Civil Liability for Credit Ratings Agencies: A Swedish Perspective

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Abstract

Since June 20, 2013 a specific civil liability regime regarding credit rating agencies has been in force in the EU. A credit rating agency that has – intentionally or with gross negligence – infringed the EU:s CRA-Regulation could be held liable towards investors and issuers that have incurred a loss due to that infringement. The article discusses whether or not the new civil liability regime will entail any significant changes in relation to the liability of credit rating agencies according to general tort law principles. In the article, Swedish tort law principles are analyzed in order to determine if a credit rating agency could be held liable towards an investor due to a negligently issued credit rating. The article also discusses the relationship between the Swedish tort law principles and the recently imposed civil liability regime of the CRA-Regulation.

1. Introduction

This article deals with the question of civil liability of credit rating agencies from a Swedish perspective. On June 20, 2013 Regulation (EU) No 462/2013 amending Regulation (EC) No 1060/2009 on Credit Rating Agencies (the CRA III), entered into force.[1] Through the CRA III Article 35a, which

* Any views or opinions presented in this article are solely those of the author.

1 Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on Credit Rating Agencies, O.J. L 146 of 31.5.2013.

provides for a civil liability regime for credit rating agencies, was added to the CRA-Regulation.[2]

The aim of this article is to provide some thoughts regarding how the question of civil liability of credit rating agencies could be dealt with according to Swedish law. It is also my intention to discuss the civil liability regime that has been imposed on credit rating agencies through Article 35a of the CRA-Regulation in relation to the general tort liability regime according to Swedish law. It is thus my intention to focus this comment on the question if a credit rating agency could be held liable vis-à-vis an investor that has incurred a loss through its reliance on an incorrect credit rating, notwithstanding the civil liability regime provided in Article 35a of the CRA-Regulation.[3]

The focus of this article will be on the non-contractual liability of the credit rating agencies. Since the 1970s, the credit rating agencies employ an issuer-pays business model, which means that the rating fee is provided by the rated entity or, in the case of a security, by its issuer.[4] An investor, or another party that has relied upon a certain credit rating, is therefore not normally in a contractual relationship with the credit rating agency. In addition to providing solicited ratings, the credit rating agencies also, to a certain extent, provide unsolicited ratings. I will, however, not deal with the question regarding liability for unsolicited ratings in this short article.

2. Professional Liability

The question regarding liability of a credit rating agency towards a third party raises many interesting, but also quite complex, issues. In this context I will, however, focus on two of them. The first issue, which is of a general character, relates to if, and to what extent, a tortfeasor can be held liable when he or she has negligently caused damage to a party with whom the tortfeasor is not in a contractual relationship with. The second issue I will deal with concerns the possible professional liability of credit rating agencies. In this

[2] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on Credit Rating Agencies, O.J. L 302 of 17.11.2009.

[3] Although Article 35a also provides for a liability towards issuers, the focus of this article will be on the credit rating agencies' liability towards investors.

[4] Richard Sylla, *An Historical Primer on the Business of Credit Ratings,* in Richard M. Levich, Giovanni Majnoni & Carmen Reinhart (eds), *Ratings, Rating Agencies and the Global Financial System* 35–36 (The Hague: Kluwer Academic Publishers 2002).

context I will also deal with related questions such as causality and contributory negligence.

2.1 Compensation for Pure Economic Loss in Non-Contractual Relations

In Sweden, as in many other jurisdictions, courts have traditionally been reluctant to awarding compensation for *pure economic losses*. Pure economic losses are losses that arise without connection to damages to persons or property.[5] Chapter 2, section 2 of the Swedish Tort Liability Act (1972:207) contains a provision that historically has been interpreted as connecting the awarding of compensation for pure economic losses, in non-contractual situations, to the commission of a crime. Through a number of cases over the last three decades the Swedish Supreme Court has, however, awarded compensation for pure economic loss without the connection to the commission of a crime.[6]

