

Netherlands

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I. INTRODUCTION

The increase in the offering of financial products to consumers has driven developments in Dutch case law pertaining to a bank's duty of care. In view of this, it seems only natural to begin with an overview of the major cases in this area (§ II), followed by a treatment of the legal basis of a bank's duty of care (§ III), and the essential duties typically flowing from it (§ IV). The hotly debated topic of the impact of MiFID on a bank's duty of care is dealt with in § V. In § VI, in view of the fact that a claim based on a breach of a bank's duty of care is in Dutch law generally based on tort or breach of contract, we will focus on the requirements which must be fulfilled in order to institute a successful damages claim based on tort or breach of contract. Then we move on to the relation between a bank's duty of care and more traditional doctrines, including reasonableness and fairness, mistake and other defects of consent, unfair contract terms, and voidability or avoidance based on breach of mandatory law or the violation of public morals or public policy (§ VII). We proceed this chapter with some remarks on group actions and mass claims (§ VIII), a proposal of the Ministry of Finance to concentrate civil litigation on the provision of investment services, investment activities and prospectus liability at the Amsterdam District Court (§ IX), alternative dispute settlement at the Complaint Institute Financial Services (§ X) and the role of the regulator in settling disputes (§ XI). § XII contains some concluding observations.

II. MAJOR CASES

1. Option trades

In 1997, in the matter of *Rabobank v. Everaars*, the *Hoge Raad* (the Dutch Supreme Court) adopted a 'special duty of care' (*bijzondere zorgplicht*) of banks towards private, non-professional clients in a case about option trading.¹

¹ HR 23 May 1997, NJ 1998/192 (*Rabobank/Everaars*).

Everaars suffered considerable losses by trading in options over a period of two years using Rabobank as his broker. The applicable Trade Rules of the European Options Exchange put Rabobank under the obligation to require Everaars to provide 'margin' that would cover Everaars' losses on his trades. Everaars however traded almost continuously without providing the required margin. After suffering heavy losses, Everaars claimed damages from Rabobank, arguing that Rabobank had failed to keep him to his margin obligations and for that reason should have refused to execute Everaars's orders. The Hoge Raad ruled that due to the potentially very large risks to which investors are exposed while trading options, a bank – being pre-eminently professional and knowledgeable in this area – has to observe a special duty of care towards its private, non-professional clients. This duty of care follows from the requirements of reasonableness and fairness (*redelijkheid en billijkheid*) as they relate to the nature of the contractual relationship with this type of client and aims to protect the client against his own rashness or lack of insight, and, in this case, entails the obligation for the bank to act in compliance with the applicable trade rules. The warnings that were extended to Everaars did not suffice for meeting this duty of care because enforcing the margin requirement would have been more effective. Moreover, the seriousness of these warnings was put in doubt because Rabobank continued executing option orders notwithstanding Everaars's negligence in providing the required margin.

After the *Rabobank v. Everaars* ruling, which was very much tailored to the specific circumstances in that case, in the matter of *Kouwenberg v. Rabobank*, the Hoge Raad laid down the rule that a bank, in principle, breaches its duty if it executes a client's orders for option trades while the client does not meet the margin requirement.²

2. Share leases

The development of a second line of case law was prompted by the offering of so-called 'share leases' to consumers, starting from the late '90s up to and including the first years of the 21st century. These products consisted of a loan providing the funds to buy shares. The consumer paid interest on the loan. The principal amount either had to be repaid in instalments or at maturity. This type of leveraged product had a potentially huge upside (if the shares did well) but also carried the risk of substantial losses (if the value of the shares decreased) potentially resulting in a net debt that the consumer had

² HR 11 July 2003, *NJ* 2005/103 (*Kouwenberg/Rabobank*). Soon after *Rabobank/Everaars*, in *Van de Klundert/Rabobank* (HR 26 June 1998, *NJ* 1998/660) the Hoge Raad still suggested a case-by-case approach by stressing the relevant circumstances of the matter. In later cases, the bank's duty with respect to the enforcement of the margin requirement seems to have been relaxed somewhat. See HR 23 March 2007 *NJ* 2007/333 (*ABN AMRO/Van Velzen*) and HR 4 December 2009, *NJ* 2010/67 (*Nabbe/Staalbankiers*).

to repay. Unfavourable developments in the financial markets triggered a flood of claims against the financial institutions that had offered these share leasing products. In 2009, in three key judgments,³ the Hoge Raad confirmed the special duty of care towards private clients which had been developed in the margin requirement cases (mentioned above). The Hoge Raad added that the scope of such duty depends on the particular circumstances of each case. Relevant circumstances to take into account, according to the Hoge Raad, are the expertise and experience of the bank's counterparty, the product's complexity, the risks involved and the applicable regulatory framework. The Hoge Raad found that since a share leasing contract comprises periodical payment obligations and a risk of a net debt remaining due at maturity, the seller of share leasing products has a pre-contractual obligation to explicitly and unequivocally warn its counterparty of the risk of such a debt remaining due at maturity. The seller also has to review the consumer's level of income and wealth. When the outcome of this review leads to the conclusion that the consumer's income and wealth are insufficient to bear the obligations the agreement would entail, the seller has to disadvise the consumer entering into the agreement.

3. Investment advice and asset management

A third line of case law concerns advice and asset management for private clients. The Hoge Raad found that a bank, being pre-eminently professional and knowledgeable in the field of asset management, in accordance with the nature of the asset management agreement with its client, has a special duty of care that may lead to a specific duty to explicitly and unequivocally warn of the risks in relation to the asset portfolio that is being managed by the bank. Again, this duty of care is based on the requirements of reasonableness and fairness (*redelijkheid en billijkheid*) as they relate to the nature of the contractual relationship between the bank and this type of client and aims to protect the client against his own rashness or lack of insight.⁴ Furthermore, the Hoge Raad found that the duty of care entails that the bank has to diligently review the financial prospects, expertise and goals of the client before entering into an advisory relationship. Also, the bank has a duty to warn its client of the special risk involved with entering into derivative transactions. Furthermore, when the strategy envisaged by the client is not in line with his financial prospects, expertise and goals, the bank has a duty to warn the client as well. The special duty of care may entail that the bank is only allowed to continue a certain strategy when the bank has confronted the client

³ HR 5 June 2009, NJ 2012/182 (*De Treek/Dexia*); HR 5 June 2009, NJ 2012/183 (*Levob/Bolle*); HR 5 June 2009, NJ 2012/184 (*Stichting Gesp/Aegon*).

⁴ HR 24 December 2010, NJ 2011/251 (*Fortis/Bourgonje*).

with its risks, has made sure that the client is actually aware of these risks, and the client has agreed to continuing the strategy.⁵

4. Third parties

A fourth line of case law concerns banks' liability towards third parties. In 1998, in *Mees Pierson/Ten Bos*, the Hoge Raad held that the role that banks have within society causes banks to have a special duty of care, not only towards clients on the basis of contractual relationships, but also towards third parties whose interests the bank has to take into account on the basis of the requirements of unwritten law. The scope of this duty of care depends on the circumstances of the case.⁶ The cases *Fortis/Stichting Volendam*⁷ and *ABN AMRO/SBGB*⁸ concerned fraudulent investment services; the banks' only involvement in these matters was that the fraudulent 'investment services provider' used bank accounts held with these banks. In both cases, the Hoge Raad upheld the court of appeal's finding that the banks are liable for the investors' losses (in *ABN AMRO* this was only a conditional finding⁹). In the *Fortis* matter, the bank's liability was grounded on the fact that the bank had at some point in time realised that the services were possibly being provided without the required regulatory licence, but had failed to investigate this further. In the *ABN AMRO* case, the (presumed) liability of the bank was based on the fact that the payments to and from the fraudster's private bank account were unusual in quantity and nature, which should have prompted the bank to further investigate these transactions. In *ABN AMRO*, the Hoge Raad held that the special duty of care towards third parties also aims to protect these third parties against their own rashness or lack of insight. In the *Befra* case,¹⁰ Rabobank and other institutions were not held liable vis-à-vis third parties for their purported failure to investigate, because in those matters the consumers had invested to become a limited partner in a limited partnership (and the fraudulent service provider was the general partner). The Hoge Raad held that these consumers had acted as entrepreneurs and not as investors, meaning that no regulatory licence had been required for the services. Consequently, according to the Hoge Raad, there had effectively been no reason for the bank to start an investigation prompted by a suspicion that services were being rendered without the required licence.

⁵ HR 2 February 2012, *NJ* 2012/95 (*Rabobank/X.*); HR 14 August 2015, *NJ* 2016/107 (*Brouwer/ABN AMRO*).

⁶ HR 9 January 1998, *NJ* 1999/285 (*Mees Pierson/Ten Bos*).

⁷ HR 23 December 2005, *NJ* 2006/289 (*Fortis/Stichting Volendam*).

⁸ HR 27 November 2015, *RvdW* 2016/88 (*ABN AMRO/SBGB*).

⁹ The Court of Appeal allowed the bank to rebut the assumption of its knowledge of unusual payment transactions.

¹⁰ HR 8 April 2011, *NJ* 2012/361 (*Befra/Rabobank*),

A final important judgment on a bank's liability towards third parties concerns World Online's IPO.¹¹ The Hoge Raad held as being relevant aspects for ABN AMRO and Goldman Sachs's duty of care towards investors of World Online, the fact that these banks were the (joint) global coordinators, lead managers and bookrunners to the IPO. According to the Hoge Raad, this meant that they had been engaged by World Online as issuer to lead the syndicate of banks involved in the IPO and that they were responsible for the determination of the price, for the due diligence investigation and for drafting and distributing the prospectus. As a syndicate leader, a bank has the responsibility to prevent that potential investors get a wrong impression of the issuer, as far as is possible within the syndicate leader's sphere of influence – e.g. within the scope of the due diligence investigation and when drafting the prospectus.

5. Interest rate swaps

A fifth line of cases concerns lower case law on interest rate swaps which accepts that banks are also subject to a special duty of care towards SME's, resulting in the usual duties to investigate and warn.¹² In some of these cases, instead of claiming damages based on infringement of the bank's duty of care,¹³ clients have successfully sought nullification of interest rate swaps on the basis of mistake.¹⁴ Judgments by the Hoge Raad on these interest rate swap cases are expected to be rendered over the next couple of years.

The question whether SME's and other inexperienced commercial parties are sufficiently protected by the law when obtaining financial services and products is a hotly debated issue in the Netherlands. Largely triggered by the massive mis-selling of interest rate swaps to SME's, the Dutch Ministry of Finance recently published a consultation document, soliciting stakeholder views on possible law reform to increase protection.¹⁵

¹¹ HR 27 November 2009, *NJ* 2014/201 (*VEB c.s./World Online c.s.*)

¹² See esp Court of Appeal Den Bosch 15 April 2014, *JOR* 2014/168, with annotation Van der Wiel en Wijnberg; *Ondernemingsrecht* 2014/92, with annotation Arons (*Holding Westkant B.V., in liquidatie/ABN AMRO Bank N.V.*). Please also note that the open norms in the Dutch Civil Code could in any even facilitate the development of any such special duty of care towards commercial parties. See Art. 6:2, Art. 6:248 and Art. 7:401 DCC, on which see § III and § VII.2

¹³ E.g. Court of Appeal Den Bosch 15 April 2014, *JOR* 2014/168 (*Holding Westkant/ABN AMRO*).

¹⁴ E.g. Court of Appeal Amsterdam 15 September 2015, *JOR* 2015/334 (*X./ING*); Court of Appeal Amsterdam 10 November 2015, *JOR* 2016/37 (*X./ABN AMRO*); Court of Appeal Amsterdam 11 October 2016, case number 200.153.823/01 (*X./ABN AMRO*).

¹⁵ See Dutch Ministry of Finance, *Consultatiedocument - Effectiviteit en gewenste mate van bescherming voor zzp-ers en mkb-ers bij financiële diensten en producten* (1 September 2016) (downloadable at www.internetconsultatie.nl/consultatiebeschermingkleinzakelijk).

6. Suretyship

A recurring case in which duties to warn and investigate are accepted by the Dutch courts beyond the scope of investment services, is the situation where a consumer acts as the guarantor of a debtor of a bank loan. In the Netherlands the bank has a duty to warn such guarantor for the risks involved.¹⁶

III. LEGAL BASIS OF A BANK'S DUTY OF CARE

Banks are generally held to have a duty of care that results in pre-contractual duties and duties during the term of the contract. In the pre-contractual stage the duty of care follows from the general private law principle of reasonableness and fairness (*redelijkheid en billijkheid*).¹⁷ During the term of the contract this duty can be based on either (1) Article 7:401 DCC, which applies to services contracts generally and requires service providers to observe the care of a prudent service provider, or (2) the general private law principle of reasonableness and fairness.¹⁸ A bank's the duty of care also follows from Article 2 of the General Banking Conditions 2009 and 2017 to the extent that they apply to the relevant contract; the Conditions provide that a bank must exercise due care when providing services and must take the client's interests into account to the best of its ability.¹⁹

The duty of care, an open-ended norm, is made more specific through either legislation or judicial interpretation. The Dutch Civil Code (*Burgerlijk Wetboek* or DCC) does not impose specific pre-contractual duties on banks, while imposing some, but not many, specific duties during the term of the relationship. In contrast, the *Wet op het financieel*

¹⁶ See HR 1 April 2016, ECLI:NL:HR:2016:543, *NJ* 2016/190 (*Aruba Bank c.s./Hardeveld*), consideration 3.4.1. See for similar reasoning in the context of avoidance of the guarantee on the basis of mistake (*dwaling*): HR 1 June 1990, *NJ* 1991/759 with annotation Brunner (*Van Lanschot/Bink*).

¹⁷ Flowing from the Dutch system of private law as such.

¹⁸ See explicitly on reasonableness and fairness during the term of the relevant legal relationship (eg an asset management contract) Arts 6:2(1) and 6:248(1) DCC. Art 6:2 DCC reads as follows: 'A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and fairness'. Art 6:248(1) DCC reads: 'A contract has not only the legal effects agreed upon by the parties, but also those which, according to the nature of the contract result from the law, usages or the requirements of reasonableness and fairness'. Apart from these provisions, reasonableness and fairness also flow from the Dutch system of private law as such during the term of the relevant legal relationship (eg an asset management contract).

¹⁹ Cf also the General Banking Conditions 1995, Art. 2. The General Banking Conditions 2017 entered into force on 1 March 2017. The General Banking Conditions 1995, 2009 and 2017 are available at <https://www.nvb.nl/publicaties-standpunten/publicaties/619/algemene-bankvoorwaarden-general-banking-conditins.html>.

toezicht (Dutch Financial Supervision Act, Wft) and lower legislation issued pursuant thereto set out in detail the acts that a bank must perform (or refrain from performing) to comply with the general norm. In addition, as we have seen above, a fair amount of case law helps clarify a bank's obligations.

