The Adoption of Regulation Brussels I Recast: Analysis of the Introduced Changes

Hamed Alavi, Tanel Kerikmäe, Tatsiana Khamichonak*

Summary: The Regulation Brussels I is claimed to be the most successful instrument on international civil procedure of all time.[1] Together with its predecessor the Brussels Convention 1968 it has been instrumental in harmonizing the jurisdictional issues in the EU and EEA countries and reforming the process of recognition and enforcement of judgments. Recently further simplification of its subject matter has been carried out by the European law maker in the form of the Regulation Brussels I Recast, which came into force in January 2015. The paper addresses the most fundamental changes introduced by the Recast Regulation. We seek to analyses the major new amendments as opposed to the old regime under the original Brussels I Regulation and establish whether they are suited to achieve their objectives. To this end, the paper begins with Part I, which introduces the background and purposes of the new Recast Regulation. It is followed by Part II, which discusses the introduced changes: the abolition of exequatur, changes to the lis pendens rule, and the reinforced arbitration exclusion. The discussion is concluded with Part III, which gives an overview of the prognosis for the application of the newly amended provisions and the extent, to which the Recast Brussels I Regulation stands up to its purpose.

Keywords: Brussels I Regulation, Brussels I Recast, Amendments, Judgement Recognition, Enforcement, the European Union Law

1. Background and purposes of the Regulation Brussels I Recast

Eight years after Brussels I Regulation[2] entered into force, a number of amendments were proposed as necessary despite its overall success. The amendments meant to target the drawbacks that have proved unsatisfactory throughout the Regulation's application. Such included the exequatur procedure for

* Tallinn Law School, Tallinn University of Technology, Estonia. Contact: hamed.alavi@ttu.ee

1 Timmer, LJ 2013, 'Abolition of Exequatur under the Brussels I Regulation: ILL Conceived and Premature?', Journal of Private International Law, vol. 9, no. 1, pp. 129–147.

2 Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L 12 p.1. Hereinafter 'the Regulation'.

recognition and enforcement of judgements rendered in another Member State; the limitation of the scope to defendants domiciled in the EU; the regulation of choice-of-court agreements and the notorious 'torpedo' actions; and finally, the exclusion of arbitration from the scope of the Regulation.[3]

The exequatur procedure has proved to cause extra costs and delays for the parties involved despite of it being fairly technical. Cases that involve defendants from 3rd countries are governed (with some exceptions) by national law. This causes two kinds of issues: unequal access to justice for companies that conduct business with partners from outside the EU and uncertainty as to whether the mandatory EU rules regarding consumers and employees are enforced. The existing under the Regulation approach provides a loophole for the 'torpedo' proceedings. Particularly, any court, even the one expressly designated by the parties in a valid choice-of-court agreement, shall stay the proceedings until such time as the court first seized establishes whether or not it has jurisdiction. The exclusion of arbitration from the scope jeopardizes the predictability of dispute resolution: when challenged before a court, arbitration agreements can lead to parallel proceedings and irreconcilable resolutions of the dispute.

Consultations with the stakeholders have consolidated the said shortcomings in the Commission's Impact Assessment and a number of amendments were suggested. Such included abolition of the exequatur; extending jurisdiction rules to disputes involving defendants from outside the EU; improving the efficiency of choice-of-court agreements; addressing the relationship between the Regulation and arbitration. Additionally, the reform was meant to facilitate coordination of proceedings before the Member States courts; access to justice in certain specific disputes[4], and clarifying the conditions for the circulation of provisional and protective measures in the EU.[5]

The legislative instrument resulting from the proposed amendments was a joint work of the European Parliament and the Council, with its legal basis in Articles 67(4) and 81(2)(a) and (c) TFEU. The Legal Affairs Committee with its rapporteur Mr. Tadeusz Zwiefka and the Working Party on Civil Law

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[3] Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, Brussels 17 December 2010.

[4] COM(2010) 748 final, Section 2, Article 5(3), Article 18(1), Article 22(1)(b), Article 24(2). So, the primary changes with regard to access to justice include the creation of a special jurisdiction rule regarding rights *in rem* in immovable property; provision for the possibility of proceedings brought against joint employers in different Member States; provision for the possibility of choice-of-court agreements in tenancy of premises for professional use; introduction of a rule to inform defendants of their right to contest jurisdiction and the consequences of not doing so, respectively.

[5] Ibid., p. 5.

Matters concluded the work on the Regulation Brussels I Recast[6] on December 6th, 2012. On December 12th it was published in the Official Journal.[7] The Recast Regulation entered into force in January 10th 2015 with the original Brussels I Regulation continuing to apply to judgments given in proceedings instituted before that date. Interestingly, already before entering into force, the Recast had already been amended in order to allow its rules to be applied by the two courts common to several Member States – the Unified Patent Court (UPC)[8] and the Benelux Court of Justice[9] – when they deal with matters that fall within the scope of the Recast Regulation.[10]

The Recast Regulation turned out to be less ambitious than the initial Commission Proposal. The exequatur was abolished but the conditions for contesting recognition and enforcement of judgements remained unchanged. The exclusion of arbitration from the scope of the Regulation was reinforced. The proposed extension of the scope of the original Regulation to 3rd-country defendants has retained references to national law in most cases. Thus, a defendant not domiciled in a Member State is subject to the national rules on jurisdiction in the Member State where a court is seized. In contrast, as regards protection of consumers and employees, certain rules in the regulation shall be applied regardless of the defendant's domicile.[11] By far the greatest change concerns the choice-of-court agreements and the *lis pendens* rule, which is meant to do away with 'Italian torpedo' actions.

It is suggested that the Recast Regulation is not simply a reworking of the pre-existing rules. Likewise, the original Brussels I Regulation is not a bare embodiment of the preceding Brussels Convention within the framework of

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6 Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L351 p.1.

7 Dickinson, A & Lein 2015, E, *The Brussels I Regulation Recast*, Oxford University Press, Oxford, UK.

8 The UPC was established on February, 19 2013 to ensure uniform applicability of patent law among the signatory states. The UPC Agreement provides that its international jurisdiction is to be established according to the Brussels I Recast Regulation or the 2007 Lugano Convention, where applicable. See Agreement of February, 19 2013 between 25 Member States (excl. Spain, Poland and Croatia) on a Unified Patent Court, OJ C175/1, 20 June 2013.

9 Benelux Court of Justice was established under the Treaty of March, 31 1965 between Belgium, Luxembourg and the Netherlands. In October 2012 the Treaty was amended so as to make it possible to transfer jurisdiction over certain matters falling under the scope of Brussels I Recast Regulation to the Benelux Court of Justice. See Protocol of October, 15 2012 between Belgium, Luxembourg and the Netherlands amending the treaty of 31 March 1965 on the establishment and statute of a Benelux Court of Justice.

10 Press Release of the Council of the European Union regarding the amendments to the recast 'Brussels I' regulation, Brussels, 6 May 2014, 9356/14 (OR. en).

11 Recital 14 of the Recast Regulation.

the European Union but 'the matrix of [transnational litigation]'[12]. The Recast Regulation is, too, one of a number of changes in transnational litigation, preceded by the legal instruments that have already altered the original scope of application of Brussels I Regulation.[13] These include, inter alia, the Small Claims Regulation[14], the Order of Payment Regulation[15], the Uncontested Claims Regulation[16], which allow the judgments rendered under their scopes to be enforced in other Member States. As a result, the scope of Brussels I Regulation both shrank and expanded, as certain procedures have been transferred to specific instruments. Thus, the Insolvency Regulation[17], for example, refers to the relevant provisions of the Brussels I Regulation regarding enforcement of certain judgments rendered during transnational insolvency proceedings. Other instruments borrow terms from Brussels I such as 'civil and commercial matters', which have acquired a very particular meaning in the EU legal vocabulary.[18] Therefore, the Recast Regulation does not introduce a totality of new rules and a new regime. It instead constitutes another string in the web of transnational litigation, alongside Brussels I Regulation and related legal instruments