2.1.1 Nytt Juridiskt Arkiv (NJA) 1987 p. 692 (The Kone Invest-Case)

In the landmark *Kone Invest-Case* of 1987(NJA 1987 p. 692), the Swedish Supreme Court awarded compensation for a pure economic loss without a criminal act being committed in connection therewith. A real estate appraiser had appraised the value of a certain real estate, on behalf of its owner, to 4.3 million SEK. The certificate stating the appraisers' opinion about the value of the real estate was later used by Kone Invest when lending the owner of the real estate one million SEK, with the real estate as security. When the borrower declared bankruptcy the property was sold for a significantly smaller amount than it was originally appraised to. The reason being that the appraiser had disregarded the fact that the authorities had, previous to the appraising of the real estate, denied any exploitation of the real estate in question.

The Supreme Court noted that the *travaux préparatoires* of the Tort Liability Act stated that the existence of the above-mentioned provision in chapter 2, section 2 did not prevent the courts from extending the liability for

[5] This definition is found in chapter 1, section 2 of the Swedish Tort Liability Act (1972:207).

[6] It should be mentioned that no case law (yet) exists where a Swedish court has dealt with the question of civil liability regarding a credit rating agency.

pure economic losses to certain cases. It also noted that the court, before the enactment of the Tort Liability Act, had extended liability for pure economic losses in some cases without a connection to the commission of a crime (e.g. statements regarding credit worthiness). The court came to the conclusion that:

> "There are overwhelming reasons supporting the view that the person who has justifiably placed his confidence in a valuation certificate shall not suffer the consequences of a loss which depends ultimately on the fact that the issuer of the certificate acted negligently."

The court thereby accepted a general principle concerning liability of persons acting in their professional capacity relative to a third party.[7] The principle could be formulated as such: when a person has placed his trust in certain information, which has been negligently provided, he is able to recover his losses if his trust was *justifiable*. Two conditions need to be fulfilled in order for the trust to be considered justifiable. First, his trust must have been reasonable[8] and, second, it must be valued against a legal-political backdrop.[9]

2.1.2 NJA 1996 p. 224

The Swedish Supreme Court has in a number of cases following the above-mentioned *Kone Invest Case* dealt with compensation for pure economic loss in non-contractual relations. Worth mentioning in this context is the Supreme Courts' judgment in NJA 1996 p. 224, in which an auditor was

[7] Jan Kleineman, *Adviser's Liability in Connection with Duty to Inform – A Problem Inventory* 41 Sc.St.L., 393, 398 (2001). See also Jan Kleineman, *Om den befogade tillitens skadeståndsrättsliga relevans,* Juridisk Tidskrift 625 et. seq. (2001).

[8] A number of years later the Swedish Supreme Court dealt with a similar case but came to the opposite result (NJA 2001 p. 878). The difference between the cases was, however, that the appraiser in the 2001 case had issued his certificate on behalf of one of the parties in connection with a dispute regarding that property. The appraiser had made a note in the certificate that informed its user that it had been issued regarding that dispute. When a bank later relied upon the certificate, its reliance was considered, by the majority of justices of the Supreme Court, to be unjustified. The reason being that the bank should have realized that the certificate was not meant to be used in connection with the extension of a loan.

[9] In the *Kone Invest-case* (NJA 1987 p. 692) the Supreme Court argued that the result of a third party not being able to rely upon a certificate regarding the value of real estate, would be that each party made their own valuation. The result would be a situation that would neither benefit the real estate market nor the credit market.

held liable towards a bank due to the fact that he had made false representations to the bank regarding the financial situation of the company he earlier had been employed by. The auditor had participated in the preparation of a "balance sheet" which he also presented to the bank at a meeting concerning the financial situation of the company.

Even though the auditor officially had not participated at the meeting in the capacity of being the company's auditor, the Supreme Court considered it as though he had participated as an auditor, thereby applying the same liability standards as regarding auditors.[10] Since the damage caused to the bank was a direct result of the false representations made to them by the auditor, the court held him liable toward the bank for the loss it had incurred.