According to the Hoge Raad, the position of banks in society brings with it a 'special' duty of care towards both private, non-professional clients and private, non-professional third parties whose interests banks must take into account. In the Hoge Raad's view, a bank's special duty is also based on the fact that it is a professional service provider that must be deemed to have the necessary expertise. The scope and intensity of this duty of care depends on the circumstances of the case. These circumstances may include the client's expertise, if any, its financial position, and the regulatory rules to which the particular bank is subject.²⁰

Under Dutch law, the special duty of care owed by a bank is a counterpart to the duties of care that have been developed in the context of the professional liability of professional service providers (such as medical doctors, civil law notaries, attorneys-at-law, and auditors).²¹ The position of both banks and professional service providers in society brings with it that they owe clients and to a certain extent third parties a special duty of care. In both cases, the duty of care is also based on the fact that they are professional parties that are deemed to have the necessary expertise. They all perform essential functions in society. If they fail to comply with their duty of care, this has a severe impact on the financial markets, health and justice.

IV. DUTIES TO INVESTIGATE, WARN AND REFUSE

1. General

As expressed in the previous paragraph, the scope and intensity of a bank's duty of care depends on the circumstances of the case. However, based on this theoretical starting

²⁰ See the cases mentioned in § II above.

²¹ See HR 9 November 1990, *NJ* 1991/26 (*Speeckaert v. Gradener*); HR 12 July 2002, *NJ* 2003/151 (both on the duty of care of medical doctors); HR 13 June 2003, *NJ* 2004/196 (*Beatrixziekenhuis v. ProCall*) (attorneys-at-law and civil law notaries); HR 13 October 2006, *NJ* 2008/528 (*X, Y, Z & Q v. Stichting Vie d'Or*) with annotation C.C. van Dam under *NJ* 2008/529 (auditors). See generally on the liability of professional service providers Asser/Tjong Tjin Tai, 7-IV* 2014/66, 191 ff., 406 ff (with further references).

point, the Hoge Raad has developed specific duties to investigate and to warn, and, in exceptional circumstances, outright duties to refuse to provide a product or service.

2. Duties to investigate

Before entering into a credit agreement with a consumer, a lender has to investigate the consumer's creditworthiness. Furthermore, the case law on share leasing (see above, § II.2) implies that when a financial product comprises periodical payments and may result in a net debt remaining due at maturity, the bank has to review the product's suitability for the consumer before entering into a contract.

3. Duties to warn

The share leasing cases also imply that there is an obligation to explicitly and unequivocally warn a consumer of the risk of a debt remaining due at maturity and, when such a product is not deemed suitable for the consumer, to advise the consumer against entering into an agreement. The third line of cases, pertaining to advice and asset management for private clients (see above, § II.3), implies a duty to explicitly and unequivocally warn of the special risks of particular transactions and of any potential mismatch between the chosen investment strategy and the financial prospects, expertise and goals of the client. The special duty of care furthermore may entail that the bank is only allowed to continue a certain strategy when the bank has confronted the client with its risks, has made sure that the client is actually aware of these risks, and the client has agreed to continuing the strategy.

The fourth line of case law (on liability vis-à-vis third parties, see above § II.4) implies that when a bank becomes aware of any unusual transactions, it has a duty to further investigate the matter in order to protect third parties.

4. Duty to refuse

Apart from duties to investigate and duties to warn, there are instances in which a bank has a duty to act or a duty to refuse to act. In cases on option trading, the infringement of margin requirements results in an obligation for the bank to refuse to execute any further transactions for the client and to liquidate the client's asset portfolio to prevent further losses from occurring.

Such a duty to refuse to enter into an agreement may also arise with respect to credit agreements between banks and consumers, when a bank concludes that a particular consumer is insufficiently creditworthy. This obligation is in line with Article 4:34, Section 2 Wft.

V. THE IMPACT OF MIFID ON A BANK'S DUTY OF CARE

1. General

As regulatory provisions are classified as public law, any failure by a bank to comply with one or more regulatory provisions applicable to it will primarily affect its relationship with the relevant financial regulator.²² In other words, the financial regulator can enforce these provisions under administrative law in the event of an infringement, for example by imposing an administrative fine on the firm.

However, the regulatory provisions, in particular the conduct of business rules under MiFID/MiFID II, also have a major influence on relations between the bank and its clients under private law. It is now commonly accepted in Dutch case law and literature that the regulatory rules help to define the pre-contractual and contractual (special) duty of care of banks (and other financial undertakings as well) under private law.²³ Moreover, an infringement of provisions of the Wft and subordinate legislation can constitute not only a breach of the civil duty of care but also a tort (unlawful act) for contravention of a statutory duty. In addition, the rules on unfair commercial practices explicitly provide in relation to retail clients (consumers) that a breach of a contractual or pre-contractual obligation to provide information under or pursuant to section 4:20

²² In the Netherlands, the Stichting Autoriteit Financiële Markten (AFM) is the conduct of business regulator for financial institutions, including banks and investment firms. De Nederlandsche Bank N.V. (DNB) is the prudential regulator for financial institutions, including banks and investment firms (subject to some exceptions, such as the granting of a banking licence, in which case the European Central Bank (ECB) is competent). But if a bank is 'significant' within the meaning of the SSM Regulation the ECB instead of DNB is the prudential regulator. See on the SSM Regulation for example: D. Busch & G. Ferrarini (eds), *European Banking Union*, OUP, Oxford 2015.

²³ See eg HR 23 March 2007, *NJ* 2007/333, with annotation by Mok (*ABN AMRO v. Van Velzen*) (breach of special duty of care due to non-compliance with margin requirement on a trade in options); HR 3 February 2012, *NJ* 2012/95; *AA* (2012) 752, with annotation by Busch; *JOR* 2012/116, with annotation by Van Baalen (*Coöperatieve Rabobank Vaart en Vecht UA v. X*) (breach of special duty of care due to non-compliance with KYC rules when providing investment advice); HR 8 February 2013, *NJ* 2013/105; *JOR* 2013/105 (*Daelmans v. Dexia*) (breach of special duty of care due to non-compliance with KYC rules in relation to portfolio management). See also inter alia the following authors: S.B. van Baalen, Aansprakelijkheid als gevolg van een schending van de Wft-regels, in: D. Busch *et al.* (eds), *Onderneming en financieel toezicht* (Onderneming en Recht nr. 57), 2nd ed., Kluwer, Deventer 2010, p. 1013-1038, at p. 1015; B. Bierens, Het waarheen en waarvoor van de bancaire zorgplicht. De ontwikkeling van een weerbarstig leerstuk op het snijvlak van financieel publiek- en privaatrecht, *NTBR* (2013), p. 15-27, at § 3.3; D. Busch & L.J. Silverentand, Chapter 7: The Netherlands, in: D. Busch & D.A. DeMott (eds), *Liability of Asset Managers*, OUP, Oxford 2012, § 7.56 ff; O.O. Cherednychenko, European Securities Regulation, Private Law and the Firm-Client Relationship *ERPL* (2009), pp. 925-952.

Wft (including an obligation under MiFID and, in due course, MiFID II) in commercial communications (including advertising and marketing) constitutes, by definition, an unfair commercial practice and hence also a tort.²⁴ It should also be noted that in the context of institutional asset management (for pensions funds, insurers and so forth) duties of care under public law and other regulatory provisions are regularly explicitly incorporated into the contract, with all the contractual consequences that this entails. Institutional asset management contracts routinely include a provision in which the portfolio manager declares that he has an authorization from the AFM and will at all times comply with the Wft and subordinate legislation.

2. May the Dutch civil courts be stricter than MiFID?

In the Netherlands it is unclear whether civil courts may be stricter than MiFID. In 2009, in the *Dexia* case and in two other decisions handed down on the same date, the Hoge Raad ruled that, in the circumstances of the case, the private law duty of care could be stricter than the public law duties of care contained in the conduct-of-business rules.²⁵ However, these decisions did not concern the conduct-of-business rules implementing the *maximum* harmonization regime of MiFID, but rather the conduct-

²⁴ See Article 6:193b(1) and (3)(a), Article 6:193d(1) and (2) and Article 6:193f, opening words and (f), Dutch Civil Code (DCC). Since 13 June 2014 a contract concluded as a consequence of an unfair commercial practice may also be rescinded (Article 6:193j(3) DCC) (*Stb.* 2014, 40). As regards the application of the legislation on unfair commercial practices to investment services, see: A.A. Ettema, *De Wet oneerlijke handelspraktijken in de praktijk*, *Bb* (2010), p. 111-113. There is some discussion about whether the unfair commercial practices legislation can also relate to the duty to provide information during the term of a contract. From the history of the Dutch implementing legislation, this would indeed seem to be the case because the Unfair Commercial Practices Directive is said to apply to unfair business-to-consumer commercial practices before, during and after a commercial transaction in relation to a product (*Dutch Parliamentary Papers II* 2006/07, 30 928, no. 3, p. 1). See also Rotterdam District Court 24 June 2010, *JOR* 2010/237, with note by Grundmann-van de Krol. This is also the view we have taken in the main text above. For a different view, at any rate in relation to the duty of a bond-issuing institution to provide information during the maturity of the bonds, see: T.M.C. Arons/J.B.S. Hijink/A.C.W. Pijls, *Oneerlijke handelspraktijken bij aanbiedingen van obligaties: een never ending story?*, *WPNR* 6821 (2009), p. 953-957; J.B.S. Hijink, *Enige ontwikkelingen rondom de financiële verslaggeving van obligatie-uitgevende instellingen: toepasselijkheid van het '403-regime' en het toezicht van de AFM op 'oneerlijke handelspraktijken'*, *TvJ* (2010), p. 74-81, at p. 80. Possibly likewise, see W.H. van Boom, *Handhaving consumentenbescherming. Een toelichting op de Wet handhaving consumentenbescherming*, Uitgeverij Paris, Amsterdam 2010, p. 77 note 233. To date there has been no discussion of this question in relation to the duties to provide information under MiFID, as implemented in section 4:20 Wft and the more detailed rules, let alone in relation to the corresponding duties under MiFID II.

²⁵ HR 5 June 2009, *NJ* 2012/182; *JOR* 2009/199 with annotation by Lieverse (*De Treek/Dexia Bank Nederland*) consideration 4.11.5; HR 5 June 2009, *NJ* 2012/183; *JA* 2009/116 (*Levob Bank/Bolle*) consideration 4.5.8; HR 5 June 2009, *NJ* 2012/184 with annotation by Vranken; *JOR* 2009/200 (*Stichting Gedupeerden Spaarconstructie/Aegon Bank*) consideration 4.6.10.

of-business rules implementing the *minimum* harmonization regime of its predecessor, the Investment Services Directive (ISD). In view of this, it is an open question in the Netherlands whether the civil courts can impose a private law duty of care that is stricter than the regulatory rules implementing the current MiFID regime.

The Dutch legal literature is divided on this issue. Some Dutch authors argue that for the sake of legal certainty, and in view of MiFID's purpose a European level playing field and the idea of maximum harmonization, it should not be possible for civil courts to impose a higher or stricter standard than the conduct-of-business rules contained in MiFID.²⁶ Other Dutch authors argue that the civil courts can impose a higher or stricter standard, based on an alleged autonomy of private law. After all, these authors argue, MiFID only harmonizes regulatory law, not private law. This autonomous position of private law is important, they argue, because the *ex ante* application of regulatory law may lead to *ex post* solutions that are unacceptable in the circumstances of a specific case. According to these authors, the *Dexia* case would provide an excellent illustration.²⁷ The argument that the European civil courts cannot render justice in individual cases because the MiFID duties are inflexible, has been rejected as unconvincing by some authors, because important MiFID duties are principle-based. A well-known example is art. 19 MiFID, providing that a bank must act honestly, fairly and professionally in accordance with the best interests of its clients. It is argued in the legal literature that this and other principles-based provisions give the civil courts sufficient latitude to render justice in individual cases, although, these authors claim, for the sake of legal certainty, the principles-based duties under MiFID should be used with caution.²⁸

In any event, one cannot rule out that the civil courts would feel free to subject banks to private law duties which are stricter or more demanding than the MiFID duties. This can be illustrated by the *Fortis Bank/Bourgonje* judgment rendered by the Hoge Raad in 2010. The case came before the Court prior to the implementation of MiFID, but it cannot be ruled out that that the Hoge Raad would have rendered the same decision under MiFID. In any event, in *Fortis Bank/Bourgonje* it was held that Fortis was subject to a special duty of care towards its non-professional client Bourgonje. This special

²⁶ Lieveise in her annotation No 12 under HR 5 June, *JOR* 2009/199 (*Treek/Dexia Bank Nederland*); in a similar vein S.B. van Baalen, Aansprakelijkheid als gevolg van een schending van de Wft-regels, in: D. Busch *et al.* (eds), *Onderneming en financieel toezicht* (Onderneming en Recht nr. 57), 2nd ed., Kluwer, Deventer 2010, p. 1013-1038, at p. 1024.

²⁷ See esp O.O. Cherednychenko, European Securities Regulation, Private Law and the Firm-Client Relationship *ERPL* 925-52 at 945-6 (2009); O.O. Cherednychenko, De bijzondere zorgplicht van de bank in het spanningsveld tussen publiek- en privaatrecht, *NTBR* 66-77 at 74 (2010).

²⁸ See D. Busch, Why MiFID Matters to Private Law – The Example of MiFID's Impact on an Asset Manager's Civil Liability, *CMLJ* (2012), p. 386-413, at p. 395-396.

duty of care was based on the fact that Fortis was a professional provider of asset management services with the necessary expertise par excellence. According to the Hoge Raad, this special duty may encompass a duty to explicitly and unequivocally warn the client of the risk of considerable financial loss posed by the composition of the portfolio (excessive concentration of the portfolio in a particular asset). Whether and to what extent such duty to warn exists, and whether it is breached, depends on the relevant circumstances of the case.²⁹ Those circumstances may result in a duty to warn that is more or less intense. The circumstances may even lead to the conclusion that there is no duty to warn at all.

In view of the above, it is submitted that a duty to warn explicitly and unequivocally based on the circumstances of the case goes further than to warn appropriately in a standardized format, as is allowed under Art. 19(3), third dash MiFID.³⁰ Also it should be borne in mind that more recent case law from the Hoge Raad (but still pertaining to the pre-MiFID era) even requires that the bank should verify whether the consumer actually understood the warning.³¹

VI. LIABILITY FOR BREACH OF DUTY OF CARE

1. General

In relation to a breach of a bank's duty of care the most important remedy in practice is a claim for damages. As we have seen, such a claim is normally based on the general tort provision (*onrechtmatige daad*)³² or breach of contract (*toerekenbare*

²⁹ HR 24 December 2010, *NJ* 2011/251 with annotation by Tjong Tjin Tai; *JOR* 2011/54 with annotation by Pijls (*Fortis Bank/Bourgonje*), consideration 3.4.

³⁰ Please note that the provision of information in a standardized format becomes a Member State option under MIFID II: the Member States *may* allow the information to be provided in a standardized format (see Article 24(5), last sentence, MIFID II). In short, if a Member State does not allow this, it seems as though the information must always be provided in a personalized format. In the Netherlands this Member State option is exercised (implicitly). The relevant Dutch implementing provision (Article 4:20(6) Wft) is not altered in the Draft Bill to implement MiFID II, and the accompanying Explanatory Memorandum is also silent on this point. See *Dutch Parliamentary Papers II*, 2016/2017, 34 583, no. 2 (Draft Bill) and no. 3 (Explanatory Memorandum). It will therefore remain possible in the Netherlands to provide information in standardized format. The situation will undoubtedly be different in at least a few other Member States. If the Member States had unanimously considered that information could be provided in standardized format, a compromise in the form of a Member State option would have been unnecessary.

