



Recovering Attorneys' Fees under CISG: An Interpretation of Article 74*

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PART I: Framing the Controversy

1. Introduction to the Essay

The subject of this essay is the recoverability of attorneys' fees under the United Nations Convention on Contracts for the International Sale of Goods (CISG). The recoverability of attorneys' fees under the CISG is one of the most controversial issues in contemporary CISG jurisprudence. Domestic courts, international arbitral tribunals, and domestic arbitral tribunals diverge as to why, how, and whether to award attorneys' fees under CISG governed contracts.

The recoverability of attorneys' fees under the domestic laws of nations signatory to the CISG is governed primarily by two diametric rules: the *American Rule* and the *Loser-Pays Rule*. The American Rule is the rule adopted almost exclusively by the United States¹ and "calls for litigants to bear their own legal expenses: in the absence of an explicit statutory or contractual provision to the contrary, each party to a dispute must bear his own attorneys' fees."² The American rule is considered a general rule of U.S. procedure, although there are numerous exceptions to the rule that either allow or require the recovery of attorneys' fees as a remedy, one such exception is the inherent authority given to federal courts to award attorneys' fees in instances of extreme bad faith.³ In fact, the United States has over one-hundred federal statutes that modify the American Rule so as to allow for the recovery of attorneys' fees; these statutes are applicable to such fields as: antitrust, copyright, pension, federal antidiscrimination, and securities.⁴ Additionally, the Revised Uniform Commercial Code §5-111(e) requires that attorneys' fees be recoverable as damages for a breach of a letter of credit.⁵ These numerous statutes modify the general American Rule that disallows the recovery of attorneys' fees.

¹ Japan also adopts the American Rule, but Japan only recently acceded to the CISG in July 2008 and the CISG has not yet gone into force in Japan; it will go into force in Japan on August 1, 2009. See: DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 2ND ED. 48 (Oxford University Press 2005).

² Jarno Vanto, *Attorney's Fees as Damages in International Commercial Litigation*, 15 PACE INT'L L. REV. 203, 204 (Spring 2003).

³ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 388 (7th Cir. 2002). See also: *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52-55 (1991). Attorneys' fees are also recoverable in the United States in certain class actions and certain derivative shareholder suits. See: SHELTON, *supra* note 1 at 48, note 176 ("Fees are also awarded plaintiffs in class actions where the plaintiff has preserved or generated a common fund for the benefit of the class and in shareholders' derivative suits where the defendant is perceived to benefit from the suit.")

⁴ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 388 (7th Cir. 2002). See also: SHELTON, *supra* note 1 at 48, note 176.

⁵ Revised UCC §5-111(e) reads: "Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article."

The Loser-Pays Rule, sometimes referred to as the “English Rule,” is adopted in almost every nation party to the CISG except the United States.⁶ The Loser-Pays Rule designates “that the party losing the dispute will be held liable for the legal fees of both parties to the proceedings.”⁷ This rule has a number of variations, but is accepted in some form or another in a “nearly universal” manner.⁸

CISG Article 74 is the general damages provision for breaches of CISG governed contracts. Article 74 allows the recovery of foreseeable and consequential losses, including losses of profit, for breaches of CISG governed contracts. The controversy over attorneys’ fees arises because the courts and tribunals of the CISG parties have rendered inconsistent and contradictory opinions as to whether a “loss” in Article 74 includes attorneys’ fees. This essay addresses the many methods by which courts, tribunals, and commentators have dealt with the question of whether attorneys’ fees are a “loss” under CISG Article 74. The essay also puts forward a unique method of interpreting Article 74 by appealing to principles that have previously not been used to interpret Article 74, concluding that attorneys’ fees are recoverable under the substantive term, “loss” in Article 74.

The United Nations Convention on Contracts for the International Sale of Goods, sometimes referred to as the “Vienna Convention,” and yet others as the “CISG,” is the most recent in a series of attempts at a unified, international sales law.⁹ The origins of the CISG can be traced to the 1930s when a group of distinguished European legal experts convened under the patronage of the International Institute for the Unification of Private Law (UNIDROIT).¹⁰ By 1935 these Western European scholars had completed a preliminary draft of a sales convention.¹¹ This progress was temporarily suspended upon the rise of World War II, but following the war the scholars reconvened in 1951 to continue their legacy.¹² Numerous drafts were issued over the subsequent years including a draft uniform law on the formation of a contract that was circulated in 1958, and a uniform law for the international sale of goods, drafts of which were circulated in 1956 and 1963.¹³ Following these events, 28 nations met at the 1964 Hague Convention during which they finalized these drafts.¹⁴ These efforts culminated in two international conventions: one presented the Uniform Law for the International Sale of Goods (ULIS), and the other the Uniform Law on the Formation of Contracts for the International

⁶ Vanto, *supra* note 2 at 204-205.

⁷ Vanto, *supra* note 2 at 205-206.

⁸ Vanto, *supra* note 2 at 205.

⁹ See generally: E. Allan Farnsworth, *The Vienna Convention: History and Scope* 18 INT’L LAW. 17 (winter 1984).

¹⁰ Peter Winship, *New Rules for International Sales*, 68 A.B.A.J. 1230 (October, 1982).

¹¹ JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES*, 3rd Ed., 5 (Kluwer Law International 1999).

¹² *Id.* at 5.

¹³ HONNOLD, *supra* note 11 at 5.

¹⁴ HONNOLD, *supra* note 11 at 5.

Sale of Goods (ULF).¹⁵ All of the “[s]tates ratifying these 1964 conventions agreed to incorporate the uniform laws into their domestic legislation.”¹⁶ Finally, in 1972 the conventions went into effect after their ratification by five nations.¹⁷

The 1964 conventions had a “minimal impact on international commerce,” and were never ratified by the United States, so the redrafting of a new international sales law was initiated by the United Nations.¹⁸ The ULF and ULIS, although falling short of attaining unanimous international support, laid a foundation upon which the United Nations could later build.¹⁹ In 1966 the General Assembly of the United Nations created UNCITRAL, the U.N. commission on international trade law, to attempt to harmonize and unify international trade.²⁰ UNCITRAL convened for the first time in 1968 and by its second meeting of 1969 appointed a 14-member Working Group, including the United States, to study the previous conventions and redraft an international sales law.²¹ The Working Group was instructed to determine what changes would need to be made to the ULIS and ULF to accommodate the various needs of the many nations, particularly the needs of nations outside of Western Europe because Western European views had dominated the drafting of the relatively unsuccessful ULIS and ULF.²²

Over the subsequent years the CISG was created and finalized through multinational efforts spearheaded by UNCITRAL. From 1970 to 1978 the Working Group continued to revise the conventions over nine more meetings, and in 1978, in its eleventh session, adopted a draft convention that combined and revised the rules of the ULF and the ULIS.²³ This draft was accompanied by a Secretariat Commentary, which is the “closest counterpart to an official commentary,”²⁴ provided for the present day CISG. The Secretariat Commentary was distributed to the many nations and international organizations with the Draft CISG.²⁵ With minor revision, the CISG was then approved in the 1980 Vienna Conference. The conference was composed of representatives from sixty-two countries and eight international organizations;²⁶ it spanned the months of March and April of 1980.²⁷ The final text of the

¹⁵ HONNOLD, *supra* note 11 at 5.

¹⁶ Winship, *supra* note 10 at 1230-1234.

¹⁷ HONNOLD, *supra* note 11 at 5-6.

¹⁸ Winship, *supra* note 10 at 1230-1234.

¹⁹ Winship, *supra* note 10 at 1230-1234.

²⁰ Winship, *supra* note 10 at 1230-1234.

²¹ Farnsworth, *supra* note 9 at 17-20.

²² Farnsworth, *supra* note 9 at 17-20.

²³ Farnsworth, *supra* note 9 at 17-20.

²⁴ See e.g.: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html> (last visited January 19, 2007).

²⁵ Farnsworth, *supra* note 9 at 17-20.

²⁶ HONNOLD, *supra* note 11 at 10.

CISG was issued in six official languages: English, Russian, French, Spanish, Arabic, and Chinese.²⁸ The Convention was finalized with eighty-eight substantive articles as well as thirteen other articles (relating to such things as effective date and reservations).²⁹

The CISG is the most successful, unified international sales law to date although attaining uniformity in interpretation remains a challenge to all parties concerned. The CISG represents a pinnacle of modern history in that after over half a century's efforts there is a uniform international sales law among seventy-one of the world's nations.³⁰ This stress on uniformity may be a bit misleading because there is much disagreement as to how certain provisions of the CISG should be interpreted, and as to the meaning of the many concepts within the text of the CISG itself. One of the most controversial topics within CISG jurisprudence is whether attorneys' fees are recoverable as damages under Article 74 or not. *Infra*, this paper discusses in detail the need for a uniform interpretation regarding the recoverability of attorneys' fees under Article 74 of the CISG.³¹ The following section addresses the CISG provisions relevant to interpretation and damages; subsequent to the following section is an analysis of the CISG arbitral and court decisions across the many nations.

2. Interpreting the CISG Damages Provisions

2.1. Introducing the Hierarchy of Interpretation

CISG Article 7 contains the methodology of interpreting the provisions of the CISG; it contains a hierarchy of interpretation that is used to interpret each provision of the CISG.³² Every provision of the CISG must be interpreted in accord with the mandate of Article 7(1) and the interpretational hierarchy set out in Article 7(1-2).³³ This section lays out the interpretational methodology of the CISG as contained in Article 7(1-2). This section then

²⁷ Farnsworth, *supra* note 9 at 17-20.

²⁸ HONNOLD, *supra* note 11 at 11.

²⁹ Farnsworth, *supra* note 9 at 17-20.

³⁰ See: <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last visited January 19, 2007) (for the present status of who is a party to the CISG).

³¹ See: Sections III-VI of this paper.

³² The predecessor to the CISG, the ULIS, contained a similar provision (ULIS article 17) for interpreting the ULIS.

³³ For Legal scholarship addressing Article 7 interpretations, see e.g.: Vanto, *supra* note 2; John Felemegas, *An Interpretation of Article 74 CISG by the US Circuit Court of Appeals*, 15 PACE INT'L L. REV. 91 (Spring 2003); John Y. Gotanda, *Awarding Damages Under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation*, 37 GEO. J. INT'L L. 95 (Fall 2005); and, BRUNO ZELLER, *DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* (OCEANA PUBLICATIONS 2005). For U.S. case law addressing Article 7 interpretations, see e.g.: *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385 (7th Cir. 2002); *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*, 320 F.Supp.2d 702 (N.D.Ill. 2004); *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, 2003 WL 223187 (N.D. Ill.), Prod. Liab. Rep. (CCH) P 16, 516; *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agonistino, S.p.A.*, 144 F. 3d 1384, 1389 (11th Cir. 1998); and, *Delchi Carrier Spa v. Rotorex Corporation*, 71 F.3d 1024 (2nd Cir. 1995).

presents Articles 74 and 77: the damages provisions relevant to the recovery of attorneys' fees for breaches of CISG governed contracts.

2.2. *The Top of the Hierarchy of Interpretation: Article 7(1):*

Article 7(1) contains the general rule of interpretation for the CISG which informs all of the provisions of the Convention including Article 7(2). Article 7(1) provides:

In interpreting this Convention, regard is to be had to its *international character* and to the need to promote *uniformity* in its application and the observance of *good faith* in international trade (emphasis added).

The text clearly manifests three requirements of an Article 7(1) interpretation: (i) regard be had to the Convention's international character, (ii) regard be had to the need to promote uniformity in application of the Convention, and (iii) that good faith in international trade be observed in its interpretation.

2.3. *The Next Steps in the Hierarchy of Interpretation: Article 7(2)*

Article 7(2) comes into play when matters that are governed by the Convention are "not expressly settled" by the interpretational techniques of Article 7(1).³⁴ When matters within the scope of the Convention are not expressly settled, Article 7(2) is used to fill the gaps. As John Honnold put it, Article 7(2) "is designed to help the law adapt and grow in the light of new circumstances."³⁵ Article 7(2) provides:

Questions concerning *matters governed by this Convention* which are *not expressly settled* in it are to be settled in conformity with the *general principles on which it is based* or, *in the absence of such principles*, in conformity with the law applicable by virtue of *the rules of private international law* (emphasis added).

Article 7(2) does not apply unless the matters concerned are "governed by the convention" and the matters concerned are "not expressly settled" in the Convention. Only if these two prerequisites are met does the interpreter attempt to settle the matters "in conformity with the general principles on which it is based," and only if there are no principles that apply, does the interpreter settle the matter "in conformity with the law applicable by virtue of the rules of private international law."

³⁴ CISG Article 7(2).

³⁵ HONNOLD, *supra* note 11 at 88.

2.4. *Interpreting the Damages Provisions of the CISG*

The recovery of damages under CISG governed contracts is guided primarily by Articles 74 through 78.³⁶ Other articles specify rights and obligations of the buyer and seller specific to damages.³⁷ Regarding the recoverability of losses, Articles 74 and 77 impose four requirements for a party seeking damages in breach of contract actions. Additionally, Article 75 allows for the recovery of damages when a contract is avoided that includes the damages for breach of contract provided in Article 74.

The victim of the breach in a breach of contract action is subject to the duty to reasonably mitigate damages under Article 77. Article 77 provides:

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

The Secretariat Commentary notes that Article 77 “states a duty owed by the injured party to the party in breach...In this case the duty owed is the obligation of the injured party to take actions to mitigate the harm he will suffer from the breach so as to mitigate the damages he will claim.”³⁸ Any damages recoverable for breach of contract must be reasonably mitigated by the victim of the breach and if the victim does not reasonably mitigate then the party in breach “may claim a reduction in the damages in the amount by which the loss should have been mitigated.”³⁹ The amount that should have been mitigated is a question of the facts and circumstances surrounding the individual case. The duty to reasonably mitigate damages is the first requirement for recovery in a breach of contract action.

Article 74 imposes three additional requirements before damages can be recovered for breach of CISG governed contracts. Article 74 provides:

Damages for breach of contract by one party consist of a *sum equal to the loss, including loss of profit*, suffered by the other party as a *consequence of the breach*. Such damages may not exceed the loss which the party in breach *foresaw or ought to have foreseen* at the time of the conclusion of the contract, in light of the facts and matters of which he then

³⁶ Article 78 relates to interest on sums not paid; Article 77 covers the duty to mitigate damages; Articles 75 and 76 provide for damages and duties relating to the avoidance of the contract; and Article 74 is the general provision on damages for breaches of CISG contracts.

³⁷ See: Appendix A to this paper for the rights and obligations of the buyer compared and contrasted to the rights and obligations of the seller.

³⁸ Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-77.html> (last visited January 15, 2007).

³⁹ CISG Article 77.

knew or ought to have known, as a possible consequence of the breach of contract (emphasis added).

The second requirement for breach of contract actions is that there is a “loss” involved in the adjudication. The amount of damage recovery will be a “sum equal to the loss, including loss of profits,” but as was discussed by the U.S. Seventh Circuit, if the alleged damage does not constitute a loss then it is not recoverable under Article 74.⁴⁰ The meaning of “loss,” although seemingly simple, is a highly controversial topic within CISG jurisprudence.⁴¹ Take, for example, the divergent views as to whether attorneys’ fees constitute a loss under Article 74.⁴² The Secretariat Commentary clarifies that the “basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed.”⁴³ Therefore, a “loss” according to the Commentary entails placing the victim of the breach in the same economic position she would have been in but for the breach.

The third requirement for breach of contract actions is that the “loss” is a “consequence of the breach.” Whether a loss is a consequence of a breach is to be determined on a case-by-case basis taking into account all of the relevant circumstances of the case. As the Secretariat Commentary states, “The court or arbitral tribunal must calculate that loss in the manner which is best suited to the circumstances,”⁴⁴ in determining whether it is a consequence of the breach. The circumstantial leniency in determining whether a “loss” is a consequence of the breach is somewhat limited by the fourth requirement: foreseeability.

The foreseeability standard contained in Article 74, that a party’s loss is limited to that which it “foresaw or ought to have foreseen” at the time the contract was completed is influenced by the French Code of Civil Procedure’s (FCCP) foreseeability standard.⁴⁵ FCCP §1150 provides a limitation on damages to those “which were foreseen or which could have been foreseen at the time of the contract,” subject to some provisos.⁴⁶ It has also been noted that the famous 1854 English decision, *Hadley v. Baxendale*,⁴⁷ on which the U.S. foreseeability standard is based, made

⁴⁰ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 387-389 (7th Cir. 2002).

⁴¹ See: *Infra*: Sections III-VI.

⁴² See: *Infra*: Sections III-VI.

⁴³ Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html> (last visited January 15, 2007). See also: HONNOLD, *supra* note 13 at 445.

⁴⁴ Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html> (last visited January 15, 2007).

⁴⁵ HONNOLD, *supra* note 11 at 448.

⁴⁶ One such proviso is “willfulness.” See: HONNOLD, *supra* note 11 at 448.

⁴⁷ *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854).

a positive reference to this French law in its opinion.⁴⁸ The majority of legal systems in the world have foreseeability standards that exclude unforeseeable losses or damages.⁴⁹

In sum, in order to recover under a breach of contract there must be a “loss,” the “loss” must be a foreseeable, consequence of the breach, and the victim of the breach must have mitigated this loss lest the “loss” get reduced by the amount that the party should have mitigated. The damages provisions of the CISG must be interpreted under the hierarchy of interpretation set out in Articles 7(1-2). The following section relays the problems with developing a uniform, international interpretation of Article 74 by surveying the divergent decisions on the recoverability of attorneys’ fees under Article 74 by the many parties to the CISG. Following the survey of CISG decisions, this paper addresses an Article 7 interpretation of Articles 74 and 77, concluding that Article 7 requires that attorneys’ fees be recoverable as a “loss” under Article 74.

3. Survey of CISG Decisions on the Recovery of Attorneys’ Fees

3.1. Introducing the Decisions

Attorneys’ fees are recoverable as damages in the courts of almost every country party to the CISG except the United States. This section first provides examples of the many international and domestic arbitral panels that award attorneys’ fees in CISG governed disputes. Second, this section surveys the case law from China, Germany, Belgium, Finland, and Switzerland to show that each of these countries regularly award attorneys’ fees in CISG disputes. Finally, this section discusses in detail the leading U.S. case that disallows the recovery of attorneys’ fees under the CISG, *Zapata Hermanos Sucesores v. Hearthside Banking Co. (Zapata)*.⁵⁰ *Zapata* is a decision of the 7th Circuit Court on appeal from the United States District Court for the Northern District of Illinois.⁵¹ The Supreme Court thereafter denied the petition for a writ of certiorari to the *Zapata* ruling of the 7th Circuit,⁵² and at the time of the writing of this article, neither the Supreme Court nor any other U.S. Circuit courts have directly spoken on the topic of the recoverability of attorneys’ fees under CISG governed contracts.

⁴⁸ HONNOLD, *supra* note 11 at 447-448.

⁴⁹ Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html> (last visited January 15, 2007).

⁵⁰ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385 (7th Cir. 2002).

⁵¹ *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 155 F.Supp.2d 969 (N.D.Ill. Aug 22, 2001) (NO. 99 C 4040).

⁵² *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 540 U.S. 1068, 124 S.Ct. 803, 157 L.Ed.2d 732, 71 USLW 3589, 72 USLW 3364, 72 USLW 3373 (U.S. Dec 01, 2003) (NO. 02-1318).

3.2. *International and National Arbitral Decisions*

International and national arbitral tribunals consistently award attorneys' fees in actions governed by the CISG. Often, these arbitral panels have rules explicitly authorizing the arbitrators to award attorneys' fees as the circumstances of the case may require.⁵³ The Russian Federation Arbitral Tribunal as well as the International Chamber of Commerce Arbitral Panel have both determined that attorneys' fees fall under the substantive term, "loss" in Article 74 of the CISG and are recoverable as damages. Other arbitral tribunals, including the China International Economic & Trade Arbitration Commission (CIETRA) and the Schiedsgericht der Handelskammer [Arbitral Tribunal] of Hamburg, Germany have similarly held that attorneys' fees are a recoverable "loss" under Article 74 of the CISG.

The Russian Federation tribunal of August 15, 2003 found that the Seller had breached a contract governed by the CISG by sending nonconforming goods, and allowed the recovery of attorneys' fees.⁵⁴ The tribunal analyzed the amount of damages under Article 74 of the CISG and disallowed recovery of moral damages. The tribunal stated it is "of the opinion that, based on Article 74 CISG, such claim [for moral damages] cannot be granted."⁵⁵ Nevertheless, the tribunal granted the buyer's "claim to recover attorneys' fees taking into consideration the volume of the documents submitted in support [of the claims], the length of the hearings and the award rendered."⁵⁶ The Russian tribunal found that although Article 74 of the CISG bars the recovery of moral damages, it does not bar the recovery of attorneys' fees.

The Russian Federation tribunal considered three contracts between buyer and seller in the June 17, 2004 panel decision resulting in various awards including the awarding of attorneys' fees to the injured claimant.⁵⁷ This decision is complicated by the fact that one contract was governed by the law of Cyprus, one was governed by Russian law, and one contract was governed by the CISG.⁵⁸ The panel determined that the claimant was entitled to, *inter alia*: "reimbursement of the damages in the form of loss of profit...founded on art. 74 CISG."⁵⁹ In this complicated panel decision which was decided under three different bodies of law, the tribunal awarded attorneys' fees to the complainant in accord with the authority granted them

⁵³ For instance, the Russian Federation Rules, §9 states: "The winning party may demand that the other party be obliged to reimburse his reasonable expenses incurred in connection with the arbitral proceedings and, in particular, the expenses connected with defending his interests through legal representatives."

⁵⁴ Russia 15 August 2003 Arbitration proceeding 57/2001. Available at: <http://cisgw3.law.pace.edu/cases/030815r1.html> (last visited March 7, 2007).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Russia 17 June 2004 Arbitration proceeding 186/2003 (*Barter transaction*). Available at: <http://cisgw3.law.pace.edu/cases/040617r1.html> (last visited March 7, 2007).

⁵⁸ *Id.*

⁵⁹ *Id.*

by §9 of the Rules of Arbitration Expenses and Fees, the rule authorizing arbitrators to award reasonable legal costs.⁶⁰

The Russian Federation tribunal has regularly awarded attorneys' fees in CISG governed disputes, although the panel decision of June 6, 2003 reveals a caveat for buyers and sellers arbitrating in the Russian Federation.⁶¹ This tribunal found under Article 74 and 77 of the CISG and the UNIDROIT principles that the seller was liable to buyer for two-thirds of the claim the buyer alleged.⁶² As to the caveat, the tribunal determined that "the winning party may demand that the other party reimburse reasonable expenses incurred in connection with the arbitration and, in particular, legal expenses. However, the [Buyer] did not present evidence of his legal expenses. Therefore, the Tribunal denies such claim."⁶³ In other words, because the buyer did not provide evidence of his legal expenses, the tribunal refused to award the buyer otherwise awardable attorneys' fees.

The International Chamber of Commerce's Court of Arbitration held in a 1992 decision that attorneys' fees are recoverable as a "loss" under Article 74 of the CISG.⁶⁴ The ICC panel awarded not only attorneys' fees as a "loss" under Article 74 but also all "legal costs" which extend beyond attorneys' fees.⁶⁵ As another ICC panel clarified: "legal costs' do not encompass only attorneys' fees but also the costs of a party itself provided that they are reasonable and incurred in connection with the preparation and presentation of the arbitration case."⁶⁶ The 1992 panel decision determined attorneys' fees are a foreseeable, consequence of the breach so are recoverable as a "loss" under CISG Article 74.

The CIETAC (China) arbitral panel decision of May 14, 1996 determined in a breach of contract action that the breaching buyer was liable for attorneys' fees under Article 74 of the CISG.⁶⁷ The dispute arose over four signed letters of sale confirmation of which the buyer only paid a small percentage of the designated costs.⁶⁸ The panel decided the buyer was liable for cost, interest, arbitration fees, and that "the expenses of attorney handling the case and attorney fee...are

⁶⁰ Russian Federation Rule, *supra* note 133.

⁶¹ Russia 6 June 2003 Arbitration proceeding 97/2002. Available at: <http://cisgw3.law.pace.edu/cases/030606r1.html> (last visited March 7, 2007).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ ICC Arbitration Case No. 7585 of 1992 (*Foamed board machinery*). Available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=134&step=FullText> (last visited March 7, 2007).

⁶⁵ *Id.*

⁶⁶ ICC Arbitration Case No. 10329 of 2000 (*Industrial product case*). Available at: <http://cisgw3.law.pace.edu/cases/000329i1.html> (March 7, 2007).

⁶⁷ China 14 May 1996 CIETAC Arbitration proceeding (*Down coat case*). Available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960514c1.html> (last visited March 7, 2007).

⁶⁸ *Id.*

indirect losses caused by [Buyer]'s breach, and [Seller] has provided certificate of such expenses, so [Buyer] shall indemnify [Seller] such expenses.”⁶⁹ The CIETAC arbitrators determined that attorneys’ fees are a “loss” and are recoverable as damages under CISG Article 74.⁷⁰

The CIETAC again awarded attorneys’ fees as a foreseeable, consequence of the breach under CISG Article 74 in the February 12, 1999 panel decision.⁷¹ As the tribunal decision reads: “The [Seller] submitted evidence of...damages, and evidence of the attorneys' fee, investigation cost, and traveling fee, which was accepted by the Tribunal. According to Article 74, the Arbitral Tribunal decided that the...loss was a foreseeable loss that can be expected and should be expected by the [Buyers] when entering into the contract, which then shall be indemnified by the [Buyers].”⁷² The CIETAC tribunal awarded not only attorneys’ fees but the costs of traveling and investigation costs under CISG Article 74 to the seller who was the victim of the breach of contract.

Another CIETAC arbitral tribunal determined that the breaching buyer had to pay the seller’s attorneys’ fees but because the seller did not submit the actual costs of his attorneys’ fees, that the buyer had to pay the standard rate of attorneys’ fees.⁷³ The tribunal decided: “the Respondent [Buyer] should bear only part of payable attorney fees to the Claimant [Seller]...according to the standard charge by professional attorneys, because the [Seller] did not submit the appointment contract with attorneys, nor did he note expressly the relation with this case in his attorney fee receipt.”⁷⁴ Even though the seller did not provide the actual cost of attorneys’ fees, the CIETAC tribunal still awarded attorneys’ fees.⁷⁵

A 1996 Hamburg (Germany) arbitral tribunal determined that the victim of the breach can recover attorneys’ fees under the CISG.⁷⁶ The UNCITRAL case abstract for this decision clarified, “The arbitral tribunal, in rendering its award on the costs of the proceedings, held

⁶⁹ *Id.*(Quoting English translation.)

⁷⁰ Many CIETAC tribunals have also determined that attorneys’ fees are a foreseeable consequence of the breach. See e.g.: China 6 August 1996 CIETAC Arbitration proceeding (*Lacquer handicraft case*), available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960806c1.html> (last visited March 8, 2007).

⁷¹ China 12 February 1999 CIETAC Arbitration proceeding (*Nickel plating machine production line equipment case*). Available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/990212c2.html> (last visited March 8, 2007).

⁷² *Id.*

⁷³ China 18 December 1996 CIETAC Arbitration proceeding (*Lentil case*). Available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/961218c1.html> (last visited March 8, 2007).

⁷⁴ *Id.*

⁷⁵ Another CIETAC decision similarly limited the amount of recoverable attorneys’ fees because the victim of the breach did not submit evidence of actual cost. See: China 31 December 1997 CIETAC Arbitration proceeding (*Lindane case*), available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/971231c1.html> (last visited March 8, 2007).

⁷⁶ Germany 21 June 1996 Hamburg Arbitration proceeding. Available at: <http://cisgw3.law.pace.edu/cases/960621g1.html> (last visited March 7, 2007).

that the [seller] could claim its attorney's fees for the arbitration proceedings as damages according to articles 61 and 74 CISG.”⁷⁷ This is a supplementary decision addressing solely the recovery of attorneys’ fees following an earlier decision on the same facts rendered by the same tribunal.⁷⁸ This supplementary decision solidifies the panel’s earlier determination to award attorneys’ fees under CISG Article 74.

In short, both international and national arbitral tribunals have consistently awarded attorneys’ fees under Article 74 of the CISG. The following subsection surveys the various methods that domestic courts outside of the United States have taken in determining whether attorneys’ fees should be awarded under CISG governed contracts. This subsection is followed by an analysis of the United States’ courts.

3.3. *Domestic Courts outside of the United States*

3.3.1. Varying Domestic Courts outside of the United States

Domestic courts outside of the United States generally award attorneys’ fees under CISG governed disputes. Some award attorneys’ fees for the same reason the arbitral tribunals do, that is, because attorneys’ fees are a “loss” under Article 74. Other domestic courts determine attorneys’ fees are not directly considered in the Convention, so domestic law is used under Article 7(2) to fill the gap; these courts apply their domestic rules as to the recovery of attorneys’ fees. And yet others combine the two approaches: these courts state that attorneys’ fees are a “loss” under Article 74 but they calculate the amount of the award by use of their domestic law. These latter methods have led to inconsistent CISG opinions both across national boundaries and even within individual nations. As this section will display, by deferring to domestic law in determining whether attorneys’ fees are recoverable and in calculating them, the many courts have rendered opinions that contravene the uniform, international nature of the Convention in derogation of the mandate of Article 7(1).⁷⁹ Additionally, domestic law based determinations as to attorneys’ fees pose problems of predictability for contractual parties.⁸⁰ The following evaluates case law from China, Germany, Belgium, Finland, and Switzerland. The various approaches to the recovery of attorneys’ fees in CISG governed disputes are represented well by this sampling of cases.

⁷⁷ *Id.* Although the CLOUT abstract clarifies this point of attorneys’ fees, the questions of attorneys’ fees are somewhat ambiguous in the text of the case itself.

⁷⁸ Germany 21 March 1996 Hamburg Arbitration proceeding. Available at: <http://cisgw3.law.pace.edu/cases/960321g1.html> (last visited March 7, 2007).

⁷⁹ Article 7(1) reads: “In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”

⁸⁰ Discussed *infra*, section V-VI.

3.3.2. China

China has consistently awarded attorneys' fees in CISG disputes, but has not clearly stated whether they are awarding attorneys' fees under CISG Article 74 or Chinese law. In one case, the Chinese Appellate Court confirmed the lower court's decision to award attorneys' fees in a CISG governed dispute.⁸¹ The court's reasoning implied the award of attorneys' fees for the breach of contract was due to its international obligations rather than domestic law. The court affirmed the award because: "Paying the attorneys' fee accords with international practices."⁸²

A Chinese Maritime Court issued a similarly ambiguous decision.⁸³ This dispute arose over the failure in shipment of 60,000 tons of iron ore that was contracted to be shipped to the buyer via a chartered ship. The court stated the contract was governed both by the Convention and the Maritime law of China. The court held that the contract was breached and awarded attorneys' fees because they are "necessary expenses to settle disputes in a society governed by law..."⁸⁴ In both of these cases the Chinese court, or perhaps the translation, did not state whether the attorneys' fees are recoverable because of Article 74 of the CISG or pursuant to Chinese law.

3.3.3. Germany

The German courts have consistently held that attorneys' fees constitute a "loss" under Article 74 of the CISG, but generally defer to German domestic law to calculate the amount of attorneys' fees. The German courts often draw the distinction between prelitigation fees and litigation fees in their domestic calculations, and sometimes award the former but not the latter. However, sometimes whether the court is awarding prelitigation or litigation fees is unclear.⁸⁵ And yet at other times, it seems clear that the German courts are awarding both

⁸¹ China 17 July 2000 Higher People's Court [Appellate Court] of He'nan Province (*Mintermet S.A. v. He'nan Local Product Import and Export Company*). Available at: <http://cisgw3.law.pace.edu/cases/000717c1.html> (last visited March 8, 2007).

⁸² *Id.*

⁸³ China 5 March 2002 Guangxi Beihai Maritime Court (*Sino-Add (Singapore) PTE. Ltd. v. Karawasha Resources Ltd.*). Available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/020305c1.html> (last visited March 8, 2007).

⁸⁴ *Id.*

⁸⁵ See generally: Harry M. Flechtner, *Recovering Attorneys' Fees as Damages Under The U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice With Comments on Zapata Hermanos v. Hearthside Baking*, 22 Nw. J. INT'L L. & BUS. 121 (Winter 2002) (arguing that many of the non-United States cases that appear from their English translation to award attorneys' fees are actually only awarding prelitigation and not litigation expenses). See also: Germany, 22 July 2004 Appellate Court- Dusseldorf, available at: <http://cisgw3.law.pace.edu/cases/040722g1.html> (last visited February 21, 2008); and, Germany, 21 June 2006 Lower Court Landsberg (*Dust ventilator case*), available at: <http://cisgw3.law.pace.edu/cases/060621g1.html> (last visited February 18, 2008).

litigation and prelitigation fees. The courts of Germany are a fine example of the erratic results that arise from a non-uniform interpretation of CISG Article 74.

A number of German courts have determined that attorneys' fees are recoverable as a "loss" under CISG Article 74. For example, a 2003 German district court held that attorneys' fees are recoverable as a "loss" under CISG Article 74.⁸⁶ The court reasoned that recovery in this breach of contract action was allowed under Article 74 but the method of calculating the amount of attorneys' fees was governed by German domestic law.⁸⁷ Similarly, a 2002 lower German court held that "The term "loss" in Art. 74 sent[ence] 1 CISG, encompasses the cost of pursuing one's rights," including attorneys' fees.⁸⁸ In this latter case also, the court calculated the amount of attorneys' fees in accord with German domestic law.⁸⁹

German courts, although determining that the term "loss" in Article 74 entails attorneys' fees have employed their domestic rules to calculate the amount of attorneys' fees that can be recovered. In importing these rules, the German courts sometimes award attorneys' fees from litigation and at others only for prelitigation as is apparently in accord with their domestic law. Professor Harry M. Fletchner⁹⁰ suggests that many of the German cases that appear from their English translation to award attorneys' fees are actually only awarding prelitigation and not litigation expenses.⁹¹ He addresses specifically a 1996 decision that holds prelitigation expenses recoverable and yet litigation expenses non-recoverable.⁹² These inconsistencies flow from the application of domestic law as a means of calculating recoverable attorneys' fees.

3.3.4. Belgium

The Belgium courts are inconsistent in the awarding of attorneys' fees in CISG governed disputes. One Belgium District Court⁹³ held that the seller can recover attorneys' fees, after a discussion of Article 74. The court stated that "The claim of the [Seller] can be allowed...on the

⁸⁶ LG Berlin, 103 O 213/02, March 23, 2003, (F.R.G.). Available at <http://cisgw3.law.pace.edu/cases/030321g1.html> (last visited January 7, 2007).

⁸⁷ *Id.*

⁸⁸ Amtsgericht Viechtach, No. 1 C 419/01, April 1, 2002 (F.R.G.) available at: <http://cisgw3.law.pace.edu/cases/020411g1.html> (last visited January 7, 2007) (quoting the English Translation).

⁸⁹ Many German cases have similarly held that the term "loss" in Article 74 encompasses attorneys' fees. See e.g.: Germany 13 March 1997 Lower Court Berlin-Tiergarten, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970313g1.html> (last visited March 8, 2007).

⁹⁰ Flechtner, *supra* note 85 at 121.

⁹¹ Flechtner, *supra* note 85 at 128-135.

⁹² Decision of July 11, 1996, Oberlandesgericht Dusseldorf No. 6 U 152/95, available at <http://cisgw3.law.pace.edu/cases/960711g1.html> (last visited January 7, 2007).

⁹³ Decision of February 25, 2004, Rechtbank van Koophandel Hasselt, available at <http://cisgw3.law.pace.edu/cases/040225b2.html> (last visited January 8, 2007).

basis of articles 74 and 78 of the Vienna Sales Convention.”⁹⁴ No discussion is offered in this case of a domestic law governing the recoverability of attorneys’ fees or a statement that attorneys’ fees are a “loss” under Article 74, nonetheless “The court...direct[ed] the [Buyer] to compensate the [Seller] for the legal costs incurred.”⁹⁵ It is not stated explicitly in this opinion whether the court awarded attorneys’ fees as a “loss” under Article 74 or whether the court thought attorneys’ fees excluded from the ambit of Article 74 and awarded them as a matter of domestic law.

The same Belgium court, in another case, did not allow the victim of the breach of contract to recover attorneys’ fees claimed under the CISG. In this 2004 District Court opinion, the Belgium court did not allow the prevailing party in the CISG breach of contract action to recover attorneys’ fees.⁹⁶ This court did not appeal to the CISG in determining the victim of the breach could not recover, but rather stated the recovery was banned because of a Belgium law that barred compensation in this circumstance.⁹⁷ This appeal to domestic Belgium law, rather than the CISG in disallowing the recovery of attorneys’ fees indicates that either Belgium courts do not accept that attorneys’ fees are considered a “loss” under Article 74 or that in this instance the Belgium law trumped the CISG.

3.3.5. Finland

Finland adopts the “loser pays” rule, which provides the losing party to the lawsuit has to pay the prevailing party’s legal fees. In an Appellate Court decision, a buyer sought damages including loss of profit due in part to non-conforming goods and in part from an avoided CISG governed contract, but the buyer lost on these counts.⁹⁸ The buyer also claimed the seller had never paid the invoices the buyer sent to seller, and won on this count. The court decided, as to attorneys’ fees:

By and far, [buyer] has lost this case. The part concerning the invoices that [buyer] won comprises only a small part of the entire trial and claims presented, especially when considering the grounds for the claims and the claims in their entirety and therefore is inconsequential in relation to the division of the parties’ legal expenses. Therefore,

⁹⁴ *Id.*

⁹⁵ Decision of February 25, 2004, Rechtbank van Koophandel Hasselt, available at <http://cisgw3.law.pace.edu/cases/040225b2.html> (last visited January 8, 2007) (quoting the English translation).

⁹⁶ Decision of February 25, 2004, Rechtbank van Koophandel Hasselt (K BVBA v. BV), available at <http://cisgw3.law.pace.edu/cases/040225b1.html> (last visited January 8, 2007). See also: ZELLER, *supra* note 59 at 145 (Dr. Bruno Zeller has noted this case was rendered on the same day and by the same judge as the previous Belgium case, *supra* note 175, that allowed the recovery of attorneys’ fees).

⁹⁷ *Id.*

⁹⁸ Finland 12 April 2002 Turku Court of Appeal (*Forestry equipment case*). Available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/020412f5.html> (last visited March 8, 2007).

[buyer] has to compensate [seller] and its owner for their legal expenses in their entirety. [Buyer] has admitted the amount to be correct.⁹⁹

Even though the buyer won on the invoices in this case, the court determined that the buyer had substantially lost, and so attributed to the buyer the legal expenses of the seller. In this case, in a CISG governed lawsuit, Finland applied its own domestic law (the “loser-pays” rule) in determining the buyer had to pay attorneys’ fees to the seller.

3.3.6. Switzerland

Swiss courts have consistently held that attorneys’ fees are recoverable in CISG governed disputes, but some appeal to Article 74 in justifying the award and others appeal to Swiss law to justify the award of attorneys’ fees.

A 1996 Swiss court¹⁰⁰ held that a party is allowed to recover attorneys’ fees for both litigation and prelitigation expenses for CISG governed contracts, and this court awarded the fees under Swiss law. The court ruled that “The Plaintiff [seller] who has won on the merits has a claim for the costs of litigation...which must be fixed at the sum of Sf [Swiss Franks] 8,830 including: Sf 6,000 for the honorarium paid to its counsel; Sf 200 for the expenses of the latter; and Sf 2,630 in compensation of litigation fees.”¹⁰¹ In stating the authority for the awarding of attorney fees, this Swiss court referred to the Code of Civil Procedure rather than Article 74 CISG.

One year later, a 1997 Swiss court¹⁰² held that all attorneys’ fees are recoverable under a CISG governed contract as a “loss” in accordance with Article 74. The Swiss court held that all attorneys’ fees (both pre-litigation and litigation fees) are recoverable as a “loss” under Article 74 so long as they are reasonable.¹⁰³ The court determined that the “costs of the current Swiss attorney of the [seller] are neither specified in detail nor unusually high. They are therefore, according to general practice, to be considered in the final award regarding the parties’ costs.”¹⁰⁴ The court’s awarding of attorneys’ fees is not to be confused with its awarding of court costs, which was done under its domestic law. The court’s domestic law requires that the “costs of the

⁹⁹ *Id.*

¹⁰⁰ Decision of March 11, 1996, Appellate Court (Tribunal Cantonal) Canton Vaud 11 March 1996 [No. 01 93 1061] [163/96/BA and 164/96/BA]; available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960311s2.html> (last visited January 8, 2007).

¹⁰¹ *Id.* (Quoting English Translation); (Authority was claimed under the Swiss Code of Civil Procedure, Article 92, paragraph 1).

¹⁰² Decision of December 19, 1997. Handelsgericht des Kantons Aargau (Switzerland), No. OR.97. 00056, available at <http://cisgw3.law.pace.edu/cases/971219s1.html> (last visited January 8, 2007).

¹⁰³ *Id.*

¹⁰⁴ *Id.* (Quoting English translation); (The court cited the authority of Section 6(1) *Einführungsgesetz zum Bürgerlichen Gesetzbuch* [German Code on the Conflict of Laws], to support this finding).

proceedings are to be paid by the parties according to the relation in which they prevail or are defeated...”¹⁰⁵ Although the court costs are configured under domestic law, the attorneys’ fees are determined in this case to be a “loss” under Article 74 of the CISG and hence recoverable.¹⁰⁶

As the preceding manifests, of the cases surveyed,¹⁰⁷ most domestic courts, domestic arbitral tribunals, and international arbitral tribunals that have spoken on the issue of the recoverability of attorneys’ fees have found them recoverable in CISG governed disputes. The manner in which these courts award attorneys’ fees as a function of Article 74, domestic law, or a combination of the two varies but generally these courts award attorneys’ fees. The next section examines the court decision by the United States’ 7th Circuit that excludes attorneys’ fees from the ambit of Article 74 and prescribes the recoverability of attorneys’ fees to be a matter of domestic procedural law. This decision effectively announced to the world that the United States will not award attorneys’ fees for litigation under CISG governed disputes.

3.4. United States Courts

3.4.1. General Remarks

The United States courts have had few opportunities to speak directly on the recoverability of attorneys’ fees in CISG governed disputes. The U.S. Supreme Court has not heard the question of the recoverability of attorneys’ fees in CISG governed disputes, and only one U.S. Circuit Court has made a determination as to whether they are recoverable in the United States. The 7th Circuit court’s opinion, *Zapata Hermanos Sucesores v. Hearthside Banking Company*¹⁰⁸ is the leading U.S. case on the recoverability of attorneys’ fees. This subsection traces the issue of attorneys’ fees in *Zapata* from the United States District Court for the Northern District of Illinois’s¹⁰⁹ opinion that awarded attorneys’ fees under a combination of domestic and CISG

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ This assessment could be rebutted if, as more courts speak on the topic of the recovery of attorneys’ fees under CISG Article 74, they hold the contrary by stating attorneys’ fees are non-recoverable as damages. Nonetheless, my present research indicates that the majority of courts will be prone to award attorneys’ fees for breaches of CISG governed contracts but the function by which they will award them is unclear at this point (i.e., whether attorneys’ fees are awarded as a matter of domestic law, as a ‘loss’, or as a combination of the two in these other countries is unclear).

¹⁰⁸ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385 (7th Cir. 2002).

¹⁰⁹ *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 155 F.Supp.2d 969 (N.D.Ill. Aug 22, 2001) (NO. 99 C 4040).

law, through the 7th Circuit's reversal as to attorneys' fees, and then to the denial of the writ of certiorari to the *Zapata* ruling of the 7th Circuit by the United States Supreme Court.¹¹⁰

3.4.2. The Facts of Zapata

This dispute arose simply over an alleged breach of contract between Mexican corporation, Zapata, and U.S. wholesaler, Lenell.¹¹¹ Zapata was a Mexican supplier of cookie tins that supplied Hearthside Baking Co., Inc. d/b/a Maurice Lenell Cooky Co. (Lenell), a U.S. cookie wholesaler with the cookie tins that Lenell used to package and sell his cookies.¹¹² Both the U.S. and Mexico are parties to the CISG, so when Lenell refused to pay Zapata the almost \$900,000 due under invoices, Zapata sued under the Convention for breach of contract in the District Court for the Northern District of Illinois.¹¹³ Of the one-hundred and ten invoices that Zapata sued over, the District Court Judge granted judgment as a matter of law on ninety-three of them, totaling \$850,000.¹¹⁴ The money due under the other seventeen invoices was then submitted to the jury and the jury found in favor of Lenell.¹¹⁵ The Judge dismissed a number of counterclaims filed by Lenell and the jury found in favor of Zapata on the others, and also awarded Zapata \$350,000 for the ninety-three invoices Zapata had prevailed on, for prejudgment interest.¹¹⁶ The judge thereafter awarded Zapata \$550,000 in attorney's fees, for the fees incurred throughout the litigation.¹¹⁷ On appeal, the 7th Circuit affirmed the District Court's judgment in part, and reversed as to attorneys' fees.¹¹⁸

3.4.3. The Northern Illinois District Court

(a) The Outcome of the District Court

The District Court reasoned that Article 74 of the CISG allowed for the award of attorneys' fees as a "loss" in CISG governed disputes, and further that in the present case wherein Lenell

¹¹⁰ *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 540 U.S. 1068, 124 S.Ct. 803, 157 L.Ed.2d 732, 71 USLW 3589, 72 USLW 3364, 72 USLW 3373 (U.S. Dec 01, 2003) (NO. 02-1318).

¹¹¹ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 387 (7th Cir. 2002).

¹¹² *Id.* at 387.

¹¹³ *Id.* at 387.

¹¹⁴ *Id.* at 387.

¹¹⁵ *Id.* at 387.

¹¹⁶ *Id.* at 387-388.

¹¹⁷ *Id.* at 387-388, 391.

¹¹⁸ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 391 (7th Cir. 2002).

acted in bad faith, that attorneys' fees were recoverable under domestic law. Pursuant to this reasoning, the District Court awarded Zapata \$550,000 in attorneys' fees.

(b) The CISG Rationale

The court first addressed the American rule's inapplicability, and then presented two intertwined reasons for allowing the recovery of attorneys' fees under this CISG governed contract.

The District court rejected the contention of Lenell's counsel that attorneys' fees are not recoverable because of the American Rule. The American Rule is a general rule which disallows the recovery of attorneys' fees in federal courts unless if there is a statute or contract providing otherwise. In this instance, the court reasoned, the parties stipulated that the CISG applied and the parties entered into an agreement subsequent to the contract, on June 8, 2001, which stated in part:

As of the dates when [buyer] issued its purchase orders for the tins described in the invoices attached as Group Exhibit A to [seller's] Complaint in this case, [buyer] foresaw or should have foreseen that if Lenell failed to pay for the tins that it ordered, received and accepted, [seller] would incur litigation costs including attorneys fees, to seek payment of the invoices for said tins...The court shall determine if attorney's fees are recoverable as a matter of law.

The preceding stipulation was admissible evidence of the intent of the parties under CISG Article 8(3) because it was the "subsequent conduct of the parties."¹¹⁹ The court coupled this stipulation with an unconstrained reading of Article 74 to determine that attorneys' fees were recoverable.

The court determined that Article 74 of the CISG, when read with a mind towards uniformity, required that foreseeable, consequential damages were recoverable under this provision.¹²⁰ The court took into account non-U.S. court decisions that awarded attorneys' fees in similar situations, and in line with uniformity which is stressed in many articles of the Convention, looked to the language of Article 74. Article 74 clearly stated that a "foreseeable" loss that is a

¹¹⁹ Article 8(3) provides the courts should be "...giving due consideration...to all relevant circumstances of the case including negotiations, any practices which the parties have established between themselves, usage and any subsequent conduct of the parties."

¹²⁰ Article 74 reads: "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the partying breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."

“consequence of the breach” is recoverable. Given Lenell’s own stipulation that attorney’s fees were foreseeable and were a consequence of the breach (above), the court determined that attorneys’ fees were recoverable under CISG Article 74.

The combination of the CISG, an international convention, requiring the attorneys’ fees as recoverable and the contractual stipulation that the court should determine if attorneys’ fees are recoverable led the District Court to determine that the American rule was inapplicable in this circumstance.¹²¹ Thus, the District Court determined that attorneys’ fees were recoverable in this circumstance under Article 8 and Article 74 of the CISG. The District Court then turned to justify the award under the domestic law of the United States.

(c) The Domestic Rationale

The “searchlight of the analysis is...properly focused on the language of the Convention,” and yet under domestic law, in this instance of bad faith, the District Court determined that attorneys’ fees were awardable also under domestic law.¹²² The District Court cited the Supreme Court’s decision *Chambers v. NASCO*,¹²³ which stated under domestic law federal courts have the inherent power to impose attorney’s fees as damages when bad faith is the cause of additional expenses.¹²⁴ In the present case, the District Court considered Lenell’s refusal to pay for hundreds of thousands of cookie tins and its refusal to offer a legal defense for not paying as constitutive of bad faith.¹²⁵ This refusal both to pay and to offer a defense continued throughout the litigation and, in turn, made the litigation more expensive for Zapata.¹²⁶ As the District Court concluded, “this is a case of an extreme bad faith refusal to pay, both before and during this litigation...”¹²⁷ Therefore, the awarding of attorneys’ fees was found to be dually justified by the District Court: one, by the substantive provisions of the CISG, and two, under the Supreme Court precedent allowing federal courts to award attorneys’ fees in circumstances of extreme bad faith.

¹²¹ *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 2001 WL 1000927, at 3 (N.D.Ill. Aug 29, 2001).

¹²² *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 2001 WL 1000927, at 3 (N.D.Ill. Aug 29, 2001).

¹²³ *Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991).

¹²⁴ *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 2001 WL 1000927, at 4-5 (N.D.Ill. Aug 29, 2001). See also: *Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991); *Hall v. Cole*, 412 U.S. 1, 15 (1973); *Roadway Express Inc. v. Piper*, 447 U.S. 752, 766 (1980); and, *Hutto v. Finney*, 437 U.S. 679, 689 n. 14 (1978).

¹²⁵ *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 2001 WL 1000927, at 4-6 (N.D.Ill. Aug 29, 2001).

¹²⁶ *Id* at 4-5.

¹²⁷ *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 2001 WL 1000927, at 6 (N.D.Ill. Aug 29, 2001). See also: Elisabeth Opie, *Special Feature: Zapata Hermanos Sucesores S.A. v. Hearthside Baking Co., Inc. d/b/a Maurice Lenell Cooky Co.*, 6 VJ 25, 26 n. 4 (2002).

3.4.4. The Seventh Circuit Court's Reversal as to Attorneys' Fees

(a) The Outcome of the Seventh Circuit Court

The Seventh Circuit, in an opinion written by Judge Posner, reverses the dual justification of the District Court. The Seventh Circuit determines that attorneys' fees are neither recoverable under the CISG nor, in this instance, under the Supreme Court bad faith precedent.

(b) The CISG Rationale

(i) Introducing the Three Arguments

The Circuit Court offers three lines of argument for excluding attorneys' fees from the substantive ambit of CISG Article 74. The first line is what I have called the "Apparent" argument; the second line is what I have named the "Procedural" argument, and the third I have termed the "Anomalous" argument. In light of these three lines of argument, the Circuit Court determines that attorneys' fees are not recoverable under the CISG. Each will be introduced in this section; an analysis of these arguments is offered *infra*.¹²⁸

(ii) The "Apparent" Argument

The Circuit Court determines that it is "apparent" that attorneys' fees are not intended to be considered a "loss" under CISG Article 74. The court reasons that there is no mention of attorneys' fees in the CISG, in its drafting history, or in the cases under it: there is no suggestion in any of these sources that attorneys' fees are considered a "loss" but no suggestion that they are not considered to be a "loss" under Article 74 of the Convention.¹²⁹ Therefore, the court contends, that it "seems apparent" that "loss" does not include attorneys' fees for litigation, but could include "certain pre-litigation legal expenditure" as incidental damages.¹³⁰

(iii) The "Procedural" Argument

The Circuit Court resolves that the matter of attorneys' fees is not expressly settled in the CISG, so attorneys' fees are to be evaluated under Article 7(2), and concludes that the domestic procedural law of the United States governs attorneys' fees.¹³¹ According to Article 7(2), if a matter is not expressly settled by the Convention, then it is to be settled "in conformity with

¹²⁸ See: Section IV to this paper.

¹²⁹ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 388 (7th Cir. 2002).

¹³⁰ *Id.* at 388.

¹³¹ *Id.* at 388.

the general principles upon which it is based, or in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.” The Circuit court reasons that since there are no general principles applicable, that domestic law should be used to fill this gap. Anyways, the Circuit Court emphasizes, the “Convention is about contracts, not about procedure,” and the recovery of attorneys’ fees is a matter of the procedural law of the United States.¹³² Thus, according to the Circuit Court, attorneys’ fees are excluded from the substantive provisions of the CISG and are left as a matter of domestic procedural law.

(iv) The “Anomalous” Argument

The Circuit Court’s third line of argument is that an interpretation of “loss” under Article 74 that includes attorneys’ fees would lead to anomalous results.¹³³ The court elaborates that Article 74 is conditional upon there being a breach of contract and no damages are recoverable unless the court determines there is a breach of contract.¹³⁴ If “loss” in Article 74 were to include attorneys’ fees, then only a prevailing plaintiff in a breach of contract action would be able to recover attorneys’ fees. A prevailing defendant would not be able to recover attorneys’ fees under Article 74 because there is no breach of contract found by the court if the defendant prevails.¹³⁵ These anomalous effects are, according to the court, yet “another reason to reject the interpretation,” of the term “loss” in Article 74 that would allow for the recovery of attorneys’ fees.¹³⁶

In sum, the Seventh Circuit overturns the District Courts’ decision to allow attorneys’ fees to be recoverable as a “loss” in Article 74 for the preceding three reasons. The Seventh Circuit also poses a series of questions regarding the effects of such an interpretation and whether the U.S. would have agreed to such an interpretation in the drafting of the Convention.¹³⁷ The Seventh Circuit is skeptical that the U.S. would have signed the Convention if attorneys’ fees were to be deemed recoverable, this skepticism is manifested in the opinion’s query: “how likely is it that the United States would have signed the Convention had it thought that in doing so it was abandoning the hallowed American rule?”¹³⁸ The Seventh Circuit determines that attorneys’ fees are not recoverable under the substantive provisions of the CISG, but are a matter for the

¹³² *Id.* at 388.

¹³³ *Id.* at 388.

¹³⁴ CISG Article 74.

¹³⁵ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 388 (7th Cir. 2002). (The court also notes that recovery for breach of contract is subject to the CISG Article 77 requirement that parties mitigate damages).

¹³⁶ *Id.* at 388.

¹³⁷ *Id.* at 389.

¹³⁸ *Id.* at 389.

domestic procedural law of the forum. And, the procedural law of the U.S. is the “American Rule” which bars litigants from recovering attorneys’ fees in cases concerning contracts for the sale of goods.

(c) The Domestic Rationale

The Seventh Circuit, after concluding the American rule is applicable, further determines that the Supreme Court’s “bad faith” justification for awarding attorneys’ fees was misapplied by the District Court. The federal court’s inherent authority to award attorneys’ fees in instances of extreme bad faith is “to be exercised sparingly”¹³⁹ and cannot be extended to provide federal courts with a remedy unavailable under state law when, as in this case, the substantive law of the state provides the rules of decision.

Federal courts have the inherent authority to award attorneys’ fees in cases of extreme bad faith for cases arising under federal law, but under the *Erie* doctrine, federal courts cannot award attorneys’ fees for cases arising under substantive state law.¹⁴⁰ Extending the inherent authority of federal courts to award attorneys’ fees to cases governed by state law would allow the *Erie* doctrine to be circumvented by essentially renaming “punitive damages” (a matter of substantive state law) as “attorneys’ fees” and this, the Seventh Circuit contends, cannot be Constitutionally done.¹⁴¹

The authority for federal courts to award attorneys’ fees, regardless of the *Erie* problems, the Circuit court confirms, is to be used in rare and extreme circumstances. The Seventh Circuit makes “clear that it is a residual authority, to be exercised sparingly, to punish misconduct (1) occurring in the litigation itself, not in the events giving rise to the litigation...and (2) not adequately dealt with by other rules, most pertinently here Rules 11 and 37 of The Federal Rules of Civil Procedure, which Lenell has not been accused of violating.”¹⁴² The Circuit Court reiterates that Lenell’s failure to pay (breach of contract) and refusal to offer a defense for the breach, is hardly the scenario previous courts considered when awarding attorneys’ fees for

¹³⁹ *Id.* at 391.

¹⁴⁰ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 390 (7th Cir. 2002). (The court cites as authority for this: *United States ex rel. Treat Bros. Co. v. Fidelity & Deposit Co. of Maryland*, 986 F.2d 1110, 1119-20 (7th Cir. 1993); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52-55 (1991); *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.*, 976 F.2d 541, 548-50 (9th Cir. 1992); and, *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 83-85, 87-88 (1994).)

¹⁴¹ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 390 (7th Cir. 2002).

¹⁴² *Id.* at 391.

reasons of bad faith.¹⁴³ If the District Court's interpretation were to be adopted, the Circuit court says, the authority to award attorneys' fees would be extended to almost every breach of contract action arising in a federal court.

The Seventh Circuit thus reverses the District Court's awarding of attorneys' fees to Zapata because the District Court exceeded its authority in awarding attorneys' fees under domestic law, and because attorneys' fees are not governed by the CISG but rather are a matter of the procedural law of the United States. The procedural law of the United States bars the recovery of attorneys' fees in actions concerning breaches of contracts for the sale of goods under the "American rule," so attorneys' fees are not recoverable in this case.

Following the decision of the Seventh Circuit, the counsel for Zapata petitioned the Supreme Court of the United States for a writ of certiorari.¹⁴⁴ The United States government submitted a brief as amicus curiae for the petition for writ, submitting to the Supreme Court that the Seventh Circuit court's opinion is correct as to attorneys' fees.¹⁴⁵ The United States as amicus curiae argued, *inter alia*: "The Court of Appeals correctly held that attorneys' fees are not a form of "Loss" under Article 74 of the Convention and its decision does not conflict with the decision of any other court of appeals"¹⁴⁶ The United States Supreme Court thereafter denied the petition for writ of certiorari. The following section analyzes the arguments made by the Seventh Circuit which have rendered all subsequent claims for attorneys' fees under CISG governed contracts in the Seventh Circuit moot.¹⁴⁷

¹⁴³ *Id.* at 391.(The Circuit Court cites this list of authority for its rationale, see: *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1318 (10th Cir. 2000); *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.* 976 F.2d 541, 558-550 (9th Cir. 1992); and, *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226, 1232-1233 and n. 9 (6th Cir. 1984) (en banc)).

¹⁴⁴ *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 540 U.S. 1068, 124 S.Ct. 803, 157 L.Ed.2d 732, 71 USLW 3589, 72 USLW 3364, 72 USLW 3373 (U.S. Dec 01, 2003) (NO. 02-1318).

¹⁴⁵ Brief for the United States as Amicus Curiae (No. 02-1318), On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, In the Supreme Court of the United States_ *Zapata Hermanos Sucesores, S.A., Petitioner v. Hearthside Baking Company, d/b/a Maurice Lenell Cooky Company Respondent*. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/zapata4.html> (last visited March 9, 2007).

¹⁴⁶ *Id.*

¹⁴⁷ See also: *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, 2003 WL 223187 (N.D. Ill.), Prod. Liab. Rep. (CCH) P 16, 516; and, *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*, 320 F.Supp.2d 702 (N.D.Ill. 2004) (for instances of where a U.S. District Court has used *Zapata* to deny requests for attorneys' fees).

PART II: ANALYSIS OF THE CONTROVERSY

4. A Critique of the Seventh Circuit's Opinion: Zapata

4.1. *Introducing the Critique*

The 7th Circuit court's opinion in *Zapata* offered three strong arguments for not allowing the recovery of attorneys' fees under CISG contracts in the United States. Judge Posner, who wrote the opinion, intricately delineated the reasons why attorneys' fees are not recoverable as damages under Article 74 of the CISG. I have termed these arguments: (i) the "Apparent" Argument, (ii) the "Procedural" Argument, and (iii) the "Anomalous" Argument. These arguments have since become the subject of critique for many commentators who are not satisfied with the 7th Circuit court's decision and reasoning.

The arguments and critique are considered in the following.

4.2. *Addressing the "Apparent" Argument*

Judge Posner of the 7th Circuit realizes that there is no mention of whether attorneys' fees should be considered a "loss" under Article 74 of the CISG or anywhere in the drafting history of the Convention.¹⁴⁸ The opinion goes on to state that even though there is no mention of attorneys' fees, that it is "apparent" that attorneys' fees were not intended to be included in the substantive meaning of the term "loss" in Article 74.¹⁴⁹ Judge Posner further queries into the likelihood that the United States would have signed the Convention if the U.S. would have had to give up the American Rule in signing: the rule that prohibits the recovery of attorneys' fees as damages for breaches of contracts for the sale of goods.¹⁵⁰ Considering these two factors: that the U.S. probably would not have given up the American Rule, and that it is "apparent" that attorneys' fees are not considered a "loss" under Article 74, Judge Posner determines that attorneys' fees are not recoverable under Article 74 of the CISG.

Judge Posner makes the valid point that it would be unusual for the United States to give up a rule firmly embedded in its own laws in order to become party to an international convention. Nonetheless, in signing the CISG the United States sacrificed many rules firmly rooted in its laws. Both the parole evidence rule and the statute of frauds, two doctrine of United States law of common law origin, were superseded by the laws of the CISG. It would not be unreasonable,

¹⁴⁸ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 388 (7th Cir. 2002).

¹⁴⁹ *Id.*

¹⁵⁰ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 388 (7th Cir. 2002). (These two points are made separately in the opinion but I have combined them here because addressing them in this fashion, I believe, is in accord with the court's reasons for dismissing an interpretation of Article 74 that would allow for the recovery of attorneys' fees as a "loss.")

in light of these two concessions, to think that the United States by signing the CISG conceded also to allow for the recovery of attorneys' fees as a "loss" under Article 74.

The 11th Circuit in *MCCMarble Ceramic Center v. Ceramica Nuova D'Agostino, S.P.A.*¹⁵¹ affirmed that Article 8 of the CISG trumps the parol evidence rule, an integral rule that is part of the United States laws. The 11th Circuit held, unquestionably that "The CISG...precludes the application of the parol evidence rule, which would otherwise bar the consideration of evidence concerning a prior or contemporaneously negotiated oral agreement."¹⁵² CISG Article 8 requires that courts consider both the subjective intent of the parties to the contract and "all relevant circumstances of the case including negotiations...."¹⁵³ In order to fulfill this mandate to consider negotiations, U.S. courts have had to deny the application of the parol evidence rule in favor of Article 8's mandate for cases brought in U.S. courts under the CISG.¹⁵⁴

The CISG also superseded the statute of frauds provision that is well embedded both in the Uniform Commercial Code and U.S. common law when signing the CISG.¹⁵⁵ Article 11 of the CISG states explicitly that 'A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.' The requirement that contracts be in writing absent certain exceptions (the statute of frauds) is well established in U.S. law particularly in §2-201 of the UCC, a model rule that has been adopted by almost every state.¹⁵⁶ The United States was willing to give up the doctrine of the statute of frauds and the parol evidence rule for CISG governed contracts, two common-law rules firmly embedded in United States' law, in order to sign on to the CISG. It is not implausible to think the United States was also willing to give up the more recent, non-common law rule that prevents the recovery of attorneys' fees in order to sign on to the CISG.

The 7th Circuit failed to consider that although it is unlikely that the U.S. would have given up its "American Rule" in signing the CISG, it is even less likely that almost every other country signatory to the CISG would concede to the United States by allowing it to maintain its rule

¹⁵¹ *MCCMarble Ceramic Center v. Ceramica Nuova D'Agostino, S.P.A.* 144 F.3d 1384 (1998).

¹⁵² *Id.* at 1392.

¹⁵³ CISG Article 8(3). See also: Bruno Zeller, *Interpretation of Article 74- Zapata Hermanos v. Hearthside Banking- Where Next?*, 1 NORDIC JOURNAL OF COMMERCIAL LAW 1-11, 4 (2004) (for a similar argument).

¹⁵⁴ See also: *Mitchell Aircraft Spares v. European Aircraft Serv. AB*, 23 F. Supp. 2d 915 (1998) (The court holding that the CISG allows courts to consider parol evidence to determine subjective intent under Article 8(1) of the CISG).

¹⁵⁵ Uniform Commercial Code (UCC) § 2-201. Formal Requirements; Statute of Frauds (contains a rule subject to exceptions that contracts must be in writing).

¹⁵⁶ UCC §2-201 entitled Formal Requirements, Statute of Frauds, states: "(1) Except as otherwise provided in this section a [contract](#) for the [sale](#) of [goods](#) for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a [contract for sale](#) has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of [goods](#) shown in such writing...."

and contravene uniformity. As the court's opinion itself states, most other countries in the world abide by some variation of the "loser-pays" rule that allocates to the losing party the responsibility of paying the winning party's attorneys' fees.¹⁵⁷ It is highly unlikely that every other country signatory to the Convention would intend to contravene a uniform interpretation by allowing the United States to maintain a different rule as to attorneys' fees than almost every other country that is party to the Convention. Article 74 could be seen as a compromise between the two views because it allows the prevailing plaintiff to recover attorneys' fees as damages but not the prevailing defendant, when a "loss" in Article 74 is read so as to include attorneys' fees.

The "American rule" itself is filled with exceptions, as the 7th Circuit notes, and international sales contracts could easily be another exception to the rule disallowing parties to recover attorneys' fees. The U.S. has over one-hundred federal statutes that modify the American Rule so as to allow for the recovery of attorneys' fees.¹⁵⁸ Judge Posner specifies that, "federal antidiscrimination, antitrust, copyright, pension, and securities laws all contain field-specific provisions modifying the American rule (as do many other field specific statutes). An international convention on contract law *could* do the same."¹⁵⁹ This is true that the Convention could act as an exception to the American rule, but the 7th Circuit contends that because there is no mention of attorneys' fees anywhere in the legislative history or the text of the CISG that attorneys' fees are a matter not expressly settled in the Convention so they must be analyzed under Article 7(2).¹⁶⁰ This is correct, but the court goes on to reason that there are no general principles upon which the Convention is based that would be applicable in this instance, so they must resort to domestic law (i.e., the American Rule).

It is this last step in the analysis that most commentators have criticized. A number of commentators state that the court was mistaken in its assessment that there are no general principles applicable in this instance. Jarno Vanto, for example, contends that the court's conclusion in *Zapata* was correct, but that "The court failed to create internationally acceptable grounds for excluding attorneys' fees from the sphere of Article 74."¹⁶¹ Vanto argues that the court too quickly deferred to domestic procedural law without examining the international principles as required by Article 7(2) of the Convention.¹⁶² According to Vanto, in looking to domestic procedural law the court missed an opportunity to develop an international

¹⁵⁷ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 388 (7th Cir. 2002).

¹⁵⁸ SHELTON, *supra* note 1 at 48 ("More than 100 American federal statutes now authorize courts to award attorney's fees").

¹⁵⁹ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 388 (7th Cir. 2002).

¹⁶⁰ *Id.*

¹⁶¹ Vanto, *supra* note 2 at 221.

¹⁶² Vanto, *supra* note 2 at 221.

interpretation in line with the purpose of the CISG, viz., uniformity.¹⁶³ Similarly, a number of commentators assert that there is a principle of “full compensation” embodied in Article 74,¹⁶⁴ and the 7th Circuit did not address this principle of full compensation.¹⁶⁵ This decision by Judge Posner not to address any general principles in the CISG may well be because of disagreement over the meaning of a “principle” in Article 7(2). *Infra*, this essay discusses the underlying jurisprudential considerations that are represented in the meaning of the term “principle” in Article 7(2).¹⁶⁶

In saying that it is “apparent” that attorneys’ fees are not included under the term “loss” in Article 74, Judge Posner is correct insofar as under United States contract laws for the sale of goods it is apparent that a “loss” does not include attorneys’ fees. The Uniform Commercial Code does not allow recovery of attorneys’ fees under Article 2, the Article addressing contracts for the sale of goods.¹⁶⁷ This model law has been adopted in almost every state in the U.S., so it is apparent in the U.S. that contracts for the sale of goods do not allow the recovery of attorneys’ fees. However, in the arena containing all the other countries signatory to the CISG besides the United States, the “loser-pays” rule is adopted in one variation or another in a “nearly universal” manner.¹⁶⁸ Moreover, certain types of contracts in the United States do allow for the recovery of attorneys’ fees. Under the Revised Article 5 of the UCC, which has been adopted in almost every U.S. state, §5-111(e) not only allows but requires the recovery of reasonable attorneys’ fees including litigation expenses, in letter of credit actions.¹⁶⁹ These points all raise questions as to whether it is really “apparent” that attorneys’ fees are not considered a “loss” under Article 74 CISG.

¹⁶³ Vanto, *supra* note 2 at 221.

¹⁶⁴ See e.g.: Joseph Lookofsky, *In Dubis Pro Conventione? Some Thoughts About Opt-outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. OF COMP. & INT’L L. 263 (2003); and, Bojidara Borisova, *Remarks on the Manner in Which the Principles of European Contract Law May be used to Interpret or Supplement Article 75 of the CISG*, 1 NORDIC JOURNAL OF COMMERCIAL LAW 1-6 (2003).

¹⁶⁵ See e.g.: Bruno Zeller, *Interpretation of Article 74 Zapata Hermanos v. Hearthside Banking- Where Next?*, 1 NORDIC JOURNAL OF COMMERCIAL LAW 1-11, 4 (2004).

¹⁶⁶ Section V to this paper. This discussion will perhaps clarify the term “principle” so that prospectively courts can ascertain and apply the general principles of Article 7(2).

¹⁶⁷ Uniform Commercial Code (UCC), Article 2 (specifically, §2-701 through §2-725).

¹⁶⁸ Vanto, *supra* note 2 at 205.

¹⁶⁹ UCC §5-111(e) (“Reasonable attorney’s fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article”). See also: Carter H. Klein, *Attorney’s Fees in Letter of Credit Cases under UCC §5-111(e)*, 9 DOCUMENTARY CREDIT WORLD 10 (Nov/Dec 2005).

4.3. Addressing the “Procedural” Argument

Judge Posner’s second reason for concluding that attorneys’ fees are not recoverable as a “loss” under Article 74 is because: “The Convention is about contracts, not about procedure.”¹⁷⁰ Judge Posner suggests that the “American Rule” is not a field-specific rule, but rather is a general rule of U.S. procedure.¹⁷¹ The court reasons that since the Convention is about contracts and not about procedure, attorneys’ fees which are a part of general procedural law in the United States are not recoverable as a “loss” under the substantive term “loss” in Article 74. The 7th Circuit’s opinion contends that the rules of different nations vary in whether they allow the recovery of attorneys’ fees,

But no one would say that French contract law differs from U.S. because the winner of a contract suit in France is entitled to be reimbursed by the loser, and in the U.S. not. That is an important difference but not a contract-law difference. It is a difference resulting from differing procedural rules of general applicability.¹⁷²

Judge Posner argues that the allowance of the recovery of attorneys’ fees is not a matter of the substantive contract law, but rather is a matter of the procedural law of the forum.

This “procedural” argument has led to some very creative responses by critics, and I have recognized at least two interrelated, strong lines of argument in the literature. The first line of argument claims that classifying attorneys’ fees as procedural contravenes the mandate in Article 7(1) requiring uniformity in interpretation.¹⁷³ And, the second line of argument suggests that attorneys’ fees in the context of the CISG are substantive law, and not procedural, in other

¹⁷⁰ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 388 (7th Cir. 2002).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Gotanda, *supra* note 33. See also: Carruthers, *The Substance and Procedure Distinction in Conflict of Laws: A Continuing Debate in Relation to Damages*, 53 INT’L & COMP. L.Q. p. 691 (2004); and, CISG AC Opinion No. 6, *Calculation of Damages under Article 74*, Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA., available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op6.html> (last visited March 6, 2007).

words, the 7th Circuit did not have regard for the Convention's international character.¹⁷⁴ I am most sympathetic to these arguments, and we will consider each in turn.¹⁷⁵

Classifying attorneys' fees as a matter of procedural law will contravene the mandate for a uniform interpretation required by Article 7(1) of the CISG.¹⁷⁶ The 7th Circuit court's classification of attorneys' fees as procedural and outside the ambit of the Convention will allow each jurisdiction to award attorneys' fees in accord with the domestic laws of the jurisdiction regardless of whether they are considered substantive or procedural law in the jurisdiction. The United States will not award litigation attorneys' fees but may sometimes award prelitigation attorneys' fees as incidental damages, according to the 7th Circuit court's decision.¹⁷⁷ At the same time, Switzerland can award both prelitigation and litigation fees for every CISG breach of contract action. As one Swiss court held, "all costs incurred in the reasonable pursuit of a claim are refundable, which included retaining a lawyer in the country of each party."¹⁷⁸ Whereas the Swiss court allows recovery of all attorneys' fees and the U.S. court allows no recovery of litigation expenses but sometimes the recovery of non-litigation expenses, another jurisdiction may disallow any recovery for any attorneys' fees incurred during litigation and prelitigation. Even more so, there could be any other number of variant laws, both substantive and procedural, that allow or disallow the recovery of attorneys' fees based on country or jurisdiction specific laws.¹⁷⁹ The 7th Circuit court's decision to allow the recovery of attorneys' fees to be determined on a domestic basis allows the inconsistent holdings under the CISG as to attorneys' fees to remain inconsistent. This counter argument essentially is making two claims: one, that the "procedural" argument does not promote a uniform application of the

¹⁷⁴ ZELLER, *supra* note 33; and, John Felemegas, *An Interpretation of Article 74 CISG by the US Circuit Court of Appeals*, 15 PACE INT'L L. REV. 91, 121 (Spring 2003) (The distinction between substantive and procedural laws "could be termed artificial or technical").

¹⁷⁵ Djakhongir Saidov, *Standards of Proving Loss and Determining the Amount of Damages*, 22 J. OF CONTRACT L. 1 (March 2006) (Saidov suggests that there may be a third line of argument which claims the Convention can govern procedural matters, *citing*, HERBER IN P SCHLECHTRIEM (ED), COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), 2ND ED, 46, (Clarendon Press, Oxford 1998)). Moreover, Albert Kritzer of Pace University School of Law pointed out that CISG Article 11 guides procedural matters by providing how to prove the existence of a contract, so the CISG arguably does govern some procedural matters - potentially including attorneys' fees (email correspondence).

¹⁷⁶ Article 7(1) reads: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

¹⁷⁷ *Zapata Hermanos Sucesores v. Hearthsides Banking Co.*, 313 F.3d 385, 388 (7th Cir. 2002). *See also: Sorenson v. Fio Rito*, 90 Ill.App.3d 368, 45 Ill. Dec. 714, 413 N.E.2d 47, 50- 52 (1980); *and, Tull v. Gundersons, Inc.*, 709 P.2d 940, 946 (Colo.1985); *and, Restatement (Second) of Contracts* § 347, comment c (1981).

¹⁷⁸ Decision of December 19, 1997. Handelsgericht des Kantons Aargau (Switzerland), No. OR.97. 00056, Quotation from the English case abstract available at: <http://cisgw3.law.pace.edu/cases/971219s1.html> (last visited December 28, 2006).

¹⁷⁹ *See generally: Vanto, supra* note 2 (for a delineation of the variant laws on attorneys' fees in a number of countries).

CISG, and two, that the “procedural” argument does not give regard to the international character of the CISG.

As to uniformity, a number of commentators contend that the substantive-procedural distinction employed by the 7th Circuit thwarts the mandate of a uniform application of the CISG.¹⁸⁰ As Professor Gotanda proposes, “relying on a substance/ procedure distinction in cases where jurisdictions differ over the classification of a matter is counterproductive and...can lead to conflicting results.”¹⁸¹ Whether a matter is considered substantive or procedural, Professor Gotanda asserts, often varies between jurisdictions and the facts of an individual case.¹⁸² By allowing such conflicting results based on jurisdictional interpretations, a court “undermines the legitimacy of the Convention and thwarts its goal of creating uniform rules.”¹⁸³ That is, the Convention is a matter of international law and domestic categorization of items into substantive or procedural should not be used to interpret the international Convention. And, this faulty distinction is the root of the non-uniform interpretation that derogates from the aim of a uniform international sales law, according to these commentators.¹⁸⁴

As to not giving regard to the international character of the Convention, many commentators argue that the 7th Circuit did not take into account the international character of the Convention as required by Article 7(1) when deeming attorneys’ fees as procedural.¹⁸⁵ This argument suggests that the substantive-procedural distinction employed by the 7th Circuit was suffering from the homeward trend, that is, the tendency to interpret an international convention by the importation of domestic meanings, rather than international meanings.¹⁸⁶ These commentators claim that the international meaning of “loss” within the context of the

¹⁸⁰ Gotanda, *supra* note 33 at 122. See also: Carruthers, *supra* note 173 at 691; and, CISG A-C Opinion No. 6, *Calculation of Damages under Article 74*, Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA.

¹⁸¹ Gotanda, *supra* note 33 at 122.

¹⁸² Gotanda, *supra* note 33 at 122.

¹⁸³ Gotanda, *supra* note 33 at 120.

¹⁸⁴ See also: Chiara Giovannucci Orlandi, *Procedural Law Issues and Uniform Law Conventions*, UNIFORM LAW REVIEW, Vol. V, No. 1, 23 (2000); and, CISG A-C Opinion No. 6, *Calculation of Damages under Article 74*, §5.2, Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA., available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op6.html> (last visited March 6, 2007). (“Relying upon such a [substance-procedure] distinction in this context is outdated and unproductive”); and, Peter Schlechtriem, *Legal Costs as Damages in the Application of UN Sales Law*, forthcoming (2008). *Contra* Harry Fletcher & Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION (2003) 93-104; and, Harry Fletcher & Joseph Lookofsky, *Zapata Retold: Attorneys Fees Are (Still) Not Governed by CISG*, forthcoming (2008).

¹⁸⁵ ZELLER, *supra* note 33 at 143-167, and, Felemegas, *supra* note 174 at 121 (The distinction between substantive and procedural laws “could be termed artificial or technical”).

¹⁸⁶ ZELLER, *supra* note 33 at 143-167.

CISG includes attorneys' fees. In other words, what may be considered procedural law in the United States was transmuted into substantive law via the term "loss" in Article 74 of the CISG, and attorneys' fees are recoverable as a "loss."

The delineation of substantive and procedural law is complicated because the same term or the same standard in one context can be given a procedural role whereas the exact same term or standard in another context will be considered substantive. Perhaps Judge Posner is correct and attorneys' fees are generally a matter of procedural law within the United States, nevertheless, at times attorneys' fees even in the United States are a matter of substantive law. Take, for example, Revised §5-111(e) of the Uniform Commercial Code which requires the payment of attorneys' fees in letter of credit actions. The UCC is a substantive body of law and the inclusion of attorney's fees under the "Remedies" heading of §5-111 has, in effect, transmuted attorneys' fees from general procedural law into a substantive body of law. UCC §5-111(e) provides that "Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article." In addition to attorneys' fees, other remedies provided in §5-111 include incidental damages¹⁸⁷ and damages resulting from the breach,¹⁸⁸ both of which are damages considered to be substantive law even within the United States. By analogy, the CISG term "loss" has transmuted attorneys' fees into the substantive law of the CISG even though it may generally be procedural law within the United States. As Dr. Zeller remarks, "In essence, the application of a domestic procedural law distorted the process of what could have been a uniform application of substantive law."¹⁸⁹ Therefore, it has been argued, that attorneys' fees are considered substantive law under the CISG, rather than procedural.

Other commentators suggest that the recovery of attorneys' fees as a "loss" is in accord with the principle of "full compensation" recognized by the CISG so should be given the substantive content required by the international convention.¹⁹⁰ The principle of full compensation under the Secretariat Commentary, does not explicitly state any types of damages that are recoverable but only that the principle of full compensation is limited by the principles of foreseeability, mitigation, and that the loss must be a consequence of the breach.¹⁹¹ Given that these are the only explicit limitations on a 'loss' under Article 74, it seems apparent that attorneys' fees should be considered a "loss," and hence recoverable for breaches of contracts for the international sale of goods.

¹⁸⁷ UCC §5-111(b) and §5-111(c).

¹⁸⁸ UCC §5-111(b) and §5-111(c).

¹⁸⁹ ZELLER, *supra* note 33 at 159.

¹⁹⁰ ZELLER, *supra* note 33 at 143-167.

¹⁹¹ Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html> (last visited January 15, 2007).

Attorneys' fees are considered as a "loss" under Article 74 of the CISG, and a "loss" is generally considered to be a substantive term. Djakhongir Saidov maintains that standards of proving loss and what constitutes a "loss" are often contained in canons of law that are traditionally considered substantive law.¹⁹² He provides the example of the UNIDROIT principles which are generally considered substantive law; these principles contain provisions pertaining to the certainty of loss.¹⁹³ Moreover, Saidov points out, "the standard of certainty with which loss needs to be proved is contained in a separate provision in the US Restatement (Second) of Contracts containing rules on contracts which seem to be traditionally regarded as rules on substantive law."¹⁹⁴ The "loss" provision in Article 74 is a substantive provision and like the exceptions to the American rule (e.g., antitrust, copyright, letters of credit, etc.), the substantive term "loss" in Article 74 should trump the general procedural law of the United States.¹⁹⁵ Despite that Judge Posner is correct insofar as generally the procedural law of the United States governs the recovery of attorneys' fees, according to these commentators, Judge Posner's conclusion is flawed because Article 74 of the CISG, like Article 5 of the UCC and the United States federal statutes that exceed one-hundred in number, allows attorneys' fees to be awarded as damages.

4.4. Addressing the "Anomalous" Argument

The final argument offered by the 7th Circuit for excluding attorneys' fees from the term "loss" under Article 74 is that this interpretation would result in anomalies.¹⁹⁶ Judge Posner suggested that if the interpretation of "loss" included attorneys' fees, then "the prevailing plaintiff in a suit under the Convention would...get his attorneys' fees reimbursed more or less automatically...But what if the defendant won?"¹⁹⁷ If the defendant won, he would be unable to recover attorneys' fees under Article 74, because recovery is conditional upon a breach of contract. If there is no breach, then there can be no "loss" recovered under Article 74 by the defendant. This is the "anomalous" result flowing from "loss" in Article 74 of the CISG being

¹⁹² Saidov *supra* note 175.

¹⁹³ Article 7.4.3 UNIDROIT Principles. *See also*: Saidov *supra* note 175 at 51.

¹⁹⁴ Saidov *supra* note 175 at 51 (referring to §352 of the Restatement (Second) of Contracts).

¹⁹⁵ ZELLER, *supra* note 33 at 143-167.

¹⁹⁶ *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, 313 F.3d 385, 388 (7th Cir. 2002).

¹⁹⁷ *Id.* at 389. Judge Posner is particularly concerned about allowing the recovery of attorneys' fees for prevailing plaintiffs and not for prevailing defendants in the U.S. because if this recovery is allowed in the U.S., then foreign courts may implement their domestic rules if the defendant prevails. This will both allow prevailing defendants to recover attorneys' fees under domestic law and prevailing plaintiffs to recover attorneys' fees under the CISG. This is a justifiable worry by Judge Posner, but it is presuming bad faith by the other parties to the Convention, and "good faith" is also a requirement of interpretation. I believe that we must presume that if the U.S. acts in good faith in interpreting this provision by allowing the recovery of attorneys' fees as a 'loss' under Article 74, then other countries will similarly follow and proceed with their interpretations in good faith without the incorporation of domestic laws.

interpreted so as to include attorneys' fees: the prevailing plaintiff can recover attorneys' fees but the prevailing defendant cannot. This "anomalous" result, the court says, "is another reason to reject the interpretation,"¹⁹⁸ that allows attorneys' fees to be recoverable as a "loss."

The "anomalous" result argument was addressed in the Reply Brief for the Petitioner for writ of certiorari in *Zapata*.¹⁹⁹ Counsel for petitioner argued that the,

complaint that the recovery of attorneys' fees under Article 74 would produce anomalous results is also easily refuted when one considers that attorneys' fees would only be recoverable as damages. It is hardly anomalous that only a plaintiff (or counter-plaintiff) would be able to recover damages. After all, that is how lawsuits work.²⁰⁰

Counsel for petitioner's argument is a bit succinct, but it makes the valid point that damages for breach of contract actions under Article 74 are only recoverable by a prevailing plaintiff or counter-plaintiff. When a defendant prevails, the defendant does not argue that he should get the damages the plaintiff would have gotten had the plaintiff prevailed because if he does not get such damages it will result in anomalies. No, rather the defendant gets nothing except for the satisfaction of having won the lawsuit. On the other hand, if the plaintiff prevails the plaintiff receives all foreseeable losses flowing as a consequence of the breach (presuming she properly mitigated damages). From this perspective, allowing the plaintiff to recover any damages for breach of contract without the defendant being able to recover the same damages has an anomalous result. Granted, the defendant can bring a counter-claim for breach of contract and if the defendant brings such a claim then all anomalies will disappear, including the anomaly resulting from allowing the recovery of attorneys' fees as a "loss" under Article 74. Thus, "anomalous results" is a faulty justification for excluding attorneys' fees from the quantum of damages under Article 74.

I suggest further that even if attorneys' fees are excluded from the meaning of the term "loss" under Article 74, that there will still be anomalous results. The 7th Circuit is concerned with the anomalous results of the relationship between the prevailing plaintiff and the prevailing defendant that will occur if attorneys' fees are recognized as a loss. The court did not consider the anomalous results that will occur between the prevailing plaintiff in one suit and the prevailing plaintiff in another suit, or, for that matter, the prevailing defendant in one suit and the prevailing defendant in another suit, if attorneys' fees are excluded from the scope of "loss" under Article 74. As excluded from the scope of "loss," prevailing plaintiffs in some jurisdictions will be capable of recovering attorneys' fees whereas prevailing plaintiffs in other jurisdictions will not. Likewise, prevailing defendants in some jurisdictions will be capable of

¹⁹⁸ *Id.* at 388.

¹⁹⁹ Reply Brief for the Petitioner, On Petition For a Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit, *Zapata Hermanos Sucesores v. Hearthside Banking Co.*, No. 02-1318.

²⁰⁰ *Id.* at para. A4.

recovering attorneys' fees whereas prevailing defendants in other jurisdiction will not be capable of recovering such fees. For instance, prevailing plaintiffs in Switzerland can recover attorneys' fees but prevailing plaintiffs in the United States cannot.²⁰¹ This is an anomalous result of the relationship between prevailing plaintiffs that flows from the decision of the 7th Circuit. The same anomalous result occurs between prevailing defendants in different jurisdictions. In short, anomalies will be the result whether or not the United States allows the recovery of attorneys' fees as a "loss" under Article 74. Given the foregoing analysis, an interpretation of Article 74 to include attorneys' fees as a "loss," is a viable and reasonable option for other United States Circuit courts or even the Supreme Court.

5. Underlying Jurisprudential Considerations

5.1. *Positivism versus Natural Law*

The contradictory interpretations on the recovery of attorneys' fees are not merely rooted in the variant interpretations of the term "loss" under Article 74 of the CISG but are caused, in part, by the various interpretations of the term "principle" in Article 7(2) of the CISG. Article 7(2) mandates that when a term within the scope of the Convention is not expressly settled that the term be settled in conformity with the general principles on which the Convention is based. The meaning of the term "principle" in the context of Article 7(2) has been interpreted by different commentators in accord with their underlying theories of jurisprudence. Positivist theorists look to the Convention as a rule of recognition and pull principles from the text of the Convention or find the principles in other rules that the rule of recognition authorizes and validates as law. Conversely, natural law theorists look within and beyond the text in their attempt to find principles, natural law theorists believe that there are general principles underlying the universe and the law attempts to encapsulate them. The Convention is mankind's attempt to recognize these general principles, so any appeal to these principles in the interpretation of the law is wholly justified, or even in the case of traditional natural law theory, it is required.²⁰² Historically, natural law theorists such as St. Thomas Aquinas believed that if a law is not in accord with the natural law principles of the universe, then the alleged law is a pseudo-law, and not a law at all.²⁰³ The contradictory interpretations of Article 74 of the CISG are rooted in these underlying jurisprudential considerations.

Natural law theorists use Article 7(2) to decipher the "general principles" underlying the Convention by appealing to natural law principles, that is, by appealing to principles that are

²⁰¹See: *Supra* Section III.

²⁰² Diener, Keith W., *A Defense of Soft Positivism: Justice and Principle Processes* (for a synopsis and the highlights of the debate between positivists and natural law theorists) (2006), available at: http://etd.gsu.edu/theses/available/etd-04172006-125357/unrestricted/Diener_Keith_W_200601_MA.pdf (last visited March 2, 2007).

²⁰³ Diener, *supra* note 202 at 1-75.

not necessarily recognized explicitly in the text of the Convention as valid principles to use in interpreting gaps in the Convention. They attempt to infer from the provisions of the Convention a natural law principle that is encapsulated in a provision or provisions of the Convention and apply them to interpret other provisions of the Convention. These principles are justified in their use, according to the natural law theorist, simply because they are natural law, the highest law.²⁰⁴

Natural law theorists claim that rules and principles are logically distinct entities.²⁰⁵ Generally, rules are considered by natural law theorists to be rigid and inflexible. If a rule comes into conflict with another rule then one rule is considered invalid and the other remains valid.²⁰⁶ Principles are different than rules because they are flexible: two principles can come into conflict with another without one being deemed invalid. Principles are weighted so that when they come into conflict one outweighs the other without invalidating either- they both remain valid.²⁰⁷ As seen as logically distinct entities, a natural law theorist by this very reasoning must look to natural law principles rather than the rules stated in the text of the Convention to interpret and settle terms that are not expressly settled under Article 7(2). Thus, according to the natural law view, the general principles underlying the convention referred to in Article 7(2) are none other than natural law principles.²⁰⁸

Positivist theorists, on the other hand, decipher the “general principles” underlying the Convention by appealing to what is recognized as a valid principle under the rule of recognition, in this case, the CISG. Rules of recognition are the master rule per a jurisdiction or per the laws that come within the scope of the rule. In the realm of international law, the rule of recognition states what is considered valid law within the area of law stated in the Convention to countries signatory to the Convention. The CISG acts as the rule of recognition for international contracts for the sale of goods for the parties to the Convention. The CISG also validates the use of domestic law and private international law in international sales law under the bottom rung of the hierarchy of interpretation provided in Article 7(2), via the rules of private international law including the choice of law rules.²⁰⁹

²⁰⁴ Diener, *supra* note 202 at 1-75.

²⁰⁵ Diener, *supra* note 202 at 1-75.

²⁰⁶ Diener, *supra* note 202 at 1-75.

²⁰⁷ Diener, *supra* note 202 at 1-75.

²⁰⁸ Diener, *supra* note 202 at 1-75.

²⁰⁹ Article 7(2) explicitly recognizes the use of private international law, it states “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”

Positivists assert that the difference between rules and principles is not a logical distinction, but rather the difference is a matter of degree.²¹⁰ Rules can come into conflict with other rules and can remain in force despite the conflict, and at other times one will be invalidated. Similarly, principles can remain in force when they come into conflict with other principles but at times one or the other is invalidated. I have argued elsewhere that principles and rules are not logically distinct entities in part because they undergo many of the same processes in the law, but I will not repeat these arguments here.²¹¹ Rules and principles, as entities whose difference is merely a matter of degree (i.e., a principle may be a bit more flexible than a rule but is nonetheless generally similar to a rule), are both validated by their recognition in the master rule, in this case the CISG. The positivist, by this logic, looks within the text of the CISG to determine what principles have been recognized by the CISG in determining the general principles upon which the Convention is based under Article 7(2).²¹²

5.2. *The Natural Law Approach to the Interpretation of Article 74*

Numerous commentators look beyond the text of the Convention to discover the general principles upon which the Convention is based. These commentators apply the discovered principles to interpret the Convention under Article 7(2) and, pursuant to these principles, determine that Article 74 does not allow for the recovery of litigation expenditures as attorneys' fees. The principle of equality between buyer and seller, a principle deemed to underlie the CISG by natural law commentators, is offered in its strongest form by Professor John Y. Gotanda pursuant to what he has called the "interpretative approach" to the interpretation of the CISG.²¹³ Professor Gotanda abstracts the principle of equality by inference from other Articles of the Convention as a general principle and applies it to Article 74, concluding that the general principle of equality limits the meaning of the term "loss" in article 74 by excluding fees relating to litigation from the quantum of recoverable damages.²¹⁴

Professor Gotanda contends that the principle of equality is embedded in Articles 45 and 61 of the Convention, and that "interpreting Article 74 as providing for the recovery of attorney's fees and costs as damages would be contrary to the principle of equality between buyers and sellers as expressed in Articles 45 and 61."²¹⁵ Gotanda does not elaborate as to where this

²¹⁰ Diener, *supra* note 202 at 1-75.

²¹¹ Diener, *supra* note 202 at 1-75.

²¹² Article 7(2), *supra* note 209.

²¹³ Gotanda, *supra* note 33 at 130. See also: Troy Keily, *How Does the Cookie Crumble? Legal Costs Under a Uniform Interpretation of the United Nations Convention on Contracts for the International Sale of Goods*, 1 NORDIC JOURNAL OF COMMERCIAL LAW 1, 19 (2003) ("it is reasonable to suggest that the CISG recognizes a general principle of equality or reciprocity between the buyer and seller").

²¹⁴ Gotanda, *supra* note 33 at 130.

²¹⁵ Gotanda, *supra* note 33 at 130.

principle of equality is manifest in these articles, but the only conceptual manifestation of a principle of equality in Articles 45 and 61 is in the fact that these two articles point to the same damages clauses for both the buyer and the seller. Both Articles 45(1)(b) and 61(1)(b) respectively state the seller and the buyer may, “claim damages as provided in articles 74 to 77.” The use of verbatim language in Articles 45 and 61 leads Gotanda to infer that there is a natural law principle of equality underlying these clauses and thus the CISG as a whole.

According to the principle of equality between the buyer and seller, Gotanda asserts, attorneys’ fees for litigation cannot be recoverable as damages under Article 74 because an interpretation allowing recovery of litigation expenses would lead to anomalous results.²¹⁶ The anomalous results are an asymmetry between the ability of the plaintiff and the defendant to recover damages pursuant to Article 74. Article 74 is conditional upon there being a breach of contract, so only if the plaintiff prevails and a breach of contract is found by the court would the plaintiff be able to recover litigation expenses.²¹⁷ In the converse, if a breach of contract is not found by the court, then the defendant would not be able to recover litigation expenses. This asymmetry, Gotanda reasons, is in violation of the principle of equality between the buyer and the seller underlying the Convention. Therefore, an interpretation of Article 74 in conformity with the principle of equality does not allow parties to recover attorneys’ fees.²¹⁸

The principle of “full compensation” is a generally accepted general principle upon which Article 74 of the Convention is based. The principle of “full compensation” is explicitly recognized in the Secretariat Commentary to the 1978 Draft of the CISG,²¹⁹ and is almost unanimously accepted by commentators as a general principle upon which the Convention is based.²²⁰ This principle is from either a positivist or a natural law perspective a principle upon which the Convention is based pursuant to its recognition in the Convention itself. Gotanda claims that the principle of full compensation is limited by other principles recognized in the Convention, particularly the mitigation requirement of Article 77²²¹ and the foreseeability requirement of Article 74.²²² The limitations on the principle of full compensation are

²¹⁶ Gotanda, *supra* note 33 at 130.

²¹⁷ Article 74 requires a breach of contract to be applicable: “Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach...”

²¹⁸ Gotanda, *supra* note 33 at 130.

²¹⁹ Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html> (“The principle of recovery of the full amount of damages...”) (last visited March 3, 2007).

²²⁰ *Id.*

²²¹ Article 77 requires mitigation: “A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.”

²²² Article 74 requires foreseeability: “...Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.”

recognizable limitations placed by the Convention itself, and are recognized pursuant to either a positivist or a natural law reading of the Convention. The natural law theorist, however, takes these limitations on full compensation a step beyond the positivist recognition of them in the rule, and infers a general principle of “limitation on damages” from these principles that limit damages. Professor Gotanda considers that the principles of foreseeability and mitigation should be conjoined with the limitation placed on recoverability for “non-material loss, which includes emotional injury, mental suffering, and ‘moral damages’ [that] is not recoverable under the Convention based on article 5 and a reading of the convention as a whole.”²²³ These numerous limitations, including Article 5’s disallowance of recovery “for death or personal injury,” when intratextually²²⁴ read, Gotanda seems to say, reveal a general principle of “limitations on damages.” This general principle of “limitations on damages” underlying the CISG limits the scope of the principle of “full compensation” by excluding *inter alia*, attorneys’ expenses related to litigation from the quantum of recoverable damages.

Based on the principles of “equality” and “limitation on damages” professor Gotanda has put forth the position, in accord with a natural law approach to jurisprudence, that litigation fees are not recoverable as damages under Article 74 of the CISG. Professor Gotanda concedes that although litigation expenses are not recoverable that prelitigation expenses “cannot be separated from other incidental expenses resulting from a breach of contract,”²²⁵ and are recoverable as damages under Article 74. The mitigation requirement under Article 77 will often require that parties to the contract engage legal services to fully mitigate their damages. Parties often hire attorneys to write letters of request or use various legal services to mitigate damages, and in accord with the principle of “continuation of the contract” parties are required to engage these legal services.²²⁶ Allowing recovery for prelitigation expenditures is outside the “limitations on damages” principle because they are required by the principle of mitigation and are recoverable as damages under Article 74 of the CISG, according to Gotanda. Professor Gotanda’s natural law approach to interpreting Article 74 requires that prelitigation expenses be recoverable but does not allow for the recovery of litigation expenses.

5.3. *The Positivist Approach to the Interpretation of Article 74*

Positivist influenced commentators look to the CISG as a rule of recognition and read from it principles that are explicitly recognized and validated by the CISG. These principles are either found within the text of the CISG itself, or are referenced in the CISG as applicable law and

²²³ Gotanda, *supra* note 33 at 120-130.

²²⁴ I use the term “intratextual” consistent with the holistic meaning given it in: Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (February, 1999).

²²⁵ Gotanda, *supra* note 33 at 130.

²²⁶ Gotanda, *supra* note 33 at 130.

through this reference are validated in their use. Positivist proponent, Dr. Bruno Zeller, uses these recognized principles in his “four corners approach” to the interpretation of the CISG.²²⁷ He looks to the four corners of the Convention as a rule of recognition to determine the principles upon which the Convention is based as is required by Article 7(2) for matters within the scope of the CISG that are not expressly settled.²²⁸ Dr. Zeller’s use of recognized principles in his interpretation of Article 74 leads to the conclusion that both litigation and prelitigation fees are recoverable as damages for breaches of CISG governed contracts as a “loss.”²²⁹

Dr. Zeller looks to the CISG to ascertain what principles can be validly used under Article 7(2) of the CISG in determining whether a “loss” under Article 74 includes attorneys’ fees. Dr. Zeller claims that the concept of “loss” as used in Article 74 of the CISG includes attorneys’ fees under the principle of “full compensation.”²³⁰ Dr. Zeller asserts that the principle of full compensation is limited in scope by the principles of mitigation, foreseeability, and the principle requiring the loss be a “consequence of the breach,” but that these limitations do not exclude attorneys’ fees as recoverable damages.²³¹ Zeller contends, assuming the party has properly mitigated damages, that “[t]he only consideration is whether these losses were foreseeable at the conclusion of the contract and whether they are a direct consequence of the breach.”²³² The natural law influenced theorist generally also adopts the foreseeability, mitigation, and consequence of the breach principles and none argue convincingly that attorneys’ fees are excluded from the scope of Article 74, so “[a]rguably there is no debate that attorney’s fees are a foreseeable expense due to any breach of contract,”²³³ Zeller assures us. The principle of full compensation is explicitly acknowledged in the Secretariat Commentary as a principle that places the victim of the breach in the same economic position she would have been in but for the breach of contract.²³⁴ The principle of full compensation by its very definition must include attorneys’ fees under the definition of “loss” under Article 74 because any other resolution would be in derogation of this principle upon which the CISG is based. The principle of full compensation is limited by the foreseeability, consequence of the breach,

²²⁷ BRUNO ZELLER, FOUR-CORNERS - THE METHODOLOGY FOR INTERPRETATION AND APPLICATION OF THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (May 2003), available at: <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html> (last visited March 3, 2007).

²²⁸ *Id.*

²²⁹ ZELLER, *supra* note 33 at 130, 143-167.

²³⁰ ZELLER, *supra* note 33 at 130, 143-167.

²³¹ ZELLER, *supra* note 33 at 130, 143-167.

²³² ZELLER, *supra* note 33 at 154.

²³³ Bruno Zeller, *Interpretation of Article 74. Zapata Hermanos v. Hearthside Banking- Where Next?*, 1 NORDIC JOURNAL OF COMMERCIAL LAW 1-11, 4 (2004).

²³⁴ Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html> (“The principle of recovery of the full amount of damages....”) (last visited March 3, 2007).

and mitigation principles, but these principles do not generally exclude attorneys' fees from the scope of the full compensation principle, according to Zeller.

The "principle of full compensation" is recognized within the Convention, but I prefer to call it the principle of the "full recovery of loss" because this naming is more faithful to the text of the Convention. Article 74 refers to the "recovery of loss," and the Secretariat Commentary refers explicitly to the "the principle of recovery of the full amount of damages."²³⁵ The following analysis affirms Zeller's reading that these recognized principles generally do not limit the scope of the principle of the "full recovery of loss" to such an extent as to exclude attorneys' fees.

The principle of the "full recovery of loss" is limited in scope by the mitigation requirement explicitly recognized in Article 77, but unless if a party fails to mitigate damages properly, attorneys' fees will be recoverable under the principle of the "full recovery of loss."²³⁶ For instance, there may be a circumstance that a party does not mitigate her damages by paying overwhelmingly excessive attorneys' fees for litigation, in which case these unreasonable attorneys' fees may be excluded from recovery based on the principle requiring mitigation of damages. Generally, however, attorneys' fees are fully recoverable as a "loss" under the principle of the "full recovery of loss" embodied in Article 74.

The principle of the "full recovery of loss" is limited in scope by the foreseeability requirement explicitly recognized in Article 74, but foreseeability will rarely if ever disallow the recovery of attorneys' fees under the principle of the "full recovery of loss."²³⁷ The foreseeability standard is somewhat controversial because some believe it is an objective standard, and some both an objective and subjective standard. On the one hand, it has been suggested that the foreseeability standard is "essentially an objective standard, where the question is whether a reasonable person in the position of the promisor and with knowledge of the circumstances surrounding the conclusion of the contract, ought to have foreseen the possible losses at the time of the conclusion of the contract."²³⁸ As an objective standard, the foreseeability standard does not limit the scope of the principle of the "full recovery of loss" because objectively, a contracting party generally knows that they will be responsible for the payment of all damages resulting from the breach including attorneys' fees.

It has been suggested, on the other hand, that the CISG foreseeability standard differs from the traditional common law standard in that it contains both an objective and subjective aspect. As one commentator states, "Article 74...provides an objective and subjective foreseeability test:

²³⁵ Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html> (last visited March 5, 2007) ("The principle of recovery of the full amount of damages").

²³⁶ ZELLER, *supra* note 33 at 110, 143-167.

²³⁷ ZELLER, *supra* note 33 at 105, 143-167.

²³⁸ Damon Schwartz, *The Recovery of Lost Profits under Article 74 of the U.N. Convention on Contracts for the International Sale of Goods*, 1 NORDIC JOURNAL OF COMMERCIAL LAW 1-16, 3 (2006).

‘damages may not exceed the loss which the party in breach foresaw or ought to have foreseen...’²³⁹ Taking into account the subjective aspect, an argument can be put forth that subjectively a party did not foresee that attorneys’ fees would be recoverable as damages. Such an argument would make sense, perhaps, when offered by a United States’ party wherein attorneys’ fees are generally not recoverable in contractual disputes for the sale of goods. Nevertheless, it is unlikely that this subjective reasoning will ever overwhelm the objective awarding of attorneys’ fees in contractual disputes on an international basis.²⁴⁰ In short, attorneys’ fees are almost always foreseeable to parties entering into a contract together so the principle of foreseeability does not prevent attorneys’ fees from being recoverable under the principle of the “full recovery of loss.”

The third limitation on the principle of the “full recovery of loss” is that the loss must be a consequence of the breach: this is the consequential principle recognized in Article 74, but the consequential principle does not prevent attorneys’ fees from being recoverable under Article 74.²⁴¹ Whether a loss is a consequence of the breach is a question of causality, and even under the strictest “but for” causality test attorneys’ fees are a consequence of a breach of contract.²⁴² If a party did not breach the contract, then there would be no reason to hire and pay an attorney to litigate a breach of contract action, that is, but for the breach of contract, the attorneys’ fees would not have to be paid. So, the third and final principle limiting the principle of the “full recovery of loss” does not exclude attorneys’ fees from the scope of the principle of the “full recovery of loss.” The foregoing analysis reveals that from a positivist reading of the CISG, the three recognized principles that limit the scope of the principle of the “full recovery of loss” do not limit it in such a fashion as to exclude attorneys’ fees.

6. The Vienna Convention on the Law of Treaties

6.1. The Meaning of “Principle” in Article 7(2)

The controversy lies in the meaning of the term “principle” as it is used in Article 7(2) of the CISG, and whether a principle has the meaning attributed it by natural law theorists (self-validating natural law principles that are not necessarily recognized in the rule), or the meaning attributed it by positivists (as only different from rules in degree, and validated by their recognition in the rule), or even a third meaning different than the meanings offered by these theories. The provision of Article 7(2) that states “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the

²³⁹ Jeffrey S. Sutton, *Measuring Damages under the United Nations Convention on Contracts for the International Sale of Goods*, 50 OHIO ST. L.J. 737, 744 (1989).

²⁴⁰ See: *supra*, section III.

²⁴¹ ZELLER, *supra* note 33 at 124, 143-167.

²⁴² ZELLER, *supra* note 33 at 124, 143-167.

general principles on which it is based...” was added after the 1978 Draft of the Convention, so there is no Secretariat Commentary on this provision that could aid in determining a conclusive meaning.²⁴³ Article 7 is itself the instrument of interpretation of the Convention that is to be used to interpret the other provisions of the Convention, and when a meaning within Article 7 is unclear there is no guidance within the CISG as to how to resolve the controversy.

In public international law, when a meaning in a provision is unclear courts employ The Vienna Convention on the Law of Treaties of 1969 (VCLT) as the method of interpreting the meaning of the questionable provision, specifically, Articles 31 and 32 of the VCLT speak to interpretation. Articles 31 and 32 of the VCLT have been adopted by international courts as customary international law and pursuant to this status of customary international law are used to interpret public treaties almost universally in international courts.²⁴⁴ The CISG is primarily a private law convention because it concerns the rights and obligations of buyers and sellers, rather than a public law convention that concerns the rights and obligations of states. Because there is no clear methodology for interpreting Article 7(2) of the CISG, I suggest the VCLT can be used at the very least for pragmatic purposes to aid in determining the meaning of “principle” under Article 7(2) of the CISG.²⁴⁵

The general rule of interpretation of treaties is contained in Article 31 of the VCLT which reads in pertinent part:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes....

²⁴³ See the match-up between the 1978 Draft Article and the adopted Article 7 of the CISG, available at: <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-07.html> (last visited March 3, 2007).

²⁴⁴ See e.g.: Case Concerning Legality of Force, *Serbia and Montenegro v. Portugal*, 2004 ICJ LEXIS 14, para. 102 (“The Court will thus proceed to the interpretation...of the Statute, and will do so in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties”). See also: *United States- Measures Treating Exports Restraints as Subsidies*, World Trade Organization, Report of the Panel, WT/DS194/R, 29 June 2001, para. 8.18, para. 8.64.

²⁴⁵ See generally: Joseph Lookofsky, *Walking the Article 7(2) Tightrope between CISG and Domestic Law*, 25 J.L. & COM. 87 (Fall 2005) (For analyses outlining the importance of a proper interpretation of Article 7(2) of the CISG).

(i) Textual Analysis

The VCLT Article 31(1) requires that the ordinary meaning be taken into account when interpreting a treaty. The ordinary meaning of “principle”²⁴⁶ as defined by Merriam-Webster is:

“1 a: a comprehensive and fundamental law, doctrine, or assumption **b (1)**: a rule or code of conduct **(2)**: habitual devotion to right principles <a man of principle> c: the laws or facts of nature underlying the working of an artificial device **2**: a primary source : origin **3 a**: an underlying faculty or endowment <such principles of human nature as greed and curiosity> **b**: an ingredient (as a chemical) that exhibits or imparts a characteristic quality...”²⁴⁷

This ordinary meaning does not suggest a conclusion as to whether the word “principle” when standing alone means the interpretation given it by natural law theorists nor does it suggest the interpretation given it by positivists. To the contrary, the ordinary meaning suggests that either interpretation is correct when the term “principle” is standing alone. The positivists advocate that a principle is a “rule” whereas natural law theorists are proponents of the “laws or facts of nature” view; both are provided for within the definition of “principle.”

6.2. Context

6.2.1. Multiple Aspects of Context

The VCLT Article 31 (1-2) requires that the context of a provision be taken into account when interpreting a treaty. As regards the context of “principles,” the context of the term within the provision, the context of the provision in the Convention, and the context of the provision in light of the CISG Preamble must all be considered.

6.2.2. Context of “Principle” within Article 7(2)

As to the context of the term within the provision, the meaning attributed to “principle” can be ascertained by looking at its syntax within the sentence. The relevant segment of Article 7(2) reads: “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based...” Within the syntax of this sentence, there are two relationships that shed light on the meaning attributed to “principles.” The first is the relationship between the phrase “settled in conformity with” and “principle” and the second is the relationship between “on which it is based” and

²⁴⁶ I have used “principle” and “principles” interchangeably in this section as the latter is merely the plural form of the former.

²⁴⁷ Merriam-Webster Online Dictionary, available at: <http://209.161.33.50/dictionary/principle> (last visited March 3, 2007).

“principle.” Additionally, the adjective “general” magnifies that these principles affect the whole of the Convention.²⁴⁸

The relationship between “settled in conformity with” and “principle” reveals that these principles are to guide the interpretation of the provision in such a way that unsettled matters can become settled. “Settled” denotes a conclusive resolution, and this is apparent both from its definition and its relationship to “not expressly settled,” the latter of which denotes something that is unresolved.²⁴⁹ In order to guide an interpretation so as to settle it, the principles must be clearly stated and not merely speculative, for speculation as to which principles apply will not result in a resolution, but will complicate matters by leaving issues in the Convention unsettled. The relationship between “settled in conformity with” and “principles” reveals that the principles must be capable of settling matters. Given that natural law principles are extremely broad and there is no clear meaning as to what these principles entail nor as to how many there are, they are less capable of resolving unsettled issues in the Convention than are positivist rule-type principles. The first relationship thus weighs towards the positivist definition of principle.

The second relationship, that between “principle” and “on which it is based” relays that the Convention is based on principles because the “it” in “on which it is based” refers back to the antecedent, “Convention.” The intentional referral to the “Convention” in this case provides weight for the positivist, recognized rule-based definition of principle. If the drafters had intended for natural law principles to be applicable, then they would have referred to the “universe” or the “world” or even to “natural law” rather than the “Convention.” The drafters must have referred to the Convention rather than the universe for a reason and meaning must be given to this reference to the “Convention” rather than the “universe.” Furthermore, “Based” in the transitive sense that it is used in Article 7(2) is defined as a “basis for.”²⁵⁰ The Convention can thus be read as the basis for the “principles” rather than the universe being the basis for these principles, as natural law theory would propose. The second relationship thus also weighs towards the positivist definition of “principle” because the Convention, rather than the universe, is stated to be based on these principles.

²⁴⁸ Merriam-Webster defines “general” as: “1: involving, applicable to, or affecting the whole 2: involving, relating to, or applicable to every member of a class, kind, or group <the general equation of a straight line> 3: not confined by specialization or careful limitation 4: belonging to the common nature of a group of like individuals : [generic](http://209.161.33.50/dictionary/generic) 5 a: applicable to or characteristic of the majority of individuals involved : [prevalent](http://209.161.33.50/dictionary/prevalent) b: concerned or dealing with universal rather than particular aspects 6: relating to, determined by, or concerned with main elements rather than limited details <bearing a general resemblance to the original>...” Available at: <http://209.161.33.50/dictionary/general> (last visited March 4, 2007).

²⁴⁹ Merriam-Webster defines “settle” in this context as: “5 a: to fix or resolve conclusively <settle the question>...” Available at: <http://209.161.33.50/dictionary/settled> (last visited March 4, 2007).

²⁵⁰ Merriam-Webster defines “base” as “1 : to make, form, or serve as a base for 2 : to find a base or basis for — usually used with *on* or *upon*.” Available at: <http://209.161.33.50/dictionary> (last visited March 4, 2007).

6.2.3. Context of Article 7(2) in the Convention

(a) The Influence of Article 7(1) on Article 7(2)

The context of Article 7(2) within the Convention is significant because of its placement immediately after Article 7(1), and its placement under the “General Provisions” heading. Article 7(1) states the general rule of interpretation of the Convention requiring that: “In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.” Article 7(2), which immediately follows Article 7(1) is the rule of interpretation for matters within the scope of the Convention that are not expressly settled in the Convention. As informed by Article 7(1), the general rule of interpretation, any “gap filling” that takes place under Article 7(2) must also be done with regard to the Convention’s international character, desire for uniformity in application, and in good faith.

(b) International Character

Regarding the international character of the Convention, it must be determined whether the natural law reading or the positivist reading of “principle” better gives regard to the international character of the Convention. Arguably, natural law principles are universal principles that underlie everything in the world, internationally, so natural law principles would be the most rational choice when having regard for the Convention’s international character. On the other hand, Article 7(1) instructs the interpreter to have regard to the *Convention’s* international character and what better means of determining the character of the Convention than looking to the Convention itself? The Convention is an international agreement between numerous parties and in signing onto the Convention the parties have not implicitly signed on to natural law principles that could be applied by interpreters discretionarily, but rather they have signed on to the principles enunciated in the text of the Convention. The international character of the Convention is best determined by looking to the Convention itself and the parties thereto, not to principles outside of the Convention. This consideration also weighs towards the positivist definition of a “principle,” as principles recognized within the Convention.

(c) Uniformity in Application

The discretion given under a natural law approach to “principles” leaves it largely up to the individual interpreter to decipher principles and how they are to apply to the Convention. The natural law interpreter need only allege that somewhere in the Convention a principle of natural law is embodied and via this principle, the Convention should be interpreted. Allowing the interpreter to have this largely unfathomed discretion can easily lead to a multitude of principles that may or may not underlie the Convention, and, in effect, lead to a non-uniform application of the Convention. For example, if one interpreter sees a principle of equality in a

provision and applies this principle to interpret the provision, but another interpreter does not see the principle of equality and does not use it to interpret the provision, then the two interpreters will have different interpretations of the same provision. These various interpretations conflict with the uniformity requirement of Article 7(1).

The positivist definition of principle, as similar to a rule and recognized in the text, does not give rise to this problem of uniformity. Because all interpreters are looking to the same text to discover what principles are validated there will be agreement as to what principles the Convention is based on, because only those recognized by the Convention will be a basis for interpretation. Although the positivist definition of principle will not entirely preclude any non-uniform interpretations, it will promote uniformity by limiting the discretion of the interpreter to the use of principles recognized by the rule.

6.2.4. Placement of Article 7 under “General Provisions”

The drafters of the Convention placed Article 7 under the heading “General Provisions” with Articles 8 through 13. What these seven articles all share in common is that they are provisions that apply generally to the Convention and they clarify the meanings of terms within the Convention. Take, for example, Article 11 which expresses “A contract of sale need not be concluded in or evidenced by writing...” This article clarifies the meaning of a “contract” and expressly includes non-written contracts within its meaning. Whenever the word contract appears in the Convention, pursuant to the general provision Article 11, it includes non-written contracts. By analogy, Article 7(2) speaks of “principles,” so whenever a principle appears in the Convention it can be used as a means of interpretation pursuant to the general provision, Article 7. Neither Article 11 nor Article 7 is reaching beyond the rule, but rather are applicable generally to the Convention itself.

The heading “General Provisions” is distinguished from another heading, the “Sphere of Application.” The “Sphere of Application” heading includes Articles 1 through 6. These six articles state when the Convention applies by expressly including and excluding certain types of circumstances. If the drafters of the Convention intended to delineate a sphere of application that included natural law then they would have placed Article 7(2) under the “Sphere of Application” heading rather than the “General Provisions” heading. The latter of which is filled with provisions that inform the other provisions of the Convention without extending the scope or applicability of the Convention.

6.2.5. Context of 7(2) in Light of the CISG’s Object and Purpose

The VCLT Article 31(2) expressly states the Preamble to a treaty shall be considered as context when interpreting a treaty provision, and Article 31(1) states that the context shall be taken into account in light of a treaty’s object and purpose. The Preamble to the CISG states, in pertinent part, that the object and purpose of the CISG is the “adoption of uniform rules which govern

contracts for the international sale of goods.” The Preamble, much like Article 7(1), stresses that the CISG is a uniform system for the governance of international sales contracts. It is unlikely that the drafters of the CISG intended for natural law principles which can so easily contravene the uniform rules of the CISG to be included within its scope by appealing to self-validating principles that are not recognized in the text to interpret the CISG. Rather, in accord with a uniform interpretation of the CISG, the positivist definition which gives clear guidance as to what principles are valid and applicable within the CISG promotes the uniformity that is stressed both in the Preamble and Article 7(1). The object and purpose of the CISG is to adopt a uniform sales law, and again, if natural law principles are the means of interpreting the treaty, then the object and purpose of uniformity is not fulfilled.

The positivist definition of “principle,” as different in degree from a rule and validated by recognition in the CISG is in accord with the ordinary meaning of “principle,” context of “principle,” and the object and purpose of the CISG. Although an Article 31 of the VCLT analysis prescribes the positivist definition of a “principle,” the VCLT provides a supplementary means of interpretation in Article 32 that can be used to confirm the resultant meaning of an Article 31 analysis. Article 32 reads, in relevant part:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31....

6.3. *Supplementary Means of Interpretation*

The VCLT Article 32 provides that the preparatory work as well as the circumstances of the conclusion of the treaty can be taken into account to confirm a meaning of a treaty provision, in this case the meaning of the term “principle.” The preparatory work and circumstances of conclusion include both the Secretariat Commentary to the 1978 Draft CISG and the legislative history leading to the adoption of the final draft CISG.

The legislative history of Article 7(2) reveals that its initiation was influenced by ULIS Article 17.²⁵¹ The records of the 1980 Vienna Diplomatic Conference state that Article 7 was a compromise rendered by the German Democratic Republic between the views of the Czechoslovak and the Italian.²⁵² This compromise is present-day Article 7, and was adopted in the 1980 Vienna Conference by 17 votes to 14 votes, with 11 abstentions.²⁵³ As the Conference records indicate, the compromise involved including a segment similar to “article 17 of ULIS

²⁵¹ LEGISLATIVE HISTORY, 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the, First Committee, 5th meeting, Thursday, 13 March 1980, at 3 p.m. Available at: <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting5.html> (last visited March 4, 2007).

²⁵² *Id.*

²⁵³ *Id.*

which laid down that questions not expressly settled therein were to be settled in conformity with the general principles on which the Convention was based."²⁵⁴ Therefore, the meaning of “principle” in Article 17 of the ULIS will have some relevance to the meaning of “principle” in the CISG, as it has been said that when a term “has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it.”²⁵⁵

Article 17 of the ULIS provides: “Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based,” and was interpreted in the 1978 Netherlands Appellate Court decision, *Amran v. Tesa*.²⁵⁶ This case takes the positivist approach to a principle by looking to the text of the CISG to pull out principles that have been validated by their recognition in the CISG. The court, when determining there is a principle of reasonableness in the ULIS, states: “[I]n ULIS one finds in Articles 10, 11, 22, 26(1), 26(4), 37, 42(2), 61(2), 74, 88 and 91 the expressions 'reasonable', 'unreasonable' and 'reasonably'. 'Reasonableness' is therefore one of the 'general principles' by which, in accordance with Article 17 ULIS, questions not expressly settled in the uniform sales law shall be answered.”²⁵⁷ The court’s method of decision in *Amran v. Tesa*, of looking to the principles recognized in the ULIS itself rather than natural law principles beyond the text of the rule confirms that the positivist meaning of “principle” was adopted by the court in the time of the ULIS. This provides persuasive evidence that the positivist meaning of “principle” was also intended in Article 7(2) of the CISG.

The legislative history for Article 7(2) is sparse because the provision was added in the 1980 Vienna Conference and was not in existence at the time of the Draft 1978 CISG. The 1978 Draft CISG was accompanied by a Secretariat Commentary which was distributed to all of the prospective parties along with the Draft CISG.²⁵⁸ Although there was no Article 7(2) and hence no Secretariat Commentary on it, the Secretariat Commentary to the 1978 Draft often spoke of “principles” when discussing the Articles of the Convention.

The Secretariat Commentary further confirms that “principles” as used in Article 7(2) of the CISG are principles recognized by the CISG, in accord with the positivist definition of principles. The Secretariat Commentary speaks of the “principle of foreseeability,”²⁵⁹ the

²⁵⁴ *Id.*

²⁵⁵ F.A. Mann, *Uniform Statutes in English Law*, 99 LAW QUARTERLY REVIEW 382-383 (1983).

²⁵⁶ Netherlands 5 January 1978 Appellate Court Amsterdam (*Amran v. Tesa*), available at: <http://cisgw3.law.pace.edu/cases/780105n1.html> (last visited March 4, 2007).

²⁵⁷ *Id.*

²⁵⁸ Farnsworth, *supra* note 9.

²⁵⁹ Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html> (last visited March 5, 2007) (“This principle of excluding the recovery of damages for unforeseeable losses is found in the majority of legal systems”).

“principle of full compensation” (aka, the principle of the “full recovery of loss”),²⁶⁰ and the principle of “mitigation,”²⁶¹ when discussing principles in the CISG, but makes no mention of natural law-type principles. In fact, the Secretariat Commentary suggests that there is not a principle of equality between the buyer and the seller.

The Secretariat Commentary to Article 57 of the 1978 Draft [became Article 61] reveals there is contrast between the buyer and the seller’s rights and obligations under the CISG, and particularly their rights as to remedies. The Commentary states,

the buyer has only two principal obligations, to pay the price and to take delivery of the goods, whereas the seller's obligations are more complex. Therefore, the seller has no remedies comparable to the following which are available to the buyer: reduction of the price because of non-conformity of the goods...right to partially exercise his remedies in the case of partial delivery of the goods...right to refuse to take delivery in case of delivery before the date fixed or of an excess quantity of goods....²⁶²

This passage shows that total equality between the buyer and seller was not anticipated in the drafting of the CISG, as is manifest by the different obligations and rights of the buyer when compared to the seller, and particularly the different rights as to remedies. These differences cut against a natural law-type principle of equality. Furthermore, there is no mention of a principle of equality in the Commentary to Articles 45 or 61, which provides further support that the natural law view of principles is not the meaning given to “principle” in Article 7(2) of the CISG. In other words, the principles of Article 74 and 77 were explicitly recognized as principles in the Commentary to these provisions and these are the same principles recognized by the CISG in its provisions whereas the principle of equality is nowhere to be found in the CISG and is not mentioned in the Secretariat Commentary.

Using the interpretational method set out in Articles 31 and 32 of the VCLT, I conclude that the meaning of “principle” in Article 7(2) of the CISG is the meaning given it by positivists. That is, a “principle” is recognized in the provisions of the CISG and validated by its recognition in the rule rather than by an appeal to natural law. Therefore, if a principle is not recognized by the CISG as a valid principle it cannot be used for the purposes of gap filling under Article 7(2).

²⁶⁰ Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html> (last visited March 5, 2007) (“The principle of recovery of the full amount of damages”).

²⁶¹ Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-77.html> (last visited March 5, 2007) (“contains a principle of mitigation”).

²⁶² Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-61.html> (last visited March 5, 2007).

7. Beyond the VCLT Interpretation

7.1. *Introducing Two Additional Arguments*

Under a VCLT interpretation it has been shown that “principle” as used in Article 7(2) does not include natural law-type principles, but there are further reasons for rejecting the natural law approach to interpretation of the CISG. This subsection presents two additional arguments for disregarding the natural law approach, even assuming that natural law principles can justifiably be used in the interpretation of the Convention: (i) the natural law “principle of equality” contradicts the text of the Convention, and (ii) the scope of the natural law principle of “limitations of damages” is too broad. Each is considered in turn in the following.

7.2. *The Natural Law Approach Contradicts the Convention*

As you will recall, Professor Gotanda contends that there is a principle of equality manifest in Articles 45 and 61 of the CISG. The principle of equality, apparently, arises from the use of verbatim language in the CISG, which provides both the buyer and seller may “claim damages as provided in articles 74 to 77.”²⁶³ It has already been suggested that the alleged principle of equality is not sufficient to justify excluding attorneys’ fees from the scope of damages.²⁶⁴ I agree, and reason that because all damages are not subject to the principle of equality, assuming there is a principle of equality, that it has first to be shown that attorneys’ fees are within the scope of this alleged principle of equality before a principle of equality can justify excluding attorneys’ fees from the damage award under Article 74.

Articles 45 and 61 of the CISG themselves reveal that there are limits to the principle of equality. Article 45(1)(a) refers to the rights of the seller upon breach and Article 61(1)(a) refers to the rights of the buyer upon breach; these two provisions reference different Articles in the CISG. Article 45(1)(a) states that “If the seller fails to perform any of his obligation under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52,”²⁶⁵ whereas Article 61(1)(a) states: “If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may: (a) exercise the rights provided in articles 62 to 65.”²⁶⁶ This disparity reveals that even if there is a principle of equality, that it is limited in its scope by the variant rights and obligations of the buyer.

²⁶³ Article 45(1)(b) and Article 61(1)(b).

²⁶⁴ John Felemegas, *An Interpretation of Article 74 CISG by the US Circuit Court of Appeals*, 15 PACE INT’L L. REV. 91, 121, 126 (Spring 2003).

²⁶⁵ CISG Article 45(1)(a).

²⁶⁶ CISG Article 61(1)(a).

The rights and obligations of the buyer are not identical to the rights and obligations of the seller under the CISG. I have set out in *Appendix A* to this paper the rights and obligations of the buyer versus the rights and obligations of the seller. As one can see, the buyer and seller are not equal under the CISG because they are given different rights and obligations. Take, for example, Articles 48 and 50 which provide for limitations and reductions of damages for the buyer without any corresponding provision or rights for the seller. In other words, the buyer and the seller are not given absolute equality in their damage allocation because they are given different rights and obligations, and particularly different rights as to damages.²⁶⁷ Even assuming there is a principle of equality between the buyer and the seller, it is not absolute, and all questions of damages do not fall within its ambit. The argument that the CISG should not include attorneys' fees cannot be sustained, then, by claiming that the anomalous results violate a principle of equality without also showing that attorneys' fees are intended to be within the scope of this principle.

7.3. *The Scope of the Natural Law Principle is too Broad*

The natural law principle of "limitations on damages" places a limit on the principle of "full compensation" so as to exclude attorneys' fees, according to Gotanda.²⁶⁸ He argues that the limitations on full compensation as provided by the foreseeability requirement, the mitigation requirement, the exclusion of recovery for moral damages, and Article 5's prohibition on recovery for death or personal injury all combine to create a principle of "limitations on damages."²⁶⁹ Pursuant to this principle of limitations on damages, attorneys' fees are excluded from the scope of the full compensation principle, Gotanda seems to say.

Professor Gotanda is correct in stating there are limitations on damages and that certain damages are excluded from the Convention, but the Convention does not expressly exclude attorneys' fees from the quantum of recoverable damages. The Convention states a number of explicit limitations on damages, including foreseeability,²⁷⁰ mitigation,²⁷¹ and the prohibition on damages for death or personal injury,²⁷² but nowhere in the Convention or in the legislative history to the Convention is it stated that these limitations extend to the recovery of attorneys' fees. The only explanation for Gotanda's extension of "limitations of damages" to attorneys' fees for litigation is via a principle of limitations of damages that he finds underlying the Convention. Such a principle is in direct contradiction to the principle of "full compensation,"

²⁶⁷ See: *Appendix A* to this paper.

²⁶⁸ Gotanda, *supra* note 33 at 129-130.

²⁶⁹ Gotanda, *supra* note 33 at 129-130.

²⁷⁰ Article 74.

²⁷¹ Article 77.

²⁷² Article 5.

and even if it conceptually exists, it has not been shown that the scope of this principle of “limitations on damages” extends to attorneys’ fees for litigation

8. Completing the Interpretation of the Term “loss” in Article 74

8.1. *Adopting the Positivist Approach*

In light of the preceding VCLT analysis and the additional flaws of the natural law reading of the CISG, I adopt the positivist approach to the interpretation of the CISG. In doing so, I adopt that the principle of the “full recovery of loss” is limited in scope by the principles of foreseeability, the consequential principle, and the principle of mitigation. Simultaneously, I adhere to the belief that only in rare circumstances will these three principles limit the scope of the principle of the “full recovery of loss” to such an extent as to exclude attorneys’ fees, as we have discussed *supra*.²⁷³ In line with this underlying jurisprudential theory I have realized a number of principles recognized as valid in the text of the CISG that can aid in the interpretation of the term “loss” under Article 74. The subsequent analysis will discuss the principle of “reasonableness,” the principle of “mutual benefit,” and the principle of “equality between states.” I conclude that an interpretation of Article 74 in conformity with these general principles upon which the Convention is based provides support for the conclusion that attorneys’ fees are recoverable as a “loss” under Article 74 of the Convention.

8.2. *The Principle of “Reasonableness”*

There is a principle of reasonableness underlying the CISG; the CISG explicitly refers to “reasonableness” or “unreasonableness” forty-seven times in its text.²⁷⁴ Article 7(2) instructs that the Convention be interpreted in conformity with the principles upon which it is based, so the Convention should be interpreted in conformity with “reasonableness.” Thus if an interpretation is unreasonable, then it is not in conformity with the general principle of “reasonableness.” We are therefore looking for a reasonable interpretation of the term “loss” or “loss of profit” as it is used in Article 74, to discover whether a reasonable interpretation of the term “loss” or “loss of profit” can include attorneys’ fees or not. I suggest that the ordinary meaning of a term is generally a reasonable meaning,²⁷⁵ so by evaluating the ordinary meaning we shall be able to determine if attorneys’ fees can reasonably be considered a “loss” or “loss of profit.”

²⁷³ Section V to this paper.

²⁷⁴ Joseph Lookofsky, *Walking the Article 7(2) Tightrope between CISG and Domestic Law*, 25 J.L. & COM. 87, 89 NOTE 15 (Fall 2005).

²⁷⁵ Keith W. Diener, *Constitutional Interpretations and the Benefits of Meaning Originalism*, 48 Dialogue #2-3 (April 2006) (Addressing the benefits of looking to the meaning of terms in Constitutional interpretations. Many of these benefits exist also for the purpose of treaty interpretation).

When considering the ordinary meaning of “loss” in the context of Article 74, a reasonable interpretation of “loss” can include attorneys’ fees. Article 74 reads, in pertinent part, “Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach...” The ordinary meaning of “loss” in this context, as defined in Merriam-Webster is a “decrease in amount, magnitude, or degree.”²⁷⁶ In light of this ordinary meaning, Article 74 can be read as:

Damages for breach of contract by one party consist of a sum equal to the decrease in amount, magnitude, or degree, including the decrease in amount, magnitude, or degree of profit, suffered by the other party as a consequence of the breach.

The question then turns on the meaning of “profit” and whether attorneys’ fees fall under the phrase “loss of profit.” If they do, then attorneys’ fees are required to be reimbursed as a “loss of profit” because Article 74 states explicitly that a “loss of profit” is recoverable. If attorneys’ fees are not a “loss of profit” then they may still be recoverable as a “loss”. The meaning of “profit,” as defined in Merriam-Webster is:

1: a valuable return : [gain](#) 2: the excess of returns over expenditure in a transaction or series of transactions; especially : the excess of the selling price of goods over their cost 3: net income usually for a given period of time 4: the ratio of profit for a given year to the amount of capital invested or to the value of sales 5: the compensation accruing to entrepreneurs for the assumption of risk in business enterprise as distinguished from wages or rent.²⁷⁷

Given the ordinary meaning of “profit” and “loss,” Article 74 can be read as:

Damages for breach of contract by one party consist of a sum equal to the decrease in amount, magnitude, or degree, including the decrease in amount, magnitude, or degree of the net income over a period of time suffered by the other party as a consequence of the breach... or,

Damages for breach of contract by one party consist of a sum equal to the decrease in amount, magnitude, or degree, including the decrease in amount, magnitude, or degree of the valuable return or gain suffered by the other party as a consequence of the breach...

²⁷⁶ The complete definition is very unhelpful, but reads: “1: [destruction](#), [ruin](#) 2 a: the act of losing possession : [deprivation](#) <loss of sight> b: the harm or privation resulting from loss or separation c: an instance of losing 3: a person or thing or an amount that is lost: as a plural : killed, wounded, or captured soldiers b: the power diminution of a circuit or circuit element corresponding to conversion of electrical energy into heat by resistance 4 a: failure to gain, win, obtain, or utilize b: an amount by which the cost of something exceeds its selling price 5: decrease in amount, magnitude, or degree 6: the amount of an insured's financial detriment by death or damage that the insurer is liable for...” Available at: <http://209.161.33.50/dictionary/loss> (last visited March 6, 2007).

²⁷⁷ Merriam-Webster available at: <http://209.161.33.50/dictionary/profit> (last visited March 6, 2007).

Given the ordinary meaning of “loss” and “profit” it is reasonable to interpret “loss of profit” as including attorneys’ fees. If this is the case, then attorneys’ fees are required to be awarded under Article 74 because it states explicitly that a loss includes a “loss of profit.” Even if attorneys’ fees are not to be considered a “loss of profit” in the context of the CISG, it is reasonable to interpret “loss” as including attorneys’ fees. Thus, interpreting the CISG in conformity with the principle of reasonableness leads to the conclusion that attorneys’ fees can reasonably be considered a “loss” or even a “loss of profit” under Article 74.

8.3. Recognition of the Principles of “Mutual Benefit” and “Equality between States”

8.3.1. Recognition in the Rule

The principles of “mutual benefit” and “equality between states” are explicitly recognized in the Preamble to the CISG. The relevant section of the CISG Preamble reads “the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States...” There is compelling support for using these principles for gap filling under Article 7(2) of the CISG for matters within the scope of the CISG that are not expressly settled.²⁷⁸ As one commentator states, the principles of mutual benefit and equality between states can: “be used to fill gaps because those principles can be counted among, or have an influence on, the basic rules underlying the Convention...”²⁷⁹ Furthermore, the Vienna Convention on the Law of Treaties provides persuasive support for the use of the Preamble. The VCLT states the context of a treaty provision includes its Preamble and Annexes, and the context is to be taken into account in interpreting a treaty.²⁸⁰

The principles of “mutual benefit” and “equality between states” are public law principles that recognize a uniform international sales law benefits and promotes equality between the states party to the Convention. One commentator suggests that these principles were included to recognize that developing countries party to the Convention were on equal ground with the developed parties, and that both developing and developed countries will benefit from the

²⁷⁸ See: Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in: BLAINPAIN, GEN. ED., *INTERNATIONAL ENCYCLOPEDIA OF LAWS - Contracts* 18 (Kluwer Law International 2000); Horacio A. Grigera Naón, *The UN Convention on Contracts for the International Sale of Goods*, in: Horn/Schmittoff eds., *THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS: STUDIES IN TRANSNATIONAL ECONOMIC LAW* (Kluwer 1982) 92; and, Amy H. Kastely [U.S.], *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 *NW J. INT'L L. & BUS.* 574 (1988). *Contra see*: PETER SCHLECHTRIEM, *UNIFORM SALES LAW* 38 n.111 (1986); and, JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES* 541 (Kluwer 1999).

²⁷⁹ FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW* 19-20 (Oceana Publications 1992).

²⁸⁰ Vienna Convention on the Law of Treaties (1969), Article 31.

adoption of the CISG.²⁸¹ Another Commentator suggests that although these are obligations between states, they have relevance to commercial law, when referring to the Preamble he states:

Emphasis is placed here on two of the particularly important principles of international trade, 'equality' and 'mutual benefit', which should also govern the relations between States . . . They expressly refer to the relations between States. However, it is exactly this part of the preamble which is relevant for commercial relations as well, for equal and mutually beneficial relations between States in this context have to be specified in the respective commercial relations, including sales contracts.²⁸²

In other words, the relationship between states party to the CISG should be governed by the principles of “mutual benefit” and “equality between states” in their transactions involving the international sale of goods. Having recognized the principles of mutual benefit and equality between states in the Preamble as governing the relationship between states party to the CISG, we shall now turn to how the term “loss” in Article 74 of the CISG is to be interpreted in conformity with these principles under Article 7(2).

8.3.2. The Principle of “Mutual Benefit”

An interpretation of the term “loss” in CISG Article 74 in conformity with the principle of mutual benefit requires that attorneys’ fees be recoverable as a “loss.” The principle of mutual benefit signifies the agreement by CISG parties that a uniform international sales law will mutually benefit the parties to the CISG.²⁸³ The failure of the CISG to create a uniform, international sales law will be to the detriment of the parties to the CISG and in violation of the principle of mutual benefit. An interpretation of “loss” that does not include attorneys’ fees will similarly be in derogation of the principle of mutual benefit for two reasons: one, such an interpretation will create predictability problems, and two, such an interpretation will create uniformity problems. Both of these factors are suggested by commentators to decrease the use of the Convention and thwart the aim of a uniform, international sales law.

Excluding attorneys’ fees from the quantum of recoverable damages leads to inconsistent results internationally because almost every nation party to the CISG allows the recovery of attorneys’

²⁸¹ John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, para. 3b, Pace University Essay (February 2001). Available at: <http://www.cisg.law.pace.edu/cisg/biblio/felemegas-pre.html> (last visited March 7, 2007).

²⁸² ENDERLEIN & MASKOW, *supra* note 279 at 21.

²⁸³ ENDERLEIN & MASKOW, *supra* note 279 at 21.

fees in cases brought under the CISG.²⁸⁴ This inconsistency poses problems with predictability, and the lack of predictability is a reason that many lawyers seek to opt-out of the Convention.²⁸⁵ It has been suggested that there is a “reluctance of the result-oriented international business community and international legal practitioners to embrace the Convention because of the unpredictability of law in international sales transactions.”²⁸⁶ This reluctance is pursuant to the inconsistent and even contradictory judicial decisions rendered in the many nations signatory to the CISG.²⁸⁷ As one commentator states, “U.S. courts are in a position to develop a method of interpretation under the Convention that provides predictable results to the international business community.”²⁸⁸ By allowing attorneys’ fees to be fully recoverable under Article 74, predictability of result will be solidified, and the proliferation of opting-out of the Convention will decrease. In turn, the states will be mutually benefited through the acceptance and use of a uniform, international sales law and, in the words of the CISG Preamble, “friendly relations among States” will be promoted.

The lack of predictability caused by disallowing the recovery of attorneys’ fees under Article 74 is intertwined with the lack of uniformity such a decision creates. A number of commentators believe that uniformity in application is the key to the success of the Convention.²⁸⁹ One such commentator contends, “Uniform application is fundamental for the successful harmonisation of laws by international treaty. Accordingly, to the extent that compromises within the text of the CISG derogate from its uniform application, they also detract from the success of the CISG as an exercise in harmonisation.”²⁹⁰ The inability to harmonize an interpretation of the CISG detracts from the purpose of a uniform sales law and, in turn, from the principle of mutual benefit because parties to the CISG cannot benefit from a unified system of international sales

²⁸⁴ See: *supra* Section III. