sense that different periods applied varying according to the type of claim.[536] With the law reform of 17 June 2008, the limitation periods were shortened and the amount of exceptions was reduced.[537] Under Article 2224 CC, the standard limitation period for the prescription of claims is 5 years: '*Les actions personnelles ou mobilières se prescrivent par cinq ans à compter du jour où le titulaire d'un droit a connu ou aurait dû connaître les faits lui permettant de l'exercer*.' This general limitation period does however not apply if special rules

535 *As discussed in the context of credit rating agency liability by* Tchotourian 2011, para II and Thépot 2010, para II.B.1. *Also* Seibold 2016, p. 149.

536 *Cf.* Bénabent 2016, no. 837. French law distinguishes between the passing of time that leads to the acquisition of a title (acquisitive or positive prescription, i.e. '*la prescription acquisitive*') and the passing of time that leads to the loss of a title (extinctive or negative prescription, i.e. '*la prescription libératoire ou extinctive*'). Malaurie, Aynès & Stoffel-Munck 2018, no. 1200.

537 Bénabent 2016, no. 838. *Cf.* Viney, Jourdain & Carval 2017, no. 601. Although the reform has been criticised for not having simplified the regime sufficiently, *see in more detail*, Malaurie, Aynès & Stoffel-Munck 2018, no. 1201.

prescribe deviating limitation periods pursuant to Article 2223 CC.[538] But, in the area of credit rating agency liability, the limitation period for claims concerning contractual and non-contractual liability is 5 years.[539] The limitation period starts to run as from the day that the holder of the right became acquainted or should have become acquainted with the facts that allow it to exercise its right (*'à compter du jour où le titulaire d'un droit a connu ou aurait dû connaître les faits lui permettant de l'exercer'*, Art. 2224 CC). The notion of acquaintance is interpreted subjectively and objectively, in the sense that the holder of the right should know or should have known the relevant facts. In order for the prescription period to start running, the wrongful act or omission – the infringement in the case of credit rating agency liability – must have at least been committed and the loss occurred. In the words of Klein: *'la prescription ne saurait courir avant la naissance de l'action'*.[540]

How should Article 2224 CC be applied in credit rating agency liability, and, more in particular, in how far does the French notion of loss play a role here? The limitation period will start to run at different moments depending on whether one deems the loss to arise at the moment the credit rating turns out to be wrong and the financial markets respond to that information, or at the moment the investor was not able to make a fully and well-informed investment decision. Yet, as appears from Article 2224 CC, if the issuer or investor can prove that he should not have been aware of the loss when it arose, the limitation period can also start to run later in time.[541] The right to claim damages will, however, nevertheless expire 20 years after the moment of the emergence of the right to claim damages under Article 2232 CC (*'à compter du jour de la naissance du droit'*).

5.5.6 Concluding remarks

During the time in which this national law report was drafted, the French approach to credit rating agency liability underwent important changes. Whereas French law was known for its stringent approach towards credit rating agencies under Article L. 544-5 and L. 544-6 Code monétaire et financier, the abolition of these provisions by the French legislature in January 2018 leaves the question open of whether credit rating agencies can still be held

538 In the words of Viney, Jourdain & Carval 2017, no. 600: '*Or celles-ci sont nombreuses.*' For instance, an extended limitation period of ten years applies under Art. 2226 CC to claims involving physical harm (*'dommage corporel'*).

539 *Cf. for the general limitation period* Viney, Jourdain & Carval 2017, no. 601-602. Prior to 2008, the limitation period for claims concerning non-contractual liability was ten years starting from the moment the damage occurred or aggravated (Art. 2270 (1) ancien CC). *Cf. also for the general limitation period* Bénabent 2016, no. 841.

540 Klein 2013, no. 64.

541 *Cf.* Klein 2013, no. 78.

liable under French private law or whether Article 35a CRA Regulation provides the only legal basis for a claim for damages brought by issuers and investors. The silence in French academic literature with regard to the abolition of Article L. 544-5 and L. 544-6 Code monétaire et financier contrasts greatly with the large amount of attention devoted to the introduction of the provisions in 2010. The abolition shows that Article 35a CRA Regulation influences national legislatures even though Article 35a (5) CRA Regulation allows Member States to impose stricter rules upon credit rating agencies.

French law does not provide explicit guidance on the interpretation and application of Article 35a CRA Regulation. Therefore, the interpretation and application was constructed in accordance with the principles of French private law derived from Book 3 Code Civil. French law leans towards a rather broad interpretation and application of Article 35a CRA Regulation. The threshold for 'gross negligence' involves serious negligence, and does not require subjective intent or recklessness. Furthermore, French courts can adopt a flexible approach to causation and may apply the doctrine of loss of chance in the context of credit rating agency liability claims brought by investors. The application of this doctrine can be debated within the scope of Article 35a CRA Regulation, because it replaces the requirement of reasonable reliance under Article 35a (1) CRA Regulation as part of the causal link between the infringement and the investment decision. From the perspective of legal certainty, the application of the doctrine of loss of chance can be criticised. Due to the fact that French courts do not provide extensive reasoning on how they assess the height of the lost chance and the corresponding amount of damages, it is difficult to predict how French courts will calculate the amount of damages awarded in future cases. In the context of Article 35a (3) CRA Regulation, it is expected that limitation clauses will hardly have effect under French law if an issuer or investor fulfilled the requirements of Article 35a (1) CRA Regulation. As the threshold for liability under Article 35a (1) CRA Regulation ('intention' or 'gross negligence') and the threshold for singling out the effect of a limitation clause (*faute lourde* or *faute dolosive*) boil down to the same minimum threshold, a limitation clause does not have effect under French law when an issuer or investor succeeds in proving a credit rating agency behaved intentionally or grossly negligent. In conclusion, French law leans towards a rather broad interpretation and application of Article 35a CRA Regulation to the benefit of issuers and investors.

5.6 German law

5.6.1 National private law context

This national law report concentrates on the interpretation and application of Article 35a CRA Regulation under German law. Similar to the private law

systems of Dutch and French law, the German system of private law is of a civil law nature. The main codification of German private law is formed by the Bürgerliches Gesetzbuch (BGB, the German Civil Code). The Bürgerliches Gesetzbuch was introduced in 1900, upon the unification of Germany in 1871.[542] It essentially roots in Roman law, but was developed over the years by German scholars in the 'Historical School of Law' of Von Savigny.[543] The Bürgerliches Gesetzbuch is known for being heavily structured, for using abstract concepts and for being highly detailed. It was said to be addressed to lawyers, and not to ordinary citizens.[544] The same level of detail can be found in decisions of German courts and in German academic literature. German courts motivate their decisions extensively and refer to relevant legal literature in their decisions.[545]

The Bürgerliches Gesetzbuch splits German private law into five books. For the purpose of interpreting the terms of Article 35a CRA Regulation, the first book '*Allgemeiner Teil*' (general part) and the second book '*Recht der Schuldverhältnisse*' (the law of obligations) have been used. The second book involves general provisions applicable to all obligations (such as the provisions on compensation and damages, § 249 BGB ff.). Furthermore, it involves the rules relating to contractual liability (§ 280 BGB ff.) and non-contractual liability (§ 823 BGB ff.). Claimants can base a claim for compensation[546] on contract and tort law, as German law is not familiar with the principle of *non-cumul*.[547]

An overarching feature of German non-contractual liability law is that only the rights described by law are protected. German law hence does not involve a general open provision for non-contractual liability for unlawful conduct. § 823 (1) BGB, for instance, protects '*das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht*' (life, body, health, freedom, property or another right). If § 823 (1) BGB does not refer to a specific interest, that interest in principle does not fall within the protective scope of § 823 (1) BGB. Financial interests are not referred to in § 823 (1) BGB, and German law

542 *Cf.* Zimmermann 2005, pp. 7-8. Germany is a federal republic, yet private law belongs to the competence of the federal government, Van Dam 2013, no. 401-1.

543 *Cf.* Robbers 2017, no. 567-574, Dedek & Schermaier 2012, pp. 353-354 and Kötz & Wagner 1998, p. 138. *For a description of the process towards codification*, Zimmermann 2005, pp. 4-8 and Kötz & Wagner 1998, pp. 132-142.

544 Kötz & Wagner 1998, p. 144. *Cf. also* Zimmermann 2005, p. 10.

545 *Cf.* Dedek & Schermaier 2012, p. 362.

546 Under German private law, a claimant is entitled to *Schadensersatz* (compensation) under § 249 BGB. The term 'compensation' is used rather than the term 'damages', because German law in principle awards restitution in kind instead of monetary damages. See section 5.6.3.3 (a).

547 De Graaff 2017, no. 33, and in more detail, no. 30-37. *Cf.* Staudinger/Hager (2017) Vorbem zu §§ 823 ff., para 37.

generally approaches the compensation of pure economic loss reluctantly.[548] This feature of a limitative system of non-contractual liability will appear throughout this section frequently.

Finally, fundamental rights play an important role in German private law. The importance of fundamental rights increased after the Second World War, when the overarching Grundgesetz (GG, the Basic Law) was introduced. The Grundgesetz applies to the whole body of German law, and hence also influences German private law. As the highest competent court in disputes concerning fundamental rights established under the Grundgesetz, the German Constitutional Court can decide on disputes concerning private law matters and fundamental rights.[549]

5.6.2 National rules on credit rating agency liability

5.6.2.1 Much attention to credit rating agency liability

The liability of credit rating agencies received much attention both prior and subsequent to the introduction of Article 35a CRA Regulation in 2013. Many authors explained the application and interpretation of Article 35a CRA Regulation under German law, which provided information for the analysis made in this dissertation.[550] Furthermore, the amount of case law on the liability of credit rating agencies and credit scoring agencies is considerable, especially compared to the other legal regimes investigated in this dissertation. Aligned with the general character of German law, a tangled web of national grounds for liability exists. As we will see below, German law takes a restrictive approach towards the civil liability of credit rating agencies vis-à-vis investors; hardly any of the legal grounds discussed provide investors with a realistic legal basis for a claim for compensation against a credit rating agency.

548 Although compensation for pure economic loss can be claimed under other provisions of the BGB, and sometimes even under § 823 (1) BGB, as will be discussed under section 5.6.2.3 (a) (i). *Cf.* Staudinger/Hager (2017) Vorbem zu §§ 823 ff., para 20 and Staudinger/Hager (2009) § 823, para E 7.

549 *Cf.* Dedek & Schermaier 2012, pp. 350 and 356.

550 *E.g.* Heuser 2019, Deipenbrock 2018, Dumont du Voitel 2018, Jansen, Kästle-Lamparter & Rademacher 2017, Wimmer 2017, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, Seibold 2016, Schantz 2015, Haar 2014, Halfmeier 2014, Kontogeorgou 2014, Von Rimon 2014, Schroeter 2014, Amort 2013, Dutta 2013, Gietzelt & Ungerer 2013, Rosset 2013, Wagner 2013, Wojcik 2013 and Arntz 2012. *Prior to the introduction of Art. 35a CRA Regulation e.g.* Berger & Stemper 2010, Wildmoser, Schiffer & Langoth 2009 and Rohe 2005.

5.6.2.2 In the presence of a contractual relationship

(a) Issuers

The legal basis for a claim for compensation in contract law brought by issuers depends on the legal qualification of rating contracts, a topic to which German literature has devoted quite some attention. Most often, rating contracts are qualified as '*Werkvertrag*' (a contract for the production of a specific work) under § 631 BGB or as '*atypische Vertragsverhältnis*' (an atypical contractual relationship) under § 311 BGB.[551] The qualification as *Werkvertrag* (agreement for the execution of work) imposes the obligation upon a credit rating agency to assign a credit rating free from material and legal defects under § 633 (1) BGB.[552] Furthermore, a credit rating agency is under the general obligation not to breach duties arising from its obligations under § 280 (1) BGB.[553] A credit rating agency is not required to have assigned the accurate credit rating in hindsight, but rather must have assigned the credit rating in an objective, independent and professional manner – a yardstick that can be substantiated by Annex III CRA Regulation.[554] A violation of these provisions by a credit rating agency entitles the issuer to compensation under (§ 634 (4) in conjuction with) § 280 (1) BGB.[555]

(b) Investors

The legal basis for a claim for compensation in contract law brought by investors depends on the legal qualification of paid subscription contracts. German scholars often qualified a paid subscription as '*Kaufvertrag*' (sales contract) under § 433 (1) BGB, but also as '*Dienstvertrag*' (services contract) under § 611 (1) BGB or '*atypische Vertragsverhältnis*' (an atypical contractual relationship) under § 311 BGB.[556] In general, a credit rating agency is under the general obligation not to breach duties arising from its obligations under § 280 (1) BGB. When adopting the qualification of a paid subscription as *Kaufverträge*, § 433 (1) BGB requires the credit rating agency to deliver the credit

551 § 631 (1) BGB – '(1) *Durch den Werkvertrag wird der Unternehmer zur Herstellung des versprochenen Werkes, der Besteller zur Entrichtung der vereinbarten Vergütung verpflichtet.*' *For the qualification as Werkvertrag e.g.* Dumont du Voitel 2018, p. 251 (with one exception on p. 253), Seibold 2016, p. 46, Von Rimon 2014, p. 144, Amort 2013, p. 274 and Arntz 2012, pp. 90-91. *For the qualification as atypical contractual relationship e.g.* Seibold 2016, p. 46, Von Rimon 2014, p. 144, Arntz 2012, p. 91.

552 *E.g.* Dumont du Voitel 2018, p. 256, Seibold 2016, pp. 46-47 and Von Rimon 2014, pp. 145-146.

553 Seibold 2016, p. 48.

554 *Cf.* Von Rimon 2014, pp. 146-147.

555 Wimmer 2017, p. 342. *Also* Dumont du Voitel 2018, pp. 255-256.

556 *On the qualification as Kaufverträge see* Dumont du Voitel 2018, pp. 282-283, Seibold 2016, p. 82 and Amort 2013, p. 275. *On the qualification as Dienstverträge see* Wimmer 2017, p. 345 and Kontogeorgou 2014, p. 1401. *On the qualification as atypische Vertragsverhältnisse see* Von Rimon 2014, p. 185. *On the debate see* Seibold 2016, p. 81.

rating free from material and legal defects. A credit rating agency is not required to have assigned the accurate credit rating in hindsight, but rather must have assigned the credit rating in an objective, independent and professional manner.[557] The investor is entitled to damages under (§ 437 (3) in conjuction with) § 280 (1) BGB if the credit rating agency fails to comply with this obligation.[558]

5.6.2.3 In the absence of a contractual relationship

(a) Issuers

In the absence of a contractual relationship between an issuer and a credit rating agency, the issuer can make use of German non-contractual liability law only. German scholars mentioned, for instance, § 823 (1), § 824 and § 826 BGB as possible legal bases for liability.[559] It is, however, not always clear whether a claim concerning credit rating agency liability is covered by these grounds. Moreover, an appeal to these liability grounds will only succeed in a limited number of situations.

(i) – § 823 (1) BGB

§ 823 (1) BGB states that '*[w]er vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet.*'[560] An aggravated party hence has a right to compensation only when the other party violated an interest – life, body, health, freedom, property or another right – listed in § 823 (1) BGB. German courts expanded the protection of this provision by ensuring that unlawful violations of *das Recht am eingerichteten und ausgeübten Gewerbebetrieb* ('the right to business as a going concern'[561]) and *das allgemeines Persönlichkeitsrecht* ('the general right to protection of the personality'[562]) also belong to the protective scope of § 823

557 *Cf.* Von Rimon 2014, p. 186.

558 Seibold 2016, p. 83.

559 *With regard to unsolicited credit ratings* Dumont du Voitel 2018, pp. 264 ff., MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Wimmer 2017, pp. 346-360, Seibold 2016, pp. 62-69, Von Rimon 2014, pp. 175-180, Schroeter 2014, pp. 853-863, Amort 2013, p. 275, Wagner 2013, pp. 473-474 and Arntz 2012, pp. 93-95. *Regarding solicited credit ratings* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Wimmer 2017, pp. 346-360, Seibold 2016, p. 49, Von Rimon 2014, pp. 165-173, Schroeter 2014, pp. 817 and 822, Amort 2013, p. 275, Wagner 2013, pp. 473-474 and Arntz 2012, p. 93. The overview provided does not reflect all grounds for liability discussed in German literature.

560 'A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019.

561 *Translation derived from* Robbers 2017, no. 748.

562 *Translation derived from* Robbers 2017, no. 750.

(1) BGB under the category of '*ein sonstiges Recht*'.[563] 'The right to business as a going concern' provides an entrepreneur with a right to compensation (of pure economic loss) when another party directly damages its business in an unlawful manner.[564] 'The general right to protection of the personality' covers, amongst others, situations in which someone's privacy was not respected or in which someone suffered loss as a consequence of defamatory statements.[565] In the context of credit rating agency liability, German authors generally state that issuers can claim damages for unlawful violations of the right to business as a going concern.[566] Compensation for violations of the general right to protection of the personality of the issuer is generally conceived to be more complex or even impossible.[567]

§ 823 (1) BGB requires that the rights of the claimant have been violated in an unlawful manner. In order to determine whether a credit rating agency's conduct was unlawful, German courts must balance an issuer's right to business as a going concern against a credit rating agency's right to freedom of speech under § 5 (1) Grundgesetz.[568] The simple fact that a credit rating or another statement relating to an issuer is negative, does not in itself create a unlawful violation of an issuer's rights. In a decision on the liability of a credit scoring agency for an allegedly too negative *Detailanalyse* in May 2006, the Higher Regional Court of Berlin stated that '*der Emittent [muss eine Beurteilung] grundsätzlich hinnehmen, und zwar auch dann, wenn sie für ihn ungünstig ist. Jeder Gewerbebetrieb muss eine nicht in Wettbewerbsabsicht verbreitete Kritik an seinem Produkt dulden […].*'[569] A credit rating agency hence does not unlawfully violate the rights of an issuer by assigning a negative credit rating.

563 Van Dam 2013, no. 701-2 and Koch 2005, p. 210. *Cf.* Robbers 2017, no. 748 and no. 750.

564 Robbers 2017, no. 748, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 322 ff., Staudinger/Hager (2017) § 823, para D 2, Van Dam 2013, no. 710-3 and Koch 2005, p. 210.

565 Robbers 2017, no. 750, Van Dam 2013, no. 706-2 and Koch 2005, p. 210.

566 *E.g.* Dumont du Voitel 2018, pp. 266 ff., MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139 and MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 350, Seibold 2016, p. 64, Schroeter 2014, pp. 860-861, Von Rimon 2014, pp. 170-171, Wagner 2013, p. 473 and Arntz 2012, pp. 93-94. *For a more cautious approach*, Wimmer 2017, pp. 350-352.

567 Seibold 2016, p. 65 and Arntz 2012, p. 93-94. The authors emphasised that issuers would only succeed in exceptional situations. Schroeter 2014, pp. 858-859 and Von Rimon 2014, p. 173 concluded that a claim for damages based on the general right of the protection of the personality was not possible. *Cf. also* Dumont du Voitel 2018, pp. 272-273.

568 Seibold 2016, p. 66, Schroeter 2014, p. 862, Von Rimon 2014, pp. 171-172 and Amort 2013, p. 275. *Cf.* Dumont du Voitel 2018, pp. 267. In Oberlandesgericht Brandenburg 7 December 2017, 6 W 141/17, ECLI:DE:OLGBB:2017:1207.6W141.17.0A, *BeckRS* 2017, 143334, para 19, the Higher Regional Court of Brandenburg repeated that the rights of the issuer and the credit rating agency must be balanced. In this specific case, however, the claim for damages was already dismissed for different reasons so that the balancing act was not necessary.

569 Kammergericht Berlin 12 May 2006, 9 U 127/05, ECLI:DE:KG:2006:0512.9U127.05.0A, para 33. *See also in respect of this decision*, Von Rimon 2014, p. 171. *Cf. in general* Staudinger/Hager (2017) § 823, para D 24.

At the same time, a credit rating agency's right to freedom of speech is not absolute. German scholars assumed that German courts will apply the yardstick developed in the case law concerning the unlawfulness of publications on products and legal entities (*Warentests*) in order to determine whether the violation was unlawful.[570] This assumption can be derived from a decision of the Higher Regional Court of Berlin, in which it held: '*Die Zulässigkeit der Veröffentlichung von Ratings […] ist (mit) an den Maßstäben auszurichten, die die Rechtsprechung […] für die Zulässigkeit der Veröffentlichung von Waren- bzw. Leistungstests entwickelt hat*'.[571] The yardstick developed in the context of the unlawfulness of publications on products and legal entities hence also applies to credit ratings. Subsequently, the Higher Regional Court explained that the analysis of the issuer must be produced neutrally, professionally and objectively: '*[d]anach muss die jeweilige Analyse einer beworbenen Kapitalanlage neutral, sachkundig und im Bemühen um objektive Richtigkeit erarbeitet werden*.'[572] Although less explicit, the Higher Regional Court of Frankfurt adopted the same approach in April 2015 where it held:

> '*Die von der Beklagten abgegebene äußerst negative Bewertung der Kreditwürdigkeit der Klägerin ist* ohne jegliche sachliche Basis. *Das gesamte Vorgehen der Beklagten bei der Abgabe ihrer verschiedenen Bewertungen ist von einer* verantwortungslosen Oberflächlichkeit geprägt, *die das absolute Recht der Klägerin, keine rechtwidrigen Eingriffe in ihren eingerichteten und ausgeübten Gewerbebetrieb erleiden zu müssen, schwerwiegend verletzt*.'[573]

Hence, in order to determine whether a credit rating agency committed an unlawful violation of the issuer's right to business as a going concern, German courts will determine whether the credit rating agency assgined the credit rating in a neutral, professional and objective manner.

(ii) – § 823 (2) BGB

A second option available to issuers upon which to base a claim for credit rating agency liability might be formed by § 823 (2) BGB.[574] On the basis of § 823 (2) BGB, the person who '*gegen ein den Schutz eines anderen bezweckendes*

570 Dumont du Voitel 2018, pp. 267-268, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Seibold 2016, p. 66, Von Rimon 2014, pp. 171-172, Gietzelt & Ungerer 2013, p. 345 and Arntz 2012, p. 94. *See, differently,* Schroeter 2014, pp. 862-863.

571 Kammergericht Berlin 12 May 2006, 9 U 127/05, ECLI:DE:KG:2006:0512.9U127.05.0A, para 33.

572 Kammergericht Berlin 12 May 2006, 9 U 127/05, ECLI:DE:KG:2006:0512.9U127.05.0A, para 34. *Cf. in general* Staudinger/Hager (2017) § 823, para D 32.

573 Oberlandesgericht Frankfurt 7 April 2015, 24 U 82/14, ECLI:DE:OLGHE:2015:0407.24U82.14.0A, para 26. Emphasis added [DJV].

574 *Brought up by* Wimmer 2017, pp. 352-355.

Gesetz verstößt' must compensate the loss caused.[575] In contrast to § 823 (1) BGB, aggrieved parties can claim the compensation of pure economic loss under § 823 (2) BGB.[576] In the context of credit rating agency liability, a credit rating agency must hence compensate the loss suffered by the issuer if it violated a norm intended to protect the individual issuer. Norms that are capable of having direct effect, for instance those included in EU regulations, can fall under the category '*eines anderen bezweckendes Gesetz*'.[577] Prior to the introduction of the third version of the CRA Regulation, individually protective norms were considered to be absent in the field of credit rating agency liability.[578] At that time, the infringements listed in Annex III CRA Regulation indeed served public enforcement and the protection of general public interests only. Yet the introduction of Article 35a CRA Regulation might have brought change in this regard, although it must be determined for each rule whether it specifically aims to protect an individual issuer.[579] Several German scholars however doubted the individually protective nature of the norms under the CRA Regulation.[580] But if the norms have such a protective effect, issuers can use Annex III of the CRA Regulation upon which to base a claim for non-contractual liability in accordance with § 823 (2) BGB.

The possibility of claims under § 823 (2) BGB was denied for another reason as well. Heuser argued that '*Art. 35 a Abs. 5 Rating-VO erlaubt zwar weitere mitgliedstaatliche Haftungsansprüche, aber gilt dies nach Erwägungsgrund 35 nicht für solche zivilrechtliche Haftungsansprüche, die sich auf Verstöße gegen die Rating-VO stützen* […]'.[581] Heuser hence defended the point of view that Article 35a (5) CRA Regulation does not allow further claims under the applicable national law for infringements listed in Annex III CRA Regulation. This point was already addressed in section 2.5.4.2 (c), where it was concluded that Article 35a (5) CRA Regulation does allow stricter national rules on civil liability for

575 § 823 (2) BGB: 'The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019. The phrase '[t]he same duty' refers to the duty to compensate the damage under § 823 (1) BGB.

576 *Cf.* Staudinger/Hager (2009) § 823, para G 4.

577 Palandt/Sprau 2019, BGB § 823, no. 57.

578 Wimmer 2017, pp. 352-353.

579 This dissertation assumes that the obligations under Annex III CRA Regulation can have direct horizontal effect through Article 35a CRA Regulation.

580 Wimmer doubted whether the norms under the CRA Regulation qualify as individual protective norms: Wimmer 2017, pp. 354-355. *Also e.g.* Berger & Ryborz 2014, p. 2243 and Schroeter 2014, p. 826. *Contra* Dutta 2013, p. 1735. Dumont du Voitel 2018, p. 353 argued that the norms under the CRA Regulation qualify as individual protective norms and can be used under § 823 (2) BGB.

581 Heuser 2018, p. 84. *Also* Heuser 2019, pp. 85-86. *For the same approach* Berger & Ryborz 2014, p. 2247.

infringements of Annex III CRA Regulation. Therefore, Heuser's conclusion in respect of § 823 (2) BGB is not followed here.[582]

(iii) – § 824 (1) BGB

Another possible ground for non-contractual liability available to issuers is § 824 (1) BGB. German academic literature refers to this provision as a possible legal basis for compensation, but immediately concludes that it will hardly be available to issuers in practice. § 824 (1) BGB offers protection against loss caused by the dissemination of incorrect factual statements which threaten someone's creditworthiness. The provision states that '*[w]er der Wahrheit zuwider eine Tatsache behauptet oder verbreitet, die geeignet ist, den Kredit eines anderen zu gefährden oder sonstige Nachteile für dessen Erwerb oder Fortkommen herbeizuführen, hat dem anderen den daraus entstehenden Schaden auch dann zu ersetzen, wenn er die Unwahrheit zwar nicht kennt, aber kennen muss*.'[583] But as credit ratings are considered opinions rather than facts, German academic literature deemed the applicability of § 824 (1) BGB to credit rating agency liability to be (nearly) impossible.[584]

The aforementioned decision of the Higher Regional Court of Berlin of May 2006 supports the conclusion drawn in German literature. The Higher Regional Court of Berlin dismissed an issuer's claim for damages based on § 824 BGB, because the *Detailanalyse* did not concern incorrect factual statements. It held that statements posed in an analysis can trigger the application of § 824 BGB, but only

> '*wenn ihnen im Rahmen der Analyse eine eigenständige Bedeutung zukommt. Handelt es sich dagegen um Angaben, die zu den Analyseergebnissen hinführen, kann es gerechtfertigt sein, diese Angaben gemeinsam mit den Ergebnissen als wertende Meinungsäußerung anzusehen*'.[585]

Subsequently, the Higher Regional Court of Berlin concluded that the information included in the *Detailanalyse* did not qualify as a factual statement. Taking into account this decision and the sentiment in German literature, it seems

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582 *For the same reasoning in respect of § 823 (2) BGB*, Dumont du Voitel 2018, p. 338-341.

583 'A person who untruthfully states or disseminates a fact that is qualified to endanger the credit of another person or to cause other disadvantages to his livelihood or advancement must compensate the other for the damage caused by this even if, although he does not know that the fact is untrue, he should have known.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019.

584 Dumont du Voitel 2018, pp. 274 and 276, Heuser 2019, p. 85, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Seibold 2016, pp. 67-68, Schroeter 2014, p. 854, Amort 2013, p. 275, Wagner 2013, p. 473 and Arntz 2012, p. 93. Von Rimon 2014, p. 169 concluded that basing a claim for damages on § 824 BGB was not possible at all.

585 Kammergericht Berlin 12 May 2006, 9 U 127/05, ECLI:DE:KG:2006:0512.9U127.05.0A, paras. 41 and 34. *See also in respect of this decision*, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, fn. 569 and Von Rimon 2014, pp. 166-167.

highly unlikely that an issuer's claim for damages based on § 824 BGB will succeed.

(iv) – § 826 BGB

Finally, as another possibility, issuers can base a claim for compensation on § 826 BGB. This provision offers protection against loss caused by persons who intentionally acted contrary to public policy. The provision states that *'[w]er in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet'*.[586] The threshold for liability is high: the tortfeasor must have acted contrary to public policy and the tortfeasor must have done so intentionally.[587] German literature deemed the applicability of § 826 BGB to credit rating agency liability exceptional, because it was assumed that this provision requires credit rating agencies to issue incorrect credit ratings with the intention to harm the issuer.[588]

(b) Investors

In the absence of a contractual relationship between investors and credit rating agencies, investors can make use of German non-contractual liability law only. German scholars mentioned various legal bases for liability, such as liability on the basis of a *Vertrag mit Schutzwirkung zugunster Dritter* (contracts with protective effects on third parties), § 823 (2) BGB and § 826 BGB.[589] As con-

586 'A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019.

587 German courts adopted a broad approach to the requirement of '*vorsätzlich*' conduct, section 5.6.2.3 (b) (iii) discusses the meaning of this requirement in more detail.

588 Heuser 2019, p. 85, Seibold 2016, p. 68, *cf.* Von Rimon 2014, p. 170, Schroeter 2014, p. 817 and Arntz 2012, p. 94. *Cf. also* Wimmer 2017, p. 360. Dumont du Voitel 2018, p. 277, considered that infringements of Annex III CRA Regulation could qualify as conduct contrary to public policy.

589 *E.g.* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 140, Haar 2014, pp. 317-318, Halfmeier 2014, pp. 330-331, Kontogeorgou 2014, pp. 1401-1402, Schroeter 2014, pp. 892 ff., Amort 2013, pp. 276-277, Wagner 2013, pp. 476-478 and 480-483 and Berger & Stemper 2010, pp. 2289-2293. Some other grounds for liability referred to by German authors are rather clearly not applicable, so that they do not deserve detailed attention here. For instance, a claim for damages cannot be based on § 823 (1) BGB, because a credit rating agency will not have violated an investor's right which is protected under § 823 (1) BGB, recently: Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 49. *E.g.* Wimmer 2017, p. 361, Seibold 2016, p. 90, Schantz 2015, p. 218, Schroeter 2014, p. 897 and Wojcik 2013, p. 2386. Furthermore, authors pointed at § 311 (3) BGB which creates a ground for *Dritthaftung* or *quasi-vertragliche Vertrauenshaftung* in respect of third parties who did not become part of an agreement, but, who, in particular, influenced the contract negotiations or the conclusion of the contract because of a certain degree of trust (*e.g.* Wimmer 2017, pp. 372 ff., Seibold 2016, pp. 96-98, Schantz 2015, pp. 218 ff. and Wagner 2013, pp. 482-483). Applying § 311 (3) BGB in the context of credit rating

cluded in the German contributions and as demonstrated by recent German case law, a successful appeal to these legal bases will only occur in exceptional situations.

(i) – Das Vertrag mit Schutzwirkung zugunster Dritter

To start with, German literature paid attention to the question of whether the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* entitles investors to claim compensation from a credit rating agency.[590] When invoking this concept, the investor attempts to derive protection from the rating contract concluded between the issuer and the credit rating agency.[591] The concept of *das Vertrag mit Schutzwirkung zugunster Dritter* entitles third parties to compensation based on protection derived from a contract concluded between other parties. So third party Z (the investor) can claim damages from X (a credit rating agency) on the basis of a contract that was concluded between X (a credit rating agency) and Y (an issuer).

The application of this concept requires four conditions to be fulfilled: (1) *Leistungsnähe* or *Vertragsnähe* – the investor must be directly involved in the performance of the contract, or the dangers entailed by a defective performance to the investor must be similar to the dangers to the issuer;[592] (2) *Einbeziehungsinteresse* or *Glaubigernähe* – the issuer must have an interest in the protection of the investor, so the question arises whether the issuer is responsible for the '*Wohl und Wehe*' of the investor;[593] (3) *Erkennbarkeit* of the circle of persons involved – the credit rating agency must be able to calculate and insure against liability risks prior to the conclusion of the contract;[594] and (4) *Schützbedürfigkeit* of the investor – the investor must deserve protection, for instance, because it has no other legal grounds at its disposal to base a claim

agency liability, in the sense that an investor would be able to base a claim against a credit rating agency on the basis that the credit rating agency influenced the contract negotiations or the conclusion of the contract between the issuer and the investor, seems to stretch the boundaries of this provision too far (*cf.* Dumont du Voitel 2018, p. 303, Wagner 2013, p. 483, Wojcik 2013, pp. 2386-2387, Seibold 2016, p. 98, *cf.* Schroeter 2014, p. 921 and *cf.* Berger & Stemper 2010, pp. 2292-2293).

590 *E.g.* Deipenbrock 2018, pp. 572-573, Dumont du Voitel 2018, pp. 303 ff., Wimmer 2017, pp. 363 ff., Seibold 2016, pp. 92-96, Schantz 2015, pp. 220-230, Haar 2014, p. 317, Halfmeier 2014, p. 330, Kontogeorgou 2014, p. 1401, Schroeter 2014, pp. 930 ff., Von Rimon 2014, pp. 201-209, Wagner 2013, pp. 480-482 and Berger & Stemper 2010, pp. 2289-2292.

591 *Cf.* Von Rimon 2014, p. 201, who remarked that the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* hence does not apply in case of unsolicited credit ratings. *Also* Dumont du Voitel 2018, p. 304.

592 MüKoBGB/Gottwald, 8. Aufl. 2019, BGB § 328, no. 184 and Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, para 61.

593 MüKoBGB/Gottwald, 8. Aufl. 2019, BGB § 328, no. 185.

594 MüKoBGB/Gottwald, 8. Aufl. 2019, BGB § 328, no. 190.

for compensation on.[595] German courts will apply these conditions stringently for the sake of avoiding opening the floodgates.[596]

Does the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* entitle an investor to claim compensation from a credit rating agency on the basis of a rating contract concluded between a credit rating agency and an issuer? Thus far, the German courts held that investors could not derive protection from rating contracts and credit scoring contracts and, subsequently, dismissed the claims for compensation.[597] Yet, it must be stressed that these decisions only related to credit scoring and issuer ratings.

In July 2017, the Higher Regional Court of Frankfurt dismissed a claim for damages against a credit scoring agency because the court considered that all four conditions for application of the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* were not fulfilled.[598] First, the claimants failed to satisfy the condition of *Leistungsnähe*. In summary, the Higher Regional Court explained that it cannot be concluded from the contract that the contracting parties meant for the investor to be involved with the performance of the contract and that the dangers entailed by a breach of contract committed by the credit rating agency to investors and the issuer were not comparable.[599] Second, the required *Einbeziehungsinteresse* was lacking. In summary, the Higher Regional Court held that it could not be said that the issuer meant for the investor to be protected and that the issuer was responsible for the '*Wohl und Wehe*' of the investor.[600] Third, the Higher Regional Court held that the potential liability risks were insufficiently *erkennbar* (foreseeable) for

595 MüKoBGB/Gottwald, 8. Aufl. 2019, BGB § 328, no. 191. *E.g. on these conditions in general in the context of credit ratings and credit scoring*, Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 22, Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 22-29 and *e.g.* Dumont du Voitel 2018, pp. 307 ff., Seibold 2016, p. 92, Schantz 2015, pp. 222 ff. and Berger & Stemper 2010, pp. 2289-2292.

596 *See* MüKoBGB/Gottwald, 8. Aufl. 2019, BGB § 328, no. 192.

597 Oberlandesgericht Dresden 6 March 2019, 5 U 1146/18, ECLI:DE:OLGDRES:2019:0306.5U1146.18.00, *BeckRS* 2019, 4673, para 32, Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 23, Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 58-59 and 67 and Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 9.

598 Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, para 62. Subsequently, in September 2017, the Regional Court Darmstadt again rejected a claim for damages against a credit scoring agency for similar reasons, Landgericht Darmstadt 22 September 2017, 13 O 195/14, ECLI:DE:LGDARMS:2017:0922.13O195.14.00, *BeckRS* 2017, 144511, paras. 81-97.

599 Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 23 and 62.

600 Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 25 and 63.

the credit scoring agency. When it entered into the contract, the credit scoring agency was not able to identify the amount of potential claimants and could therefore not calculate the potential liability risks, so that the credit scoring agency could not insure against those risks.[601] Finally, fourth, the Higher Regional Court held that the investor did not deserve protection on the basis of the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* because the investor could also base claims for damages against both the credit scoring agency and the issuer on other, independent legal bases.[602]

A few months later, in December 2017, the Regional Court Düsseldorf dismissed a claim for damages brought against a credit rating agency in relation to an issuer rating.[603] The reasoning bears resemblance to the reasoning of the Higher Regional Court of Frankfurt. First, the Regional Court held that a credit rating agency's breach of contract exposes an issuer to more severe and different dangers compared to the position of an investor. The Regional Court motivated that '*[d]er Anleger wird durch das Unternehmensrating bei seiner Anlageentscheidung möglicherweise beeinflusst. Der Emittent wird durch die Einstufung seiner Bonität, welche durch das Rating erfolgt, hingegen einer Vielzahl von Auswirkungen (z.B. Umsatzeinbußen, Einbußen bei der Kreditwürdigkeit) ausgesetzt*'.[604] Second, it was held that it did not become apparent why the issuer would have an interest in protecting investors, especially because the issuer is not responsible for the '*Wohl und Wehe*' of investors.[605] Third, the potential liability risks were insufficiently *erkennbar* (foreseeable) for the credit rating agency. The general nature of an issuer rating entails that the credit rating agency cannot calculate how many bond issues will be conducted.[606] Finally, fourth, the investor did not deserve protection on the basis of the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* because the investor could also claim compensation on other, independent legal bases. In this respect, it was not relevant whether such claims would be successful.[607]

In different legal proceedings, in April 2018, the Higher Regional Court of Düsseldorf more generally rejected a claim for damages brought against

601 Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 27 and 64-65.

602 Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 29 and 66.

603 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, paras. 9-13.

604 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 10. Seibold applied this requirement in the opposite way, Seibold 2016, p. 93.

605 *See* Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 11.

606 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 12.

607 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 13.

a credit rating agency in respect of an issuer rating: '*Der Senat schließt sich der – soweit ersichtlich – in der Rechtsprechung und der Literatur ganz überwiegend vertretenen Ansicht an, dass dem Anleger im Falle eines fehlerhaften Unternehmensratings gegenüber einer Ratingagentur im Ergebnis grundsätzlich kein Anspruch aus der Rechtsfigur des Vertrags mit Schutzwirkung zu Gunsten Dritter zusteht […].*'[608] The Higher Regional Court hence followed the approach taken in other decisions and academic literature that investors cannot derive legal protection from rating contracts. In its reasoning, the Higher Regional Court attached great significance to the general nature of issuer ratings. The lack of *Leistungsnähe* was explained by means of the credit rating agency's disclaimer with regard to the use of the issuer rating that excluded the issuer rating to be used for the valuation of bonds.[609] The lack of *Einbeziehungsinteresse* was explained by the fact that '*[d]ie Verwendung der Unternehmensratings diente jedenfalls nicht unmittelbar der Erlangung des Kaufpreises für die Anleihe, sondern der Aufnahme bzw. dem Verbleib der Anleihen in das bzw. in dem Handelssegment C der Börse Stuttgart und sollte ausdrücklich nicht die alleinige Grundlage der Kaufentscheidung von Anlegern sein.*'[610] Hence, sufficient *Einbeziehungsinteresse* was lacking because the issuer rating served multiple goals, but not necessarily directly pricing bonds. Also, the Higher Regional Court stated that investors should not use issuer ratings as the sole basis for investment decisions. Furthermore, very importantly, the Higher Regional Court emphasised that the nature of an issuer rating entails that the circle of potential claimants is insufficiently foreseeable to a credit rating agency.[611]

Most recently, in March 2019, the Higher Regional Court of Dresden again rejected a claim for damages in respect of issuer ratings brought by an investor against a credit rating agency.[612] The credit rating agency was not registered under the CRA Regulation. The issuer had used issuer Top-Ratings for the advertisement of its financial products.[613] The Higher Regional Court of Dresden explicitly decided that the investor was not entitled to a claim for compensation based on the concept of *das Vertrag mit Schutzwirkung zugunster*

608 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 23. *Also e.g.* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 140, Seibold 2016, pp. 92-96 and Amort 2013, p. 276.

609 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 25.

610 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 26. Seibold applied this requirement in the opposite way, Seibold 2016, p. 93.

611 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 27.

612 Oberlandesgericht Dresden 6 March 2019, 5 U 1146/18, ECLI:DE:OLGDRES:2019:0306.5U1146.18.00, *BeckRS* 2019, 4673 and Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 3 and 5.

613 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 6.

Dritter.[614] As Top-Ratings are directed to an unlimited circle of persons and a credit rating agency cannot influence to whom the issuer disseminates Top-Ratings, the Higher Regional Court of Dresden concluded that the credit rating agency was not able to calculate its liability risks prior to the conclusion of the contract.[615] It was irrelevant whether the credit rating agency knew or should have known the volume of the issue of financial instruments at the time it assigned the credit rating, because this knowledge did not enable the credit rating agency to calculate its complete liability risks (the issue was for instance not necessarily limited to a certain volume).[616] Moreover, it was irrelevant whether the defendant acted as a credit scoring agency, an unregistered credit rating agency or a registered credit rating agency.[617]

As remarked, these decisions only concerned credit scorings and issuer ratings. This begs the question of whether the type of rating – attached to the issuer or to a specific financial instrument – is of relevance. The Higher Regional Court of Düsseldorf explicitly clarified that its decision did not relate to ratings attached to financial products.[618] The Higher Regional Court of Dresden did not address this point, but emphasised that the credit rating agency could not calculate its liability risks because the issue was not limited to this volume and was not limited to the period of validity of the Top-Ratings.[619] In German literature published prior to most case law described above, authors defended the point of view that the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* can apply to situations involving credit ratings attached to specific financial instruments.[620] Especially where the credit rating is designed for the purpose of one single, fixed issue of bonds, an investor can meet at least the requirement of *Erkennbarkeit* of liability risks. However, there is currently no German case law available confirming the applicability of the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* to cases involving credit ratings attached to specific financial instruments.

614 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 16 and 32.

615 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 23 and 25.

616 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 25.

617 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 16 and 32.

618 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, paras. 26 and 28.

619 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 25.

620 Seibold 2016, p. 95 and Halfmeier 2014, p. 330. Furthermore, Deipenbrock was of the opinion that the facts of the case of 8 February 2018 did not form a typical scenario of credit rating agency liability (because the case concerned an issuer rating and not a financial instrument rating), and that the decision, therefore, might not provide general guidance (*cf.* Deipenbrock 2018, p. 573).

(ii) – § 823 (2) BGB

As a second option available to investors upon which to base a claim for credit rating agency liability, German literature refers to § 823 (2) BGB.[621] On the basis of § 823 (2) BGB, the person who '*gegen ein den Schutz eines anderen bezweckendes Gesetz verstößt*' shall compensate the loss caused.[622] In contrast to § 823 (1) BGB, aggrieved parties can claim the compensation of pure economic loss under § 823 (2) BGB.[623] In the context of credit rating agency liability, a credit rating agency must compensate the loss suffered by the investor if it violated a norm intended to protect the individual investor. Norms that are capable of having direct effect, for instance those included in EU regulations, can fall under the category '*eines anderen bezweckendes Gesetz*'.[624] Prior to the introduction of the third version of the CRA Regulation, individually protective norms were considered to be absent in the field of credit rating agency liability.[625] The Regional Court Dresden decided that the rules of the CRA Regulation '*keine Schutzgesetze i.S.v. § 823 Abs. 2 BGB seien*' in a case of which the factual circumstances took place prior to the introduction of the third version of the CRA Regulation.[626] At that time, the infringements listed in Annex III CRA Regulation indeed served public enforcement and the protection of general public interests only. The introduction of Article 35a CRA Regulation may have brought change in this regard, although it must be determined for each rule whether it specifically aims to protect a specific investor.[627] If so, investors can use Annex III of the CRA Regulation upon

621 Dumont du Voitel 2018, pp. 321 ff., Wimmer 2017, pp. 352-355, Seibold 2016, pp. 90-91, Schantz 2015, pp. 234-238, Schroeter 2014, pp. 897, Von Rimon 2014, pp. 193-196 and Wojcik 2013, p. 2386.

622 § 823 (2) BGB: 'The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019. The phrase '[t]he same duty' refers to the duty to compensate the loss under § 823 (1) BGB.

623 *Cf.* Staudinger/Hager (2009) § 823, para G 4.

624 Palandt/Sprau 2019, BGB § 823, no. 57.

625 *Cf. e.g.* Schroeter 2014, p. 898, Berger & Stemper 2010, p. 2293 and Haar 2010, p. 1285.

626 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872. The Regional Court Dresden held that the case did not fall under the temporary scope of the third version of the CRA Regulation. It did not explain why the rules of the CRA Regulation did not qualify as protective norms under to § 823 (2) BGB (*see also* Deipenbrock 2018, p. 573). This point did not arise on appeal, Oberlandesgericht Dresden 6 March 2019, 5 U 1146/18, ECLI:DE:OLGDRES:2019:0306.5U1146.18.00, *BeckRS* 2019, 4673.

627 Seibold 2016, p. 91, Halfmeier 2014, p. 331, Von Rimon 2014, p. 195, Amort 2013, p. 277 and Wojcik 2013, p. 2386. However, Wimmer and Schantz doubted whether the norms under the CRA Regulation qualify as individual protective norms: Wimmer 2017, p. 361 and Schantz 2015, pp. 235-236. *Also* Dutta 2013, p. 1735. This dissertation assumes that the obligations under Annex III CRA Regulation can have direct horizontal effect through Article 35a CRA Regulation. *Cf. also in this regard* Maier *EWiR* 2018, p. 274. Dumont du Voitel 2018,

which to base a claim for non-contractual liability in accordance with § 823 (2) BGB.[628]

Heuser denied the possibility for investors to base claims on § 823 (2) BGB for another reason as well. He argued that '*Art. 35 a Abs. 5 Rating-VO erlaubt zwar weitere mitgliedstaatliche Haftungsansprüche, aber gilt dies nach Erwägungsgrund 35 nicht für solche zivilrechtliche Haftungsansprüche, die sich auf Verstöße gegen die Rating-VO stützen* […]'.[629] Heuser hence defended the point of view that Article 35a (5) CRA Regulation does not allow further claims under the applicable national law for infringements listed in Annex III CRA Regulation. This point was already addressed in section 2.5.4.2 (c), where it was concluded that Article 35a (5) CRA Regulation does allow stricter national rules on civil liability for infringements of Annex III CRA Regulation. Therefore, Heuser's conclusion in respect of § 823 (2) BGB is not followed here.[630]

(iii) – § 826 BGB

As a third option for investors upon which to base a claim for non-contractual liability, German literature refers to § 826 BGB.[631] § 826 BGB offers protection against loss caused by persons who intentionally acted contrary to public policy. The provision states that '*[w]er in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet.*'[632] The threshold for liability is high: a credit rating agency must have acted contrary to public policy and must have done so intentionally.

The requirement of intent is applied rather broadly. The German Federal Supreme Court held that the threshold of § 826 BGB can also be met when the wrongdoer acted carelessly (*gewissenlos*) or with gross negligence. Moreover, intentional conduct in the context of § 826 BGB can also occur if the wrongdoer has acted in such a frivolous manner that it must be assumed that the wrong-

p. 353 argued that the norms under the CRA Regulation qualify as individual protective norms and can be used under § 823 (2) BGB.

628 *As argued by* Dumont du Voitel 2018, p. 353.

629 Heuser 2018, p. 84. *Also* Heuser 2019, pp. 85-86 and Dumont du Voitel 2018, pp. 320-321. *For the same approach* Berger & Ryborz 2014, p. 2247. In contrast, in the context of § 823 (2) BGB, Schantz concluded that Art. 35a (5) CRA Regulation leaves the possibility of a claim under the applicable national law to the Member States (Schantz 2015, p. 235).

630 *For the same reasoning in respect of § 823 (2) BGB*, Dumont du Voitel 2018, p. 338-341.

631 *E.g.* Seibold 2016, pp. 91-92, Schantz 2015, pp. 239 ff., Haar 2014, p. 318, Kontogeorgou 2014, p. 1402, Schroeter 2014, p. 892, fn. 62 and p. 897, Wagner 2013, pp. 477-478 and Wojcik 2013, p. 2386.

632 § 826 BGB: 'A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019.

doer took possible harmful consequences for the victim for granted.[633] Notwithstanding the rather broad interpretation of the requirement of intent, investors can successfully invoke § 826 BGB only in exceptional situations. To have acted contrary to public policy, it is insufficient for the wrongdoer to have breached a general duty of care or a contractual obligation.[634] In the context of credit rating agency liability, it is insufficient if a credit rating agency did not exercise all reasonable care and skill in the assignment of the credit rating. A situation in which a credit rating agency acted contrary to public policy, for instance because it has issued incorrect credit ratings with the purpose of causing loss to investors, will rarely occur.[635]

A decision of the Regional Court Düsseldorf of December 2017 supports this observation, and adds a new perspective on the relevance of the difference between credit ratings attached to issuers and credit ratings attached to specific financial instruments, which limits the applicability of § 826 BGB in this context even further. The Regional Court dismissed an investor's claim for damages under § 826 BGB as the credit rating agency was not considered to have acted contrary to public policy.[636] The case involved an allegedly incorrect BBB credit rating attached to the issuer.[637] The Regional Court first analysed that conduct is not deemed as contrary to public policy for the only reason that it caused loss to others. Moreover, the conduct must be characterised by a special degree of blameworthiness, the existence of which can be derived from the aim of the conduct, the means employed, the disposition of the person or the consequences of the conduct. The grossly negligent dissemination of incorrect information or opinions qualifies as conduct contrary to public policy if the person who disseminated the information or opinions was aware of the potential loss that the dissemination could cause to other persons and adopted a thoughtless or reckless approach in respect of the significance of the information or opinions for decisions made by those persons. This will especially be so if the person who disseminated the information or opinions claims to be competent in this field but did not meet the standards of expertise in this

633 *Cf.* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 30. Bundesgerichtshof 3 December 2013, XI ZR 295/12, *NJW* 2014, pp. 1098-1101, para 34. *In particular on credit rating agency liability and § 826 BGB* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 140 and Wagner 2013, p. 477.

634 Bundesgerichtshof 3 December 2013, XI ZR 295/12, *NJW* 2014, pp. 1098-1101, para 23 and Bundesgerichtshof 4 June 2013, VI ZR 288/12, *NJW-RR* 2013, pp. 1448-1451, para 14.

635 *Cf.* Seibold 2016, p. 91. *Also, briefly,* Van Rimon 2014, p. 212. *More neutrally,* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 140, Halfmeier 2014, p. 330 and Amort 2013, p. 274. As an example of a situation in which a claim for damages can be based on § 826 BGB, Seibold referred to the situation in which a credit rating agency and an issuer cooperated to mislead investors by an inflated credit rating, Seibold 2016, p. 91.

636 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, paras. 18-19.

637 Amtsgericht Neuss 20 June 2017, 87 C 175/17, ECLI:DE:AGNE:2017:0620.87C175.17.00, *BeckRS* 2017, 144619, para 3.

regard.[638] The Regional Court subsequently concluded that these requirements were not met in that case:

> *'Diese Voraussetzungen sind nicht gegeben. Zwar muss der Beklagten bewusst sein, dass auch ein Unternehmensrating bei der Anlageentscheidung von Anlegern eine Rolle spielen wird. Allerdings handelt es sich bei einem Unternehmensrating stets nur um eine Komponente, welche ein Anleger bei seiner Entscheidung zugrunde zu legen hat. Tatsächlich wird das Unternehmensrating anders als das auf ein Finanzinstrument bezogenes Rating auch nicht etwa für das' Finanzinstrument erstellt, sondern dient in der Regel dazu, dass sich das bewertete Unternehmen zu besseren Konditionen Fremdkapital verschaffen kann. Die Bedeutung für die Entscheidung der Anleger ist daher nicht so hoch einzustufen, dass von einem rücksichtsbzw. gewissenlosen Verhalten bei fehlerhafter Erstellung des Ratings auszugehen ist.'*[639]

The reasoning of the Regional Court builds upon the assumption that an issuer rating is just one of the relevant factors underlying an investment decision. The Regional Court distinguishes issuer ratings from ratings attached to specific financial instruments in the sense that issuer ratings are assumed to have as a main goal to help the issuer attract capital against more favourable conditions. Due to their limited significance for investment decisions, the Regional Court concludes that it cannot be said that having attached an incorrect issuer rating qualifies as a thoughtless or reckless approach to the significance of the issuer rating for investment decisions made.

It is surprising that the decision of the Regional Court is rooted in the assumption that an issuer rating is just one of the relevant factors underlying an investment decision. Should the Regional Court not have focused on the blameworthiness of the credit rating agency's conduct instead? This decision leaves the impression that the blameworthiness of the credit rating agency's conduct might not be decisive for the qualification of conduct contrary to public policy. If other German courts adopt this line of reasoning, it does not

638 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 18: '*Sittenwidrig ist eine Handlung, die nach Inhalt oder Gesamtcharakter, der durch zusammenfassende Würdigung von Inhalt, Bewegungsgrund und Zweck zu ermitteln ist, die gegen das Anstandsgefühl aller billig und gerecht Denkender verstößt, d.h. mit den grundlegenden Wertungen der Rechtsund Sittenordnung nicht vereinbar ist […]. Dass das Verhalten einen Schaden hervorruft, genügt nicht. Hinzutreten muss eine nach den Maßstäben der allgemeinen Moral und des als „anständig" geltenden besondere Verwerflichkeit des Verhaltens, die sich aus dem verfolgten Ziel, den eingesetzten Mitteln, der zutage tretenden Gesinnung oder den eingetretenen Folgen ergeben kann […]. Grob fahrlässig unrichtige Auskünfte oder leichtfertige Gutachten u.ä. sind sittenwidrig, wenn sich der Auskunftgeber der möglichen Schädigung derjenigen, die mit seiner Äußerung zwangsläufig in Berührung kommen, bewusst ist und sein Verhalten angesichts seiner Bedeutung für die Entscheidung dieser Person als rücksichtsbzw. gewissenlos erscheint, insbesondere, wenn er Expertenkompetenz für sich in Anspruch nimmt, ohne den insoweit maßgeblichen Maßstäben auch nur annähernd zu genügen […].'*

639 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 19.

seem possible for investors who based their investment decision on an issuer rating to claim damages under § 826 BGB.

In March 2019, the Higher Regional Court of Dresden did focus on the blameworthiness of the conduct of the credit rating agency.[640] For conduct to qualify as contrary to public policy under § 826 BGB, it must qualify as *gewissenlos*. This could be the case if a credit rating agency accepted that its credit ratings would be used by the issuer to mislead investors.[641] It is, however, not sufficient if a credit rating agency would have assigned a different credit rating if it had assessed the issuer more critically.[642] Hence, unless there are special circumstances indicating that the credit rating agency acted in a *gewissenlos* manner, it does not seem possible for investors who based their investment decision on an issuer rating to claim damages under § 826 BGB.

5.6.3 Article 35a (1)

5.6.3.1 'Intentionally' or 'with gross negligence'

The German version of Article 35a CRA Regulation translates the required degree of culpability as '*vorsätzlich oder grob fahrlässig*'. The term '*vorsätzlich*' (intentionally) occurs regularly in the BGB, but has not been defined in the BGB itself.[643] German case law has shone light on the elements of intentional conduct:

> '*Vorsatz enthält ein „Wissens-" und ein „Wollenselement". Der Handelnde muss die Umstände, auf die sich der Vorsatz beziehen muss, […] gekannt bzw. vorausgesehen und in seinen Willen aufgenommen haben […]. Die Annahme der – vorliegend allein in Betracht kommenden – Form des bedingten Vorsatzes setzt voraus, dass der Handelnde die relevanten Umstände jedenfalls für möglich gehalten und billigend in Kauf genommen hat […].*'[644]

For conduct to qualify as intentional under German law, the wrongdoer must hence know of and intend the consequences of its conduct to occur, or must

640 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872.

641 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 36 and 39.

642 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 40.

643 *E.g.* § 276, § 823 and § 826 (1) BGB. Wimmer 2017, p. 293. *Cf. also* Van Dam 2013, no. 802-2.

644 Bundesgerichtshof 20 December 2011, VI ZR 309/10, *NJW-RR* 2012, pp. 404-405, para 10. *As derived from* Palandt/Grüneberg 2019, BGB § 276, no. 10. *Also* Bundesgerichtshof 3 December 2013, XI ZR 295/12, *NJW* 2014, 1098, para 26.

at least accept or take for granted that its conduct may have harmful consequences.[645]

The term *grob fahrlässig* also occurs regularly in the BGB, but has not been defined either.[646] The difference between gross negligence and 'normal' negligence is a matter of degree. Whereas a person acts negligently when it fails to take reasonable care,[647] gross negligence presumes a more serious and severe breach of duty. Frey described the breach required for normal negligence as '*[d]as kann vorkommen*' and the breach required for gross negligence as '*[d]as darf nicht vorkommen*'.[648] In 1953, the German Federal Supreme Court held in this respect:

> '*Was grobe Fahrlässigkeit ist, sagt das Gesetz nicht. Die Rechtsprechung versteht darunter im allgemeinen ein Handeln, bei dem die erforderliche Sorgfalt nach den gesamten Umständen in ungewöhnlich großen Maße verletzt worden ist und bei dem dasjenige unbeachtet geblieben ist, was im gegebenen Falle jedem hätte einleuchten müssen […].*'[649]

Gross negligence hence requires a person to have breached the required standard of care in an unusually severe way, by not having paid attention to matters that should not have been ignored in that concrete situation. A person who acts with gross negligence must generally do so from an objective and a subjective perspective. This means that the breach of duty must objectively be unusually severe, while the person must be to blame from a subjective perspective.[650] Subjective culpability can, for instance, exist when the tortfeasor was conscious of the risks involved. However, gross negligence cannot be equated with conscious negligence.[651] Consciousness of the possible harmful consequences, therefore, does not seem an essential part of gross negligence

645 *Cf.* Palandt/Grüneberg 2019, BGB § 276, no. 10, Van Dam 2013, no. 802-2. *In the context of credit rating agency liability*, Heuser 2019, p. 138.

646 *E.g.* § 31a, 199 (1) (2), 300 (1), 309 (7) (b) and 521 BGB. Wimmer 2017, p. 294. *Recently* Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, para 401.

647 As defined under § 276 (2) BGB. § 276 BGB is taken as a starting point by Heuser 2019, p. 138 and Wimmer 2017, p. 294.

648 Frey *AuR* 1953, 7 (8), *as derived from* MüKoBGB/Grundmann, 8. Aufl. 2019, BGB § 276, no. 94. *This quotation was also used by* Heuser 2019, p. 138.

649 Bundesgerichtshof 11 May 1953, *Entscheidungen des Bundesgerichtshofes*, Band 10, p. 16. *Also* Bundesgerichtshof 8 July 1992, IV ZR 223/91, *NJW* 1992, pp. 2418-2419, para 1: '*[E]inen schweren Verstoß gegen die im konkreten Fall gebotene Sorgfalt dar, der über ein normales Maß deutlich hinausgehe.*' *Recently* Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, para 401. *Also* MüKoBGB/Grundmann, 8. Aufl. 2019, BGB § 276, no. 94, Palandt/Grüneberg 2015, BGB § 276, no. 14, Staudinger/Schwarze (2014) § 276, no. 93 and Röhl 1974, p. 521.

650 Staudinger/Schwarze (2014) § 276, no. 93-94. *In the context of credit rating agency liability* Heuser 2019, p. 138. *Recently* Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, para 401.

651 Staudinger/Schwarze (2014) § 276, no. 104 and Röhl 1974, p. 526.

under German law. Moreover, the requirement of subjective culpability can be relaxed when the wrongdoer is a legal person.[652]

In the context of credit rating agency liability, hence, conduct can qualify as 'intentional' if a credit rating agency knew its conduct would or could cause an infringement and intended to commit an infringement or at least accepted that its conduct could result in an infringement.[653] Furthermore, German legal scholars explained the meaning of gross negligence in such way that a credit rating agency – by having committed one of the infringements – must have breached the required standard of care in an unusually severe way, thereby not having paid attention to matters that it should not have ignored. Although consciousness of possible harmful consequences does not seem required, courts must assess the subjective blameworthiness of the wrongdoer. German scholars point out that whether conduct qualifies as gross negligent, is a question that can only be answered in the concrete circumstances of the case.[654]

Finally, due to the increased threshold for liability under Article 35a CRA Regulation, the question arises to what extent the threshold of gross negligence under Article 35a CRA Regulation is similar to the yardstick under § 826 BGB. The German Federal Supreme Court indeed held that the threshold of § 826 BGB can also be met when the wrongdoer acted carelessly (*gewissenlos*) or with gross negligence.[655] Moreover, Wagner stated that Article 35a CRA Regulation might practically not go further than § 826 BGB.[656] However, § 826 BGB requires the wrongdoer to have acted intentionally *and* contrary to public policy. Considering the decision of the Higher Regional Court of Dresden, § 826 BGB seems to introduce a higher threshold than Article 35a CRA Regulation. Indeed, for conduct to qualify as contrary to public policy under § 826 BGB, it is insufficient for the wrongdoer to have breached a general duty of care or a contractual obligations.[657] Instead, the conduct must qualify as *gewissenlos*, which could be the case if a credit rating agency accepted that its credit ratings would be used by the issuer to mislead investors or if a credit

652 MüKoBGB/Grundmann, 8. Aufl. 2019, BGB § 276, no. 95 and Staudinger/Schwarze (2014) § 276, no. 96, both referring to Röhl 1974, p. 526. *In the context of credit rating agency liability* Heuser 2019, pp. 138-139.

653 *In the context of credit rating agencies* Wimmer 2017, p. 293 and Gietzelt & Ungerer 2013, p. 341.

654 *E.g.* Heuser 2019, p. 139, Wimmer 2017, pp. 294-295 and Gietzelt & Ungerer 2013, p. 341. Dutta 2013, p. 1734 refers the explanation of gross negligence back to the case law in respect of § 309 (7) (b) BGB.

655 *Cf.* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 30. Bundesgerichtshof 3 December 2013, XI ZR 295/12, *NJW* 2014, pp. 1098-1101, para 34. *In particular on credit rating agency liability and § 826 BGB* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 140 and Wagner 2013, p. 477.

656 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 142 (referring to Haar 2013, p. 2493).

657 Bundesgerichtshof 3 December 2013, XI ZR 295/12, *NJW* 2014, pp. 1098-1101, para 23.

rating agency issued credit ratings to damage the issuer.[658] This example goes further than the requirement of a credit rating agency having committed an infringement with gross negligence under Article 35a CRA Regulation.

5.6.3.2 'Impact' and 'caused to', including claimant-specific requirements

(a) General rules on causation

As stated in section 5.3.1.3, the terms 'impact', 'caused to' and the claimant-specific requirements are related to causation, and are therefore discussed together. German law divides the assessment of causation into two elements: *haftungsbegründende Kausalität* and *haftungsausfüllende Kausalität*. *Haftungsbegründende Kausalität* concerns the link between the defendant's conduct and the infringement of the claimant's rights, while *haftungsausfüllende Kausalität* concerns the link between the infringement of the claimant's rights and the claimant's loss. *Haftungsausfüllende Kausalität* in fact forms part of the German law of damages. Depending on the circumstances of the case, it can be difficult to draw the line between these two elements of causation. The difference, however, is important in the context of the required standard of proof.[659]

The elaboration of the two elements of causation depends on the legal context in which they apply. In the context of § 823 (1) BGB, *haftungsbegründende Kausalität* concerns the causal relationship between the defendant's breach of duty and the infringement of the claimant's protected legal right(s), whereas *haftungsausfüllende Kausalität* concerns the causal relationship between the infringement of the claimant's protected legal right(s) and the loss suffered by the claimant.[660] In the context of § 823 (2) BGB, *haftungsbegründende Kausalität* concerns the causal relationship between the defendant's conduct and the breach of a legal provision that intends to protect the claimant, whereas *haftungsausfüllende Kausalität* concerns the causal relationship between the breach of such a legal provision and the loss suffered by the claimant.[661] As a concrete example, in the context of prospectus liability, *haftungsbegründende Kausalität* concerns the causal relationship between the incorrect or incomplete information (resulting from the defendant's conduct) and the investment decision (the infringement of the claimant's right to decide on the investment), whereas *haftungsausfüllende Kausalität* concerns the causal relationship between

658 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 36 and 39.

659 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 67, Van Dam 2013, no. 1103-1, Van Gerven, Lever & Larouche 2000, p. 397 and Magnus 2000, pp. 63-64.

660 *E.g.* Infantino & Zervogianni 2017, p. 104 and Van Dam 2013, no. 1103-1. Van Gerven, Lever & Larouche 2000, pp. 396-397 provided a slightly different explanation of *haftungsausfüllende Kausalität* and emphasised the causal relationship between the conduct of the defendant and the loss suffered by the claimant.

661 *Cf.* Kötz & Wagner 2013, no. 130.

the incorrect or incomplete information (resulting from the defendant's conduct) and the loss suffered by the claimant.[662]

The claimant bears the burden of proof as regards the requirement of causation.[663] The difference between *haftungsbegründende Kausalität* and *haftungsausfüllende Kausalität* is important for it determines the required standard of proof under German law.[664] § 286 ZPO sets the required standard of proof to determine the truth of factual claims and *haftungsbegründende Kausalität*, while § 287 ZPO sets the required standard of proof to determine *haftungsausfüllende Kausalität* – and the extent of the loss suffered.[665]

Under the general rule of § 286 ZPO, '*[d]as Gericht hat unter Berücksichtigung des gesamten Inhalts der Verhandlungen und des Ergebnisses einer etwaigen Beweisaufnahme nach freier Überzeugung zu entscheiden, ob eine tatsächliche Behauptung für wahr oder für nicht wahr zu erachten sei*', German courts are hence free to assess the evidence, but the standard of proof is demanding: courts must 'be convinced' that a claim is true or not.[666] The German Federal Supreme Court explained this yardstick in the *Anastasia* case in 1970, which was a case on the burden and standard of proof relating to the statement of the claimant that she was the grand Duchess Anastasia Romanov. The Federal Supreme Court held that courts could not be convinced on the basis of a *bloßen Wahrscheinlichkeit* (sheer probability) only, but that '*[e]ine von allen Zweifeln freie Überzeugung*' (complete persuasion) was not required either. In factually doubtful situations, the courts can suffice with '*einem für das praktische Leben brauchbaren Grad von Gewißheit […], der den Zweifeln Schweigen gebietet, ohne sie völlig auszuschließen*'.[667] Furthermore, the courts can suffice with '*einer an Sicherheit grenzenden Wahrscheinlichkeit*' only, if the judges are convinced of the truth.[668]

In contrast, under § 287 ZPO, the claimant must meet a less demanding standard of proof in relation to the *haftungsausfüllende Kausalität* and the extent

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662 Assmann in Assmann/Schütze, HdB KapitalanlageR 2015, § 5 no. 90-91 and *cf.* Vandendriessche 2015, no. 166.

663 As a rule, the burden of proof lies with the party that invokes a fact to support its claim or defence. Bundesgerichtshof 17 February 1970, *Entscheidungen des Bundesgerichtshofes*, Band 53 (*Anastasia*), p. 250: '*Die allgemeine Beweislastregel des deutschen Rechts, daß jede Partei die Beweislast für alle Voraussetzungen einer von ihr in Anspruch genommenen Norm trägt […].*' *As derived from* Murray & Stürner 2004, p. 267.

664 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 67, Van Dam 2013, no. 1103-1, Van Gerven, Lever & Larouche 2000, p. 397 and Magnus 2000, pp. 63-64.

665 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 67 and no. 85. *Also* GF-ZPO/Siebert 2019, § 287, no. 4-5 and Infantino & Zervogianni 2017, p. 104. Some caution must be exercised, as the 'division of labour between § 286 ZPO and § 287 ZPO' is debated, Steel 2015, p. 56.

666 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 67, Steel 2015, p. 53 and Murray & Stürner 2004, p. 310.

667 Bundesgerichtshof 17 February 1970, *Entscheidungen des Bundesgerichtshofes*, Band 53 (*Anastasia*), p. 256.

668 *Cf.* Bundesgerichtshof 17 February 1970, *Entscheidungen des Bundesgerichtshofes*, Band 53 (*Anastasia*), p. 256.

of the loss suffered: '*[i]st unter den Parteien streitig, ob ein Schaden entstanden sei und wie hoch sich der Schaden oder ein zu ersetzendes Interesse belaufe, so entscheidet hierüber das Gericht unter Würdigung aller Umstände nach freier Überzeugung*.' § 287 ZPO provides courts with more freedom to decide on the evidence:[669] the required standard of proof does not involve '*an Sicherheit grenzenden Wahrscheinlichkeit*', but rather '*überwiegende Wahrscheinlichkeit*'.[670] This relaxation of the standard of proof, however, does not discharge claimants from the obligation to provide sufficient *Anhaltspunkte* (reference points). Otherwise, without such *Anhaltspunkte* the assessment made by the Court would remain '*in der Luft*' and would qualify as '*willkürlich*' (arbitrary).[671]

In the context of credit rating agency liability, the question arises as to how Article 35a (1) CRA Regulation fits within the framework of *haftungsbegründende* and *haftungsausfüllende Kausalität*. In relation to claims brought by issuers, one can qualify the causal relationship between the infringement and the affected credit rating – the 'impact' – as *haftungsbegründende Kausalität* and the causal relationship between the infringement which resulted in the affected credit rating and the loss suffered by issuers as *haftungsausfüllende Kausalität*. However, in relation to claims brought by investors, it is more difficult to determine where the line between *haftungsbegründende Kausalität* and *haftungsausfüllende Kausalität* must be drawn. German academic literature generally qualifies the causal relationship between the infringement and the affected credit rating – the 'impact' – as *haftungsbegründende Kausalität* and the causal relationship between the infringement which resulted in the affected credit rating and the loss suffered by investors as *haftungsausfüllende Kausalität*.[672] These general descriptions of *haftungsbegründende Kausalität* and *haftungsausfüllende Kausalität* however do not specifically address the requirement of reasonable reliance, thereby suggesting that reliance falls within the scope of *haftungsausfüllende Kausalität*. Only Schroeter explicitly divides the assessment of *haftungsbegründende Kausalität* in the causal relationship between the infringement and the affected credit rating and reasonable reliance by the credit rating agency, so that reliance then needs to be proven under the general rule of § 286 ZPO.[673]

669 Murray & Stürner 2004, p. 312. *Cf. also* Baumbach/Lauterbach/Albers/Hartmann 2015, § 287, no. 2.

670 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 85. *Also* GF-ZPO/Siebert 2019, § 287, no. 11. Bundesgerichtshof 5 November 1992, IX ZR 12/92, *NJW* 1993, p. 734: '*jedenfalls eine deutlich überwiegende, auf gesicherter Grundlage beruhende Wahrscheinlichkeit reicht für die richterliche Überzeugungsbildung aus* […].' *See also e.g.* Bundesgerichtshof 21 July 2005, IX ZR 49/02, *NJW* 2005, p. 3277.

671 Oberlandesgericht München 18 July 2002, 19 U 5630/01, ECLI:DE:OLGMUEN:2002:0718.19U5630.01.0A, *NZG* 2002, p. 1111, *as derived from* Von Rimon 2014, p. 191. *Also in this regard* GF-ZPO/Siebert 2019, § 287, no. 11, Musielak/Voit/Foerste, 15. Aufl. 2018, ZPO § 287, no. 7 and Baumbach/Lauterbach/Albers/Hartmann 2015, § 287, no. 2.

672 *E.g.* Wimmer 2017, pp. 153 and 210, Seibold 2016, pp. 128-129 and Gietzelt & Ungerer 2013, p. 342.

673 With regard to *haftungsbegründende Kausalität* only, *see* Schroeter 2014, pp. 948-949.

It is possible to defend both approaches, depending on whether one finds the wording of Article 35a (1) CRA Regulation or the German system of private law decisive.[674] In any case, I would conclude that the element of 'reasonable reliance' constitutes a factual claim that must be proven by the standard of proof required under § 286 ZPO, regardless of whether the causal link between the credit rating and the investment decision qualifies as *haftungsbegründende Kausalität* and *haftungsausfüllende Kausalität*.[675]

Haftungsbegründende and *haftungsausfüllende Kausalität* spin out the different causal links which must be proven. In addition, there are tests to assess the existence of a causal relationship. The *condicio sine qua non* test determines the existence of causation in fact, whereas the *Adäquanztheorie* (the theory of causal adequacy) and the *Schutzzwecklehre* (the theory of the scope of the rule) determine the existence of causation in law. There seems to be no unity in German doctrine as regards the question of whether all of these tests apply both to the assessment of *haftungsbegründende* and *haftungsausfüllende Kausalität*. It has been argued that *haftungsbegründende Kausalität* is mainly determined by the *condicio sine qua non* test, whereas *haftungsausfüllende Kausalität* is determined by all three of them.[676]

Causation in fact is determined by application of the *condicio sine qua non* test. This test is not satisfied if the loss would also have occurred in the absence of the defendant's breach of contract or duty.[677] The application of the *condicio sine qua non* test is problematic if two independent causes led to the loss

674 One the one hand, liability under Art. 35a (1) CRA Regulation is essentially based on an infringement listed in Annex III which had an impact on a credit rating, so one could argue that the *haftungsbegründende Kausalität* only concerns this causal link. On the other hand, the essence of *haftungsbegründende Kausalität* can be said to concern the link between the defendant's conduct and the infringement of the claimant's rights, so that an investor should demonstrate its right to take a proper investment decision has been breached by the infringement and the affected credit rating. The first approach adopted by German authors as Seibold, Gietzelt & Ungerer and Wimmer can be explained by reference to the wording of Art. 35a CRA Regulation, but leads to a remarkable difference with the approach to prospectus liability under German law. In the area of prospectus liability, *haftungsbegründende Kausalität* concerns the causal relationship between the incorrect information and the investment decision of an investor, whereas *haftungsausfüllende Kausalität* concerns the causal relationship between the incorrect information and the loss suffered by the claimant. Consequently, reliance upon the prospectus falls within the scope of *haftungsbegründende Kausalität*, while reliance on an affected credit rating by investors falls within the scope of *haftungsausfüllende Kausalität*. Although the structure of Art. 35a (1) CRA Regulation can be used to explain this difference, it is nevertheless remarkable that the requirement of reliance falls under different standards of proof in factually comparable situations. At the same time, when one considers 'reasonable reliance' to qualify as a factual claim anyway, both approaches lead to the conclusion that the high standard of proof under § 286 ZPO applies.

675 *Cf.* Von Rimon 2014, p. 155.

676 Zimmermann & Kleinschmidt 2007, p. 594. *See also* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 70 and Van Gerven, Lever & Larouche 2000, p. 397.

677 *Cf.* Palandt/Grüneberg 2019, Vorb v § 249, no. 25.

('multiple causation'), as the question of whether the loss suffered by the claimant would also have occurred without one of the two causes is then answered twice in the affirmative. As a result, the *condicio sine qua non* test is not fulfilled in respect of both causes which would lead to the incorrect conclusion that none of the causes stands in a causal relationship with the loss. § 840 (1) BGB remedies this situation by stating that the parties responsible for these causes will be jointly and severally liable.[678]

Causation in law involves an assessment of whether the loss can be attributed to the defendant.[679] The *Adäquanztheorie* (the theory of causal adequacy) and the *Schutzzwecklehre* (the theory of the scope of the rule) were developed to restrict responsibility for causes that did satisfy the *condicio sine qua non* test.[680] The *Adäquanztheorie* entails that the defendant is responsible only for loss that could reasonably be expected to flow from the defendant's conduct.[681] The German Federal Supreme Court described the theory as follows:

> '*Eine Begebenheit ist adäquate Bedingung eines Erfolges, wenn sie die objektive Möglichkeit eines Erfolges von der Art des eingetretenen generell in nicht unerheblicher Weise erhöht hat. Bei der dahin zielenden Würdigung sind lediglich zu berücksichtigen a) alle zur Zeit des Eintritts der Begebenheit dem optimalen Beobachter erkennbaren Umstände, b) die dem Urheber der Bedingung noch darüber hinaus bekannten Umstände.*'[682]

In summary, the German Federal Supreme Court held that an event can be considered an adequate cause of a certain result if the event generally increased the objective possibility of that result while that result did not occur in an inconsiderable manner. For this purpose, a) all circumstances recognisable to the optimal observer at the time of the occurrence of the event and, b) the further circumstances known to the author of the cause can be taken into consideration. In addition, the *Schutzzwecklehre* entails that the defendant is liable only for loss that falls within the protective scope of the violated rule or duty.[683]

In the context of credit rating agency liability, the burden of proof regarding causation between the infringement and the loss suffered lies with investors

678 *In the context of credit rating agency liability*, Jansen, Kästle-Lamparter & Rademacher 2017, p. 251.

679 Bundesgerichtshof 23 October 1951, *Entscheidungen des Bundesgerichtshofes*, Band 3, p. 265: '*Es ist seit langem in der Rechtslehre und Rechtsprechung unstreitig, daß der Kreis solcher natürlich logischen Ursachen gemeinhin ein viel zu großer ist, um jede ihrer Folgen dem Verursachenden verantwortlich zur Last legen zu können.*'

680 *E.g. cf.* Infantino & Zervogianni 2017, pp. 103-104 and Van Dam 2013, no. 1103-1 and 1103-2.

681 Van Dam 2013, no. 1103-1.

682 Bundesgerichtshof 23 October 1951, *Entscheidungen des Bundesgerichtshofes*, Band 3, pp. 266-267. *As derived from,* Van Dam 2013, no. 1103-1. *Also* Bundesgerichtshof 30 January 1990, XI ZR 63/89, *NJW* 1990, p. 2058.