2.2 Professional Liability in a Non-Contractual Relationship

The question regarding compensation for pure economic losses in a non-contractual relationship is especially relevant in cases where someone has relied upon an advice provided by a person in the course of that person's profession. The term professional liability does, in Swedish law, normally refer to a liability standard regarding a specific professional sector, such as lawyers, auditors or appraisers of real estate.[11] Those who practice these professions have in common that they possess a certain knowledge and know-how, which they use in order to give professional advice to individuals or companies seeking their services.[12] Relevant to this discussion is whether credit rating agencies should be considered as professionals in this context. Article 3.1.b of the CRA-Regulation defines a credit rating agency as "a legal person whose occupation includes the issuing of credit ratings on a professional basis". Furthermore the credit rating agencies perform a service for which they receive (substantial) remuneration. In addition, credit ratings issued by the credit rating agencies are based on advanced methodologies developed by the agencies. Consequently it is a natural assumption that the liability of the credit rating agencies should be regarded as a professional liability.[13]

[10] See below under 2.5.

[11] See Fredric Korling, *Rådgivningsansvar,* 509 et. seq. (Jure Förlag 2010).

[12] Vibe Ulfbeck, *Erstatningsretlige grænseområder,* 23–24 (2nd ed., Jurist- og Økonomforbundets Forlag 2010).

[13] Vibe Ulfbeck, *Civil Liability of Credit Rating Agencies – A Professional Liability regime?* In Jan Kleineman, Lars Gorton & Aron Verständig (eds), *Perspectives on Credit Rating Agencies*, 309–311 (Jure Förlag 2013).

2.3 Relevant Professional Standards

When a person has solicited a professional to perform certain services, he or she can reasonably expect that the services performed by the professional will be carried out according to the provisions of the contract between the parties. If a provision of the contract has not been fulfilled, due to negligence on the side of the contractor, the contractor is generally liable towards his or her counterparty for the loss incurred. In the absence of a contract, professional standards can be used in order to determine whether or not the professional in question has acted negligently or not.[14] These professional standards could either be regulated in a legally binding regulation[15] or derived from good practices relevant to that specific profession.[16]

There is, however, not a single definition regarding the meaning of professional liability in Swedish law, since the courts rarely use the term. Some distinct features of the professional liability can, however, be distinguished. The existence of professional norms results in an objectification of the liability of the professional in question. In the absence of explicit regulation regarding a certain profession, the assessment as to the tort liability could be based on good practices regarding that specific profession.[17] Similar to the contract, these good practices and other non-binding regulations can create an expectation with the person, which has engaged the professional, that the services in question will be performed in accordance with the mentioned professional standards.[18] The presence of a professional standard can thus be used as a reference point when determining whether or not the professional in question has acted negligently or not.

It is therefore relevant to explore whether or not professional standards exist which could be relevant to the present discussion. In this context, I will focus on the IOSCO Code of Conduct Fundamentals for Credit Rating

[14] Håkan Andersson, *Ansvarsproblem i skadeståndsrätten – Skadeståndsrättsliga utvecklingslinjer*, 225–231 (Iustus Förlag 2013).

[15] One example from Swedish law is Chapter 29, section 2 of the Companies Act (2005:551) which states a liability for an auditor that has acted negligently and thereby caused damage to a shareholder or other person as a consequence of a violation of the Companies Act, the applicable annual reports legislation or the articles of association of the company in question.

[16] Fredric Korling, *Rådgivningsansvar,* 530–532 (Jure Förlag 2010).

[17] Vibe Ulfbeck, *Erstatningsretlige grænseområder,* 25–27 (2nd ed., Jurist- og Økonomforbundets Forlag 2010).

[18] Håkan Andersson, *Ansvarsproblem i skadeståndsrätten – Skadeståndsrättsliga utvecklingslinjer,* 225–231 (Iustus Förlag 2013).

Agencies (the IOSCO Code of Conduct) and the CRA-Regulation. I will also focus on the question whether or not these legal instruments can form the basis for a legal claim between, e.g., an investor and a credit rating agency.