2. The major changes to the old regime

2.1 Abolition of exequatur

Exequatur is a term that refers to the procedure of verification of foreign judgments. The word had been most popular in French legal vocabulary before it was consolidated in EU law after 2000s. In 2000s, after the 1999 European Council of Tampere, the course was taken for the simplification of recognition and enforcement of foreign judgments. After the Brussels I Regulation came into force, the verification procedure has become a mere technicality.[19]

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[12] Baumgartner, P 2014, 'Recent Reforms in EU Law. Recognition and Enforcement of Foreign Judgments', *Judicature*, vol. 97, no. 4, pp. 188–195.

[13] Ibid, p. 193.

[14] Regulation (EC) No. 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure, 2007 0.J. (L 199) 1

[15] Regulation (EC) No. 1896/2006 of the European Parliament and the Council of December 12, 2006, creating a European order for payment procedure, 2006 0.J. (L 399) 1

[16] Regulation (EC) No. 805/2004 of the European Parliament and of the Council of April 2004 creating a European Enforcement Order for uncontested claims, 2004 0.J. (L 143) 15

[17] Council Regulation (EC) No 1346/2000 of May 29 2000 on insolvency proceedings, 2000 O.J. (L 160) 1

[18] Baumgartner, P 2014 op.cit., p. 193.

[19] Cuniberti, G & Rueda, I 2010, 'Abolition of Exequatur. Addressing the Commission's Concerns', Law Working Paper Series, Paper Number 2010–03, University of Luxembourg, Faculty of Law, Economics and Finance, pp. 1–23.

Under Regulation Brussels I a foreign judgment is recognized, i.e. given the same effects of *res judicata* as in its State of origin, automatically. That is, no exequatur procedure is required, apart from submission of a copy of the judgment, which verifies its authenticity, and a certified translation, where necessary.[20] In contrast, Article 38 provides that a foreign judgment is enforced by a special declaratory decision – exequatur. The exequatur procedure is the only way a party can obtain enforcement. Hence, suing for a new judgment in the Member State where the enforcement is sought is no alternative. However, exequatur is a mere formality, after the completion of which a foreign judgment is declared enforceable. No review of the judgment on the grounds of public policy or other grounds is permitted. The exequatur decision can only be contested on appeal by the party against whom enforcement is sought.[21] At this stage limited grounds of refusal may be invoked relating to public policy, proper notice, irreconcilability of judgments, and violation of designated exclusive jurisdiction rules. In 90 per cent of cases the challenge is unsuccessful.[22]

Abolition of exequatur is motivated by both economic and political considerations. Thus, it would not only reduce the costs of verification of judgments and facilitate cross-border debt recovery but also allow the free movement of judgments as part of the functioning of the single market.[23]The new Recast Regulation was not a revolutionary instrument. Indeed, the first Regulation to abolish exequatur was Regulation 2201/2003 on matrimonial matters[24] followed by a number of other instruments dealing with specific matters.

The new regime under the Recast Regulation makes foreign judgments directly enforceable without the need for obtaining an exequatur. The same provisions apply to authentic instruments and court settlements, which also fall within the scope of the Regulation. According to Article 37(1), the party seeking to enforce a judgment must only produce its authentic copy and a certificate

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[20] Bogdan, M 2012, *Concise Introduction to EU Private International Law*, 2nd edn, Europa Law Publishing, The Netherlands. p. 72.

[21] Ibid. pp. 76–77.

[22] Kramer, XE 2011, 'Abolition of exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area', Nederlands Internationaal Privaatrecht, vol. 4, pp. 633–641.

[23] Cuniberti, G & Rueda, I 2010 op.cit., p. 5.

[24] Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, OJ L338, 23.12.2003, p.1. It was followed by Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for Uncontested Claims; Regulation (CE) No 1896/2006 of 12 December 2006 creating a European Order for Payment Procedure; Regulation (CE) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure; Regulation (CE) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure.

issued by the court of origin. A translation of the judgment may also be required if the court or the competent authority is unable to proceed without it.[2526] Notably, direct enforcement does not circumvent the right of defense of the party against whom enforcement is sought. Now, an application for refusal must be submitted on that party's own accord after the certificate of enforcement is received and before the first enforcement measure is carried out.[27]

Among the voiced concerns about abolishing exequatur one of the most acute was that of human rights. It is pointed out that an exequatur procedure is a safeguard against importing human rights violations from the jurisdiction where they originate. This is so because to be recognized foreign judgments must meet the standards of the European human rights law. Such concerns, however, must be weighed against the effectiveness of other means for securing human rights, such as the mechanisms of the ECHR and the EU Charter of Fundamental Rights.[28]

2.2 Choice-of-court agreements and the lis pendens rule

The 'Italian torpedo' is an action designed to create delays and undermine the effectiveness of choice-of-court agreements. Particularly, a party to a dispute brings an action before a notoriously slow court system, often Italy, to bar an unwanted action in a quicker court system. According to the *lis pendens* doctrine the court seized second will be obliged to stay the proceedings until the first court establishes whether it has jurisdiction. Unsurprisingly, the changes introduced to this approach by the Recast Regulation were widely welcomed.

The old rules under the Brussels I Regulation left a loophole for 'torpedo' actions to be possible and popular. To this end, Article 23 of the Regulation provided for choice-of-court agreements as an expression of the principle of party autonomy. It allows the parties to agree on their own rules, including the choice of forum, provided that such rules do not contradict mandatory law[29]. This, in turn, provides for a considerable degree of certainly with regard to the place where potential disputes are to be adjudicated. Article 23(1) implies that it is immaterial whether there is a connection between the courts of the State chosen and the substance of or parties to the dispute, provided that is it not

[25] Article 37(2) of the Recast Regulation.

[26] Timmer, LJ 2013, 'Abolition of Exequatur under the Brussels I Regulation: ILL Conceived and Premature?', Journal of Private International Law, vol. 9, no. 1, pp. 129–147.

[27] Ibid. p. 134.

[28] Cuniberti, G & Rueda, I 2010 op. cit., pp. 7–8.

[29] Kuipers, JJ 2009, 'Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice', *German Law Journal*, vol. 10, no. 11, pp. 1505–1524.

a purely internal matter. Once the parties agree on a court it shall have exclusive jurisdiction over the substance of the dispute and over the validity of the choice-of-court agreement itself.

The convenience and certainty offered by prorogation of jurisdiction may lead to forum shopping and taking advantage of the *lis pendens* rule.[30] *Lis pendens* is recognised internationally as a means to avoid irreconcilable judgments and afford effective legal protection, whence later instituted proceedings are barred by prior action[31]. The rule is contained in Article 27 of the Brussels I Regulation and reaffirmed by the ECJ case law, particularly *Erich Gasser GmbH -v- MISAT Srl.*[32] It provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. The article is mandatory, shall be applied *ex officio* and cannot be derogated from by the agreement of the parties. It is the *lis pendens* doctrine that makes 'Italian torpedo' possible. The court seized second shall await until jurisdiction is established by the court seized first. A related issue is the so-called 'race of plaintiffs', when a *mala fide* party seeks to create parallel proceedings and submits an action to a court not designated by the choice-of-court agreement. When the other party then brings the action with the same cause before the chosen court, the court will have to nonetheless apply the *lis pendens* rule and stay the proceedings. This loophole in the Brussels I Regulation has been widely criticised and the Recast Regulation means to leave no room for such a manoeuvre[33].

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[30] Ivanova, E 2009–2010, 'Choice of Court Clauses and Lis Pendens under Brussels I regulation', *Merkourios-Utrecht Journal of International and European law*, vol. 26, no.71, pp. 12–16.

[31] Martiny, D & Reithmann, C, *Internationales Vertragsrecht*, Schmidt, Dr. Otto, Germany.

[32] Case C-116/02 *Erich Gasser GmbH -v- MISAT Srl [2003] ECR 1–14693.* In the case, MISAT brought proceedings against Gasser before the Tribunale Civile e Penale in Rome. Seven months later, Gasser brought an action against MISAT before the Landsgericht Feldkirch in Austria regarding the same business relationship. Gasser indicated that the Austrian court was not only the one for the place of performance of the contract between the parties, but also the one designated in the choice-of-court cases, to which MISAT has never objected. MISAT relied on Article 2 of Regulation Brussels I, which confirred jurisdiction on the Italian court according to the place of establishment, and on the fact that proceedings were already started before the Austrian court was seized. The ECJ ruled that the *lis pendens* rule shall be interpreted broadly so as to mean that any court subsequently seized, even if it happens to be the one indicated in the valid choice-of-court agreement, shall stay the proceedings until the court first seized establishes whether or to it has jurisdiction. The ECJ also expressly stated that this rule cannot be derogated from for the sole reason that the court system of the court first seized is excessively slow.

[33] Nielsen, PA 2012, 'The State of Play of the Recast of the Brussels I Regulation', *Nordic Journal of International Law*, vol. 81, pp. 585–603.

The Recast makes an express exception to the general rule of *lis pendens*. The new amended rule provides that as soon as the *designated* court is seized all other courts, previously or subsequently seized, shall stay the proceedings. Recital 22 of the Recast Regulation provides that the designated court shall proceed regardless of whether the non-designated court has stayed the proceedings. This gives it authority to act immediately and independently of any potential parallel proceedings. To this end, Article 31(2) says that when a designated court is seized with exclusive jurisdiction any court of another Member State shall stay the proceedings until it declares – in case the agreement is invalid – lack of jurisdiction. If the designated court establishes jurisdiction, all other courts shall decline it in favour of the court under the agreement (Article 31(3)). The effect of the new rule is such as to prevent any attempt of filing an action with a court other than the one designated by the choice-of-court agreement.

In as much as such a change is welcome and significant, it has several issues that are to be tested in court now that the new Recast Regulation has come into force. The new rules deal expressly with exclusive jurisdiction under the choice-of-court agreements and leave non-exclusive clauses unaddressed.

It is also unclear whether the new rules tackle both identical[34] and related[35] proceedings, or only the former.[36] Identical and related proceedings fall under different articles in the Brussels I Regulation – Article 27 and 28, respectively. According to Article 27, any court is obliged to stay the proceedings until the court first seized decides whether it has jurisdiction. Article 28 gives courts discretion as to whether to stay or not stay the proceedings. Article 31 of the Recast Regulation is silent on the matter, neither including nor excluding either of them. The suggested interpretation, which relies on Recital 22 and Article 29(1) of the Recast Regulation, assumes that related actions were not envisioned for the purposes of Article 31. If this is the case, the exclusion of related actions presents a loophole in the Recast's mechanism of combatting 'torpedo' actions. Under the old regime a case regarding the same cause of action and between the same parties was brought before Italian courts to create a delay in litigation; today the party wishing to circumvent the choice-of-court agreement would only need to make slight changes to either the cause of action or

[34] Proceedings between the same parties and regarding the same cause of action.

[35] Proceedings 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'. Case C-406/92 The Tatry v Maciej Rataj [1994] ECR I-5439 [52].

[36] Kenny, D & Hennigan, R, 2015, 'Choice-of-Court Agreements, The Italian Torpedo, And The Recast Of The Brussels I Regulation', *International and Comparative Law Quarterly*, vol. 64, no. 1, pp. 197 – 209.

the parties involved, and voilà – the full force of the Recast Regulation Article 31 loses its significance.

The case faced with these concerns has very recently been decided in Ireland in February of 2014, *Websense v. ITWAY*. In the case, despite the existence of a valid choice-of-court agreement, which gave exclusive jurisdiction to the courts in Ireland, the Irish Supreme Court decided that the proceedings between the parties in Ireland be stayed until the Italian court first-seized rules on jurisdiction. It is argued that this case may not be the last one dealing with similar circumstances and failing to uphold the effectiveness and fair application of choice-of-court agreements.[37]

2.3 Arbitration exclusion

The Regulation Brussels I excludes arbitration from its scope. It is consistent with arbitration exclusion from the original Brussels Convention 1968: the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards and the 1961 European Convention on International Commercial Arbitration were believed to be sufficient. The rationale for the exclusion was prevention of parallel proceedings and irreconcilable judgments, which may result if one party to an arbitration agreement nonetheless brings a court action. The most unclear part under the old Brussels I Regime is the extent of the exclusion, i.e. whether the arbitration agreement, arbitral award and its consequences are altogether not covered. In the *Marc Rich*[38] case it was ruled that Brussels Convention did not cover cases where arbitration was the principal subject matter of the case. In line with this reasoning, in the *West Tankers*[39] case the ECJ decided that the validity of the arbitration agreement was not the main claim in the case. Instead, the subject matter was a claim for tort damages. Therefore, the incidental to it question about the validity of the arbitration agreement was also covered by the scope of Brussels I Regulation. It was considered inconsistent with the overall exclusion of arbitration and caused negative reactions from the arbitration community.[40]

The new Recast Regulation reinforces the exclusion of arbitration from its scope. This, however, is not contained in the main text of the Regulation but in Recital 12. The Recital 12 reads that when any court is seized of a matter in respect of which the parties have entered into an arbitration agreement, the

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[37] Ibid., p. 198.

[38] Case C-190/89, Marc Rich & Co. AG v. SocietA Italiana Impianti PA, 1991 E.C.R. 1–03855

[39] Case C-185/07, Allianz SpA v. West Tankers, Inc., 2009 E.C.R. 1–00663.

[40] Moses, M 2014, 'Arbitration/Litigation Interface: The European Debate', *Northwestern Journal of International Law & Business*, vol. 35, no. 1, pp. 1–47.

court may refer the parties to arbitration, stay or dismiss the proceedings, or examine the validity of the arbitration agreement. Further, it lays down that when a court rules on the validity of an arbitration agreement, the decision is outside the scope of Recast Regulation's recognition and enforcement rules regardless of whether it is a principal issue or an incidental question. Paragraph 3 of the recital specifies, that when a court rules on the validity of an arbitration agreement and finds it null and void, it can still rule on the substance of the dispute. The decision concerning the substance of the dispute shall be recognised and enforced according to the Recast Regulation. Besides, Recital 12 in conjunction with Article 73 mean that arbitration awards that deal with the same subject matter and are inconsistent can be enforced under the New York Convention, which takes precedence. Finally, the Recital explains that the Recast Regulation does not apply to any action or ancillary proceedings, which relate to the establishment of an arbitral tribunal, powers of arbitrators, etc.

The effects of the following amendments will show more clearly after the provisions on arbitration are tested in court. On the face of it, the clarifications provided by Recital 12 reduce some controversy about the extent of the exclusion and provide protection of arbitration proceedings from parallel proceedings.

3. Conclusion

The Recast Brussels I Regulation introduces a number of improvements to the old regime, not all of which are accommodated in this paper. Some other changes concern the extension of the provisions on jurisdiction agreements, which now can be concluded between the parties, none of whom are domiciled in the EU. Moreover, protective rules relating to consumer contracts and individual contracts of employments are extended to apply in some circumstances to 3rd-country parties.[41] It is evident that the Recast Regulation is far less ambitious than the original Commission proposal. It does, however, bring certain amendments that are highly welcomed by the international community.

[41] Johnson, A, Pertoldi, A, Peacock, N & Ambrose, H 2015, 'The Recast Brussels Regulation. Implications for Commercial Parties', Thomson Reuters (Professional) UK Limited.