683 Van Dam 2013, no. 1103-2.

and issuers. Issuers must prove that had the infringement not occurred: (1) the credit rating would have been different (the requirement of 'impact'); and (2) the issuer would not have suffered additional funding costs and/or reputational loss. Furthermore, investors must prove that had the infringement not occurred: (1) the credit rating would have been different (the requirement of 'impact'); and (2) the investor would not have suffered pure economic loss. In order to do so, in combination with the second sentence of Article 35a (1) CRA Regulation, investors must prove that they relied on the credit rating when making their investment decision.[684]

In respect of both claims, the first causal link qualifies as *haftungsbegründende Kausalität*. The standard of proof required by § 286 ZPO does not apply, due to the rules stated by Article 35a (2) CRA Regulation in this regard. The second link qualifies as *haftungsausfüllende Kausalität*, although it was argued already that the requirement of reasonable reliance falls within the scope of *haftungsbegründende Kausalität*. The lower standard of proof under § 287 ZPO applies to the causal link and the assessment of the loss. However, § 286 ZPO applies to factual claims underlying the *haftungsausfüllende Kausalität*, such as whether the investor has reasonably relied upon the credit rating or not. Finally, if the issuer or investor succeeds in proving the *condicio sine qua non* relationship, a German court can limit the liability of the credit rating agency by application of the *Adäquanztheorie* and the *Schutzzwecklehre*.

(b) Opportunities to deal with causal uncertainty

Issuers and, in particular, investors can experience problems in gathering evidence proving the existence of a *condicio sine qua non* relationship. In 2016, for instance, the Regional Court Düsseldorf rejected a claim for damages because the investor could not prove the *condicio sine qua non* relationship between the incorrect credit rating and its investment decision. The Regional Court concluded that it was possible that the investor based its investment decision on the credit rating, but that it was also possible that the investor based its investment decision on other factors. The Regional Court acknowledged that proving an internal fact (*innere Tatsache*) may often be difficult, but did not attach consequences to this statement, except for the conclusion that proof based on indices will be of special importance in this type of cases.[685]

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684 Jansen, Kästle-Lamparter & Rademacher 2017, p. 251. *For this approach, see* Landgericht Düsseldorf 29 August 2016, 21 O 57/15, ECLI:DE:LGD:2016:0829.21O57.15.00, *BeckRS* 2016, 17265.

685 Landgericht Düsseldorf 29 August 2016, 21 O 57/15, ECLI:DE:LGD:2016:0829.21O57.15.00, *BeckRS* 2016, 17265: '*Die Kammer verkennt hierbei nicht, dass die Transaktionskausalität eine sog. innere Tatsache und der Beweis einer solchen oftmals mit erheblichen Schwierigkeiten verbunden ist. Daher kommen Indizien bei der Beweisführung eine besondere Bedeutung zu.*' In this case, the facts pleaded against the investor, because the investor invested for the second time in the same issuer after the credit rating agency had withdrawn the credit rating and the

German scholars raised the question of whether German courts will facilitate issuers and investors in proving causation between the infringement and the eventual loss.[686] German law can facilitate claimants in general through procedural law by (statutory) reversals of the burden of proof or by presumptions of causation on the basis of *prima facie* evidence (in German *prima facie Beweis* or *Anscheinsbeweis*).[687] In the context of prospectus liability and liability of incorrect or incomplete investment advice, specific facilitations to the benefit of investors were introduced. A study of German academic literature however displays scepticism by German authors with regard to the application of facilitations in the context of credit rating agency liability,[688] although Schantz argued in favour of the application of these facilitations in the context of Article 35a CRA Regulation.[689] This section briefly describes the possible facilitations and explains the reasons why German authors consider it unlikely that German courts will apply them. The first facilitation concerns claims brought by both issuers and investors, while the other possible facilitations discussed are relevant in relation to claims brought by investors only. This section does not pay attention to the doctrine of loss of chance, as German courts do not apply this doctrine as a matter of principle.[690] Lost chances do not qualify as protected interests for which compensation can be claimed under German law.

(i) – Anscheinsbeweis (prima facie evidence)

German courts can presume the truth of certain facts on the basis of *Anscheinsbeweis* (*prima facie* evidence) provided by the claimant. The application of this concept is relevant in relation to claims for credit rating agency liability brought by issuers and investors. In order for a presumption to be based on *Anscheinsbeweis*, it is required that '*im Einzelfall ein typischer Geschehensablauf vorliegt, der nach der Lebenserfahrung auf eine bestimmte Ursache hinweist und so*

issuer had filed for a *Schutzschirmverfahrens* (in preparation of insolvency proceedings). The Regional Court also concluded that § 448 ZPO, under which a court may question one of the parties if the court is not satisfied that a certain fact is true or not true on the basis of the evidence provided, does not apply when a party provided insufficient proof to support a claim.

686 *E.g.* Schantz 2015, pp. 327 ff. As Art. 35a (2) CRA Regulation stipulates the burden of proof in respect of causation between an infringement and a credit rating, this dissertation does not pay further attention to German law in this respect.

687 *Cf.* Van Dam 2013, no. 1107-1, Magnus 2013, no. 20 and Jansen 1999, p. 276. The line between these concepts is sometimes difficult to draw.

688 *E.g.* Arne Maier *VuR* 2017, p. 386, Wimmer 2017, pp. 306-307, Von Rimon 2014, p. 154, Amort 2013, p. 278, Gietzelt & Ungerer 2013, p. 343, *cf.* Wagner 2013, pp. 494-495, Berger & Stemper 2010, p. 2294 and Blaurock 2007, pp. 635-637.

689 Schantz 2015, p. 365.

690 *Cf. e.g.* Palandt/Grüneberg 2019, Vorb v § 249, no. 53, Magnus 2013, no. 35 and Van Dam 2013, no. 1110-3. Less recently: Jansen 1999, pp. 273-274. *Although, in German literature, it has been argued that the doctrine of loss of chance should be applied, e.g.* Jansen 1999, p. 275.

sehr das Gepräge des gewöhnlichen und Üblichen trägt, daß die besonderen individuellen Umstände in ihrer Bedeutung zurücktreten […].'[691] German courts can thus accept *prima facie* evidence when a case involves a typical course of events which, from life experience, points to a certain cause in such an ordinary and customary way that special individual circumstances of the case are not important.

In the context of credit rating agency liability, the question arises whether a causal relationship between the affected credit rating and the loss suffered by issuers and investors can be presumed on the basis of *prima facie* evidence. As concluded by Von Rimon and Schroeter, the influence of credit ratings cannot be qualified as typical course of events in which individual circumstances of the case are not important.[692] This applies to pure economic and reputational loss that issuers could suffer, because these types of loss could be caused by other factors as well. The same applies to pure economic loss that could be suffered by investors, because investors can take investment decisions that are not necessarily only influenced by credit ratings[693] or because the price or yield of the financial instruments was affected by other causes (or was not even affected at all).

(ii) – The concept of Anlagestimmung (reliance on 'market sentiment')[694]

The application of the concept of *Anlagestimmung* (the concept of 'market sentiment'[695]) is relevant in relation to claims brought by investors only. German courts applied this concept in prospectus liability cases, prior to the introduction of the reversal of the burden of proof under § 23 (2) Wertpapierprospektgesetz (German Securities Prospectus Act).[696] The concept of *Anlagestimmung* substitutes the requirement of an investor's individual reliance on a prospectus. Instead, German courts presume that a prospectus caused a certain sentiment on the financial markets based on which an investor was presumed to have taken its investment decision.[697] In the context of claims brought by investors against credit rating agencies, the majority of German

691 Bundesgerichtshof 18 March 1987, IVa ZR 205/85, *NJW* 1987, p. 1945, *as derived from* Musielak/Voit/Foerste, 15. Aufl. 2018, ZPO § 286, no. 23.

692 Von Rimon 2014, pp. 157 and 191 and Schroeter 2014, p. 950.

693 *Cf. for this consideration in the context of ad-hoc disclosure* Bundesgerichtshof 4 June 2007, II ZR 147/05, *NZG* 2007, pp. 708-711 (*ComROAD IV*), para 13.

694 The concepts of the *Vermutung aufklärungsrichtigen Verhaltens* and *Anlagestimmung* are sometimes categorised as form of *Anscheinsbeweis*, factual presumption or reversal of the burden of proof. It has however been decided to discuss these concepts separately.

695 *As derived from* Vandendriessche 2015, no. 322.

696 § 23 (2) '*Ein Anspruch nach den §§ 21 oder 22 besteht nicht, sofern (1) die Wertpapiere nicht auf Grund des Prospekts erworben wurden, (2) der Sachverhalt, über den unrichtige oder unvollständige Angaben im Prospekt enthalten sind, nicht zu einer Minderung des Börsenpreises der Wertpapiere beigetragen hat, (3) der Erwerber die Unrichtigkeit oder Unvollständigkeit der Angaben des Prospekts bei dem Erwerb kannte*'. Vandendriessche 2015, no. 323.

697 Vandendriessche 2015, no. 322-323.

scholars concluded that German courts will generally not presume the existence of a causal relationship based on *Anlagestimmung*.[698] They explained this conclusion by the fact that German courts mostly restricted the application of the concept of *Anlagestimmung* to the field of prospectus liability and by the fact that credit ratings in themselves are generally not considered capable of creating the required market sentiment.[699]

On several occasions, investors have tried to expand the scope of the concept of *Anlagestimmung* to cases concerning the violation of ad hoc disclosure obligations, but without success. In *Infomatic I*, the German Federal Supreme Court refused to assume that incomplete or incorrect ad hoc disclosures are generally capable of creating a positive market sentiment similar to prospectuses:

> '*Auch die von der Rechtsprechung zur Prospekthaftung nach dem Börsengesetz alter Fassung entwickelten Grundsätze über den Anscheinsbeweis bei Vorliegen einer Anlagestimmung […] lassen sich nicht ohne weiteres auf die Deliktshaftung nach § 826 BGB im Hinblick auf fehlerhafte Adhoc-Mitteilungen i.S. des § 15 Abs. 1 bis 3 WpHG a.F. übertragen. Zwar ist denkbar, daß sich im Einzelfall -je nach Tragweite der Information aus positiven Signalen einer Adhoc-Mitteilung auch eine (regelrechte) Anlagestimmung für den Erwerb von Aktien entwickeln kann. Zur genauen Dauer einer solchen denkbaren Anlagestimmung lassen sich aber ebenso wenig -wenn nicht sogar weniger -verläßliche, verallgemeinerungsfähige Erfahrungssätze aufstellen wie für den Bereich der Emissionsprospekte.*'[700]

Yet, the German Federal Supreme Court left the door open for exceptional situations in which statements issued on an ad-hoc basis do create a certain sentiment in the financial markets. The German Federal Supreme Court repeated this restrictive approach in *Comroad IV*:

> '*Denn der Informationsgehalt der Ad-hoc-Mitteilung beschränkt sich im Allgemeinen ausschnittartig auf wesentliche aktuelle, neue Tatsachen aus dem Unternehmensbereich, die zumeist für eine individuelle zeitnahe Entscheidung zum Kauf oder Verkauf der Aktien relevant sein können, jedoch in der Regel nicht geeignet sind, eine so genannte Anlagestimmung hervorzurufen. Zwar ist denkbar, dass sich im Einzelfall – je nach Tragweite der*

698 *As stated by* Dumont du Voitel 2018, p. 220, Wimmer 2017, p. 307, Von Rimon 2014, p. 188, Gietzelt & Ungerer 2013, p. 343 and Blaurock 2007, p. 636. Although there is no unity in German literature, *see* Heuser 2019, p. 181, fn. 939 and 940. Heuser, however, rejected the application of the concept of *Anlagestimmung* because it would be contrary to EU law (Heuser 2019, p. 183).

699 Von Rimon 2014, pp. 187-188 and Gietzelt & Ungerer 2013, p. 343. *In respect of the latter argument only* Wimmer 2017, p. 307.

700 Bundesgerichtshof 19 July 2004, II ZR 217/03, *NJW* 2004, pp. 2668-2671 (*Infomatec*), para 60. *Also* Koch 2017, pp. 381-382.

> *Information – aus positiven Signalen einer Ad-hoc-Mitteilung auch eine regelrechte Anlagestimmung für den Erwerb von Aktien entwickeln kann; […].'*[701]

The German Federal Supreme Court hence made a difference between the question of whether a statement is material for an individual investment decision and the question of whether a statement is capable of creating a certain market sentiment. Ad-hoc disclosures can be relevant for individual investment decisions to purchase or sell financial instruments. However, they are only capable of creating a certain market sentiment in exceptional situations. Overall, outside the field of prospectus liability, an investor hence faces a difficult task to prove that the incorrect or the incomplete information created a certain market sentiment.[702]

In the context of credit rating agency liability, the reasoning of the German Federal Supreme Court in *Infomatic I* and *Comroad IV* might well apply. Credit ratings show resemblance to ad-hoc disclosures, in the sense that they do not provide such an extensive overview of the issuer or its financial instruments as prospectuses do. German courts will therefore analyse whether a certain credit rating created a certain market sentiment. Von Rimon posed this question, and answered it in the negative for most situations. In her opinion, only solicited credit ratings can create a certain investment sentiment in exceptional situations. However, normally, credit ratings will not be considered to be capable of creating a certain market sentiment so that the concept of *Anlagestimmung* will not be applied easily to cases concerning credit rating agency liability.[703]

(iii) – Vermutung aufklärungsrichtigen Verhaltens ('a presumption of advice-conform behaviour'[704])

The application of a *Vermutung aufklärungsrichtigen Verhaltens* is relevant in relation to claims brought by investors only. It applies to situations in which the claimant received incorrect or incomplete advice on the basis of which the claimant took a decision, while the defendant owed a duty to the claimant to provide correct and complete information in order to enable the claimant to take a decision. When a German court adopts a *Vermutung aufklärungsrichtigen Verhaltens* ('a presumption of advice-conform behaviour'[705]), it presumes that, had the advice been correct and complete, the claimant would have acted

701 Bundesgerichtshof 4 June 2007, II ZR 147/05, *NZG* 2007, pp. 708-711 (*ComROAD IV*), para 13. *Also* Koch 2017, p. 382. This approach was repeated subsequently again in Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 64.

702 *Cf.* Fleischer in Assmann/Schütze, HdB KapitalanlageR 2015, § 6, no. 25 and no. 27-28.

703 Von Rimon 2014, p. 188.

704 *Translation derived from* Vandendriessche 2015, no. 199.

705 *Translation derived from* Vandendriessche 2015, no. 199.

in accordance with that advice.[706] The burden of proof shifts towards the defendant, who must provide evidence to the contrary.[707]

In the context of claims brought by investors against credit rating agencies, German scholars often concluded that the *Vermutung aufklärungsrichtigen Verhaltens* does not apply.[708] This conclusion is based on the difference in services provided by investment advisors and credit rating agencies, which entails that a reversal of the burden of proof is justified in the context of investment advice, but not in the context of credit rating agency liability. As explained by the German Federal Supreme Court, the justification of the reversal of the burden of proof lies in the fact that, on the one hand, the duty owed by the defendant aims to protect the claimant, while, on the other hand, the claimant cannot not benefit much from this protection without any facilitations in relation to the burden of proof:

> '*Dem Ersatzberechtigten wäre wenig damit gedient, wenn er seinen Vertragsgegner zwar an sich aus schuldhafter Verletzung einer solchen Hinweispflicht in Anspruch nehmen könnte, aber regelmäßig daran scheitern würde, daß er den meist schwer zu führenden Beweis nicht erbringen könnte, wie er auf den Hinweis reagiert hätte, wenn er gegeben worden wäre.*'[709]

As the goal of the duty of an advisor is to enable an investor to take a specific investment decision and to estimate whether it wishes to take the investment risks attached to that decision, it was considered reasonable to shift the burden of proof towards the advisor.[710] Whereas investment advisors provide advice as to enable an investor to take a certain investment decision, such an element of advice with regard to a concrete investment decision is lacking in the context of the services provided by credit rating agencies.[711] The fact that advice relating to a specific investment decision is not part of the duty owed by credit rating agencies, entails that German courts cannot presume that, had the credit rating not been affected by the infringement, investors would have acted in

706 *In the context of financial advice* Vandendriessche 2015, no. 199. *See also* Von Rimon 2014, p. 189. In 1973, the German Federal Supreme Court drew an analogy between situations of medical negligence and negligent investment advice and applied the *Vermutung aufklärungsrichtigen Verhaltens* in the context of investment advice. Bundesgerichtshof 5 July 1973, VII ZR 12/73, *NJW* 1973, p. 1689.

707 *Explicitly* Bundesgerichtshof 8 May 2012, X I ZR 262/10, *NJW* 2012, pp. 2427-2434, *BKR* 2012, pp. 368-377, para 29. *See also* Von Rimon 2014, p. 189.

708 *As stated by* Von Rimon 2014, pp. 189-190, Amort 2013, p. 278 and Berger & Stemper 2010, p. 2294. *Cf. also* Schantz 2015, pp. 327-328. *Contra* Dumont du Voitel 2018, p. 224, who argued that application of this doctrine is possible in specific situations.

709 Bundesgerichtshof 5 July 1973, VII ZR 12/73, *NJW* 1973, p. 1689.

710 Bundesgerichtshof 5 July 1973, VII ZR 12/73, *NJW* 1973, p. 1689.

711 *For a similar reasoning in the context of ad-hoc disclosure,* Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 62.

accordance with the credit rating or would have acted in a different manner.[712]

(iv) – Replacing direct reliance with Kursdifferenzschade

The final facilitation investigated in this subsection is relevant in relation to claims brought by investors only. This facilitation does not relieve the burden of proof by presumptions of reliance or by presumptions of correct-credit-rating-conform conduct, but instead relates to the replacement of the requirement of reliance on the credit rating by the requirement of causation between the credit rating and the price of the financial instruments and the yield.[713] This method of circumventing the requirement of direct reliance is similar to the fraud-on-the-market doctrine as applied under US securities law.[714]

In the case of *ComROAD IV*, the German Federal Supreme Court refused to apply the US fraud-on-the-market doctrine in the context of ad-hoc disclosure. It held that application of this doctrine would lead to an endless extension of civil liability under § 826 BGB.[715] Consequently, direct reliance on the information was hence considered crucial for a duped investor to succeed in a claim for damages. But since the *IKB* case of 2011, it seems possible for German courts to award compensation when the claimant cannot prove direct reliance on the information, but wishes to be compensated for the fact that the incorrect or incomplete transaction affected the price of the securities transaction. In the context of a claim for compensation based on § 37b WpHG (on liability for

712 *For this reasoning, see, most extensively*, Von Rimon 2014, pp. 189-190. *Also* Amort 2013, p. 278 and Berger & Stemper 2010, p. 2294. *The same reasoning applies in relation to ad-hoc disclosure*, Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 62.

713 Schantz 2015, pp. 330-331.

714 The fraud-on-the-market doctrine builds upon the idea that all information is reflected in the price of a financial instrument (Efficient Capital Market Hypothesis). Instead of requiring the claimant's reliance on incomplete or incorrect information, the theory assumes that an investor relies on the integrity of market prices so that there exists a causal connection between the loss suffered by the investor and the incomplete or incorrect information. Investors hence do not need to provide evidence of their direct reliance on the incomplete or incorrect information. *See in detail* Vandendriessche 2015, no. 396 ff. *Also* Schantz 2015, pp. 330-331. A more detailed description of the fraud-on-the-market doctrine under US securities law falls outside the scope of this dissertation. On the differences between the US fraud-on-the-market doctrine and the German *IKB*-case, Vandendriessche 2015, no. 419.

715 Bundesgerichtshof 4 June 2007, II ZR 147/05, *NZG* 2007, pp. 708-711 (*ComROAD IV*), para 16: '*Derartige Ansichten liefen darauf hinaus, im Rahmen des § 826 BGB auf den Nachweis des konkreten Kausalzusammenhangs zwischen der Täuschung und der Willensentscheidung des Anlegers zu verzichten und stattdessen – in Anlehnung an die so genannte fraud-on-the-market-theory des US-amerikanischen Kapitalmarktrechts – an das enttäuschte allgemeine Anlegervertrauen in die Integrität der Marktpreisbildung anzuknüpfen. Diesem Denkansatz, der zu einer uferlosen Ausweitung des ohnehin offenen Haftungstatbestands der sittenwidrigen vorsätzlichen Schädigung auf diesem Gebiet führen würde, ist der Senat in seiner bisherigen kapitalmarktrechtlichen Rechtsprechung zu den fehlerhaften Ad-hoc-Mitteilungen in Bezug auf die haftungsbegründende Kausalität nicht gefolgt […]; hieran hält er weiterhin fest.*' Haar 2014, p. 319. *Also* Koch 2017, p. 282.

the omission to disclose insider information in time), the German Federal Supreme Court held:

> *'Für den Fall, dass der Klägerin der Kausalitätsnachweis zwischen unterbliebener Ad-hoc-Mitteilung und Kaufentschluss des Zedenten nach den oben genannten Maßstäben nicht gelingen sollte, weist der Senat darauf hin, dass dann jedenfalls der Kursdifferenzschaden ersatzfähig ist. Hierfür kommt es im Rahmen von § 37b WpHG nicht darauf an, ob der Zedent bei rechtzeitiger Veröffentlichung der Insiderinformation vom Kauf der Aktien Abstand genommen hätte; er muss lediglich darlegen und gegebenenfalls beweisen, dass – wäre die Ad-hoc-Mitteilung rechtzeitig erfolgt – der Kurs zum Zeitpunkt seines Kaufs niedriger gewesen wäre […].'*[716]

Hence, if the claimant cannot provide evidence for the causal relationship between the investment decision and the ad-hoc disclosure, it can be apt to compensate the claimant for the so-called *Kursdifferenzschade* (the impact of the incorrect or incomplete information on the price of the transaction). The claimant then must prove that the incomplete or incorrect information affected the price of the transaction.

It is highly questionable whether German courts would apply this relaxation of the requirement of reliance to the situation of credit rating agency liability by analogy.[717] As explained in the general introduction the term 'caused to' in section 5.3.1.3, Article 35a (1) CRA Regulation explicitly prescribes that an investor must have 'reasonably relied […] on a credit rating'. A strictly grammatical interpretation hence leaves no room for a replacement of the requirement of reliance on the credit rating by the requirement of causation between the credit rating and the price of the financial instruments and the yield. From other decisions with regard to the question of whether Article 35a (1) CRA Regulation applies to investors who relied on an issuer rating (as opposed to a credit rating attached to a specific financial instrument), it appears that German courts stay close to the wording of the CRA Regulation.[718] There-

716 Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 67. Vandendriessche 2015, no. 418 ff., Haar 2014, p. 319 and Wagner 2013, p. 495. *Also* Koch 2017, p. 384. *Repeated in e.g.* Landgericht Stuttgart 28 February 2017, 22 AR 1/17 Kap, ECLI:DE:LGSTUTT:2017:0228.22AR1.17KAP.0A, *BeckRS* 2017, 118702, para 369: '*Im Rahmen der Ersatzfähigkeit der Kursdifferenzschäden kommt es im Rahmen von § 37b WpHG nicht darauf an, dass der Kläger bei rechtzeitiger Veröffentlichung der Ad-hoc-Mitteilung von seiner Transaktion Abstand genommen hätte. Der Kläger muss lediglich darlegen und gegebenenfalls beweisen, dass – wäre die Ad-hoc-Mitteilung rechtzeitig erfolgt – der Kurs zum Zeitpunkt seines Kaufs niedriger gewesen wäre […].' Also* Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, para 330.

717 Dumont du Voitel dismissed application of this doctrine in the context of credit rating agency liability claims under Art. 35a CRA Regulation (Dumont du Voitel 2018, p. 221).

718 See section 3.5.3.3 (b). *E.g.* Amtsgericht Neuss 28 December 2016, 80 C 3954/15, ECLI:DE:AGNE:2016:1228.80C3954.15.00, *BeckRS* 2016, 130332, Landgericht Düsseldorf 17 March 2017, 10 O 181/15, ECLI:DE:LGD:2017:0317.10O181.15.0A and Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321.

fore, it is unlikely that German courts will apply the rules flowing from the *IKB* decision in disputes over credit rating agency liability.

5.6.3.3 Suffering 'damages' and claiming 'damages'

(a) Nature of reparable loss and calculation of damages

When applying Article 35a CRA Regulation, German courts will determine the award of damages in accordance with the general rules on *Schadenersatz* (compensation[719]) under § 249-254 BGB.[720] These provisions apply to all *Schadenersatzansprüche*, also to those codified outside the BGB.[721] From § 249-254 BGB, it can be derived that an obligation to provide compensation can relate to material loss, immaterial loss, and lost profits. The German law of damages builds upon the principle of full compensation. Under § 249 (1) BGB, the party that shall provide compensation, '*hat den Zustand herzustellen, der bestehen würde, wenn der zum Ersatz verpflichtende Umstand nicht eingetreten wäre*'. Tot hat end, a German court must determine in what position the aggrieved party would have been in the absence of the wrongful conduct of the other party (*Differenz-hypothese*[722]). Under German law, compensation involves *Naturalrestitution* (restitution in kind) as a matter of principle. However, compensation can also be granted in the form of an award of damages pursuant to § 249 (2), § 251 (1) and § 253 BGB.[723]

The claimant bears the burden of proof in respect of the existence and extent of the loss suffered. As discussed, the required standard of proof is relaxed with regard to *haftungsausfüllende Kausalität* and the extent of the loss under § 287 ZPO.[724] This provision provides courts more freedom to decide on the evidence and allows them to estimate the loss.[725] The required standard of proof does not involve '*an Sicherheit grenzenden Wahrscheinlichkeit*' (freely translated as a degree of probability that borders certainty) as under § 286 ZPO, but rather '*überwiegende Wahrscheinlichkeit*' (freely translated as

719 The term 'compensation' is used rather than the term 'damages', as German law in principle awards restitution in kind instead of monetary damages.

720 *As commonly accepted in German contributions. E.g.* Heuser 2019, pp. 158 ff., Wimmer 2017, p. 283, Von Rimon 2014, pp. 164 and 191, Schroeter 2014, p. 849 and Dutta 2013, p. 1735.

721 Palandt/Grüneberg 2019, Vorb v § 249, no. 4. *Cf. also* Staudinger/Schiemann (2017) Vorbem zu §§ 249 ff., para 6 and Van Dam 2013, no. 1203-2.

722 Palandt/Grüneberg 2019, Vorb v § 249, no. 3 and 10. *Cf. also* Staudinger/Schiemann (2017) Vorbem zu §§ 249 ff., para 35 and Staudinger/Schiemann (2017) § 249, para 4.

723 Robbers 2017, no. 656 and Van Dam 2013, no. 1203-2. *Cf. also* Staudinger/Schiemann (2017) § 249, para 1.

724 Heuser 2019, pp. 191-192, Dumont du Voitel 2018, pp. 225 ff. and Schantz 2015, p. 318. *In general cf.* Staudinger/Schiemann (2017) Vorbem zu §§ 249 ff., para 97. *Recently* Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, para 332.

725 Murray & Stürner 2004, p. 312. *Cf. also* Staudinger/Schiemann (2017) Vorbem zu §§ 249 ff., para 97 and Baumbach/Lauterbach/Albers/Hartmann 2015, § 287, no. 2.

predominant degree of probability).[726] This relaxation of the standard of proof, however, does not discharge claimants from the obligation to provide sufficient *Anhaltspunkte* (reference points). Without any such *Anhaltspunkte*, the estimate of a court would remain '*in der Luft*' and would qualify as '*willkürlich*' (arbitrary).[727] In *EM.TV*, the German Federal Supreme Court paid attention to the fact that proof of hypothetical transaction prices may be difficult to gather in cases concerning liability for the violation of ad-hoc disclosure obligations. However, it stated that '*sich trotz aller Schwierigkeiten der hypothetische Transaktionspreis mit den Methoden der modernen Finanzwissenschaft durchaus mit der erforderlichen Sicherheit errechnen läßt, um […] zumindest eine richterliche Schadenssätzung gemäß § 287 ZPO zu ermöglichen*' and *'[a]ls geeignete Hilfgröße zur Ermittlung des hypothetischen Preises kann auf die Kursveränderung unmittelbar nach Bekanntwerden der wahren Sachlage zurückgegriffen und sodann "vermittels rückwärtiger Induktion" auf den wahren Wert des Papiers am Tage des Geschäftsabschlusses näherungsweise geschlossen werden*'.[728] According to the Regional Court of Stuttgart, the claimant does not need to prove the concrete difference between the actual value of the financial instruments and the price paid at the time the claimant entered into the transaction. It is sufficient to provide evidence of the change of the price of the financial instruments at the moment that the information was corrected.[729]

In the context of credit rating agency liability, German courts must hence determine in what position the issuer or investor would have been in the absence of the infringement and the affected credit rating. In relation to claims for damages brought by issuers, issuers must hence provide sufficient *Anhaltspunkte* that, had the credit rating not been affected, they would have paid less funding costs and would not have suffered reputational loss.[730] In addition, lost profits may be claimed under § 252 BGB.[731]

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726 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 85. *Also* GF-ZPO/Siebert 2019, § 287, no. 11. Bundesgerichtshof 5 November 1992, IX ZR 12/92, *NJW* 1993, p. 734: '*jedenfalls eine deutlich überwiegende, auf gesicherter Grundlage beruhende Wahrscheinlichkeit reicht für die richterliche Überzeugungsbildung aus* […].' *See also e.g.* Bundesgerichtshof 21 July 2005, IX ZR 49/02, *NJW* 2005, p. 3277 and Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 68. *Also* Dumont du Voitel 2018, p. 226.

727 Oberlandesgericht München 18 July 2002, 19 U 5630/01, ECLI:DE:OLGMUEN:2002:0718.19U5630.01.0A, *NZG* 2002, p. 1111, *as derived from* Von Rimon 2014, p. 191. *Also in this regard* GF-ZPO/Siebert 2019, § 287, no. 11, Musielak/Voit/Foerste, 15. Aufl. 2018, ZPO § 287, no. 7 and Baumbach/Lauterbach/Albers/Hartmann 2015, § 287, no. 2. *Also* Dumont du Voitel 2018, p. 227.

728 Bundesgerichtshof 9 May 2005, II ZR 287/02 (*EM.TV*), p. 18. *For EM.TV in the context of credit rating agencies*, Schantz 2015, pp. 318-319.

729 Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, paras. 330 and 332.

730 *Cf.* Von Rimon 2014, p. 164. *Also* Heuser 2019, p. 166, Wimmer 2017, pp. 202-203 and Rosset 2013, p. 38. *See for the idea that an issuer can also claim Naturalrestitution* Wimmer 2017, pp. 201-202.

731 Wimmer 2017, p. 203, Von Rimon 2014, p. 164 and Rosset 2013, p. 38.

In the context of claims brought by investors, the eventual amount of damages to be awarded to investors is the subject of debate in German literature. The discussion evolves around the question of whether investors shall be compensated to the full extent of the investments made (*Vertragsabschlussschade* or *Transaktionsschade*) or only to the extent to which the credit ratings affected the price of the investments (*Kursdifferenzschade*). Some German scholars preferred compensation of the *Kursdifferenzschade* only, mainly because they considered it unfair to hold credit rating agencies responsible for all risks involved with investment decisions.[732] German courts have not decided on this matter in the context of credit rating agency liability.

As described under section 5.6.3.2 (b), I expect that German law will generally not facilitate investors in proving reasonable reliance. But if investors succeed in proving reasonable reliance, they might receive compensation to the extent of the costs of cancellation of the transaction of the financial instruments. In the *IKB* case, which was decided in the context of deficient ad-hoc market disclosures, the German Federal Supreme Court held that claimants may choose whether to claim *Vertragsabschlussschade* (in the sense of *Transaktionsschade*) or *Kursdifferenzschade*, provided that they are able to prove reliance on the ad-hoc disclosure. The German Federal Supreme Court stated that investors cannot only claim damages to the extent of the *Kursdifferenz*, but also '*die Rückgängigmachung des Wertpapiergeschäfts*' (the cancellation of the securities transaction) which forms in fact the *Naturalrestitution* to which investors are entitled under the general rule of § 249 BGB.[733] The investor then transfers the securities back to the issuer in return for the price of the transaction. When the investor has already resold the securities, it is entitled to the difference between the purchase price and the sales price.[734] The German Federal Supreme Court explicitly paid attention to the argument often used against full compensation that it is not fair to hold issuers responsible for all risks of investment decisions.[735] However, it ended this discussion by stating that '*die Gefahr der zufälligen Verschlechterung der zurück zu gewährende Sache general beim Schädiger [bleibt]*' and that '*die infolge allgemeiner Marktrisiken eingetretene Vermögensminderung trotzdem (auch) Folge der durch die unrichtige bwz. unterbliebene Ad-hoc-Mitteilung bedingten Investitionsentscheidung des Anlegers*

732 Wimmer 2017, pp. 194-197, Gietzelt & Ungerer 2013, p. 344, *cf.* Wagner 2013, p. 495. Heuser 2019, pp. 161-164 and Von Rimon 2014, p. 191 do not make a choice between these two options. Schantz does not support the idea to limit the amount of damages to *Kursdifferenzschade* (Schantz 2015, p. 324).

733 Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 50. *Also* Bundesgerichtshof 9 May 2005, II ZR 287/02 (*EM.TV*), p. 8. *Also* Koch 2017, pp. 382-384.

734 *Prior to the IKB decision,* Bundesgerichtshof 9 May 2005, II ZR 287/02 (*EM.TV*), p. 8.

735 *For a description of this criticism, see also* Schantz 2015, p. 321.

[ist]'.[736] At the same time, the German Federal Supreme Court held that a limitation of the amount of damages to the *Kursdifferenz* is justified when a provision that entitled the investor to damages in the first place prescribes this.[737]

As discussed, Article 35a (1) CRA Regulation in principle requires an investor to have reasonably relied on a credit rating. Provided that the investor can prove that this was the case, the *IKB* case suggests that the investor is free to choose whether to claim damages for the *Vertragsabschlussschade* or *Kursdifferenzschade*.[738] Furthermore, the *IKB* case suggests that an investor's right to compensation of the *Vertragsabschlussschade* is limited if Article 35a CRA Regulation prescribes this. Here, one ends up in a circular reasoning because the *IKB* decision implies that one needs to look at the ground for liability, while the ground for liability in this situation provides no indications in this regard and refers the term '*Ersatz*' back to German law. Overall, under German law, issuers can claim compensation for increased funding costs and reputational loss and investors can choose whether they wish compensation for *Vertragsabschlussschade* or *Kursdifferenzschade*. German courts in principle award restitution in kind, but damages can also be awarded. Issuers and investors bear the burden of proof in respect of the recoverable loss, but the standard of proof is relaxed under § 287 ZPO.

(b) – Contributory negligence & mitigation

§ 254 BGB establishes the rules on *Mitverschulden* in both contractual and non-contractual liability law, covering both contributory negligence and the obligation resting upon the aggrieved party to mitigate its loss. Under § 254 (1) BGB,

736 Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 58.

737 Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 52.

738 Wimmer 2017, p. 200. *Cf. also* Schantz 2015, p. 326. Wimmer pointed out that the possibility of compensation of *Vertragsabschlussschade* through *Naturalrestitution* has the somewhat peculiar consequence that a credit rating agency would receive the financial instruments and would have to pay the investor for these financial instruments (Wimmer 2017, p. 195). Rosset therefore stated that the compensation will be paid in the form of damages (Rosset 2013, p. 38). Heuser pointed out that the possibility of *Naturalrestitution* is barred by the CRA Regulation itself. If an investor would transfer the financial instruments to the credit rating agency in return for the purchase price, the credit rating agency would possess rated financial instruments and thereby act contrary to Art. 6 (1)-(2) and Infringement 3 (a) and (b) Annex I Part B CRA Regulation (Heuser 2019, p. 161). These Infringements prohibit a credit rating agency to rate issuers of which the credit rating agency owns financial instruments or, in case of an existing credit rating, requires a credit rating agency to disclose its credit rating might be affected by the fact that the credit rating agency owns financial instruments of the issuer. Hence, *Naturalrestitution* in respect of an affected credit rating does not automatically cause the credit rating agency to commit an infringement of the CRA Regulation, but it seems nevertheless most likely that, in a dispute over credit rating agency liability, compensation will often be granted in the form of damages.

courts can reduce the award of damages if the aggrieved party has *mitgewirkt* or contributed to the loss. Under § 254 (2) BGB, courts can reduce the award of damages if the aggrieved party failed to point out to the other party that there was a risk of an unusually large loss and if the aggrieved party failed to avoid or to reduce the loss. Under German law, one cannot say the aggrieved party owes any duties to the defendant, but rather that the aggrieved party loses its right to full compensation if it does not guard its own interests.[739] If the wrongdoer acted intentionally, the award of damages will not be reduced. However, if the wrongdoer acted with gross or conscious recklessness, the award of damages can be reduced on the basis of § 254 BGB.[740] German courts must consider the application of § 254 BGB on its own motion if one of the parties states adequate factual statements in this regard.[741] However, the burden of proof lies with the wrongdoer.[742] The factual statements must be proven under the standard of proof of § 286 ZPO. Subsequently, under § 287 ZPO, German courts weigh the degree to which the respective parties contributed to the loss and reduce the amount of damages accordingly.[743]

The 'reasonableness' of an investor's reliance on a credit rating would not be considered in the stage of the establishment of causation under German law. When an investor's reliance is unreasonable, the credit rating agency involved is entitled to the defence of contributory negligence under § 254 (1) BGB. The German private law approach to reasonable reliance hence differs from Article 35a CRA Regulation in two aspects: the burden of proof lies with the credit rating agency, and a lack of reasonable reliance does not necessarily break the causal link between the credit rating agency's conduct and the loss suffered by the investor completely.[744] The application of the requirement of 'reasonable reliance' hence causes inevitable friction within the structure of German national private law.

739 *Cf.* Van Dam 2013, no. 1208-03.
740 *See* MüKoBGB/Oetker, 8. Aufl. 2019, BGB § 254, no. 11.
741 MüKoBGB/Oetker, 8. Aufl. 2019, BGB § 254, no. 143.
742 MüKoBGB/Oetker, 8. Aufl. 2019, BGB § 254, no. 145.
743 *See* MüKoBGB/Oetker, 8. Aufl. 2019, BGB § 254, no. 117. *Also Cf. also* Staudinger/Schiemann (2017) Vorbem zu §§ 249 ff., para 91.
744 *Cf.* Heuser 2019, pp. 164-165.

5.6.4 Article 35a (3) Limitations of liability in advance

5.6.4.1 General system[745]

The legal basis for determining the admissibility of a limitation clause under German law depends on whether the limitation clause was included in general terms and conditions or not; for instance, when the limitation clause resulted from individual negotiations between the parties. The description of the German law approach to limitation clauses is divided into three parts: (i) the binding force of terms and conditions in general; (ii) the substantive test for general terms and conditions under § 305 – § 310 BGB;[746] and (iii) the substantive test for other (individually negotiated) terms and conditions under § 242 BGB. As an overarching principle, under § 276 (3) BGB, liability for intentional conduct cannot be limited in advance.[747]

(a) – Are the terms and conditions binding upon the other party?
In order for the other party to be bound by a limitation clause, the clause must have been offered by the user and accepted by the other party. General terms and conditions become part of an agreement when the user of the terms, upon the moment of entering into the agreement, (1) '*die andere Vertragspartei ausdrücklich oder, wenn ein ausdrücklicher Hinweis wegen der Art des Vertragsschlusses nur unter unverhältnismäßigen Schwierigkeiten möglich ist, durch deutlich sichtbaren Aushang am Ort des Vertragsschlusses auf sie hinweist und*' (2) '*der anderen Vertragspartei die Möglichkeit verschafft, in zumutbarer Weise, die auch eine für den Verwender erkennbare körperliche Behinderung der anderen Vertragspartei angemessen berücksichtigt, von ihrem Inhalt Kenntnis zu nehmen, und wenn die andere Vertragspartei mit ihrer Geltung einverstanden ist*' under § 305 (2) BGB.[748] The user of the terms must hence inform the other party expressly of the terms or must place a clearly visible notice at the place where the contract is concluded and must allow the other party to take notice of the content of the terms. These requirements also apply to agreements concluded online. Users can bind their counterparties by submitting the conclusion of an agreement to the explicit acceptance of the general terms and conditions (by 'box ticking')[749] or by

745 *Similar overviews can be found in the dissertations on credit rating agency liability of e.g.* Heuser 2019, pp. 167 ff., Wimmer 2017, pp. 233 ff. and Von Rimon 2014, pp. 158 ff.
746 Limitations of liability will often be included in general terms and conditions. Most of the literature used relates to general terms and conditions.
747 § 276 (3) BGB: '*Die Haftung wegen Vorsatzes kann dem Schuldner nicht im Voraus erlassen werden*.'
748 This provision does not apply to entrepreneurs and legal entities under public law under § 310 (1) BGB.
749 MüKoBGB/Basedow, 8. Aufl. 2019, BGB § 305, no. 76.

creating a clearly visible link at the order page through which the other party can access and print the general terms and conditions.[750]

In the context of credit rating agency liability, if the limitation is included in the (general) terms and conditions of rating contracts concluded between credit rating agencies and issuers or subscription contracts concluded between credit rating agencies and investors, offer and acceptance of the limitation clause are not problematic. The same applies to the use of standard terms of use on credit rating agency's websites to which an investor has explicitly agreed by clicking in agreement. Some credit rating agencies make use of this method by subjecting the access to credit ratings on their websites to explicit acceptance of standard terms of use that also include a limitation.