2.3.1 The IOSCO Code of Conduct and the EU Regulation on Credit Rating Agencies (The CRA-Regulation)

In 2004 the Technical Committee of the International Organization of Securities Commissions (IOSCO) issued a Code of Conduct regarding credit rating agencies.[19] The IOSCO Code of Conduct contains a number of measures that are intended to be included in the individual credit rating agencies' codes of conduct. The measures are mainly aimed at improving the quality of the credit ratings and strengthening the independence of the credit rating agencies. Although not binding, the IOSCO Code of Conduct provided for the credit rating agencies to implement their own codes of conduct, disclose in which aspects their respective codes of conduct deviate from the IOSCO Code of Conduct, and provide an explanation thereto (Comply or Explain). The IOSCO Code of Conduct could therefore be considered as a *soft law* instrument.

2.3.2 The CRA-Regulation

In December of 2009 the CRA-Regulation entered into force. The regulation contains a number of provisions regarding the quality of credit ratings, the independence of the credit rating agencies and its employees and the disclosure of credit ratings. The Regulation also introduced a registration as well as a supervisory regime, giving the supervisory the authority to issue penalties or withdraw the registration of a credit rating agency that fails to comply with the standards of the regulation. Through Regulation (EU) no 513/2011 of the European Parliament and of the Council of 11 May 2011 Amending Regulation (EC) No 1060/2009 on Credit Rating Agencies[20] (the CRA II), the task of supervising and registering credit rating agencies was transferred from the national competent authorities to the recently established European Securities and Markets Authority (ESMA).

[19] The IOSCO Code of Conduct was later revised in 2008.

[20] Regulation (EU) no 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on Credit Rating Agencies, O.J. L 145 of 31.5.2011.

A number of provisions of the CRA-Regulation are of particular relevance in this context:

- Article 6.1 that requires credit rating agencies to ensure that the issuing of a credit rating is not affected by any existing or potential conflict of interest.
- Article 7.1 that requires credit rating agencies to ensure that its employees have appropriate knowledge and experience for the duties that are assigned to them.
- Article 8.1 that requires credit rating agencies to disclose to the public the methodologies, models and key rating assumptions it uses in its credit rating activities.
- Article 8.2 that requires credit rating agencies to adopt, implement and enforce adequate measures to ensure that the credit ratings it issues are based on a thorough analysis of all the information that is available to it and that is relevant to its analysis according to its rating methodologies.

In annexes to the CRA-Regulation, the demands on the credit rating agencies are further defined.

2.3.3 Relevance of Public Law Regulations and Soft Law Instruments When Determining Liability

When determining whether or not a defendant has acted negligently or not, the court will generally base its decision on applicable tort law statutes and provisions in the contract between the defendant and the plaintiff. A party that has infringed a contractual provision and thereby caused its counterpart to incur a loss is generally held liable. The defendant is – naturally – also held liable if he has transgressed a legal statute that is sanctioned with liability relative to the party that has incurred the loss in question. In the absence of an applicable tort law statute or a contract, the court can, however, find guidance from public law statutes or soft law instruments when determining whether or not the defendant has acted negligently.[21] If, e.g., a credit rating

[21] Regarding many professions professional trade organizations have been established. The objectives of these organizations are usually to educate and inform the public and decision makers of the profession in question as well as to develop professional standards. The standards developed by these organizations can be used when determining the liability of a professional. Although the credit rating industry was incepted over a century ago, no formal trade organization for credit rating agencies exists.

agency has issued a credit rating that was relied upon by an investor when making a decision to invest in a certain bond, the investor needs to prove that the credit rating agency was negligent when issuing the rating in question. In this regard public law provisions or soft law instruments can be employed when determining the liability of a credit rating agency or another professional.