³¹ See HR 3 February 2012, *NJ* 2012/95; AA (2012) 752, with note by Busch; *JOR* 2012/116, with note by Van Baalen (*Coöperatieve Rabobank Vaart en Vecht UA v. X*) (duty of care in relation to the provision of investment advice), consideration 3.6.2. See also HR 14 August 2015, *NJ* 2016/107 (*Brouwer/ABN AMRO*) (duty of care in relation to the provision of investment advice).

³² Art 6:162 DCC.

tekortkoming).³³ Under Dutch law, a contractual claim does not preclude a damages claim based on tort, if an action or failure to act amounts to a tort independent from an imputable non-performance of a contractual obligation. Thus, a client may institute a general tort claim against the bank during the term of the contract, for example, with respect to a violation of regulatory duties to furnish information during that term. In practice, clients often base claims both on tort and breach of contract. In the absence of a contractual relationship with a bank, parties other than the bank's clients (third parties) must base their claim on tort.³⁴

In the case of misleading information, a claim for damages may also be based on special tort provisions regarding unfair commercial practices³⁵ or misleading advertising.³⁶ In the case of a bank's breach of contract, alternative remedies are (1) specific performance if proper performance is still possible, either instead of or in addition to damages for late performance;³⁷ and (2) dissolving the contract, either instead of or in addition to damages.³⁸ These alternative remedies have limited practical relevance in the case of liability of banks.

In view of the above we will now look in more detail at the requirements for a successful damages claim based on the general tort provision, the special tort provisions mentioned above, and breach of contract.

2. Tort liability

2.1 General

A client or third party claiming damages on the basis of the general tort provision must meet the following requirements: (1) unlawful behaviour (*onrechtmatigheid*); (2) attributability (*toerekening*); (3) loss (*schade*); (4) causation between the loss and the tort committed;³⁹ and (5) 'proximity' or 'relativity' (*relativiteit*).⁴⁰ As a general rule, the (potential) client or third party has the burden of proof on these requirements,⁴¹ subject to exceptions, in particular concerning proof of causation.

³³ Arts 6:74 ff DCC.

³⁴ See D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 21.1 (p. 109).

³⁵ Arts 6:193a through 6:193j DCC.

³⁶ Arts 6:194 and 6:195 DCC.

³⁷ Art 3:296(1) DCC.

³⁸ Art 6:265 DCC.

³⁹ Art 6:162(1) DCC.

⁴⁰ Art 6:163 DCC.

⁴¹ Art 150 Rv. Explicitly in relation to the burden of proof of a breach of duty of care by an asset manager: HR 15 December 2006, *NJ* 2007, 203 with annotation by Mok; HR 11 July 2008, *JOR* 2008/272 with annotation by Voerman (*Noordnederlands Effektenkantoor BV/Mourik*)

2.2 Unlawful behaviour

Except where there are grounds for justification, unlawful behaviour may be based on (1) the violation of a right, (2) the breach of a statutory duty, or (3) the breach of an unwritten rule pertaining to proper social conduct.⁴² In the context of liability of banks, tortious behaviour normally consists of an act or omission under (2) and/or (3) above.

In the case of *non-professional* clients and *non-professional* third parties whose interests the bank is required to take into account, the Hoge Raad refers to a ‘special’ duty of care, see § II and III above. A violation of this duty amounts to a tort because it constitutes an act or omission breaching a rule of unwritten law pertaining to proper social conduct.

The duty of care is frequently specified by reference to regulatory duties contained in the Wft (and its predecessors) and the regulations pursuant thereto, particularly the conduct of business rules. In such cases, a tort claim based on the violation of regulatory rules amounts to an unlawful act for breaching a statutory duty. However, such an approach is not always an option. Some cases took place prior to the enactment of detailed regulatory duties, in which cases a tort claim could only be based on breach of a duty of care. It transpires from recent decisions from the Hoge Raad that the position prior to the enactment of detailed regulatory rules is sometimes not materially different from the position after their enactment, especially after the enactment of the MiFID.⁴³

2.3 Attributability, causation, loss

Liability in tort also requires that the tortious act be attributable to the bank. This is the case if the act is due to the bank’s fault (*schuld*) or a cause for which the bank is accountable by statutory provision (*wet*), or pursuant to generally accepted principles (*in het verkeer geldende opvattingen*).⁴⁴ In reported cases on the liability of banks, the requirement of attributability has not been the object of much litigation. On requirements of causation and loss, which are regularly the object of litigation in relation to liability of banks, see § VI.4 and § VI.5, respectively.

⁴² Art 6:162(2) DCC.

⁴³ HR 5 June 2009, JA 2009/116 (*Levob Bank/Bolle*), considerations 4.5.6 and 4.5.7; HR 5 June 2009, JOR 2009/199 with annotation by Lieveerse; JA 2009/117 (*Treek/Dexia Bank Nederland*), considerations 4.11.4 and 4.11.5; HR 5 June 2009, JOR 2009/200; JA 2009/118 with annotation by Van Boom (*Stichting Gedupeerden Spaarconstructie/Aegon Bank*) considerations 4.6.4 and 4.6.8.

⁴⁴ Art 6:162(3) DCC.

2.4 Proximity

‘Proximity’ or ‘relativity’ (*relativiteit*) means that the violation of a standard leads to liability towards persons who allege damages as a consequence of such violation only when and to the extent that the standard is intended to protect the claimant’s patrimonial interests.⁴⁵ For the liability of banks, this means that only the breach of a written or unwritten rule that aims to protect the claimant’s patrimonial interest can serve as a basis for a claim for unlawful conduct.

According to the legislative history of the Wft, the requirement in Article 6:163 DCC will be met when a financial institution’s client suffers loss as a consequence of a violation of the Wft. These prudential rules and the conduct of business rules not only serve the general interest, but also the client’s individual interests.⁴⁶ This approach also seems to apply in relation to non-compliance with MiFID/MiFID II rules, since they have been (or, as the case may be, will be) transposed into Dutch law in the Wft and subordinate legislation. Nevertheless, some Dutch authors doubt whether this is the correct approach and argue that in fact only (some) conduct of business rules are drafted to protect the interests of individual clients, and that prudential rules in principle are not so drafted.⁴⁷

The proximity test may also have a bearing on the recoverable amount of damages. The Hoge Raad held that the specific regulatory provisions on margin requirements, which banks must observe, only aim to protect clients against relatively large losses, not against any loss suffered as a result of a violation.⁴⁸

⁴⁵ Art 6:163 DCC. See further D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 21.4.4.

⁴⁶ *Dutch Parliamentary Papers II*, 2003/04, 29 708, No 3, pp 28–9; *Dutch Parliamentary Papers II*, 2005/06, 29 708, No 19, p 393. This view accords with HR 13 October 2006, *NJ* 2008, 529 with annotation by Van Dam; *JOR* 2006/295 with annotation by Busch (*DNB/Stichting Vie d’Or*) consideration 4.2.2, where it was held that the patrimonial interests of policyholders are protected by the prudential rules to which life insurance companies were subject pursuant to the Wtv, one of the predecessors of the Wft.

⁴⁷ See eg S.B. van Baalen, *Aansprakelijkheid als gevolg van een schending van de Wft-regels*, in: D. Busch *et al.* (eds), *Onderneming en financieel toezicht* (Onderneming en Recht nr. 57), 2nd ed., Kluwer, Deventer 2010, p. 1013-1038, at p. 1014-1021.

⁴⁸ HR 4 December 2009, *NJ* 2010, 67 with annotation by Mok; *JOR* 2010/19 with annotation by Frielink (*Nabbe/Staalbankiers B.V.*) consideration 3.7. The case concerned Art 28 (2)–(4) of the Further Regulation on Supervision of the Securities Trade (*Nadere Regeling toezicht effectenverkeer 1999*) a predecessor of Arts 85 and 86 BGfo, but the decision is generally held to apply *mutatis mutandis* to Arts 85 and 86 BGfo. See eg Frielink in his annotation No 7 under the decision as published in *JOR*. See also on this case S.B. van Baalen, *Aansprakelijkheid als gevolg van een schending van de Wft-regels*, in: D. Busch *et al.* (eds), *Onderneming en financieel toezicht* (Onderneming en Recht nr. 57), 2nd ed., Kluwer, Deventer 2010, p. 1013-1038, at p. 1015-1016.

2.5 *Unfair commercial practices*

The implementation⁴⁹ of the Unfair Commercial Practices Directive⁵⁰ has been in effect since 15 October 2008.⁵¹ These rules also apply to financial products and services.

A trader who engages in an unfair commercial practice acts unlawfully towards the consumer.⁵² A trader is defined as any natural person acting in the conduct of his/her profession or business.⁵³ A consumer is defined as any natural person not acting in the conduct of his/her profession or business.⁵⁴ The point of departure in the rules on unfair commercial practices is the ‘average consumer’. The European Court of Justice has held that the average consumer is informed, cautious, and prudent.⁵⁵ According to the rules on unfair commercial practices the average consumer also includes the average member of a particular group addressed by the trader or an average member of a specific group when the trader could reasonably be expected to foresee that such group, due to their mental or physical infirmity, age, or credulity, will be especially vulnerable to the commercial practice or the underlying product.⁵⁶

The rules on unfair commercial practices are particularly relevant to a bank’s liability in relation to a violation of Article 4:20 Wft (and the further regulations pursuant thereto) on pre-contractual duties of information and duties of information during the term of the contract. The rules on unfair commercial practices explicitly provide that a violation of these provisions automatically amounts to a misleading and therefore unfair commercial practice to the extent that the provisions apply in relation to non-professional clients/consumers.⁵⁷ Thus, clients who are consumers can base their damages claim against the bank on the rules on unfair commercial practices when the bank violates these provisions.⁵⁸

In case of a violation of Article 4:20 Wft (and the further regulations pursuant thereto) non-professional clients can also base their damages claim on the general tort provision

⁴⁹ Arts 6:193a through 6:193j DCC.

⁵⁰ Directive 2005/29/EC.

⁵¹ *Stb.* 2008, 398.

⁵² Art 6:193b(1) DCC.

⁵³ Art 6:193a(1)(b) DCC.

⁵⁴ Art 6:193a(1)(a) DCC.

⁵⁵ European Court of Justice, 16 July 1998, C-210/96, *NJ* 2000, 374.

⁵⁶ Art 6:193a(2) DCC.

⁵⁷ Art 6:193b(1) and (3)(a), Art 6:193d(1) and (2) and Art 6:193f, opening words and sub(f) DCC.

⁵⁸ See on the application of the rules on unfair commercial practices in relation to the provision of information by investment services providers: A. A. Ettema, *De Wet oneerlijke handelspraktijken in de praktijk Bb* 111–13 (2010).

of Article 6:162 DCC or, to the extent the claim concerns inadequate information during the term of the contract, also on breach of contract. However, a damages claim based on the rules on unfair commercial practices is more advantageous for the consumer. First, as a general rule, the bank has the burden of proof with respect to the material correctness and completeness of the information provided to the consumer.⁵⁹ He only needs to state that the information is incorrect and/or incomplete. Secondly, attribution of the tortious act is assumed, unless the bank proves that the tort was not due to its fault and that it cannot be held accountable for the fault on any other ground.⁶⁰ Finally, since 13 June 2014 a contract concluded as a consequence of an unfair commercial practice may also be rescinded (Article 6:193j(3) DCC).⁶¹

2.6 *Misleading advertisements*

Like the rules on unfair commercial practices, the rules on misleading advertisements⁶² are special tort provisions. Although the rules on misleading advertisements entered into force in 1975, they are considered to incorporate the provisions of the 1984 Misleading Advertisements Directive.⁶³ Before 15 October 2008, the rules on misleading advertisements applied in relation to both consumers and professionals. Since the entry into force of the rules on unfair commercial practices, the rules on misleading advertisements apply only to professionals. Since then, Article 6:194 DCC states that a person who makes public or causes to be made public information regarding goods or services which he, or the person for whom he acts, offers in the conduct of a profession or business, acts unlawfully towards another person acting in the conduct of its business if this information is misleading in one or more respects. ‘Goods’ is interpreted broadly to include securities such as shares.⁶⁴ ‘Services’ includes financial services.

The rules on misleading advertisements often serve as the basis for misleading-prospectus claims against issuers and banks, for example, in connection with initial public offerings. Prior to the entering into force of the rules on unfair commercial practices, the misleading character of a prospectus had to be established with reference

⁵⁹ Art 6:193j(1) DCC.

⁶⁰ Art 6:193j(2) DCC.

⁶¹ *Stb.* 2014, 40.

⁶² Arts 6:194 and 6:195 DCC.

⁶³ Directive 1984/450/EEC. Cf D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 21.7.1.

⁶⁴ *Dutch Parliamentary Papers II*, 1975/76, 13 611, No 3, p 9.

to the average informed, cautious, and prudent ordinary investor,⁶⁵ a reference derived from the case law of the European Court of Justice.⁶⁶ The ‘average investor’ may be expected to be prepared to dive into the information offered, but not to have specialized or special knowledge and experience at his/her disposal, unless the advertising is directed solely to persons with such knowledge and experience.⁶⁷ Since the entering into force of the unfair commercial practices rules, the rules on misleading advertisements apply only in relation to professionals.

In relation to a bank’s liability, the rules on misleading advertisements are (like the rules on unfair commercial practices) particularly relevant in relation to a violation of Article 4:20 Wft on pre-contractual duties of information and duties of information during the term of the contract. It is submitted that a violation of these provisions, to the extent that they concern professional clients, automatically amounts to a misleading statement within the meaning of Article 6:194 DCC. Thus, when a bank violates Article 4:20 Wft a professional client can base a damages claim on the rules on misleading advertisements.

In case of a violation of Article 4:20 Wft (and the further regulations pursuant thereto) a client can also base a damages claim on the general tort provision of Article 6:162 DCC or, as far as it concerns inadequate information during the term of the contract, on breach of contract. However, a damages claim based on the rules on misleading advertisements has some advantages in comparison to a claim based on the general tort provision or breach of contract. First, the bank has the burden of proof with respect to the material correctness and completeness of the information that the bank provided.⁶⁸ The client must merely state that the information was incorrect and/or incomplete. Secondly, attribution of the tortious act is assumed, unless the bank proves that the tort committed was not due to its fault and that it cannot be held accountable for the tort on any other ground.⁶⁹

⁶⁵ See eg HR 27 November 2009, *JOR* 2010/43 with annotation by Frielink (*Vereniging van Effectenbezitters c. s./World Online International NV c. s.*) consideration 4.10.3.

⁶⁶ European Court of Justice, 16 July 1998, C-210/96, *NJ* 2000, 374, confirmed in European Court of Justice, 19 September 2006, C-356/04, *NJ* 2007, 18.

⁶⁷ HR 27 November 2009, *JOR* 2010/43 with annotation by Frielink (*Vereniging van Effectenbezitters c. s./World Online International NV c. s.*) consideration 4.10.3.

⁶⁸ Art 6:195(1) DCC.

⁶⁹ Art 6:195(2) DCC.

3. Breach of contract

3.1 General

A damages claim based on breach of contract⁷⁰ may, amongst other things, concern an (1) alleged breach of the investment guidelines, (2) underperformance, (3) breach of margin requirements in relation to options transactions, (4) breach of duties of information during the term of the contract, and (5) breach of contractual representations and warranties.

A client claiming damages on the basis of breach of contract must establish the following requirements: (1) failure in the performance of a contractual obligation; (2) attributability (*toerekening*); (3) loss (*schade*); (4) causation between the loss and failure in the performance of the relevant contractual obligation.⁷¹ Unless proper performance is permanently impossible, the client is entitled only to damages when the bank is in default under Articles 6:81 ff DCC. As a general rule, the burden of proof with regard to these requirements is with the client.⁷² However, there are some important exceptions to this rule, particularly in relation to proof of causation. In addition, the client has a duty of prompt protest against defects in the performance of a contract; failure bars the client's ability to base a claim on this defect.⁷³

3.2 Failure in the performance of a contractual obligation

If a bank violates his duty of care,⁷⁴ this amounts to a failure in the performance of a contractual obligation in the sense of Article 6:74 (1) DCC.⁷⁵

The contractual duty of care is frequently specified by the civil courts by reference to regulatory duties imposed on a bank contained in or pursuant to the Wft (and its predecessors), including the conduct of business rules. In principle, the violation of such regulatory rules amounts to a breach of the contractual duty of care.

⁷⁰ Art 6:74 ff DCC.

⁷¹ Art 6:74(1) DCC.

⁷² Art 150 Rv. Thus explicitly in relation to the burden of proof of a breach of duty of care by an asset manager: HR 15 December 2006, *NJ* 2007, 203 with annotation by Mok; HR 11 July 2008, *JOR* 2008/272 with annotation by Voerman (*Noordnederlands Effektenkantoor BV/Mourik*)

⁷³ Art 6:89 DCC.

⁷⁴ In the case of private, non-professional clients and private, non-professional third parties whose interests the bank is required to take into account, the Hoge Raad refers to a 'special' duty of care.

⁷⁵ In the pre-contractual stage and during the term of the contract, a violation of the duty of care can also amount to a tort.

3.3 *Attributability, causation, loss*

The failure in the performance of the bank's contractual obligation must be attributable to the bank, on the basis of fault (*schuld*), a statutory provision (*wet*), a juridical act (*rechtshandeling*), or generally accepted principles (*in het verkeer geldende opvattingen*) (Art 6:75 DCC). An example of a failure in performance that is attributable to the bank on the basis of a juridical act (here the contract) is the breach of a contractual representation or warranty. In reported cases on the liability of banks, the requirement of attributability has not been the object of much litigation. On requirements of causation and loss, which are regularly the object of litigation in relation to liability of banks, see § VI.4 and § VI.5, respectively.

3.4 *Duty to protest*

Under Article 6:89 DCC, a creditor may not invoke a defect in the performance of an obligation in the absence of prompt protest after the creditor has discovered, or should reasonably have discovered, the defect. The purpose of this rule is protecting the debtor against claims that are difficult to dispute due to the passage of time. Whether the creditor is considered to have protested promptly enough depends on the circumstances of the case. The court does not apply Article 6:89 DCC on its own initiative; the creditor must invoke the provision⁷⁶ and has the burden of proving that protest was timely made and in a manner apparent to the debtor.⁷⁷ If the creditor does not manage to prove that it protested in time, its claim will be rejected. The duty to protest also applies if the creditor bases its claim concerning defective performance on tort.⁷⁸

Article 6:89 DCC applies to claims against financial services providers. Non-compliance with the duty to protest is regularly invoked in court proceedings in relation to alleged losses on investments in financial instruments. The loss on investments in financial instruments (unlike many other losses) is often difficult to determine. As long as the client does not sell an investment, its value may fluctuate due to market developments. It is argued that it is undesirable that a client can just wait and see how the markets develop, filing a claim only when an investment turns into a loss, for example, on the basis that the investment policy was too risky in the light of the client's investment objectives.⁷⁹ If the client protests, he must clearly specify in which ways

⁷⁶ See HR 20 January 2006, *NJ* 2006, 80 (*Robinson/Molenaar v. o. f.*).

⁷⁷ See HR 23 November 2007, *RvdW* 2007, 996.

⁷⁸ HR 23 November 2007, *RvdW* 2007, 996. See on Art 6:89 DCC in connection with investment services D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 21.5.5.

⁷⁹ Cf A. A. Ettema, *Protesteerplicht bij klachten over effectendienstverlening* (HR 11 juni 2010, LJN: BL8297) *Bb* 161–4 at 161 (2010).

the bank's performance is defective. Most of the time the bank's defence of non-compliance with the duty to protest is unsuccessful.⁸⁰

4. Causation

4.1 General

The loss suffered by a (potential) client or third party must be caused by the bank's unlawful behaviour or imputable non-performance. The decisive test is whether, without the tortious behaviour or imputable non-performance, the loss would not have occurred (the *condicio-sine-qua-non* or but-for test).⁸¹ As a rule, the burden of proof for causation is on the client or the third party claiming damages.⁸² Especially in cases of a failure to provide information or to adequately warn a non-professional client about financial risks), proof of this requirement is often problematic. In such cases, banks usually argue that there is no causal connection between the breach and the loss suffered because the non-professional client would have made the same investment decision had the bank complied with its duty to provide information.⁸³

4.2 Proportionate liability

Recently, an attempt has been made to divide the risk of uncertainty about the *condicio-sine-qua-non* requirement between a bank and its client in a case concerning a violation of a duty to provide information. The Amsterdam Court of Appeal held that the bank

⁸⁰ See e.g. HR 11 June 2010, *JOR* 2010/199 with annotation by Lieveerse; HR 8 October 2010, *NJ* 2010/545 (*Tan c.s./Forward Business Parks 2000 N.V. & Chipshol 2000 B.V.*); HR 8 February 2013, *RvdW* 2013/253; AA (2013) 755 with annotation Van Boom; *JOR* 2013/106, with annotation Van der Wiel (*Van de Steeg c.s./Rabobank*); HR 8 February 2013, *RvdW* 2013/250; *JOR* 2013/107, with annotation Van der Wiel (*Kramer/Van Lanschot*).

⁸¹ Art 6:162(1) DCC and Art 6:74(1) DCC.

⁸² Art 150 Rv.

⁸³ Given that the client keeps his investment after the moment that he knew or should have known that it is too risky, the courts sometimes infer that the client would not have opposed the relevant investment had he been adequately informed about the risks from the very start, with the effect that there is no *condicio sine qua non* connection between the bank's breach of its duty of care and the damage suffered by the client. See eg Court of Appeal Amsterdam 2 November 2010, *JOR* 2011/80 (concerning an advisory relationship). See also n 144. In addition, it is sometimes reasoned that the causal chain between the bank's unlawful act or breach of contract and the damage suffered is broken from the moment that the client was or should have been aware of the risks, with the effect that any loss suffered thereafter cannot be attributed to the bank. See GCHB 1 July 2010–394, consideration 4.8.3 (concerning an advisory relationship). Similar results can be achieved through an application of the duty to mitigate damages because as soon as the client is or should have been aware of the risks he can instruct the bank to sell the relevant investment. See further § VI.6.2 below. See on GCHB § X below.

providing asset management services breached its duty of care because it did not explicitly and unequivocally warn its non-professional client about the risk of considerable financial loss to the portfolio due to excessive concentration in a particular asset. The Court held that it was not entirely clear whether the client would have followed the bank's warning to sell the investment that constituted a disproportionately large portion of the portfolio as soon as possible. The Court held that there was a 50 per cent chance that the client would have followed the bank's explicit warning and ruled that the bank was liable for 50 per cent of the loss.⁸⁴

The Hoge Raad quashed the decision. In a previous judgment, it had accepted proportionate liability in relation to damage to health,⁸⁵ considering that proportionate liability would also be conceivable in other types of cases, in particular if (1) the violation of the relevant standard is clear, (2) there is a fair chance that there is *condicio-sine-qua-non* connection between the violated standard and the loss suffered, and (3) application of proportionate liability is justified by the purpose and nature of the violated standard. In its decision to quash the decision of the Amsterdam Court of Appeal, it considered that the nature of the violated standard was the bank's duty to warn its client and the purpose of the violated standard was preventing patrimonial loss. It also considered that the Court of Appeal had held that the chance that the client would have followed the bank's advice to sell the relevant investment as soon as possible was not particularly large.⁸⁶ In other words, it is not likely that proportionate liability will be applied when a bank breaches its duties to inform or to warn, as the claim will normally concern financial loss rather than personal injury.

4.3 Loss of chance

A second possibility is the theory of the loss of a chance, which is related yet distinct to proportionate liability. Loss of a chance puts the focus on the damage rather than causation. Unlike with proportionate liability, the *condicio sine qua non*-test or but-for test is passed and the discussion only concerns how to translate into damages the chance that the client would have refrained from contracting, had he been properly informed or warned for the risks of the investment.

The Hoge Raad and the lower courts have applied this theory of the loss of a chance outside the area of liability for investment damage, with respect to the liability of

⁸⁴ Court of Appeal Amsterdam 4 November 2008, *JOR* 2009/51 with annotation by Voerman.

⁸⁵ HR 31 March 2006, *RvdW* 2006, 328 (*Nefalit/Karamus*).

⁸⁶ HR 24 December 2010, *JOR* 2011/54 with annotation by Pijls (*Fortis Bank/Bourgonje*), considerations 3.8–3.10.

attorneys-at-law (*advocaten*), tax advisers and medical doctors.⁸⁷ It cannot be excluded that at some point the courts may be asked to apply the theory to banks that have failed to inform or warn its client. It is, however, unlikely that this theory would lead to a different outcome than when the doctrine of proportionate liability is applied.⁸⁸

4.4 Reversal rule and related techniques

4.4.1 Reversal rule

The Hoge Raad also regularly applies the so-called ‘reversal rule’. The rule applies when: (1) an act or inaction violates a duty that aims to protect against the risk of suffering specific losses; and (2) the person who invokes the breach of duty makes it plausible that in its case this specific risk materialized. If the reversal rule applies, there is a rebuttable presumption of a *condicio-sine-qua-non* connection between the breach of the relevant duty and the loss suffered, unless the defendant makes it plausible that the loss is not due to its act or inaction.⁸⁹

The reversal rule may apply when a bank violates duties to furnish information (including duties to warn). For example, it is arguable that a duty to warn the client against the risks of investing with borrowed funds specifically aims to protect the client against the risk of suffering losses as a result of investing in financial instruments with borrowed funds. If such risk materializes, the reversal rule may apply. Depending on the circumstances of the case, the bank’s duty to pay damages may be mitigated by the client’s contributory negligence.⁹⁰ Thus, the reversal rule, combined with the doctrine

⁸⁷ Liability of attorneys-at-law: HR 24 October 1997, *NJ* 1998, 257, m.nt. Stein (*Baijings/Mr. H*); HR 19 January 2007, *NJ* 2007, 63 (*C. Kranendonk Holding B.V./Maatschap A*); HR 16 February 2007, *NJ* 2007, 256, m.nt. Maeijer; *JOR* 2007/112, m.nt. Van Veen en Van Wechem (*Gebroeders Tuin Beheer/Houthoff Buruma c.s.*). Liability of tax advisers: HR 21 december 2012, *NJ* 2013, 237, m.nt. Lindenbergh; *JA* 2013, 41, m.nt. Akkermans en Van Dijk (*Deloitte Belastingadviseurs/H&H Beheer*). Liability of medical doctors: Hof Amsterdam 4 januari 1996, *NJ* 1997, 213 (*Wever/De Kraker c.s.*); Rb. Middelburg 11 maart 1998, *NJ* 1999, 41; Rb. Amsterdam 28 oktober 1998, *NJ* 1999, 406 (*Brinkman/Stork*); 28 oktober Hof Arnhem 24 juni en 14 december 1999, *NJ* 2000, 742; Rb. Zwolle 31 mei 2000, *NJkort* 2000, 89; Rb. Den Haag 12 juli 2000, *VR* 2001, 20; Rb. Leeuwarden 12 juli 2000, *TvGr* 2001, 13; Hof Den Haag 10 oktober 2002, *NJ* 2003, 99; Rb. Amsterdam 23 mei 2003, *NJ* 2004, 45; Rb. Maastricht 13 juli 2005, *JA* 2006, 44, m.nt. Zaadhof; Hof Arnhem 17 januari 2006, *JA* 2006, 37, m.nt. Giard; Rb. Zwolle 1 februari 2006, ECLI:NL:RBZLY:2006:AW6459.

⁸⁸ In this sense, inter alia, Akkermans and Van Dijk in their annotation nr. 15 under HR 21 December 2012, *JA* 2013, 41 (*Deloitte Belastingadviseurs/H&H Beheer*).

⁸⁹ HR 29 November 2002, *NJ* 2004, 404 (*TFS/NS*); HR 29 November 2002, *NJ* 2004, 305 with annotation by Asser (*Kastelein/Achterkarspelen*).

⁹⁰ Art 6:101 DCC (*eigen schuld*). See for an example KCHB 31 March 2009, No 369. See on KCHB § X below.

of contributory negligence, may in application result in outcomes largely similar to the technique of proportionate liability discussed above.

However, case law from the Hoge Raad suggests that the reversal rule does not apply to ‘informed consent’ cases because duties to furnish information aim to enhance well-informed decisions and not to protect against the risk of suffering specific losses, as the reversal rule requires.⁹¹ If so, the reversal rule probably has no role to play when a bank breaches its duties to furnish information, including duties to warn.⁹²

4.4.2 Related techniques

General

Recent case law from the Hoge Raad suggests that more informal, ad hoc techniques are available that yield results similar to the reversal rule.⁹³ Although formally the Court did not apply the reversal rule in these cases, considerations of reasonableness apparently dictated that the risk of uncertainty about the *condicio-sine-qua-non* connection should shift to the party that violated a duty to furnish information. To the extent appropriate, damages may be reduced by the investor’s contributory negligence.⁹⁴

World Online

The reason to shift the risk of uncertainty about the *condicio-sine-qua-non* connection to the party violating the relevant duty of information, articulated in the *World Online* judgment on prospectus liability, may be relevant to liability of a bank for breach of

⁹¹ HR 23 November 2001, *NJ* 2002, 386; HR 23 November 2001, *NJ* 2002, 387, with annotation by Brunner (both concerning medical liability); HR 2 February 2007, *NJ* 2007, 92 (*Juresta Nederland B.V.*) (concerning the liability of an attorney-at-law).

⁹² See A. C. W. Pijls, *Het bewijs van causaal verband bij informatieverzuimen in de beleggingspraktijk NTBR* 170–81 at 174 (2009); A. J. P. Schild, *Het ‘condicio sine qua non’-verband bij de schending van een zorgvuldigheidsverplichting: enige wegen naar Rome RMTh* 254–64 at 257–9 (2009); see also the conclusion of the substitute Procurator-General De Vriesch Lentsch-Kostense, in No 3.36 before HR 5 June 2009, *JA* 2009/116 (*Levob Bank/Bolle*); HR 5 June 2009, *JOR* 2009/199 with annotation by Lieverse; *JA* 2009/117 (*Treek/Dexia Bank Nederland*); HR 5 June 2009, *JOR* 2009/200; *JA* 2009/118 with annotation by Van Boom (*Stichting Gedupeerden Spaarconstructie/Aegon Bank*).

⁹³ HR 5 June 2009, *JA* 2009/116 (*Levob Bank/Bolle*) considerations 4.7.8–4.7.10; HR 5 June 2009, *JOR* 2009/199 with annotation by Lieverse; *JA* 2009/117 (*Treek/Dexia Bank Nederland*) considerations 5.5.1–5.5.3 (both concerning liability for complex financial products); HR 27 November 2009, *JOR* 2010/43 (*Vereniging van Effectenbezitters c. s./World Online International NV*) (concerning prospectus liability), considerations 4.11.1 and 4.11.2.

⁹⁴ See eg HR 5 June 2009, *JA* 2009/116 (*Levob Bank/Bolle*) considerations 4.9.1–4.9.4; HR 5 June 2009, *JOR* 2009/199 with annotation by Lieverse; *JA* 2009/117 (*Treek/Dexia Bank Nederland*) considerations 4.13.1–4.14.4.

duty of care. The European Prospectus Directive provides detailed rules about the content and layout of a prospectus but does not harmonize national regimes on prospectus liability.⁹⁵ Nevertheless, the Hoge Raad held that it follows from the Directive's objectives that rules of national law must offer effective legal protection. Thus, the court held that it may serve as a 'point of departure' that the *condicio-sine-qua-non* connection between the misleading statement and the investment decision is present. In principle it must be assumed that, but for the misleading statement, the investor would not have bought the securities; or, in a secondary-market transaction, would not have bought them on the same terms. However, taking into account the nature of the misleading information and the other available information, a court might instead arrive at the conclusion that this point of departure should be displaced, for example, in the case of a professional investor, who in view of its experience and knowledge may not have been influenced by the misleading prospectus in making its decision to invest.⁹⁶

Share lease

The assessment of causation is strongly connected with the scope of the breached duty. The Hoge Raad emphasised this in three judgments handed down in 2009. The cases were about an investment in securities with money borrowed from the financial service provider or a third party (see above, II.2). The Hoge Raad held that the banks had breached their duties to warn the client in no unclear terms about the risk of the investment (here: a remaining debt) and to advise the client not to conclude the contract. The clients generally argued they would not have concluded the contract if the bank had warned them for the remaining debt or had advised them against concluding the contract.

In such a situation, according to the Hoge Raad, the question whether there is a causal connection between the bank's breach of duty and the client's damage (the remaining debt and the already paid interest and instalments), the court has to compare the client's actual situation and the hypothetical situation in which he would have found himself had the bank not breached its duty. The Hoge Raad held that the duties breached by the bank aim to prevent a private client from rashly or without sufficient insight concluding an investment contract. Concluding the contract can therefore be considered to be the

⁹⁵ The European Prospectus Directive merely indicates that the member states are under an obligation to ensure that the national statutory provisions regarding civil law liability apply to those who are responsible for the information referred to in the prospectus (Art 6(2) of Directive 2003/71/EC).

⁹⁶ HR 27 November 2009, *JOR* 2010/43 with annotation by Frielink (*Vereniging van Effectenbezitters c. s./World Online International NV*) considerations 4.11.1 and 4.11.2.

consequence of the bank's breach of its duty of care. This means that the remaining debt, the paid interest, the instalments and the costs can be considered to be the client's damage caused by the bank's breach.⁹⁷

More particularly, the Hoge Raad distinguished two situations. First, the causation test is supposed to be passed if the service provider should have understood that when offering the product, considering the client's financial position, payment of the lease instalments and the possible (maximum) remaining debt, would supposedly have put an unacceptably heavy financial burden on the client. In such a situation the chance that this client would not have concluded is so considerable that, had he realised the specific risks to which he would have been exposed, it can be assumed that without the bank's breach he would not have concluded the contract, unless there are strong indications of the opposite.⁹⁸

Second, if at the time of concluding the contract, the client's financial situation was sufficient to meet his obligations flowing from the contract, including the possible remaining debt, the financial service provider has to specifically underpin its defence that the client would also have concluded the contract if the provider had not breached its duty, particularly its duty to warn. If this underpinning is insufficient, a causal connection can, in principle, be assumed.⁹⁹

These Hoge Raad judgments provide the guidance for the decisions of the lower courts with respect to causation.¹⁰⁰

4.5 *Art. 149 Rv*

Finally, there may sometimes be an easier way to establish causation. Consumer X argued that he would not have concluded certain contracts, including option contracts, had the bank complied with its duty to warn him, as he wanted to keep his capital, considering it was aimed at being a financial retirement provision. The bank did not dispute this statement but argued that the warnings would not have had affected the client's decision. However, the court of appeal rejected this statement, as not being sufficiently substantiated, the consequence of which was that the client's statement was

⁹⁷ HR 5 June 2009, ECLI:NL:HR:2009:BH2809 (*De Treek/Dexia*); in the same sense HR 5 June 2009, ECLI:NL:HR:2009:BH2811 (*Levob/Bolle*).

⁹⁸ HR 5 June 2009, ECLI:NL:HR:2009:BH2811 (*Levob/Bolle*), par. 4.7.9.

⁹⁹ HR 5 June 2009, ECLI:NL:HR:2009:BH2811 (*Levob/Bolle*), par. 4.7.10.

¹⁰⁰ Court of Appeal Den Bosch 15 April 2014, ECLI:NL:GHSHE:2014:1052 (*Westkant/ABN.AMRO*); District Court Oost-Brabant 26 March 2014 (ECLI:NL: RBOBR:2014:1415, *JOR* 2014/167) (*X/Rabobank Peel*).

considered to be insufficiently disputed and, hence, upheld. The Hoge Raad dismissed the appeal, considering that the court of appeal had correctly applied the rules on evidence and causation.¹⁰¹

5. Damages

5.1 General

The Dutch Civil Code contains a separate section on damages,¹⁰² applicable to all legal obligations to repair damage, including liability arising from non-performance of a contractual obligation and from tort. It does not apply to damages that are the object of contractual provisions, such as liquidated damages and insurance.¹⁰³

In case of the breach of a bank's duty of care, the damage will generally be pure economic loss (that is loss unrelated to property loss or personal injury). This loss may be related to:

- *investment losses*: the loss an investor suffers because of misleading information by or about securities issuing institutions;
- *inadequate financial services*: the loss someone suffers because his financial service provider does not carry out asset management in a proper way (for example by not following the client's risk profile);
- *investment losses*: the investor has invested in a product about which a financial service provider has given incorrect information with respect to a product, provided they would not have invested in the product if they had been given correct and complete information but in a different product.¹⁰⁴

The basic principle is that the injured party must be placed as much as possible in the situation he would have been in had the event that caused the damage not occurred.¹⁰⁵ As a general rule, pecuniary loss is eligible for compensation¹⁰⁶ and may consist of

¹⁰¹ HR 3 February 2012, *NJ* 2012, 95; *AA* (2012) 752, with annotation Busch; *JOR* 2012/116, with annotation Van Baalen (*Coöperatieve Rabobank Vaart en Vecht UA/X*). See in the same sense HR 8 February 2013, *RvdW* 2013, 249; *JOR* 2013/108, annotation Van der Wiel (*Van Lanschot Bankiers/Grove c.s.*).

¹⁰² Arts 6:95–110 DCC.

¹⁰³ D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 24.1 (p. 152).

¹⁰⁴ See for example District Court Utrecht 30 January 2013, *ECLI:NL:RBMNE:LJN:BY9836* (*Stichting Claim SNS/SNS Bank c.s.*).

¹⁰⁵ D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 24.1 (p. 153).

¹⁰⁶ Art 6:95 DCC. Other harm may be eligible for repair as well, but only to the extent that statute law grants a right to reparation thereof (Art. 6:95 DCC). In that connection, Art 6:106 DCC provides in certain instances for the recovery of moral damage. However, in view of the strict criteria for recovery

sustained losses (*damnum emergens*) and lost profits (*lucrum cessans*),¹⁰⁷ The court evaluates the damage in a manner that is best suited to its nature.¹⁰⁸ When the extent of the damage cannot be precisely determined, it will estimate it.¹⁰⁹ The court may apply abstract calculations by quantifying damages on the basis of the difference between the purchase price and the market price.¹¹⁰

The duty to repair damage presupposes that the failure in the performance of a contractual obligation or the tortious act is the *condicio-sine-qua-non* of the damage.¹¹¹ In addition, damages under the DCC are recoverable only to the extent that they can be imputed to the bank as a consequence of its non-performance or tortious act.¹¹² All relevant circumstances of the case are taken into account. For patrimonial damage, normally the kind of damage suffered in the context of investment services, the concept of foreseeability plays an important part in legal practice.¹¹³

5.2. Calculation of losses

Usually the damage consists of the loss which would have been avoided had the bank not breached its duty. For example, if a disproportionate part of the portfolio is invested in a particular industry, often not all the loss suffered on investment in that particular industry will qualify as loss. An assessment must be made of the percentage that would have been acceptable in that industry in the light of the client's profile, plus the investment guidelines and restrictions. If 90% of the portfolio is invested in one relevant industry where 45% would have been acceptable, only half of the loss (ie 50% of the 90%) on the investment in that industry qualifies as loss. The remainder of the damage is considered not to have been caused by the bank. A similar reasoning may be followed if the client's (or third party's) assets are invested in too risky a manner due to the bank's fault when it is plausible that but for the fault the assets would still be

of moral damage (HR 22 February 2002, *NJ* 2002, 240 with annotation by Vranken (*Kindertaxi*)) such recovery will only in highly exceptional cases be possible in cases of liability financial services providers. See D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 24.1 (p. 153); M. van Luyn and E. Du Perron, *Effecten van de zorgplicht: Klachten over effectendienstverlening in de praktijk*, Kluwer, Deventer 2004, 276.

¹⁰⁷ Art 6:96(1) DCC.

¹⁰⁸ Art 6:97, first sentence, DCC.

¹⁰⁹ Art 6:97, second sentence, DCC.

¹¹⁰ D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 24.1 (p. 153).

¹¹¹ See § VI.4.

¹¹² Art 6:98 DCC.

¹¹³ D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 24.2.

invested in a risky manner (albeit less risky), which would also have caused loss.¹¹⁴ In many such cases, the amount of loss that is due to the bank's fault can only be estimated.¹¹⁵ Often a comparison with a relevant benchmark is made to render the estimate more realistic.¹¹⁶

5.3 Calculation of lost profits

Damage may also consist of the lost profits the client or third party would likely have made had he not breached its duty.¹¹⁷ To take a similar example: if 70% of a portfolio is invested in shares and 30% in fixed income financial instruments, but the opposite allocation was warranted by the client's risk profile, the profits of which the client has been deprived (assuming a market in which the value of fixed income financial instruments moved favorably relative to the value of shares) consists of the difference in market value between shares and fixed income securities for the 40% of the portfolio that should have been invested in fixed income financial instruments, not in shares. As is the case when calculating loss due to the bank's fault, the profits of which the client or third party has been deprived can often only be estimated.¹¹⁸ Again, a comparison with a relevant benchmark may render the estimate more realistic.

5.4 Deduction of benefits received by the client or third party

If a breach of contract or a tort results in benefits as well as damage, those benefits must be deducted from the total amount of damage.¹¹⁹ This is particularly relevant in cases of incorrect asset allocation. In such cases, the correction must be made from the moment that the incorrect asset allocation took place. Thus, if 70 per cent instead of 30

¹¹⁴ KCHB 8 January 2004, *JOR* 2004/52; KCD 23 July 2004, 04-112. Cf. M. van Luyn and E. Du Perron, *Effecten van de zorgplicht: Klachten over effectendienstverlening in de praktijk*, Kluwer, Deventer 2004, 10, 271. See on KCD and KCHB § X below.

¹¹⁵ On the basis of Art 6:97, second sentence, DCC.

¹¹⁶ KCD 27 August 2002, 02-153 (AEX index); KCD 3 June 2004, 04-81 (AEX index); KCD 7 June 2004, 04-96 (MSCI (Europe) index); KCD 14 July 2004 (CBS bond index); KCD 10 January 2007, 07-1, *JOR* 2007/92 with annotation by Voerman (Euronext 100 index); District Court Amsterdam 24 January 2007, *JOR* 2007/94 with annotation by 't Hart (*Laan c. s./Wijs & Van Oostveen*) (AEX-index); GC 6 July 2010, 10-132 (Robeco Solid Mix Fund). Cf. M. van Luyn and E. Du Perron, *Effecten van de zorgplicht: Klachten over effectendienstverlening in de praktijk*, Kluwer, Deventer 2004, 272. See on KCD and GC § X below.

¹¹⁷ Art 6:96(1) DCC.

¹¹⁸ On the basis of Art 6:97, second sentence, DCC. See eg KCD 10 June 2004, 04-93. Cf. M. van Luyn and E. Du Perron, *Effecten van de zorgplicht: Klachten over effectendienstverlening in de praktijk*, Kluwer, Deventer 2004, 273. See on KCD § X below.

¹¹⁹ Art 6:100 DCC.

per cent of a portfolio has been invested in shares, not only the loss suffered in the years of declining share prices should be taken into account but also the profits made in the years of rising share prices.¹²⁰ In addition, benefits to a client may also include tax benefits realized due to the bank's breach of contract or tort.¹²¹

5.5 *Benefits enjoyed by the bank*

The damage suffered by the client or third party does not include the benefit enjoyed by the bank as a result of its breach of contract or tortious act. Nevertheless, Article 6:104 DCC provides that when someone is liable to someone else on the basis of a breach of contract or a tort, the court may, upon the claimant's request, determine the damage according to the amount of that profit or a part thereof. For this rule to apply the claimant must prove that he suffered damage, but he does not need to prove its extent. The court may not apply this rule if the bank makes it plausible that the claimant cannot have suffered any damages due to the act for which the bank is held liable.¹²²

5.6 *Statutory interest and reference date*

A bank is obliged to pay statutory interest on the amount of damages if he is liable in tort or contract.¹²³ Statutory interest is due from the reference date for the assessment of damages until the date on which the bank has satisfied its obligation to pay damages. The reference date is usually considered to be the date as closely as possible to the moment of the breach of contract or the unlawful act that caused the damage.¹²⁴ However, it may also be the date when the client discovered the breach of contract or tortious act or should have discovered it, as from then on he could have avoided further

¹²⁰ Cf M. van Luyn and E. Du Perron, *Effecten van de zorgplicht: Klachten over effectendienstverlening in de praktijk*, Kluwer, Deventer 2004, 273, 274.

¹²¹ Cf 't Hart in his annotation No 11 under District Court Amsterdam 24 January 2007, *JOR* 2007/94 (*Laan c. s./Wijs & Van Oostveen*).

¹²² HR 24 December 1993, *NJ* 1995, 421 with annotation by Brunner (*Waeyen-Scheers/Naus*); HR 16 June 2006, *NJ* 2006, 585 with annotation by Snijders (*Kecofa/Lancme*); HR 18 June 2010, *LJN*: BM0893; HR 18 June 2010, *LJN*: BL9662. See D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 24.7 .

¹²³ Art 6:119 DCC.

¹²⁴ KCHB 22 November 2001, No 9; Amsterdam District Court 23 December 2009, *JOR* 2010/110 with annotation by Van Setten; AA 372-82 (2011) with annotation by Busch (*Stichting Pensioenfonds OPG/State Street Global Advisors Ltd*) consideration 5.9. Cf M. van Luyn and E. Du Perron, *Effecten van de zorgplicht: Klachten over effectendienstverlening in de praktijk*, Kluwer, Deventer 2004, 274. See on KCHB § X below.

damage.¹²⁵ Finally, the reference date may be based on the parties' procedural positions.¹²⁶

6. Contributory negligence and duty to mitigate damages

6.1 General

The amount of damages payable by a bank may be reduced due to the claimant's contributory negligence or his failure to mitigate the damage.¹²⁷

When circumstances that can be attributed to the client (or third party) have contributed to the damage, the duty to pay damages is reduced by apportioning the damage between the client (or third party) and the bank, in proportion to the degree to which the circumstances attributable to each have contributed to the damage (primary apportionment on the basis of *condicio-sine-qua-non* causation,¹²⁸ supplemented by a reasonable imputation of damages in the sense of Article 6:98 DCC (*causaliteitsafweging*)).¹²⁹ However, a different apportionment is made, or the duty to pay damages may be considered null, as a consequence of different degrees of seriousness in the faults committed or any other circumstances of the case (so-called correction based on considerations of equity, *billijkheidscorrectie*).¹³⁰ Article 6:101(1) DCC concerns not only situations of contributory negligence with respect to the initial occurrence of the damage, but also the failure to comply with a duty to mitigate damage once it has occurred.¹³¹

The Hoge Raad has held several times that faults by a non-professional client resulting from his/her rashness or lack of understanding in principle weigh less heavily than do

¹²⁵ See further § VI.6.2, below.

¹²⁶ KCHB 22 November 2001, No 9. Cf M. van Luyn and E. Du Perron, *Effecten van de zorgplicht: Klachten over effectendienstverlening in de praktijk*, Kluwer, Deventer 2004, 274. See on KCHB § X below.

¹²⁷ In addition, the court may reduce a legal obligation to pay damages if a full award of damages would lead to clearly unacceptable results in the given circumstances, including the nature of the liability, the parties' existing legal relationship, and their financial resources (Art 6:109(1) DCC). The reduction may not be made if it reduces the amount below that for which the debtor has covered his liability by insurance or was obliged to do so (Art 6:109(2) DCC). Any stipulation in breach of Art 6:109(1) DCC is null and void (Art 6:109(3) DCC). We are not aware of any cases in which this provision has been applied in the context of liability of financial services providers. In view of this, the possibility of judicial reduction seems to be a largely theoretical possibility.

¹²⁸ See § VI.4, above.

¹²⁹ See § VI.5.1, above.

¹³⁰ Art 6:101(1) DCC.

¹³¹ D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 25.1 (p. 160).

faults committed by a financial institution.¹³² Although it is not entirely clear, these considerations seem to refer not to the primary apportionment based on causation, but rather to the secondary apportionment based on equity. If so, the Hoge Raad provided a rule of thumb, ie that a non-professional client's faults weigh less heavily than faults committed by a financial institution, for cases in which the damage is also due to a non-professional client's faults resulting from rashness or lack of understanding.¹³³

In the share lease cases (see § II.2), the Hoge Raad held that the starting point is that paid interest, instalments and costs as well as the remaining debt are circumstances that can also be attributed to the claimant because the lease contract made sufficiently clear that the investment was made with borrowed money, that the contract included a loan and that interest had to be paid over this loan regardless of the value of the securities at the moment of selling them. In this respect it can be expected from the client that, before concluding the contract, he make a reasonable effort to understand the security lease contract.¹³⁴ Under these circumstances the court may reduce the amount of damages to be paid by the bank.

Subsequently, the court needs to assess whether equity justifies a higher percentage to be paid by the bank. In this assessment, errors made by the client because of rashness or lack of insight weigh in principle less heavy than errors on the side of the financial service provider when it breached its duty of care. If the financial position of the client was sufficient to pay interest and instalments, these heads of damage will in principle have to be borne by the client as this damage can be entirely contributed to the circumstance that the investment took place with borrowed money. If, however, the financial position of the client was such that he could not have reasonably continued meeting the obligations flowing from the contract, in principle part of the paid interest and instalments will be eligible for compensation. Part of the remaining debt will always be partially have to remain for the account of the client.¹³⁵

¹³² HR 23 May 1997, *NJ* 1998, 192 with annotation by Van Zeben (*Rabo/Everaars*) consideration 3.3; HR 11 July 2003, *NJ* 2005, 103 with annotation by Du Perron (*Kouwenberg/Rabobank*) consideration 3.6.3; HR 5 June 2009, *JA* 2009/116 (*Levob Bank/Bolle*) consideration 4.7.12; HR 5 June 2009, *JOR* 2009/199 with annotation by Lieverse; *JA* 2009/117 (*Treek/Dexia Bank Nederland*) consideration 5.6.2.

¹³³ See Du Perron in his annotation under HR 11 July 2003, *NJ* 2005, 103 (*Kouwenberg/Rabobank*); W. H. van Boom, *Bancaire zorgplicht en eigen verantwoordelijkheid van de belegger*. Enige opmerkingen naar aanleiding van HR 11 juli 2003, C01/257 (Erven Kouwenberg/Rabobank Schaijk-Reek) *NTBR* 555–64 at 562–4 (2003); F. M. A. 't Hart, *De maat van eigen schuld Ondernemingsrecht* 125–33 at 128 (2005). Critical about such rule of thumb: S. B. van Baalen, *Rien ne va plus. Over opties, zorg en aansprakelijkheid VrA* 46–79 at 61–2 (2004).

¹³⁴ HR 5 June 2009, ECLI:NL:HR:2009:BH2811 (*Levob/Bolle*), consideration 4.7.12.

¹³⁵ HR 5 June 2009, ECLI:NL:HR:2009:BH2811 (*Levob/Bolle*), par. 4.7.13.

Generally speaking, a higher percentage of contributory negligence will be imputed on the claimant in case of an advisory relationship than in case of asset management. Some examples may illustrate this.

A bank advised a professional client to conclude an interest rate swap without advising him about the specific risk of high costs in case of premature termination of the contract. The court considered this a breach of the bank's duty of care. However, it could have been expected from the client that he, before concluding the contract, made a reasonable effort to understand the interest rate swap and, if need be, ask questions. For this reason the damage was partially caused by circumstances that can be attributed to the client. The court held that the bank had to compensate 60% of the damage.¹³⁶

Another example concerned a bank that had advised a client to take out a loan with a variable interest rate combined with an interest rate swap. The court held that the bank's advice was flawed and that it had breached its duty. The client subsequently and undisputedly stated that if the bank would not have breached its duty, he would have taken out a loan with a fixed interest rate for a period of 10 years. The Court of Appeal held that the client should be brought into the situation in which he would have been had the breach not occurred. This means that a comparison had to be made between the costs of a loan with a fixed interest rate for ten years and the arrangement as concluded in the contract. The Court did not accept contributory negligence of the client.¹³⁷

In a case of breach of duty of care in advisory relationships, the Hoge Raad did not agree with applying the same apportioning of the damage between the client and the seller as in 'standard' share lease cases (see above). The Hoge Raad found that the client may assume that a professional adviser meets its duty of care, meaning that the client does not have to suspect and go into non disclosed risks in the manner that is to be expected from someone who turns to a seller of share leases.¹³⁸

On 2 september 2016, the Hoge Raad decided two cases in which share leases were sold to clients that were brought in by an intermediary. The seller of the share leases knew or ought to have known that the intermediary had advised these clients without having the required regulatory licence. Engagement with clients bought in by an unlicensed intermediary qualified as an infringement of regulatory law.¹³⁹ The Hoge

¹³⁶ District Court Oost-Brabant 26 March 2014, ECLI:NL:RBOBR:2014:1415.

¹³⁷ Court of Appeal Den Bosch 15 april 2014, ECLI:NL:GHSHE:2014:1052, (*Westkant/ABN AMRO*).

¹³⁸ HR 6 september 2013, ECLI:NL:HR:2013:CA1725, NJ 2014/176 with annotation by Tjong Tjin Tai, consideration 3.4.2.

¹³⁹ More precisely of Art. 41 of the Further Regulation on Supervision of the Securities Trade (now repealed).

Raad found that these circumstances give cause for a different apportioning of the damage between the client and the seller than in 'standard' share lease cases (see above), and that a secondary apportionment based on equity should in principle result in omitting any reduction of the amount of damages payable.¹⁴⁰

6.2 Duty to mitigate damages

Reported cases also address the duty to mitigate damages in the context of investment services after the damage has occurred. One case concerned asset management based on the risky *Premseelaar*-method. In 1999 and 2000 the clients complained several times about disappointing investment results, which did not lead to termination of the asset management agreement because the asset manager convinced the clients that the results would improve. Based on correspondence between the clients and the asset manager, it should have been clear to the clients in February 2001 that the application of the *Premseelaar*-method would not lead to the desired result, despite the asset manager's reassurances. They nevertheless consented to a continuation of the asset management agreement and even transferred additional funds to the asset manager. The court held that the clients were fully responsible for the consequences; only damage suffered up to 31 January 2001 were recoverable.¹⁴¹ Alternatively, one might reason that the causal chain between the tortious act or breach of contract by the asset manager and the damage suffered was broken from the moment that the clients were or should have been aware of the risks, with the effect that any loss suffered thereafter cannot be attributed to the manager.¹⁴²

¹⁴⁰ HR 2 september 2016 ECLI:NL:HR:2016:2012, consideration 5.7; HR 2 september 2016 ECLI:NL:HR:2016:2015, consideration 3.17.

¹⁴¹ KCD 17 June 2003, 03-98 (confirmed in KCHB 22 June 2004, No 70). Cf also District Court Zutphen 26 March 2003, *JOR* 2003/147; KCHB 18 November 2003, *JOR* 2004/16; KCD 9 February 2004, 04-19 (confirmed in KCHB 26 January 2005, No 100); District Court Leeuwarden 25 October 2006, *JOR* 2007/16 with annotation by Frieling under *JOR* 2007/19. See on the duty to mitigate damages in the case of liability for financial services: S.E. Baalen, *Zorgplichten in de effectenhandel*, Kluwer, Deventer 2006, 419–25; See M. van Luyn and E. Du Perron, *Effecten van de zorgplicht: Klachten over effectendienstverlening in de praktijk*, Kluwer, Deventer 2004, 280–7. See on KCD and KCHB § X below.

¹⁴² GCHB 1 July 2010, 2010-394, consideration 4.8.3 (concerning an advisory relationship). See on this case M. B. C. Kloppenburg and E. J. van Praag, Een vergissing van de bank in uw voordeel *MvV* 93–9 (2011). From the fact that the client keeps his investment after the moment that he knew or should have known that it is too risky, it is sometimes inferred that the client would not have been opposed to the relevant investment if he would have been adequately informed about the risks from the very start, with the effect that there is no *condicio-sine-qua-non* connection between the breach of duty of care by the bank and the damage suffered by the client. See eg Court of Appeal Amsterdam 2 November 2010, *JOR* 2011/80 (concerning an advisory relationship). See also n [86]. See on GCHB § X below.

7. Limitation and exclusion of liability

7.1 Limitation and exclusion of liability contrary to good morals

A limitation or exclusion of liability for damage caused by the wilful default (*opzet*) or gross negligence (*grove schuld*) of the bank or its executives (*leidinggevenden*) is in principle contrary to public morals (*goede zeden*) in the sense of Article 3:40(1) DCC and thus null and void.¹⁴³ Hence, exemption clauses in, for example, asset management contracts do not exclude liability, at least to the extent that the damage is *directly* caused by the wilful default or gross negligence of the asset manager or its executives.

A limitation or exclusion of liability for damage caused by the wilful default or gross negligence by delegates (third parties, ie non-employees) is in principle permitted.¹⁴⁴ In line with this, the liability of the bank for damage caused by delegates is often limited to observing due diligence and care in selecting and monitoring delegates.¹⁴⁵ However, depending on the circumstances of the case, such clauses may be unreasonably onerous or contrary to reasonableness and fairness. Liability for damage caused by delegates that are group companies of the bank is often explicitly accepted in institutional asset management contracts on the same footing as liability for the bank's own acts.

Article 1:23 Wft explicitly provides that a juridical act is not invalid solely because it has been performed in violation of a rule laid down by or pursuant to the Wft (except where otherwise provided by the Wft). In view of this, it is submitted that clauses limiting or excluding the bank's liability for damage caused by a violation of such a rule cannot be void or voidable on the basis that they are contrary to mandatory law.¹⁴⁶ In theory, clauses excluding or limiting the bank's liability for damage caused by a violation of a rule laid down by or pursuant to the Wft can still be null and void on the basis that they are contrary to public morals (*goede zeden*) or public policy (*openbare orde*).¹⁴⁷ However, it seems highly unlikely that a court would render such a clause null and void, except of course to the extent that it concerns a violation by the bank or its executives caused by wilful conduct or gross negligence, or when, depending on the circumstances of the case, such clauses are considered to be unreasonably onerous or contrary to reasonableness and fairness.

¹⁴³ D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 26.2. Cf HR 12 December 1997, *NJ* 1998, 208 (*Gemeente Stein/Driessen*).

¹⁴⁴ D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 26.2.

¹⁴⁵ Art 3 of the General Banking Conditions 1995. Cf Art 5(3) of the General Banking Conditions 2009 and 2017.

¹⁴⁶ Art 3:40(2) and (3) DCC.

¹⁴⁷ Art 3:40(1) Wft.

7.2 Unreasonably onerous limitation and exclusion of liability

To the extent that a clause limiting or excluding liability is included in standard terms, it may be unreasonably onerous and therefore voidable. Contract clauses qualify as standard terms to the extent that they are drafted to be included in a number of contracts.¹⁴⁸

In institutional asset management, exclusion and limitation clauses are often heavily negotiated and tailored to the circumstances of a specific mandate. As a consequence, these clauses in institutional asset management contracts will not normally qualify as clauses included in standard terms. However, in consumer contracts limitation and exclusion clauses will by default qualify as such.

The general provision applicable to unreasonably onerous conditions is Article 6:233 (a) DCC, which states that a stipulation in standard terms may be voidable if it is unreasonably onerous to the other party, taking into consideration the contract's nature and the further content, the manner in which the conditions have arisen, the parties' mutually apparent interest, and the other circumstances of the case. Article 6:233 (a) DCC protects only consumers and 'small-sized' businesses.¹⁴⁹

It is questionable whether a bank may contractually limit or exclude the (special) duty of care. Given that exercising the care of a prudent service provider is a central duty of the bank, relying on a clause limiting its liability to wilful default and gross negligence is probably unreasonably onerous on the basis of Article 6:233 (a) DCC and therefore voidable.

It follows from the Wft that banks who delegate activities to third parties must ensure that they comply with the MiFID implementation rules to which banks are subject with respect to the outsourced activities.¹⁵⁰ In other words, notwithstanding the outsourcing of activities, the bank remains responsible for compliance with the relevant MiFID implementation rules. In view of this, if the party to whom activities are outsourced (eg a more specialized asset manager) violates conduct of business rules pursuant to MiFID and thereby causes damage to the client, it is questionable whether the bank can successfully invoke a clause included in standard terms that limits its liability for third parties to observing due diligence and care in the selection (and monitoring) of such

¹⁴⁸ Art 6:231(a) DCC. Art 6:231(a) DCC also stipulates that standard terms do not include clauses that constitute the essence of the mutual obligations. In the case of, for example, asset management, these obligations are the duty to manage the assets in a diligent and professional manner and the duty to pay the agreed fee.

¹⁴⁹ Art 6:235(1) DCC.