(b) – Substantive test for general terms and conditions

§ 307 BGB forms the legal basis of the substantive test to determine the admissibility of general terms and conditions (*Inhaltskontrolle*). This provision is part of the statutory framework on general terms and conditions (*allgemeine Geschäftsbedingungen*) under § 305 – § 310 BGB. *Allgemeine Geschäftsbedingungen* are terms and conditions that have been formulated in advance by the user and that are meant to apply to a multitude of agreements.[751] § 310 (1) BGB restricts the scope of application of this statutory framework by stating that part of the rules do not apply to general terms and conditions accepted by entrepreneurs and legal entities under public law (e.g. states).[752] As a result, entrepreneurs and legal entities under public law who agreed to the general terms and conditions of their counterparty cannot derive protection from § 305 (2)-(3), § 308 (1) and (2)-(8) and § 309 BGB directly. The effect of this restriction, however, must not be overestimated. The second sentence of § 310 (1) BGB states that '*§ 307 Abs. 1 und 2 findet in den Fällen des Satzes 1 auch insoweit Anwendung, als dies zur Unwirksamkeit von in § 308 Nummer 1, 2 bis 8 und § 309 genannten Vertragsbestimmungen führt; auf die im Handelsverkehr geltenden Ge-*

750 Bundesgerichtshof 14 June 2006, I ZR 75/03, *NJW* 2006, pp. 2976-2978, para 16, *in the context of an agreement for parcel services*. *Also* Palandt/Grüneberg 2019, § 305, no. 36.

751 § 305 (1) BGB.

752 § 310 (1) BGB: '*§ 305 Absatz 2 und 3, § 308 Nummer 1, 2 bis 8 und § 309 finden keine Anwendung auf Allgemeine Geschäftsbedingungen, die gegenüber einem Unternehmer, einer juristischen Person des öffentlichen Rechts oder einem öffentlich-rechtlichen Sondervermögen verwendet werden […].*' The term '*unternehmer*' is defined under § 14 BGB. '*Einer juristischen Person des öffentlichen Rechts*' covers amongst others states and other public authorities. Ulmer & Schäfer in Ulmer/Brandner/Hensen, AGB-Recht, 12. Aufl., § 310 BGB, no. 14 and no. 24, respectively. *As discussed in the context of credit rating agencies by e.g.* Wimmer 2017, pp. 235-236 and Von Rimon 2014, pp. 159-160.

wohnheiten und Gebräuche ist angemessen Rücksicht zu nehmen.'[753] The admissibility of the terms is judged in accordance with § 307 (1)-(2) BGB, but § 308 and § 309 BGB can nevertheless apply by analogy to provide substance to this test (by a '*Parallelwertung in der Unternehmersphäre*').[754] Therefore, the protection that entrepreneurs and legal entities under public law can derive from § 305-§ 310 BGB is similar.

As already mentioned, § 307 BGB submits general terms and conditions to a substantive test. Furthermore, § 308 and 309 BGB provide examples of types of terms that do not have effect.[755] The test employed by § 307 (1) BGB is that '*[b]estimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen*', so that terms do not have effect if they disadvantage the other party unreasonably against the principle of good faith. Such an unreasonable disadvantage can, for instance, exist when the term restricts rights and duties lying at the essence of the agreement to such an extent that the achievement of the goals of the agreement is endangered (so called '*Kernpflichten*' or '*Kardinalpflichten*').[756] In addition, § 308 and 309 BGB provide examples of terms that do not have effect. The list under § 308 BGB is indicative in the sense that courts have a margin of appreciation ('*Wertungsmöglichkeit*'), whereas no such discretion exists in respect of the list under § 309 BGB. In the context of this dissertation, the most relevant example is found under § 309 (7) (b) BGB, which provides that '*ein Ausschluss oder eine Begrenzung der Haftung für sonstige Schäden, die auf einer grob fahrlässigen Pflichtverletzung des Verwenders oder auf einer vorsätzlichen oder grob fahrlässigen Pflichtverletzung eines gesetzlichen Vertreters oder Erfüllungsgehilfen des Verwenders beruhen*' does not have effect.

(c) – Substantive test for other terms and conditions

In respect of terms and conditions that do not qualify as general terms and conditions covered by § 305 – § 310 BGB, the general open norm under § 242 BGB forms the legal basis of the substantive test.[757] In the context of this

753 § 310 (1) BGB – 'Section 305 (2) and (3) and sections 308 and 309 do not apply to standard business terms which are used in contracts with an entrepreneur, a legal person under public law or a special fund under public law. Section 307 (1) and (2) nevertheless apply to these cases in sentence 1 to the extent that this leads to the ineffectiveness of the contract provisions set out in sections 308 and 309; reasonable account must be taken of the practices and customs that apply in business dealings […].' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0731, last accessed at 31 August 2019.

754 MüKoBGB/Basedow, 8. Aufl. 2019, BGB § 310, no. 11-12 and Palandt/Grüneberg 2019, § 307, no. 38 and 40. *Also* Wimmer 2017, pp. 237-236 and Von Rimon 2014, p. 160.

755 Palandt/Grüneberg 2019, § 307, no. 1.

756 § 307 (2) (2) BGB. Palandt/Grüneberg 2019, § 307, no. 33.

757 Prior to the introduction of special rules on general terms and conditions, the substantive test was based on § 242 BGB. The special statutory framework of § 305 – § 310 BGB takes priority over § 242 BGB, *cf. e.g.* MüKoBGB/Schubert, 8. Aufl. 2019, BGB § 242, no. 532, Staudinger/Looschelders/Olzen (2015) § 242, no. 379-380, Fuchs in Ulmer/Brandner/

dissertation, terms and conditions resulting from individual negotiations form an important example of terms and conditions covered by § 242 BGB. § 242 BGB provides a general norm prescribing how a party should act in the performance of an agreement. The provision is applied on several occasions, of which the substantive test of limitation clauses is only one.[758] § 242 BGB states that '*[d]er Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*.'[759] The obligor must hence perform its duties in good faith. The other party can attempt to deprive a limitation clause from its effects by invoking § 242 BGB, but German courts will not easily deprive limitation clauses from their effects on this basis.[760] German law starts from the principles of freedom of contract and private party autonomy and from the premise that negotiating parties are able to guard their own interests. Only when a significant imbalance between the parties' negotiating strengths precludes one of the parties to exercise its party autonomy, will courts make use of § 242 BGB to restore the balance between the parties in the agreement.[761]

5.6.4.2 Limitations of liability in relation to issuers

Depending on whether a limitation clause has been included in general terms and conditions or has been negotiated on an individual basis, the admissibility of the limitation clause must be assessed in accordance with § 305 – § 310 BGB or § 242 BGB respectively. This dissertation assumes that the issuer qualifies as an entrepreneur or a legal entity under public law. An application of the general statutory framework to the admissibility of limitations clauses in the context of credit rating agency liability, as already carried out in German literature, then leads to the following general guidelines:

Hensen, AGB-Recht, 12. Aufl., Vorb. v. § 307 BGB, no. 62 and Pfeiffer in Wolf/Lindacher/Pfeiffer, § 307, no. 27-28. *This topic has been discussed in the context of credit rating agencies by e.g.* Wimmer 2017, pp. 239-241 and Von Rimon 2014, pp. 162-163.

758 The *Inhaltskontrolle* must be distinguished from the *Ausübungskontrolle* under § 242 BGB. The *Ausübungskontrolle* assumes that a term is valid, but that invoking the term in a concrete situation is unreasonable, *e.g.* Staudinger/Looschelders/Olzen (2015) § 242, no. 342, Fuchs in Ulmer/Brandner/Hensen, AGB-Recht, 12. Aufl., Vorb. v. § 307 BGB, no. 63 and Pfeiffer in Wolf/Lindacher/Pfeiffer, § 307, no. 27 and 29.

759 § 242 BGB – 'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0731, last accessed at 31 August 2019.

760 *Cf.* Staudinger/Looschelders/Olzen (2015) § 242, no. 340.

761 MüKoBGB/Schubert, 8. Aufl. 2019, BGB § 242, no. 534, Wimmer 2017, pp. 240-241 and Von Rimon 2014, pp. 162-163.

- Under § 276 (3) BGB, a credit rating agency cannot limit its liability for loss caused by intentional conduct.[762]
- By means of general terms and conditions, a credit rating agency cannot limit its liability for loss caused by grossly negligent conduct under § 310 (1) in conjunction with § 307 (1) in conjunction with § 309 (7) (b) BGB.[763]
- By means of general terms and conditions, a credit rating agency cannot limit its liability for the violation of rights and duties lying at the essence of the agreement to such an extent that achieving the goals of the agreement is endangered under § 307 (2) (2) BGB.[764] In particular, Von Rimon argues that the CRA Regulation involves so-called '*Kardinalpflichten*' so that limiting liability in respect of obligations flowing from the CRA Regulation is not permitted.[765] If German courts adopted this approach, credit rating agencies would find it difficult to limit their liability for obligations flowing from the CRA Regulation.
- By means of individually negotiated terms, a credit rating agency generally has more freedom to limit its liability. However, when a significant imbalance between the negotiating strengths of the credit rating agency and the issuer precludes the issuer from exercising its party autonomy, German courts may step in to restore the imbalance between the credit rating agency and the issuer.[766] According to Wimmer and Von Rimon, such an imbalance may occur when an issuer negotiates with Moody's, Standard & Poor's or Fitch.[767]

In respect of claims based on Article 35a CRA Regulation, the most important conclusion is that if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a limitation clause included in the contract will hardly have any effect under German law. Indeed, the threshold for liability under Article 35a (1) CRA Regulation ('intention' or 'gross negligence') and the threshold for singling out the effect of a limitation clause (*Vorsatz* or *grobe Fahrlässigkeit*) are similar. In relation to intentional conduct,

762 *As concluded by e.g.* Heuser 2019, p. 169, Wimmer 2017, p. 234, Seibold 2016, p. 138, Happ 2015, p. 85, Von Rimon 2014, p. 159, Schroeter 2014, p. 813, Dutta 2013, p. 1735, Gietzelt & Ungerer 2013, p. 345 and Rohe 2005, p. 140.

763 § 309 (7) (b) BGB is used to pencil in the substantive test under § 307 (1). *As concluded by e.g.* Heuser 2019, p. 169, Wimmer 2017, p. 238, Seibold 2016, p. 139, Happ 2015, p. 85, Von Rimon 2014, p. 161 (*also* pp. 159-160), Schroeter 2014, p. 813, Dutta 2013, p. 1735, Gietzelt & Ungerer 2013, p. 345, Arntz 2012, p. 93, Berger & Stemper 2010, p. 2293 and Rohe 2005, p. 140.

764 *As concluded by e.g.* Wimmer 2017, pp. 236-238, Seibold 2016, pp. 140-141, Von Rimon 2014, pp. 160-161, Schroeter 2014, pp. 813-814, Amort 2013, p. 277, Arntz 2012, p. 93, Berger & Stemper 2010, p. 2294 and Rohe 2005, p. 141.

765 Von Rimon 2014, pp. 160-161.

766 *As concluded by e.g.* Wimmer 2017, pp. 240-241 and Von Rimon 2014, pp. 162-164.

767 Wimmer 2017, pp. 240-241 and Von Rimon 2014, pp. 163-164.

this conclusion applies to all (general) terms and conditions under § 276 (3) BGB. In relation to grossly negligent conduct, this conclusion applies to at least all general terms and conditions under § 310 (1) in conjunction with § 307 (1) in conjunction with § 309 (7) (b) BGB. One can also question whether such a clause would cause a significant imbalance between the credit rating agency and the issuer under § 242 BGB.

5.6.4.3 Limitations of liability in relation to investors

As a credit rating agency will most likely not enter into negotiations with investors, it is assumed the limitation is included in the credit rating agency's general terms and conditions.[768] The admissibility of the limitation must therefore be assessed in accordance with § 305 – § 310 BGB. An application of the general statutory framework to limitations adopted in respected of investors, as done by German legal scholars, leads to the following general guidelines:

- A credit rating agency cannot limit its liability for loss caused by intentional conduct under § 276 (3) BGB.[769]
- A credit rating agency cannot limit its liability for loss caused by gross negligence under § 309 (7) (b) BGB.[770] When the investor qualifies as an entrepreneur or a legal entity under public law, the inadmissibility is based on § 310 (1) BGB in conjunction with § 307 BGB with an application by analogy of § 309 (7) (b) BGB.
- A credit rating agency cannot limit its liability for the violation of rights and duties lying at the essence of the subscription contract to such an extent that the achievement of the goals of the agreement is endangered under § 307 (2) (2) BGB.[771]

In respect of claims based on Article 35a CRA Regulation, the most important conclusion is that if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a limitation clause included in the contract will hardly have any effect under German law. Indeed, the threshold for liability under Article 35a (1) CRA Regulation ('intention' or 'gross negligence') and the threshold for singling out the effect of a limitation clause (*Vorsatz* or *grobe Fahrlässigkeit*) are similar. In relation to intentional conduct,

768 This section does not concentrate on limitation clauses directed at third parties included in rating contracts between credit rating agencies and issuers.

769 *As concluded by e.g.* Wimmer 2017, p. 234, Dutta 2013, p. 1735 and Gietzelt & Ungerer 2013, p. 345.

770 *As concluded by e.g.* Wimmer 2017, p. 238, Dutta 2013, p. 1735, Gietzelt & Ungerer 2013, p. 345, Wagner 2013, p. 486 and Berger & Stemper 2010, p. 2293.

771 *As concluded by e.g.* Wimmer 2017, p. 238, Wagner 2013, p. 486 and Berger & Stemper 2010, p. 2294.

this conclusion applies to all (general) terms and conditions under § 276 (3) BGB. In relation to grossly negligent conduct, this conclusion applies to at least all general terms and conditions under § 310 (1) in conjunction with § 307 (1) in conjunction with § 309 (7) (b) BGB.

5.6.5 Prescription of claims

German authors generally concluded that the rules for the prescription periods of claims ('*Anspruch*'), which can be found in Book 1, Abschnitt 5 '*Verjährung*' of the BGB, apply to claims concerning credit rating agency liability.[772] German law works with a relatively short standard limitation period ('*regelmäßigen Verjährungsfrist*') of 3 years under § 195 BGB, which can be extended to 10 or 30 years depending on the type of claim and the circumstances of the case.[773]

Under § 199 (1) BGB, the standard prescription period of 3 years starts to run by the end of the year[774] in which (1) '*der Anspruch entstanden ist*'; and (2) '*der Gläubiger von den den Anspruch begründenden Umständen und der Person des Schuldners Kenntnis erlangt oder ohne grobe Fahrlässigkeit erlangen müsste*'. Hence, the beginning of the prescription period is marked by the end of the year (1) in which the claim arises; and (2) in which the claimant becomes acquainted with the circumstances on which the claim can be based and with the defendant's identity, or in which the claimant should have become acquainted with the circumstances on which the claim can be based and with the defendant's identity had it not acted with gross negligence.[775] In this way, German law combines subjective and objective elements in the yardstick for prescription.[776]

German law considers a claim to arise when the claimant can enforce its right.[777] So in the context of credit rating agency liability, it must be determined from what moment issuers and investors are able to enforce their rights

772 *As concluded by e.g.* Heuser 2019, pp. 170-171, Happ 2015, p. 86, Halfmeier 2014, pp. 332-333, Gietzelt & Ungerer 2013, p. 345, Wojcik 2013, p. 1389 and Wildmoser, Schiffer & Langoth 2009, pp. 663-664. The prescription periods under § 195 and § 199 apply, provided that the claim for compensation is not governed by special prescription regimes, Palandt/Ellenberger 2019, § 195, no. 2.

773 Palandt/Ellenberger 2019, § 195, no. 1.

774 The period then starts to run as from 31 December midnight, Koopmann 2010, p. 9.

775 *Translation based on* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019.

776 MüKoBGB/Grothe, 8. Aufl. 2018, BGB § 199, no. 1 and *cf.* Koopmann 2010, p. 9.

777 Bundesgerichtshof 17 February 1971, VIII ZR 4/70, *NJW* 1971, p. 979: '*Unter der Entstehung des Anspruchs i.S. des § 198 Satz 1 BGB ist der Zeitpunkt zu verstehen, an welchem der Anspruch erstmalig geltend gemacht und notfalls im Wege der Klage durchgesetzt werden kann.*' *As referred to by* MüKoBGB/Grothe, 8. Aufl. 2018, BGB § 199, no. 4 and Palandt/Ellenberger 2019, § 199, no. 3.

under Article 35a (1) CRA Regulation. An issuer can do so when the affected credit rating has been issued and allegedly influenced its funding costs and its reputation. In contrast, it is more difficult to determine the exact moment an investor can enforce its rights. Would that be from when the investor invests in the issuer – so that the loss can no longer be avoided – or later in time when the influence of the rating becomes clear – and the loss actually occurs? Inspiration can be drawn from the area of investment advice and prospectus liability, where claims are understood to arise when the investor purchases the financial instruments.[778] The German Federal Supreme Court explained that the requirement for the claim to have arisen is: '*nicht erst mit dem Eintritt von Kursverlusten, sondern schon mit dem Erwerb der Wertpapier […] erfüllt gewesen, da die Zedentin die risikoreichen Wertpapiere bei sachgerechter Beratung nicht erworben hätte.*'[779] The German Federal Supreme Court hence considered the claim to arise when the financial instruments were bought, because the claimant argued that it would not have purchased the financial instruments had the advice been correct. The same type of reasoning could apply to claims brought by investors against credit rating agencies, so that the claim arises when an investor purchases the financial instruments.

In addition, it must be questioned when exactly a claimant can be considered to have become acquainted with the circumstances on which the claim can be based and with the defendant's identity had it not acted with gross negligence. The first part of this analysis – namely when the claimant actually became acquainted with the facts of the case and with the identity of the defendant – strongly depends on the circumstances of the case. It is not required that the claimant understands the precise legal consequences of the situation, but the claimant must know that the facts of the case may entitle it to certain rights.[780] Furthermore, the threshold for acting with gross negligence is rather high, the claimant must for instance have omitted to access easily accessible sources of information.[781] In the context of claims brought against credit rating agencies by investors, German literature stated that investors for example need to pay attention to situations in which the credit rating agency corrects the credit rating.[782]

Furthermore, § 199 (3) BGB arranges for specific maximum prescription periods with regard to *Schadensersatzansprüche* (claims for compensation) arising

778 *On liability for incorrect investment advice*, Bundesgerichtshof 8 March 2005, XI ZR 170/04, *NJW* 2005, p. 1580, *as derived from* Palandt/Ellenberger 2019, § 199, no. 21. *On prospectus liability,* Assmann in Assmann/Schütze, HdB KapitalanlageR 2015, § 5, no. 110 and no. 202.

779 Bundesgerichtshof 8 March 2005, XI ZR 170/04, *NJW* 2005, p. 1580.

780 MüKoBGB/Grothe, 8. Aufl. 2018, BGB § 199, no. 28 and Bundesgerichtshof 27 May 2008, XI ZR 132/07, *NJW-RR* 2008, pp. 1497-1498.

781 MüKoBGB/Grothe, 8. Aufl. 2018, BGB § 199, no. 31. *In the context of credit rating agency liability*, Wimmer 2017, p. 313 and Halfmeier 2014, p. 332.

782 Wimmer 2017, p. 313 and Wildmoser, Schiffer & Langoth 2009, p. 664.

out of contract and tort. Irrespective of the knowledge of the obligee, a claim expires 10 years after it arose. Irrespective of the knowledge of the obligee and the moment at which the claim arose, a claim for compensation expires 30 years after the conduct that caused the loss. When a conflict arises between these two terms, the claim expires when the shortest term has passed.

Finally, attention should be paid to the dissertation of Wimmer, in which she adopted a deviating approach as regards the prescription period applying to claims for damages brought against credit rating agencies. She stated that the special prescription regime under § 12 (4) WpÜG (*Wertpapiererwerbs- und Übernahmegesetz*, Securities Acquisition and Takeover Act) can be applied by analogy to credit rating agency liability.[783] This provision determines the prescription period for liability claims brought against persons who offered securities while their offers contained incorrect or incomplete information under § 12 (1) WpÜG. Pursuant to § 12 (4) WpÜG, those claims expire 1 year after the moment the person who purchased the securities became aware of the incorrect of incomplete information contained in the offer and, at the latest, three years after the moment the offer was published.[784] Wimmer considered that the systems of liability and the goals of § 12 (1) WpÜG and Article 35a (1) CRA Regulation were comparable to such an extent, that the prescription period under § 12 (4) WpÜG could apply by analogy to claims concerning credit rating agency liability. However, she also submitted that the application of the general rules of prescription under § 194 BGB is defendable, especially because the prescription of comparable claims for prospectus liability and the liability for ad-hoc disclosure follow the general rules under § 194 BGB ff.[785] This dissertation follows this (majority) approach so that the rules for prescription under German law can be found under § 195 in conjuction with § 199 (1) and (3) BGB.

5.6.6 Concluding remarks

The civil liability of credit rating agencies is a widespread topic of academic debate in Germany. Many authors explained the application and interpretation

783 *For a detailed analysis,* Wimmer 2017, pp. 314-319. Again, the prescription periods under § 195 and § 199 only apply if the claim for compensation is not governed by special prescription regimes such as § 12 (4) WpÜG, Palandt/Ellenberger 2015, § 195, no. 2.

784 § 12 (4) WpÜG: '*Der Anspruch nach Absatz 1 verjährt in einem Jahr seit dem Zeitpunkt, zu dem derjenige, der das Angebot angenommen hat oder dessen Aktien dem Bieter nach § 39a übertragen worden sind, von der Unrichtigkeit oder Unvollständigkeit der Angaben der Angebotsunterlage Kenntnis erlangt hat, spätestens jedoch in drei Jahren seit der Veröffentlichung der Angebotsunterlage.*' *Cf. also* MüKoAktG/Wackerbarth, 4. Aufl. 2017, WpÜG § 12, no. 36.

785 Wimmer 2017, p. 314, fn. 1223. The German legislature abolished the special regime for the prescription of prospectus liability claims in 2012, Assmann in Assmann/Schütze, HdB KapitalanlageR 2015, § 5 no. 110 and no. 200.

of Article 35a CRA Regulation under German law, which provided information for the analysis made in the previous sections.[786] Furthermore, the amount of case law on the liability of credit rating agencies and credit scoring agencies is considerable, especially compared to the other legal regimes investigated in this dissertation.

German private law takes a rather restrictive approach to credit rating agency liability. In the absence of a contractual relationship, investors have few possibilities for holding a credit rating agency liable under German law. They will only succeed in a claim for damages on German private law under exceptional circumstances. This situation might have changed with the introduction of Annex III CRA Regulation, as the Annex might have created statutory norms that aim to protect investors, so that investors can use these norms in a claim for damages based on § 823 (2) BGB. Issuers and investors, who concluded paid subscription contracts, have more opportunities to hold a credit rating agency liable under German law.

German law does not provide explicit guidance on the interpretation and application of Article 35a CRA Regulation. Therefore, the interpretation and application were made in accordance with the general principles of German private law. The German courts interpreted the scope of application of Article 35a CRA Regulation restrictively, so that the right of redress is only available to investors who relied on credit ratings attached to financial instruments. Furthermore, the research shows that German law leans towards a restrictive interpretation and application of Article 35a CRA Regulation in respect of causation; tools available to facilitate investors are generally not available in the situation of credit rating agency liability. But if an investor can prove reasonable reliance, it can be fully compensated under German law to the extent of the costs of the transaction of the financial instruments. German law does not entail an equally restrictive interpretation and application of other terms, such as 'gross negligence'. Furthermore, limitation clauses will hardly have effect under German law when an issuer or investor fulfilled the requirements of Article 35a (1) CRA Regulation. As the threshold for liability under Article 35a (1) CRA Regulation and the threshold for singling out the effect of a limitation clause boil down to the same minimum threshold, a contractual limitation clause will not have effect under German law when an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence.

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786 *E.g.* Heuser 2019, Deipenbrock 2018, Jansen, Kästle-Lamparter & Rademacher 2017, Wimmer 2017, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, Seibold 2016, Schantz 2015, Haar 2014, Halfmeier 2014, Kontogeorgou 2014, Von Rimon 2014, Schroeter 2014, Amort 2013, Dutta 2013, Gietzelt & Ungerer 2013, Rosset 2013, Wagner 2013, Wojcik 2013 and Arntz 2012. *Prior to the introduction of Art. 35a CRA Regulation e.g.* Berger & Stemper 2010, Wildmoser, Schiffer & Langoth 2009 and Rohe 2005.

5.7 ENGLISH LAW

5.7.1 National private law context

This national law report concentrates on the interpretation and application of Article 35a CRA Regulation under English law.[787] In contrast to the other legal systems investigated, English law is a common law system. The main feature of common law systems is that private law rules are developed generally through case law, and cannot be found in a general civil code. The roots of the English system of private law lie in the Middle Ages, with little influence from Roman law.[788] Initially, common law courts and courts of equity separately developed English private law.[789] Over the years, however, the distinction between these courts was abandoned and further changes to the court system were made – such as the change from the House of Lords to the Supreme Court, but courts and individual judges still form the core actors of the English common law system.

When solving a case, an English court does not have an English general civil code to take as a starting point; instead it starts from the facts of the case. The court compares the case at hand with prior court decisions, and reaches a conclusion on the basis of the similarities and dissimilarities.[790] This report makes an attempt to apply this style of reasoning as well. The absence of a national civil code does not mean that English courts are free to take any decision they consider apt. English law developed rules of legal precedent. Court decisions are, for instance, binding upon 'lower' courts. This means that decisions of the Supreme Court are binding upon the High Court and the Court of Appeal.[791] Although case law is of the utmost importance for English private law, case law is not the only source of English private law rules. Parts of English private law has indeed been codified in statutes over the years.[792]

787 This dissertation refers to the term 'English' law, but also refers to the UK legislature and to the Credit Rating Agencies (Civil Liability) Regulations 2013 as the UK Implementing Regulations. The United Kingdom involves the legal systems of England and Wales, Scotland and Northern Ireland. It was the legislature of the United Kingdom who implemented Art. 35a CRA Regulation in the UK Implementing Regulations, but this dissertation only looked at the interpretation and application of Art. 35a CRA Regulation from the perspective of the UK Implementing Regulations under the legal systems of England and Wales.

788 Cartwright 2016, pp. 8-9 and *cf.* Van Dam 2013, no. 501-1.

789 Cartwright 2016, p. 5.

790 *Cf.* Cartwright 2016, p. 20 and Van Dam 2013, no. 501-1.

791 Cartwright 2016, pp. 24-27.

792 *E.g.* the Defamation Act 2013 in respect of the tort of defamation, Occupiers' Liability Act 1957 on occupiers' liability and the Law Reform (Contributory Negligence) Act 1945 in respect of the defence of contributory negligence.

English courts approach statutory rules from an objective perspective and tend to interpret them in accordance with their literal meaning.[793]

English contract and tort law were developed separately by the courts, although they both form part of the English law of obligations.[794] Breaches of contract and torts entitle the aggrieved party to the same remedy of damages, which is the primary remedy under English law.[795] When the conduct of a party constitutes both a breach of contract and a tort, the aggrieved party can choose to bring a claim for damages based on breach of contract and/or on tort.[796] The structure of English tort law deserves some explanation from the outset. English tort law does not involve a general legal basis for non-contractual liability and, instead, consists of multiple torts applicable to specific situations. The system of multiple torts originates from medieval English civil procedure law, under which claimants could only bring claims for damages if they had a right of action, namely if they could serve a so-called writ.[797] Torts relate to all types of different situations, such as when the tortfeasor violated its duty of care towards another party (the tort of negligence), disseminated defamatory statements (tort of defamation), caused damage to someone's land (tort of nuisance) or intentionally misleads another party by making an incorrect statement (tort of deceit).

This report will mainly use concepts relating to the tort of negligence to construct the English interpretation and application of Article 35a CRA Regulation. The reason why this report concentrates on these concepts lies in the contents of the Credit Rating Agencies (Civil Liability) Regulations 2013 (hereinafter: UK Implementing Regulations). The UK legislature introduced the UK Implementing Regulations especially for the purpose of explaining the meaning of the terms of Article 35a CRA Regulation.[798] Where the UK Implementing Regulations do not provide a clear-cut definition of a term, they mostly refer the interpretation and application of the terms back to the tort of negligence. Examples of such references can be found under Article 6 (the term 'reasonable relied'), Article 8 (the term 'caused') and Article 14 (b) (on the calculation of damages). As the existence and scope of a duty of care forms the core element of the tort of negligence, this topic will be discussed in detail in section 5.7.2.3. From the outset, it is important to realise that English law

793 Cartwright 2016, p. 28 and Van Dam 2013, no. 501-4.

794 *Cf.* Cartwright 2016, pp. 51-52.

795 *See in respect of English contract law* Cartwright 2016, p. 274. Specific performance of contractual obligations will only be ordered when the primary remedy of damages is not suitable in a concrete situation, *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, 11.

796 As appeared from *Henderson v Merrett Syndicates Ltd (No. 1)* [1995] 2 A.C. 145, 193-194, a claimant may choose 'the remedy [*viz.* contractual or tortious] which is most advantageous to him.' Seibold 2016, p. 62.

797 Van Dam 2013, no. 502-1.

798 Regulations 2013 (2013 No. 1637), available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksi_20131637_en.pdf, last accessed at 31 August 2019.

shows reluctance towards the compensation of pure economic loss as a matter of principle and that the UK Implementing Regulations aim to diminish the differences between Article 35a and common law liability.[799]

As already stated on multiple occasions, upon the completion of this research on 3 September 2019, there was not yet certainty as regards the legal consequences of Brexit. Nevertheless, it was decided to include English law in this dissertation for two reasons. First, based on Article 3 (1) and Article 3 (2) (a) European Union (Withdrawal) Bill, the Regulations on credit rating agencies will form part of UK domestic law, so that Article 35a CRA Regulation and the UK Implementing Regulations[800] will continue to exist at least for some time after Brexit.[801] More specifically, Article 92 UK EU Exit Credit Rating Agencies Regulations of February 2019 confirms that Article 35a CRA Regulation will be transposed into English law.[802] Moreover, the impression that the UK may continue the civil liability regime for credit rating agencies was derived from the post-implementation review of the UK Implementing Regulations conducted by HM Treasury and the Financial Conduct Authority in April 2019.[803] The review recommended to keep the UK Implementing Regulations in their current form. It was concluded that the UK Implementing Regulations provide legal certainty to stakeholders involved and that credit rating agencies are not burdened by large amounts of claims.[804] Yet, even though the United Kingdom introduces a nationalised version of Article 35a CRA Regulation, Article 35a CRA Regulation and English law will not necessarily develop in the same direction after Brexit – for instance, because UK courts are no longer bound by decisions of the CJEU as from Brexit Day.[805] If, after that date, the CJEU rules on the interpretation and application of Article 35a CRA Regulation, English courts are not bound by such decisions. Furthermore, the second reason to continue to include English law in this legal comparison is that the English approach to Article 35a CRA Regulation differs from the other national laws investigated, and demonstrates how Member States

799 Explanatory Memorandum to the Credit Rating Agencies (Civil Liability) Regulations 2013, 2013 No. 1637, para 7.4. *Also* Risso 2015, pp. 715-716.

800 In full: The Credit Rating Agencies (Civil Liability) Regulations 2013 (2013 No. 1637), available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksi_20131637_en.pdf, last accessed at 31 August 2019.

801 The European Union (Withdrawal) Bill is available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf, last accessed at 31 August 2019.

802 In full: The Credit Rating Agencies (Amendment etc.) (EU Exit) Regulations 2019 (2019 No. 266), available at www.legislation.gov.uk/uksi/2019/266/pdfs/uksi_20190266_en.pdf, last accessed at 31 August 2019.

803 Post-implementation review of the Credit Rating Agencies (Civil Liability) Regulations 2013, 12 April 2019, available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksiod_20131637_en.pdf, last accessed at 31 August 2019.

804 Post-implementation review of the Credit Rating Agencies (Civil Liability) Regulations 2013, 12 April 2019, available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksiod_20131637_en.pdf, last accessed at 31 August 2019.

805 Art. 6 (1) (a) and Art. 6 (2) European Union (Withdrawal) Bill.

can use their discretion under Article 35a CRA Regulation to limit its scope of application. Therefore, the English interpretation and application of Article 35a CRA Regulation forms an interesting study object.

5.7.2 National rules on credit rating agency liability

5.7.2.1 Approach UK Implementing Regulations

The Explanatory Memorandum of the UK Implementing Regulations describes Article 35a CRA Regulation as an 'additional mode of claim', because credit rating agencies were already 'subject to civil liability' under tort law (the tort of negligent misstatement) and contract law.[806] Yet, contrary to what the Explanatory Memorandum suggests, it is not evident whether and, if so, to what extent credit rating agencies can be held liable under English law. No cases on credit rating agency liability have been decided under English law thus far[807] and the application of general concepts of contract law and, in particular, tort law in this specific type of situation is not problem-free. Depending on whether they entered into a contractual relationship with the credit rating agency, issuers and investors can choose to bring a claim for damages based on breach of contract and/or[808] on tort. As described, English tort law does not involve a general ground for non-contractual liability, but consists of multiple torts applicable to specific situations. When an issuer or an investor wishes to base its claim for damages on tort law, it may wonder whether to base that claim on the tort of deceit or the tort of negligence (the tort of negligent misstatement) for its pure economic loss or the tort of defamation for its reputational loss. The following subsections provide a brief overview of the possible grounds based on which issuers and investors can bring claims for damages against credit rating agencies under English law. Due to its importance for the interpretation and application of Article 35a CRA Regulation under the UK Implementing Regulations, most attention is paid to the tort of negligence.

806 Explanatory Memorandum to the Credit Rating Agencies (Civil Liability) Regulations 2013, 2013 No. 1637, para 7.4.

807 *Most recently confirmed by* Getzler & Whelan 2017, p. 16. To the knowledge of the author, there was no English case law on credit rating agency liability available upon the completion of this study.

808 As appeared from *Henderson v Merrett Syndicates Ltd (No. 1)* [1995] 2 A.C. 145, 193-194, a claimant may choose 'the remedy which is most advantageous to him.' Seibold 2016, p. 62.

5.7.2.2 In the presence of a contractual relationship – issuers & investors

The relationship can be qualified as contractual when the issuer and the credit rating agency have concluded a rating contract or when the investor has a paid a subscription with the credit rating agency. For issuers and investors to be able to base a claim on breach of contract under English law, the credit rating agency must have violated the express or implied terms of the contract.[809] Similar to other professional parties acting in their professional capacity, credit rating agencies must 'exercise the skill and care which is to be expected of a reasonably competent member of the profession' when assigning credit ratings.[810] Yet it is not easy to hold credit rating agencies liable for breach of contract, because, as stated by Seibold, issuers may have trouble proving that the credit rating agency failed to take reasonable skill and care.[811] Also, an issuer or investor will not be able to hold a credit rating agency liable (to the full extent of its losses) if the rating contract or subscription includes a valid clause that limits or excludes the duty owed by, or the liability of, a credit rating agency.[812]

5.7.2.3 In the absence of a contractual relationship

(a) Issuers

(i) – Tort of negligence

In the absence of a contractual relationship between an issuer and a credit rating agency, an issuer can attempt to hold a credit rating agency liable for an incorrect credit rating under the tort of negligence. The tort of negligence covers a wide range of situations in which the wrongdoer owed a duty of care to the aggrieved party, while the breach of that duty caused the aggrieved party to suffer loss that is not too remote and while the wrongdoer cannot successfully raise a defence. In disputes over credit rating agency liability, difficulties already arise at the first stage in which the claimant must establish that the defendant owed a duty of care towards it.

In the absence of a contractual relationship, one cannot treat the existence of a duty of care owed by a credit rating agency vis-à-vis issuers (and investors) as a given fact.[813] English private law approaches the compensation of pure economic loss caused by reliance on inaccurate statements with re-

809 *Cf. with regard to issuers* Seibold 2016, pp. 59-61, Edwards 2013, p. 190 and Ebenroth & Dillon 1992, pp. 789-790.

810 *Quotation of* Treitel 2015, no. 6-043. *Cf. with regard to issuers* Seibold 2016, p. 61, Edwards 2013, p. 190 and Ebenroth & Dillon 1992, pp. 789-790.

811 *Cf.* Seibold 2016, p. 61.

812 *Cf.* Edwards 2013, p. 190 and Ebenroth & Dillon 1992, p. 789.

813 For the analysis made in this section, particular use has been made of other studies on credit rating agency liability under English law: Getzler & Whelan 2017, Seibold 2016, Alexander 2015 and Ebenroth & Dillon 1992.

luctance. Traditionally, the English courts adopted a 'general exclusionary rule'[814] in respect of pure economic loss, in the sense that the defendant generally does not owe a duty to of care in respect of such loss.[815] There are a few exceptions to this general exclusionary rule in the field of negligent misstatements and the provision of services. In *Customs and Excise Commissioners v Barclays Bank plc*, Lord Mance described 'three broad approaches' to assess whether a claimant owes a duty of care to avoid pure economic loss: (1) to consider whether a voluntary assumption of responsibility has been made by the defendant; (2) to consider whether a duty is owed under the three stage test of *Caparo Industries Plc v Dickman*; and (3) to consider an application of the so-called 'incremental approach'.[816]

The distinction between the second and the third approach is, however, not as sharp as it may seem. The recent case of *Robinson v Chief Constable of West Yorkshire Police* clarified that one can actually not speak of a three stage *test*. In fact, Lord Reed JSC explained that *Caparo Industries Plc v Dickman* rejected the idea of a test, and instead adopts 'an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities'.[817] Having that said, when courts exercise judgement in deciding whether a party owes a duty of care in a novel type of case, the exercise of judgement involves perspectives of *Caparo Industries Plc v Dickman* that will be discussed hereafter in more detail.[818] As the perspectives of *Caparo Industries Plc v Dickman* hence continue to be of relevance in novel types of cases such as the duty of care owed by credit rating agencies, the remainder of this section and section 5.7.2.3. (b) (ii) will be based on these perspectives.

Prior to turning to the perspectives of *Caparo Industries Plc v Dickman*, this paragraph considers whether it can be said that a credit rating agency voluntarily assumed responsibility towards an issuer in respect of a credit rating. The concept of the voluntary assumption of responsibility was introduced in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*, in which the claimant relied on a negligent misstatement made by the defendant.[819] The defendants had provided a credit reference in respect of a third party upon the request of the claimant's bank. When the claimant subsequently relied on the incorrect credit reference and suffered loss, the claimant started proceedings against the defendant. In *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*, the House of

814 Lunney, Nolan & Oliphant 2017, p. 381 and Mullis & Oliphant 2011, p. 53.

815 *Spartan Steel and Alloys Ltd v Martin & Co (Contractor) Ltd* [1973] Q.B. 27, [1972] 3 W.L.R. 502. Mullis & Oliphant 2011, p. 53. *Cf.* Cartwright 2017, no. 6-04. *In the context of credit rating agencies* Miglionico 2019, no. 7.05 ff.

816 *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 A.C. 181, 189-190 and 213. *In the context of credit rating agencies,* Alexander 2015, pp. 4-5.

817 *Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] A.C., para 21.

818 *Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] A.C., para 27 and 29.

819 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465.

Lords held that the defendant owed a duty of care to the claimant. Lord Morris of Borth-y-Gest explained that a duty of care exists when a party, who possesses a special skill, uses that skill to assist another party who subsequently relies upon that skill.[820] A duty of care can also arise when a party takes it upon itself to provide information or advice, while it was placed in such a position that it knows or should have known that other parties could reasonably rely on its information or advice.[821] Furthermore, Lord Devlin considered that certain special relationships justify the existence of a duty to take care in word.[822] Such special relationships include relationships that are 'equivalent to contract', namely relationships in which the one party assumed responsibility towards the other and in which there would be an agreement but for the absence of consideration.[823]

Second, we turn to the question of whether English courts can conclude that a credit rating agency owed a duty of care to avoid economic loss caused by negligent misstatements, i.e. credit ratings, based on the three perspectives that were deemed relevant in the case of *Caparo Industries Plc v Dickman*.[824] The relevant perspectives to determined the existence of a duty of care are whether: (1) the loss is foreseeable; (2) the relationship between the parties is 'one of "proximity" or "neighbourhood"'; and (3) imposing a duty is 'fair, just and reasonable'.[825] In this concrete situation, Caparo Industries Plc. purchased shares in Fidelity Plc. while relying on 'inaccurate and misleading' reports on Fidelity made by the auditors.[826] Questions were raised regarding the scope of the duty of care owed by the auditors and, in particular, the question was raised whether the auditors owed a duty of care to the shareholders of Caparo. It was decided that the auditors neither owed a duty of care 'to members of the public at large who rely upon the accounts in deciding to buy shares in the company', i.e. potential investors,[827] nor to shareholders who decided to buy additional shares based upon the accounts.[828] Lord Bridge of Harwich explicitly distinguished the factual situation in *Caparo Industries Plc v Dickman* from the situation in which a valuer of property held a duty of care to house purchasers, such as in the case of *Smith v Eric S. Bush*.[829] He explained the main characteristics of these cases, which lead to the conclusion that a duty of care was owed:

820 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465, 502-503.
821 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465, 503.
822 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465, 528.
823 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465, 529. *E.g.* Cartwright 2017, no. 6-10 and no. 6-16 and Mullis & Oliphant 2011, p. 61.
824 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605.
825 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 617-618.
826 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 614.
827 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 623.
828 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 627.
829 *Smith v Eric S. Bush* [1990] 1 A.C. 831, 848.

> 'The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation.'[830]

In contrast, Lord Bridge of Harwich held that a duty of care will not be owed if a statement is 'put into more or less general circulation' and may be foreseeably relied on by strangers for a variety of purposes, because, if the law would state otherwise, the defendant would be subject to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' (the floodgates argument).[831] Hence, the extent to which the addressee of the advice or information can be determined ('proximity') plays a key role in determining the existence and the scope of the duty of care.

How do these general principles relate to situations in which an issuer claims to have suffered loss as a consequence of an incorrect credit rating? In the case of solicited credit ratings, the existence of a rating contract entails that issuers will not have trouble establishing that the credit rating agency owed them a duty of care under the tort of negligence as well.[832] In contrast, it is doubtful that English courts will accept that a credit rating agency made a voluntary assumption of responsibility towards an issuer as in the case of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* or owed a duty of care under the three perspectives of *Caparo Industries Plc v Dickman* vis-à-vis issuers in the absence of a rating contract.[833] Up until the completion of this study, there was no English case law available on this concrete matter.

The fact pattern of claims for credit rating agency liability brought by issuers differs from the fact patterns in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* and *Caparo Industries Plc v Dickman*. In the latter two cases, the claimant relied upon a statement providing information on a third party made by the defendant and suffered loss as a result. In the situation of an issuer claim in relation to an unsolicited credit rating, the issuer takes the position of the third party in the cases of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* and *Caparo Industries Plc v Dickman*. Here, it is the subject of the statement, namely the issuer, who claims the party who made the statement, namely the credit rating agency, owed a duty of care towards it. The difference in fact patterns does not form an obstacle to construct a voluntary assumption of responsibility towards an issuer as in the case of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* or a duty of care in accordance with *Caparo Industries*

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830 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 620-621.

831 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 621. *Referring to the US case Ultramares v Touche* (1931) 174 N.E. 441, 444.

832 *Cf.* Ebenroth & Dillon 1992, p. 790.

833 *See* Ebenroth & Dillon 1992, p. 790 and Seibold 2016, pp. 76 ff.

Plc v Dickman vis-à-vis issuers. In *Spring v Guardian Assurance Plc*, the House of Lords applied the cases to construct a duty of care owed by an employer to its former employee in the provision of a job reference as well.[834]

The situation in which an issuer claims damages under the tort of negligence from a credit rating agency for the inaccurate assignment of an unsolicited credit rating bears rather strong resemblance to situations in which an inadequate reference provided by a referee caused loss to the subject of the reference. Also in this area, there are only a few decisions of English courts available.[835] The case of *Spring v Guardian Assurance Plc* is one of these cases. The House of Lords held that an employer owed a duty to take reasonable care to one of its former company representatives (Spring) in the preparation of a job reference to a potentially future employer of Spring.[836] Lord Goff based the existence of the duty of care on the principles derived from *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd*.[837] He argued that the former employer possessed special knowledge of the employee and emphasised the importance of job references in daily life. Moreover, in his opinion, it is obvious that an employee relies upon the employer exercising reasonable skill and care in the preparation of the reference.[838] The duty of care was even described as an 'implied term' of the former employment contract.[839] The majority of the House of Lords held that the employer owed a duty of care under the three stage test of *Caparo Industries Plc v Dickman*.[840] Lord Slynn of Hardly explained that loss resulting from a careless reference is clearly foreseeable and that the proximate relationship is obvious in this context. Indeed, the relationship between the employer and its former employee was sufficiently proximate due to the existence of a former employment relationship between them. Furthermore, Lord Slynn of Hardly could find no reasons why it would not be fair, just and reasonable to impose a duty of care upon the employer.[841]

Furthermore, in *Gatt v Barclays Bank Plc*, one can find an indication that English courts might not have so many objections against deciding that the provider of a credit reference owes a duty of care to the subject of the reference. In this case, Judge Moloney QC remarked along the sidelines that he would have no great difficulty in holding that a bank, as the provider of a credit reference, owed a duty of care to a customer, the subject of the credit reference, when providing a credit reference to a third party. He explained

834 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, in particular, 319.
835 *Cf.* Cartwright 2017, no. 6-40.
836 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296. *Also* Cartwright 2017, no. 6-40. *As repeated in Hincks v Sense Network Ltd* [2018] EWHC 533 (QB), para 71.
837 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 316 and 319.
838 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 319.
839 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 320.
840 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 325 and 335.
841 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 335.

his position by emphasising the importance of credit rating 'in the modern world' and by pointing to the analogies between job references and credit references. In this case, a contractual relationship between the bank and the customer existed as well, so that a contractual duty also existed between the parties.[842]

The references to the cases of *Spring v Guardian Assurance Plc* and *Gatt v Barclays Bank Plc* begin to explain why it is doubtful that English courts will accept that a credit rating agency made a voluntary assumption of responsibility towards an issuer as in the case of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*, or owed a duty of care in accordance with *Caparo Industries Plc v Dickman* vis-à-vis issuers in the absence of a rating contract, though this has not yet been substantiated. Overall, it seems that the lack of relationship between the issuer and the credit rating agency blocks these possibilities, in contrast to the case of *Spring v Guardian Assurance Plc*.

First, it is doubtful whether English courts will accept that a credit rating agency made a voluntary assumption of responsibility towards an issuer, as in the case of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd*. An argument in favour of the existence of a duty of care is that a credit rating agency employs a special skill. It placed itself in a position in which it could expect that others would reasonably rely on the information provided. However, the choice to conduct credit rating activities might not be sufficient to establish that a credit rating agency assumed responsibility towards the issuer. Support for the rejection of this argument can be found in the Court of Appeal case *Smeaton v Equifax Plc* on the liability of a credit reference agency.[843] The Court of Appeal held that credit reference agency Equifax did not owe a duty of care towards a consumer whose credit file with Equifax was incorrect. Lord Justice Tomlinson concluded that a credit reference agency does not assume responsibility 'to every member of the public simply by choosing to operate this type of business'.[844] It must, however, be admitted that Equifax maintained credit files on virtually all inhabitants of the United Kingdom, whereas credit rating agencies assign unsolicited credit ratings to a more limited amount of issuers.[845] The main reason for the doubt as to the existence of a voluntary assumption of responsibility is that, in the absence of any form of communication between a credit rating agency and an issuer, the relationship between the issuer and the investor cannot be called 'special', let alone 'equivalent to contract'. In contrast to the case of *Spring v Guardian Assurance Plc*, one cannot say that the duty of care is in fact an implied contractual term, because no

842 *Cf. Gatt v Barclays Bank Plc* [2013] EWHC 2 (QB), para 35. *For a similar decision Boyo v Lloyds Bank Plc* [2019] EWHC 2279 (QB), p. 16.

843 *Smeaton v Equifax Plc* [2013] EWCA Civ 108.

844 *Cf. in case of credit reference agencies Smeaton v Equifax Plc* [2013] EWCA Civ 108, para 74. Contrary to Judge Thornton QC in the decision of the High Court of Justice Queen's Bench Division.

845 *Smeaton v Equifax Plc* [2013] EWCA Civ 108, para 1.

relationship exists between the issuer and the credit rating agency at all. When a credit rating agency and an issuer communicate about the assignment of the unsolicited credit rating, it might be possible to construct such a special relationship. Hence, although there are indications that a credit rating agency voluntarily assumed responsibility towards the issuer, it is difficult to fit this situation under the criteria derived from *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd* in the complete absence of any communication between the parties.

Second, English courts may also be reluctant to accept the existence of a duty of care when considering the three perspectives that were of relevance in *Caparo Industries Plc v Dickman*. When approaching the case of credit rating agencies from the first and the third perspective, one could conclude credit rating agencies owe a duty of care in relation to solicited credit ratings. First, it is foreseeable that an issuer could suffer loss if a credit rating agency fails to exercise reasonable care and skill in the assignment of a credit rating. The information function of credit ratings to market participants renders it logical that an issuer could suffer loss if a credit rating agency negligently publishes a credit rating that mirrors an incorrect level of creditworthiness. Second, imposing a duty of care upon a credit rating agency vis-à-vis an issuer is fair, just and reasonable. In the case of unsolicited credit ratings, there are no floodgates arguments against imposing a duty of care upon a credit rating agency, because a credit rating agency will not be exposed to an indeterminate group of claimants, just to those issuers and the products it decided to attach a credit rating to itself.[846] From the perspective of proximity, however, it could be difficult to establish that a credit rating agency owes a duty of care to the issuer in the absence of any form of relationship between the credit rating agency and the issuer.[847] In particular situations, sufficient proximity might be present when a credit rating agency and an issuer communicate about the assignment of the unsolicited credit rating. Hence, although it is not a given fact that issuers who received an unsolicited credit rating can establish that a credit rating agency owed a duty of care towards them under the English tort of negligence, the presence of any communication on the assignment of the credit rating might provide a window of opportunity to overcome the hurdle of proximity under English law.

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846 *See, for relevant factors to determine whether imposing a duty of care would be fair, just and reasonable, Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 A.C. 181, 219-220. From this perspective, the case on credit reference liability *Smeaton v Equifax Plc* [2013] EWCA Civ 108 is somewhat different, as Lord Justice Tomlinson concluded that imposing a duty of care would not be fair, just and reasonable because that could lead to 'indeterminate liability to an indeterminate class' (para 75).

847 Ebenroth & Dillon 1992, p. 801. *See also* Seibold 2016, p. 78. Although both sources state that 'weak proximity' can be overlooked if the damage is very foreseeable and it is 'inherently fair and just' to impose a duty.

(ii) – Tort of defamation

As a credit rating concerns the reputation of the issuer in terms of its creditworthiness, an issuer may wonder whether it can base a claim on the tort of defamation and, more specifically, whether it can bring an action for libel.[848] The tort of defamation provides a ground to compensate reputational loss caused by defamatory statements. Yet, as pointed out by Duncan & Neill, the law of defamation must seek the right balance between defending the one party's reputation and the other party's right to free speech.[849] Prior to asking whether a credit rating agency can invoke a defence that precludes liability under the tort of defamation, it must be questioned whether a credit rating qualifies as a defamatory statement at all.

To qualify as a 'defamatory' statement, a credit rating must have seriously harmed the issuer's reputation[850] in the eyes of 'right-thinking members of society generally' or 'reasonable people generally'.[851] Under Article 1 (2) of the Defamation Act 2013, the requirement of serious harm is elaborated upon in respect of commercial entities that trade for profit. Translated to the context of credit rating agency liability, English courts will only accept that an issuer has suffered serious harm if the credit rating has caused serious financial loss to the issuer. Furthermore, one can question whether a credit rating qualifies as a defamatory statement in the eyes of society. Whereas an incorrect and insulting newspaper article is clearly harmful to someone's reputation in the eyes of society, the defamatory character of an incorrect commercial opinion on creditworthiness is less self-evident. Opinions in academic literature differ on whether a credit rating can qualify as a defamatory statement in the eyes of society.

On the one hand, Von Schweinitz took the point of view that a credit rating, as a prognosis for future default, does not generally involve a statement that would seriously harm the issuer's reputation in the eyes of society.[852] For this reason, he concluded that the tort of defamation is generally not available to issuers.[853] On the other hand, Ebenroth & Dillon were of the completely opposite opinion that, at first sight, the assignment of an inaccurate credit rating presents a case of defamation.[854] Support for the latter approach

848 Duncan & Neill explained that within the tort of defamation a distinction could be made between 'an action of libel' and 'an action for slander'. Although oversimplified, libel relates to defamatory statements made by written word or another 'permanent form' and slander relates to defamatory statements made by spoken word. Duncan & Neill 2015, no. 3.01. *Also* Clerk & Lindsell 2018, no. 22-08.

849 Duncan & Neill 2015, no. 1.01. *Also* Clerk & Lindsell 2018, no. 22-01.

850 Under Art. 1 (1) Defamation Act 2013. Under Art. 15 Defamation Act 2013, statements can involve 'words, pictures, visual images, gestures or any other method of signifying meaning'.

851 *Skuse v Granada Television Ltd* [1996] E.M.L.R. 278, 286. Duncan & Neill 2015, no. 4.01.

852 Von Schweinitz 2007, p. 123. *Cf. also* Seibold 2016, p. 75 (fn. 438).

853 Von Schweinitz 2007, p. 124.

854 Ebenroth & Dillon 1992, p. 810.

can be derived from Duncan & Neill, where they explain the meaning of the term 'financial loss' under Article 1 (2) Defamation Act 2013. As examples of financial loss, they refer to the 'loss of customers and suppliers' and to issues in 'obtaining credit' or 'attracting investment'.[855] These are typically types of losses that issuers could suffer as a result of an inaccurate credit rating, which would be an indication that a claim based on defamation is possible as a matter of principle. Support for this approach can also be found in the High Court of Justice decision in the case of *Gatt v Barclays Bank Plc*.[856] In this case, a bank had provided a third party with an inaccurate credit reference on one of its customers. HHJ Moloney QC held that this credit reference qualified as defamatory, because it incorrectly suggested that the customer was financially irresponsible.[857] This suggests that statements on financial matters could qualify as defamatory as a matter of principle. In the absence of case law confirming this matter, however, it is not certain whether English courts would qualify inaccurate credit ratings as defamatory statements. Moreover, one must realise that a credit rating agency can try to invoke a defence of honest opinion under Article 3 Defamation Act 2013.[858]

(b) Investors

(i) – Tort of deceit

In the absence of a contractual relationship with a credit rating agency, investors can start proceedings against credit rating agencies on the basis of the tort of deceit, though such claims will only be successful in extra-ordinary situations of fraud on the side of the credit rating agency. The tort of deceit is meant for situations in which a wrongdoer intentionally or recklessly issues a false or misleading statement with the intention that another party relies on that false or misleading statement. If the other party suffers loss as a consequence of relying on the false or misleading statement, it can claim damages under the tort of deceit.[859] The high threshold of 'intention' or 'recklessness' entails that investors will only be able to use this tort in exceptional situations. Such an exceptional situation could occur when a credit rating agency fraudulently attached an inflated credit rating to an issuer or its financial instruments.

(ii) – Tort of negligence

Section 5.7.2.3 (a) (ii) on the existence of a duty of care to take reasonable care and skill in the assignment of the credit rating owed by a credit rating agency

855 Duncan & Neill 2015, no. 4.21.

856 *Gatt v Barclays Bank Plc* [2013] EWHC 2 (QB).

857 *Gatt v Barclays Bank Plc* [2013] EWHC 2 (QB), para 37.

858 *Prior to the introduction of the Defamation Act 2013* Ebenroth & Dillon 1992, pp. 815-816. *For a successful defence based on qualified privilege of a bank for a report to a credit reference agency Boyo v Lloyds Bank Plc* [2019] EWHC 2279 (QB), p. 14.

859 *E.g.* Cartwright 2017, no. 5-05 and Winfield & Jolowicz 2014, no. 12-002.

vis-à-vis an investor under the tort of negligence has explained the general principles relating to the duty of care in cases involving inaccurate statements that caused pure economic loss. The restrictive approach under English law towards the compensation of pure economic loss becomes visible once again when assessing whether credit rating agencies voluntarily assumed responsibility or owed a duty of care towards investors in situations in which investors do not have a paid subscription with a credit rating agency. This situation mirrors the fact patterns in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd*. and *Caparo Industries Plc v Dickman* in the sense that one party makes a negligent statement on which another party places reliance and suffers loss as a consequence. The duty of care towards investors would involve the duty to ensure reasonable care and skill in the assignment of the credit rating so that the investor is provided with accurate information. The importance of the scope of the duty of care will be discussed in more detail in section 5.7.3.3 (a) in the context of the calculation of damages.[860]

First, it is doubtful that English courts accept that a credit rating agency made a voluntary assumption of responsibility towards an investor, as in the case of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd*. An argument in favour of the existence of a duty of care is that a credit rating agency employs a special skill and placed itself in a position in which it could expect that investors would rely on the information provided. The reliance on credit ratings by investors is indeed one of most important uses of credit ratings. The main reason for the doubt as to the existence of a voluntary assumption of responsibility is that there is no relationship between a credit rating agency and an investor, let alone a relationship that is equivalent to contract or a relationship that would be contractual but for the absence of consideration. Hence, although a credit rating agency employs a special skill on which investors may place reliance, it is difficult to fit this situation under the criteria derived from *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd* due to the generally complete absence of a relationship between credit rating agencies and investors.[861]

Second, if at all, it is only in exceptional situations that English courts will accept that credit rating agencies owe a duty of care vis-à-vis investors based on an analogue application of *Caparo Industries Plc v Dickman*. From the perspective of foreseeability of losses, it would be justified to conclude that a credit rating agency owes a duty of care vis-à-vis investors. It is common knowledge, and credit rating agencies must or should be well aware, that investors base investment decisions on credit ratings. It is, therefore, logical that investors may suffer loss if a credit rating agency does not exercise reasonable care and

860 *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191.

861 *Contra* Miglionico, no. 7.54, who put most emphasis on the arguments in favour of the application of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd* to the context of credit rating agencies.

skill in the assignment of the credit rating and negligently assign an inaccurate credit rating. This reasoning especially applies in the rating of structured finance products, because credit rating agencies can provide advice to the issuer on the composition of the transaction so that the structured finance products can be traded on the financial markets with a certain credit rating.[862] However, even though the loss is foreseeable, it is still difficult to establish that credit rating agencies owe a duty of care towards investors because of a possible lack of sufficient proximity and because imposing a duty of care may not be considered fair, just and reasonable by English courts.[863]

Getzler and Whelan expected that the existence and scope of the duty of care depend on the way in which an English court approaches the purpose of the credit rating and on whether English courts conclude that credit ratings aim to protect a claimant from certain types of loss.[864] The importance of the purpose of a statement and the task undertaken by the provider of the statement can be derived from the approach of the English courts in negligent misstatement cases.[865] In *Caparo Industries Plc v Dickman*, Lord Bridge of Harwich held that a party does not owe a duty of care for a statement that was 'put into more or less general circulation' and that could be foreseeably relied on by strangers for a variety of different purposes. He feared that accepting the existence of a duty of care in such situations would subject the defendant to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' (the floodgates argument).[866] In respect of auditing reports, Lord Oliver of Aylmerton remarked that such reports do not aim to assist 'those who might be minded to profit from dealings in the company's shares'.[867] He cannot find a reason why the statutory duties of an auditor extend to the protection of the interests of investors in the financial markets.[868] As stated by Getzler and Whelan, the reports rather aimed to provide companies and shareholders with information to exercise their company and shareholder rights.[869] Hence, English courts do not tend to accept a duty of care in respect of statements that are put in general circulation and tend to closely scrutinise the purpose of the particular statement.

If a statement serves a particular purpose and is known to be relied upon by a particular party, English courts can accept the existence of a duty of care vis-à-vis that particular party. In *Caparo Industries Plc v Dickman*, Lord Oliver

862 Alexander 2015, pp. 9-10.
863 *Cf.* Getzler & Whelan 2017, p. 21.
864 Getzler & Whelan 2017, p. 21. *For the importance of the task resting upon a referee,* Cartwright 2017, no. 6-40.
865 *See also for a description of the case law* Getzler & Whelan 2017, pp. 17-21.
866 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 621. Referring to *Ultramares v Touche* (1931) 174 N.E. 441, 444.
867 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 643.
868 *See Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 649-650.
869 Getzler & Whelan 2017, p. 16.

of Aylmerton explicitly stated that his decision on the absence of a duty of care did not concern cases in which accountants audited a company and issued reports for the specific purpose of submission to a potential investor.[870] This approach can also be derived from other professional liability cases. In *Smith v Bush*, a valuer who carried out a valuation of a house at the request of a prospective mortgagee was held to owe a duty of care to a prospective mortgagor where the valuer knew that the prospective mortgagor would base its decision to purchase the house in reliance on the valuation alone.[871] Furthermore, in the Court of Appeal decision in *Law Society v KPMG Peat Marwick*, the auditors who made the annual reports of a law firm at the request of the firm owed a duty of care towards the Law Society, as a third party, because the auditors were told that the reports were meant for the Law Society to scrutinise the law firm.[872] English courts interpret the purpose of a statement objectively, so that a court needs to consider whether 'a reasonable person in the position of the claimant' could have expected that the purpose 'for which the statement was made or communicated included protecting him from' the type of losses suffered.[873]

So, then, would English courts consider the purpose of a credit rating to justify the existence of a duty of care towards investors? The purpose of credit ratings differs from the purpose of the auditor reports in one important respect. Whereas reports of auditors are generally meant to inform the company and its shareholders to exercise their rights 'in their respective capacities',[874] the purpose of credit ratings is outward-looking.[875] Both the information and regulatory function of credit ratings mean that they are meant to be used by third parties. Credit ratings provide an informed opinion on relative creditworthiness to investors, potential investors and regulators, so the reason of their existence is that they will be relied upon by third parties. Yet, one can wonder whether a credit rating actually aims to protect an investor from credit risk. A credit rating is an informed opinion, but not a guarantee against defaults. But, notwithstanding the outward-looking purpose of credit ratings, English courts may not be prepared to hold that a credit rating agency owes a duty of care because that could expose credit rating agencies to liability claims coming from an indeterminate group for indeterminate amounts.[876] In conclusion, it is expected that English courts will not easily accept that a

870 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 650.
871 *Smith v Eric S. Bush* [1990] 1 A.C. 831. *See also* Mullis & Oliphant 2011, p. 59 and Ebenroth & Dillon 1992, pp. 792-793.
872 *Law Society v KPMG Peat Marwick* [2000] 1 W.L.R. 1921. Getzler & Whelan 2017, pp. 18-19.
873 *MAN Nutzfahrzeuge AG v Freightlinger Ltd* [2007] EWCA Civ 910, para 36. *See also* Getzler & Whelan 2017, p. 20. *Also Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 A.C. 181, 199.
874 Getzler & Whelan 2017, p. 16.
875 Von Schweinitz 2007, pp. 120-121 and 140. *See also* Siebold 2016, p. 102.
876 Ebenroth & Dillon 1992, p. 800.

credit rating agency owes a duty of care towards investors to take reasonable care and skill in the preparation of the credit rating.[877] Having that said, in specific situations, the imposition of a duty of care can be justified. The clearest example is when a credit rating is assigned on a specific request while a credit rating agency is aware that the credit rating is meant for potential investors to decide on a specific investment decision.[878]

5.7.3 Article 35a (1)

5.7.3.1 'Intentionally' or 'with gross negligence'

Article 3 UK Implementing Regulations defines 'intention' in such way that the senior management of the credit rating agency must have deliberately committed the infringements. In other words, the senior management must have intended to commit an infringement as a consequence of its conduct.[879]

Article 4 UK Implementing Regulations defines 'gross negligence' as 'reckless' as to whether the infringement occurs. The senior management acts 'recklessly' if it acts 'without caring whether an infringement occurs'.

Whereas most provisions of the UK Implementing Regulations refer the interpretation of Article 35a CRA Regulation back to the tort of negligence, Article 4 forms an exception. As stated by Hoggard, the requirement and definition of 'recklessness' is known from the tort of deceit.[880] Under the tort of deceit, someone who made a false statement can be held liable if the statement was made intentionally or recklessly and was made to be acted upon

877 *See* Seibold 2016, pp. 102-103. *Cf.* Alexander 2015, p. 11. *Contra* Miglionico 2019, no. 7.54 and no. 7.64.

878 *Cf.* Getzler & Whelan 2017, p. 21 and Alexander 2015, p. 11. *Cf. also* Miglionico 2019, no. 7.76.

879 *Cf. on the term 'intention' in general* Winfield & Jolowicz 2014, no. 3-002 and 3-003. *Cf.* Charlesworth & Percy 2018, no. 1-03. *In detail with regard to credit rating agencies* Hoggard 2016, pp. 370-373.

880 Hoggard 2016, pp. 367-368. See, on the tort of deceit, section 5.7.2.3 (b) (i). Baumgartner raised an interesting similarity between the UK Implementing Regulations and US law. He stated that the same threshold for civil liability was introduced under Article 15 U.S. Code 78u–4: 'In the case of an action for money damages brought against a credit rating agency or a controlling person under this chapter, it shall be sufficient, for purposes of pleading any required state of mind in relation to such action, that the complaint state with particularity facts giving rise to a strong inference that the credit rating agency knowingly or recklessly failed – (i) to conduct a reasonable investigation of the rated security with respect to the factual elements relied upon by its own methodology for evaluating credit risk; or (ii) to obtain reasonable verification of such factual elements (which verification may be based on a sampling technique that does not amount to an audit) from other sources that the credit rating agency considered to be competent and that were independent of the issuer and underwriter.' Baumgartner 2015, p. 514.

by another party.[881] In *Derry v Peek*, the term 'reckless' was explained as acting without 'care whether [a statement] is true or false'.[882] The term 'reckless' hence serves to describe the mental state in which someone 'turned his mind to the consequences of his act' but did not let these consequences stop him.[883]

By having adopted this definition, the UK Implementing Regulations have introduced a high threshold for claimants to overcome. Being reckless as to the consequences of certain conduct strongly resembles having an intention in respect of the consequences of certain conduct. In *Three Rivers DC v Bank of England (No 3)*, Lord Steyn said that 'reckless indifference to consequences is as blameworthy as deliberately seeking such consequences'.[884] Moreover, the wording of Article 4 UK Implementing Regulations indicates that recklessness must be construed subjectively instead of objectively. The senior management should have been careless as to whether an infringement occurred, which differs from the situation in which the senior management 'had failed to give any thought to the possibility of an objectively obvious risk'.[885] Article 4 UK Implementing Regulations, hence, requires indifference and not mere inadvertence. 'Inadvertence' covers situations in which the person responsible for the damage has never even thought about the potential risks of his act.[886]

5.7.3.2 'Impact' and 'caused to', including claimant-specific requirements

As stated in section 5.3.1.3, the terms 'impact', 'caused to' and the claimant-specific requirements fall under the broad concept of causation, and are therefore discussed all together. The UK Implementing Regulations, however, address these terms separately.

In respect of the term 'impact', Article 5 UK Implementing Regulations states that an infringement has an impact on a credit rating if, due to the infringement, issuers or financial products ended up in a different rating category. The English approach codifies the common sense approach to the term 'impact', as already mentioned in section 5.3.1.3 (a).

In respect of the term 'caused to', Article 8 UK Implementing Regulations states that 'the test of causation in negligence' applies to determine whether a causal relationship exists between the infringement and the loss. In *Wallace v Kam*, the High Court of Australia summarised the common law approach to causation in the tort of negligence: 'The common law of negligence requires determination of causation for the purpose of attributing legal responsibility.

881 Winfield & Jolowicz 2014, no. 12-002.
882 *Derry v Peek* (1889) 14 App. Cas. 337, 350. *Also* Cartwright 2017, no. 5-14-5-15.
883 Charlesworth & Percy 2018, no. 1-05.
884 *Three Rivers DC v Bank of England (No 3)* [2003] 2 A.C. 1, 192 and Clerk & Lindsell 2018, no. 1-61.
885 *Cf.* Clerk & Lindsell 2018, no. 1-61.
886 Charlesworth & Percy 2018, no. 1-05.

Such a determination inevitably involves two questions: a question of historical fact as to how particular harm occurred; and a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person.'[887] The English law of negligence divides the test for causation in an assessment of causation in fact and causation in law. The burden of proof in respect of factual causation rests upon the claimant (an issuer or investor). When the claimant has established causation, English courts can use the concepts of legal causation and remoteness as correction mechanisms.

(a) Causation in fact

The assessment of causation in fact is formed by the but for test: 'would the [issuer or investor] not have suffered the harm, but for the [credit rating agency's] negligence'?[888] Issuers and investors have to prove on a balance of probabilities ('more likely than not')[889] that they would not have suffered the loss had the infringement not been committed and had the credit rating not been affected.

Issuers need to prove that they would not have suffered (financial and/or reputational) loss but for the affected credit rating. To that end, they must prove that they would have been better off without the affected credit rating. If a rating trigger was included in an investment contract, issuers can prove factual causation more easily. It will however be more difficult to prove factual causation if the issuer would have suffered the loss anyway; for instance, due to a general decline in the financial markets. That said, English courts can apply the but for test more flexibly if it would cause unfair results in a specific situation. Otherwise, in situations where multiple causes independently contributed to the loss (overdetermination), none of the causes would satisfy the but for test.[890] For instance, in the hypothetical scenario that an issuer is able to prove that two incorrect credit ratings issued by different credit rating agencies independently caused an increase in funding costs, a strict application of the but for test would lead to the conclusion that none of the credit ratings actually caused the loss because the loss would have occurred anyway due to the other incorrect credit rating. One would therefore never be able to conclude that the loss would not have been caused, but for one of the incorrect

887 *Wallace v Kam* [2013] HCA 19, 250 CLR 375, 381 (para 11).

888 *Cf. e.g.* Clerk & Lindsell 2018, no. 2-09, Mullis & Oliphant 2011, p. 121 and Wanambwa 2014. *See for an application of the but for test e.g. Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428, 438-439.

889 *E.g.* Clerk & Lindsell 2018, no. 2-07 and Lunney, Nolan & Oliphant 2017, p. 224.

890 *See e.g.* Green 2015, p. 9.

credit ratings. As that would lead to unfair results, causation will be accepted in these situations.[891]

Investors need to prove on a balance of probabilities that they (reasonably) relied on the credit rating at the moment of making the investment decision and they would not have invested at all or would have made an alternative investment decision had the credit rating not been affected.[892] Both elements are difficult to prove, as there may be various causes that contributed to the investment decision (e.g. other available information and advice) and to the loss (e.g. a general decline in the financial markets). As will be described under (c), English courts are not likely to mitigate the burden of proof or to employ other methods to overcome the evidential problems of investors. Moreover, as will be discussed first under (b), Article 6 and 7 UK Implementing Regulations interpret 'reasonable reliance' in such manner that the threshold for the civil liability of credit rating agencies is increased further.

(b) 'Reasonable' reliance

Article 6 and 7 UK Implementing Regulations define when an investor reasonably relied on a credit rating in accordance with Article 5a CRA Regulation or otherwise with due care. Pursuant to Article 6, the test for whether the reliance of an investor was reasonable is the same as for whether it is reasonable for a person to rely on a statement for the purposes of determining whether the statement gives rise to a duty of care in negligence. In the case of professional investors, this test shall be combined with the requirement under Article 5a CRA Regulation (see the general remarks on causation, section 5.3.1.3). Alternatively, investors must have reasonably relied with due care. Article 7 UK Implementing Regulations states that an investor has acted otherwise with due care if it took the care that a reasonably prudent investor would have exercised in the same circumstances – which forms an objective approach, depending on the circumstances of the case.

By equating the test for reasonable reliance with the test for whether a statement gives rise to a duty of care under the tort of negligence, the UK Implementing Regulations in fact introduce the requirement of the existence of a duty of care under the tort of negligence in the application of Article 35a

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891 It is important to distinguish cases of multiple causation from cases in which a causal connection was not proven at all. In *Wilsher v Essex Area Health Authority* [1988] AC 1074, a premature baby developed a medical condition that could have been caused by the negligence of a junior doctor *or* by naturally arisen conditions from which the baby suffered. Green described this case as a case of 'indeterminate cause', in which no liability could be based on the but for test. In extreme situations, particularly in medical cases, a more flexible approach towards causation has been adopted based on public policy reasons. Green 2015, pp. 33-34. In the event of credit rating agency liability, however, such public policy reasons do not exist.

892 *Cf. for other examples in professional negligence cases* Kramer 2017a, no. 13-12 and Wanambwa 2014.

CRA Regulation. In order to assess whether the reliance of the investor was reasonable, it must hence be investigated whether the credit rating agency voluntarily assumed responsibility towards the investor as in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*[893] or whether the credit rating agency owed a duty towards the investor using the three perspectives employed in *Caparo Industries Plc v Dickman*.[894] But, as discussed in section 5.7.2.3 (b) (ii), in the absence of any special relationship, an investor faces a challenging task to establish that the credit rating agency owed a duty of care towards him, let alone that the credit rating agency voluntarily assumed responsibility. This interpretation of reasonable reliance thus causes the threshold for liability under Article 35a CRA Regulation to be very high in situations where English law applies.

As a final remark, the English interpretations of gross negligence and reasonable reliance lead to a combination of elements of two different torts (deceit and negligence, respectively) in the interpretation and application of Article 35a CRA Regulation under English law – although one must realise that the UK Implementing Regulations do not explicitly refer back to the tort of deceit.[895] The tort of deceit requires at least recklessness on the side of the defendant (the English interpretation of 'gross negligence'), but, although the claimant has to be induced by the statement, the tort of deceit does not require the claimant to have *reasonably* relied on the statement.[896] For liability under the tort of negligence, recklessness on the side of the defendant is not required, but reasonable reliance is required through the assessment of the voluntary assumption of responsibility and the through application of the perspectivesof *Caparo Industries Plc v Dickman* (blended in through the English interpretation and application of reasonable reliance). The interpretation and application under the UK Implementing Regulations hence leads to a situation in which a credit rating agency is required to have committed the infringement recklessly, while the claimant also needs to have reasonably relied on the credit rating for purposes of establishing a duty of care under English law.[897] As

893 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465.

894 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605.

895 *The idea of the combination of the requirements of these torts is derived from* Hoggard 2016. Hoggard criticised the combination of the requirements of intention or gross negligence and reasonable reliance in general: 'Taken on its own terms, the requirement [of reasonable reliance] is not without possible justification: one suspects that the requirement of reasonable reliance is partly to ensure that investors are not at liberty to make risky investments effectively underwritten by the CRAs. That being said, the requirement of reasonable reliance does seem out of place in an article concerned with intentional or grossly negligent infringement. However, there exists no such requirement in tortious deceit. All that is required in this respect is that the claimant relied on the statement, not that the reliance was in any way reasonable.'

896 *Cf.* Winfield & Jolowicz 2014, no. 12-015 and 12-016 (who do not mention the requirement of *reasonable* reliance in the context of the tort of deceit). *Cf. also* Hoggard 2016, p. 373.

897 *Cf.* Hoggard 2016, p. 373.

a consequence, as already stated above, the threshold for liability under Article 35a CRA Regulation is very high in situations in which English law applies, even compared to the requirements of the torts of deceit and negligence under common law.

(c) Possibilities to deal with causal uncertainty concerning reliance[898]

(i) – No relaxation burden of proof but for test

To start with, English courts will not relax the but for test in cases concerning credit rating agency liability. By 'relaxation of the but for test', I understand situations in which the claimant cannot satisfy the but for test, but courts accept that the but for test has been satisfied anyway. English courts can do so for reasons of public policy, but they will only do so in the most exceptional situations.

Such an exceptional situation occurred in the medical negligence case *Chester v Afshar*. In this case, the claimant (a patient) suffered from a serious neurological disease after a 'small but unavoidable risk of surgery' had occurred.[899] The doctor had performed the surgery properly, but had not warned the patient of this risk prior to the surgery. This omission constituted a breach of his duty of care towards the patient. The question arose whether the patient was entitled to damages, even though she could not prove that her decision to undergo the surgery would have been different had she been warned.[900] Lord Steyn held that this situation justified 'a narrow and modest departure from traditional causation principles'.[901] Lord Hope of Craighead explained in this regard: 'To leave the patient who would find the decision difficult without a remedy, as the normal approach to causation would indicate, would render the duty useless in the cases where it may be needed most. This would discriminate against those who cannot honestly say that they would have declined the operation once and for all if they had been warned.'[902] Hence, the English courts will not lightly depart from the com-

898 In case of prospectus liability, Art. 90 FSMA (in conjunction with Schedule 10 para 6 FSMA) is assumed to have introduced a presumption of reliance, Vandendriessche 2015, no. 326. This section will not discuss this rule because the presumption does not apply to cases concerning credit rating agency liability. Art. 90 FSMA is limited to prospectus liability and Art. 8 UK Implementing Regulations explicitly refers to 'the test of causation in negligence'.

899 *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134, 139-140, para 1.

900 *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134, 139-140, paras. 1-5.

901 *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134, 146, para 24.

902 *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134, 162, para 87.

mon law principles and will only do so in the most extreme situations of medical negligence.[903]

English courts have not applied the principles of *Chester v Afshar* outside the field of medical negligence.[904] In the context of financial advice, in *Beary v Pall Mall Investments*, the Court of Appeal refused to relax the but for test and refused to apply *Chester v Afshar* by analogy. In this case, the claimant had received incorrect advice in respect of his pension savings. The defendant – who was an independent financial adviser – provided this incorrect advice negligently. The claimant could not prove he would have invested his pension savings differently in the absence of the incorrect advice, but instead invoked the principles of *Chester v Afshar*.[905] Dyson L.J. acknowledged the difficulties in proving causation,[906] but nevertheless refused to apply these principles by analogy: 'But I would not in any event accept the submission of Mr Ticciati that the *Chester v Afshar* principle should be applied generally in claims for negligent financial advice. In *Chester v Afshar*, the majority made it very clear that the departure from established principles of causation in that case was exceptional, and was justified by the particular policy considerations that are in play where there is a breach of the doctor's duty to advise a patient of the disadvantages and dangers of proposed treatment so as to enable the patient to give informed consent. The analogy that Mr Ticciati seeks to draw between a breach of the doctor's duty of care and breach of the duty of care owed by financial advisers (whether in relation to pensions or otherwise) is unconvincing. The subject-matter of the two duties is very different. The policy considerations applicable to the duty to give proper financial advice and the duty to give proper medical advice are quite different. The suggestion that the established principles of causation should be rejected in all cases of negligent financial advice is breathtakingly ambitious, contrary to authority and, in my view, wrong.'[907] Hence, as stated by Dyson L.J., the public policy reasons which justified a departure from the common law principles in *Chester v Afshar* are absent in relation to cases concerning negligent investment advice.

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903 *As appears as well from subsequent decisions, e.g. Meiklejohn v St George's Healthcare NHS Trust* [2014] EWCA Civ 120, para 34: 'Chester is at best a modest acknowledgement, couched in terms of policy, of narrow facts far from analogous to those we are considering. Reference to it does not advance the case for the Claimant since I cannot identify within it any decision of principle.' and *Crossman v St George's Healthcare NHS Trust* [2016] EWHC 2878 (QB), para 50.

904 *Cf.* Clerk & Lindsell 2018, no. 2-19.

905 *Beary v Pall Mall Investments* [2005] EWCA Civ 415, [2005] P.N.L.R. 35, paras. 1-6 and 10.

906 *Beary v Pall Mall Investments* [2005] EWCA Civ 415, [2005] P.N.L.R. 35, para 36: 'Indeed, the question [what would have happened had correct advice been given] is even more difficult for the victim of negligent pension advice than it is for the victim of negligent medical advice. This is because in the world of financial advice, there are very many possible choices, whereas the number of possible answers to the question what would the patient have decided to do if properly advised or informed is usually far more restricted.'

907 *Beary v Pall Mall Investments* [2005] EWCA Civ 415, [2005] P.N.L.R. 35, para 38.

Although by means of a less extensive reasoning, the Court of Appeal also refused to apply *Chester v Afshar* by analogy in *White v Paul Davidson & Taylor* concerning negligent advice provided by solicitors for the same reason.[908]

As English courts have explicitly refused to apply the principles of *Chester v Afshar* outside the field of medical negligence because of a lack of pressing reasons of public policy, I see no room to apply these principles in cases concerning credit rating agency liability either. The relaxation of the but for test is reserved for the most extreme cases of medical negligence, and finds no application in the field of negligent advice provided by both financial advisors and lawyers. The nature of public policy arguments relating to credit rating agency liability bears more resemblance to the liability of financial advisors and lawyers than to the liability of doctors. Also, misconduct by credit rating agencies causes pure economic loss rather than physical loss to investors, on the basis of which the decisions in *Chester v Afshar* and *Beary v Pall Mall Investments* could also be distinguished.

(ii) – No application loss of chance

English law acknowledges the loss of a chance as a head of damages and applies the concept on several occasions. In order to explain whether the English courts would apply the doctrine of loss of chance to cases concerning claims for credit rating agency liability brought by investors, first, some background information must be provided on the application of the doctrine of loss of chance in English private law.

The starting point of an analysis of the application of the doctrine of loss of chance under English law is traditionally formed by the Court of Appeal decision in *Chaplin v Hicks* in 1911. In this case, the Court of Appeal decided the defendant had breached his contractual obligations towards the plaintiff by refusing to reschedule an interview with her, subsequent to which the defendant would decide to whether or not admit her to take part in a beauty contest. The Court of Appeal awarded damages for loss of chance, because '[t]he very object and scope of the contract were to give the plaintiff the chance of being selected as a prize-winner, and the refusal of that chance is the breach of contract complained of and in respect of which damages are claimed as compensation for the exclusion of the plaintiff from the limited class of competitors'.[909]

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908 *White v Paul Davidson & Taylor* [2004] EWCA Civ 1511, [2005] P.N.L.R. 15, paras. 33 and 42: 'There are no such policy considerations in the present case. If there were, then it would be difficult to distinguish this case from any other case of professional negligence on the part of a lawyer or accountant. None of the long-established authorities on causation was overruled by the House of Lords in *Chester v Afshar*. For these reasons, it would not, in my judgment, be right for this court to apply *Chester v Afshar* in preference to those traditional principles already summarised by Ward LJ.' And, implicitly, *Moy v Pettman Smith (A Firm)* [2005] UKHL 7, [2005] 1 W.L.R. 581, para 64.

909 *Chaplin v Hicks* [1911] 2 K.B. 786, 786-788 and 795.

Furthermore, English courts are prepared to award damages for lost chances in cases in which solicitors negligently denied their clients certain opportunities. For instance, in *Kitchen v Royal Air Force Association*, the plaintiff was compensated for the lost opportunity of bringing an action against a third party, as her solicitor had negligently let the prescription period elapse.[910] As another more recent example, in *Dixon v Clement Jones Solicitors*, the plaintiff was compensated for the lost opportunity of continuing proceedings against a third party, as her solicitor had negligently failed to serve a statement of claim at the beginning of the proceedings.[911] Furthermore, in *Allied Maples Group Ltd v Simmons & Simmons*, the plaintiff was compensated for the lost opportunity to negotiate better terms with a third party, as the solicitor had negligently failed to advise the plaintiff to attempt to include a certain warranty in the terms.[912]

English courts, however, did not apply the doctrine of loss of chance in tort law cases concerning medical negligence. In *Hotson v East Berkshire Area Health Authority* and *Gregg v Scott*, the House of Lords refused to award damages for loss of chance where the claimants argued that they lost a chance – to avoid a medical condition and to recover from cancer, respectively – as a consequence of breach of duty of the defendants – namely not having discovered the initial injury and the disease of the claimants in time.[913] The House of Lords inclined to the common law principles of causation: the claimants had to fulfil the but for test and had to prove that, on the balance of probabilities, the medical condition and the likely premature death would not have been caused but for the negligence of the doctors.[914]

Although caution must be exercised in conceptualising English case law, the key question that must be answered – to be able to determine whether the doctrine of loss of chance applies in the case of credit rating agency liability claims brought by investors – is what general rules underlie these decisions? And, more specifically, where to draw the line between loss of chance cases and cases in which the but for test is applied?[915]

In *Allied Maples Group Ltd v Simmons & Simmons*, Stuart-Smith L.J. provided useful guidance to distinguish between 'normal' but for test cases and loss

910 *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563, 567 and 575-576.

911 *Dixon v Clement Jones Solicitors* [2004] EWCA Civ 1005, paras. 48-51.

912 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1621. *Also e.g. Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, para 109.

913 *Hotson v East Berkshire Area Health Authority* [1987] A.C. 750, 765 and 767 and *Gregg v Scott* [2005] UKHL 2, [2005] 2 A.C. 176, 178. *See for an assessment of these cases* Winfield & Jolowicz 2014, no. 7-025-7-027, Lunney, Nolan & Oliphant 2017, pp. 224-227 and Mullis & Oliphant 2011, pp. 130-131.

914 *Hotson v East Berkshire Area Health Authority* [1987] A.C. 750, 793 and *Gregg v Scott* [2005] UKHL 2, [2005] 2 A.C. 176, 198-199, 225, 234. Although in *Gregg v Scott*, Lord Nicholls of Birkenhead and Lord Hope of Craighead were dissenting.

915 *For explanations of the doctrine of loss of chance under English law, see also e.g.* Green 2015, p. 154 and McGregor 2018, no. 10-043-10.045 and no. 10-057-10-067.

of chance cases.[916] In this case, the defendants (law firm Simmons & Simmons) failed to properly warn the claimant (client Allied Maples Group Ltd.) for the risks of the removal of a warranty in a contract concluded with a third party.[917] The question arose whether Allied Maples Group Ltd. could claim damages, without being able to prove that the third party would have accepted the warranty. As regards the scope of application of the doctrine of loss of chance, Stuart-Smith L.J. distinguished three types of situations. The first type covers situations in which the negligence consists of a positive act or misfeasance. Stuart-Smith L.J. considered the question of causation here to be a question of historical fact to which the but for test applies. The second type covers situations in which the negligence consists of an omission – for instance, to provide adequate instruction or advice. Stuart-Smith L.J. considered the question of causation here to be a hypothetical one, namely what would the plaintiff have done had the instruction or advice been given? In this type of situation, the answer to the question depends on the conduct of the claimant, and the claimant must prove its hypothetical conduct on the balance of probabilities. The third type covers situations in which the loss 'depends on the hypothetical action of a third party'. It is only in this type of situation that according to Stuart-Smith L.J., the English courts apply the doctrine of loss of chance.[918] Hence, regarding its own conduct, Allied Maples Group Ltd. had to prove on a balance of probabilities that it 'would have taken action to obtain the benefit or avoid the risk' had the advice been correct, so in fact being under the obligation to prove reliance on the advice.[919] But as regards the conduct of the third party, the claimant did not need to prove that the third party would actually have accepted the warranty. It was sufficient to prove that 'he had a substantial rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages'.[920]

The distinctions between past events and future events and between acts of claimants and defendants appear from other decisions as well. The English courts upheld the but for test in a wide range of cases involving negligent professional advice and the claimant's reliance.[921] In a case concerning incorrect advice provided by accountants, *First Interstate Bank of California v Cohen Arnold & Co*, the Court of Appeal applied the but for test to the question of what the claimant (the First Interstate Bank of California) would have done

916 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1609 ff.

917 *See Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1607.

918 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1609-1611. As can be derived from the speech of Stuart-Smith L.J., he considers cases as *Chaplin v Hicks* [1911] 2 K.B. 786 and *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563 to qualify as the third type of situation. *See also* Clerk & Lindsell 2018, no. 2-78, McGregor 2018, no. 10-057 ff. and *cf.* Kramer 2017a, no. 13-79.

919 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1610.

920 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1611.

921 Kramer 2017a, no. 13-11-13-13.

had the advice of the accountant been correct.[922] Moreover, in cases on negligent investment advice such as *Zaki and others* and *Bank Leumi (UK) plc v Wachner*, the claimants do not invoke the application of the doctrine of loss of chance at all. In these cases, the English courts actually analysed the personality and previous investment conduct of the investor claimants to be able to conclude whether they had relied on the negligent investment advice. The degree of investor sophistication formed an important indicator: a sophisticated investor will have more trouble proving reasonable reliance than an unexperienced investor.[923] For instance, in *Zaki v Credit Suisse (UK) Ltd*, Teare J concluded that the claimant had its own views on the markets, 'had a serious appetite for investing' and was 'bullish, brave and confident'.[924] Furthermore, in *Bank Leumi (UK) plc v Wachner*, Flaux J concluded that he was not convinced the claimant's conduct was influenced by the investment advice, based on 'the evidence of her own personality' and the fact that she was 'a sophisticated business woman and investor who knew her own mind'.[925] The English courts hence evaluated whether the investor relied on the advice by concretely assessing the capacities and characteristics of the investors and the other circumstances of the case.

In February 2019, in *Perry v Raleys Solicitors*, the Supreme Court confirmed the position taken by Stuart-Smith L.J. in *Allied Maples Group Ltd v Simmons & Simmons*.[926] According to Lord Briggs JSC, where the hypothetical factual scenario depends on the claimant's hypothetical conduct, the claimant needs to prove on a balance of probabilities what the claimant would have done. If the hypothetical conduct depends on a third party's conduct, the doctrine of loss of chance applies.[927] *Perry v Raleys Solicitors* concerned a case in which the hypothetical factual scenario depended on the conduct of the claimant. The concrete question was whether, in the absence of the negligence of its solicitor, Perry would have filed a claim for a specific type of damages against its former employer and whether Perry would have succeeded in this claim. According to Lord Briggs JSC, Perry had to prove on a balance of probabilities: (1) he would have made the claim for a specific type of damages in time; and

922 *First Interstate Bank of California v Cohen Arnold & Co* [1996] C.L.C. 174, 183-184. *Example derived from* McGregor 2018, no. 10-079. *See also e.g. Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 Q.B. 113 and the assessment of Stuart-Smith L.J. with regard to this case in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1612.

923 *See* Bradley 2015, p. 514.

924 *Zaki v Credit Suisse (UK) Ltd* [2011] EWHC 2422 (Comm), para 133 (appeal dismissed in *Zaki v Credit Suisse (UK) Ltd* [2013] EWCA Civ 14, para 50). *This example has been derived from* Bradley 2015, p. 514.

925 *Bank Leumi (UK) Plc v Wachner* [2011] EWHC 656 (Comm), paras. 203 and 209-210. *This example has been derived from* Bradley 2015, p. 514.

926 *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 W.L.R. 636.

927 *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 W.L.R. 636, paras. 20-21.

(2) the claim was 'an honest claim'.[928] It was added that it could be tested in an adversarial trial whether Perry's claim was an honest claim.[929]

The cases described and the types of situations distinguished by Stuart-Smith L.J. in *Allied Maples Group Ltd v Simmons & Simmons* and confirmed by the Supreme Court in *Perry v Raleys Solicitors* provide a good explanation of the reasons why English courts will not apply the doctrine of loss of chance in credit rating agency liability cases started by investors. These situations classify as the so-called 'type 2' situations of *Allied Maples Group Ltd v Simmons & Simmons*. Indeed, for the purposes of establishing causation, the hypothetical question must be answered of what the claimant (the investor) would have done if the defendant (the credit rating agency) had conducted itself adequately. The causal uncertainty hence relates to the conduct of the claimant and not, or at least, not only, to the conduct of a third party or another external event. As a consequence, investors must prove on a balance of probabilities how they would have acted in the absence of the affected credit rating (reasonable reliance) and how this scenario would have played out. English courts will not apply the doctrine of loss of chance to claims for damages brought by investors based on Article 35a CRA Regulation.

(d) Causation in law

If claimants – issuers and investors – succeed in satisfying the but for test, that does not put an end to a court's assessment of causation under English law. Legal causation or causation in law is not automatically provided if claimants manage to satisfy the but for test. English courts tend to hold a defendant liable if its act or omission qualifies as the effective or dominant cause of the claimant's loss.[930] In *Galoo Ltd v Bright Grahame Murray*, a case on auditor liability, Glidewell L.J. stated 'the court's common sense' determines whether an act or omission merely 'gives the opportunity for [the claimant] to sustain the loss' or forms the effective cause of the loss.[931] In addition, liability will not be accepted if the chain of causation between the act or omission and the loss was broken by intervening acts of the claimant itself or a third party or by a natural event occurring independent of any human acts.[932]

928 *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 W.L.R. 636, para 25.

929 *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 W.L.R. 636, para 24.

930 *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360, 1374. *In the context of the liability of accountants and auditors,* Jackson & Powell 2017, no. 17-127. *Cf.* Clerk & Lindsell 2018, no. 2-98.

931 *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360, 1375, Glidewell L.J. explicitly states this rule applies to contract and tort law. *In the context of the liability of accountants and auditors,* Jackson & Powell 2017, no. 17-128. *Cf.* Clerk & Lindsell 2018, no. 2-99.

932 Clerk & Lindsell 2018, no. 2-107 and Mullis & Oliphant 2011, pp. 136-137.

(e) Remoteness

This final subsection on causation pays attention to the concept of remoteness of loss.[933] Article 35a CRA Regulation does not suggest that the term 'caused to' includes questions relating to remoteness, but since both the elements of causation and damages are left to the interpretation and application of the applicable national law, it was assumed that English courts can include the concept of remoteness in decisions on claims for civil liability based on Article 35a CRA Regulation under English law. The concept of remoteness serves to avoid that a wrongdoer's liability extends to all, possibly far-fetched, harmful consequences of a breach of contract or tort. In essence, the concept of remoteness limits a wrongdoer's responsibility to the foreseeable consequences of its conduct. The concrete tests to determine whether a certain type of loss is too remote differ in contract and tort law.[934] Although up to now, we have mainly been concerned with English private law concepts under the tort of negligence for the purposes of the interpretation and application of Article 35a CRA Regulation, this dissertation now briefly pays attention to the tests for remoteness in both contract and tort law. It was decided to do so because the possible existence of a contractual relationship, or of a relationship between parties equivalent to contract in credit rating agency liability cases, may cause English courts to apply the narrower approach to remoteness adopted in contract law.

The test for remoteness is narrower in contract law as compared to tort law.[935] Losses are considered not too remote and, hence, recoverable when the respective parties had or could have had the losses in reasonable contemplation when they entered into the agreement or when the loss flowed naturally from the breach of contract. The first element of the test scrutinises whether a reasonable party has or could have thought about the possible harmful consequences of a breach at the time it entered into the contract.[936] The background of this test is the type of relationship between the parties. As explained by Lord Reid in *The Heron II*, prior to entering into a contract, parties have the opportunity to discuss usual and unusual risks with each other and to search for protection against such risks from each other.[937] The idea

933 The topic of remoteness could alternatively be discussed in the context of the calculation of the award of damages and is closely related to the duty of care and the scope of the duty of care owed by a wrongdoer.

934 *Cf. The Heron II* [1969] 1 A.C. 350, 385-386. *Also e.g.* Beatson, Burrows & Cartwright 2016, p. 581 and Cartwright 1996, p. 493.

935 *Cf.* Cartwright 1996, p. 493.

936 *The Heron II* [1969] 1 A.C. 350, 385. Cartwright 1996, p. 493. *Also e.g.* McKendrick 2017, pp. 388 and 393 and Beatson, Burrows & Cartwright 2016, pp. 575 and 585. Since the decision in *The Achilleas* [2008] UKHL 48, [2009] 1 A.C. 61 some uncertainty exists on the exact application of the test for remoteness in contract law (*cf.* Beatson, Burrows & Cartwright 2016, pp. 578-580). A broader discussion of these matters falls outside the scope of this dissertation.

937 *The Heron II* [1969] 1 A.C. 350, 386.

is that the claimant was in the position to discuss specific unusual risks with the defendant prior to the conclusion of the contract and, thereby, could have protected itself against those risks.

In tort law, and more specifically in the context of the tort of negligence, the test for remoteness is formulated in terms of the foreseeability of losses. Losses are considered not too remote and, hence, recoverable when they are a reasonably foreseeable consequence of the negligence of the defendant.[938] As long as the losses were reasonably foreseeable, it is irrelevant whether the losses were usual or unusual risks associated with the tort. Moreover, losses can also be reasonably foreseeable if their magnitude and precise manner of infliction could not be determined in advance.[939] Again, the background of this test is the type of relationship between the parties. As explained by Lord Reid in *The Heron II*, in tort cases, the aggrieved party was not in the position to discuss specific unusual risks with the wrongdoer prior to the tort and to protect itself against such risks. Therefore, the defendant cannot complain if it is held liable for the foreseeable consequences of the violation of its duty of care under the tort of negligence.[940]

In cases involving the tort of negligence, the remoteness of loss can be closely connected to the question of whether a credit rating agency owes a duty of care at all and what would the scope of that duty be. The foreseeability of loss is indeed a recurring element in the requirements of the tort of negligence. It is not only relevant at the stage of causation for the purpose of the concept of remoteness, but can already play a role in the assessment of whether the defendant owes a duty of care at all.[941] One of the perspectives of *Caparo Industries Plc v Dickman* is indeed whether the loss suffered was foreseeable to the wrongdoer.[942] Therefore in a concrete case, it might well be that the loss is not reasonably foreseeable, and that the defendant does not owe a duty of care to the claimant in the first place.[943]

In the context of credit rating agency liability, the question is what type of loss is recoverable and, if any, what type of loss is too remote. If a contractual relationship exists between an issuer and a credit rating agency, one can wonder whether English courts would apply the test for remoteness of contract or tort law to claims based on Article 35a CRA Regulation. For the purpose of Private International Law, Article 35a CRA Regulation qualified as a non-contractual obligation,[944] yet one can imagine English courts laying emphasis on the contractual relationship between the parties instead and

938 *The Wagon Mound* [1961] A.C. 388, 409. *Also The Heron II* [1969] 1 A.C. 350, 385-386. *E.g.* Mullis & Oliphant 2011, p. 139 and Winfield & Jolowicz 2014, no. 7-029.
939 Winfield & Jolowicz 2014, no. 7-037. *E.g. Hughes v Lord Advocate* [1963] A.C. 837, 845.
940 *The Heron II* [1969] 1 A.C. 350, 386.
941 *For this point*, Cartwright 1996, pp. 497-498.
942 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 617-618. Section 5.7.2.3 (a) (i).
943 *Cf.* Cartwright 1996, p. 499.
944 Section 4.2.

applying the narrower contractual test of remoteness. In *Wellesley Partners LLP v Withers LLP*, the Court of Appeal indeed held that, if concurrent liability in tort and contract arises, English courts must apply the contractual test for remoteness.[945] However, irrespective of whether the contractual or tortious test of remoteness is applied in the context of claims based on Article 35a CRA Regulation, it seems safe to assume that reputational loss and increased funding costs are so specific to the business of credit rating that those types of loss must have been contemplated by the parties anyway. Therefore, neither of these types of loss seem too far-fetched or remote from the perspective of credit rating agencies. This reasoning applies both in the presence and in the absence of a contractual relationship between an issuer and a credit rating agency.

More interesting questions regarding remoteness can arise in non-contractual cases, and, more specifically, when an investor claims damages from a credit rating agency caused by an impacted credit rating, while the investor's loss aggravated due to a general decline in the financial markets. In the context of negligent financial advice, the remoteness of pure economic loss caused by a downturn of the financial markets was addressed in *Rubenstein v HSBC Bank plc*.[946] One must be aware of the differences between the factual situation in *Rubenstein v HSBC Bank plc* and of the situation of credit rating agency liability: in *Rubenstein v HSBC Bank plc*, the parties had entered into a contractual relationship for the purpose of the provision of financial advice, while a credit rating agency issues a credit rating on the internet mostly in the absence of a contractual relationship with investors. The reasoning of the Court of Appeal is nevertheless interesting for purposes of this dissertation, because it shows that loss caused by general declines in the financial markets is not necessarily considered too remote under English law.

In *Rubenstein v HSBC Bank plc*, Rubenstein invested in financial instruments in 2005 relying on negligent investment advice provided by HSBC Bank. Rubenstein suffered economic loss in 2008, when Lehmann Brothers became insolvent. In first instance, the judge held that HSBC Bank had breached its duty of care and various statutory duties, but refused to award damages to Rubenstein

945 *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 W.L.R. 1351, paras. 80, 157 and 163. Although in *Wellesley Partners LLP v Withers LLP*, tortious liability was based on an assumption of responsibility of the defendant. Moreover, Cartwright could imagine that English courts do not always apply the test of reasonable foreseeability in tort cases in the same way. At some occasions, he could imagine English courts to apply this test in a stricter manner. He referred to the example of *Hedley Byrne*-type of cases, because English courts qualified the relationship between the parties as equivalent to a contractual relationship in such situations, which would justify application of the contractual test of remoteness. *Cf.* Cartwright 1996, pp. 500-502. Roth J and Longmore LJ adopted this position in *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, para 163 and para 187.

946 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184.

because the loss was considered too remote.[947] Lord Justice Rix allowed Rubenstein's appeal,[948] considering, among other things, that the cause of Rubenstein's pure economic loss was a collapse in the value of the financial instruments in which Rubenstein had invested. This type of loss was not only foreseeable but also foreseen, because the factor of market risk was included in the brochure of the financial instruments.[949] Furthermore, as it was HSBC Bank's duty to protect Rubenstein from the negative consequences following market volatility, HSBC Bank could not escape liability by arguing that this collapse of the market was unforeseeable.[950] Moreover, Lord Justice Rix attached importance to the fact that this case concerned the statutory protection of a consumer, so that the bank should have contemplated this type of loss even though the consumer did not raise the risk of this type of loss prior to entering into the contract.[951] Hence, Lord Justice Rix used the scope of duty of HSBC Bank and the capacity of the claimant to explain that the market loss was foreseeable and not too remote.

The reasoning of Lord Justice Rix in *Rubenstein v HSBC Bank plc* demonstrates that loss aggravated by a large decline in the financial markets does not qualify as too remote per se. It is of crucial importance whether the type of loss in itself was reasonably foreseeable, irrespective of the magnitude of the loss. Moreover, it demonstrates again the crucial importance of the specific circumstances of a concrete case. Transposing these lessons to the context of claims for credit rating agency liability brought by investors, one could draw the conclusion that loss aggravated by a large decline in the financial markets is not too remote as a matter of principle. A credit rating agency could have foreseen that an investor would invest in financial instruments in reliance on its credit rating. Moreover, it could have foreseen that if the credit rating was impacted by an infringement, an investor could take up more credit risk than expected. Considering the financial context in which credit rating agencies operate, it is also foreseeable that loss is aggravated by a general downturn in the financial markets. However, even if the losses are foreseeable, a credit rating agency is not necessarily required to compensate investors for these losses under English law. Section 5.7.3.3 (a) discusses the reasons why investors are not compensated for this foreseeable type of loss under English law anyway.

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947 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, para 1. As described somewhat more precisely by Lord Justice Rix on appeal 'the judge also found that the loss suffered by the investor was not caused by the bank's negligence or breach of duties: it was rather caused by unprecedented market turmoil, and was unforeseeable and too remote.'

948 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, paras. 113 and 116-125.

949 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, para 117.

950 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, paras. 118-119.

951 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, para 123.

5.7.3.3 Suffering 'damage' and claiming 'damages'

(a) Nature of reparable loss and calculation of the amount of damages

Article 13 and Article 14 UK Implementing Regulations provide rules on the types of loss that are recoverable and on how courts must calculate awards of damages. In respect of issuer claims, the amount of damages awarded depends on the content of any existing contract between an issuer and a credit rating agency. In the absence of such a contract, the increased funding costs of an issuer are recoverable.[952] Consequently, reputational loss does not seem recoverable under the UK Implementing Regulations. In respect of investor claims, if an investor and a credit rating agency entered into a contract for the provision of a credit rating, the recoverable damages have to be determined in accordance with that contract.[953] In the absence of such a contract, the amount of damages is equal to the amount of damages awarded to the investor in a case in which the investor would succeed in a claim for damages in the tort of negligence.[954]

The latter rule deserves elaboration. In English tort law, as a general rule, the amount of damages must be determined by analysing in which position the investor would have been in the absence of the tort.[955] The application of this rule results in the compensation of all loss suffered by an investor, yet with the exclusion of types of loss that are too remote.[956] Furthermore, the recoverable loss can be limited by the scope of the duty of care owed by the defendant, as demonstrated by the case of *South Australia Asset Management Corporation v York Montague Ltd* (*SAAMCO*). In *SAAMCO*, Lord Hoffmann limited the award of damages in a case on the overvaluation of property based on the type of duty owed by the defendant.[957] Nowadays, this ruling is considered a general principle of the English law of damages.[958]

In *SAAMCO*, Lord Hoffmann connected the award of damages to the scope of the duty of care owed by the defendant. He distinguished two types of duties: the duty 'to *provide information* for the purpose of enabling someone else to decide upon a course of action' and the duty 'to *advise* someone as to what course of action he should take'. If a defendant owes a duty to provide

952 Art. 13 UK Implementing Regulations. For the admissibility of limitation clauses in contracts, see section 5.7.4.

953 Art. 14 (a) UK Implementing Regulations.

954 Art. 14 (b) UK Implementing Regulations.

955 *E.g.* Clerk & Lindsell 2018, no. 28-07 and Mullis & Oliphant 2011, p. 381.

956 Section 5.7.3.2 (e).

957 *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191.

958 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 47. *As recently applied by the Court of Appeal in Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 54 and *repeated in Main v Giambrone & Law (A firm)* [2017] EWCA Civ 1193, para 81. *Cf.* Clerk & Lindsell 2018, no. 10-156. Irrespective of whether it concerns a contract or tort law case, *see* Winfield & Jolowicz 2014, no. 7-059.

information, 'he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong'.[959] The defendant bears, however, no responsibility for the decision of the claimant to enter into a certain transaction and for loss that would have occurred even if the information had been correct (e.g. general declines in property or financial markets).[960] The distinction of Lord Hoffmann has been criticised. It was argued, for example, that it would be difficult to tell the difference between the duty to provide information and the duty to give advice in some situations.[961]

More recently, in *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)*, Lord Sumption confirmed the substantive idea underlying Lord Hoffmann's distinction between information and advice cases, and described prototypes of each duty: a valuer who owes a duty to provide information (as in *SAAMCO*)[962] and an investment adviser advising clients on particular transactions who owes a duty to provide advice.[963] The distinction is rooted in whether it was the responsibility of the wrongdoer to guide the aggrieved party through the decision-making process, or not. The task of an adviser is to consider all matters involved in taking a certain decision, instead of specific factors in the decision only.[964] The task of a provider of information is to provide a limited amount of the information based on which a claimant takes a certain decision. It is not the task of the information provider to guide a claimant through the entire decision-making process.[965] As emphasised by Lord Sumption, the fact that a certain piece of information is crucial for the

959 *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191, 214.

960 *See BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, paras. 31 and 35. As the defendant bears no responsibility for the claimant's decision to enter into the transaction, Lord Hoffmann did not distinguish between 'no transaction cases' and 'successful transaction cases', see *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191, 218 and *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 35. *Also e.g.* Kramer 2017a, no. 14-97.

961 *As pointed out by Lord Sumption in BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, paras. 37 and 39.

962 As another example, one can refer to the duty owed by the accountant in *Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 74.

963 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 44. For another example, the Court of Appeal decision in *Main v Giambrone & Law (A firm)* [2017] EWCA Civ 1193, 2017 WL 03174625, paras. 82-83.

964 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 40. *Also Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 52 and *Main v Giambrone & Law (A firm)* [2017] EWCA Civ 1193, para 81.

965 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 41.

claimant's decision does not necessarily cause the provision of information to qualify as advice.[966]

In the concrete case of *SAAMCO*, the House of Lords concluded that the valuer owed a duty to provide information only. According to Lord Hoffmann, the direct consequence of the defendant's incorrect valuation was that the claimant's collateral for a loan was worth less than expected. Lord Hoffmann calculated the cap on the amount of damages by measuring the difference between the overvaluation and the actual value of the property at the moment of the valuation.[967] Additional loss caused by the general decline in the property markets fell within the sphere of risk of the claimant and outside the scope of the duty owed by the defendant.

Considering the fact that the *SAAMCO* rules are general rules of the law of damages and considering the similarities between the case of *SAAMCO* and investor claims against credit rating agencies, it can be argued that the rules flowing from *SAAMCO* should be applied in the field of credit rating agency liability as well. But, as pointed out by Wanambwa, caution must be exercised in the absence of case law confirming this conclusion.[968] If the rules flowing from *SAAMCO* are applied, the question is whether a dispute over credit rating agency liability between an investor and a credit rating agency qualifies as an information case or as an advice case.[969] This question can be answered relatively easily. The position of credit rating agencies is more equal to the position of valuers than the position of actual advisers. Credit rating agencies provide a specific piece of information to investors, which does not involve advice to investors as to whether to take a certain investment decision or not. It is not a credit rating agency's task to guide an investor through the investment decision process. By analogy, if a credit rating agency owes a duty of care at all, a credit rating agency owes a duty to exercise reasonable care and skill to provide adequate information only. This conclusion is not altered by the fact that a credit rating agency knew or could have known that the credit rating was material to the investor's investment decision.[970] Hence, a credit rating agency is not responsible for the investor's investment decision and the investor itself bears the risk of all consequences flowing from that decision. A credit rating agency only bears responsibility for the direct consequences

966 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 42.

967 *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191, 222. *Recently Tiuta International Ltd v De Villiers Surveyors Ltd* [2017] UKSC 77, [2017] 1 W.L.R. 4627, para 6. *For criticism on this method e.g.* Kramer 2017a, no. 14-117.

968 Wanambwa 2014, p. 521.

969 Assuming that a credit rating agency owes a duty of care under the tort of negligence to investors.

970 *Cf. BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, paras. 41-42.

of the information being incorrect, namely of the credit rating being impacted by the infringement(s) committed.

How, then, should courts assess the height of the amount of damages in concrete terms? In information cases, courts must quantify the direct consequences of the inaccurate information.[971] It is upon the claimant to provide evidence of the direct consequences of the inadequate information.[972] English courts can calculate the amount of damages by excluding the loss that a claimant would have suffered anyway had the information been correct, this is the so-called *SAAMCO* cap.[973] It is this construction that causes loss caused by general market declines to often fall outside the aggrieved party's recoverable loss in information cases. In the area of prospectus liability, as Vandendriessche explained, courts may limit the award of damages in accordance with the *SAAMCO* rules as well. The amount of damages is then capped at the difference between the price paid for the financial instruments and the price that would have been paid for the financial information had the prospectus been correct ('mispricing loss').[974] In the context of investor claims against credit rating agencies, courts must assess the direct consequences of the credit rating being impacted by the infringement. Loss that would have been suffered anyway, had the credit rating not been impacted, falls outside the scope of duty of the credit rating agency. An investor's award of damages would then be capped at the difference between the price paid for the financial instruments and corresponding yield and actual price and corresponding yield had the credit rating not been affected. Hence, mispricing loss caused by the credit rating is at most recoverable under English law.

The application of *SAAMCO* under Article 35a CRA Regulation is not without difficulties. First, the rules flowing from *SAAMCO* do not necessarily fit well within the structure of Article 35a CRA Regulation. Lord Hoffmann's reasoning in *SAAMCO* was based on the scope of the duty of care owed by the defendant. However, the scope of the duty of care owed by credit rating agencies under the tort of negligence is not necessarily comparable with the duty not to commit infringements listed in Annex III of the CRA Regulation. One can, therefore, question whether it is justified to limit the award of damages based on the scope of duty argument, while the overall responsibility of the credit rating agency is based on infringements of the EU regulatory framework. This forms at least one example of a situation in which the system employed by Article 35a CRA Regulation leads to a strange mixture of EU law and a national

971 *Cf.* Winfield & Jolowicz 2014, no. 7-059.

972 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 53.

973 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, paras. 32 and 45. *Also Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 47 and *Main v Giambrone & Law (A firm)* [2017] EWCA Civ 1193, para 81. *See e.g.* Kramer 2017a, no. 14-105.

974 Vandendriessche 2015, no. 352.

legal system. In addition, restricting the award of damages to mispricing loss under English law seems at odds with the requirement of reasonable reliance under Article 35a CRA Regulation. Article 35a requires proof of reasonable reliance on the side of the investor, so that it can be insufficient for the investor to show it would have bought the financial instruments for another price had the credit rating been correct. But at the end of the day, if the rules of *SAAMCO* apply, an investor's award of damages is nevertheless capped at the mispricing loss anyway. Overall, friction exists between the rules flowing from *SAAMCO* and the mould provided by Article 35a CRA Regulation.

Furthermore, the application of *SAAMCO* can lead to difficulties in concrete cases, because it can be difficult to measure the informational value and direct effects of impacted credit ratings. The case of *SAAMCO* provided a rather clear example in which the direct consequences of the incorrect information could be calculated in the form of the overvaluation, but this is not necessarily the case in other situations. For instance, in *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)*, a lawyer of the defendant's firm had drawn up a facility agreement that included an incorrect assumption on the purpose of the loan provided by the claimant.[975] As another example, in *Manchester Building Society v Grant Thornton UK LLP*, an accountant provided incorrect advice on the possibility of an accounting strategy in respect of interest rate swaps.[976] In such information cases, it is difficult to quantify the direct consequences of the incorrect information provided. According to Kramer, courts should then engage in 'a more sophisticated and logical investigation' of the hypothetical scenario in which the information provided had been correct. Subsequently, courts must determine what types of loss fall inside and outside the duty of care owed by the defendant.[977] Lord Sumption also admitted that the *SAAMCO* cap may be a mathematically imprecise tool to link the scope of duty to the height of the award of damages. He pointed at difficulties that could arise if the loss was caused by multiple commercial factors, and it is difficult or impossible to quantify and distinguish the direct consequences of the factors. Subsequently, he dismissed this concern by stating that 'mathematical precision is not always attainable in the law of damages'.[978] Yet, in the case of credit rating agency liability, the application of *SAAMCO* can lead to difficulties in concrete cases, because it can be difficult to measure the informational value and direct effects of impacted credit ratings at all, and to distinguish between the effects of the credit rating and other aggravating factors of the loss. As the burden of proof lies upon the investor as the claimant

975 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 6.

976 *Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 21.

977 Kramer 2017a, no. 14-119.

978 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 46. *See* Kramer 2017a, no. 14-118.

in this regard, the risks of not providing sufficient evidence lie with investors.[979]

(b) Contributory negligence[980] and mitigation of loss

Article 15 declares that the English concepts of contributory negligence and mitigation are applicable to claims brought by issuers and investors. Article 15 (2) UK Implementing Regulations declares that the Law Reform (Contributory Negligence) Act 1945 is applicable to the assessment of damages awarded to investors and issuers. As defined under the Law Reform (Contributory Negligence) Act 1945, the concept of contributory negligence refers to situations in which the claimant has suffered loss 'as the result partly of his own fault and partly of the fault of any other person or of persons'[981] so that the claimant can be said to have contributed to its loss. As stated by Winfield & Jolowicz, for a successful appeal to contributory negligence, the defendant must prove that (1) the claimant did not take reasonable care of its own safety; and (2) this failure contributed to, in the sense of (partly) 'caused', its loss.[982]

A successful appeal to contributory negligence by the defendant does not automatically cause its liability to be completely excluded, but instead reduces the amount of damages awarded to the claimant.[983] Under Article 1 (1) of the Law Reform (Contributory Negligence) Act 1945, courts can reduce the damages to the extent they consider 'just and equitable having regard to the claimant's share in the responsibility for the damage'. But, assuming that the rules of *SAAMCO* also apply to credit rating agency liability, how should this so-called 'apportionment' of damages be done: by reducing the award of damages on the basis of the total amount of loss suffered, or on the basis of the amount of damages that would be awarded in accordance with the rules of *SAAMCO*?[984] This question was raised before the House of Lords in *Platform Home Loans Ltd v Oyston Shipways Ltd*, a case on the overvaluation of property.[985] According to Lord Hobhouse of Woodborough, reducing the damages

979 *See e.g. Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 98, in which the claimant building society did not provide sufficient evidence that the loss would not have been suffered if the accountant would have provided correct information on the accounting strategy followed.

980 The factual circumstances that can lead to contributory negligence, such as a lack of reasonable reliance, could also be relevant for a defence based on the voluntary assumption of risk (Mullis & Oliphant 2011, p. 66). As defences based on the voluntary assumption of risk (or *volenti non fit iniuria*) are nowadays less important (Mullis & Oliphant 2011, p. 147) and are not mentioned by the UK Implementing Regulations, no further attention will be paid to this topic.

981 Art. 1 (1) Law Reform (Contributory Negligence) Act 1945.

982 Winfield & Jolowicz 2014, no. 23-038–23-039.

983 *E.g.* Clerk & Lindsell 2018, no. 3-57 and Winfield & Jolowicz 2014, no. 23-037.

984 *Cf.* McGregor 2018, no. 7-010. *See also* Jackson & Powell 2017, no. 5-177.

985 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190. Clerk & Lindsell 2018, no. 3-102, McGregor 2018, no. 7-010 and Jackson & Powell 2017, no. 5-177.

on the basis of the damages that would be awarded in accordance with *SAAMCO* 'in effect makes the same deduction twice over'.[986] He concluded that English courts should apply 'the traditional percentage reduction' to the overall loss suffered by the claimant.[987] Afterwards, the damages can be limited further in accordance with the *SAAMCO* principle.[988]

As a final remark, the application of the concept of contributory negligence combined with the English interpretation of 'gross negligence' again leads to a combination of elements of two different torts (deceit and negligence, respectively) in the interpretation of Article 35a CRA Regulation.[989] A comparison similar to the one made under the requirement of reasonable reliance can be conducted. The tort of deceit requires recklessness on the side of the defendant (the English interpretation of 'gross negligence'), but, if the requirements have been met, the defence of contributory negligence is not available.[990] Under the tort of negligence, the threshold for liability is less high, but the defendant is entitled to invoke the defence of contributory negligence. The English interpretation of Article 35a CRA Regulation hence leads to a situation in which a credit rating agency is required to have committed the infringement recklessly, while the credit rating agency can also invoke the defence of contributory negligence if the claimant failed to take reasonable care. As already stated above, the threshold for liability under Article 35a CRA Regulation is very high in situations in which English law applies, even compared to the requirements of the torts of deceit and negligence under common law.

Under Article 15 (1) UK Implementing Regulations, the concept of mitigation applies to claims for damages brought by issuers and investors. The concept of mitigation precludes a victim from adopting a passive attitude towards its loss. If the claimant unreasonably decided to wait and see its loss getting worse and, in other words, did not act 'reasonably in response to the defendant's wrong', courts can limit the amount of damages awarded.[991] It is up to the defendant to prove that the claimant failed to act reasonably.[992] But courts will not easily conclude that the claimant failed to act reasonably, as the

986 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190, 211.
987 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190, 212. *See also* Levinson 2002, p. 199.
988 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190, 212. Clerk & Lindsell 2018, no. 3-102, McGregor 2018, no. 7-010, Jackson & Powell 2017, no. 5-177 and Levinson 2002, p. 199.
989 *The idea of the combination of the requirements of these torts is derived from* Hoggard 2016.
990 *Alliance and Leicester BS v Edgestop Ltd* [1993] 1 W.L.R. 1462, 1477.
991 *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWCH 1250 (Comm), para 33. *Cf.* Clerk & Lindsell 2018, no. 28-09, *cf.* McGregor 2018, no. 9-004 and Winfield & Jolowicz 2014, no. 23-064.
992 *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWCH 1250 (Comm), para 38.

claimant was put in the unfortunate position in which he suffered losses by the defendant in the first place.[993]

In the case of credit rating agency liability, what can be reasonably expected from issuers and investors after an infringement has occurred? The answer to this question will of course vary depending on the exact situation. It follows from the speech of Leggatt J in *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* that, once aware of the defendant's misconduct, the claimant must act quickly.[994] In the scenario that an issuer discovers the occurrence of an infringement, it seems reasonable to expect the issuer to warn the credit rating agency within reasonable time (in the short term). It is, however, questionable whether the concept of mitigation requires investors to sell their financial instruments upon becoming aware of an infringement. There are examples in English case law where the failure to sell a house (as a security or as property) in times of more favourable market conditions constituted a failure to mitigate,[995] but these were again situations in which the claimant had unreasonably postponed action in reaction to the defendant's breach.[996] Such a situation seems not to be at hand when the financial markets suddenly crash down very shortly or immediately after the investor becomes aware of the occurrence of an infringement.

The consequence of a failure to mitigate loss is that the part of the loss that could have been avoided is not recoverable.[997] But how should this principle be applied? By reducing damages on the basis of the total amount of loss suffered, or on the basis of the amount of damages that would be awarded in accordance with the rules of *SAAMCO*? As discussed above, this question came before the House of Lords in *Platform Home Loans Ltd v Oyston Shipways Ltd*, a case on the overvaluation of property and contributory negligence.[998] According to Lord Hobhouse of Woodborough, reducing the damages on the basis of the damages that would be awarded in accordance

993 *Banco de Portugal v Waterlow & Sons Ltd* [1932] A.C. 452, 506 and *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWCH 1250 (Comm), para 38. Clerk & Lindsell 2018, no. 28-09 and Winfield & Jolowicz 2014, no. 23-064. *Cf.* McGregor 2018, no. 9-079.

994 *Cf. Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWCH 1250 (Comm), para 35.

995 McGregor 2018, no. 9-084-9-085, referring to *Bristol and West Building Society v Fancy & Jackson* [1997] 4 All E.R. 582 and *Patel v Hooper & Jackson* [1999] 1 W.L.R. 1792, respectively. *Bristol and West Building Society v Fancy & Jackson* has been partly overturned by *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 50 as regards the point of the respective duties, but not as regards mitigation.

996 *Bristol and West Building Society v Fancy & Jackson* [1997] 4 All E.R. 582.

997 *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No.2)* [1912] A.C. 673, 689. *Also* Clerk & Lindsell 2018, no. 28-09, McGregor 2018, no. 9-014 and Winfield & Jolowicz 2014, no. 23-064.

998 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190.

with the *SAAMCO* principle 'in effect makes the same deduction twice over'.[999] He concluded that English courts should apply 'the traditional percentage reduction' in case of contributory negligence to the overall loss suffered by the claimant.[1000] According to McGregor, the same considerations apply to mitigation, so that 'the mitigation should attach, in the claimant's favour, to the real loss and not to the lesser attributable loss'.[1001]

5.7.4 Article 35a (3) Limitations of liability in advance

Article 9 (1) UK Implementing Regulations stipulates that limitations are generally allowed under English law. Under Articles 10-12, non-exhaustive lists of factors are provided that courts can take into account when deciding whether a limitation clause is 'reasonable and proportionate'. These factors provide useful guidance, but do not provide a clear-cut answer on which limitation clauses would be reasonable and proportionate and leave considerable discretion to the courts.

5.7.4.1 Limitations of liability towards issuers – solicited ratings

Article 10 (1) UK Implementing Regulations lists six circumstances that can indicate a limitation is reasonable and proportionate:

- The limitation was the result of contractual negotiations.
- The price of the rating is in proportion to the extent of the limitation.
- The credit rating agency allowed the issuer to provide additional information or clarifications which were taken into consideration prior to the issue of the credit rating.
- The limitation involves loss which the credit rating agency could not have reasonably foreseen at the time of the assignment of the credit rating.
- The limitation involves loss against which a credit rating agency could not have reasonably insured itself.
- The limitation involves loss that no credit rating agency would be reasonably expected to have the resources to meet.

5.7.4.2 Limitations of liability towards issuers – unsolicited ratings

The UK Implementing Regulations have dedicated an entire provision to the limitation of liability towards issuers for the assignment of an unsolicited credit rating. It is, however, rather difficult to imagine how the limitation could take

999 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190, 211.
1000 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190, 212. *See also* Levinson 2002, p. 199.
1001 *Cf.* McGregor 2018, no. 9-037.

shape and how the credit rating agency gives notice of the limitation. A credit rating agency could try to rely on a general limitation against third parties on its website. Nevertheless, Article 11 (1) UK Implementing Regulations lists four circumstances that can indicate a limitation is reasonable and proportionate:

- The credit rating agency allowed the issuer to provide additional information or clarifications which were taken into consideration prior to the issue of the credit rating.
- The limitation involves loss which the credit rating agency could not have reasonably foreseen at the time of the assignment of the credit rating.
- The limitation involves loss against which a credit rating agency could not have reasonably insured itself.
- The limitation involves loss that no credit rating agency would be reasonably expected to have the resources to meet.

5.7.4.3 Limitations of liability towards investors – with and without subscriptions

Article 12 (1) UK Implementing Regulations lists seven circumstances that can indicate a limitation is reasonable and proportionate:

- The limitation was the result of contractual negotiations.
- The price of the rating is in proportion to the extent of the limitation.
- The relationship between the credit rating agency and the investor lacks proximity.
- The limitation relates to loss that followed from unexpected or unusual use of the credit rating.
- The limitation involves loss which the credit rating agency could not have reasonably foreseen at the time of the assignment of the credit rating.
- The limitation involves loss against which a credit rating agency could not have reasonably insured itself.
- The limitation involves loss that no credit rating agency would be reasonably expected to have the resources to meet.

Finally, under Article 12 (3) UK Implementing Regulations, a limitation is not likely to be reasonable and proportionate if the credit rating agency has not taken steps to make investors aware of the limitation.

The three lists of circumstances described above originate from and specify circumstances that could be considered under 'ordinary' common law rules.[1002] Under English law, disclaimers restricting or excluding the duty of care and limitations restricting or excluding liability arising out of breach

1002 *See in detail in the context of credit rating agencies* Getzler & Whelan 2017, pp. 25 ff. *Also* Seibold 2016, pp. 201 ff. *See in detail in general* Cartwright 2017, no. 9-08 ff. This section concentrates on the statutory controls for limitation clauses only.

of contract or breach of duty[1003] incorporated in a contractual term or a notice must comply with the 'reasonableness test' under the Unfair Contract Terms Act 1977 (UCTA 1977).[1004] As Articles 10-12 UK Implementing Regulations provide non-exhaustive lists, courts are free to consider other factors that could be included in the reasonableness test as well. Seibold refers to the factor of the equality of the bargaining power of the respective parties as an example.[1005] It is doubtful whether courts can take the gravity of the conduct or the state of mind of the credit rating agency into account, because Article 9 (1) UK Implementing Regulations states that limitations are generally allowed under English law for the purpose of Article 35a (3) CRA Regulation, while Article 35a (3) CRA Regulation relates to a right of redress that requires intention or gross negligence on the side of the defendant already.

The Consumer Rights Act 2015[1006] applies to non-individually negotiated general terms and conditions in subscription contracts concluded between credit rating agencies and investors who can be qualified as 'consumers'.[1007] The relevance of this act will, however, be limited in practice as currently only one credit rating agency (Egan Jones) provides for paid subscriptions. The Consumer Rights Act 2015 entails that 'unfair terms' are not binding upon

1003 *Distinction derived from* Getzler & Whelan 2017, pp. 25-26.

1004 *Cf.* Art. 1 (1), Art. 1 (3), Art. 2 (2), Art. 3 (2) and Art. 11 UCTA 1977. With regard to disclaimers, *see Smith v Eric S. Bush* [1990] 1 A.C. 831, 849 and 873. The UCTA 1977 only applies to 'business liability', i.e. liability arising from 'things done or to be done […] in the course of a business' (Art. 1 (3) UCTA 1977) and the burden of proof lies on the party who wishes to rely on the contractual term or the notice (Art. 11 (5) UCTA 1977). Under Art. 11 (1) UCTA 1977, a term will be considered fair and reasonable if 'having regard to the circumstances of which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made'. Schedule 2 provides factors that can be involved, such as the equality of bargaining power of the parties, whether the customer could have entered into another contract without having excepted the term and whether the customer knew (or ought reasonably to have known) the existence and the extent of the term. Although under Art. 11 (2) UCTA 1977 the factors listed in Schedule 2 relate to specific types of contract, English courts use them as 'generally applicable guidelines' (Cartwright 2016, p. 229). If a contract term or a notice seeks to restrict liability to a fixed sum, Art. 11 (4) UCTA 1977 specifies that one has to consider: (1) how many resources the person relying on the restriction could be expected to hold to meet potential obligations to pay damages; and (2) the possibilities of insurance.

1005 Seibold 2016, p. 202 (and p. 153).

1006 Since 1 October 2015. The Consumer Rights Act 2015 forms the English Implementation of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. Previously: the Unfair Terms in Consumer Contracts Regulations 1999. Cartwright 2016, pp. 230-231. *Cf.* Seibold 2016, p. 154.

1007 Art. 2 (3) (in conjunction with Art. 59 (1) and Art. 60) Consumer Rights Act 2015: '"Consumer" means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.'

consumers.[1008] A term can be qualified as 'unfair' if 'it causes a significant imbalance in the parties' rights and obligations' 'contrary to the requirement of good faith'.[1009] As described under Schedule 2: 'A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations (…)'[1010] may be considered unfair, although the unfairness of the term is not automatically provided. Yet, limitation clauses included in subscription contracts concluded with consumers shall be assessed in light of the Consumer Rights Act 2015 and cannot manifestly limit the right to claim damages under Article 35a CRA Regulation.

5.7.5 Prescription of claims

Under Article 16 UK Implementing Regulations, the limitation period under English law is one year, starting from the moment the claimant discovered the infringement or 'could with reasonable diligence have discovered it'. As pointed out by Getzler and Whelan, this limitation period is 'remarkably short'.[1011] In comparison, actions for latent damages based on the tort of negligence expire six years 'from the date on which the cause of action accrued' or three years after the moment the claimant had or could have had the knowledge necessary to bring an action for damages.[1012] A time bar of one year after the cause of action arose applies to actions based on the tort of defamation,[1013] but there are various escapes through which this period can be prolonged.[1014]

5.7.6 Concluding remarks

English law takes a restrictive approach to the civil liability of credit rating agencies. Although the Explanatory Memorandum to the English Implementing Regulations states that credit rating agencies were already 'subject to civil

1008 Art. 62 (1) Consumer Rights Act 2015.
1009 Art. 62 (4) Consumer Rights Act 2015.
1010 Schedule 2, Part 1 (2) Consumer Rights Act 2015.
1011 Getzler & Whelan 2017, p. 35.
1012 Art. 14A (4)-(5) Latent Damage Act 1986, with a maximum of fifteen years after the date on which the act or omission took place that allegedly constituted to negligence, Art. 14B (1) Latent Damage Act 1986. Winfield & Jolowicz 2014, no. 26-093.
1013 Art. 5 Defamation Act 1996, Duncan & Neill 2015, no. 24.01.
1014 Winfield & Jolowicz 2014, no. 26-089. *In detail* Duncan & Neill 2015, no. 24.03 ff.

liability' under tort law ('the tort of negligent misstatement'),[1015] a closer analysis of English tort law shows that in the absence of any contractual relationship, a credit rating agency will owe a duty of care under the tort of negligence in exceptional situations only. This reluctant approach stems from a more general reluctance under English law to compensate economic loss caused by reliance on negligent misstatements. As concluded in several other academic contributions, issuers and, in particular, investors who wish to base a claim for damages on the tort of negligence will experience severe difficulties in establishing that a credit rating agency owed them a duty of care in the first place.[1016] If the conduct of a credit rating agency constitutes a breach of contract, English law allows issuers and investors to claim damages on the basis of contractual liability.

The UK legislature implemented the terms of Article 35a CRA Regulation in the UK Implementing Regulations. This approach enhances the legal certainty in respect of the interpretation and application of Article 35a CRA Regulation under English law.[1017] At the same time, the UK legislature used UK Implementing Regulations as a method to diminish the differences between Article 35a and common law liability.[1018] This aim resulted in a narrow interpretation and application of Article 35a CRA Regulation. On the one hand, the UK Implementing Regulations restrict the scope of application of Article 35a CRA Regulation by indirectly providing that only the senior management can commit infringements, and by creating high hurdles for the condition of gross negligence. On the other hand, the UK Implementing Regulations refer back to various elements of the tort of negligence, which find only restrictive application in relation to credit rating agency liability. This restrictive approach does not only become apparent in relation to the existence of a duty of care, but also in relation to the other elements of the tort of negligence. As a result, the threshold for liability under Article 35a CRA Regulation is high in situations in which English law applies, even compared to the requirements of the torts of deceit and negligence under common law. Considering this narrow interpretation and application, it comes as no surprise that the post-implementation review of the UK Implementing Regulations conducted in April 2019 concluded

1015 Explanatory Memorandum to the Credit Rating Agencies (Civil Liability) Regulations 2013, 2013 No. 1637, para 7.4.

1016 *Cf. with regard to issuers* Seibold 2016, p. 76. *Cf. with regard to investors* Seibold 2016, p. 101, Alexander 2015, p. 11, Risso 2015, p. 716, Miglionico 2014, pp. 164-165, Edwards 2013, p. 189 and Ebenroth & Dillon 1992, p. 800.

1017 As concluded by the post-implementation review of the Credit Rating Agencies (Civil Liability) Regulations 2013, 12 April 2019, available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksiod_20131637_en.pdf, last accessed at 31 August 2019.

1018 Explanatory Memorandum to the Credit Rating Agencies (Civil Liability) Regulations 2013, 2013 No. 1637, para 7.4. *Also* Risso 2015, pp. 715-716.

that credit rating agencies are not burdened by large amounts of claims under English law.[1019]

5.8 COMPARISON

5.8.1 Remarks in advance

The previous sections analysed the interpretation and application of Article 35a CRA Regulation under Dutch, French, German and English law. This section compares the results of the national law reports, concentrating on both similarities and differences between the legal systems investigated. In addition, this section briefly concludes to what extent any differences between the legal systems can lead to different outcomes in decisions of national courts on claims for damages based on Article 35a CRA Regulation.

It is necessary to make three important remarks in advance. First, the overviews of national rights of redress provided by the second parts are not entirely exhaustive, but do provide an idea of the general approach taken in the private law systems of the legal systems investigated. The comparison made in this section is based only on the rights of redress referred to in the second parts of the country reports. Second, the findings of the national law reports used in this comparative overview must be approached with the necessary caution, as the reports contain some uncertainties regarding the exact national interpretations and applications of Article 35a CRA Regulation. These uncertainties are partly caused by the absence of explicit national statutory guidance and case law in some Member States, which explains how general rules of private law apply in the context of the civil liability of credit rating agencies. Third, the comparative sections restrict the amount of references to relevant case law, legal academic literature and other sources to a minimum, to ensure the comparison remains readable and to avoid unnecessary repetition. The findings (and especially the summary positions provided) are, however, based on contributions written by other legal scholars. The national law reports account for the academic contributions and other sources used. Therefore, readers are referred to the national law reports for the findings used in the previous comparative overview.

1019 *Cf.* post-implementation review of the Credit Rating Agencies (Civil Liability) Regulations 2013, 12 April 2019, available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksiod_20131637_en.pdf, last accessed at 31 August 2019.

5.8.2 National bases for civil liability – comparison

5.8.2.1 In the presence of a contractual relationship

The second parts of the national law reports concentrated on the question of whether and on what legal basis (or bases) issuers and investors can bring claims for compensation against credit rating agencies under the national laws investigated.[1020] The relevant sections focussed, in other words, on rights of redress available to issuers and investors under the national legal systems investigated.

Contractual liability is most relevant where issuers concluded ratings contracts with credit rating agencies. In the presence of a contractual relationship, the legal landscapes of the national laws investigated look similar.[1021] The four national systems investigated allow issuers and investors to claim damages based on contractual liability, if the conduct of a credit rating agency constituted a breach of its obligations under the contract.[1022] Furthermore, the national laws adopt similar yardsticks or standards to assess whether a credit rating agency breached its contractual obligations. In essence, national courts must assess whether a credit rating agency acted with reasonable care and skill in the assignment of a credit rating, and not whether a credit rating agency assigned a correct credit rating in hindsight.[1023] Consequently, it seems that credit rating agencies will not be liable soon under any of the four legal systems, because they have a wide margin of discretion in the assignment of credit ratings.

1020 Section 5.4.2 (Dutch law), section 5.5.2 (French law), section 5.6.2 (German law) and section 5.7.2 (English law).

1021 *See* section 5.4.2.2 (Dutch law), section 5.5.2.1 (French law), section 5.6.2.2 (German law) and section 5.7.2.2 (English law). With regard to the legal bases for compensation available in the presence of contractual relationships, this dissertation concentrated on general principles and norms of the national laws of contract, notwithstanding the power of the (commercial) parties involved to create their own terms that may expand the responsibility of credit rating agencies.

1022 Under Art. 6:74 BW (Dutch law), Art. 1231-1 CC (French law), § 280 (1) BGB (German law) and liability for breach of contract under English law.

1023 In respect of Dutch law, Atema & Peek 2013, pp. 950-951 and Bertrams 1998, p. 357. In respect of French law, Dondero, Haschke-Dournaux & Sylvestre 2004, no. 78 and *cf.* Sotiropoulou 2013, no. 9, Merville 2013, no. 14 and Leclerc 2008, pp. 153-155. In respect of German law, Von Rimon 2014, pp. 146-147 and 186. In respect of English law, *cf. with regard to issuers* Seibold 2016, p. 61, Edwards 2013, p. 190 and Ebenroth & Dillon 1992, pp. 789-790.

5.8.2.2 In the absence of a contractual relationship

In the absence of a contractual relationship, the opportunities for issuers and investors to hold a credit rating agency liable differ between the national legal systems investigated.[1024]

The national law reports demonstrated that issuers have more opportunities to hold a credit rating agency liable than investors. Under Dutch and French law, issuers are able to base claims for damages against credit rating agencies on the general legal bases for non-contractual liability of Article 6:162 BW and Article 1240 and Article 1241 CC, respectively. Prior to January 2018, French law involved special rules on credit rating agency liability under Article L. 544-5 and L. 544-6 Code monétaire et financier. The French legislature abolished these provisions in January 2018 in order to converge the civil liability regimes for credit rating agencies under French and EU law.[1025] The *Exposé sommaire* of the French legislature does not address the relationship between Article 35a CRA Regulation and legal bases for credit rating agency liability under French law, so that one can question whether issuers and investors can still base a claim for damages on French private law or whether issuers and investors can only resort to Article 35a CRA Regulation. Under German law, issuers can base claims for damages on § 823 (1) for violations of an issuer's right to business as a going concern, § 824 and § 826 BGB.[1026] Within these three legal systems, national courts must balance an issuer's interests against a credit rating agency's right to freedom of speech. The right to freedom of speech is not absolute, and credit rating agencies are generally required to assign the credit rating with the care and skill that can be expected from a reasonable credit rating agency. English law takes a more restrictive approach towards the civil liability of credit rating agencies vis-à-vis issuers. In the absence of case law confirming these matters, it is not certain whether English courts are prepared to grant claims for damages based on the tort of defamation or to decide that a credit rating agency owes a duty of care under the tort of negligence towards issuers.

The opportunities for investors to hold a credit rating agency liable differ between the national legal systems investigated. Under Dutch law, investors

1024 *See* section 5.4.2.3 (Dutch law), section 5.5.2.2 (French law), section 5.6.2.3 (German law) and section 5.7.2.3 (English law).

1025 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 1.

1026 *With regard to unsolicited credit ratings* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Wimmer 2017, pp. 346-360, Seibold 2016, pp. 62-69, Von Rimon 2014, pp. 175-180, Schroeter 2014, pp. 853-863, Amort 2013, p. 275, Wagner 2013, pp. 473-474 and Arntz 2012, pp. 93-95. *With regard to solicited credit ratings* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Wimmer 2017, pp. 346-360, Seibold 2016, p. 49, Von Rimon 2014, pp. 165-173, Schroeter 2014, pp. 817 and 822, Amort 2013, p. 275, Wagner 2013, pp. 473-474 and Arntz 2012, p. 93. The overview provided did not reflect all grounds for liability discussed in German literature.

can base claims for damages on the general tort law provision of Article 6:162 BW. Furthermore, investors may invoke the special grounds for liability under Article 6:193b and 6:194 BW in case of solicited ratings or structured finance ratings, which entitle them to facilitations regarding the burden of proof in respect of the accuracy of credit ratings. Under French law, investors seem to be able to base a claim for damages on the general tort law provisions of Article 1240 and Article 1241 CC. Again, the abolition of the special rules on credit rating agency liability under Article L. 544-5 and L. 544-6 Code monétaire et financier in January 2018 caused some doubt on this matter.[1027] As the *Exposé sommaire* of the French legislature does not address the relationship between Article 35a CRA Regulation and legal bases for credit rating agency liability under French law, one can question whether investors can still base a claim for damages on French private law or whether they can only resort to Article 35a CRA Regulation.

German and English law involve less opportunities for investors to hold credit rating agencies liable in the absence of a contractual relationship. It seems that investors can only successfully invoke certain provisions of national law if a credit rating agency conducted itself in a highly blameworthy manner or in exceptional situations involving credit ratings relating to specific issues of financial instruments. Under German law, the financial interests of investors do not fall within the interests protected by § 823 (1) BGB.[1028] Prior to the introduction of Article 35a CRA Regultion, investors could not use the infringements of Annex III CRA Regulation in claims for damages based on § 823 (2) BGB. It is doubtful whether investors can currently use the infringements of Annex III CRA Regulation in claims for damages based on § 823 (2) BGB,[1029] and, if at all, an investor will only be able to base a claim for compensation on the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* in relation to credit ratings attached to specific financial instruments.[1030] Furthermore, investors can resort only to § 826 BGB in the most exceptional situations of

1027 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 1.

1028 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 49.

1029 This dissertation argued in favour of the opportunity to use the infringements listed in Annex III under § 823 (2) BGB (section 5.6.2.3 (a) (ii) and (b) (ii)). Dumont du Voitel 2018, p. 353 argued that the norms under the CRA Regulation qualify as individual protective norms and can be used under § 823 (2) BGB. However, other German scholars doubted this opportunity (Wimmer 2017, pp. 354-355 and Heuser 2019, p. 84).

1030 Seibold 2016, p. 95 and Halfmeier 2014, p. 330. Furthermore, Deipenbrock was of the opinion that the facts of the case of 8 February 2018 did not form a typical scenario of credit rating agency liability (because the case concerned an issuer rating and not a financial instrument rating), and that the decision, therefore, might not provide general guidance (*cf.* Deipenbrock 2018, p. 573).

misconduct,[1031] and this provision creates conditions for civil liability which are more restrictive than the conditions set by Article 35a (1) CRA Regulation itself. Under English law, the opportunities for investors to bring claims for damages are limited as well. Investors can base a claim for damages on the tort of deceit, but such a claim succeeds only if the credit rating agency acted intentionally or recklessly in the assignment of the credit rating. Furthermore, except for exceptional situations, credit rating agencies will not owe a duty of care under the tort of negligence towards investors.[1032]

Overall, issuers and investors have more opportunities to hold a credit rating agency liable in the presence of a contractual relationship in the legal systems investigated. The four legal systems are rather similar in this respect. In the absence of a contractual relationship, English law takes the most restrictive approach towards the civil liability of credit rating agencies vis-à-vis issuers. Furthermore, the comparison demonstrated that investors have much fewer opportunities to hold a credit rating liable and, in some legal systems, are hardly entitled to any right of redress at all. From this perspective, Article 35a CRA Regulation had the potential of filling a gap in the legal protection of investors at least under German and English law.

5.8.3 Article 35a (1) CRA Regulation – comparison

5.8.3.1 'Intentionally' or 'with gross negligence'

The requirement that an infringement must have been committed 'intentionally' or 'with gross negligence' forms an increased threshold for the civil liability of credit rating agencies. What exactly constitutes intentional or grossly negligent conduct depends on the circumstances of the case and is difficult to grasp in a concrete definition. As a result, the analyses made in the national law reports remained abstract. The positions of the national laws investigated can be summarised as follows:

1031 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 19 and Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 40.

1032 *Cf.* Getzler & Whelan 2017, p. 21, Seibold 2016, pp. 102-103 and Alexander 2015, p. 11.

Legal system	*Summarised position on 'intentionally' and 'with gross negligence'*	*Section*
Dutch law	Intentionally: a credit rating agency deliberately and consciously committed an infringement or accepted that its conduct would result in committing an infringement or created a significant chance of committing an infringement. With gross negligence: a credit rating agency was conscious or should have been conscious of the fact that its conduct involved the risk of committing one the infringements listed in Annex III. The conduct will be approached from an objective perspective, so that it will be compared with the conduct of a reasonable credit rating agency placed in the same position. Yet, uncertainty remains as regards the exact interpretation and application of this term under Dutch law.	5.4.3.1
French law	Intentionally: a credit rating agency intended to commit an infringement or intended the consequences of its conduct to occur; it is not required that the credit rating agency intended to cause any loss. With gross negligence: a credit rating agency was conscious or should have been conscious of the chance that loss would occur, but decided to carry on anyway and the credit rating agency did not intend to commit an infringement or was not conscious of potential risks, but acted with such a high degree of negligence compared to how a reasonable credit rating agency would have acted in the same position, that it is shown that the credit rating agency was not competent to fulfil its tasks.	5.5.3.1
German law	Intentionally: a credit rating agency knowingly and consciously committed an infringement or must have intended or accepted that its conduct could result in committing an infringement. With gross negligence: a credit rating agency must have breached the required standard of care in an unusually severe way, thereby not having paid attention to matters that should not have been ignored. Consciousness of possible harmful consequences does not seem required under German law. Courts assess the subjective blameworthiness of a wrongdoer's conduct, but the requirement of subjective culpability can be relaxed when the wrongdoer is a legal person.	5.6.3.1

Legal system	*Summarised position on 'intentionally' and 'with gross negligence'*	*Section*
English law	Intentionally: a credit rating agency must have deliberately committed an infringement under Art. 3 UK Implementing Regulations – concentrated on senior management only, i.e. it must have intended an infringement to occur. With gross negligence: a credit rating agency must have acted recklessly, i.e. it must have acted without caring whether an infringement occurred under Art. 4 UK Implementing Regulations – concentrated on senior management only, implying consciousness of the risks involved.	5.7.3.1

The four legal systems approach the term 'intentionally' in similar manners. A credit rating agency must have deliberately committed the infringement or must have accepted its conduct would result in an infringement of the CRA Regulation. The UK Implementing Regulations do not explicitly mention the latter component under Art. 3 UK Implementing Regulations.

The more interesting question is what type of conduct meets the threshold of grossly negligent conduct. The national law reports revealed the four systems split into two groups. On the one hand, Dutch, French and German law adopt similar approaches to gross negligence, in the sense that the national courts concentrate on the blameworthiness of a credit rating agency's conduct as a whole as compared to the conduct of a reasonable credit rating agency placed in the same position. Whether a credit rating agency was conscious of the potentially harmful consequences of its conduct forms a sign of gross negligence, but is not an essential element of grossly negligent conduct. Yet, it must be remarked that the Dutch interpretation and application of gross negligence remains uncertain, due to the fact that the Dutch translation of Article 35a (1) CRA Regulation does not correspond to commonly used Dutch legal concepts, while Dutch law involves a tangled web of terms and definitions relating to different degrees of culpability. On the other hand, English law provides a different, namely a narrower and subjective, interpretation of gross negligence under Article 4 UK Implementing Regulations. Following this interpretation, the senior management of a credit rating agency must have acted recklessly, i.e. must have acted without caring whether an infringement would occur. The senior management, hence, must have considered the possibility that its conduct would result in an infringement, but must have carried on anyway. As the burden of proof lies with issuers and investors, English law creates a threshold for civil liability, which investors and issuers can only overcome in the most exceptional situations.

Furthermore, the difference between, on the one hand, Dutch, French and German law and, on the other hand, English law is enlarged by the fact that

the UK Implementing Regulations strongly suggest limitations on the circle of organs and persons within a credit rating agency that can commit infringements actionable under Article 35a (1) CRA Regulation. As described under section 5.3.1.1 (b), the wording of Article 3 and 4 (2) UK Implementing Regulations entails that the scope of application of Article 35a (1) CRA Regulation is restricted to situations in which the senior management of the credit rating agency committed an infringement intentionally or with gross negligence. Dutch, French and German law do not contain such explicit restrictions in the context of credit rating agency liability. As described under section 5.3.1.1 (b), I do not consider the relevant circle of organs and persons a matter of national law, but rather a matter of EU law. The wording and spirit of the infringements determine the relevant circle of organs and persons and, thereby, the scope of application of Article 35a CRA Regulation. However, as long as this matter has not come up in legal proceedings, the result in practice is that the English interpretation and application of the minimal threshold of gross negligence and the relevant circle of organs and persons that can commit infringements is much more restrictive in comparison to the other Member State laws investigated.

5.8.3.2 'Impact' and 'caused to', including claimant-specific requirements

Article 35a (1) CRA Regulation addresses several aspects of causation. First, the infringement listed under Annex III must have had an impact on the credit rating, thereby building the first part of the bridge between an infringement and the eventual loss suffered by issuers and investors. Second, a causal relationship must exist between the infringement – which resulted in the affected credit rating – and the loss suffered by the claimant. Furthermore, Article 35a (1) CRA Regulation contains two claimant-specific requirements. The wording of these requirements indicates that the burden of proof lies with issuers and investors and, more importantly, suggests that if issuers and investors cannot meet these requirements, the causal link between the infringement and the loss is broken so that these issuers and investors are not entitled to compensation under Article 35a CRA Regulation at all.

The table below provides an overview of the summarised positions under the national laws investigated. This overview, however, gives the impression that national courts will adopt a more structured approach than they would do in practice. The positions of the national laws investigated can be summarised as follows:

Legal system	*Summarised position on 'impact' and 'caused to', including specific requirements*	*Section*
Dutch law	'Two stage' test for the purposes of causation, which applies to 'impact' and 'caused to': - Establishing liability: *condicio sine qua non* test. Burden of proof: rests upon the issuer or investor, being the party who invokes Art. 35a. Standard of proof: a reasonable degree of probability. Opportunities to deal with causal uncertainty relating to reasonable reliance in claims brought by investors: • Evidentiary presumption of causation in relation to reliance (*VEB v World Online*)(?) – most relevant for retail investors • Application loss of chance(?) - Determining the extent of liability: Art. 6:98 BW, which forms part of the Dutch law of damages.	5.4.3.2
French law	No clear conceptualised distinction between different 'stages' of causation. - *Condicio sine qua non* test. French courts apply both theory of equivalence and the theory of causal adequacy. Burden of proof: rests upon issuer or investor, being the party who invokes Art. 35a. Standard of proof: French courts can adopt a flexible approach towards causation both in relation to claims brought by issuers and investors. Opportunities to deal with causal uncertainty relating to reasonable reliance in claims brought by investors: • Application loss of chance(?) - Defence based on *cause étrangère*.	5.5.3.2

Legal system	*Summarised position on 'impact' and 'caused to', including specific requirements*	*Section*
German law	Conceptualised distinctions between *Haftungsbegründende Kausalität* and the *Haftungsausfüllende Kausalität*, and between the *condicio sine qua non* test, the *Adäquanztheorie* and the *Schutzzwecklehre*. Test: - *Haftungsbegründende Kausalität*: 'impact' = causal link between infringement and credit rating. • *Condicio sine qua non* test. Burden of proof: rests upon issuer or investor, being the party who invokes Art. 35a. Standard of proof: influenced by Art. 35a (2). - *Haftungsausfüllende Kausalität*: 'caused to' = causal link between infringement and loss. • *Condicio sine qua non* test. • *Adäquanztheorie* (the theory of causal adequacy). • *Schutzzwecklehre* (the theory of the scope of the rule). Burden of proof: rests upon the claimant. Standard of proof: arranged for by § 287 ZPO, '*überwiegende Wahrscheinlichkeit*', but underlying factual claims, such as reasonable reliance in accordance with § 286 ZPO. Opportunities to deal with causal uncertainty relating to reasonable reliance in claims brought by investors: generally not applicable. The concept of *Anlagestimmung* might apply in the most exceptional situations. Uncertainty exists as regards to whether the requirement of reasonable reliance falls within the scope of *Haftungsbegründende Kausalität* or *Haftungsausfüllende Kausalität*. It was argued that reasonable reliance concerns a factual claim, so that the standard of proof under § 286 ZPO applies.	5.6.3.2

Legal system	*Summarised position on 'impact' and 'caused to', including specific requirements*	*Section*
English law	The UK Implementing Regulations split the interpretation and application of 'impact' and 'caused to'. 'Impact': The issuer or financial product ended up in a different rating category due to the infringement under Art. 5 UK Implementing Regulations. In essence, this description mirrors the but for test. 'Caused to': the test for causation in negligence under Art. 8 UK Implementing Regulations: - Causation in fact: But for test. Burden of proof: rests upon the claimant. Additional threshold 'reasonable' reliance: only if the credit rating agency assumed responsibility or owed a duty of care towards the investor under the tort of negligence. Opportunities to deal with causal uncertainty relating to reasonable reliance in claims brought by investors: n.a. - Causation in law. - Remoteness. Standard of proof: balance of probabilities.	5.7.3.2

The overview shows that the national laws touch upon the same main elements in relation to causation. Differences between the Member States mainly arise in the ways in which national courts could deal with causal uncertainty relating to the reasonable reliance of investors. English law in particular takes a very restrictive approach to the requirement of reasonable reliance, so that the number of situations in which investors can meet the threshold of reasonable reliance is limited to a great extent.

(a) 'Impact'

Article 35a (1) CRA Regulation requires the infringement committed to have had an impact on the credit rating. Article 35a (4) CRA Regulation explicitly refers the term 'impact' back to the applicable national law, so that national rules on causation determine the substantive test to establish the impact of a credit rating. Article 35a (2) CRA Regulation, however, did not completely leave matters of civil procedure law to the Member States. It provides that the investor or issuer must provide accurate and detailed information indicating that the infringement had an impact on the credit rating. The result is a somewhat strange mixture of EU law and national law, in which national law

determines the relevant 'test' and EU law determines the burden and standard of proof in relation to that national test.[1033]

The reference under Article 35a (4) CRA Regulation to the applicable national law is superfluous, as the meaning of the requirement of 'impact' is a matter of common sense. What else could the Union legislature have meant by the requirement of 'impact' apart from the idea that the infringement entailed that the credit rating ended up in a different rating category? The national law reports do not reveal relevant differences between the Member States in this regard. English law explicitly stipulates that the issuer or financial product must have ended up in a different rating category due to the infringement under Article 5 UK Implementing Regulations. The other three legal systems investigated do not provide explicit explanations, but the requirement of impact must be assessed within the general analysis on causation. Dutch, French and German law apply the *condicio sine qua non* test. In essence, the four national laws investigated hence approach the term 'impact' in the same way.

(b) 'Caused to'

The second element of causation concerns the relationship between the infringement which affected the credit rating and the eventual loss suffered by issuers and investors. The national law reports show that legal systems investigated take the same test for causation as a starting point: had the infringement not occurred, then an issuer would not have suffered additional funding costs and/or reputational loss and an investor would not have suffered pure economic loss. This test forms a concrete application of the national tests for factual causation; the *condicio sine qua non* test under Dutch, French and German law and the 'but for' test under the English tort of negligence. All legal systems place the burden of proof upon the issuer or the investor, being the party that invokes its rights under Article 35a (1) CRA Regulation. Furthermore, the legal systems employ mechanisms to limit the outcomes of the *condicio sine qua non* test and the 'but for' test, if the defendant's conduct was not the adequate cause of the loss or if the loss was unforeseeable or too remote. Differences can be identified between the Member States in respect of the opportunities of national courts to deal with causal uncertainty in relation to the investor-specific requirement of 'reasonable reliance'.

(c) Opportunities to deal with causal uncertainty in relation to '(reasonable) reliance'

Article 35a (1) CRA Regulation contains two claimant-specific requirements. This section concentrates on the investor-specific requirement, which requires investors to prove that they 'reasonably relied, in accordance with Article 5a(1)

1033 Although, ultimately, the applicable national law determines the content of Art. 35a (2) CRA Regulation as well.

or otherwise with due care, on a credit rating for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating'.