The question is whether or not provisions in statutes that lack explicit tort law statutes, such as the CRA-Regulation (with the exception of Article 35a) or soft law instruments such as the IOSCO Code of Conduct, can form the basis for a legal claim between two individuals. Public law statues are usually enacted in order to govern the relationship between the individual and the state. It is therefore generally considered in Swedish legal doctrine that public law statutes cannot form the basis for a legal claim of one individual against another individual, unless it has been enacted with the explicit purpose of protecting certain individuals, e.g. consumers or investors.[22]

The IOSCO Code of Conduct as well as the CRA-Regulation contain, as explained above, numerous provisions regarding the credit rating agencies and their activities. The provisions of the IOSCO Code of Conduct as well as the CRA-Regulation should therefore be considered as constituting good practice for the credit rating industry. It is therefore necessary to determine if the public law regulations or the soft law instruments in question aim at protecting individual investors or if the purpose was rather to protect the financial market or investors in general. The IOSCO Code of Conduct, the CRA-Regulation aim at protecting, *inter alia,* investors.[23] In addition, the IOSCO Code of Conduct aims at promoting the fairness, efficiency and transparency of securities markets as well as to reduce systemic risks.[24] The CRA-Regulation aims at enhancing the integrity, transparency, responsibility, good governance and reliability of credit rating activities. It also aims at enhancing the quality of credit ratings and promoting the credit rating agencies' independence and the avoidance of conflicts of interest within the CRA industry.[25] Even though investor protection is mentioned as one of the objec-

[22] Fredric Korling, *Rådgivningsansvar,* 550–551 (Jure Förlag 2010).

[23] See Article 1 of the CRA-Regulation and the introduction to the revised IOSCO Code of Conduct where it is stated that "the essential purpose of the [IOSCO Code of Conduct] is to promote investor protection by safeguarding the integrity of the rating process".

[24] See the introduction to the IOSCO Code of Conduct.

[25] See Article 1 of the CRA-Regulation.

tives of the IOSCO Code of Conduct, as well as of the CRA-Regulation, these regulations have numerous other objectives.

It should also be noted in this context that the infringement of a certain public law statute, such as the CRA-Regulation or a soft law instrument such as the IOSCO Code of Conduct does not *per se* mean that the entity should be held liable for the damage it has caused through the commission of that infringement. The fact that a certain norm has been infringed, whether it is binding such as the CRA -Regulation or non-binding such as the IOSCO Code of Conduct, is just one of many factors that a court should consider when determining liability.

2.4 Tort Liability Assessment

Essential when determining the tort liability of a certain tortfeasor, according to Swedish legal doctrine, for an incorrect statement, is whether or not the victim has relied upon that statement and if his or her reliance was reasonable. What constitutes reasonable trust varies substantially depending on the circumstances under which the information in question was provided. One should therefore naturally be very restrictive when it comes to advice provided outside a professional relationship.[26] This is, however, not the case when it comes to the ratings provided by the credit rating agencies. The receiver of the advice should be able to expect that the advice was provided based on correct information and that facts are accurately represented.[27] What the investor who relies upon a certain credit rating reasonably can expect is, naturally, not an easy question to answer. As mentioned above, guidance may be received from the applicable regulations and principles. Even more relevant is what the investor, which has relied upon a certain statement, could reasonably have expected when he or she relied upon that statement.[28]

If a contract exists between the credit rating agency and the investor, the contract sets the standard regarding the question if the credit rating agency has been liable. If, e.g., the contract stipulates that a certain method should

[26] Håkan Andersson, *Ansvarsproblem i skadeståndsrätten – Skadeståndsrättsliga utvecklingslinjer,* 232 (Iustus Förlag 2013).

[27] Håkan Andersson, *Ansvarsproblem i skadeståndsrätten – Skadeståndsrättsliga utvecklingslinjer,* 234 (Iustus Förlag 2013).

[28] Fredric Korling, *Rådgivningsansvar,* 511 (Jure Förlag 2010). See also NJA 1987 p. 692 (above under 2.1.1).

be used, the credit rating agency can naturally be held liable if it has negligently infringed that provision of the contract and thereby caused the investor to incur a loss. It will, in such a case, normally be up to the credit rating agency to prove that its failure to comply with the provision of the contract did not cause the investor to incur the loss in question.[29]

One has, however, to take into account the fact that disclaimers normally are employed by the credit rating agencies.[30]

2.5 Analogies from Auditors and other Professions

When discussing the liability of an entity that has not in any significant extent been the subject of professional liability, analogies can be drawn from other well-established areas of professional liability. The most common analogy when it comes to the professional liability of credit rating agencies is definitely to auditors, which normally are subject to a rather strict liability standard.[31] Similar to auditors, the credit rating agencies are tasked with making an assessment of a certain company. This assessment can, in turn, be relied upon by a third party that, e.g., intends to make an investment in the company in question.