¹⁵⁰ Arts 3:18(1), 3:22, and 4:16(1) Wft.

third parties. It is arguable that such a limitation clause is unreasonably onerous on the basis of Article 6:233 (a) DCC and therefore voidable.

Inter alia in the cases described in the previous two paragraphs,¹⁵¹ if the bank's client is a consumer, he/she can directly invoke Article 6:237 (f) DCC, on the basis that stipulations freeing the user of the standard terms (the bank) or a third party (eg a delegate of the bank) in whole or in part from a legal obligation to repair damages, are presumed to be unreasonably onerous.¹⁵² The bank may rebut this presumption. In one case, an asset manager limited its liability in the applicable standard terms to damage directly caused by wilful default or gross negligence. The court ruled that the asset manager did not observe the care of a prudent asset manager and committed an imputable non-performance of its obligations under the asset management contract, *inter alia* because the asset manager omitted to draw up an adequate client profile. The court also held that the clause limiting the asset manager's liability was included in standard terms and was unreasonably onerous on the basis of Article 6:237 (f) DCC, which rendered the clause voidable.¹⁵³

7.3 Limitation and exclusion of liability contrary to reasonableness and fairness

Invoking an exemption clause may also be contrary to reasonableness and fairness. Whether this is so depends on the circumstances of the case. Relevant circumstances may include the gravity of the debtor's fault, the nature and the importance of the interests involved, the contract's nature and object, how the exemption clause was formed, the (dis)proportion between the exemption and the damage suffered, and the parties' degree of professionalization and the relations between them.¹⁵⁴ However, when a bank or its executives have committed a wilful default or gross negligence, invoking an exemption clause will generally be contrary to reasonableness and fairness.¹⁵⁵

¹⁵¹ Cf S.E. Baalen, *Zorgplichten in de effectenhandel*, Kluwer, Deventer 2006, 311–12.

¹⁵² In the case described in the previous paragraph of the main text, the client who is a consumer may also invoke Art 6:237(b) DCC, stating that a clause which materially limits the scope of the obligations of the user of the standard terms (here: the bank) with respect to what the consumer could reasonably expect without such stipulation, taking into account the rules of law which pertain to the contract, is presumed to be unreasonably onerous. See S.E. Baalen, *Zorgplichten in de effectenhandel*, Kluwer, Deventer 2006, 311.

¹⁵³ District Court Amsterdam 24 January 2007, *JOR* 2007/94 with annotation by 't Hart (*Laan c. s./Wijs & Van Oostveen*).

¹⁵⁴ HR 19 May 1967, *NJ* 1967, 261 with annotation by Scholten (*Saladin/HBU*); HR 18 June 2004, *NJ* 2004, 585; D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 26.4 (p. 169).

¹⁵⁵ HR 12 December 1997, *NJ* 1998, 208. D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 26.4; J. H. Duyvensz, *Exoneratie en bewuste roekeloosheid WPNR* 225–31 at 225–6 (2011).

In a case concerning asset management with a view to generating a pension, the Rotterdam District Court ruled that the asset manager did not observe the care of a prudent asset manager because the portfolio was invested disproportionately in shares. In view of the fact that observing the care of a prudent asset manager is such a central duty of the asset manager, reliance on a clause limiting its liability to gross negligence was held contrary to reasonableness and fairness.¹⁵⁶

7.4 Limitation and exclusion of liability and contractual interpretation

Unreasonable limitation and exclusion clauses can also be challenged through contractual interpretation of the relevant clause in the light of the contract's other provisions. Through reasonable interpretation of the contract, it may be concluded that the limitation or exclusion clause does not cover the imputable non-performance.¹⁵⁷ For example, Article 2(1) of the General Banking Conditions 2009 and 2017 provides that none of the provisions of the General Banking Conditions 2009 and 2017 or of any special conditions used by the bank may detract from the duty of care laid down in Article 2(1) of the General Banking Conditions 2009 and 2017. This can be read to mean that a bank may not, irrespective of any applicable limitation or exclusion clause, contractually deviate from the duty of care laid down in the General Banking Conditions.

Furthermore, if a limitation or exclusion clause is unclear it should be interpreted against the person invoking the clause (*contra proferentem*). Finally, the contractual clause that is breached may be a special clause that prevails in relation to the more general limitation or exclusion clause.¹⁵⁸

¹⁵⁶ Art 6:2 DCC. See District Court Rotterdam, 18 July 2002, *JOR* 2002/167. Similarly KCD 23 July 2004, 04-112; KCD 26 June 2006, 06-120. See on the first two cases also S.E. Baalen, *Zorgplichten in de effectenhandel*, Kluwer, Deventer 2006, 398–9. See on KCD § X below.

¹⁵⁷ See D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 26.5; M. van Luyn and E. Du Perron, *Effecten van de zorgplicht: Klachten over effectendienstverlening in de praktijk*, Kluwer, Deventer 2004, 288.

¹⁵⁸ See D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 26.5 ; M. van Luyn and E. Du Perron, *Effecten van de zorgplicht: Klachten over effectendienstverlening in de praktijk*, Kluwer, Deventer 2004, 288.

VII. RELATIONSHIP WITH TRADITIONAL DOCTRINES

1. General

In § III it was noted that a claim for a breach of duty of care may be based on contract, tort, or both. In general, the Hoge Raad has been hesitant to apply remedies that would lead to partial or total annulment of the contract, or that would render the contract partially unenforceable. Notably, the Hoge Raad has declined pleas that share leasing agreements are void or can be nullified on the basis of mistake (Article 6:228 DCC) or on the basis of an infringement of public law rules.

2. Reasonableness and fairness

However, more recent case law provides examples of the application of contractual remedies. For instance, the Hoge Raad upheld a court of appeal decision in which the termination of loans was deemed to be unacceptable according to standards of reasonableness and fairness (Article 6:248(2) DCC), rendering the penalties triggered by that termination unenforceable. In upholding the court of appeal's decision, the Hoge Raad pointed out that in determining whether the termination had been acceptable, the court of appeal was allowed to deem the duty of care mentioned in Article 2 of the General Banking Conditions relevant.¹⁵⁹

The test of unacceptability as referred to in Article 6:248(2) DCC was also applied in a decision of the Amsterdam District Court. In this case the bank had provided a loan to a health care institution. The interest due consisted of a floating interest rate and a spread. Furthermore, the parties had entered into an interest rate swap agreement, swapping the floating interest due on the loan with a fixed interest rate. A year after these transactions, the bank raised the spread on the basis of a provision in the loan agreement. The court found this unacceptable, holding that the bank had breached its duty of care by not warning the client for the fact that the swap did not cover the risk of the spread being raised, effectively raising the total interest due in spite of the swap.¹⁶⁰ The court's decision resulted in the unenforceability of the contractual terms rather than a damages award.

3. Mistake and other defects of consent

The case law also shows examples of attempts to avoid contracts with banks on the basis of mistake (*dwalig*).¹⁶¹ In theory, avoidance of the contract is also possible on

¹⁵⁹ HR 28 oktober 2014, NJ 2015/70 (*ING/De Keijzer c.s.*).

¹⁶⁰ District Court Amsterdam 4 November 2015, ECLI:NL:RBAMS:2015:7586.

¹⁶¹ Art 6:228 DCC.

the basis of other defects of consent, ie threat (*bedreiging*), fraud (*bedrog*), or abuse of circumstances (*misbruik van omstandigheden*).¹⁶² Avoidance of a contract (or of any other juridical act) has retroactive effect.¹⁶³ This means, that from the moment of avoidance onwards, the contract (or other juridical act) is deemed void *ab initio*. After avoidance, both the client and the bank have mutual claims to restore the position that existed prior to the conclusion of the contract (*restitutio in integrum*), based on undue payment.¹⁶⁴

The provision of information plays an important role in actions brought by a client for mistake (*dwaling*). The Hoge Raad has held that a client must ensure that he does not conclude an agreement based on an incorrect understanding of its terms. This means that a client in principle has an obligation to investigate. This obligation entails, among other things, that he must review any documentation provided by the contracting party (such as the agreement itself and any brochures) and, if the documentation is unclear, ask questions to clarify the relevant points. On the other hand, the service provider has an obligation to provide appropriate information about the characteristics and risks of the relevant service or product. If the client does not meet his obligation to investigate and the service provider meets its obligation to provide sufficient information, the client has to bear the consequences of a mistake.¹⁶⁵

It also follows from the Hoge Raad's case law that a bank, although having provided sufficient information under the rules of mistake, may breach its special duty of care towards non-professional clients to warn them explicitly and unequivocally about financial risks.¹⁶⁶ This approach has been criticized in the legal literature.¹⁶⁷

¹⁶² Art 3:44(2), (3), and (4), respectively, DCC.

¹⁶³ Art 3:53(1) DCC.

¹⁶⁴ Art 6:203 DCC. See D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 27.1.

¹⁶⁵ HR 5 June 2009, *JA* 2009/116 (*Levob Bank/Bolle*) considerations 4.4.1–4.4.10; HR 5 June 2009, *JOR* 2009/199 with annotation by Lieverse; *JA* 2009/117 (*Treek/Dexia Bank Nederland*) considerations 4.4.1–4.4.6.

¹⁶⁶ HR 5 June 2009, *JA* 2009/116 (*Levob Bank/Bolle*) considerations 4.5.6–4.5.7; HR 5 June 2009, *JOR* 2009/199 with annotation by Lieverse; *JA* 2009/117 (*Treek/Dexia Bank Nederland*) considerations 4.10.1–4.10.4; HR 5 June 2009, *JOR* 2009/200; *JA* 2009/118 with annotation by Van Boom (*Stichting Gedupeerden Spaarconstructie/Aegon Bank*) considerations 4.6.4–4.6.13.

¹⁶⁷ See W. L. Valk, *Dwaling, tekortkoming en effectenlease NTBR 237* (2009); Lieverse in her annotation under *JOR* 2009/199; Van Boom in his annotation under *JA* 2009/116–118. For a more positive account, A. J. P. Schild, *Mededelingsplichten komen van Venus, waarschuwingplichten van Mars WPNR 939–40* (2009).

Despite this Hoge Raad's case law, the Amsterdam Court of Appeal, held in two cases that an interest rate swap was void on the basis of mistake.¹⁶⁸ The court found that the bank had led the client, a real estate property trader, to believe that the interest rate swap would ensure that there would not be any floating interest rate costs due for the client's credit facility. However, the credit agreement contained a floating interest component that was not covered by the swap.

4. Violation of regulatory law

Pursuant to Article 1:23 Wft, a juridical act is not invalid solely because it has been performed in violation of a rule laid down by or pursuant to the Wft (except where otherwise provided by the Wft). Thus, a contract concluded by, eg an asset manager who lacks the licence required by regulatory law is not, for that sole reason, void or voidable. Of course, juridical acts can still be void or voidable if they are performed in violation of public morals (*goede zeden*) or public policy (*openbare orde*);¹⁶⁹ however, this seems highly unlikely in the context of an asset management contract.

VIII. GROUP ACTIONS AND MASS CLAIMS

1. Group actions

The Netherlands does not know class actions and public interest litigation as is known in common law jurisdictions. However, it is possible to file collective claims. Such collective actions are subject to three important limitations.¹⁷⁰

First, a collective claim can only be filed by a foundation or an association that has full legal capacity and a clearly defined interest that it actually pursues. See article 3:305a(1) Dutch Civil Code: 'A foundation or association with full legal capacity can

¹⁶⁸ E.g. Court of Appeal Amsterdam 15 September 2015, *JOR* 2015/334 (*X./ING*); Court of Appeal Amsterdam 10 November 2015, *JOR* 2016/37 (*X./ABN AMRO*); Court of Appeal Amsterdam 11 October 2016, case number 200.153.823/01 (*X./ABN AMRO*).

¹⁶⁹ Art 3:40(1) DCC.

¹⁷⁰ See, inter alia, Ianika Tzankova and Hélène van Lith, 'Class Actions and Class Settlements Going Global: The Netherlands', in: Duncan Fairgrieve and Eva Lein (eds), *Extraterritoriality and Collective Redress* (Oxford: OUP, 2012), p. 67ff; M.-J. van der Heijden, 'Class Actions', *Electronic Journal of Comparative Law* 14 (2010) 3: <http://www.ejcl.org/143/abs143-18.html>; N. Frenk, *Kollektieve akties in het privaatrecht* (PhD Utrecht), Deventer: Kluwer 1994.

institute an action intended to protect similar interests of other persons to the extent that its articles promote such interests.’¹⁷¹

Secondly, a collective action is only possible after prior consultation with the defendant. This follows from art. 3:305a(2) Civil Code:

‘A legal person referred to in paragraph 1 shall have no *locus standi* if, in the given circumstances, it has not made a sufficient attempt to achieve the objective of the action through consultations with the defendant.’¹⁷²

Thirdly, a collective claim cannot serve to obtain damages:

‘The right of action referred to in paragraph 1 may have as its object that an order against the defendant to publish or cause publication of the decision in a manner to be determined by the court and at the expense of the party or parties, as directed by the court. Its object may not be to seek monetary compensation.’¹⁷³

Abolishing the latter limitation is subject of a Bill pending in the Dutch Parliament. If this Bill is adopted, collective redress may also include a claim for damages.¹⁷⁴

The main aim of a collective claim is therefore to obtain a court order that the defendant committed a tort or breached a contractual duty. Such an order often serves as an important basis to reach an out of court settlement. The ban on seeking damages may be and is circumvented by combining the collective claim with individual claims by one or more (legal) persons. Such a combination of claims will be heard jointly by the court.

The fact that it is not possible to file a claim for damages means that questions of causation, damages and contributory negligence cannot be addressed. In the framework

¹⁷¹ ‘Een stichting of vereniging met volledige rechtsbevoegdheid kan een rechtsvordering instellen die strekt tot bescherming van gelijksoortige belangen van andere personen, voorzover zij deze belangen ingevolge haar statuten behartigt.’

¹⁷² ‘Een rechtspersoon als bedoeld in lid 1 is niet ontvankelijk, indien hij in de gegeven omstandigheden onvoldoende heeft getracht het gevorderde door het voeren van overleg met de gedaagde te bereiken. Een termijn van twee weken na de ontvangst door de gedaagde van een verzoek tot overleg onder vermelding van het gevorderde, is daartoe in elk geval voldoende.’

¹⁷³ ‘Een rechtsvordering als bedoeld in lid 1 kan strekken tot veroordeling van de gedaagde tot het openbaar maken of laten openbaar maken van de uitspraak, zulks op een door de rechter te bepalen wijze en op kosten van de door de rechter aan te geven partij of partijen. Zij kan niet strekken tot schadevergoeding te voldoen in geld.’