(i) – Structural mismatch with national legal systems

The national law reports displayed a structural mismatch between the investor-specific requirement of reasonable reliance under Article 35a (1) CRA Regulation and the national legal systems investigated. The requirement does not fit within the national legal systems. Whereas reasonable reliance under Article 35a (1) CRA Regulation forms part of the requirement of causation, the Member State laws would deal with this element in a different manner. For instance, Dutch and German law separate the elements of reliance and the reasonableness of the reliance. The first element belongs to the assessment of causation, whereas the second element belongs to the law of damages. A lack of reasonable reliance, therefore, would not automatically lead to the negation of the causal connection, but rather to a reduction of the recoverable loss and the amount of damages awarded in these legal systems.

Furthermore, in respect of claims brought under the tort of negligence, English courts consider 'reasonable reliance' for the purpose of establishing whether a credit rating agency owes a duty of care or not. The UK Implementing Regulations also treat the requirement of reasonable reliance under Article 35a (1) CRA Regulation as part of the duty of care. Article 6 aligns the test for reasonable reliance with the test to determine whether it is reasonable for a person to rely on a statement for the purposes of determining whether the statement gives rise to a duty of care in negligence. As a result, national courts must investigate whether a credit rating agency voluntarily assumed responsibility towards the investor as in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[1034] or whether a credit rating agency owed a duty towards the investor using the considerations of *Caparo Industries Plc v Dickman.*[1035] But, in the absence of the existence of a special relationship between the credit rating agency and the investor, the investor will face a very challenging task to establish that the credit rating agency owed a duty of care towards him, let alone that the credit rating agency voluntarily assumed responsibility towards him. By framing the requirement as part of the duty of care, the English implementation of 'reasonable reliance' hence leads to a severe restriction of the scope of Article 35a CRA Regulation.

(ii) – Facilitating investors

The requirement of 'reasonable reliance' imposes a heavy burden upon investors in concrete legal proceedings against credit rating agencies. It requires investors to provide evidence of their reliance on credit ratings and of the

1034 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465, [1963] 3 W.L.R. 101.

1035 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, [1990] 2 W.L.R. 358. *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, 189-190 and 213.

relevance of credit ratings for their investment decisions. Investors may often have trouble providing such evidence and a strict application of this requirement will cause many claims to be rejected because of a lack of evidence. Therefore, the national law reports investigated whether national courts have possibilities to facilitate investors in meeting the requirement of (reasonable) reliance. These could be of an evidentiary law nature, involving, for instance, reversals of the burden of proof. Alternatively, such facilitation possibilities could be of a substantive law nature, involving, for instance, the replacement of the requirement of reasonable reliance with the doctrine of loss of chance. As statutes and case law on this matter are often absent in the concrete situation of credit rating agency liability, the national law reports analysed to what extent facilitation possibilities applied in other areas could also apply in the context of credit rating agency liability. But in the absence of statutes and case law confirming this matter, one must exercise the necessary caution with regard to these applications.[1036]

The picture arising from the national law reports is diverse,[1037] and clouded by uncertainties. French and Dutch law provide the most possibilities to relax the requirement of reasonable reliance in favour of investors. French courts can adopt a flexible approach in respect of the burden and standard of proof imposed upon investors. Furthermore, French law leaves room to apply the doctrine of loss of chance in the context of credit rating agency liability. The application of this doctrine would entail that the requirement of causation between the infringement (and the affected credit rating) and a lost chance replaces the requirement of reasonable reliance. Although French courts have not yet applied the doctrine in the context of credit rating agency liability, such an application fits the general French approach to the doctrine of loss of chance; French courts tend to apply this concept in a broad manner and recognise the loss of autonomy as a compensable head of damages in the context of the dissemination of incorrect or incomplete information to the financial markets.[1038] In the context of credit rating agency liability, investors must argue that due to the infringement and the affected credit rating, they lost an opportunity to make a completely and well-informed investment decision, i.e. they lost the autonomy to make a completely and well-informed investment decision. As long as the investor can prove this chance was real, serious and certain, French courts are prepared to even compensate lost chances that are relatively small.

1036 It must be noted that the opinions are divided on this matter. Heuser believed concrete reliance is required under Art. 35a CRA Regulation. Contrary to Heuser, I would say this matter is left to the Member States. *See also on this topic* Heuser 2019, pp. 182-183.

1037 *Cf. also in the context of deficient issuer information*, Vandendriessche 2015, no. 337.

1038 *Most notably* Cour de Cassation (Chambre Commerciale) 9 March 2010, 08-21547 and 08-21793, Bulletin 2010, IV, no. 48 (*Gaudriot*) and Cour de Cassation (Chambre Commerciale) 6 May 2014, 13-17632 and 13-18473, ECLI:FR:CCASS:2014:CO00430, Bulletin 2014, IV, no. 81 (*Marionnaud*).

Compared to French law, the current state of Dutch law in relation to possibilities to relax the requirement of reasonable reliance in favour of investors is clouded by more uncertainty. It is doubtful whether Dutch courts will apply the evidentiary presumption of *VEB v World Online* by analogy to the causal link between the credit rating and the investment decision, and whether Dutch courts will apply the doctrine of loss of chance in relation to credit rating agency liability. Dutch law leaves room to apply both concepts. However, at the same time, applying these concepts in the context of credit rating agency liability involves broadening their application. The application of the evidentiary presumption depends on whether courts consider a credit rating to be misleading to the average investor and whether courts deem it necessary to apply the presumption in the light of an effective application of Article 35a CRA Regulation. Considering the similarities between prospectus liability (*VEB v World Online* on the facts) and credit rating agency liability, there are valid reasons to assume that Dutch courts will apply the evidentiary presumption by analogy under Dutch law.[1039] Furthermore, it is doubtful whether Dutch courts would award damages if an investor frames its claim as a loss of chance case. The doctrine of loss of chance has developed further under French law than under Dutch law. As shown by the case of *Deloitte Belastingadviseurs v H&H Beheer*, the Dutch Supreme Court allows for the compensation of lost chances, the realisation of which depends on the conduct of claimants, such as a lost chance to take a certain decision.[1040] Moreover, in October 2018, the Court of Appeal of The Hague also applied the doctrine of loss of chance where a medical case manager failed to provide the claimant with information on options of insurance and to offer the claimant assistance; in the absence of this failure, the chance that the claimant would have hired the case manager was 50%.[1041] At the same time, the link between the affected credit rating and the investor's investment decision is more far-fetched than, for instance, the link between the advice of a lawyer and the subsequent conduct of its client. In addition, Dutch courts have not awarded damages for the loss of autonomy in the context of incorrect or incomplete information to the financial markets. So there is room to apply the doctrine of loss of chance to credit rating agency liability under Dutch law, but it would constitute an extension of the application of this concept under Dutch law. In the absence of case law confirming this matter, the application of the evidentiary presumption and the doctrine of loss of chance remains uncertain under Dutch law. From an investor's perspective, however, it is worthwhile invoking these tools when Dutch law applies to their claim.

The positions of German and English law are the clearest, but also the most restrictive: these legal systems will in principle not relax the requirement of

1039 *Cf.* Giesen & Rijnhout 2017, p. 264.
1040 Asser/Sieburgh 6-II 2017/80a.
1041 Gerechtshof Den Haag 9 October 2018, ECLI:NL:GHDHA:2018:2558, para 16.

reasonable reliance in favour of investors. German law involves very few possibilities to relax the requirement of reasonable reliance in favour of investors. It is assumed that in principle the normal burden and standard of proof continue to apply in respect of reasonable reliance. Investors must prove that they reasonably relied on a credit rating under the high standard of proof under § 286 ZPO. The standard of proof under § 286 ZPO is more demanding than the 'balance of probabilities' test employed under English law. German courts are not likely to apply facilitations such as the adoption of *Anscheinsbeweis*, the *Vermutung aufklärungsrichtigen Verhaltens* (a presumption of advice-conform behaviour) and the tool of replacing direct reliance with *Kursdifferenzschade* by analogy in the context of credit rating agency liability. Furthermore, as a matter of principle, German law does not protect chances lost by an aggrieved party. Therefore, the doctrine of loss of chance finds no application in the context of credit rating agency liability under German law.[1042] In the most exceptional situations, there is some room for German courts to replace the requirement of reliance with the concept of *Anlagestimmung* (reliance on market sentiment). Yet, German courts are assumed to mostly uphold the requirement of reasonable reliance of Article 35a (1) CRA Regulation.[1043]

Finally, English courts will maintain the normal division of the burden of proof of the 'but for' test in respect of reasonable reliance, so that investors must prove that they reasonably relied on a credit rating on a balance of probabilities. English courts only deviate from the general common law principles in respect of causation for the most pressing reasons of public policy in cases concerning medical negligence, which do not come into play in cases of credit rating agency liability in which financial interests are at stake.[1044] Furthermore, English courts will not apply the doctrine of loss of chance in these situations, as that concept is strictly reserved for causal uncertainty relating to future events in which the lost chance does not depend on the hypothetical conduct of the claimant.[1045] In this regard, English law adopts the exact opposite position as compared to French law. Whereas French law compensates the loss of autonomy to have taken a fully and well-informed investment decision, English law explicitly denies the compensation of the loss of autonomy to have taken a fully and well-informed investment decision. Hence, in the context of credit rating agency liability in which the lost chance of the claimant involves a chance to have made a fully and well-informed

1042 *Cf. e.g.* Palandt/Grüneberg 2019, Vorb v § 249, no. 53, Magnus 2013, no. 35 and Van Dam 2013, no. 1110-3. Less recently Jansen 1999, pp. 273-274.

1043 Von Rimon 2014, p. 188. Heuser, however, rejected the application of the concept of *Anlagestimmung* because it would be contrary to EU law (Heuser 2019, p. 183).

1044 *As can be derived from e.g. Beary v Pall Mall Investments* [2005] EWCA Civ 415, [2005] P.N.L.R. 35.

1045 *As can be derived from e.g. Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 W.L.R. 636 and *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602.

investment decision, English courts would not apply the doctrine of loss of chance to facilitate the investor.

In summary, French law leaves most room to deviate from the requirement of reasonable reliance by relaxing the burden and standard of proof or by application of the doctrine of loss of chance. Under Dutch law, the application of such facilitation possibilities remains more uncertain. From an investor's perspective, however, it is worthwhile invoking these tools when Dutch law applies to their claim. Finally, the positions of German and English law are the clearest, but also the most restrictive: these legal systems do not[1046] leave room to facilitate investors in proving reasonable reliance or to relax the requirement of reasonable reliance. Of these two systems, the standard of proof under German law is the most compelling. However, as the UK Implementing Regulations aligned the test for whether the reliance of an investor was reasonable with the test for whether it is reasonable for a person to rely on a statement for the purposes of determining whether the statement gives rise to a duty of care in negligence, the hurdle for proving reasonable reliance is very high under English law as well.

5.8.3.3 Suffering 'damage' and claiming 'damages'

Article 35a (1) CRA Regulation entitles issuers and investors to 'damages' for 'damage' caused to them due to the infringement and the affected credit rating. The CRA Regulation does not provide sufficient guidance on what loss ('damage') an issuer or investor must have suffered, so that this element falls within the remit of the applicable national law. Therefore, the national law reports concentrated on what constitutes recoverable loss and how compensation, i.e. the amount of damages, is calculated. Furthermore, the national law reports focus on national legal mechanisms developed to limit the amount of damages awarded. It should be kept in mind that if national courts reach the stage at which they must calculate the amount of damages to be awarded, issuers and investors have already managed to overcome quite some hurdles on the way to a successful claim for compensation against a credit rating agency.

1046 Noting that German law leaves some room for German courts to replace the requirement of reliance with the concept of *Anlagestimmung* in the most exceptional situations.

The positions of the national laws investigated can be summarised as follows:

Legal system	*Summarised position on suffering 'damages' and claiming 'damages'*	*Section*
Dutch law	Type of loss: undefined in BW, but compensation of both pure economic and reputational loss is not problematic. Recoverable loss and calculation of damages: - Issuers: in principle full compensation, unless the loss cannot be attributed to the credit rating agency under Art. 6:98 BW (legal causation). But, in general, the factors of Art. 6:98 BW point towards a broad attribution of loss. - Investors: in principle full compensation, unless the loss cannot be attributed to the credit rating agency under Art. 6:98 BW (legal causation). The obligation to compensate loss and the corresponding amount of damages may be limited to the influence of the affected credit rating on the price or the yield of the financial instruments. Unless Dutch courts apply the doctrine of loss of chance to claims brought by investors then the amount of damages would be calculated by multiplying the total loss by the lost chance. Art. 6:101 BW: Contributory negligence applies and issuers and investors are under the obligation to mitigate their loss.	5.4.3.3
French law	Types of loss: undefined in CC. Each type of loss is eligible for compensation as long as it qualifies as certain, direct and legitimate. Recoverable loss and calculation of damages: - Issuers: full compensation. - Investors: full compensation, unless not all loss is considered sufficiently 'direct' and unless French courts apply the doctrine of loss of chance to claims brought by investors then the amount of damages is calculated by multiplying the total loss by the lost chance. However, in practice, French courts often award a fixed sum of damages without clear motivation. Contributory negligence applies. No general obligation to mitigate the loss.	5.5.3.3

Legal system	*Summarised position on suffering 'damages' and claiming 'damages'*	*Section*
German law	Types of loss: material loss, immaterial loss and lost profits. Recoverable loss and calculation of damages: - Issuers: full compensation. - Investors: full compensation, analogue application of the case *IKB* suggests investors, if they succeed in proving reasonable reliance, can choose between *Vertragsabschlussschade (Transaktionschade)* and *Kursdifferenzschade*. § 254 BGB: Contributory negligence applies and issuers and investors are under the obligation to mitigate their loss.	5.6.3.3
English law	Under Art. 13 and 14 UK Implementing Regulations, the following types of loss can be compensated and the following method to calculate the amount of damages applies: - Issuers: • Amount depends on the rating contract. • In the absence of a rating contract, increased funding costs only. - Investors: • Amount depends on the subscription contract. • In the absence of a subscription contract, courts must calculate the amount of damages in accordance with the rules under the tort of negligence. Starting point: Full compensation. But: analogue application of the case *SAAMCO* leads to the compensation of the mispricing loss only. Art. 15 UK Implementing Regulations: Contributory negligence applies. Art. 15 UK Implementing Regulations: Mitigation applies.	5.7.3.3

The national law reports aimed to provide guidance on what types of loss are compensated and on how the amount of damages is calculated.

In respect of claims against credit rating agencies brought by issuers, the reports revealed a difference between the types of loss eligible for compensation under, on the one hand, Dutch, French and German law, and, on the other hand, English law. Under Dutch, French and German law, issuers can claim damages for both pure economic and reputational loss as a matter of principle

– notwithstanding practical difficulties relating to proving the existence and extent of reputational loss. Under English law, however, issuers can only claim damages awarded for increased funding costs pursuant to Article 13 (1) (b) UK Implementing Regulations. Apart from this difference, the general principles to calculate the amount of damages are similar within the four legal systems investigated. The national laws take the principle of full compensation as a starting point, and calculate the award of damages by comparing the actual position of the issuer with the hypothetical situation in which the issuer would have been in the absence of the infringement and the impacted credit rating. The burden of proof lies with the issuer, but the national courts can estimate the recoverable loss and the corresponding amount of damages.

In respect of claims brought by investors, the national law reports demonstrated some uncertainty as to what loss is eligible for compensation and how the amount of damages is calculated. The laws of damages of the four legal systems start from the principle of full compensation. A recurring consideration in the national law reports is to what extent investors are entitled to compensation: to the total lost value of their investments or to the mispricing loss and lost yields only. The nature of the activities pursued by credit rating agencies and investors renders general reluctance towards the compensation of the total value of the investment justified. There are multiple manners in which national courts can limit the recoverable loss so that investors are not compensated to the full costs of the transaction of the financial instruments.

Under Dutch law, for instance, courts can limit the recoverable loss by applying the theory of objective attribution under Article 6:98 BW. The defendant (a credit rating agency) must invoke this theory. The case law of the Dutch Supreme Court provides little guidance on the application of this theory in the context of financial litigation. Dutch scholars argued against the compensation of the total value of the investment in the field of prospectus liability and liability for a breach of disclosure obligations, and argued in favour of the compensation of mispricing loss.[1047] It is worthwhile for credit rating agencies to invoke Article 6:98 BW and to argue that at least part of the loss suffered by investors cannot be reasonably attributed to them.

Furthermore, under English law, if an investor manages to reach the stage at which national courts calculate the damages at all, the investor is not entitled to compensation of the total value of the investment. The scope of duty of a credit rating agency does not extend to the compensation of the total value of the investment. If a credit rating agency owes a duty of care to investors under English law at all, such a duty only concerns the provision of correct and complete information. The breach of such a duty entitles the investor to compensation of the direct consequences of the incorrect or incomplete information only under the general principles of the *SAAMCO* case.[1048] Trans-

1047 De Jong 2016, pp. 128-129 and De Jong 2010, pp. 183, 189 and 294, Pijls 2009, p. 135.
1048 *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191.

posing these principles to claims for damages under Article 35a (1) CRA Regulation, an investor is entitled to the compensation of mispricing loss and lost yields at most.

As stated, French law leaves room to apply the doctrine of loss of chance in the context of credit rating agency liability. The application of the doctrine of loss of chance would also lead to the 'partial' compensation of investors only. As we have seen, in cases concerning issuer liability for deficient market disclosures, French courts have applied the doctrine of loss of chance in order to achieve a 'golden mean' replacing the all-or-nothing approach. The risks of an uncertain causal relationship are hereby distributed amongst the issuer and the investor. Yet, the application of the doctrine of loss of chance has disadvantages. The way in which French courts currently apply the doctrine leads to uncertainties at the stage of the calculation of the amount of damages. In the context of issuer liability, French courts often award fixed sums of damages and fail to explain how they assessed the height of the chance or the fixed sum of damages. The case law shows that French courts hardly motivate their decisions on the award of damages. Due to this lack of (proper) motivation, it is difficult to derive general guidelines from the case law which can help to predict how French courts will calculate the amount of damages in future cases.[1049]

Only German law takes a position that deviates from the other legal regimes investigated. The German approach to calculation of the award of damages relates to the German approach to causation. As described in section 5.6.3.2 (b), under German law, the requirement of reasonable reliance under Article 35a (1) CRA Regulation will most likely be upheld so that investors will only reach the stage of the calculation of damages in exceptional situations. However, if an investor does reach this stage, it seems that the investor can choose to claim *Vertragsabschlussschade* or *Kursdifferenzschade* based on the *IKB* case.[1050]

Overall, German and English law adopt the clearest approaches, whereas Dutch and French law lack clear guidance on the recoverable loss and the calculation of damages in the context of credit rating agency liability. One difference between German and English law is that although both regimes incline towards demanding proof of reasonable reliance, German law entitles an investor to the compensation of *Vertragsabschlussschade* or *Kursdifferenzschade* whereas English law entitles an investor to the compensation of mispricing loss only. Under Dutch law, it is worthwhile for credit rating agencies to invoke Article 6:98 BW and to argue that part of the loss suffered by investors

1049 Rapport du Club des Juristes 2014, no. 26. *Similar criticism has been brought up by* Chacornac 2016, no. 99 and Vandendriessche 2015, no. 354.

1050 Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 50. *Also* Bundesgerichtshof 9 May 2005, II ZR 287/02 (*EM.TV*), p. 8. *Also* Koch 2017, pp. 382-384.

cannot be attributed to them. The current position of Dutch law in this respect, however, is not yet clear. Finally, French law leaves room to find a golden mean by applying the doctrine of loss of chance, but it is then completely dependent upon the circumstances of the case as to what damages the investor is entitled exactly. It is hence unlikely that courts will compensate investors to the extent of the total value of the investment. German law seems to take a different approach in this regard, provided that the investor succeeds in proving reasonable reliance. However, German legal scholars strongly argued against the full compensation of investors.

5.8.4 Article 35a (3) CRA Regulation – Limitations of liability in advance – comparison

Article 35a (3) CRA Regulation prohibits exclusion clauses, but allows for limitation clauses as long as they are reasonable and proportionate and allowed by the applicable national law. The positions of the national laws investigated can be summarised as follows:

Legal system	*Summarised position on the admissibility of limitations of liability in advance*	*Section*
Dutch law	Limitation clauses are valid as a matter of principle. In respect of issuers and investors, the following general guidelines apply: - If Section 6.5.3 BW applies, by means of general terms and conditions, a credit rating agency cannot limit its liability if that would be 'unreasonably onerous' to the issuer or investor under Art. 6:233 (a) BW. Limitations of liability are presumed to be unfair under Art. 6:237 (f) BW. - In general, a credit rating agency cannot invoke a limitation clause if the appeal is contrary to the principles of reasonableness and fairness under Art. 6:248 (2) BW. - The reasonableness and fairness test involves a balancing act of the relevant circumstances of the case, whereby the gravity of the conduct of the credit rating agency, the insurability of the risks on the side of the credit rating agency, the capacity and expertise of the issuer or the investor and the price paid for the agreement by the issuer or investor can be of particular importance. It follows from this test that by means of (general) terms and conditions, a credit rating agency cannot limit its liability for loss caused by intentional or consciously reckless conduct.	5.4.4

Legal system	*Summarised position on the admissibility of limitations of liability in advance*	*Section*
French law	The French law approach towards limitation clauses differs depending on whether the liability is of a contractual or non-contractual nature. In relation to contractual liability, limitation clauses are valid as a matter of principle. In relation to non-contractual liability, parties may not limit their liability in advance. However, irrespective of the existence of a contractual relationship, a credit rating agency cannot limit its essential obligations under the rating contract or the subscription contract and cannot limit liability even for *fautes lourdes* or a *fautes dolosives.* As the threshold for liability under Art. 35a (1) CRA Regulation ('intention' or 'gross negligence') and the threshold for singling out the effect of a limitation clause (*faute lourde* or *faute dolosive*) boil down to the same minimum threshold (extreme misconduct on the side of the credit rating agency, showing that it is not able to fulfil its tasks), *if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a limitation clause included in the contract will also not have any effect under French law.*	5.5.4

Legal system	*Summarised position on the admissibility of limitations of liability in advance*	*Section*
German law	Limitation clauses are valid as a matter of principle. But, in respect of issuers, the following general guidelines apply: - Under § 276 (3) BGB, a credit rating agency cannot limit its liability for loss caused by intentional conduct. - By means of general terms and conditions, a credit rating agency cannot limit its liability for loss caused by grossly negligent conduct under § 310 (1) in conjunction with § 307 (1) in conjunction with § 309 (7) (b) BGB. - By means of general terms and conditions, a credit rating agency cannot limit its liability for the violation of rights and duties lying at the essence of the agreement under § 307 (2) (2) BGB. - By means of individually negotiated terms, a credit rating agency generally has more freedom to limit its liability. However, when a significant imbalance between the negotiating strengths of the credit rating agency and the issuer precludes the issuer from exercising its party autonomy, German courts may step in to restore the imbalance. Limitation clauses are valid as a matter of principle. But, in respect of investors, the following general guidelines apply: - A credit rating agency cannot limit its liability for loss caused by intentional conduct under § 276 (3) BGB. - A credit rating agency cannot limit its liability for loss caused by gross negligence under § 309 (7) (b) BGB. When the investor qualifies as an entrepreneur or a legal entity under public law, the inadmissibility is based on § 310 (1) BGB in conjunction with § 307 BGB with an application by analogy of § 309 (7) (b) BGB. - A credit rating agency cannot limit its liability for the violation of rights and duties lying at the essence of the subscription contract to such an extent that the achievement of the goals of the agreement is endangered under § 307 (2) (2) BGB. Most importantly, in the specific context of Art. 35a CRA Regulation, *if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a limitation clause included in the contract will also not have any effect under German law.* In relation to intentional conduct, this conclusion applies to all (general) terms and conditions under § 276 (3) BGB. In relation to grossly negligent conduct, this conclusion applies to at least all general terms and conditions under § 310 (1) in conjunction with § 307 (1) in conjunction with § 309 (7) (b) BGB. One can also question whether such a clause would cause a significant imbalance pursuant to § 242 BGB between the credit rating agency and the issuer.	5.6.4

Legal system	*Summarised position on the admissibility of limitations of liability in advance*	*Section*
English law	Limitation clauses are generally allowed under Art. 9 UK Implementing Regulations. Arts. 10-12 UK Implementing Regulations provide a non-exhaustive list of factors that courts can take into account when deciding whether a limitation clause is 'reasonable and proportionate'. These factors provide guidance, but do not provide a clear-cut answer on which limitation clauses would be reasonable and proportionate and leave much freedom to the courts.	5.7.4

On a general level, the national laws investigated approach the admissibility of limitation clauses differently, although all sorts of reasonableness tests and a large dependency on the circumstances of the case recur in the national law reports. The similarities between the Dutch and German systems to assess the admissibility of limitation clauses is explained by the fact that the Dutch legislature used the German rules on general terms and conditions as an example for Section 6.5.3 BW.

French and German law approach the admissibility of limitation clauses most restrictively in favour of issuers and investors. They do not allow a credit rating agency to limit its liability for intentional or grossly negligent conduct. Hence, as intentional and grossly negligent conduct is required by Article 35a (1) CRA Regulation, credit rating agencies cannot limit their liability under Article 35a CRA Regulation when an issuer or investor has proven that the credit rating agency committed the infringement intentionally or with gross negligence. Under German and French law, limitation clauses will not have effect if the issuer or investor managed to establish liability under Article 35a (1) CRA Regulation.

Under Dutch law, slightly different rules apply in respect of the effects of the blameworthiness of the conduct of a credit rating agency on its possibilities to invoke limitation clauses. The threshold for prohibitions to invoke limitation clauses is higher; Dutch law does not allow a credit rating agency to limit its liability for intentional or consciously reckless conduct. Consequently, the fact that the issuer or investor managed to establish liability on the basis of Article 35a CRA Regulation does not entail that the limitation clause is invalid or that an appeal to the clause is contrary to reasonableness and fairness. Finally, credit rating agencies have most room to limit their liability under English law. Articles 9-12 UK Implementing Regulations allow limitation clauses as a matter of principle and provide an overview of circumstances that courts can take into consideration when assessing whether a limitation clause is permissible, such as whether the parties negotiated on the terms and whether the credit rating agency could insure against the loss suffered.

5.8.5 Prescription of claims (comparison)

The final part of this legal comparison involves the limitation periods of claims within the selected legal systems. This subject cannot be explicitly linked to the terms referred back to the applicable national law under Article 35a CRA Regulation, but was discussed due to the short limitation period of one year introduced by the UK Implementing Regulations. The positions of the national laws investigated can be summarised as follows:

Legal system	*Summarised position on the prescription of claims*	*Section*
Dutch law	Art. 3:310 BW: claims for damages expire 5 years after the moment that the issuer or investor actually became acquainted with both the loss and the party responsible for the loss (this period starts to run from the day after the issuer or investor became acquainted with these elements) and, at the latest, 20 years after the event that caused the loss occurred.	5.4.5
French law	Arts. 2224-2223 CC: 5 years from the day that the holder of the right has the knowledge or should have had the knowledge from the facts that allow him to exercise his claim right (with a maximum of 20 years from the day that the right to claim damages arose).	5.5.5
German law	§ 195 in conjuction with § 199 (1) and (3) BGB: 3 years after the end of the year (1) in which the claim for damages arose; and (2) in which the issuer or investor became acquainted with the circumstances on which the claim can be based and with the defendant's identity, or in which the issuer or investor should have become acquainted with the circumstances on which the claim can be based and with the defendant's identity, had it not acted with gross negligence. Irrespective of the knowledge of the issuer or investor, a claim expires 10 years after it arose. Irrespective of the knowledge of the issuer or investor and the moment at which the claim arose, a claim for compensation expires 20 years after the conduct that caused the loss (the infringement).	5.6.5
English law	Art. 16 UK Implementing Regulations: 1 year from the moment the issuer or investor discovered the infringement or could with reasonable diligence have discovered it.	5.7.5

The most important lesson to draw from the positions summarised above is that English law employs a remarkably short limitation period in comparison to the other national laws investigated. The other national laws differ as well

in length and in approach (objectively or subjectively), however claims for damages do not expire as quickly as under English law. Dutch law takes a special position in this regard, as the yardstick for the 5-year prescription period of acquaintance ('*bekendheid*') with the loss and the party who caused the loss is interpreted as *actual* acquaintance ('*daadwerkelijke bekendheid*').[1051] The other national laws investigated in this dissertation have adopted similar yardsticks, but interpret the acquaintance of the aggrieved party objectively.[1052]

5.8.6 Conclusions related to the legal comparison

Sections 5.8.3-5.8.5 compared the national interpretations and applications of Article 35a CRA Regulation, concentrating on both similarities and differences between the legal systems investigated. From this overview, one can draw the following general conclusions.

To start with, basic private law concepts, such as causation and the assessment of the recoverable loss and the calculation of the amount of damages, show similarities amongst the legal systems investigated. The four legal systems, for instance, apply the same basic test to the assessment of causation and start from the idea that the victim must be restored to the position as if the wrongful act or omission had not occurred. However, the concrete application of these concepts in the context of claims for credit rating agency liability differs. These differences become most visible in relation to claims brought by investors, which are of a complex nature and are coloured by underlying national basic principles.

Furthermore, the national interpretations and applications of Article 35a CRA Regulation did not lead to surprising findings in light of the general features of the legal systems investigated. At the risk of oversimplifying the results of the legal comparison, French law generally adopts the most flexible approach to the interpretation and application of Article 35a CRA Regulation (to the benefit of issuers and investors), while the English interpretation and application under the UK Implementing Regulations is very restrictive (to the disadvantage of issuers and investors). Dutch and German law take up middle positions, with the former system leaning more towards the French interpreta-

1051 *E.g.* Hoge Raad 31 October 2003, ECLI:NL:HR:2003:AL8168, *NJ* 2006/112 annotated by C.E. du Perron (*Saelman*), para 3.4 and Hoge Raad 6 April 2001, ECLI:NL:HR:2001:AB0900, *NJ* 2002/383 annotated by H.J. Snijders (*Vellekoop v Wilton Feijenoord*), para 3.4.2. *Repeated in* Hoge Raad 31 March 2017, ECLI:NL:HR:2017:552, *NJ* 2017/165 (*Mispelhoef v Staat*), para 3.3.2. *Also e.g.* Asser/Sieburgh 6-II 2017/411 and 415 and Koopmann 2010, pp. 44-45. These contributions discussed the case law referred to in this paragraph in detail and provided far more extensive overviews of relevant case law in this area.

1052 Koopmann 2010, p. 47.

tion and application and the latter system more towards the English interpretation and application.

The legal comparison revealed the following main differences in respect of claims for damages brought against credit rating agencies by both issuers and investors:

- 'Gross negligence': The national laws approach the term 'gross negligence' in various ways. Especially the restrictive interpretation of 'gross negligence' under Article 4 UK Implementing Regulations, which, moreover, limits the scope of application of Article 35a CRA Regulation to infringements committed by senior management only, leads to a very narrow interpretation and application of Article 35a CRA Regulation under English law – in particular as compared to the approach under French and German law.[1053]
- Admissibility of limitation clauses: French and German law do not seem to allow the limitation of liability under Article 35a CRA Regulation in the presence and absence of a contractual relationship. Dutch law and English law leave more room for the limitation of liability, especially if a contractual relationship between the parties exists.
- Prescription period: the private law systems investigated have different prescription periods to claims based on Article 35a CRA Regulation. Most importantly, Article 16 UK Implementing Regulation provides for a remarkably short limitation period of 1 year.

The legal comparison revealed the following difference in respect of claims for damages brought against credit rating agencies by issuers in particular:

- Recoverable loss: Whereas Article 13 UK Implementing Regulations only admits the compensation of increased funding costs, Dutch, French and German law do not restrict the types of recoverable loss as a matter of principle. In addition to damages for increased funding costs, issuers can also claim damages for reputational loss under these three legal systems. Recital 32 CRA III Regulation gives the impression that funding costs and reputational loss are separate heads of damages, as the Recital refers to the negative impact on an issuer's reputation and funding costs separately. In practice, the assessment of damages for reputational loss creates evidentiary problems for issuers, so that it is doubtful whether these differences will be of much relevance in practice.

The legal comparison demonstrated that one should not underestimate the differences between the national laws in respect of claims brought by investors. It revealed the following differences in respect of claims for damages brought against credit rating agencies by investors:

1053 *See* Wimmer 2017, p. 408.

- 'Reasonable reliance' (I): The UK Implementing Regulations stand out in severely limiting the scope of application of Article 35a CRA Regulation through their interpretation and application of 'reasonable reliance'. Article 6 UK Implementing Regulations links the requirement of 'reasonable reliance' to the test for the existence of a duty of care under the tort of negligence. As English courts would not often (if at all) consider this test satisfied in cases involving claims for credit rating agency liability brought by investors,[1054] national courts could reject the majority of investor claims for a failure of reasonable reliance under English law.
- 'Reasonable reliance' (II): The national laws differ in whether, and the extent to which, they facilitate investors in proving reasonable reliance, as part of the requirement of causation. The wording of Article 35a CRA Regulation does not require Member States to adopt a flexible approach towards the requirement of reasonable reliance. Under French and Dutch law, it is possible that national courts apply respectively the doctrine of loss of chance – which replaces the test of reasonable reliance altogether – or adopt an evidentiary presumption of reliance – which is a procedural law facilitation and changes the division of the burden of proof to the detriment of credit rating agencies. Under German and English law, national courts are expected to uphold the requirement of reasonable reliance and the corresponding burden of proof. The restrictive wording of Article 35a CRA Regulation, combined with the restrictive approaches under German and English law, will cause the majority of the claims for damages brought by investors to strike out under these legal systems, because investors cannot prove causation due to a lack of evidence of reasonable reliance.
- Calculation of damages: The national laws approach the calculation of the amount of damages awarded to investors in various ways. Due to the crucial role of the specific circumstances of the case at the stage of the calculation of awards of damages, it is difficult to generally predict the amount of damages courts will award. Under Dutch, French and English law, national courts will not always compensate investors to the full extent of their transaction costs. Under Dutch law, courts could attribute only part of the loss to a credit rating agency – if the credit rating agency successfully invokes Article 6:98 BW. Under French law, courts might only compensate investors' loss of autonomy to make a fully and well-informed investment decision. Under English law, courts could apply the *SAAMCO* case analogously, so that the award of damages is capped at the influence of the affected credit rating on the interest rate, yield or the price of the financial instruments. German law takes yet a different approach. It seems that if reasonable reliance can be proved, the investor can choose whether it claims *Vertragsabschlussschade* or *Kursdifferenzschade* under German law.

1054 Section 5.7.2.3 (b) (ii).

The final question, then, is whether the four national approaches to Article 35a CRA Regulation can lead to different results in legal proceedings, depending on what national law applies. Based on the differences listed above, this question is answered in the affirmative. However, even though the differences between the national approaches can lead to different results in legal proceedings, one must put them into perspective. The differences between the national interpretations and applications of Article 35a CRA Regulation are generally smaller in relation to claims brought by issuers, as compared to investors. Furthermore, irrespective of whether claims for damages are brought by issuers or investors, claims will not succeed easily in any of the legal systems investigated. The conditions set by Article 35a CRA Regulation and the national interpretations and applications of Article 35a CRA Regulation are restrictive, in particular in relation to a credit rating agency's civil liability towards investors, as compared to issuers. Hence, even though relevant differences exist between the interpretations and applications of the national laws investigated, one must keep in mind that the current combination of stringent conditions set at the EU level and restrictive national interpretations will overall cause many claims for damages to fail.

5.9 Concluding remarks

The previous section summarised the main findings of the legal comparison, rendering it superfluous to wrap up this Chapter with extensive concluding remarks. Nevertheless, after this rather voluminous Chapter, it seems useful to briefly return to its main objectives.

As national courts cannot apply Article 35a CRA Regulation without assistance of the applicable national law, an understanding of the meaning of its terms under Member State laws was needed to be able to conclude in Chapter 6 whether Article 35a CRA Regulation has created an adequate right of redress for issuers and investors. Chapter 5 aimed to contribute to this understanding by means of a legal comparison in respect of the interpretation and application of the terms of Article 35a CRA Regulation under four Member State laws. The object of this legal comparison was therefore to explain how the terms and subjects of Article 35a CRA Regulation are interpreted and applied under the four national laws selected – namely Dutch, French, German and English law – and to compare the findings, concentrating on both similarities and differences. Furthermore, this Chapter aimed to briefly conclude to what extent the differences can lead to different outcomes in decisions of national courts on claims for compensation based on Article 35a CRA Regulation.

Section 5.3 provided an in-depth analysis of the framework set by Article 35a CRA Regulation. At this point, we picked up where we left off the analysis of Article 35a CRA Regulation at the end of Chapter 3 (section 3.5.3 'Stakeholders defined and scope of application'). The terms and subjects of Article

35a CRA Regulation discussed in section 5.3 subsequently formed the main thread running through the national law reports and the legal comparison. From the outset, section 5.3 already revealed several issues in relation to the wording of Article 35a CRA Regulation. For instance, it addressed issues in relation to the attribution of acts and omissions to credit rating agencies, issues in relation to the wording of the investor-specific requirement of reasonable reliance and inconsistencies in the wording of Article 35a CRA Regulation in relation to the remedy involved (damages or compensation). These observations will be used in the analysis of whether Article 35a CRA Regulation creates an adequate right of redress for issuers and investors made in Chapter 6.

Subsequently, sections 5.4-5.7 involved reports of the interpretation and application of Article 35a CRA Regulation under Dutch, French, German and English law. Each country report started describing the main features of the legal system and the legal bases available in the legal system prior to the introduction of Article 35a CRA Regulation in 2013. Afterwards, the reports concentrated on the interpretation and application of several terms and subjects of Article 35a CRA Regulation. The national law reports revealed uncertainties as regards the exact interpretation and application of Article 35a CRA Regulation. It was sometimes difficult to predict the exact interpretation and application due to a scarcity or even lack of legal sources in respect of credit rating agency liability. Furthermore, the sometimes imprecise wording of Article 35a CRA Regulation, disparities between the conditions of Article 35a CRA Regulation and the structure of Article 35a CRA Regulation, caused uncertainties and friction. One can conclude that national law can approximately be 'poured into' the template of Article 35a CRA Regulation, but it is not an exact fit.

Finally, section 5.8 investigated which similarities and differences exist between the four national interpretations and applications, and whether any differences can lead to different decisions on civil liability claims based on Article 35a CRA Regulation. Risking oversimplifying the results of the legal comparison, French law can generally be said to adopt the most flexible approach to the interpretation and application of Article 35a CRA Regulation (to the benefit of issuers and investors). The English interpretation and application under the UK Implementing Regulations, on the other hand, is very restrictive (to the disadvantage of issuers and investors). Dutch and German law take up the middle ground, with the former system leaning more towards the French interpretation and application and the latter system more towards the English interpretation and application. It was observed that English law stands out in its adoption of a restrictive approach towards almost all terms and subjects investigated, leading to rather limited possibilities for issuers and investors to hold credit rating agencies liable when English law applies to their claims. The advantage of the method adopted by the UK legislature, however, is that English law at least provides rather clear guidance on how national courts should deal with credit rating agency liability, while this guidance is lacking and causing uncertainty within the other legal systems investigated.

The final question, then, is whether the four national approaches to Article 35a CRA Regulation can lead to different results in legal proceedings, depending on what national law applies. It was concluded that the differences can have effects on decisions in concrete cases and can lead to different results, but that the differences should be put into perspective. The current combination of stringent conditions set at the EU level and restrictive national interpretations at present causes many claims to fail, and will do so in the future, irrespective of which of the four national laws investigated applies to the dispute.