Auditors as well as credit rating agencies are commonly referred to as *gatekeepers.* In this context the term gatekeeper refers to a professional that has the ability to prevent wrongdoing by withholding consent or refuse to take certain action. When suspecting misconduct, an auditor can, e.g., refuse to sign the audit report. If the credit rating agency suspects that a certain company suffers from financial difficulties, it has the power to, *inter alia*, downgrade the company's credit rating. In addition, the gatekeeper normally possesses a certain degree of reputation that assures third parties of the quality of the subject of its respective analysis.[32]

According to the Swedish Companies Act (2005:551), auditors have a statutory liability towards, besides the company itself, shareholders and

[29] Vibe Ulfbeck, *Civil Liability of Credit Rating Agencies – A Professional Liability Regime?,* in Jan Kleineman, Lars Gorton & Aron Verständig (eds), *Perspectives on Credit Rating Agencies*, 315 (Jure Förlag 2013).

[30] See Article 35a(3) of the CRA-Regulation and Alessandro Scarso, *The Liability of Credit Rating Agencies in a Comparative Perspective* 4 JETL, 163, 169 (2003).

[31] See Jan Kleineman, *Ren förmögenhetsskada,* 558–562 (Juristförlaget 1987).

[32] John C. Coffee Jr., *Gatekeepers – The Professions and Corporate Governance,* 2–3 (Oxford University Press 2006).

"other persons".[33] An auditor could be held liable if he or she has acted negligently and thereby caused damage to a shareholder or other person as a consequence of a violation of the Companies Act, the applicable annual reports legislation or the articles of association of the company in question. In order to establish liability between an auditor and a person which has, e.g., relied upon a statement provided by him, one has to prove that the auditor has negligently transgressed the Companies Act, the applicable annual reports legislation or the articles of association of the company in question. According to Chapter 9, section 2 of the Companies Act the auditor has an obligation to conduct his audit "as detailed and extensive as required by generally accepted auditing standards". What should be considered as accepted auditing standards is largely determined by recommendations and guidelines issued by relevant professional organizations. It has thus become the responsibility of the industry to define the meaning of what "accepted auditing standards" constitute.[34]

When it comes to the liability of an auditor towards a third party – someone other than the company or one of its shareholders – Swedish legal doctrine usually requires that the auditor has had a close relation with the person that has incurred the loss in question. In the above mentioned judgment by the Swedish Supreme Court (NJA 1996 p. 224) the auditor had personally been in contact with the bank concerning credits to the company in question.[35] The Supreme Court thus held that the statements of the auditor were causal in relation to the loss incurred by the bank.[36]

There are, however, differences between the tasks performed by auditors and those performed by the credit rating agencies. While the auditor makes a decision based on the historic performance of the company in question, the credit rating agency normally makes a prediction for the future based on the current financial situation.[37] A task that could be regarded as more diffuse

[33] Chapter 29, section 2 of the Swedish Companies Act (2005:551). An "other person" could, e.g., be a person who has relied upon a statement provided by the auditor, without him or her being a shareholder at the time.

[34] Fredric Korling, *Rådgivningsansvar,* 524–527 (Jure Förlag 2010).

[35] See above under 2.1.2.

[36] Jan Kleineman, *Adviser's Liability in Connection with Duty to Inform – A Problem Inventory* 41 Sc.St.L., 393, 410 (2001).

[37] Dan Hanqvist, *The Importance of Being and of Being Earnest: Ontological, Epistemological and Constitutional Aspects of Credit Ratings,* in Jan Kleineman, Lars Gorton & Aron Verständig (eds), *Perspectives on Credit Rating Agencies*, 185–186 (Jure Förlag 2013).

than auditing.[38] The reason being that auditors have the explicit task of maintaining the public trust in not just the company in question, but in the entire financial market.[39] The audit of a company is not just performed for the benefit of the individual company or its owners, but for the benefit of the financial market in general. It is not clear whether or not the same is true when it comes to the services provided by the credit rating agencies.

There are also other areas of established professional liability from which analogies can be drawn to the professional liability of credit rating agencies. Worth mentioning in this context are the classification societies that produce and supply documentation regarding ships and other maritime vessels. By doing so these societies facilitate the execution of other related contracts. Much alike the credit rating agencies, the classification societies perform a task that is important for a large market and those who rely upon the information provided by the societies are normally not in a contractual relationship with the society in question.[40] Worth mentioning in this context are also appraisers of property, such as real estate, securities analysts and attorneys, which all perform tasks similar to those performed by the credit rating agencies.

2.6 The Requirement of Causation and Contributory Negligence

When it comes to the professional liability of credit rating agencies, it must, naturally, be shown that the infringement of a certain rule or principle or the deviation from the credit rating agency's own methodology actually caused the agency to issue an incorrect credit rating. According to Swedish legal doctrine, the investor that has incurred the damage must also prove that he or she relied upon that credit rating when making the decision to invest in the

[38] Vibe Ulfbeck, *Civil Liability of Credit Rating Agencies – A Professional Liability Regime?,* in Jan Kleineman, Lars Gorton & Aron Verständig (eds), *Perspectives on Credit Rating Agencies*, 311–312 (Jure Förlag 2013). This view has, however, been criticized in a decision by the State of New York Supreme Court, County of Erie in *M&T Bank Corp. vs. Gemstone CDO VII, Ltd.* (Index no. 7064/08, April 7, 2009) "The ratings by Moody's and S&P are not just predictions of future valuation but a present analysis of current valuation. Such ratings have been highly regarded and eagerly sought for years. To characterize them merely as predictions or opinions would undercut the necessary reliability such ratings furnish in the world of credit."

[39] Adam Diamant, *Revisors oberoende*, 81–82 (Iustus Förlag 2004).

[40] Kai Krüger, *Fault Liability of Classification Societies Towards Third Parties?*, in Lars Gorton, Jan Ramberg & Jan Sandström (eds), *Festskrift till Kurt Grönfors*, 271–296 (Norstedts Juridikförlag 1991). See also Jürgen Basedow & Wolfgang Wurmnest, *Third-Party Liability of Classification Societies – A Comparative Perspective,* passim (Springer-Verlag 2005).

entity that was rated by the credit rating agency in question. In addition, a causal connection must be established between the incurred loss and the investor's reliance on the credit rating in question.[41] The burden of proof in this regard is most likely on the side of the plaintiff.[42]

Even if the credit rating agency has committed an infringement that should make it liable toward the investor, liability could still be excluded due to contributory negligence. The investor has a duty not to simply rely on a credit rating when making a decision to invest or to hold on to a certain security.[43] It should only be in cases where the investors' reliance upon the credit rating in question was reasonable, that he or she should be able to hold the credit rating agency liable.

3. Article 35a and Swedish Tort Law

As has been previously discussed in this article, it is not unlikely that a Swedish court, based on Swedish tort law principles, would hold a credit rating agency liable if it has caused an investor to incur a loss due to an incorrect credit rating it had issued. The question then arises whether Article 35a of the CRA-Regulation will result in any change in this regard. Article 35a bears some similarities with a classic professional liability regime insofar as it introduces a common standard, which does not distinguish between contractual and non-contractual situations when determining liability. The implication of the existence of a contract is further downplayed by the fact that Article 35a.3 of the CRA-Regulation only allows limitations of liability that are "reasonable and proportionate".[44]

[41] One also has to bear in mind that the reason the investor made a certain investment could be that he or she, in addition to a favorable credit rating, also relied upon, e.g., the advice of a financial advisor. If both the credit rating and the advice were necessary in order to cause the investor to incur the loss in question, both the CRA and the advisor could be held liable. The situation is naturally different when the credit rating by itself caused the investor to make the investment and the advice provided by the advisor only reinforced his or her decision to make the investment. See Jan-Ove Færstad, *Erstatningsansvar for villedende informasjon,* 392–400 (Universitetet i Bergen 2011).

[42] Vibe Ulfbeck, *Civil Liability of Credit Rating Agencies – A Professional Liability Regime?,* in Jan Kleineman, Lars Gorton & Aron Verständig (eds), *Perspectives on Credit Rating Agencies*, 314 (Jure Förlag 2013).

[43] See Article 5a.1 of the CRA-Regulation.

[44] Vibe Ulfbeck, *Civil Liability of Credit Rating Agencies – A Professional Liability Regime?,* in Jan Kleineman, Lars Gorton & Aron Verständig (eds), *Perspectives on Credit Rating Agencies*, 318 (Jure Förlag 2013).

It should, however, be noted that Article 35a requires the investor to prove that he or she relied upon the credit rating in question with due care.[45] It also requires the investor to show that the credit rating agency has committed any of the infringements listed in Annex III of the CRA-Regulation *and* that that infringement has had an impact on the credit rating in question, which *in turn* caused damage to the investor.[46] In addition, the infringement committed by the credit rating agency must have been made intentionally or with gross negligence.[47]

Even though a common liability standard has been introduced and the validity of clauses limiting the liability of the credit rating agencies has been limited, it will most likely be quite complicated for an investor that has incurred a loss due to an incorrect credit rating to recover damages from the responsible credit rating agency. The reason being that he or she will have to prove that it was his or her reliance on the credit rating in question which caused him or her to incur the loss. He or she will also have to prove that the credit rating was impacted by a specific infringement of the CRA-Regulation.

Even though Article 35a provides a framework in which credit rating agencies can be held liable if certain requirements are fulfilled, many matters are not explicitly defined by the CRA-Regulation. According to Article 35a.4, matters such as causation and negligence should be governed by the applicable national law as determined by the relevant rules of private international law.[48] Swedish law lacks a uniform definition of the concept gross negligence. Gross negligence is, however, usually considered as a behavior quite similar to intentional conduct.[49] The Swedish Supreme Court has in a judgment concerning a construction contract interpreted gross negligence as "significant recklessness and indifference that result in a considerable risk of

45 Article 35a.1 of the CRA-Regulation.

46 Article 35a.2 of the CRA-Regulation.

47 Article 35a.2 of the CRA-Regulation.

48 See Recital 35 and Article 35a.4 of the CRA III. See also Brigitte Haar, *Civil Liability of Credit Rating Agencies after CRA 3 – Regulatory All-or-Nothing Approaches between Immunity and Over-Deterrence,* 15, 17 (University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2013-02). A claim towards a credit rating agency under Article 35a of the CRA-Regulation could therefore theoretically be settled by any competent national court in accordance with applicable national law.

49 Jan Hellner & Marcus Radetzki, *Skadeståndsrätt,* 149–150 (8th ed., Norstedts Juridik 2010).

damage".[50] Applying this standard, it should be quite difficult for an investor to claim damages from a credit rating agency under Article 35a. However, a Swedish court is free to apply Swedish regular tort law principles as Article 35a.5 does not exclude further civil liability claims in accordance with national law.

In summary; Article 35a of the CRA-Regulation introduces a civil liability regime for credit rating agencies that resembles a professional liability regime. Article 35a thereby clarifies that a civil liability exists, under certain circumstances, for credit rating agencies. It does, however, place a quite complex burden of proof on the side of the plaintiff as well as requiring that the credit rating agency has acted intentionally or with gross negligence. Against this background, it is not clear if the recently imposed civil liability regime will entail any significant changes regarding the civil liability of the credit rating agencies according to Swedish law.

[50] NJA 1992 p. 130. See also Jan Kleineman, *Grov oaktsamhet som privaträttsligt principproblem,* in Jan Kleineman, Peter Westberg & Stephan Carlsson (eds), *Festskrift till Lars Heuman,* 261–277 (Jure Förlag 2008).