¹⁷⁴ I.N. Tzankova, ‘Everything You Wanted to Know About Dutch Foundations But Never Dared to Ask: A Check List for Investors’, *Zeitschrift für Verbraucherrecht* 2015-5 & 2015-6; also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730618. See *Dutch Parliamentary Papers II*, 2016/17, 34 608, no. 2 (Draft Bill) and no. 3 (Explanatory Memorandum).

of the duty of care of the bank this has repercussions if clients have acted rashly or negligently when concluding contract with respect to financial products. According to the Hoge Raad, the court has to decide the claim for a court order by not looking into specific circumstances on the side of the claimants. Those circumstances can only be relevant with respect to damage, causation and contributory negligence. Otherwise, the application of art. 3:305a Dutch Civil Code would be unduly limited.¹⁷⁵

2. Collective Settlement Mass Claims Act (WCAM)

A second important feature of Dutch law in this respect is the ‘Collective Settlement Mass Claims Act (*Wet Collectieve Afwikkeling Massaschade* or WCAM), entering into force in 2005 and amended in 2013.¹⁷⁶ Whereas the collective action forms the basis for negotiations about an out of court settlement with respect to a mass claim for damages, the ‘WCAM’ enables a court to legally bind the entire group of claimants, represented by a foundation or an association to this out of court settlement. At the same time, this court order provides the claimants with the title to pursue payment for their claim by the responsible party or parties.

If the negotiations have led to an out of court settlement, the association or foundation with full legal capacity representing the claimants on one hand and the defendants on the other may submit a joint request to ask the court for an order to declare the agreement binding.

The binding character of the court order has been laid down in article 7:907(1) DCC:

‘An agreement concerning the payment of compensation for damage caused by an event or similar events concluded between a foundation or association with full legal competence and one or more other parties who have committed themselves by this agreement to pay compensation for this damage may, at the joint request of the parties that concluded the agreement, be declared binding by the court on

¹⁷⁵ HR 23 december 2005, ECLI:NL:HR:2005:AU3713, NJ 2006/289 (*Safe Haven*); HR 27 november 2009, ECLI:NL:HR:2009:BH2162, NJ 2014/201 (*World Online*); HR 27 november 2015, ECLI:NL:HR:2015:3399, RvdW 2016/88 (*Ponzi scheme*).

¹⁷⁶ See Willem van Boom and Tomas Arons, ‘Beyond Tulips and Cheese: Exporting Mass Security Claim Settlements from The Netherlands’, *European Business Law Review* (2010) 6, p. 857-883; Rob Polak and Ruud Hermans, ‘International Class Actions Settlements in The Netherlands After Morrison and Ahold Decisions (2011) *International Comparative Legal Guides, Class & Group Actions* (www.iclg.co.uk); F.B. Falkena en M.F.J. Haak, ‘De nieuwe wettelijke regeling afwikkeling massaschade’, *AV&S* 2004, 37, p. 198-206; I.N. Tzankova, *Toegang tot het recht bij massaschade* (diss. Tilburg), Deventer: Kluwer 2007; C.J.M. Klaassen, ‘De rol van de (gewijzigde) WCAM bij de collectieve afwikkeling van massaschade ‘en nog wat van die dingen’’, *Ars Aequi* 2013-9, p. 627-639.

persons to whom the damage was caused so long as the foundation or association represents the interests of these persons pursuant to its articles of association’.

A court order to declare the agreement binding can only be justified if the interests of the victims are adequately safeguarded. Article 7:907(2) DCC lists the minimum provisions that must be included in the agreement,¹⁷⁷ whilst Article 7:907(3) DCC lists the circumstances under which the court will reject the request.¹⁷⁸ The Court of Appeal in Amsterdam has sole jurisdiction to deal with a request to declare an agreement binding.

Once the court has issued its order to make the agreement binding, a claimant cannot obtain compensation beyond the scope of the agreement. However, a claimant can ‘opt out’ of the agreement by notifying the representing foundation or association within a specified period of at least three months that he does not wish to be bound: see Article 7:908(2) DCC. They are then entitled to lodge their own claim and go to court if need be.

¹⁷⁷ ‘2. The agreement shall in any case include:

- a. description of the group or groups of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss;
- b. the most accurate possible indication of the number of persons belonging to the group or groups;
- c. the compensation that will be awarded to these persons;
- d. the conditions these persons must meet to qualify for the compensation;
- e. the procedure by which the compensation will be established and can be obtained;
- f. the name and place of residence of the person to whom the written notification referred to in Article 908 (2) and (3) can be sent.’

¹⁷⁸ ‘3. The court shall reject the request if:

- a. the agreement does not comply with the provisions of paragraph 2;
- b. the amount of the compensation awarded is not reasonable having regard, inter alia, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage;
- c. insufficient security is provided for the payment of the claims of persons on whose behalf the agreement was concluded;
- d. the agreement does not provide for the independent determination of the compensation to be paid pursuant to the agreement;
- e. the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded;
- f. the foundation or association referred to in paragraph 1 is not sufficiently representative of the interests of persons on whose behalf the agreement was concluded;
- g. the group of persons on whose behalf the agreement was concluded is not large enough to justify a declaration that the agreement is binding;
- h. there is a legal entity which will provide the compensation pursuant to the agreement and it is not a party to the agreement.’

A relevant case under the WCAM for our purposes was the ‘Dexia’ share lease case (see § II.2). Dexia was held to have breached its duty of care by not sufficiently warning the consumers of the risks attached to these products. A number of collective actions were initiated and in 2004 a settlement was successfully concluded between Dexia on one hand and the Lease Loss Foundation, the Eegalease Foundation, the Dutch Consumers’ Association and the Dutch Equity Holders’ Association on the other hand. This arrangement implied that claimants would be paid out all or part of their residual claims at the end of the duration of the contract duration, a settlement that amounted to around one billion euro’s. The foundations and associations and Dexia requested the Court of Appeal in Amsterdam to declare this agreement binding, which it did in January 2007.¹⁷⁹

Another important case under the WCAM was the ‘DSB’ case. DSB Bank was declared bankrupt on 19 October 2009. Many consumers and several collective claim entities took the position that DSB Bank was liable for a breach of its duty of care on a number of grounds. In 2013, agreement was reached between DSB Bank and several of its subsidiaries on the one hand and three collective claim entities on a collective settlement, providing compensation for the alleged breaches of the duty of care. Parties requested Court of Appeal in Amsterdam to declare this agreement binding. In an interim decision the Court questioned the reasonableness of several aspects the compensation awarded, finding that its objections stand in the way of declaring the agreement binding.¹⁸⁰ After the parties had adjusted the agreement in light of the objections of the court, the Court declared the agreement binding.¹⁸¹

IX. CONCENTRATION OF DISPUTE SETTLEMENT IN AMSTERDAM?

It is notable that the Dutch Ministry of Finance recently solicited stakeholder views on a new Article 1:23a Wft, stipulating that civil litigation on the provision of investment services, investment activities and prospectus liability should be concentrated at the Amsterdam District Court. The Ministry of Finance expressed the view that it expected

¹⁷⁹ Court of Appeal Amsterdam 25 January 2007, ECLI:NL:GHAMS:2007:AZ7033, *NJ* 2007/427 (Duisenberg-settlement).

¹⁸⁰ Court of Appeal Amsterdam 13 May 2014, ECLI:NL:GHAMS:2014:1690, *JOR* 2015/9 with annotation I.N. Tzankova (DSB).

¹⁸¹ Court of Appeal Amsterdam 4 November 2014, ECLI:NL:GHAMS:2014:4560, *JOR* 2015/10 with annotation I.N. Tzankova (DSB).

that concentration of these cases would contribute to the quality and efficiency of justice, as well as to the establishment and preservation of knowledge and expertise at the Amsterdam District Court.¹⁸² The Ministry of Finance envisages the entry into force of Article 1:23a Wft on 1 July 2018. However, at the time of completion of this chapter it is still undecided whether or not this provision will become law. In any event, the judiciary is severely split on the usefulness of Article 1:23a Wft.

X. COMPLAINT INSTITUTE FINANCIAL SERVICES

Financial services providers, including providers of investment services holding a Dutch investment firm or banking licence, must be affiliated with a dispute settlement authority that has been recognized by the Dutch Minister of Finance.¹⁸³ Currently, only the Complaint Institute Financial Services (*Klachteninstituut Financiële Dienstverlening*, KiFID) has been recognized as such an authority.¹⁸⁴ Consequently, all financial services providers must become members of KiFID. KiFID is a self-regulatory organization that provides consumers with mediation services and other facilities for the extrajudicial settlement of complaints and disputes. Since 26 January 2015 also provides extrajudicial settlement services to SME's who entered into interest rate swap agreements with banks (albeit for the time being on a temporary basis only).¹⁸⁵ KiFID has no powers of regulation, except that its proceedings are governed by KiFID's own (procedural) rules. KiFID began its activities on 1 April 2007. From that date, KiFID's Complaints Board (*Geschillencommissie*, GC) and Appeal Committee (*Commissie van Beroep*, GCHB) took over the dispute settlement tasks of *inter alia* the Dutch Securities Institute Complaints Board (*Klachtencommissie DSI*, KCD) and the Appeal Committee of the Dutch Securities Institute (*Commissie van Beroep*, KCHB), which previously provided consumers with facilities for the extrajudicial settlement of complains against *inter alia* asset managers. The decisions

¹⁸² See <https://www.internetconsultatie.nl/wijzigingswetfm2018>. See on this provision: D. Busch and A. Lenaerts, 'Naar een gespecialiseerde overheidsrechter voor civiele beleggingsgeschillen. Een kritische bespreking van art. 1:23a Wft mede in het licht van de gespecialiseerde geschilbeslechting door de OK, het Kifid, de Financial List en de Netherlands Commercial Court', in: A.M. van Amsterdam/M. Jurgens/G.C. Makkink/J.W.M. Tromp (eds.), *Fraude - Financieel recht - Ondernemingskamer*, Deventer: Kluwer 2016, p. 151-189; D. Busch and A. Lenaerts, 'Naar een gespecialiseerde overheidsrechter voor civiele beleggingsgeschillen – Het conceptvoorstel van art. 1:23a Wijzigingswet financiële markten kritisch belicht', *TREMA* (2016), p. 284-293.

¹⁸³ Art. 4:17(1)(b) Wft.

¹⁸⁴ Since 1 January 2007, see *Stcrt.* 2007, 5, p 22.

¹⁸⁵ See <https://www.kifid.nl/rentederivaten>.

of the GC and the GCHB (and previously of the KCD and the KCHB) are binding on both parties on the basis of binding advice (*bindend advies*).¹⁸⁶

The decisions of the Complaints Board (*Geschillencommissie*, GC) and the Appeal Committee (*Commissie van Beroep*, GCHB) of KiFID are binding on both parties on the basis of binding advice (*bindend advies*). Binding advice is a *species* of a contract of settlement (*vaststellingsovereenkomst*). Thus, the content of a binding advice is binding on the parties on the basis of contract. Binding advice resembles arbitration, but is more informal (statutory procedural rules are lacking). A binding advice clause in standard terms in a consumer contract is considered unreasonably onerous if the consumer is not offered the possibility of settling a dispute in a state court.¹⁸⁷

XI. THE ROLE OF THE REGULATOR IN SETTLING DISPUTES

Finally, in the Netherlands, neither the conduct of business regulator AFM, nor prudential regulator DNB, have formal powers to settle disputes between banks and their clients. The same is true for the Dutch Ministry of Finance. Nevertheless, both the AFM and the Ministry of Finance have played an active role in settling the massive mis-selling of interest rate swaps to SMEs. In a first stage, the AFM investigated individual interest rate swap contracts with SMEs and concluded that in many cases the MiFID rules pertaining to interest rate swaps had not been complied with. In many cases the client had been insufficiently informed about the mechanics of interest rate swaps in general, and the benefits and risks of any such product for their individual situation. The AFM requested the banks concerned to re-evaluate individual interest rate swap contracts and to the extent necessary compensate their clients. However, the process was badly managed by the AFM and the banks did not fully cooperate. As a result, under pressure of the Dutch Minister of Finance, and in line with the advice of the AFM, the Ministry of Finance appointed a Derivatives Committee (*Derivatencommissie*), consisting of three independent experts to draw up a uniform settlement framework for derivatives with SMEs (*Uniform Herstelkader Rentederivaten MKB*). On 5 July 2016 the committee published the framework. Under high pressure of the Ministry of Finance, the relevant banks in the end accepted the framework.¹⁸⁸ In the view of many commentators, the whole process was far too lengthy. In view of this, some commentators propose a law reform to the effect that the AFM obtains true powers to settle disputes between banks and clients, very much like the

¹⁸⁶ See D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 12.9.

¹⁸⁷ See Art. 6:236, opening words, and sub (n) DCC; D. Busch, *Vermogensbeheer* (Mon. BW no. B8), Kluwer, Deventer 2014, § 29.3.

¹⁸⁸ See for further information: <http://www.derivatencommissie.nl/>.

UK FCA.¹⁸⁹ The Dutch Ministry of Finance recently solicited stakeholder views on whether the AFM should have formal powers to settle disputes between banks and their clients.¹⁹⁰

XII. CONCLUSION

In the Netherlands, the contours of a bank's duty of care are relatively clear. The Hoge Raad has developed a fairly coherent body of case law with respect to the existence and scope of a bank's 'special' duty of care (*bijzondere zorgplicht*) towards consumers. The essential duties which typically flow from a bank's duty of care are duties to investigate, duties to disclose or warn, and - in exceptional cases - outright duties to refuse to render financial services or products

In the Netherlands, the question whether banks also owe a special duty of care to SME's and other commercial clients is hotly debated, largely triggered by the massive mis-selling of interest rate swaps to SME's. There is some lower case law on interest rate swaps which accepts that banks are also subject to a special duty of care towards SME's, resulting in the usual duties to investigate and warn. However, the Hoge Raad has not yet had the chance to confirm or reject this view.

Duties to warn are a prominent feature of the bank's duty of care in the Netherlands. But recently the Amsterdam Court of Appeal revived the doctrine of mistake in connection with interest rate swaps. At the time of writing it is not clear whether the Dutch Supreme Court agrees with this approach. In another prominent case regarding the bank's duty of care, the argument of mistake was rejected and the Dutch Supreme Court took recourse to a breach of duty of care for not warning the client explicitly enough for the special risks involved.

It transpires from the case law of the Hoge Raad that the public law duties set out in the Wft and in the lower legislation pursuant thereto - including the Dutch implementation of MiFID - influence both the pre-contractual and contractual duty of care to which banks (and other financial institutions) are subject.

The legislator intervened and eliminated uncertainty as to whether juridical acts performed in violation of the Wft can be void or voidable. Article 1:23 Wft makes it clear that a juridical act is not invalid solely because it has been performed in violation

¹⁸⁹ See *Financieele Dagblad*, 'Juridisch gat bij swaps moet dicht', 6 July 2016, p. 2.

¹⁹⁰ See p. 12 of the consultation document mentioned in § II.5, last paragraph: Ministerie van Financiën, *Consultatiedocument - Effectiviteit en gewenste mate van bescherming voor zzp-ers en mkb-ers bij financiële diensten en producten* (1 September 2016) (downloadable at www.internetconsultatie.nl/consultatiebeschermingkleinzakelijk).

of a rule laid down by or pursuant to the Wft (except where otherwise provided by the Wft). Thus, a contract concluded by eg an asset manager who lacks the licence required by regulatory law is not void or voidable.

This does not mean, however, that no questions are left. First and foremost, it is an open question, contested in legal literature, whether the civil courts may, on the basis of private law, subject banks to duties that are stricter or more demanding than the regulatory duties implementing the current MiFID regime, particularly the conduct of business rules, in the absence of an express contractual provision imposing stricter duties. Also, the massive mis-selling of interest rate swaps to SME's sparked a debate on whether the Dutch conduct of business regulator AFM should obtain powers to settle disputes between banks and clients, very much like the UK FCA.