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A Conceptual and Comparative Analysis of the Obligations of Third-Party Certifiers

JAN DE BRUYNE*

I. PRELIMINARY CONSIDERATIONS: THE CERTIFICATION PROCESS AND THIRD-PARTY CERTIFIERS

Certifiers are entities that provide services of certification.¹ Certifiers attest that a certified product, service, information, or person (further referred to as “item”) possesses certain qualifications or meets safety, quality, or technical standards.² The certification process can take different forms and often involves several parties.³ Besides first⁴ and second-party certification,⁵ third-party certification is performed by organizations that are independent *vis-à-vis* the entity that manufactures the products, offers services, or provides information (further referred to as the “requesting entity”).⁶ Such certification implies that an independent body determines whether the item complies with the applicable technical and safety

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1. *Certification*, BLACK’S LAW DICTIONARY (9th ed. 2009); AM. NAT’L STANDARDS INST., UNITED STATES CONFORMITY ASSESSMENT PRINCIPLES 5 (2011).

2. *Certification*, BLACK’S LAW DICTIONARY; AM. NAT’L STANDARDS INST., *supra* note 1.

3. *U.S. Conformity Assessment System: 2nd Party Conformity Assessment*, AM. NAT’L STANDARDS INST., https://www.standardsportal.org/usa_en/conformity_assessment/suppliers_declaration.aspx (last visited Oct. 23, 2017).

4. First-party certification implies that the manufacturers of the products or the providers of services and information provide the certification themselves. It is the party that markets those products or offers the service and information—for example, a manufacturer of medical devices, an issuer of financial instruments, or a shipowner—that takes the necessary steps to determine whether those items comply with the applicable requirements. See *U.S. Conformity Assessment System: 1st Party Conformity Assessment*, AM. NAT’L STANDARDS INST., https://www.standardsportal.org/usa_en/conformity_assessment/suppliers_declaration.aspx (last visited Oct. 23, 2017).

5. Second-party certification occurs when a person or an organization, having a user interest in a product, service, or information—the purchaser or user of the certified product, service or information—establishes whether these items comply with the applicable technical and safety standards. See AM. NAT’L STANDARDS INST., *supra* note 1. The certification is performed by the party purchasing the products or relying on the services to ensure their compliance with the agreed (contractual) requirements and (technical) specifications. European Fed’n of Nat’l Ass’ns of Measurement, Testing and Analytical Labs., *First-, Second- and Third-Party Testing – How and When*, EUROLAB, May 2000, at 3, www.eurolab.org/documents/1-2000.doc.

6. See AM. NAT’L STANDARDS INST., *supra* note 1.

standards and requirements.⁷ Most certified products, services, or information bear the certifier's mark to help consumers or other buyers making decisions.⁸ Third-party certifiers⁹ provide their services at the request of their clients.¹⁰ The certificate they issue is the performance under the certification contract.¹¹ However, the information included in this attestation can and will also be used by people with whom they do not have any contractual relationship or even by the public at large.¹² Certifiers moderate informational asymmetries that distort or prevent efficient transactions by providing the public with information it would otherwise not have.¹³ This function is so important, one could say that without certifiers "efficient trade would often be distorted, curtailed, or blocked".¹⁴

Although certifiers provide their services in several sectors,¹⁵ the article focusses on credit rating agencies (CRAs) in financial markets, classification societies in the maritime industry, and notified bodies in the medical sector.¹⁶ CRAs such as Moody's or Standard and Poor's (S&P) evaluate the creditworthiness of financial instruments or issuers of such

7. See *U.S. Conformity Assessment System: 3rd Party Conformity Assessment*, AM. NAT'L STANDARDS INST., https://www.standardsportal.org/usa_en/conformity_assessment/3party_conformity_assessment.aspx (last visited Oct. 23, 2017).

8. See *id.* (stating that certification may be appropriate if the market demands or allows it).

9. When this article refers to certifiers, it only relates to third-party certifiers unless indicated otherwise.

10. European Fed'n of Nat'l Ass'ns of Measurement, Testing and Analytical Labs., *supra* note 5, at 8-9.

11. See, e.g., *General Conditions for Certification Services*, SOCIÉTÉ GÉNÉRALE DE SURVEILLANCE (June 2005), www.sgs.com/en/Terms-and-Conditions/General-Conditions-for-Certification-Services-English.aspx.

12. See *id.*

13. European Fed'n of Nat'l Ass'ns of Measurement, Testing and Analytical Labs., *supra* note 5, at 3.

14. Jonathan M. Barnett, *Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization?*, 37 J. CORP. L. 475, 476 (2012).

15. When certifiers do not merely provide information in the form of an attestation but by doing so in effect can restrict and thereby control the access of the certified item to the market or to other facilities, they serve as "gatekeepers." See Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 54-55 (1986) (discussing the pharmaceutical sector as an example). For an extensive discussion on the concept of gatekeepers, see Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53 (2003); Frank Partnoy, *Barbarians at the Gatekeepers: A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L.Q. 491 (2001); Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U.L. REV. 916 (1998); see Lawrence A. Cunningham, *Beyond Liability: Rewarding Effective Gatekeepers*, 92 MINN. L. REV. 323 (2007). By lending their reputational capital, they enable other parties to rely on the attested trustworthiness or reliability of the requesting entity. See JOHN C. COFFEE JR., *GATEKEEPERS: THE ROLE OF THE PROFESSIONS IN CORPORATE GOVERNANCE* 1-5 (2006). By being able to withhold the necessary cooperation or consent, they can prevent misconduct by the certified entity. See *id.* at 2. The main focus of this Article, however, is not to examine whether, and if so, under which circumstances, certifiers become gatekeepers. Instead, this contribution sheds light on the obligations of certifiers during the certification process.

16. See *infra* Parts III.B.1-3.

instruments.¹⁷ Investors, who in most cases do not have the capacity or time to examine and evaluate the quality of financial instruments or the creditworthiness of the issuer of such instruments, use ratings issued by CRAs to make investment decisions.¹⁸ Classification societies, including Lloyds Register or American Bureau of Shipping (ABS), are hired and paid for by the owner of the vessel that is to be classified.¹⁹ They issue a class certificate attesting that a vessel is built in accordance with so-called class rules.²⁰ Important actors in the maritime industry rely on these certificates as an assurance that the classed vessel is likely to be reasonably suited for its intended use.²¹ This is known as the private function of classification societies.²²

From this private function, the role of classification societies expanded to cover public tasks.²³ This is referred to as statutory certification.²⁴ Flag States have the duty under international law to take appropriate measures for vessels flying their flag to ensure safety at sea.²⁵ States often delegate executive powers to classification societies.²⁶ Acting as Recognized Organizations (ROs), the latter become responsible for the implementation and enforcement of international maritime safety standards, thereby fulfilling a public role.²⁷ A last example are product certifiers such as Underwriters Laboratories (UL) or TÜV Rheinland.²⁸

17. Eddy Wymeersch & Marc Kruithof, *Regulation and Liability of Credit Rating Agencies under Belgian Law*, 1 (Ghent Univ. Fin. Law Institute, Working Paper No. 2006-05, 2006).

18. *See id.*; *see also* ALINE DARBELLAY, *REGULATING CREDIT RATING AGENCIES* 38 (2013); COFFEE, *supra* note 15, at 1-6, 286.

19. NICOLAI LAGONI, *THE LIABILITY OF CLASSIFICATION SOCIETIES* 43 (2007); *see also* *Lloyd's Register - improving safety, quality and performance*, LOYD'S REGISTER (last visited Jan. 4, 2017), <http://www.lr.org/en/>; *About Us*, AM. BUREAU SHIPPING (last visited Jan. 4, 2017), <https://ww2.eagle.org/en/about-us.html>.

20. *See* LAGONI, *supra* note 19, at 43-44.

21. *See* Machale Miller, *Liability of Classification Societies from the Perspective of United States Law*, 22 *TUL. MAR. L.J.* 75, 77 (1997); *see also* LAGONI, *supra* note 19, at 6-7.

22. *See* LAGONI, *supra* note 19.

23. *See* LAGONI, *supra* note 19, at 50 ("If the private body acts under private law, a classification society may, for instance, carry out statutory surveys and award or renew certificates. The territorial sovereignty of the port State is not affected by such private acts. For this reason, most flag States have either authorised [sic] classification societies to undertake certain statutory surveys on their behalf or even granted a full authorisation [sic] to issue all necessary statutory certificates, whether the vessel is in its port of registry or not. Classification societies are present in every major port world-wide or at least have a dense network of exclusive and non-exclusive surveyors.")

24. *See* ALAN KHEE-JIN TAN, *VESSEL-SOURCE MARINE POLLUTION: THE LAW AND POLITICS OF INTERNATIONAL REGULATION* 44 (James Crawford et al. eds., 2006).

25. *See, e.g.*, United Nations Convention on the Law of the Sea (UNCLOS), art. 94, Dec. 10 1982, 1833 U.N.T.S. 3.

26. *See* LAGONI, *supra* note 19, at 51 ("The flag State may also choose to assign these functions to a private legal subject, such as a classification society.")

27. *See* Juan L. Pulido Begines, *The EU Law on Classification Societies: Scope and Liability Issues*, 36 *J. MAR. L. & COM.* 487, 489-90, 502 (2005); *see also* LAGONI, *supra* note 19, at 13-14; Anthony M. Antapassis, *Liability of Classification Societies*, 11.3 *EJCL* 1, 12-13 (2007),

These private bodies are sometimes involved in the certification process of medical devices in the European Union (EU).²⁹ A manufacturer can only place medical devices on the European market when they meet several essential requirements.³⁰ To that end, the manufacturer has to perform a conformity assessment procedure of the medical device.³¹ In some cases, this assessment needs to be carried out by an independent certifier known as a “notified body”.³² The body determines whether medical devices meet all the applicable essential requirements to get the necessary CE marking.³³

Scandals involving certifiers (for example, the 2008 financial crisis or the *Erika* and *Prestige* maritime disasters) illustrate that the latter do not always provide accurate and reliable certificates that correspond with the “true” or “actual” value of the certified item.³⁴ Third parties might thus incur losses or suffer damage and injuries, despite the issuance of a certificate attesting that the item complied with the applicable requirements.³⁵ Investors, for instance, incurred economic losses following the financial crisis, even though positive ratings were issued to structured financial products.³⁶ Similarly, TÜV Rheinland certified Poly Implant Prothèse (PIP) breast implants that later turned out to be defective due to the risk of ruptures.³⁷ Hundreds of thousands of implants filled with sub-standard silicone gel were distributed around the world thereby potentially

<http://www.comitemaritime.org/Uploads/Work%20In%20Progress/Classification%20Societies/Antapassis%20-%20Liability%20of%20Classification%20Societies%20EJCL%20Dec%202007.pdf>

28. *About UL: What We Do*, UL (last visited Oct. 23, 2017), <https://www.ul.com/aboutul/what-we-do/>; *The Brand: TÜV Rheinland. Precisely Right.*, TÜV RHEINLAND (last visited Oct. 23, 2017), https://www.tuv.com/en/usa/about_us/group_us/the_brand_us/the_brand.html.

29. See Bernhard Lobmayr, *An Assessment of the EU Approach to Medical Device Regulation against the Backdrop of the US System*, 1 Eur. J. Risk Reg. 137, 142 (2010) (“Europe’s regulatory regime for medical devices contains self-regulatory elements in that the certification of a product is handled by the manufacturer in conjunction with a Notified Body.”).

30. See Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, OJ L 169.

31. See *Conformity Assessment*, EUROPEAN COMM’N (last visited Oct 23, 2017), <http://ec.europa.eu/growth/single-market/goods/building-blocks/conformity-assessment>.

32. See 2016 O.J. (C 272) 75.

33. See Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, OJ L 169.

34. See Brent J. Horton, *Toward a More Perfect Substitute: How Pressure on the Issuers of Private-Label Mortgage-Backed Securities Can Improve the Accuracy of Ratings*, 93 B.U. L. Rev. 1905, 1908-10 (addressing the question of how to make CRAs more accurate in information given to the investing public, especially in the context of mortgage-backed securities, which were the root cause of the 2008 financial crisis); Tito Drago, *Prestige: the Most Costly Maritime Accident in History*, INTER PRESS SERV. (Jul. 28, 2003), <http://www.ipsnews.net/2003/07/prestige-the-most-costly-maritime-accident-in-history/>; Tom Mangold, *The scandal of the Erika*, BBC NEWS (Aug. 16, 2000, 15:58 GMT), <http://news.bbc.co.uk/2/hi/programmes/correspondent/883110.stm>.

35. See Horton, *supra* note 34, at 1906, 1909-10.

36. See *id.* at 1906.

37. Patrick Sawyer & Josie Ensor, *Faulty breast Implant Victims Forced to Repay Compensation*, TELEGRAPH (July 2, 2015, 4:44 PM), <http://www.telegraph.co.uk/news/worldnews/europe/france/11712771/Faulty-breast-implant-victims-forced-to-repay-compensation.html>.

causing physical harm to women who purchased them.³⁸ The sinking of a vessel that has been classified by a major classification society can also cause financial losses to cargo-owners or result in environmental damage to coastal States. Against this background, it is no surprise that third parties have, on several occasions, filed claims against certifiers in different jurisdictions to recover their losses.³⁹

Scholars have already examined specific elements that are of importance in those liability claims.⁴⁰ For instance, the extent to which CRAs benefit from the freedom of speech defense⁴¹ or whether classification societies can rely on immunity from jurisdiction have been widely discussed.⁴² The scope of a certifier's liability towards third parties and its influence on the accuracy of certificates has been given the necessary attention as well.⁴³ The certification process as such, however, has not attracted much academic attention. Nevertheless, an analysis of a certifier's liability towards both requesting entities and third parties requires an understanding of their commitments during the certification process. Policymakers could then rely on this analysis to craft specific liability regimes for certifiers. Certifiers have several contractual obligations under the certification agreement with requesting entities.⁴⁴ They also need to

38. *Id.*

39. For credit rating agencies see *Tolin v. Std. & Poor's Fin. Servs., LLC*, 950 F. Supp. 2d 714, 716 (S.D.N.Y. 2013); *Abu Dhabi Commer. Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 163 (2009); *Cal. Pub. Emp. Retirement Sys. v. Moody's Inv'rs Serv., Inc.*, 226 Cal. App. 4th 643 (First Dist., Div. 3 2014); *Bathurst Reg'l Council v Local Gov't Fin. Servs. Pty Ltd, [No. 5]* [2012] FCA 1200 (Austl.), *aff'd ABN AMRO Bank NV v Bathurst Reg'l Council* [2014] FCAFC 65 (Court of Appeal) (Austl.). For classification societies see *Otto Candies, LLC v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530, 532 (5th Cir. 2003); *Reino de Espana*, 528 F. Supp. 2d at 456; *Marc Rich & CO A.G. v. Bishop Rock Marine Co. Ltd.*, [1996] AC 211. For notified bodies see *Case C-219/15, Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, 2017 ECLI:EU:C:2017:128; Court of First Instance Nürnberg-Fürth, September 25, 2013, 11 O 3900/13 *and* Court of Appeal Zweibrücken [OLG], January 30, 2014, 4 U 66/13 (Ger.); TÜV Rheinland, Press Release, 07/02/2015 ("In France, the Aix-en-Provence Court of Appeal reversed a judgment handed down by the Toulon Commercial Court on November 14th, 2013 against the notified body TÜV Rheinland in connection with breast implants of the French manufacturer Poly Implant Prothèse ("PIP"). The Court of Appeal thus dismissed the claims brought by foreign distributors of PIP implants as well as over 3,000 persons who had joined the case.").

40. See Horton, *supra* note 34, at 1906; See also Caleb Deats, *Talk Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?*, 100 Colum. L. Rev. 1818, 1818-19 (2010).

41. See Deats, *supra* note 40; see also Jonathan W. Heggen, *Not Always the World's Shortest Editorial: Why Credit-Rating-Agency Speech is Sometimes Professional Speech*, 96 IOWA L. REV. 1745, 1750 (2011); Parisa Haghshenas, *Obstacles to Credit Rating Agencies' First Amendment Defense in Light of Abu Dhabi*, 8 FIRST AMEND. L. REV. 452, 454 (2010).

42. See Jan De Bruyne, *Liability of Classification Societies: Cases, Challenges and Future Perspectives*, 45 J. MAR. L. & COM. 181, 221 (2014); LAGONI, *supra* note 19, at 50-55.

43. See Cunningham, *supra* note 15, at 339; see also Choi, *supra* note 15, at 918; Kraakman, *supra* note 15, at 54; Hamdani, *supra* note 15, at 58; Partnoy, *supra* note 15, at 491; COFFEE, *supra* note 15 at 5.

44. See, e.g., *General Conditions of Service*, SOCIÉTÉ GÉNÉRALE DE SURVEILLANCE (last visited Oct. 23, 2017),

comply with requirements imposed by inter-, supra- or national law.⁴⁵ The difference between these two sources—contract and legislation—is of course of importance regarding a certifier’s liability. In this article, however, they are taken together to shed light on the global certification process.⁴⁶ That is because a third-party certifier’s conduct during the certification process is determined by contractual provisions as well as legal requirements. The interaction between these two sources becomes clear as contractual terms often contain broad provisions (for example, on a certifier’s independence) that are further specified in the applicable legislation (for example, on the avoidance of specific conflicts of interest).⁴⁷ Moreover, the applicable legislation often includes provisions that specifically refer to the contractual setting with the requesting entity to ensure that certifiers issue accurate and reliable certificates.⁴⁸ Certification agreements need to be seen in light of these legal requirements. Therefore, and for reasons of clarity and reader friendliness, contractual obligations and legal requirements are combined together to shed light on the certification process. As such, when talking about a certifier’s obligations during the certification process, it includes the contractual commitments as well as the legal requirements.

The certification process generally starts with a requesting entity purchasing a certificate for a particular item.⁴⁹ To that end, requesting entities are required to provide the item that needs to be certified and/or any related information to the certifier.⁵⁰ Based on this information, the certifier

<http://www.sgs.com/-/media/global/documents/technical-documents/legal-documents/sgs-legal-general-conditions-of-services-a4-en-14-11.pdf?la=en>.

45. LAGONI, *supra* note 19, at 50-51.

46. *See infra* Parts II-IV.

47. *See* 2009 O.J. (L 302) 3.

48. For instance, EU legislation stipulates that CRAs should in their “professional activity” focus on the issuing of ratings to avoid potential conflicts of interest. Recital (22) Regulation 1060/2009 on credit rating agencies, OJ L 302. CRAs have an important responsibility towards investors and issuers in ensuring they comply with Regulation 1060/2009 so that their “ratings are independent, objective and of adequate quality.” Recital (32) Regulation 462/2013 *amending* Regulation 1060/2009 on credit rating agencies, OJ L 146. The Regulation on Medical Devices stipulates that the position of notified bodies vis-à-vis manufacturers “should be strengthened” to ensure continuous compliance by manufacturers after receipt of the original certification. (Recital (52) Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC, OJ L 117).

49. *See* LAGONI, *supra* note 19, at 43 (discussing process of contractual certification agreements between customers—typically shipyards—and classification societies, whereby the customer requests to have a vessel classified); *see* John Patrick Hunt, *Credit Rating Agencies and the “Worldwide Credit Crisis”*: *The Limits of Reputation, the Insufficiency of Reform, and a Proposal for Improvement*, 2009 Colum. Bus. L. Rev. 109, 116 (2009) (“Ratings typically are requested and paid for by the issuer or originator of the financial instrument in question, and are made available to the public for free.”).

50. Moody’s, for instance, will not issue a rating without all information necessary to calculate the initial rating. MOODY’S INV’RS SERV., CODE OF PROFESSIONAL CONDUCT 27 (2017). The

subsequently conducts the certification process.⁵¹ Certifiers have different obligations during the certification process.⁵² These obligations can be framed around two axes. The combination of both axes provides a better insight regarding the obligations of certifiers during the certification process and, as a consequence, the latter's potential liability as well. The first axis deals with the stages during the certification process and the certifier's corresponding obligations.⁵³ There are three stages in the certification process: obligations that arise before the certificate is issued (pre-issuance obligations), the issuance of an independent certificate, and obligations that come into existence once the certificate is issued (post-issuance obligations).⁵⁴ The second axis relates to the nature of the certifier's obligations in each of these stages.⁵⁵ Whether there will be a ground for liability depends on the nature of the certifier's obligations.⁵⁶ In this regard, several jurisdictions (explicitly or implicitly) make the distinction between the obligation of certifiers to produce or achieve a specific anticipated and contractual agreed result on the one hand (so-called *obligation de résultat*) and the obligation to apply the normally required diligence, reasonable care, and skill on the other hand (so-called *obligation de moyen*).⁵⁷

requirement to provide information also exists under the agreement with classification societies. Shipbuilders initiate the certification process by submitting a request for classification to the society. They provide the plans, related technical descriptions and data concerning the vessel for approval to the classification society. LAGONI, *supra* note 19, at 43-46. The duty to give information is also included in certification contracts with product certifiers. The conditions for certification services of product certifier SGS stipulate that the requesting entity has to make available or accessible product samples, information, records, documentation and facilities. *See, e.g., Terms and Conditions - General Conditions for Certification Services*, SGS (last visited Oct. 27, 2017) (art. 4), www.sgs.com/en/Terms-and-Conditions/General-Conditions-for-Certification-Services-English.aspx.

51. *See, e.g.,* LAGONI, *supra* note 19, at 43-44 (requiring ship owners to submit the vessel's blueprints to the classification society).

52. *See, e.g.,* LAGONI, *supra* note 19, at 46-49 (discussing the various contractual obligations of classification societies).

53. *See infra* Part II.

54. *See infra* Parts II-IV.

55. *See infra* Parts II-IV.

56. *See infra* Parts II-IV.

57. In Belgium and France, this is known as the difference between an *obligation de résultat* and an *obligation de moyen*. Certifiers will violate an *obligation de résultat* whenever the promised result has not been reached, except when the certifier proves that this failure is due to impossibility or *force majeure*. The requesting entity will only have to establish that the certifier did not achieve the contractually promised result(s). A violation of an *obligation de moyen* presupposes that the certifier did not apply the required care and skill. If the certification contract is qualified as *obligation de moyen*, the certifier will only be liable if the requesting entity shows that the former has been negligent and did not act as a reasonable certifier placed in the same circumstances. *See* WALTER VAN GERVEN & SOFIE COVEMAEKER, *VERBINTENISSENRECHT* 32-33 (2006); Leentje Van Valckenborgh, *De kwalificatie van een verbintenis als resultaat-of middelenverbintenis*, 5 TIJDSCHRIFT VOOR BELGISCH BURGERLIJK RECHT 222, 222-29 (2011); Wymeersch & Kruithof, *supra* note 17, at 17-18; ALAIN BÉNABENT, *DROIT DES OBLIGATIONS* 295-96 (13th ed. 2012). In England, strict contractual duties imply that, except in cases of a *force majeure* clause in the contract, liability is independent of fault. However, in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied

Each of the three stages in the certification process leads to different obligations for certifiers. During a first stage, they have to verify and examine the item or related information provided by the requesting entity.⁵⁸ This is an *obligation de moyen*.⁵⁹ Thus, there will be a ground of liability if the certifier did not carefully perform the assessment of the item or related information that needs to be certified.⁶⁰ Based on this assessment, certifiers subsequently issue an independent certificate during the second stage of the process.⁶¹ The issuance of an independent certificate is an *obligation de*

term that the supplier will carry out the service with reasonable care and skill. The Act stipulates that any rule of law might impose a duty on the supplier that is stricter than the one imposed under Section 13. Supply of Goods and Services Act, 1982, ch. 29, §§ 13, 16 (amended 1994). The type of contract determines whether the liability of the party breaching the contract will be strict or based on fault. For instance, when the contract is one for the supply of components or goods, liability is generally strict. The contractor's duty under a contract of services, on the other hand, is often one of care only. See, e.g., *BHP Petroleum Ltd v. British Steel plc* (2000), 2 Lloyd's Rep. 277, 287 (discussing drafting issues and limiting liability clauses). The general rule is that contracts under which services are rendered by professionals (e.g. accountants or lawyers) only impose a duty of care. The professional party does not guarantee to produce a specific result but only undertakes to perform the services with reasonable care and skill. EDWIN PEEL, *THE LAW OF CONTRACT* 837 (13th ed. 2011). In Germany, the distinction is made between the contract of services or employment. *Dienstvertrag reg'd in* §§ 611-30 BGB, and the contract of work *Werkvertrag reg'd in* § 631 BGB. A contract for service does not contain an obligation to achieve a specific result. Rather, under contracts to provide services, the party providing the services is only required to perform the service *lege artis* but does not promise a particular result. The party performing the service is only bound to perform this service using reasonable care and skill without achieving the specific result. The contract of work contains the duty for a party to achieve a specific result. BASIL S. MARKESINIS, HANNES UNBERATH, & ANGUS JOHNSTON, *THE GERMAN LAW OF CONTRACT: A COMPARATIVE TREATISE* 153-56 (2d ed. 2006); BASIL S. MARKESINIS, WERNER LORENZ & GERHARD DANNEMANN, *THE LAW OF CONTRACTS AND RESTITUTION: A COMPARATIVE INTRODUCTION* 40 (1997). In the United States, "every first-year law student learns [that] contract liability is absolute liability—that is to say, liability not based on fault. In the law of contracts, trying is not enough." E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1, 3 (1984). In this regard, Hillman relies on different judicial opinions, the Restatement (Second) of Contracts and doctrinal contributions to conclude that reasons for failing to perform a contract, whether willful, negligent or unavoidable "have little or no bearing in determining contract liability". Contract liability is strict, which means that the reasons for nonperformance are irrelevant in determining the injured party's rights. Robert A. Hillman, *The Importance of Fault in Contract Law*, CORNELL LAW FACULTY WORKING PAPERS, PAPER 12-34, (Aug. 2012) Eric Posner, *Fault in American Contract Law*, 107 MICH. L. REV. 1431 (2009)); see Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1351 (2009)). However, a duty of best efforts for the certifier can arise when the contractual terms explicitly limit the certifier's undertaking to a duty of best efforts. The language used in contracts that require the promisor to achieve a specific result can be interpreted as only imposing a duty of best efforts. This can be the case for contracts of service. See Farnsworth, *supra* note 57, at 4-5. As such, strict liability is a "very narrow view of the nature of a contract promise. At minimum, it ignores the many contracts that explicitly or implicitly import standards of care, such as best efforts, due care, and good faith." See Hillman, *supra* note 57, at 8.

58. See *infra* Section II.

59. See Olivier Moreteau, *Codes as Straight-Jackets, Safeguards, and Alibis: The Experience of the French Civil Code*, 20 N.C. J. Int'l L. & Com. Reg. 273, 285 (1995) (the third-party certifiers undertakes only a duty of care at this stage and "is under no obligation to reach any particular outcome.").

60. See *infra* Section II.

61. See, e.g., LAGONI, *supra* note 19, at 43, 44 (in the context of classification societies).

résultat.⁶² The certifier will, therefore, violate this obligation if it did not remain independent towards the requesting entity, regardless of the question whether it acted carefully.⁶³ Certifiers also have several post-issuance obligations during the third stage of the certification process.⁶⁴ The most important obligation during this last stage concerns monitoring and surveillance tasks.⁶⁵ These can be qualified as *obligations de moyen*, which means the certifier has to perform these duties carefully.⁶⁶ A certifier does not act wrongfully if it carefully performed these duties even if the certificate has not been withdrawn, downgraded, or adapted otherwise.⁶⁷ The combination of both axes provides a graphical illustration of the obligations of certifiers during the certification process. This could be taken into account by policymakers when crafting liability regimes.⁶⁸

II. FIRST STAGE OF THE CERTIFICATION PROCESS: ‘PRE-ISSUANCE’ OBLIGATIONS

Certifiers have several pre-issuance obligations during the first stage of the certification process.⁶⁹ They are of course required to perform the analysis of the item or related information that needs certification.⁷⁰ This obligation *to perform* the analysis has little to do with *how* the analysis is actually conducted.⁷¹ The obligation to perform the analysis within the agreed time framework qualifies as *obligation de résultat*.⁷² Thus, there might be grounds for a certifier’s liability when it did not perform the

62. See Moreteau, *supra* note 59 (it is at this stage that the third-party certifier must actually perform what was promised).

63. See *infra* Section III.

64. See *infra* Section IV.

65. See LAGONI, *supra* note 19, at 47 (describing classification societies’ monitoring obligations).

66. See Moreteau, *supra* note 59, at 285.

67. See *infra* Section IV.

68. As Mavrommati rightly underlines, “the gatekeeping problem is not confined to the US market and it certainly is an issue that concerns all countries around the world, including Europe.” Sandy Mavrommati, *The Dynamics of Gatekeepers, Corporate Culture and Whistle Blowers*, 1 CORP. GOVERNANCE L. REV. 385, 396 (2005). Therefore, a study on the obligations of certifiers during the certification process from not only a US legal perspective but also including other jurisdictions is relevant. This article does not give a country-by-country overview with regard to the obligations of certifiers. Instead, and surely not wanting to be accused of *legal tourism*, the legal context of the different jurisdictions where their liability has already been at stake is examined. In other words, an eclectic research methodology is used. The article is based on theoretical arguments and ideas coming from different jurisdictions without, however, always examining every jurisdiction thoroughly. See *id.*

69. See Cunningham, *supra* note 15, at 327-28 (“Most gatekeepers are paid for their services by the enterprises that retain them; all bear stated duties whose breach exposes them to legal liability.”).

70. See U.S. Conformity Assessment System: *3rd Party Conformity Assessment*, AM. NAT’L STANDARDS INSTIT. (last visited Oct. 23, 2017), https://www.standardsportal.org/usa_en/conformity_assessment/3party_conformity_assessment.aspx [hereinafter *3rd Party Assessment*].

71. See Moreteau, *supra* note 59.

72. See *id.*

analysis or failed to do so on time, regardless of the level of care it applied.⁷³

More important, certifiers have to examine the item or related information provided by the requesting entity.⁷⁴ Based on this analysis, they give the certificate.⁷⁵ The way in which certifiers have to perform this analysis can be determined by the certification contracts (e.g. for CRAs), codes of practice or terms, and conditions (e.g. for product certifiers and classification societies) or EU and national law (e.g. for CRAs and notified bodies).⁷⁶ A closer look at these sources shows certifiers are bound by an *obligation de moyen* when doing the analysis to determine the certificate.⁷⁷ Besides (A) general reasons pointing into that direction,⁷⁸ (B) particular attention is given to each individual certifier, namely credit rating agencies,⁷⁹ (C) classification societies,⁸⁰ and (D) product certifiers and notified bodies.⁸¹

A. General Considerations on the Certifier's Obligations During the First Stage

The issuance of the certificate is the result of tests and inspections performed by someone regarding the item that has to be certified.⁸² Class surveyors, financial analysts, or inspectors are involved in the certification process and determine whether and which certificate can be issued.⁸³ As such, the certification process remains the result of human appreciations and calculations.⁸⁴ Considering that mistakes are a part of being human, certifiers should not be liable only because the certificate does not correspond with the “real” or “true” value of the certified item. This also corresponds with decisions in several jurisdictions or legislation according

73. Tuba Akçura Karaman, *Comparative Study on the Liability of Classification Societies to Third Party Purchasers with Reference to Turkish, Swiss, German and US Law*, 42 J. MAR. L. & COM. 125, 128-29 (2011); JÜRGEN BASEDOW & WOLFGANG WURMNEST, *THIRD-PARTY LIABILITY OF CLASSIFICATION SOCIETIES: A COMPARATIVE PERSPECTIVE* 36 (2005).

74. *3rd Party Assessment*, *supra* note 70.

75. *Id.*

76. *See infra* Section II.B.1.

77. *See supra* Section I; *see infra* Section II.B.1.

78. *See infra* Section II.A.

79. *See infra* Section II.B.

80. *See infra* Section II.C.

81. *See infra* Section II.D.

82. *3rd Party Assessment*, *supra* note 70.

83. *See, e.g., Gilles, The different roles of Maritime Inspectors, Surveyors and Auditors*, MEIJ DESIGN & SURVEY (Jan. 15, 2005), <https://maritime-mea.com/blog/2015/01/15/difference-between-maritime-inspectors-surveyors-auditors/>.

84. *See, e.g., MOODY'S INVESTORS SERVICE, CODE OF PROFESSIONAL CONDUCT* i (June 2017), www.moody's.com/uploadpage/Mco%20Documents/Documents_professional_conduct.pdf (noting the possibility of human error).

to which other professional providers of information or services, such as lawyers,⁸⁵ parties issuing the electronic identification means certifiers of electric signatures,⁸⁶ or medical practitioners,⁸⁷ are only bound to carefully perform their services, without having to achieve or guarantee a particular result. There is no reason why this should be any different for certifiers who provide professional certification services. The wording used in Article 1:107 of the Principles of European Law on Service Contracts points towards a similar direction.⁸⁸ It stipulates that the provider of services has to perform the service “with the care and skill that a reasonable service provider would exercise under the circumstances”.⁸⁹ “If the service provider professes a higher standard of care and skill the provider must exercise that care and skill.”⁹⁰ “If the service provider is, or purports to be, a member of a group of professional service providers for which standards exist that have been set by a relevant authority or by that group itself, the service provider must exercise the care and skill expressed in these standards.”⁹¹

85. See, e.g., Cours d’Appel [CA] [Court of Appeal] Mons, May 14, 2009, REVUE DE JURISPRUDENCE DE LIÈGE, MONS BRUXELLES [JLMB] 2010, 1423 (Belg.); Cours d’Appel [CA] [Court of Appeal] Liège, Oct. 14, 2009, REVUE DE JURISPRUDENCE DE LIÈGE, MONS BRUXELLES [JLMB] 2010, 1434 (Belg.); PEEL, *supra* note 57, at 837 (discussing Clark. V. Kirby-Smith [1964] Ch. 506 (Eng.)); Rb. Utrecht 28 januari 2009, NJF 2009, 198 m.nt. (/The Priv. Ltd. Liab. Co.) (Neth.).

86. “Electronic identification means’ refers to a material and/or immaterial unit containing person identification data and which is used for authentication for an online service.” Article 3(2) Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257. In this regard, Article 11, 2. of Regulation 910/2014 stipulates that the “party issuing the electronic identification means is liable for damage caused intentionally or negligently to any natural or legal person due to a failure to comply with the obligation referred to in point (e) of Article 7 in a cross-border transaction”.

87. See, e.g., Cours d’Appel [CA] [Court of Appeal] Liège, Oct. 18, 2012, UN REVIREMENT DE JURISPRUDENCE DES JURIDICTIONS LIÉGEOISES, 2013, 1148 (Belg.); Cours d’Appel [CA] [Court of Appeal] Liège, Nov. 15, 2012, *3, <http://jure.juridat.just.fgov.be/JuridatSearchCombined/printDecision.jsp> (Belg.); Cour d’appel [CA] [regional court of appeal] Versailles, 1e ch., Mar. 28, 1996, D. 1996, 138 (Fr.); Eyre v. Measday [1986] All. E.R. 488 *3 (Eng.); Thake v Maurice [1986] QB 644, 658, 678, 685 (Eng.). In Germany, things seem less clear. See TADE M. SPRANGER, MEDICAL LAW IN GERMANY 79-80 (2011). Spranger concludes that it has to be assessed on a case-by-case basis whether a violation of an agreement occurred. *Id.* at 80. However, he argues that it seems clear that the physician does not owe the success of convalescence in normal medical treatments and, therefore, cannot be held responsible if the treatment is carried out according to the current state of medical arts without success. *Id.* at 79. In his study, Stauch also concludes that a violation of the medical contract does not arise merely because the result is not achieved. MARC STAUCH, THE LAW OF MEDICAL NEGLIGENCE IN ENGLAND AND GERMANY: A COMPARATIVE ANALYSIS 29 (2008). Instead, German courts have qualified the medical contract as a *Dienstvertrag*, which obliges the doctor to exercise due skill and care without warranting a particular result. *Id.*

88. MAURITS BARENDRECHT ET AL., PRINCIPLES OF EUROPEAN LAW: SERVICE CONTRACTS 216 (2007).

89. *Id.*

90. *Id.*

91. *Id.*

There are also several other elements illustrating that certifiers are bound by an *obligation de moyen* when conducting the analysis to determine the related certificate.⁹² One element, to qualify an obligation as an *obligation de moyen*, is related to uncertainty as to whether the exercise of reasonable care will actually lead to a specific anticipated result.⁹³ If a particular result remains unsure despite applying reasonable efforts to achieve it, the obligation more likely qualifies as an *obligation de moyen*.⁹⁴ This seems to be the case for certifiers, as there is no guarantee that the certified item will ever default, even when the certifiers carefully performed the analysis.⁹⁵ A comparison can, to a certain extent, be made with doctors who are bound by an *obligation de moyen*. For instance, they will not face liability in Belgium merely because the patient did not heal.⁹⁶ Liability will be imposed to the extent that the doctor did not act as a prudent and careful doctor placed in similar circumstances.⁹⁷

Another element, namely the involvement of the requesting entity in the certification procedure, might also be an indication that it concerns an *obligation de moyen*.⁹⁸ An active role of the requesting entities can be an indication that a third-party certifier is only bound by an *obligation de moyen*.⁹⁹ It remains difficult to impose an *obligation de résultat* on the third-party certifier if the latter is not solely responsible for the outcome of the first stage in the certification process.¹⁰⁰ The requesting entity has to provide the necessary information to the certifier.¹⁰¹ Consequently, a certifier is only able to issue a reliable and accurate certificate to the extent that information given by the requesting entity is correct.¹⁰² Moreover, the requesting entity has to cooperate with the certifier during the first stage of the certification process.¹⁰³ The PIP case illustrates the importance of

92. See Christian Rothhahn, *Liability Outsourcer Under Obligation de Resultat*, BIRD & BIRD (Sept. 6, 2006), <https://www.twobirds.com/en/news/articles/2006/liability-outsourcer-under-obligation-de-resultat> (illustrating that a court must determine if a contract is either obligation of result or obligation of means).

93. *Id.*

94. GENEVIÈVE VINEY & PATRICE JOURDAIN, *TRAITÉ DE DROIT CIVIL: LES CONDITIONS GÉNÉRALES DE LA RESPONSABILITÉ* 460-461 (Jacques Ghestin ed., 2d ed. 1998).

95. See *infra* Section III.

96. HERMAN NYS, *MEDICAL LAW IN BELGIUM* 81 (Roger Blanpain et al. eds., 2010).

97. Cours d'Appel [CA] [Court of Appeal] Liège, Oct. 18, 2012, UN REVIREMENT DE JURISPRUDENCE DES JURIDICTIONS LIÉGEOISES, 2013, 1148 (Belg.).

98. See, e.g., Viney & Jourdain, *supra* note 94, at 461.

99. See, e.g., *id.*

100. See, e.g., *id.* at 460-61 (discussing doctors and lawyer as examples of the types of contracts).

101. MOODY'S INVESTORS SERVICE, *CODE OF PROFESSIONAL CONDUCT* 27 (discussing what is necessary for an issuance of a credit rating and what is needed to make a proper assessment).

102. *Id.*

103. *Id.*

giving accurate information as well as the consequences of not doing so.¹⁰⁴ Poly Implant Prothèse (PIP) was a French company that produced breast implants.¹⁰⁵ As of 2001, French law obliged manufacturers of breast implants to use one specific type of medical silicone gel in their products.¹⁰⁶ However, PIP did not comply with this explicit requirement.¹⁰⁷ It “developed an elaborate scheme of deceit and continued to use sub-standard industrial silicone gel” implants to cut costs.¹⁰⁸ The impact of the PIP’s fraud on the manufacturing process was quite disparate.¹⁰⁹ Whereas some implants contained the required medical silicone gel, others held a mixture of medical and industrial silicone gel or only industrial silicone gel.¹¹⁰ Therefore, the control on the quality and certification of the breast implants by the certifier was made extremely difficult.¹¹¹ Such events show that it might take things too far to impose an *obligation de résultat* on certifiers, as they do not always have control over the item that needs certification or the behavior of the requesting entities.¹¹²

B. Obligations of Credit Rating Agencies Before Issuing the Certificate

Besides general reasons pointing towards an *obligation de moyen*, recourse can also be taken in specific situations where each certifier can underpin that conclusion.¹¹³ A credit rating agency, for instance, grounds its decision to issue a rating on financial information provided by the issuer or information that is publically available.¹¹⁴ CRAs have two major obligations during the first stage of the certification process.¹¹⁵ On the one hand, they have to analyze the information with regard to the issuer’s financial position.¹¹⁶ On the other hand, they need to use rigorous, systematic, and continuous methodologies to determine the rating.¹¹⁷

104. Barend van Leeuwen, *PIP Breast Implants, the EU’s New Approach for Goods and Market Surveillance by Notified Bodies*, 5 EUR. J. RISK REG. 338, 339 (2014).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Leeuwen, *supra* note 104.

110. *Id.*

111. *Id.*

112. *Id.* at 339-40; Baylie M. Fry, *A Reasoned Proposition to a Perilous Problem: Creating a Government Agency to Remedy the Emphatic Failure of Notified Bodies in the Medical Device Industry*, 22 WILLAMETTE J. INT’L L. & DISP. RES. 161, 169-70 (2014).

113. See MCGRAW HILL FINANCIAL, STANDARD & POOR’S RATING SERVICES, CODE OF CONDUCT 8, §7.1 (2015), www.maalot.co.il/publications/PAR20160316144028.pdf.

114. *See id.*

115. *See infra* Section II.B.1-2.

116. *See infra* Section II.B.1.

117. *See infra* Section II.B.2.

1. Analysis of Information Made Available to the CRA

The process of coming to the actual rating can be quite complex and challenging.¹¹⁸ Article 8.2. of the EU Regulation on Credit Rating Agencies stipulates that a CRA has to “adopt, implement and enforce adequate measures to ensure that the credit ratings it issues are based on a thorough analysis of all information that is available to it and that is relevant to its analysis according to its rating methodologies.”¹¹⁹ The 2008 IOSCO Code of Conduct Fundamental for CRAs,¹²⁰ as well as the individual codes of conduct adopted by the CRAs, use similar wording.¹²¹ The codes of conduct further specify that the rating analysis and any rating action have to be based upon the criteria, processes, and methodologies established by CRAs.¹²²

Arguably, the requirement that a CRA has to adopt, implement, and enforce adequate measures to ensure that the ratings are based on a thorough analysis of all available and relevant information according to its methodologies is an *obligation de moyen*. CRAs remain free to determine whether the adopted measures are adequate and the analysis is conducted thoroughly. That is because it would be difficult to establish when exactly the adopted measures would be adequate or if the analysis is thorough. As such, CRAs will apply reasonable care and skill when adopting adequate measures and conducting a thorough analysis. The purpose of Article 8.2. is (merely) to guarantee that ratings are issued after an analysis of relevant and available information, which the CRA has to consider according to its own methodologies. Therefore, CRAs only have to analyze information that is deemed relevant. Basically, CRAs are free to decide which information is relevant and only have to mention the information they will use in their methodologies. The analysis needs to be based on the available information. CRAs can ground their decision to issue a rating on the (financial) information provided by the issuer. Thus, CRAs are not expected to actively look for all existing information, and in case the issuer does not provide sufficient information, they are only required to examine

118. See, e.g., 2009 O.J. (L 302) 12; TECH. COMM. OF THE INT’L ORG. OF SEC. COMM., CODE OF CONDUCT FUNDAMENTAL FOR CREDIT RATING AGENCIES 4, § 1.1 (May 2008), www.iosco.org/library/pubdocs/pdf/IOSCOPD271.pdf; STANDARD & POOR’S RATING SERVICES, *supra* note 113, at 3, § 1.4; FITCH RATINGS, CODE OF CONDUCT, 4, §§ 2.1A, 2.1.3. (Aug. 2014), www.fitchratings.com/web_content/credit_policy/code_of_conduct.pdf [hereinafter IOSCO].

119. 2009 O.J. (L 302) 12-13.

120. TECH. COMM. OF THE INT’L ORG. OF SEC. COMM., *supra* note 118.

121. STANDARD & POOR’S RATING SERVICES, *supra* note 113, at 3, § 1.4.

122. See, e.g., FITCH RATINGS, CODE OF CONDUCT, 4, §§ 2.1A, 2.1.3.

public information on the issuer. Such wording might be difficult to match with an *obligation de résultat*.¹²³

Article 8.2. of the EU Regulation on CRAs further stipulates that CRAs have to adopt all necessary measures so that the information used when assigning a rating is “of sufficient quality and from reliable sources.”¹²⁴ At first sight, this seems an *obligation de résultat* considering that CRAs are required to use “all necessary” measures.¹²⁵ The CRA needs to refrain from issuing a rating if there is a “lack of reliable data or [when] the complexity of the structure of a new type of financial instrument or the quality of information available is not satisfactory or raises serious questions as to whether a credit rating agency can provide a credible credit rating.”¹²⁶ Such an interpretation also follows from the decision by the United States District Court for the Northern District of California in *Anschutz v. Merrill Lynch*.¹²⁷ Fitch and Standard & Poor’s acknowledged the importance to use information of sufficient quality and from accurate and reliable sources.¹²⁸ Both CRAs claimed “[they] would exercise [their] editorial discretion and [would] either refrain from publishing the opinion or withdraw an outstanding credit rating” if they would only possess inadequate information.¹²⁹ The IOSCO Code of Conduct Fundamentals, however, is less clear-cut when stipulating that “[a] CRA should [only] adopt reasonable measures so that the information . . . is of sufficient quality to support a credible rating.”¹³⁰ A similar wording is used in the rating agreements and the individual codes of conduct adopted by CRAs.¹³¹ As such, there seems a discrepancy between the wording in the Regulation on CRAs on the one hand (using “all necessary measures”) and rating agreements, or the IOSCO Code of Conduct Fundamentals (using ‘reasonable measures’) on the other hand.¹³² There are, nonetheless, two arguments why CRAs should only be bound by an *obligation de moyen*. This implies that CRAs only have to apply reasonable and not all measures to ensure the information they use to determine a rating is of sufficient quality and from reliable sources.

First, contractual terms often stipulate that CRAs do not guarantee that the information they receive from the issuer is accurate, complete, correct,

123. RAQUEL GARCÍA ALCUBILLA & JAVIER RUIZ DEL POZO, CREDIT RATING AGENCIES ON THE WATCH LIST: ANALYSIS OF EUROPEAN REGULATION 190 (1ST ed. 2012).

124. See 2009 O.J. (L 302) 13.

125. See *id.*

126. See 2009 O.J. (L 302) 4, 28 (citation omitted).

127. See 785 F. Supp. 2d 799, 809 (N.D. Cal. 2011).

128. *Id.*

129. *Id.* (citation omitted).

130. See TECH. COMM. OF THE INT’L ORG. OF SEC. COMM., *supra* note 118, at 5, § 1.7.

131. See, e.g., FITCH RATINGS, CODE OF CONDUCT, 4, §§ 2.1A, 2.1.7.

132. See TECH. COMM. OF THE INT’L ORG. OF SEC. COMM., *supra* note 118, at 5, § 1.7; see 2009 O.J. (L 302) 13.

or comprehensive.¹³³ Some credit ratings agreements also state that CRAs do not have a duty of due diligence or independent verification of the information given by the issuer.¹³⁴ Fitch's Code of Conduct is clear in this regard when stipulating the CRA relies on the issuer for the accuracy of information and documents to determine the latter's creditworthiness.¹³⁵ Fitch does not fully audit or verify all such information and does not take the responsibility for the appropriateness of the information provided.¹³⁶ The codes of conduct of the other individual CRAs contain similar wording.¹³⁷ Moody's, for instance, "is not an auditor and cannot . . . independently verify or validate information received in the rating process."¹³⁸ "Standard & Poor's relies on the issuer, its accountants, counsel, advisors, and other experts for the accuracy, completeness, and timeliness of the information submitted in connection with [the] rating."¹³⁹ Such provisions seem difficult to align with the obligation of CRAs to adopt "all necessary" measures to safeguard that the information is of sufficient quality and from reliable sources.¹⁴⁰ Therefore, it seems more realistic that CRAs, within the confines of the provisions in contracts or code of conducts, only have to adopt "reasonable measures".¹⁴¹

Second, case law in different jurisdictions can be relied upon to show that CRAs only have to apply reasonable measures to safeguard that information used when assigning a rating is of sufficient quality and from reliable sources.¹⁴² The Australian *Bathurst* case is of particular importance

133. See, e.g., FITCH RATINGS, CODE OF CONDUCT, 4, §§ 2.1A, 2.1.7 ("If the rating or a rating outlook involves a type of structured financial product presenting limited historical data (such as an innovative financial vehicle), Fitch shall disclose, clearly and in prominent place, such limitation.")

134. See in this regard also 2009 O.J. (L 302) 3 ("The level of detail concerning the disclosure of information concerning models should be such as to give adequate information to the users of credit ratings in order to perform their own due diligence when assessing whether to rely or not on those credit ratings.")

135. See, e.g., FITCH RATINGS, CODE OF CONDUCT, 4, §§ 2.1A, 2.1.7.

136. See, e.g., *id.* ("In issuing and maintaining its ratings or rating outlooks, Fitch relies on factual information it receives from issuers and underwriters and from other sources Fitch believes to be credible. Fitch conducts a reasonable investigation of the factual information relied upon by it in accordance with its ratings methodology, and obtains reasonable verification of that information from independent sources, to the extent such sources are available for a given security or in a given jurisdiction . . . Users of Fitch's ratings should understand that neither an enhanced factual investigation nor any third-party verification can ensure that all of the information Fitch relies on in connection with a rating will be accurate and complete.")

137. See MOODY'S INVESTORS SERVICE, CODE OF PROFESSIONAL CONDUCT i; STANDARD & POOR'S RATING SERVICES, *supra* note 113, at 8 §7.1.

138. MOODY'S INVESTORS SERVICE, CODE OF PROFESSIONAL CONDUCT, *supra* note 84.

139. STANDARD & POOR'S RATING SERVICES, *supra* note 113, at 8, §7.1.

140. See 2009 O.J. (L 302) 13.

141. ALCUBILLA & DEL POZO, *supra* note 123, at 190.

142. See, e.g., *Bathurst*, (No 5) [2012] FCA 1200, at ¶ 2979 (Austl.); Cours d'Appel [CA] [Court of Appeal] Brussel, Dec. 8, 2004, Tijdschrift voor Belgisch Handelsrecht-*Revue de droit commercial belge* [TBH-RDC] 2006, 135 (Belg.).

in this regard. The judge held that S&P violated its duty of care towards investors. The rating was not based on reasonable grounds and issued without reasonable care and skill.¹⁴³ One reason why the CRA did not act with reasonable care and skill was because it did not apply reasonable measures to ensure that information was of sufficient quality and from reliable sources. The CRA did not develop its own model for rating the securities but instead relied on the model created by the issuer. S&P also did not consider the model risk when assigning the rating.¹⁴⁴ In addition, S&P adopted a 15% volatility figure which had been provided by ABN Amro. However, S&P could have easily calculated the volatility and would then have realized that the correct figure was around 28%. In essence, S&P used a number of inputs that were incorrect to calculate the rating. This could have been prevented if the CRA had relied on information of sufficient quality and from accurate and reliable sources and not only on information given by the issuer ABN Amro.¹⁴⁵ Reference can also be made to a Belgian case dealing with the liability of information providers.¹⁴⁶ The Court of Appeal in Brussels upheld a lower court decision according to which the issuance of incorrect commercial information does not *ipso facto* lead to the liability of the information provider¹⁴⁷. Rather, there must be “un manque de prudence ou de diligence dans la recherche ou dans la communication de l’information” (own translation: there needs to be a lack of prudence or diligence in the research or communication of the information).¹⁴⁸ Such wording corresponds with the duty to apply reasonable measures instead of displaying all necessary measures to safeguard that the information is of sufficient quality and from reliable sources.¹⁴⁹

2. Using Rigorous, Systematic and Continuous Rating Methodologies

Once all the information is gathered, CRAs proceed with the calculation of the rating based on this information.¹⁵⁰ Article 8.3. of the EU Regulation on CRAs, the IOSCO Code of Conduct Fundamentals,¹⁵¹ and the individual

143. See *id.* at 2437, 2820-2836, 2979 & 3105 (Austl.). See Jan De Bruyne, *Liability of Credit Rating Agencies: Regulatory Changes and Tendencies in Case Law Following the Financial Crisis*, 27(3) I.C.C.L.R. 89 (2016).

144. *Id.* at 2547, 2555-2590.

145. See *Bathurst*, (No 5) [2012] FCA 1200, at ¶¶ 2547, 2611-69 (Austl.).

146. See *Cours d’Appel Brussel*, Dec. 8, 2004, at 135 (Belg.).

147. See *id.*

148. *Id.*

149. See *Cours d’Appel Brussel*, Dec. 8, 2004, at 135 (Belg.).

150. See *infra* Section III.

151. TECH. COMM. OF THE INT’L ORG. OF SEC. COMM., *supra* note 118, at 4, § 1.2.

codes of conduct adopted by the CRAs¹⁵² stipulate CRAs have to use rigorous, systematic, and continuous rating methodologies. This at first sight looks similar to an *obligation de résultat*.¹⁵³ The European Commission, for instance, adopted legislation which clearly defines when methodologies are considered rigorous,¹⁵⁴ systematic,¹⁵⁵ continuous,¹⁵⁶ and based on historical experience.¹⁵⁷ The enactment of such legislation might be an indication that CRAs are bound by an *obligation de résultat* as there are clear standards and requirements that CRAs have to follow.¹⁵⁸ Consequently, there can be a ground for liability once CRAs do not meet these standards, regardless of the efforts they made to achieve them. Similar conclusions are reached in some countries where the liability of CRAs has already been subject of academic debate. In Germany, for example, some qualify a rating agreement as a contract for work (*Werkvertrag*). The contract for work contains a duty for a party to achieve a specific result. The use of rigorous, systematic, and continuous methodologies might be such a specific result.¹⁵⁹

At the same time, however, there are two more important reasons why CRAs are actually bound by an *obligation de moyen*.¹⁶⁰ There will only be grounds for liability when CRAs negligently use rigorous, systematic, and

152. MOODY'S INVESTORS SERVICE, CODE OF PROFESSIONAL CONDUCT, *supra* note 84, at 8.

153. Moreteau, *supra* note 59.

154. See 2012 O.J. (L 140) 15 (a rigorous methodology (1) "contain[s] clear and robust controls and processes for their developments and related approvals that allow suitable challenge;" (2) "incorporate[s] all driving factors deemed relevant in determining [the] creditworthiness of a rated entity or a financial instrument [and is] supported by statistical, historical experience or evidence;" (3) "consider[s] the modelled relationship between rated entities or financial instruments of the same risk factor and risk factors to which the credit rating methodologies are sensitive;" and (4) "incorporate[s] reliable, relevant[,] and quality related analytical models, key credit rating assumptions and criteria where these are in place.").

155. See *id.* (the methodology is considered systematic if (1) it can be "applied systematically in the formulation of all ratings in a given asset class or market segment unless there is an objective reason for diverging from it[;]" and (2) if it "is capable of promptly incorporating the findings from any review of its appropriateness.").

156. See *id.* (the methodology is continuous if it is "designed and implemented in such a way that enables [it] to:" (1) "be used unless there is an objective reason for the rating methodology to change or be discontinued;" (2) "be capable of promptly incorporating any finding from ongoing monitoring or a review, in particular where changes in structural macroeconomic or financial market conditions would be capable of affecting credit ratings produced by that methodology;" and (3) "compare ratings across different asset classes.").

157. See 2012 O.J. (L 140) 16 (the rating methodology will be "subject to validation based on historical experience including back testing" if it is, for example, "supported by quantitative evidence of the discriminatory power of the credit rating methodology.").

158. See 2012 O.J. (L 140) 15, 16.

159. Alessandro Scarso, *The Liability of Credit Rating Agencies in a Comparative Perspective*, 4 JOURNAL OF EUROPEAN TORT LAW 163, 166, n.10, (2013) (with references to academic scholarship).

160. See Norbert Gaillard, *La Responsabilité Éthique des Agenciers de Notation*, 124 TRANSVERSALITÉS, 53, 66-67 (2012).

continuous methodologies.¹⁶¹ The question whether or not methodologies are rigorous, systematic, and continuous is determined by the behavior of the CRAs.¹⁶² Put differently, the conduct of CRAs makes rating methodologies unacceptable.

First, the judge in the *Bathurst* case held that the CRA did not use rigorous, systematic, and continuous methodologies because of the lack of reasonable grounds to assign the rating. The rating was not the result of the CRA's reasonable care and skill.¹⁶³ S&P did not develop its own model for rating CPDOs, but instead, relied on the model created by ABN Amro. The CRA also did not give any consideration to the model risk when assigning the credit rating.¹⁶⁴ S&P adopted a 15% volatility figure which had been provided by ABN Amro. There was no evidence S&P checked the 15% volatility figure itself. Nonetheless, S&P could have easily calculated the volatility and would then have realized the correct figure was around 28%. A reasonable and prudent CRA would have done its own calculations and surely not have adopted a volatility figure of 15%.¹⁶⁵ The notes were a newly created product issued in a new market. Consequently, there was no reliable historical data concerning the intended performance of the notes. S&P therefore had to conduct a particularly rigorous and conservative assessment of the available data. The court agreed with the plaintiffs that S&P did not undertake such an analysis. Rather, the CRA "adopted inputs for its model advocated by ABN Amro for which there was no reasonable historical or statistical basis."¹⁶⁶

The second reason concerns the actual process of calculating the rating, which *in fine* remains the result of "une appréciation humaine".¹⁶⁷ This also corresponds with the wording used in the EU Regulation on CRAs, which stipulates that the business of rating involves a degree of assessment of complex economic factors.¹⁶⁸ CRAs have a degree of discretion to determine whether their methodologies are rigorous, systematic, and continuous.¹⁶⁹ The use of different methodologies can lead to different

161. See 2012 O.J. (L 140) 15, 16.

162. See 2012 O.J. (L 140) 15 ("When examining the compliance of credit rating agencies with the provision of Article 8(3) of Regulation (EC) No 1060/2009 ESMA shall use all information relevant to assess the process of developing, approving, using and reviewing credit rating methodologies.").

163. *Id.* at 1157-67 ¶¶ 2814-36; *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCA 65 (November 5, 2012) ¶¶ 12, 503, 722 (Austl.)

164. *Id.* at ¶¶ 2547, 2555-89.

165. *Bathurst*, [2012] FCA 1200, at ¶ 2611-69.

166. *Bathurst Regional Council v Local Government Financial Services Pty Ltd* [2012] FCA 5 (05 November 2012) 1200, paragraphs 2423 & 2836 (Austl); *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 (06 June 2014) paragraphs 12, 566-722 (Austl).

167. Edith Weemaels, *La Responsabilité des Agences de Notation des Sociétés Responsables Comme les Autres?*, N 7069 PRIX DE LA REVUE PRATIQUE DES SOCIÉTÉS 123, 154 (2011).

168. 2013 O.J. (L 146) 8.

169. 2013 O.J. (L 146) 6-7.

ratings, none of which might actually be considered incorrect.¹⁷⁰ CRAs will not violate the obligation to use rigorous, systematic, and continuous methodologies merely because it would later turn out the rating does not truly reflect the issuer's creditworthiness.¹⁷¹ This is only the case when the incorrect rating is the result of a CRA's wrongful behavior, for example because it used a rating methodology that no reasonable and competent CRA would ever use.¹⁷² One might also refer to case law dealing with the liability of issuers under Section 11 & 12 of the 1933 United States Securities Act.¹⁷³ Issuers will not face prospectus liability when reporting honest ratings that later turn out to be inaccurate or merely because the CRA could have formed "better opinions" (internal quotation marks omitted).¹⁷⁴ The mere fact that ratings would have been different by using another methodology is insufficient to state a claim against the issuer.¹⁷⁵ Ratings cannot be false merely because CRAs should have used better or other rating methods or data.¹⁷⁶

C. Obligations of Classification Societies Before Issuing the Certificate

Similar to CRAs, classification societies have to perform surveys before issuing a certificate. In their private role, they conduct surveys to examine whether the vessel's condition complies with the approved plans and class rules. In their public role, they act on behalf of flag States and attest whether a vessel complies with (inter)national safety standards. Class surveys have to be carried out according to the technical requirements laid down in the class rules or in the applicable legislation.¹⁷⁷ Classification societies perform periodical and non-periodical surveys of the vessel's hull and machinery. Periodical surveys include the class renewal/special survey,¹⁷⁸ the intermediate survey,¹⁷⁹ the annual survey¹⁸⁰ and (specific) bottom/docking surveys of the hull or boiler and machinery surveys.¹⁸¹

170. 2013 O.J. (L 146) 8.

171. *See* 2013 O.J. L 146 6-8.

172. 2013 O.J. (L 146) 8; Wymeersch & Kruithof, *supra* note 17, at 20.

173. United States Securities Act of 1933, Title I of Pub. L. 73-22, 48 Stat. 74, enacted on May 27, 1933, codified at 15 U.S.C. § 77k(a) (2006).

174. *Plumbers' Union v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 775 (1st Cir. 2011); *Plumbers' Union v. Nomura Asset Acceptance Corp.*, 658 F. Supp. 2d 299, 301-303, 309-310 (D. Mass. 2009).

175. *Plumbers' Union II*, 632 F.3d at 775.

176. *Id.* at 774-76; *Boilermakers Nat. Annuity Trust v. Wamu Mortg.*, 748 F. Supp. 2d 1246, 1256 (W.D. Wash. 2010).

177. INTERNATIONAL ASSOCIATION OF CLASSIFICATION SOCIETIES (IACS), CLASSIFICATION SOCIETIES WHAT, WHY AND HOW? 5-6 (2011).

178. IACS holds the class renewal/special survey every 5 years. It includes extensive in and out-of-water examinations to verify that the vessel's structure, the main and essential auxiliary machinery or

Class certificates do, however, not imply and cannot be construed as a warranty of safety and fitness of the vessel.¹⁸² In other words, the certificate does not guarantee the ship's seaworthiness.¹⁸³ It merely is an attestation that the vessel complies with the class rules.¹⁸⁴ Class rules do not cover every piece of structure or item.¹⁸⁵ Instead, they contain a certain standard of safety which has to be state-of-the-art.¹⁸⁶ Classification societies, therefore, do not guarantee that a vessel is absolutely safe or suitable for its intended services.¹⁸⁷ The aim of classification and certification services is to ascertain that a certain vessel or particular item is state-of-the-art at the time of the survey.¹⁸⁸ Against this background, scholars conclude that classification societies have to perform the surveys with care, without guaranteeing a particular result or completion of specific work (e.g. safeguarding the seaworthiness of the vessel).¹⁸⁹ Such a conception also corresponds with the wording used in class rules or agreements.¹⁹⁰ Classification societies perform their "pre-issuance" obligations carefully by using the normally applied testing standards, procedures and techniques for the purpose of assigning and maintaining class.¹⁹¹

systems and the equipment remain in a condition that comply with the class rules. *Id.* at 6. The special survey involves a thorough analysis of all parts of the ship covered by the class rules. "Instead of a time-consuming special survey once in five years, the shipowner may opt for a [c]ontinuous [s]urvey in which not all the check-ups are conducted simultaneously . . . [E]ach and every part is surveyed at times favourable to the schedule of the ship. Nonetheless, all parts covered by the classification must be checked at least once in five years." LAGONI, *supra* note 19, at 47.

179. The intermediate survey is held approximately half way between two special surveys. The survey aims to determine whether the vessel remains in a general condition which satisfies class rules. IACS, *supra* note 177, at 6.

180. The ship is also examined during an annual survey. Such a survey includes an external and general inspection of the hull, equipment and machinery to establish whether the vessel's general condition still satisfies the requirements contained in the class rules. *See* LAGONI, *supra* note 19, 47; IACS, *supra* note 177, at 6.

181. IACS, *supra* note 177, at 5; Miller, *supra* note 21, at 80-81.

182. IACS, *supra* note 177, at 3.

183. *Id.*

184. *Id.*

185. *Id.* at 5.

186. LAGONI, *supra* note 19, at 48

187. IACS, *supra* note 177, at 3.

188. LAGONI, *supra* note 19, at 48.

189. *See, e.g.,* Antapassis, *supra* note 27, at 16.

190. IACS, *supra* note 177, at 3.

191. According to the terms and conditions of American Bureau of Shipping (ABS), the society only represents to the shipowner that when assigning class, it uses "normally applied testing standards, procedures, and techniques" as called for by the rules, standards or other criteria of ABS for the purpose of assigning and maintaining class.

AM. BUREAU OF SHIPPING (ABS), RULES FOR CONDITIONS OF CLASSIFICATION 2016, Part 1, ch. 1, §1, R. 5. Article 5 of the Bureau Veritas Rules for the Classification of Steel Ships stipulates that the "Society acts as a provider of services. This cannot be construed as an obligation bearing on the Society to obtain a result or as a warranty" BUREAU VERITAS, RULES FOR THE CLASSIFICATION OF STEEL SHIPS, art. 5.1 (July 2013).

Thus, class surveys leading to the certificate qualify as *obligations de moyen*. There will not be a ground for liability merely because a classed vessel sinks but only when the classification society did not carefully perform the surveys. This has also been affirmed by decisions dealing with the nature of the contractual obligations of classification societies in different jurisdictions; for instance, courts in Belgium have accepted that a classification society is only obliged to apply the normally required diligence during the surveys, without necessarily being required to achieve a specific anticipated result.¹⁹² With some exceptions,¹⁹³ courts in France have also ruled that classification societies commit themselves to an “obligation de diligence” when performing surveys.¹⁹⁴ Finally, several cases dealing with the contractual liability of classification societies under US law also held that classification societies are only required to exercise due care in reviewing the design and surveying the vessel’s construction before issuing the certificate.¹⁹⁵ The court in the *Great American* case held that a society has to perform two duties with due care towards “its clientele.”¹⁹⁶ The first duty is to survey and classify vessels in accordance with class rules and standards.¹⁹⁷ However, the court immediately stressed that a breach of this duty cannot lead to recovery for the plaintiff.¹⁹⁸ This “bar stems from the long-standing policy or rule that the owner of a ship has a non-delegable duty to maintain a seaworthy vessel.”¹⁹⁹ The second duty is one of due care in the detection of defects in ships and the notification thereof to the owner.²⁰⁰ A society is required to notify the shipowners of any defect if these are not yet known or apparent.²⁰¹

192. Tribunal de Première Instance [TPI] [Tribunal of First Instance] Dendermonde, civ., Jan. 11, 1973 as reported in JURISPRUDENCE ANVERS 127 at 128 (Fr.); Commercial Court Antwerp, Sept. 20, 2006, no. A/02/04109 (unpublished); Court of Appeal Antwerpen, Feb. 18, 2013 as reported in NIEUW JURIDISCH WEEKBLAD 659 (2013).

193. Cours d’appel [CA][regional court of appeal] Versailles, civ., Mar. 21, 1996, DROIT MARITIME FRANÇAIS 721.

194. Cours d’appel [CA][regional court of appeal], Paris, civ. Dec. 12, 1972, DROIT MARITIME FRANÇAIS; Cours commercial [civ.][commercial court] Le Havre, August 25, 1978, DROIT MARITIME FRANÇAIS 103 (1979).

195. *Continental Ins. Co. v. Daewoo Shipbuilding*, 707 F. Supp. 123, 123-24 (S.D.N.Y. 1988).

196. *Great Am. Ins. Co. v. Bureau Veritas*, 338 F. Supp. 999, 1011 (S.D.N.Y. 1972).

197. *Id.* at 1011-12.

198. *Id.* at 1012.

199. *Id.*

200. *Id.*

201. *Great Am. Ins. Co.*, at F. Supp. at 1013; see also Miller, *supra* note 21, at 90.

D. Obligations of Product Certifiers and Notified Bodies Before Issuing the Certificate

Third-party certifiers inspect the product or related information before issuing the certificate.²⁰² Certifiers often stipulate in the contracts or terms and conditions that they only perform their certification services carefully or diligently.²⁰³ The SGS conditions for certification services, for example, specify that the certifier provides certification services using “reasonable care and skill.”²⁰⁴ Similarly, the general conditions of certification of Bureau Veritas stipulate that the certifier has to provide the services and deliver the certificate with reasonable care, skill, and diligence as can be expected from a competent body experienced in the certification industry.²⁰⁵ Bureau Veritas does not owe any specific success but only the performance of certification services.²⁰⁶

Product certifiers are very clear in the (contractual) terms and conditions on this point; several cases have come to similar conclusions.²⁰⁷ In the United States, for instance, the Court for the Southern District of New York concluded in *Vitol Trading v. SGS* that inspectors are not insurers of their work.²⁰⁸ Therefore, they cannot “be held liable solely on the basis of an undesirable or incorrect outcome.”²⁰⁹ The third-party certifier has to inspect the product with the due care and skill that a reasonably prudent tester would have used under the same circumstances.²¹⁰ The liability of product certifiers has also been a stake in civil law jurisdictions such as Belgium; for example, the Antwerp Court of Appeal vacated a first instance decision, when deciding that “aucune obligation de résultat ne pèse sur l’organisme de contrôle [. . .] mais seulement une obligation de moyens.”²¹¹ Inspections have to be performed in a skillful and workman-like way and

202. AM. NAT’L STANDARDS INST., *supra* note 1.

203. *See, e.g., General Conditions of Service, supra* note 44.

204. *See SGS General Conditions of Service*, SGS Article 2(a) (Oct. 9, 2007), <https://www.sgs.com/-/media/global/documents/technical-documents/legal-documents/sgs-legal-general-conditions-of-services-a4-en-14-11.pdf?la=en>.

205. *General Terms and Conditions for Certification Services*, BUREAU VERITAS Article 6.1 (Jan. 2, 2017),

<http://www.bureauveritas.com.co/1884447e-8dcc-4bdc-8394-292ed3d22765/General+Conditions+of+Services+UKAS+%281%29.pdf?MOD=AJPERES>.

206. *Id.* at art. 7.2.

207. *See e.g., id.* at art. 2.1; *Vitol Trading SA Inc. v. SGS Control Services Inc.*, 680 F. Supp. at 559, 567 (1987), *rev’d*, 874 F.2d 76 (2d Cir. 1989).

208. *Id.*

209. *Id.*

210. *Id.* In the *Interore* case, the Court of Appeals for the Second Circuit held that SGS only had to carry out the inspection of a vessel with reasonable care. *Int’l Ore & Fertilizer Corp. v. SGS Control Services, Inc.*, 38 F.3d 1279, 1284 (2d Cir. 1994).

211. *See* Tribunal de Première Instance [Tribunal of First Instance], *civ.*, Antwerpen, Feb. 24, 2010 (unpublished).

aimed to detect shortcomings in the product.²¹² The certifier has to safeguard that it correctly performs its inspection and control duties (*obligation de moyen*) but cannot guarantee that it will discover any concealed damage in the product (*obligation de résultat*).²¹³ The French Cour de Cassation reached a similar conclusion when a consumer purchased a television which had been certified by the *Association Française de Normalisation* (AFNOR).²¹⁴ The television broke shortly after and the plaintiff claimed recovery from the certifier.²¹⁵ The plaintiff argued that the AFNOR certification was a guarantee of the quality and safety of the product.²¹⁶ The judges in the first instance court and on appeal followed this line of reasoning.²¹⁷ The Supreme Court, however, vacated the decision.²¹⁸ AFNOR did not guarantee the product would be free of defects merely by attaching its certificate.²¹⁹

Things are similar for notified bodies during the conformity assessment procedure of medical devices.²²⁰ It has already been mentioned that the conformity assessment procedure sometimes requires the involvement of a notified body.²²¹ In this regard, EU Recommendation 2013/473 on audits and assessments performed by notified bodies stipulates the latter should apply “special care” when examining the design, manufacture, and packaging of medical devices.²²² Although the notion of special care remains unclear, it might point towards an *obligation de moyen* during the first stage of the certification process.²²³ Such a finding also corresponds with the opinion of Advocate General Sharpston of the European Court of Justice (ECJ) in the PIP breast implant case. TÜV Rheinland was involved as a notified body in the conformity assessment procedure of the breast implants. Considering that claims against PIP were fruitless as the company went bankrupt in 2010, the plaintiffs had to find other targets against whom to claim compensation for their physical harm or the financial losses.²²⁴

212. Cour d’appel [Civ.][Court of Appeal] Antwerpen, Sept. 17, 2013 as reported in TIJDSCHRIFT VOOR BELGISCH HANDELSRECHT-REVUE DE DROIT COMMERCIAL 550-51.

213. *Id.*

214. Cour de cassation [Cass.][Supreme Court for Judicial Matters] 1e civ., Oct. 2, 2007, Bull. Civ. I, No. 315 (Fr.).

215. *Id.*

216. *See id.*

217. *See id.*

218. *Id.*

219. Cour de cassation [Cass.][Supreme Court for Judicial Matters] 1e civ., Oct. 2, 2007, Bull. Civ. I, No. 315.

220. 2013 O.J. (L. 253) 27.

221. *Id.* at 29.

222. *Id.*

223. *See id.*

224. van Leeuwen, *supra* note 104, at 345-46.

Therefore, a group of distributors and women brought a case against TÜV before courts in Germany and France. Because of the public importance of this case and the fact that a number of German courts were dealing with the same issues, the *Oberlandesgericht* (OLG) in Zweibrücken gave permission to appeal to the German *Bundesgerichtshof* (BGH). On April 9, 2015, the BGH referred three questions on the interpretation of the MDD to the European Court of Justice (ECJ).²²⁵

Advocate General Sharpston of the ECJ concluded that Annex II to the MDD dealing with the EC Declaration of Conformity²²⁶ should be interpreted as meaning that, in the case of class III medical devices, the body responsible for auditing the quality system, examining the design of the product and surveillance is under a “duty to act with all due care and diligence.” That duty will require it to exercise the powers available to it under the Annex to determine whether its certification of the device in question may stand.²²⁷ The judgement by the ECJ comes to a similar conclusion. Notified bodies must be given an appropriate degree of discretion in view of the stringent requirements they must satisfy under the applicable legislation regarding their independence and scientific expertise.²²⁸ A notified body is not under a general obligation to carry out unannounced inspections, to examine devices, and/or to examine the manufacturer’s business records.²²⁹ However, they have to act with all due diligence when determining whether the certification may be maintained.²³⁰ The French *Tribunal de Commerce* in Toulon held that TÜV negligently performed its obligations of control/inspection, care, and vigilance.²³¹ The certifier, for instance, did not carry out a sufficiently rigorous review of PIP’s financial accounts. Such a review would have revealed the

225. BGH, April, 9, 2015 - VII ZR 36/14.

226. The EC declaration of conformity is the written statement and the declaration drawn up by the manufacturer to demonstrate the fulfilment of the EU requirements relating to a product bearing the CE marking he has manufactured. See also *What is the EU/EC Declaration of Conformity for CE Marking?*, CE-MARKING (Aug. 2008), <http://www.ce-marking.com/required-content-for-CE-marking-EC-declaration-of-conformity.html>.

227. Case C-219/15, Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH, [2016] E.C.R. para. 61(2).

228. Case C-219/15, Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH, [2017] E.C.R. para. 45.

229. *Id.* at para. 48.

230. *Id.* at paras. 38-48. One could argue that the use of “all due diligence” comes close to an *obligation de résultat* (‘statement of the rule’). Yet, when looking at the actual rationale and context of the ECJ in coming to that conclusion (e.g. degree of discretion given to notified bodies), I believe the ECJ actually means that a notified body is bound by an *obligation de moyen* (‘holding of the case’).

231. Commercial Court Toulon, November 14, 2013, n° RG 2011F00517, n° 2013F00567, 144.

abnormalities with regard to the amount of gel bought and the volume of PIP's production.²³²

TüV Rheinland appealed the decision. The notified body claimed that it complied with the applicable requirements. TüV maintained it was only responsible for controlling the design and the quality system and not the actual implants. The certifier also argued that it had been systematically deceived by PIP, and that PIP had presented false documents. TüV did not have sufficient powers under the MDD to take further actions to unmask the fraud. The *Cour d'Appel* d'Aix-en-Provence followed this reasoning and reversed the first instance decision, which it held to be unfounded. The court concluded that TüV Rheinland complied with its obligations under supranational law. TüV only had an obligation to examine the technical file and not the device itself. There were no elements in the file that should have warned the body that approved silicone products were replaced by other non-approved products. Consequently, it was not at fault and, therefore, not liable.²³³

Claims against TüV were also initiated before German courts. A brief analysis of some of the arguments used in the decisions shows that notified bodies have to apply reasonable care in this stage of the certification process. Imposing an *obligation de résultat* would, for instance, be challenging considering that the *Oberlandesgericht* in Zweibrücken held that certificates issued by notified bodies only constitute a building block (*Baustein*) for manufacturers to show they complied with the requirements in the MDD.²³⁴ The objective of the MDD is to protect patients who come into contact with medical devices. The MDD stipulates that devices should provide patients and users with a high level of protection and should attain

232. *Id.* at 142-43. The commercial court ordered TüV Rheinland to pay a provisional compensation of 3,000 euro per person to approximately 1,700 patients. The immediate and provisional character of the compensation was upheld and confirmed by the *Cour d'Appel* of Aix-En-Provence on 21 January 2014 (Court of Appeal Aix-en-Provence, January, 21, 2014, no. 13/00690). See also van Leeuwen, *supra* note 104, at 345-46.

233. Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482, 109, 113 & 119 (“Contrairement à ce que prétendent les appelantes personnes physiques, les intimés et intervenantes, il résulte de la directive que lors de l’examen de la demande, l’organisme notifié n’avait pour obligation que d’examiner le dossier technique qui lui était soumis. Aucun élément ne pouvait laisser suspecter que le gel Nusil avait été remplacé par un gel non approuvé [. . .] La société AM a donc respecté les dispositions de la directive dans le cadre de la certification”). The case has been reported in several (online) journals and other sources: T. Klein, *French Court Repeals Conviction against TÜV Rheinland in PIP Case*, EUROPEAN MEDICAL DEVICE TECHNOLOGY, REGULATORY AND COMPLIANCE, July 2, 2015; QMed, “Inspecting Company Wins Appeal in French Breast Implants Scandal”, July 2, 2015, available at <www.qmed.com/news/inspecting-company-wins-appeal-french-breast-implants-scandal>.

234. van Leeuwen, *supra* note 104, at 344-45.

the performance attributed to them by the manufacturer.²³⁵ The OLG Zweibrücken, however, concluded that the MDD did not impose any statutory obligation on the notified body to intervene in order to protect all patients that might come into contact with medical devices. The purpose and aim (*Sinn und Zweck*) of the certification is not to protect third parties. It is only a prerequisite for the manufacturer to distribute the implants on the EU market. The certificate is an indication for the national authorities that the standards of care have been observed by the responsible parties without, however, relieving them of their responsibility.²³⁶

III. SECOND STAGE OF THE CERTIFICATION PROCESS: ISSUING AN INDEPENDENT CERTIFICATE

Based on the assessment of the item or related information, the certifier subsequently issues an independent certificate. This is the second stage of the certification process. Two important aspects related to a certifier's independence need some elaboration. On the one hand, (A) certifiers generally stress that the certificate is actually nothing more than an opinion. It should and cannot be used for any transactions. The certificate merely attests that the certified item complies with the applicable requirements, nothing more and nothing less. This illustrates the “restricted value” of certificates in the sense that there will not automatically be grounds for liability merely because the certificate does not correspond with the “real value” of the certified item.

On the other hand, and despite the “restricted value” of certificates, (B) there are different moments in this stage where certifiers might face

235. Recital (5) Directive 93/42/EEC concerning medical devices. In this regard, the recently adopted MDR aims to establish a robust, transparent, predictable and sustainable regulatory framework for medical devices ensuring a high degree of safety and health (Recital (1) Regulation 2017/745 on medical devices).

236. Court of Appeal Zweibrücken [OLG], January 30, 2014, 4 U 66/13, Part II, 1. b) (Ger.); W. Rehmann & D. Heimhalt, *Medical devices: liability of notified bodies?*, TAYLORWESSING, (May 2015), www.taylorwessing.com/synapse/may15.html. The ECJ, however, held that the aim of the MDD is not only the protection of health but also the safety of persons. The Directive does not only affect patients and users of devices but also ‘third parties’ and ‘other persons’. The actual aim of the MDD is to protect end users of medical devices. To that end, the MDD does not only impose obligations on the manufacturer of the device but also on Member States and notified bodies. With regard to the involvement of the notified body in the procedure relating to the EC Declaration of Conformity, it is apparent from the wording and overall scheme of the MDD that the purpose of that procedure is to ensure protection for the health and safety of persons C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, [2017], paras. 50-53. At the same time, however, it does not necessarily follow from the fact that the MDD imposes surveillance obligations on certain bodies or the fact that one of its objectives is to protect injured parties that the Directive also seeks to confer rights on such parties in the event that those bodies fail to fulfil their obligations. The ECJ eventually concluded that the conditions under which a notified body's culpable failure to fulfil its obligations under the procedure relating to the EC Declaration of Conformity may give rise to its liability vis-à-vis the end users of medical devices are governed by national law, subject to the principles of equivalence and effectiveness. *Id.* at paras. 55, 59.

liability. Certifiers are obviously required to issue the certificate for which they are paid. They will violate their obligations during the second stage when they do not issue the certificate or do so with a delay. This is an *obligation de résultat*. More importantly, certifiers have to remain independent towards the requesting entity. Clear and strict requirements exist on a certifier's independence. This obligation also qualifies as an *obligation de résultat*. As such, there can be potential grounds for liability when the third-party certifier did not issue an independent certificate, regardless of the question whether it acted carefully or not when issuing the certificate.²³⁷

A. 'Restricted Value' of Certificates & Obligations of Requesting Entities

Certificates issued by CRAs, classification societies, product certifiers, and notified bodies can serve as examples to illustrate the "restricted value" of certificates. At the same time, the analysis shows that requesting entities remain responsible for the quality and safety of the certified item. Rating contracts/reports, for instance, stress that ratings are mere opinions and not verifiable statements of facts.²³⁸ Ratings are not recommendations to buy, hold, or sell any securities.²³⁹ They do not comment on the adequacy of the market price or the suitability of an investment.²⁴⁰ As such, CRAs do not act as investment, financial, or other advisor of the issuer or any other recipient of the rating.²⁴¹ Fitch's Code of Conduct stipulates that a contract does not create a fiduciary relationship²⁴² between the CRA and the issuer

237. See *supra* Section III.B. A certifier's requirement to remain independent can be of importance in each of the three stages. In the third stage, the certifier has to independently analyze and investigate the information. Nevertheless, I have decided to categorize it in a second stage for several reasons. The certifier has to cooperate with the requesting entity in the first and third stage of the certification process when gathering the required or updated information. Based on this information, the certifier then "retrieves" to determine the certificate in an independent way. Moreover, the reader might get a better understanding on the different obligations of certifiers when dividing the certification process into three categories, one of which is the issuance of a certificate in an independent way.

238. See e.g. Wymeersch & Kruithof, *supra* note 17, at 42-43.

239. STANDARD & POOR'S RATING SERVICES, GUIDE TO CREDIT RATING ESSENTIALS 2 (2014), https://www.spratings.com/documents/20184/760102/SPRS_Understanding-Ratings_GRE.pdf/298e606f-ce5b-4ece-9076-66810cd9b6aa.

240. *Id.* at 15.

241. *Id.* at 17.

242. See Legal Information Institute, *Fiduciary Duty*, CORNELL LAW SCHOOL (July 2016), www.law.cornell.edu/wex/fiduciary_duty (discussing that a fiduciary duty is essentially a legal duty to act solely in another party's interests. Parties owing such a duty are fiduciaries. The individuals to whom they owe a duty are principals. Fiduciaries may not profit from their relationship with their principals unless they have the principals' express informed consent. They also have a duty to avoid any conflicts of interest between themselves and their principals or between their principals and the fiduciaries' other clients.).

or any other person using the rating.²⁴³ The same cautionary wording is used in the IOSCO Code of Conduct Fundamentals²⁴⁴ as well as in the individual codes of conduct of each CRA.²⁴⁵

A similar picture emerges when taking a look at classification societies. Once all surveys have been done and the classification society decides the vessel's construction complies with the applicable class rules, it assigns a class to the vessel and issues a certificate accordingly.²⁴⁶ The certificate states that the vessel has been assigned a certain class and class notation.²⁴⁷ In other words, it indicates "what has been, or according to the rules should have been, analyzed and surveyed. It does not give any further information."²⁴⁸

Class certificates, however, have their limitations, as the shipowner remains responsible for the seaworthiness of his vessel.²⁴⁹ The issuance of a certificate of class does not relieve the shipowner of his/her non-delegable duty to maintain the ship in a seaworthy condition.²⁵⁰ Even though class certificates might constitute evidence of seaworthiness,²⁵¹ they do not

243. FITCH RATINGS, CODE OF CONDUCT, 17, § 4.5.

244. TECH. COMM. OF THE INT'L ORG. OF SEC. COMM., *supra* note 118 at 3.

245. Moody's Code of Professional Conduct stipulates that "MIS is in no way providing a guarantee with regard to the accuracy, timeliness, or completeness of factual information reflected, or contained, in the Credit Rating or any related MIS publication." MOODY'S INVESTORS SERVICE, CODE OF PROFESSIONAL CONDUCT, *supra* note 84, at 7. Paragraph 7.2 in the S&P's Code of Conduct indicates that "ratings do not constitute investment, financial, or other advice . . . Credit Ratings do not comment on the suitability of an investment for a particular investor and should not be relied on when making any investment decision . . . Credit Ratings are not verifiable statements of fact." *Id.* at 8.

246. IACS, *supra* note 177, at 3.

247. Classification notations indicate the specific rule requirements that have been met. Additional voluntary notations are offered by individual societies to demonstrate that the vessel conforms to a particular standard. IACS, *supra* note 177, at 10; THOMAS J. PAGONIS, CHARTERING PRACTICE HANDBOOK 83 (5th ed. 2009); LAGONI, *supra* note 19, at 6. In addition, each classification society developed class notations or symbols that may be granted to a ship to indicate that it complies with voluntary criteria. IACS, *supra* note 177, at 11.

248. LAGONI, *supra* note 19, at 49.

249. *See* IACS, *supra* note 177, at 3.

250. *See also* ABS, *supra* note 191 (stipulating that "Nothing contained in any certificate . . . is to be deemed to relieve any designer . . . Owner, manufacturer . . . insurer or other . . . person of any duty to inspect [the vessel] or any other [contractual] duty. ABS, *supra* note 191. The certificate attests only that at the time of survey, the vessel covered by a certificate complied with the applicable requirements and standards in class rules. *Id.* The classification society is not an insurer or guarantor of the integrity or safety of a vessel or of any of its equipment or machinery. *Id.* The Rules of ABS are not meant as a substitute for the independent judgment of professional designers or shipowner. *Id.*

251. Hannu Honka, *The Classification System and Its Problems with Special Reference to the Liability of Classification Societies*, 19 TUL. MAR. L.J. 1, 3 (1994); *see, e.g.*, Tribunal de Premiere Instance [Civ.] [Tribunal of First Instance] Termonde, 4e ch. Jan. 11, 1093, RECHTSPRAAK VAN DE HAVEN VAN ANTWERPEN [RABG] 1973, 127 (Belg.); Cour D'Appel [Civ.] [Court of Appeals] D'Anvers, 4e ch. May 10, 1994, RECHTSPRAAK VAN DE HAVEN VAN ANTWERPEN [RABG] 1995, 301 (Belg.).

“warrant the seaworthiness of a vessel.”²⁵² It is merely a representation that the vessel complied with the class rules at the time of the construction or the latest survey.²⁵³ Class certificates do “not imply, and should not be construed as, a warranty of safety, fitness for purpose or seaworthiness of the ship.”²⁵⁴ “Classification societies are not guarantors of safety of life or property at sea or the seaworthiness of a vessel.”²⁵⁵ They have no control regarding the way “a vessel is manned, operated and maintained between the periodical [class] surveys[.]”²⁵⁶ Several court decisions also established that the shipowner has the duty to ensure the vessel is seaworthy.²⁵⁷ This is an obligation that cannot be delegated to classification societies.²⁵⁸

Several examples show that certificates issued by third-party product certifiers are no exception to the rule.²⁵⁹ For instance, the Intertek terms and conditions stipulate that the certifier merely tests and evaluates the submitted product samples and service without guaranteeing their quality.²⁶⁰ Similarly, the terms and conditions of business of TÜV Rheinland specify there is no assumption of any guarantee of correctness, quality, or working

252. B.D. Daniel, *Potential Liability of Marine Classification Societies to Non-Contracting Parties*, 19 U.S.F. MAR. L.J. 183, 196 (2006).

253. *Id.*

254. IACS, *supra* note 177, at 3.

255. *Id.*

256. *Id.*

257. *Sundance Cruises Corp. v. Am. Bureau of Shipping*, 799 F. Supp. 363, 384 (S.D. N.Y. 1992), *aff'd*, 7 F.3d 1007 (2d Cir. 1994).

258. *See, e.g., Great Am. Ins. Co.*, 338 F. Supp. at 1015; *Sundance Cruises Corp.*, 799 F. Supp. at 384; Cour D’Appel [Civ.] [Court of Appeals] D’Anvers, February 14, 1995, RECHTSPRAAK HAVEN VAN ANTWERPEN, 325 (Belg.); Cour D’Appel [Civ.] [Court of Appeals] D’Anvers, 4e ch. May 10, 1994, RECHTSPRAAK VAN DE HAVEN VAN ANTWERPEN [RABG] 1995, 301 (Belg.); Commercial Court Antwerp, September 20, 2006, A/02/04109 (unpublished); Court of Appeal Antwerpen, February 18, 2013 as reported in NIEUW JURIDISCH WEEKBLAD 659 (2013).

259. INTERTEK TESTING SERVICES, CERTIFICATION AGREEMENT FOR U.S. FEDERAL COMMUNICATION COMMISSION TELECOMMUNICATIONS CERTIFICATION BODY PROGRAM § 2.1 (Sept. 12, 2012); *General Terms and Conditions of Business of TÜV Rheinland Industrie Service GmbH*, TÜV RHEINLAND (Nov. 2012),

www.tuv.com/media/germany/10_industrialservices/agbs/TIS-AGB_Stand_November_2012-Englisch_TUV-Rheinland.pdf (§ 4.4) [hereinafter *General Terms*]; STEELWORK COMPLIANCE AUSTRALIA, NATIONAL STEELWORK COMPLIANCE SCHEME LICENSING AGREEMENT FOR THE USE OF CERTIFICATE OF CONFORMITY AND CERTIFICATION MARK art. 3.3 (Aug. 2014).

260. INTERTEK TESTING SERVICES, CERTIFICATION AGREEMENT FOR U.S. FEDERAL COMMUNICATION COMMISSION TELECOMMUNICATIONS CERTIFICATION BODY PROGRAM § 2.1 (Sept. 12, 2012); *General Terms and Conditions of Business of TÜV Rheinland Industrie Service GmbH*, TÜV RHEINLAND (Nov. 2012),

www.tuv.com/media/germany/10_industrialservices/agbs/TIS-AGB_Stand_November_2012-Englisch_TUV-Rheinland.pdf (§ 4.4) [hereinafter *General Terms*]; STEELWORK COMPLIANCE AUSTRALIA, NATIONAL STEELWORK COMPLIANCE SCHEME LICENSING AGREEMENT FOR THE USE OF CERTIFICATE OF CONFORMITY AND CERTIFICATION MARK art. 3.3 (Aug. 2014).

of the certified product.²⁶¹ The certification agreement with Steelwork Compliance Australia stipulates that the certifier “does not assume or undertake to discharge any responsibility to any other party or parties” when performing its contractual duties.²⁶² The requesting entity acknowledges that the certifier “does not warrant or guarantee the correctness of its opinions” or certificates.²⁶³ Finally, the SGS general conditions for certification services mention that the certifier does not take the place of the client by entering into the contract or providing the certification services.²⁶⁴ The requesting entity remains responsible to ensure the safety and quality of its products.²⁶⁵ The restricted value of the certificate and the obligation of the manufacturers concerning the quality and safety of products has also been accepted by the courts.²⁶⁶

The value of the certificates issued by notified bodies during the conformity assessment of medical devices also has some restrictions. Notified bodies perform an assessment of the product and the manufacturer’s quality system. However, the manufacturer of the products has to ensure the requirements in the relevant conformity assessment procedure are met. Whether or not a notified body has been involved in the conformity assessment procedure, the manufacturer remains responsible to affix the CE marking, to issue the Declaration of Conformity, and to guarantee compliance with the applicable EU legislation.²⁶⁷

The decisions by the German courts in the PIP case came to similar conclusions. The Court of Appeal in Zweibrücken affirmed a first instance decision.²⁶⁸ Certificates issued by notified bodies constitute a “Baustein” for manufacturers to show they complied with the requirements of the MDD. As such, the “Sinn und Zweck” of the certification was not to protect third parties. Instead, it was only a requisite for the manufacturer to

261. *General Terms*, *supra* note 260.

262. STEELWORK COMPLIANCE AUSTRALIA, *supra* note 260, at art. 12.

263. *Id.*

264. Article 3.3. SGS *General Conditions for Certification Services*, *supra* note 11.

265. *Id.*

266. *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 687-88 (1969). For a discussion of the case see Justin T. Beck, *Hanberry v. Hearst Corp.: Liability of Product Certifiers*, 5 U.S.F. L. REV. 137, 151 (1970). One reason why the court denied the application of strict liability in the case of certifiers was that it would not be justified to apply strict liability since the latter could not protect itself against possible defects in manufacture. *Id.* at 144. More specifically, the court held that the “[a]pplication of either warranty or strict liability in tort would subject respondent to liability even if the general design and material used in making this brand of shoe were good, but the particular pair became defective through some mishap in the manufacturing process”. *Hanberry*, 276 Cal. App. 2d at 867-88; see also JEFFREY BELSON, *CERTIFICATION MARKS* 50 (2002).

267. European Commission, “Commission Notice. The ‘Blue Guide’ on the implementation of EU product rules 2016”, 2016/C 272/01, 57 & 60.

268. See RECHTSPRECHUNG DER OBERLANDESGERICHTE IN FRANKENTHAL [OLGZ] Mar. 14, 2013, 3, 2013 (Ger.).

sell the implants on the European market. The purpose of the CE label given to a medical device is not to provide buyers with a right to claim compensation from a notified body involved in the conformity assessment procedure.²⁶⁹ The conformity assessment procedure undertaken by TÜV did not create a guarantee the implants complied with the essential requirements of the MDD. The manufacturer of the devices remains responsible for the quality and safety of its products. Consequently, the manufacturer assumes the risks when the device turns out to be defective and causes injuries to patients.²⁷⁰

B. The Third-Party Certifier's Independence During the Certification Process

Third-party certifiers thus stress that certificates have a “restricted value” in the sense that they cannot be relied upon by third parties to make decisions. The rating is only an opinion and not a recommendation; the CE marking is only a requirement to place medical devices on the European market and a class certificate is merely a representation that the vessel complied with the class rules. Certifiers also emphasize that the requesting entity remains responsible for the safety and quality of the certified item. As such, the requesting entity is responsible in case the certified item would default once the certificate has been issued. Based on these findings, one might conclude that holding certifiers liable is unlikely. This conclusion is further strengthened by the inclusion of clauses in certification agreements and codes of practice which exclude or limit the certifier’s liability.²⁷¹

269. See, e.g., OLGZ (Sec. 28) (Ger.). See for a translation and discussion of the case W. Rehmann & D. Heimhalt, *Medical devices: liability of notified bodies?*, TAYLORWESSING, (May 2015), www.taylorwessing.com/synapse/may15.html.

270. See OLGZ (Sec. 54) (Ger.); van Leeuwen, *supra* note 104, at 345; W.Rehmann & D.Heimhalt, *Medical devices: liability of notified bodies?*, TAYLORWESSING, (May 2015), www.taylorwessing.com/synapse/may15.html.

271. Moody’s Code of Professional Conduct, for instance, stipulates that:

[t]o the extent permitted by law, MOODY’S and its directors, officers, employees, agents, representatives, licensors and suppliers disclaim liability to any person or entity for any indirect, special, consequential, or incidental losses or damages whatsoever arising from or in connection with the information contained herein or the use of or inability to use any such information, even if MOODY’S or any of its directors, officers, employees, agents, representatives, licensors or suppliers is advised in advance of the possibility of such losses or damages, including but not limited to: (a) any loss of present or prospective profits or (b) any loss or damage arising where the relevant financial instrument is not the subject of a particular credit rating assigned by MOODY’S. To the extent permitted by law, MOODY’S and its directors, officers, employees, agents, representatives, licensors and suppliers disclaim liability for any direct or compensatory losses or damages caused to any person or entity, including but not limited to by any negligence (but excluding fraud, willful misconduct or any other type of liability that, for the avoidance of doubt, by law cannot be excluded) on the part of, or any contingency within or beyond the control of, MOODY’S or any of its

However, this needs to be seen from a more nuanced perspective. Certifiers have already been held liable in the past, both towards the requesting entity as well as third parties.²⁷² For example, there can be grounds for liability when the certifier did not carefully perform the analysis during the first stage of the certification process.²⁷³ There is another ground leading to liability when the third-party certifier did not remain independent towards the requesting entity. Certification contracts, the certifier's general terms and conditions, case law, and supranational legislation emphasize that certifiers have to remain independent *vis-à-vis* the requesting entity.²⁷⁴ These sources contain clear, strict, and specific requirements that certifiers have to comply with to safeguard that the certificate is issued in an independent way.²⁷⁵ A certifier's independence actually relates to its intention to remain independent, which can, for example, vary between the binary numbers 1—total independence—and 0—no independence. In order to achieve total independence, the above-mentioned sources contain clear, strict, and specific requirements certifiers have to comply with. A certifier's compliance with these requirements to guarantee that certificates are issued in an independent way can be qualified as *obligation de résultat*. A certifier does not have any discretion when deciding on actions to ensure its independence. The result that a certifier needs to achieve, namely compliance with the applicable requirements to ensure independence, does not depend upon the level of care it applies, nor upon the requesting entity's cooperation. Arguably, a requesting entity should not even be involved when a certifier issues the certificate in an independent way.²⁷⁶

directors, officers, employees, agents, representatives, licensors or suppliers, arising from or in connection with the information contained herein or the use of or inability to use any such information.

MOODY'S INVESTORS SERVICE, *supra* note 84.

272. See, e.g., *Bathurst Regional Council*, [No. 5] (2012) FCA 1200, 1457; *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155, 176 (S.D. N.Y. 2009); *Cal. Public Employees' Retirement System v. Moody's Investors Service, Inc.*, 226 Cal. App. 4th 645, 664 (2014); *Otto Candies LLC v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530, 538-39 (5th Cir. 2003); *Case C-219/15, Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, 2016.

273. See *supra* Section II.

274. INTERTEK TESTING SERVICES, *supra* note 260; *Terms and Conditions - General Conditions for Certification Services*, *supra* note 50 (art. 13.6); *Abu Dhabi Commercial Bank*, 651 F. Supp. 2d at 181; 2016 O.J. (C 272) 67.

275. INTERTEK TESTING SERVICES, *supra* note 260; see, e.g., *Terms and Conditions - General Conditions for Certification Services*, *supra* note 50 (art. 13.6); *Abu Dhabi Commercial Bank*, 651 F. Supp. 2d at 181; 2016 O.J. (C 272) 67.

276. See also M. KRUIHOF, "Wanneer vormen tegenstrijdige belangen een belangenconflict?", in C. VAN DER ELST, H. DE WULF, R. STEENNOT & M. TISON, *Van alle markten: liber amicorum Eddy Wymeersch*, Antwerp, Intersentia, 2008, 591-592, no. 21-22. This is not surprising when taking a comparative approach and looking into practices of other providers of information such as architects. *Compare*, *Reglement de Deontologie [Rules of Ethics] of Mar. 8, 1985, MONITEUR BELGE [M.B.] [Official Gazette of Belgium]*, April 18, 1985, Art. 4, (Belg.) with *Sur La Protection Du Titre Et De La*

The qualification as *obligation de résultat* is reinforced by the fact that none of the previously mentioned elements pointing towards an *obligation de moyen* apply when third-party certifiers have to remain independent when issuing certificates.²⁷⁷ The achieved result (namely the certifier's independence) does, for instance, not depend upon the level of care they apply, nor upon the cooperation of the requesting entity. Arguably, the requesting entity should not even be involved when a certifier issues the certificate.²⁷⁸ Recourse can also be taken in the situation where each individual certifier to underpin this conclusion. The following parts focus on (1) the obligation to remain independent in the context of CRAs, (2) classification societies, and (3) product certifiers or notified bodies.

1. The Case of Credit Rating Agencies

The role and position of CRAs as intermediaries on financial markets urges them to display the necessary independence *vis-a-vis* issuers. An independent assessment of creditworthiness is not only what the issuer pays for but also necessary for financial intermediaries to remain in business. CRAs certify the credibility of the issuer by pledging their “reputational capital.”²⁷⁹ This allows investors to trust the issuer's statements concerning its creditworthiness where they otherwise might not have. CRAs acquire this reputational capital over many years by rating many clients. However, they might lose it if their ratings are not reliable or objective. The idea is that CRAs are less willing to violate legal provisions than the issuer because of the potential risk of litigation or fear of losing this reputational capital.

Profession D'Architecte [On The Protection Of The Title And The Profession Of Architect] of Feb. 20, 1939, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 25, 1939, Art. 4, (Belg.). A brief analysis reveals that the obligation to remain independent is often essential as well. Reglement de Deontologie of Mar. 8, 1985 Moniteur Belge, April 18, 1985, Art. 4. In Belgium, for instance, the architect is required to be independent towards the principal (client), building contractors, and other parties involved in the construction process. *Id.* Such independence is necessary to properly perform his profession. *Id.* The public interest benefits from buildings that are safe; therefore, the quality control of such buildings has to be performed by an expert who is independent from the persons responsible for building the construction and the architect who does not remain independent violates the Act concerning the protection of the title of architect *See* Sur La Protection Du Ttite Et De La Profession D'Architecte [On The Protection Of The Title And The Profession Of Architect] of Feb. 20, 1939, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 25, 1939, Art. 4, (Belg.). *See*: Philippe Colle & Koenraad Troch, *Algemeen overzicht van de beginselen inzake aansprakelijkheid van de bouwheer, architect, aannemer, ingenieur en/of studiebureau*, 3 TIJDSCHRIFT VERZEKERINGSRECHT 28 (2000). Several decisions also accepted that an architect's independence is the cornerstone of his profession. Cour de Cassation [Civ.] [The Supreme Court], Dec. 1, 1994, REVUE DE JURISPRUDENCE DE LEIGE, MONS BRUXELLES [JLMB] 1077, 1078 (Belg.); Cour d'Appel Gent [Civ] [Court of Appeal Ghent] 9e. June 29, 2007, RECHTSKUNDIG WEEKBLAD 1135, 1136-1138 (Belg.).

277. *See supra* Section II.A.

278. *See* Andrea Miglionico, *Market Failure or Regulatory Failure? The Paradoxical Position of Credit Rating Agencies*, 9 CAPITAL MARKETS L.J. 194, 201 (the involvement of the requesting entity creates a conflict of interest and therefore that entity should not be involved to insure independence.).

279. *Id.* at 196.

The loss of reputational capital can lead to the collapse of CRAs as investors will no longer trust their ratings. Thus, CRAs are believed to remain independent from the issuer during the rating process to guarantee ratings are of adequate quality. If this is not the case and CRAs are instead paid to give favorable but flawed ratings, investors might no longer use their services.²⁸⁰

Several sources require CRAs to remain independent towards the issuer when issuing a credit rating. The IOSCO Code of Conduct Fundamentals, the individual codes of conducts of CRAs, as well as some of the examined rating contracts, emphasize that ratings are independent opinions based on the information provided by the issuer.²⁸¹ There is also case law which stresses the independence of CRAs and proper management of conflicts of interest.²⁸² The *Abu Dhabi* court held that “the market at large . . . ha[s]

280. See JOHN C. COFFEE, *GATEKEEPERS: THE ROLE OF THE PROFESSIONS AND CORPORATE GOVERNANCE*, 1-5, 287-88, 325 (2006); Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 WASHINGTON U. L. Q. 491, 494-95 (2001); D.W. Diamond, *Reputational Acquisition in Debt Markets*, 97 J. OF POL. ECON. 828 (1989); V.P. Goldberg, *Accountable Accountants: Is Third-Party Liability Necessary?*, 17 J. OF LEGAL STUD. 295 (1988); D.M. Covitz & P. Harrison, *Testing Conflicts of Interest at Bond Ratings Agencies with Market Anticipation: Evidence that Reputation Incentives Dominate*, December 2003 available at www.federalreserve.gov/pubs/feds/2003/200368/200368pap.pdf.

However, some have argued that following the accounting irregularities in the late 1990s, “reputational pressures alone do not create adequate incentives for issuers to disclose material facts, or for gatekeepers to certify that issuers have done so.” Frank Partnoy, *Strict Liability for Gatekeepers: A Reply to Professor Coffee*, U. OF SAN DIEGO LAW & ECON RESEARCH PAPER SERIES, 1, 3 (2004). In the context of CRAs, for instance, Miglionico observes that reputational capital and reputation alone are not a workable constraint on gatekeeper certification. Miglionico, *supra* note 278, at 198.

281. See, e.g., IOSCO, *supra* note 118, at 9-10, 12-13 (2014). Part 2 of the IOSCO Code of Conduct Fundamentals contains several general obligations for CRAs to ensure their independence, specifically that CRAs should operationally and legally separate their rating business from any other business that may present conflicts of interest. The IOSCO Code also includes several requirements with regard to procedures and policies, CRAs are under certain circumstances required to disclose the general nature of their compensation arrangements with the issuers and the independence of analysts and employees. *Id.* at 9-11. Any analyst who becomes involved in a personal relationship that creates the potential for any real or apparent conflict of interest should be required to disclose such relationship. *Id.* at 12-13; see TECH. COMM. OF THE INT’L ORG. OF SEC. COMM., *supra* note 118, at 7. Individual Codes of Conduct also contain provisions on the independence of CRAs. MOODY’S INVESTORS SERVICE, *supra* note 84, at 10-11. Moody’s professional Code of Conduct, for instance, includes a section on the “Independence and Avoidance and/or Management of Conflicts of Interest”. *Id.* at 10. Moody’s has to use “professional judgment to maintain both the substance and appearance of independence and objectivity.” *Id.* at 11. The section also includes provisions regarding the independence of rating analysts. *Id.* Their compensation arrangements, for instance, need to be organized in such a way to eliminate or manage conflicts of interest. MOODY’S INVESTORS SERVICE, *supra* note 84, at 10-11.

282. See, e.g., *Abu Dhabi Commercial Bank*, 651 F. Supp. 2d at 18; *King Cty. Wash. v. IKB Deutsche Industriebank AG*, 863 F. Supp. 2d 288, 293-94 (S.D. N.Y. 2012). These conflicts of interest follow from the issuer-pays business model and lead to the situation where the issuer whose creditworthiness is being controlled and rated pays for these services. Lawrence J. White, *Credit-rating agencies and the financial crisis: less regulation of CRAs is a better response*, 25 J. INT’L BANKING LAW & REG. 170, 170 & 173 (2010); see Lynn Bai, *On Regulating Conflict of Interests in the Credit Rating Industry*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 253, 256 (2010); Scott J. Boylan, *Will Credit Rating Agency Reforms be Effective?*, 20 J. FIN. REG. & COMPLIANCE 356, 363 (2012).

come to rely on the accuracy of credit ratings and the independence of rating agencies.”²⁸³ The CRA’s “role as an unbiased reporter of information typically requires the rating agency to remain independent of the issuers for which it rates notes.”²⁸⁴ The importance to remain independent has also been acknowledged by decisions that refused to qualify claims and statements in CRA’s codes of conduct on their independence as non-actionable puffery.²⁸⁵ Such statements are not “couched in aspirational terms” but are a promise that policies and procedures are implemented to manage and avoid conflicts of interest.²⁸⁶ Furthermore, investors often allege that it was the lack of independence that caused CRAs to give flawed ratings to mortgage-backed securities.²⁸⁷ In other words, CRAs might not have issued incorrect ratings if they remained independent from the rated entities.²⁸⁸

Article 6 of EU Regulation 1060/2009 contains several requirements to ensure CRAs remain independent from the rated entity.²⁸⁹ CRAs have to take “all necessary steps” to safeguard

that the issuing of a credit rating is not affected by any existing or potential conflict of interest or business relationship involving the credit rating agency issuing the credit rating, its managers, rating analysts, employees, any other natural person whose services are

283. *Abu Dhabi Commercial Bank*, 651 F. Supp. 2d at 181.

284. *Id.* at 166.

285. Motion to Dismiss at 8, *U.S. v. McGraw-Hill Companies, Inc. and Standard and Poor’s Financial Services LLC*, 2014 U.S. Dist. LEXIS 183599 (C.D. Cal. Sept. 24, 2014) (No. CV 13-0779-DOC (JCGx)) at 10

286. Motion to Dismiss at 8-9, *U.S. v. McGraw-Hill Companies, Inc. and Standard and Poor’s Financial Services LLC*, 2014 U.S. Dist. LEXIS 183599 (C.D. Cal. Sept. 24, 2014) (No. CV 13-0779-DOC (JCGx)); *see also*, *In re Moody’s Corporation Securities Litigation*, 599 F. Supp. 2d 493, 509 (S.D. N.Y. 2009) (holding that “Moody’s statements regarding its own independence do not constitute inactionable puffery. They were neither ‘vague’ nor ‘non-specific’ pronouncements that were incapable of objective verification . . . Moody’s not only proclaimed its independence; it also listed verifiable actions it was taking to ensure its independence . . . Rather than being general statements, these were specific steps that Moody’s was taking to ensure its independence and ratings integrity.”). *Id.* (internal quotations omitted).

287. *See, e.g., Anschutz Corp.*, 785 F. Supp. 2d at 809.

288. *See id.* (holding “an alleged conflict of interest developed such that the Rating Agencies abandoned their independence and relaxed their rating criteria and procedures in order to secure the business of the investment banks in rating these types of securities.”); *see also* *In re Lehman Bros. Sec. and ERISA Litig.*, 684 F. Supp. 2d 485, 489 (S.D.N.Y. 2009) (discussing conflicts of interest which contributed to incorrect ratings); *Abu Dhabi Commercial Bank*, 651 F. Supp. 2d at 178 (discussing when rating agencies have conflicts of interest and that rating systems can be “deeply flawed and unreliable”); *In re Standard & Poor’s Agency Litig.*, 23 F. Supp. 3d at 383-84 (noting that States and the District of Columbia brought nineteen cases against McGraw Hill Financial Inc. for misleading citizens by representing bond ratings as being independent and objective, when there were influenced by conflicts of interest); *Ohio Police and Fire Pension Fund v. Standard & Poor’s Fin. Serv., LLC.*, 813 F. Supp. 2d 871, 875 (S.D. Ohio 2011) (discussing inflated ratings and false representations regarding AAA ratings).

289. 2009 O.J. (L 302) 12.

placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control.²⁹⁰

This is strengthened considering the general obligation arising under Article 6 of the Regulation which gives more content in the Annex of the Regulation.²⁹¹

Section A of Annex I of the Regulation contains several organizational requirements that have to be respected by CRAs in order to enhance their independence and avoid conflicts of interest.²⁹² The CRA's senior management has to ensure that the agency's activities are independent "from all political and economic influences or constraints" and that "conflicts of interest are properly identified, managed and disclosed."²⁹³ CRAs must be organized in a way that safeguards their "business interest does not impair the independence or accuracy of the credit rating activities."²⁹⁴ In addition, a CRA must "establish appropriate and effective organizational and administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest."²⁹⁵

More relevant are the operational requirements listed in section B of Annex I.²⁹⁶ CRAs have to "identify, eliminate or manage and disclose clearly and prominently, any actual or potential conflict of interest that may influence the analyses and judgments of its rating analysts[.]"²⁹⁷ This objective is also pursued by several provisions in the Regulation itself.²⁹⁸ Rating analysts and other persons directly involved in rating activities are not "allowed to initiate or participate in negotiations regarding fees or payments with any rated entity, related third party or any person directly or indirectly linked to the rated entity by control."²⁹⁹ Furthermore, the "[c]ompensation and performance evaluation of rating analysts and persons approving the credit ratings shall not be contingent on the amount of revenue that the credit rating agency derives from the rated entities or related third parties."³⁰⁰ Since long-lasting relationships with the same rated entities could compromise the independence of rating analysts and any other person approving ratings, a CRA also has to establish an appropriate

290. *Id.*

291. *Id.*

292. *Id.* at 23.

293. *Id.*

294. 2009 O.J. (L 302) 23.

295. *Id.* at 24.

296. *Id.* at 25.

297. *Id.* at 24.

298. *Id.* at 12.

299. 2009 O.J. (L 302) 12.

300. *Id.*

gradual rotation mechanism.³⁰¹ Recital (12) in Regulation 462/2013 sets out a maximum duration of the contractual relationship between the issuer which is rated or which issued the rated debt instruments and the CRA, and this removes the incentive for issuing favorable ratings.³⁰² Section B contains additional requirements to ensure a CRA is independent and helps to avoid conflicts of interest.³⁰³ A CRA must publicly disclose the names of the rated entities or related third parties from which it receives more than five percent of its annual revenue.³⁰⁴ Under certain circumstances, most of them related to the direct or indirect involvement of a CRA in the operation or management of the issuer of the financial instruments; a CRA is not authorized to issue a rating.³⁰⁵

Moreover, a CRA is not allowed to “provide consultancy or advisory services to the rated entity or any related third party regarding the corporate or legal structure, assets, liabilities or activities of that rated entity or related third party.”³⁰⁶ Although a CRA may provide certain ancillary services other than issuing ratings (e.g. market forecasts, estimates of economic trends, or pricing analysis), it must ensure that this does not create conflicts of interest with its rating activities.³⁰⁷ In addition, rating analysts or persons who approve ratings are not allowed to “make proposals or recommendations, either formally or informally, regarding the design of structured finance instruments on which the credit rating agency is expected to issue a credit rating.”³⁰⁸ CRAs also have to keep “adequate records and, where appropriate, audit trails of its rating activities[.]”³⁰⁹ Such records include among other items information related to fees received from any rated entity and the procedures and methodologies they employ to determine the credit ratings.³¹⁰

2. *The Case of Classification Societies*

In the exercise of their private role, classification societies are also confronted with the situation wherein the entity that is being controlled and certified (the shipowner, and more specifically, the latter’s vessels) is the one paying for the control and certification. A classification society gives an independent assessment of a vessel while it is at the same time

301. *Id.* at 4.

302. 2013 O.J. (L 146) 3.

303. 2009 O.J. (L 302) 25.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. 2009 O.J. (L 302) 25.

309. *Id.*

310. *Id.* at 25-26.

economically dependent upon the shipowner's fleet.³¹¹ It is not unthinkable that a shipowner who is dissatisfied with a classification society will class hop to another one offering less rigorous terms and/or cheaper services.³¹² This could result in a less strict application of technical standards in class rules.³¹³

Several sources require classification societies to remain independent towards the shipowner. Some of the Membership Criteria of IACS included in the Charter³¹⁴ are designed to demonstrate a classification society's independence and impartiality.³¹⁵

This requirement is further specified in the Membership Criteria: Guidance and Application Procedure, which are listed in the Procedures concerning requirements for Membership of IACS.³¹⁶

In order to demonstrate independence from ship-owning, ship-building and other commercial interests that could undermine a classification society's impartiality, its governing bodies must have less than fifty percent representation from combined shipowners, shipbuilders and other actors commercially engaged in the manufacture, equipping, repair or operation of ships and may not have shares of fifty percent or more in any of such entities.³¹⁷ Furthermore, surveyors are not allowed to carry out classification or statutory work or participate in the decision-making related thereto if that surveyor has business, personal or family links to the requesting entity.³¹⁸

The IACS Charter also obliges classification societies to comply with the IACS Quality System Certification Scheme (QSCS),³¹⁹ which in turn stipulates that the quality management system of an individual society has to adhere to the IACS Quality Management System Requirements to obtain a QSCS certification.³²⁰ These Requirements, which are incorporated in

311. Juan L. Pulido Begines, *The EU Law on Classification Societies: Scope and Liability Issues*, 36 J. MAR. L. & COM. 487, 493 (2005) (discussing the independence of classification societies and their reliance upon vessel owners).

312. *Id.* (discussing the tendency of ship owners to join a competing classification society when they do not like the requirements of their current classification society or have been denied).

313. *Id.*; see also Philippe Boisson, *Classification Societies and Safety at Sea: Back to Basics to Prepare for the Future*, 18 MARINE POLICY 363, 373 (1994) (discussing the lax application of standards due to "class hopping"); NICOLAI LAGONI, *THE LIABILITY OF CLASSIFICATION SOCIETIES*, 26-27 (2007) (discussing the ability of classification societies to lower their requirements).

314. *IACS Charter*, INTERNATIONAL ASSOCIATION OF CLASSIFICATION SOCIETIES (Oct. 27, 2009), revised January 2018 www.iacs.org.uk/about.

315. International Association of Classification Societies, *Procedures Concerning Requirements for Membership of IACS*, 2 IACS Procedures 1, 5 (2017).

316. *Id.* at 7.

317. *Id.* at 12, E1.5.

318. *Id.* at 11, D1.8.

319. IACS Charter, *supra* note 314, at Art. 2.2(a).

320. International Association of Classification Societies, *IACS Quality System Certification Scheme*, 3 IACS Procedures 1, 35-36 (2011)

Annex 2 of the QSCS, contain several conditions with regard to independence, impartiality and integrity of the society and its surveyors.³²¹ For instance, the society's personnel has to be free from commercial, financial and other pressures that might affect their judgment. Procedures must be implemented to ensure that persons or organisations external to the society cannot influence the results of its services. Moreover, the remuneration of personal engaged in the society's activities may not directly depend on the activities carried out and in no case on their results. Furthermore, the classification society (or its staff) may not be the designer, manufacturer, supplier, installer, purchaser, owner, user or maintainer of the item subject to the service. The society or its staff may not engage in activities that conflict with their independence of judgment and their integrity. In particular, classification societies are not allowed to become involved in the design, manufacture, supply, installation, use or maintenance of the items covered by the service. Moreover, the society may not be controlled by shipowners or others commercially involved in the manufacture, equipping, repair or operation of ships. It can also not substantially depend on a single commercial enterprise for its revenue. Finally, a surveyor is not allowed to carry out class or statutory work if it has business, personal or family links to the shipowner or operator.³²²

As opposed to the situation for CRAs and by extension other capital-market certifiers such as auditors,³²³ EU legislation does not contain measures to reduce potential conflicts of interest between the shipowner and classification societies (private role). There are only provisions dealing with the independence of societies when acting as ROs (public role). Recital (9) of Directive 2009/15 stipulates that ROs need to be strictly independent and have specialised technical competence and rigorous quality management to carry out their duties in a satisfactory manner.³²⁴ Moreover, the RO may not be controlled by shipowners or shipbuilders or by other parties (commercially) engaged in the manufacture, equipping, repair or operation of ships. ROs may also not be substantially dependent on a single commercial enterprise for its revenue. The RO is not allowed to carry out class or statutory work if it is identical to or has business, personal or family

www.iacs.org.uk/media/1768/procedures_vol3_rev4_pdf2340.pdf.

321. See especially *Id.* at Part. 4.3.2 (Impartiality and Integrity) and Part 4.3.3 (Independence Criteria) of Annex 2 of the QSCS, 48-49.

322. See *Id.* at Part. 4.3.2 (Impartiality and Integrity) and Part 4.3.3 (Independence Criteria) of Annex 2 of the QSCS, 48-49.

323. See for a comparative overview J. De Bruyne & C. Vanleenhove, *An EU perspective on the liability of classification societies: selected current issues and private international law aspects*, 20 J. OF INT'L MAR. L. 110-11 (2014).

324. Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administration.

links to the shipowner or operator. This incompatibility also applies to surveyors employed by an RO.³²⁵ Besides supranational legislation, contracts between the classification society acting as an RO and the flag State can also emphasise that societies have to remain independent and impartial or contain provisions to prevent/minimise conflicts of interest.³²⁶

3. The Case of Product Certifiers and Notified Bodies for Medical Devices

The examined contractual terms and general conditions do not explicitly mention that a product certifier has to remain independent from the requesting entity, however, norms issued by the International Organization for Standardization (ISO)³²⁷ address the certifier's independence and impartiality. Article 4.2. in ISO 17065, for instance, stipulates that inspectors have to remain independent in the review and certification decision making process.³²⁸ The certification decision has to be carried out by a person who is not involved in the process for evaluating the product or service.³²⁹ Third-party certifiers are responsible to ensure their impartiality which cannot be compromised by financial, commercial, or other pressures.³³⁰ The certifier has to identify potential risks to his/her impartiality on an ongoing basis, and where such a risk is identified,

325. Annex I, A, 6 Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.

326. The IMO Model Agreement, for instance, specifies that the RO endeavors to avoid undertaking activities which may result in a conflict of interest (Article 2.5. IMO Model Agreement for the Authorization of Recognized Organizations Acting on Behalf of the Administration, MSC/Circ.710 - MEPC/Circ.307, October 9, 1995, available at www.sjofartsverket.se/pages/7148/307.pdf). The agreement with the Swedish Transport Agency (STA) states that the RO has to act in an objective and impartial way when performing its duties on behalf of the STA. Employees of the RO may not give or receive gifts, rewards or other benefits when performing duties in accordance with the agreement. Employees may not be involved in any conflict of interest when performing duties. A conflict of interest arises inter alia when the person performing the statutory certification or services, his or her next of kin or another person close to him or her (a) is a party concerned, (b) may expect extraordinary benefit or detriment from the result of the statutory certification or services, or (c) is a representative either of the person, company or organisation concerned or of someone else who may expect extraordinary benefit or detriment from the result of the statutory certification or service. A conflict of interest will also arise when there are other special circumstances that may influence the impartiality of the person performing the statutory certification or services. A person involved in such a conflict of interest may not perform duties on behalf of the STA (Article 3.5. Agreement Governing the Delegation of Statutory Certification & Services for Ships Registered in Sweden between the Swedish Transport Agency and XX, available at www.transportstyrelsen.se/globalassets/global/sjofart/fartyg/delegationsavtal-160101.pdf).

327. See INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, CONFORMITY ASSESSMENT – REQUIREMENTS FOR BODIES CERTIFYING PRODUCTS, PROCESSES AND SERVICES, cl. 4.2-4.2.3 (2012) (The ISO is an independent, non-governmental organization and the world's largest developer of standards).

328. *Id.*

329. *Id.* at cl. 7.6.2.

330. *Id.* at cl. 4.2.2.

demonstrate how it eliminates or minimizes it.³³¹ Moreover, the certifier may not be involved in the design, manufacture, installation, distribution, or maintenance of the certified item.³³² Therefore, the certifier is not allowed to offer consultancy or internal auditing services, or may not be linked with an organization providing such services to the requesting entity.³³³ Article 5.2. further contains structural and organizational requirements to safeguard the certifiers' impartiality.³³⁴ For instance, they need to have a "mechanism" to guarantee their impartiality.³³⁵ This mechanism has to provide input on policies and procedures relating to their independence.³³⁶

The EU did not adopt legislation covering the independence of product certifiers in general, however, sectoral legislation contains several provisions dealing with their independence.³³⁷ Notified bodies, for instance, act as certifiers of medical devices in the conformity assessment procedure.³³⁸ Decision 768/2008/EC sets out requirements to ensure that notified bodies remain independent towards the manufacturer of medical devices.³³⁹ More specifically, they are not allowed to engage in any activity that may conflict with their independence of judgment or integrity (e.g. consultancy services).³⁴⁰ Annex XI of the MDD contains additional criteria for the designation of notified bodies.³⁴¹ The notified body has to be an entity which is independent from the manufacturer of the product for which it performs conformity assessment activities.³⁴² The notified body, its director, and the assessment or verification staff are not allowed to be the designer, manufacturer, supplier, installer, or user of the devices which they inspect.³⁴³ They may not be directly involved in the design, construction, marketing, or maintenance of the devices, nor represent the parties engaged in these activities.³⁴⁴ The notified body and its staff need to be free from all pressures and inducements which might influence their judgment or the results of the inspections.³⁴⁵ The remuneration of analysts should also not

331. *Id.* at cl. 4.2.3-4.2.4.

332. INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, CONFORMITY ASSESSMENT – REQUIREMENTS FOR BODIES CERTIFYING PRODUCTS, PROCESSES AND SERVICES, cl. 4.2.6.

333. *Id.* (e).

334. *Id.* at cl. 5.2.

335. *Id.* at cl. 5.2.1.

336. *Id.*

337. *See* 1989 O.J. (L 40) 26; *see also* 2009 O.J. (L 170) 13-14 (containing provisions dealing with the independence of conformity assessment bodies involved in the certification of toys).

338. *See* O.J. 1993 (L 169) 4.

339. *See Id.* at 19-20.

340. 2008 O.J. (L218) 93.

341. 1993 O.J. (L 169) 59.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

depend on the number of inspections carried out, nor on the results of the inspections.³⁴⁶

Annex VII of the Medical Device Regulation contains additional criteria for the designation of notified bodies. Such a body has to be organised and operated to safeguard the independence, objectivity and impartiality of its activities. It needs to have procedures that guarantee the identification, investigation and resolution of any case in which conflicts of interest can arise. Notified bodies are not allowed to engage in activities that may conflict with their independence of judgement or integrity in relation to conformity assessment activities for which they are designated. A notified body, its top-level management and personnel responsible for carrying out the conformity assessment tasks are also not allowed to offer or provide services which might jeopardise the confidence in their independence, impartiality or objectivity. For instance, notified bodies are not allowed to provide consultancy services to the manufacturer, a supplier or a commercial competitor on the design, construction, marketing or maintenance of devices. Notified bodies cannot be involved in the design, manufacture or construction, marketing, installation and use or maintenance of devices they assess. Moreover, the level of the remuneration of the top-level management and assessment personnel of notified bodies may not depend on the results of the assessments.³⁴⁷

IV. THIRD STAGE OF THE CERTIFICATION PROCESS: ‘POST-ISSUANCE’ OBLIGATIONS

Besides the analysis (*obligation de moyen*) and the independent issuance of a certificate (*obligation de résultat*), certifiers also have “post-issuance” obligations during the last stage of the certification process.³⁴⁸ Some of these obligations qualify as *obligations de résultat*. Reference can, for example, be made to confidentiality requirements included in certification agreements. There might thus be a basis for liability once a certifier violates this obligation by disclosing confidential information.³⁴⁹ In

346. 1993 O.J. (L 169) 59.

347. Annex VII, Article 1.2. Regulation 2017/745 on Medical Devices.

348. See *infra* Section IV.

349. Rating agreements, for instance, often require CRAs to keep confidential the information they receive from the issuer. S&P Code of Conduct indicates that the CRA is not allowed to publish or disclose the rating to any party without the issuer’s consent. The CRA may use confidential information in connection with the assignment and monitoring of the rating but is not allowed to directly disclose it to any other party. The information can only be used for research and modelling purposes if it is not presented in a way that makes it possible to identify the issuer. See STANDARD & POOR’S RATING SERVICES, *supra* note 113, at 4, 7. Under the contract with Moody’s, the CRA reserves the right to publish the information given by the issuer unless it is confidential or inside information. The IOSCO Code of Conduct as well as the individual codes of CRAs also contain several confidentiality duties. See IOSCO, *supra* note 118, part 3.B at 12; Article 3.15 Moody’s, “Moody’s Code of Professional Conduct”;

addition to confidentiality requirements, a certifier also has monitoring and surveillance obligations during the last stage of the process. The certifier's monitoring and surveillance tasks during the third stage of the certification process are far more important. These obligations can be imposed by the certification agreement or by legislation. The obligation to *perform* these surveillance obligations can be labelled as an *obligation de résultat*.³⁵⁰ There will thus be a basis for liability if a third-party certifier fails to periodically perform them or does not do so within the agreed time period. Based on these monitoring and surveillance activities, there can be reasons to suspend or withdraw the certificate. The SGS Code of Practice, for example, provides that a certificate can be withdrawn if the products no longer conform to the applicable standards, norms, or regulations.³⁵¹ Certifiers can also suspend the certificate for a limited time under several other circumstances (for example, if the request for a corrective action has not been satisfactorily complied with, if products are marketed in an unsafe condition, if audits are not completed within the prescribed timeframe, or if there has been any violation of the certifier's conditions of certification and codes of practice).³⁵² The TÜV terms and conditions of certification specify that the certificate will be withdrawn if the reasons for suspending it, for example when the client is temporarily unable to fulfill the certification requirements, are not remedied within the agreed period of time.³⁵³ Article 56 of the Medical Device Regulation stipulates that when a manufacturer no longer meets the applicable requirements, a notified body is allowed to suspend or withdraw the certificate, unless compliance with the requirements is ensured by appropriate corrective action taken by the manufacturer within an appropriate deadline set by the notified body. This requirement also qualifies as an *obligation de résultat*. Put differently, if the monitoring and surveillance analysis shows that there are reasons to

June 2017, 15. Classification societies are also bound by confidentiality requirements. The terms and conditions of the marine service contract of Lloyds stipulate that the society has to keep confidential any data, plans or other technical information received from the shipowner except when disclosure is required by law or authorised by the shipowner. *See, e.g., Contract Terms, LLOYDS REGISTER* (last visited Dec. 18, 2017), <https://www.cdlive.lr.org/conditions.asp>. Confidentiality requirements are also included in the delegation agreement between the RO and the flag State. *See SWEDISH TRANSPORT AGENCY, AGREEMENT GOVERNING THE DELEGATION OF STATUTORY CERTIFICATION AND SERVICES FOR SHIPS REGISTERED IN SWEDEN BETWEEN THE SWEDISH TRANSPORT AGENCY AND XXX, §7.2.*

350. *See, e.g., Regulation of the European Parliament and of the Council on Medical Devices, and Amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009, at 5, COM (2012) 542 final* (Sept. 26, 2012) [hereinafter *Medical Devices*] (“After initial certification, notified bodies must regularly conduct surveillance assessments in the post-market phase.”).

351. Article 16 SGS, *Code of Practice*, www.sgs.com/Terms-and-Conditions/Codes-of-Practice-SSC-English-NL.aspx.

352. *Id.* at Art. 15.

353. TÜV RHEINLAND, TESTING AND CERTIFICATION REGULATIONS (PZO) OF TÜV RHEINLAND LGA PRODUCTS GMBH (TRLP), at 1 (§§ 3.17, 3.18) (2016).

withdraw or modify the certificate, there might be grounds for liability if the certifier does not do so regardless of the efforts that are made.³⁵⁴

However, the *way* in which third-party certifiers have to conduct these monitoring and surveillance obligations is an *obligation de moyen*. Certifiers have to carefully perform these tasks without guaranteeing that the monitoring and surveillance is always successful. There might be grounds for liability if certifiers negligently performed their monitoring tasks, even if it turns out the certificate has not been downgraded or withdrawn.³⁵⁵ Alternatively, if the certificate has not been downgraded or withdrawn, there is no basis for liability if certifiers carefully performed the surveillance and monitoring. Surveillance and monitoring duties find their basis in different sources such as (A) certification contract, codes of conduct/practice, or supranational legislation. More importantly, several (B) reasons are used to show that a certifier's monitoring and surveillance tasks qualify as *obligations de moyen*.

A. Sources for a Third-Party Certifier's Monitoring & Surveillance Obligations

Monitoring and surveillance obligations find their basis in different sources. For instance, Moody's Code of Professional Conduct stipulates that when a rating is published, unless it is withdrawn, the CRA will at least once in any twelve-month period review the creditworthiness of the issuer or its products.³⁵⁶ To that end, surveillance teams continuously monitor and review the ratings.³⁵⁷ The CRA can also initiate a review of the status of the

354. There are also several other circumstances when third-party certifiers need to withdraw or suspend a certificate. For instance, some rating contracts mention CRAs may raise, lower, suspend, place on CreditWatch or withdraw a rating at any time and at its sole discretion, especially when the information provided by the issuer or lack thereof requires the CRA to do so. *See e.g.* MOODY'S, CODE OF PROFESSIONAL CONDUCT 7. Classification societies can also withdraw the certificates under several circumstances. The certificate will be either automatically suspended or the classification society may withdraw it at any time and expel the ship from its register if the ship is not made accessible for a survey, or if necessary repairs are not completed in time, or if the vessel is used for other purposes than it is approved design. LAGONI, *supra* note 19, at 47-48; *see* IACS, *supra* note 177, at 5-6 & 11-12. Whether ROs are allowed to withdraw statutory is less clear. The Model Agreement states the circumstances under which a surveyor is allowed to withdraw the certificate. *See* INTERNATIONAL MARITIME ORGANIZATION (IMO), MODEL AGREEMENT FOR THE AUTHORIZATION OF RECOGNIZED ORGANIZATIONS ACTING ON BEHALF OF THE ADMINISTRATION, Annex, art. 2.5, <http://www.sjofartsverket.se/pages/7148/307.pdf> (specifies that the RO endeavors to avoid undertaking activities which may result in a conflict of interest). The agreement with the Swedish Transport Administration, however, specifies that the RO is not entitled to withdraw statutory certificates. *See* SWEDISH TRANSPORT AGENCY, AGREEMENT GOVERNING THE DELEGATION OF STATUTORY CERTIFICATION AND SERVICES FOR SHIPS REGISTERED IN SWEDEN BETWEEN THE SWEDISH TRANSPORT AGENCY AND XXX, §3.2.

355. *See* OJ (L 302) 4.

356. *Id.*

357. *Id.*

rating when it receives any information that might reasonably be expected to result in an action, such as lowering or withdrawing the rating.³⁵⁸ CRAs can upgrade and downgrade the rating or put the issuer on a Credit Watch (list)³⁵⁹ when the CRA plans to review the rating.³⁶⁰ Such a review is of particular importance for market participants.³⁶¹ Whereas an upgrade might increase future investments, a downgrade indicates that the issuer is less able or willing to meet its financial obligations.³⁶² CRAs will, therefore, inform issuers and investors of the intention to change the rating prior to publishing the downgrade or upgrade.³⁶³ This gives issuers an opportunity to adjust the design of financial instruments to avoid a downgrade.³⁶⁴ The IOSCO Code of Conduct Fundamentals further stipulates that, “[e]xcept for ratings that clearly indicate they do not entail ongoing surveillance,” the CRA should on an on-going basis monitor the published rating by “regularly reviewing the issuer’s creditworthiness.”³⁶⁵ Ratings should be updated on a timely basis taking into account the results of the review.³⁶⁶ A same conclusion follows from different cases where the monitoring and surveillance duties of CRAs were examined.³⁶⁷ In *CalPERS*, it was held that the CRAs had to continuously monitor the financial structured products to ensure that the given ratings remained accurate. They had to withdraw any rating that was no longer representative of the rated products’ financial condition. In publishing a rating, the CRAs did not simply offer investors their best prediction, at the time the product was first marketed, as to whether they would eventually be paid in full on their investment. Rather, CRAs continuously examined the products’ market performance to ensure the rating was currently valid.³⁶⁸ The EU Regulation on CRAs also requires CRAs to monitor and review ratings on an on-going basis at least annually,

358. *Id.*

359. See Christian Hirsch & Christina E. Banner, *The Economic Function of Credit Rating Agencies: What does the Watchlist Tell us?* 4 (Frankfurt School, Working Paper No. 124, 2009).

360. See *id.* at 3.

361. See *id.* at 1.

362. Stéphane Rousseau, *Enhancing the Accountability of Credit Rating Agencies: The Case for a Disclosure-Based Approach*, 51 MCGILL L. J. 617, 627 (2006); Uwe BLAUROCK, *Control and Responsibility of Credit Rating Agencies*, 11 ELECTRONIC J. COMP. LAW 1, 7 (2007).

363. DARBELLAY, *supra* note 18, at 37.

364. *Id.*

365. See IOSCO, *supra* note 118, at 5.

366. *Id.* at 5-6.

367. See e.g. *Abu Dhabi Commercial Bank*, 651 F. Supp. 2d 493; *In re Moody’s* 599 F. Supp. 2d 493; *King County, Washington et al v. IKB Deutsche Industriebank AG et al*, no. 09-08387, 31-50 (S.D.N.Y. 2012); *LaSalle Nat. Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. 1071 (S.D.N.Y. 1996); *Ohio Police & Fire Pension Fund v. Standard & Poor’s Financial Services LLC*, 813 F.Supp.2d 871 (S.D. Ohio 2011).

368. *California Public Employees’ Retirement System v. Moody’s Corp.*, Docket No. A134912, No. CGC-09-490241, n. 15 (Cal. Ct. App. 2014).

especially where material changes occurred that could have an impact on a rating.³⁶⁹

Classification societies have surveillance and monitoring obligations in the form of surveys.³⁷⁰ Vessels are subject to a life survey regime if they want to be retained in class.³⁷¹ There are different kinds of surveys.³⁷² The Rules for Classification and Construction of former society Germanischer Lloyd stipulates that it has to perform regular periodical and non-periodical surveys of the vessel's hull and machinery.³⁷³ Although the shipowner remains responsible to properly maintain the ship in between the surveys,³⁷⁴ a classification society has the discretion to determine whether or not it will initiate a survey.³⁷⁵ ABS, for instance, reserves the right to perform unscheduled surveys of a vessel when it has reasonable grounds to believe that the shipowner does not comply with the applicable class rules.³⁷⁶

Product certifiers can also be bound by monitoring and surveillance activities.³⁷⁷ The SGS Code of Practice, for example, stipulates that the certifier has to do periodic surveillances of the management system and products.³⁷⁸ To that end, the certifier has the right to visit the manufacturer unannounced.³⁷⁹ A surveillance agreement with TÜV Rheinland specifies that the surveillance of the manufacturing plants is used to check whether the manufacturer of construction products complies with the applicable requirements.³⁸⁰ Once the certificate is issued for the construction of products, the certifier has to regularly assess whether the factory production control³⁸¹ conforms to the relevant technical specifications.³⁸²

369. 2009 O.J. (L 302) 13.

370. See IOSCO, *supra* note 118, at 3.

371. IACS, *supra* note 177, at 5.

372. See *id.* at 13-14.

373. See GERMANISCHER LLOYD, RULES FOR CLASSIFICATION AND CONSTRUCTION 2-14 (§. 7.3.2) (2003) (“GL reserve the right to carry out inspections without giving prior notice. The manufacturer shall grant GL Surveyors access to all areas and shall present all documentation concerning records and tests carried out.”).

374. IACS, *supra* note 177, at 11.

375. See, e.g., ABS, *supra* note 191, Part 1, ch. 1, § 2, R. 1.3.

376. *Id.* at R. 7.

377. SGS, CODE OF PRACTICE (SSC NL) 4 (2017), www.sgs.com/Terms-and-Conditions/Codes-of-Practice-SSC-English-NL.aspx.

378. *Id.*

379. *Id.* at 5; see TÜV RHEINLAND, *supra* note 353, at 2, 4 (describing short-notice audits).

380. TÜV RHEINLAND INDUSTRIE SERVICE GMBH, SURVEILLANCE AND CERTIFICATION AGREEMENT I (Revision 3),

https://www.tuv.com/media/poland/o_nas/zalaczniki_do_ofert/dp/Umowa_w_sprawie_inspekcji_i_certyfikacji.pdf.

381. Approximation of Laws, Regulations and Administrative Provisions of the Member States relating to Construction Products, 1988 O.J. (L 40) 6 (stipulating that manufacturers may only affix the EC conformity marking on their construction products if they have “a factory production control system to ensure that production conforms with the relevant technical specifications.”). Annex III of the

Notified bodies have different monitoring and surveillance obligations as well. The MDR, for instance, contains several obligations. Regarding class IIa, class IIb and class III medical devices, notified bodies must periodically, at least once every twelve months, carry out audits and assessments to ensure that the manufacturer applies the approved quality management system and post-market surveillance plan. These audits and assessments include inspections on the manufacturer's premises as well as tests to check whether the quality management system is working properly.³⁸³ The notified body needs to randomly perform, at least once every five years, unannounced audits on the site of the manufacturer. Within the context of such unannounced on-site audits, the body has to test an adequate sample of the produced devices or an adequate sample from the manufacturing process to verify that the manufactured medical device is in conformity with the technical documentation.³⁸⁴

Reference can also be made to Recommendation 2013/473 on audits and assessments performed by notified bodies.³⁸⁵ The Recommendation obliges notified bodies to perform unannounced audits of manufacturers of medical devices at least once every three year. The timing of the audits should be unpredictable. Notified bodies need to increase the frequency of unannounced audits if the devices bear a high risk, if the devices of the type in question are frequently non-compliant or if specific information gives rise to suspicions that the devices or their manufacturer do not comply with the applicable requirements. Notified bodies have to check a recently produced sample, preferably one taken from the ongoing manufacturing process, for its conformity with technical documentation and (applicable) legal requirements.³⁸⁶

Before the implementation of the MDR and Recommendation 2013/473, post-issuance obligations were also included in Annex II of the

Directive Factory defines production control as the permanent internal control of production exercised by the manufacturer. *Id.* at 23.

382. TÜV Rheinland Industrie Service GmbH, *Surveillance and Certification Agreement* available at www.tuv.com/media/poland/o_nas/zalaczniki_do_ofert/dp/Umowa_w_sprawie_inspekcji_i_certyfikacji.pdf.

383. Annex IX, Chapter I, Article 3.3. Regulation 2017/745 on medical devices.

384. *Id.* at Art. 3.4.

385. Annex III Recommendation 2013/473 on the audits and assessments performed by notified bodies in the field of medical devices. The Recommendation is divided into four parts including general provisions and three Annexes focusing on product assessment (Annex I), quality management system assessments (Annex II) and the unannounced audits themselves (Annex III).

386. Annex III, Recommendation 2013/473/EU on the audits and assessments performed by notified bodies in the field of medical devices.

MDD.³⁸⁷ The PIP breast implant case, however, showed that the scope and content of these obligations has not always been that clear under the MDD.

In France, a large group of distributors and women brought a case before the *Tribunal de Commerce* in Toulon. The court held that TÜV Rheinland negligently performed its obligations of control/inspection, care and vigilance.³⁸⁸ In its capacity of notified body, TÜV had substantial power in its inspection role to ensure that the implants only contained the authorized gel. The court assumed that the body was required to make unannounced visits at the factory or on sites of the manufacturer.³⁸⁹ The Court of Appeal d'Aix-en-Provence, however, reversed the first instance decision and concluded that TÜV complied with its obligations under EU law. The MDD provides solely for the possibility to make unannounced visits. There was no obligation to do so.³⁹⁰

In a case before the German District Court in Nuremberg-Fürth, the victim's claim was rejected as well. The court held that EU law did not require a notified body to investigate the specific implants or carry out unannounced inspections on the manufacturing site.³⁹¹ The District Court in Frankenthal concluded TÜV Rheinland had not breached its obligations included in Annex II of the MDD.³⁹² The certifier has to check the conformity of the quality management system with the provisions of the MDD. Although the notified body undertook an audit of the quality management system, it did not have to examine whether the quality management as presented by PIP was also brought into practice.³⁹³ The audit of PIP's quality system was merely a "document-based exercise".³⁹⁴ The notified body was also required to examine the design dossier containing information on the content and design of the implants. Once again, TÜV was not obliged to inspect the actual implants.³⁹⁵ The District Court also held that the certifier had no obligation to do unannounced visits.

387. See in this regard Annex II, Articles 5.3. and 5.4. Directive 93/42 concerning medical devices.

388. Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567, 144.

389. *Id.* at 142-143.

390. Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482, part II(B)(1) in "Motifs de la décision" ("Il ne peut donc être reproché à l'organisme certifié de ne pas avoir procédé périodiquement aux inspections prévues à l'article 5.3. de l'annexe II de la directive 93/42/CEE").

391. District Court Nürnberg-Fürth, September 25, 2013, 11 O 3900/13. See TÜV Rheinland, "PIP Breast Implants: TÜV Rheinland Wins Another Case", April, 10, 2013, www.tuv.com/en/malaysia/about_us_my/news_my/news-content_208551.html.

392. District Court Frankenthal, March 14, 2013, 6 O 304/12, *JurionRS* 2013, 37376, *Medizin Produkte Recht* 2013, 134-138; van Leeuwen, *supra* note 104, at 343-44.

393. District Court Frankenthal, March 14, 2013, 6 O 304/12, *JurionRS* 2013, 37376, *Medizin Produkte Recht* 2013, 134-137.

394. van Leeuwen, *supra* note 104, at 343-44.

395. District Court Frankenthal, March 14, 2013, 6 O 304/12, *JurionRS* 2013, 37376, *Medizin Produkte Recht* 2013, 134-137; van Leeuwen, *supra* note 104, at 344.

The MDD stipulates that the notified body *may* carry out such visits.³⁹⁶ An obligation would only arise if there were specific circumstances demanding for an unannounced visit. However, the plaintiff failed to show the existence of such circumstances.³⁹⁷

The decision has been affirmed by the *Oberlandesgericht* in Zweibrücken, albeit on different grounds.³⁹⁸ More importantly, the OLG gave permission to appeal to the BGH. On the 9th of April 2015, the *Bundesgerichtshof* referred three questions on the interpretation of the MDD to the European Court of Justice.³⁹⁹ By its second and third questions, the BGH sought to ascertain whether the provisions of Annex II to the MDD are to be interpreted as meaning that a notified body is required in general, or at least where there is due cause, to do unannounced inspections/audits, to examine devices and/or to examine the manufacturer's business records.⁴⁰⁰

The European Court of Justice held that a notified body has no general obligation to carry out unannounced inspections, to examine medical devices and/or to examine the manufacturer's business records.⁴⁰¹ That being so, however, the notified body may pay unannounced visits to the manufacturer during which it may carry out or ask for tests to check if the quality system is working and applied properly.⁴⁰² The notified body may also require, where duly justified, any information or data necessary for establishing and maintaining the attestation of conformity in view of the chosen procedure.⁴⁰³ The manufacturer must allow the notified body to carry out all the inspections necessary and provide it with all relevant information.⁴⁰⁴

B. Monitoring and Surveillance Obligations

Regardless of the many sources imposing surveillance and monitoring obligations on certifiers, the way they have to be performed qualifies as *obligation de moyen*. This can be illustrated by two reasons coming from

396. Annex II, Article 5.4. Directive 93/42 concerning medical devices.

397. District Court Frankenthal, March 14, 2013, 6 O 304/12, *JurionRS* 2013, 37376, *Medizin Produkte Recht* 2013, 134-137; van Leeuwen, *supra* note 104, at 344.

398. Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13. See for a discussion and translation of the case: W. Rehmhalt & D. Heimhalt, *Medical devices: liability of notified bodies?*, TaylorWessing, (May 2015); van Leeuwen, *supra* note 104, at 344-45.

399. BGH, April, 9, 2015 - VII ZR 36/14.

400. C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, request for a preliminary ruling from the *Bundesgerichtshof* lodged on 13 May 2015.

401. C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, [2017] E.C.R. paras. 38, 40.

402. Annex II, Articles 5.3. and 5.4. Directive 93/42 concerning medical devices.

403. Article 11, 10. of Directive 93/42 concerning medical devices.

404. Annex II, Article 5.2. Directive 93/42 concerning medical devices.

different certification sectors. First, the certifier is often not the only party involved in the surveillance and monitoring process. Several other parties such as national authorities or the requesting entity can also play a role in the last stage of the certification process (1). Second, there is case law showing that certifiers are bound by an *obligation de moyen* when it comes to their monitoring and surveillance obligations (2).

1. Third-Party Certifiers & Interplay With Other Actors During the Third Stage

One reason why certifiers are bound by an *obligation de moyen* relates to the interplay with other entities coming on stage once the certificate has been issued. In the medical sector, for instance, national competent authorities also play an important role after the marketing of the device. Those authorities have several obligations under EU law once a device has been marketed. They have to do appropriate checks on the characteristics and performance of devices, including, where appropriate, a review of documentation and physical or laboratory checks on the basis of adequate samples.⁴⁰⁵ The competent authorities have to carry out both announced and if necessary unannounced inspections of the premises of economic operators such as the manufacturer and, where necessary, at the facilities of professional users.⁴⁰⁶ If the competent authority believes that the medical device presenting a health or safety risk does not comply with the applicable requirements, it can take several post-market actions (e.g. withdrawing the device from the market or recalling it within a reasonable period).⁴⁰⁷

The decisions by the German and French courts in the PIP case illustrate the ambiguity regarding the obligations of notified bodies and the interplay with national authorities during the third stage of the certification process. The District Court in Frankenthal emphasised there was a distinction between duties of notified bodies on the one hand and the obligations of national public market surveillance agencies on the other hand. Notified bodies cannot be qualified as market surveillance agencies and do not have the same powers. Instead, notified bodies only play a role in the conformity assessment procedure of devices.⁴⁰⁸ On appeal, the OLG in Zweibrücken also stressed the separation of duties between notified bodies and competent authorities. Certification cannot be placed at the same level as post-market surveillance activities. Competent authorities remain

405. Article 93.1 Regulation 2017/745 on medical devices.

406. Article 93.3 Regulation 2017/745 on medical devices.

407. Articles 94 & 95 Regulation 2017/745 on medical devices.

408. District Court Frankenthal, March 14, 2013, 6 O 304/12, JurionRS 2013, 37376, *Medizin Produkte Recht* 2013, 135-136; van Leeuwen, *supra* note 104, at 344.

responsible to monitor and control products that have been marketed.⁴⁰⁹ In France, the Commercial Court in Toulon held that notified bodies effectively assume a public role. As a consequence, they guarantee that the product has reached a certain standard of safety whenever they certify it. The functions performed by TÜV Rheinland constituted a real delegation of public services by national authorities. In its capacity of notified body, TÜV Rheinland had substantial power in its inspection role to ensure that the implants only contained the authorised gel.⁴¹⁰ The first instance decisions was, however, reversed by the *Cour d'Appel* d'Aix-en-Provence. This might be an indication that French courts adhere to the same stance as their German counterparts.⁴¹¹

Whether a certifier's obligations are successfully accomplished can also depend upon the cooperation of the requesting entity itself. Take the situation of classification societies. Vessels are subject to a lifelong survey regime if they want to be retained in class. However, it is the shipowner who remains responsible to properly maintain the vessel in the period between the surveys. He has to inform the society of events or circumstances that affect the conformity of the ship with class rules. Although classification societies have monitoring and surveillance duties, the shipowner might thus have to trigger societies to actually perform them. The effectiveness of the classification depends upon the shipbuilder or shipowner cooperating with the society in an open and transparent manner on all issues affecting its status. To that end, the shipowner has to act in good faith by disclosing to the society any damage or deterioration that may influence the vessel's classification status. If there is any doubt, the owner should notify the society and schedule a survey to decide if the vessel is still complies with the relevant class rules.⁴¹²

The importance of a requesting entity's cooperation and its influence on the certifier's services became clear as well in the PIP case. The impact of the manufacturer's fraud in the production process was disparate. Whereas some breast implants contained the required medical silicone gel, others had a mixture of medical and industrial silicone gel or only industrial gel. The manufacturer's fraud and lack of cooperation made an accurate inspection of the implants extremely difficult. Thus, the requesting entity might commit fraud the certifier will not always discover.⁴¹³

409. Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13. See for translation and discussion of the case: W. Rehmann & D. Heimhalt, *Medical devices: liability of notified bodies?*, TaylorWessing, (May 2015); van Leeuwen, *supra* note 104, at 343-48.

410. Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, 2013F00567, 142-143. See also van Leeuwen, *supra* note 104, at 345-46.

411. Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482.

412. IACS, *supra* note 177, at 5.

413. See for more information and references the discussion *supra* in part xx.

A last example relates to the certifier's remuneration by the requesting entity. The way certifiers are paid the certification fee by the requesting entity does not always induce them to carefully perform the post-issuance activities. The model where the certifier is paid by the requesting entity leads to a disincentive to adequately monitor the certified item when a downgrade or withdrawal of the certificate is appropriate.⁴¹⁴ In this regard, CRAs can serve as illustration. Investors already brought several claims against CRAs,⁴¹⁵ alleging that they failed to duly monitor the underlying assets for significant decreases in the quality of the securities that investors purchased.⁴¹⁶

CRAs charge surveillance fees for monitoring services, either upfront or annually. Performing adequate and surveys on time is important considering that issuers of structured products do not always make the underlying loan performance or other information publicly available.⁴¹⁷ Based on the issuer-pays-business model, CRAs are encouraged to give issuers favourable ratings to generate revenues. However, they have little incentives to provide monitoring services or downgrade the securities when necessary.⁴¹⁸

One reason thereto is because the issuer pays for the continuing surveillance of securities in advance. In addition, few issuers are eager to let CRAs monitor their securities considering that it could result in downgrades.⁴¹⁹ During the initial rating process, the issuer tries to assure CRAs that they are getting the "the complete picture by providing both bad information and good [on the creditworthiness]" (internal quotations marks omitted).⁴²⁰ Thereafter, the company is no longer induced to voluntarily bring any negative information to the CRA's attention.⁴²¹ Consequently,

414. N. Horner, *If You Rate It, He Will Come: Why Uncle Sam's Recent Intervention with the Credit Rating Agencies Was Inevitable and Suggestions for Future Reform*, 41 FLORIDA ST. U. L.R. 499 (2014); T.J. Pate, *Triple-A Ratings Stench: May the Credit Rating Agencies be Held Accountable?*, 2 BARRY L.R. 36 (2010).

415. See, e.g., *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742 (S.D. Tex. 2005); *California Public Employees' Retirement System v. Moody's Corp.*, No. CGC-09-490241 (Cal. Super. 2010); *California Public Employees' Retirement System v. Moody's Corp.*, Docket No. A134912, No. CGC-09-490241, paras. 30-34 (Cal. Ct. App. 2014); *In Re Moody's*, 599 F. Supp. 2d 493; *Lasalle National Bank*, 951 F. Supp. 1071..

416. T.J. Pate, *Triple-A Ratings Stench: May the Credit Rating Agencies be Held Accountable?*, 2 BARRY L.R. 36 (2010).

417. United States Securities and Exchange Commission, *Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies*, (July 2008) www.sec.gov/news/studies/2008/craexamination070808.pdf.

418. N.S. Ellis, L.M. Fairchild, F. D'Souza, *Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis*, 17 STAN. J. OF L., BUS. & FIN., 191 n. 66 (2012).

419. J.D. Krebs, *The Rating Agencies: Where We Have Been and Where Do We Go From Here?*, 3 J. OF BUS., ENTREPRENEURSHIP & THE L. 141 (2009).

420. C. Hill, *Regulating the Rating Agencies*, 82 WASHINGTON U. L. Q. 70 (2004).

421. *Id.*

credit ratings are mostly downgraded long after public information has signaled a deterioration in the issuer's probability of default.⁴²² Moreover, CRAs can obtain information from other actors involved in overlapping commercial activities during the initial rating process (e.g. investment banks or law firms). However, as time goes by and the CRA needs to monitor the initial rating, it becomes more difficult to acquire information from other sources or actors as they are no longer involved in the surveillance of issuers.⁴²³

2. Monitoring and Surveillance Obligations in Case Law

The post-issuance obligations of certifiers have also been addressed in different cases. An analysis of these decisions shows that certifiers are bound by an *obligation de moyen* when it comes to monitoring and surveillance obligations. There is no basis for liability if certifiers carefully performed the surveillance and monitoring tasks when the certified item defaults despite the existence of a favourable certificate. The PIP breast implant case as well as decisions in the context of CRAs can be used as illustration in this regard.

The French Commercial Court in Toulon, for instance, held in the PIP case that TÜV Rheinland negligently performed its obligations of control, inspection, care and vigilance. The certifier was held liable because it did not apply the normally required diligence and care during its post-issuance obligations. A reasonable and prudent certifier placed in the situation of TÜV would have conducted an announced inspection even if this was not mandatory under EU law.⁴²⁴ The certifier was not prudent or vigilant enough as it never performed unannounced inspections at the factory or on sites of the manufacturer to examine the implants despite having the right to do so under the MDD. One small-scale unannounced visit would have made it possible to detect that the products did not fall under the remit of the certified manufacturing process.⁴²⁵

TÜV Rheinland appealed against the first instance decision. The body claimed it complied with the applicable requirements. TÜV argued that it was only responsible for controlling the design and the quality system and not the implants themselves. The certifier also argued it had been systematically deceived by PIP which presented false documents. TÜV did not have sufficient powers under the MDD to take further actions to unmask

422. Krebs, *supra* note 419.

423. Hill, *supra* note 420.

424. Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567, 84-89 & 144.

425. Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, 2013F00567, 142-143; van Leeuwen, *supra* note 104, at 345-46.

the fraud. The *Cour d'Appel* d'Aix-en-Provence followed this reasoning and reversed the first instance decision. The court of appeal concluded that TÜV Rheinland complied with its obligations under supranational law.⁴²⁶

In Germany, the OLG Zweibrücken concluded that the MDD did not impose any statutory obligation on the notified body to intervene to protect all patients that might come into contact with devices. The certification of a device is only a prerequisite for placing it on the market.⁴²⁷ Even if a duty of care would exist, the OLG concluded that the notified body would have acted culpably (*Verschulden*) in order to face liability. The body would have to have committed a demonstrable mistake in carrying out the conformity assessment. This occurs when the certifier does not adequately comply with its monitoring duties and it or ought to have been aware of this fact. However, the court held that the notified body conducted inspections on a regular basis without being required to establish when inspections would exactly take place. The certifier was not obliged to perform unannounced audits of the manufactures, which would not even have brought to light PIP's fraud with the implants.⁴²⁸

It has already been mentioned that the case made it to the ECJ in a preliminary ruling. Advocate General SHARPSTON also acknowledged that notified bodies have surveillance obligations. Annex II to the MDD should be interpreted as meaning that, in the case of class III devices, the notified body responsible for auditing the quality system, examining the design of the product and "surveillance" is under a "duty to act with all due care and diligence".⁴²⁹ Several elements of the Advocate General's reasoning point towards a qualification of an *obligation de moyen*. For instance, if a notified body considers it necessary to examine medical devices and/or the manufacturer's business records, the manufacturer is bound to allow it to do so. The ECJ, however, cannot lay down precise guidelines as to whether such a body is under a duty to carry out an examination, nor when it has to perform unannounced inspections. That will be a matter to be assessed by the national court on a case-by-case basis. The main question thereby will

426. Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482 concluding that "Les appelantes personnes physiques, les intimés et intervenantes ne rapportent nullement l'existence d'une faute de la société AK, et/ou de la société AM".

427. Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, Part II, 2. d); van Leeuwen, *supra* note 104, at 344-45. ; W. Rehmann & D. Heimhalt, *Medical devices: liability of notified bodies?*, TaylorWessing, (May 2015).

428. Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13. See for a translation: W. Rehmann & D. Heimhalt, *Medical devices: liability of notified bodies?*, TaylorWessing, (May 2015).

429. Case C-219/15, Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH, [2016] E.C.R. para. 61.

be what a notified body acting with all due care and diligence would have done in the same circumstances.⁴³⁰

The judgement by the ECJ stipulates that a notified body does not have a general obligation to carry out unannounced inspections, to examine devices and/or a manufacturer's business records. When there is evidence indicating a medical device may not comply with the applicable requirements, the notified body has to take all necessary steps to ensure that it fulfils its obligations.⁴³¹ The ECJ proceeds and writes that notified bodies are under a "general obligation to act with all due diligence"⁴³² when engaged in a procedure relating to the Declaration of Conformity. Whereas such wording might point towards an *obligation de résultat*, the underlying reasons of coming to that conclusion illustrate that a body's monitoring and surveillance tasks during the third stage more likely qualify as *obligation de moyen*.⁴³³

Notified bodies must be allowed an "appropriate degree of discretion"⁴³⁴ to determine whether a device does or does not comply with the applicable requirements. A notified body's obligations would be a "dead letter"⁴³⁵ if the degree of discretion is unlimited. The notified body is under a "duty to be alert" during the last stage of the process.⁴³⁶ Arguably, a notified body will violate this duty when a reasonable notified body placed in the same circumstances would have been alerted by a medical device not complying with the applicable requirements. When performing this duty and finding evidence indicating that a device may not comply with the applicable requirements, the notified body must then take all steps necessary to ensure it fulfils its obligations under the MDD.⁴³⁷

The monitoring and surveillance obligations of CRAs have also been addressed in different cases. These cases illustrate that a CRA's post-issuance monitoring duties will more likely qualify as *obligations de moyen*.

In *Ohio Police v. Standard & Poor's*, the complaint asserted a claim for negligent misrepresentation. The plaintiffs claimed that the CRAs owed them "a duty to act with reasonable care"⁴³⁸ when preparing, assigning, maintaining and disseminating the ratings. The CRAs allegedly breached this duty *inter alia* by failing to adequately monitor the structured finance

430. *Id.* at para. 57.

431. C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, [2017] E.C.R. para. 48.

432. *Id.* at para. 46.

433. Also see the discussion *supra* in footnote xx.

434.

C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, [2017] E.C.R. para. 48.

435. *Id.* at para. 45.

436. *Id.* at para. 47.

437. *Id.* at para. 47.

438. *Ohio Police*, 813 F.Supp.2d at 875 .

securities they rated. The complaint alleged that the CRAs failed to conduct surveillance due to a lack of personnel and inadequate models to track required developments.⁴³⁹ A claim of negligent misrepresentation in Ohio requires that a person failed to exercise reasonable care or competence in obtaining or communicating the information.⁴⁴⁰ Thus, a CRA will not be held liable merely because the given ratings are not updated. Instead, there will be a basis for liability when CRA did not exercise reasonable care or competence during its monitoring duties (e.g. by using inadequate models to track required developments).⁴⁴¹

Reference can also be made to the *Lasalle* case. The plaintiffs argued their financial losses would have been prevented if Duff & Phelps had properly done the initial investigation and the post-issuance monitoring that it claimed to perform. To monitor the continued accuracy of its ratings, the CRA required the issues to submit detailed reports containing information.⁴⁴² The plaintiffs filed a claim against the CRA on the ground of Section 10(b) of the Exchange Act and SEC Rule 10b-5, which are more thoroughly discussed in part xx. These provisions prohibit fraudulent activities in connection with the purchase or sale of securities. One element a plaintiff must allege to state a prima facie case of a violation of Section 10(b) and Rule 10b-5 is that a CRA acted with scienter.⁴⁴³

The Supreme Court defined scienter as a “mental state embracing intent to deceive, manipulate or defraud”.⁴⁴⁴ To underpin a claim brought under Section 10(b), the plaintiff is required to show “fraudulent intent or recklessness rising to the level of conscious behavior”.⁴⁴⁵ The District Court for the Southern District of New York eventually held that plaintiffs have adequately alleged sufficient facts to create the strong inference that Duff & Phelps acted with fraudulent intent or recklessness. The Court held that the CRA’s self-described due diligence process would have alerted it of the issuer’s violation of the bond program as designed or approved by Duff & Phelps. The fact this did not happen constitute strong circumstantial evidence that the CRA either had knowledge of these violations or willfully disregarded the violations. In other words, Duff & Phelps’ Bond ratings were made with knowledge of falsity or at least extreme recklessness.⁴⁴⁶

439. *Id.*

440. *Id.* at 880. See on claims of negligent misrepresentation also the discussion *infra* in part xx.

441. *Id.* at 879-85.

442. *Lasalle National Bank*, 951 F. Supp. at 1082.

443. *Id. Lasalle National Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. 1071, 1082 (S.D.N.Y. 1996).

444. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

445. *O’Brien v. Price Waterhouse*, 740 F.Supp. 276, 280 (S.D.N.Y.1990).

446. *Lasalle National Bank* 951 F. Supp. at 1087.

V. CONCLUSIONS – THE OBLIGATIONS OF THIRD-PARTY CERTIFIERS

The article shed light on the obligations of certifiers during the certification process. There are three stages during the certification process, each of them giving rise to different obligations for certifiers.⁴⁴⁷ First, a certifier has several obligations before issuing the certificate (“pre-issuance obligations”).⁴⁴⁸ The most important one is to analyze the item or related information that needs to be certified.⁴⁴⁹ This analysis makes it subsequently possible to determine the certificate.⁴⁵⁰ This obligation qualifies as an *obligation de moyen*.⁴⁵¹ As such, there should only be grounds for liability when the certifier did not carefully perform the analysis.⁴⁵² The second stage relates to the issuance of an independent certificate.⁴⁵³ All certifiers have to remain independent towards the requesting entity.⁴⁵⁴ This is labelled as an *obligation de résultat*.⁴⁵⁵ Therefore, certifiers could face liability simply because they did not issue an independent certificate, irrespective of the level of care they applied.⁴⁵⁶ Finally, certifiers have “post-issuance” obligations during the last stage of the certification process.⁴⁵⁷ The most important one relates to monitoring and surveying the item that has been certified.⁴⁵⁸ This is an *obligation de moyen*.⁴⁵⁹ Certifiers will only face liability to the extent that they did not carefully perform their post-issuance surveillance and monitoring services, regardless of the question whether the certificate has been suspended, withdrawn, or updated.⁴⁶⁰ When there are reasons to withdraw or change the certificate, and the third-party certifiers fail to do so, there can be grounds for liability.⁴⁶¹ This has been qualified as an *obligation de résultat*.⁴⁶²

The combination of both axes shows that third-party certifiers will not face liability only because the certificate does not correspond with the “true” or “actual value” of the certified item. Instead, there are grounds for

447. See *supra* Sections II-IV.

448. See TaylorWessing, *Medical devices: liability of notified bodies?*, SYNAPSE (May 2015), www.taylorwessing.com/synapse/may15.html.

449. See *supra* Section II.A.

450. See *supra* III.

451. See *supra* Section II.A.

452. See *supra* Section II.A-C.

453. See *supra* Section III.

454. See *supra* Section III.B.1-3.

455. See *supra* Section III.B.

456. See *supra* Section III.

457. See *supra* Section IV.

458. See *id.*

459. See *id.*

460. See *id.*

461. See *id.*

462. See *supra* Section IV.

liability if the certifier did not act as a reasonable and prudent certifier in the first (analysis of the information) or third stages (surveillancing and monitoring duties).⁴⁶³ There might be grounds for liability when the certifier did not remain independent towards the requesting entity during the second stage, regardless of the degree of care it applied to ensure its independence.⁴⁶⁴ The certifier might also face liability if the monitoring and surveillance analysis indicated that there were grounds to withdraw or suspend the certificate but failed to do so.⁴⁶⁵ This framework could be taken into account by policymakers when crafting liability regimes for third-party certifiers or gatekeepers.

An example can illustrate the stages in the certification process. Suppose that a certifier issues a certificate that does not correspond with the “true” or “real value” of the certified item: a triple A rating for financial instruments that later default, a certificate for a vessel that sinks, or a certificate for breast implants that subsequently cause injuries. It is then required to examine in which stage of the certification process it could have gone wrong.⁴⁶⁶ There will be a basis for liability if the certifier performed an analysis of the item or used a methodology that no reasonable and prudent certifier placed in the same circumstances would have done or used (first stage)⁴⁶⁷. There is also a risk of liability if the certifier did not remain independent towards the requesting entity, for example, because it offered consultancy services or assisted in the design of the item (second stage).⁴⁶⁸ A grounds for liability might also exist if third-party certifiers do not carefully perform their monitoring and surveillance duties.⁴⁶⁹ This can be the case if the third-party certifier does not take the necessary steps to ensure that the certificate still corresponds with the value of the certified item.⁴⁷⁰ However, the mere fact that a certificate no longer corresponds with the “true value” of the certified item is no reason why liability should be imposed.⁴⁷¹ It is only when the certifier does not conduct its surveillance and monitoring duties with the required care and skill that there is grounds for liability (third stage).⁴⁷²

463. *See supra* Sections II, IV.

464. *See supra* Section III.

465. *See supra* Section IV.

466. *See supra* Section I.

467. *See supra* Section II.

468. *See supra* Section III.B.

469. *See supra* Section IV.

470. *See id.*

471. *See id.*

472. *See id.*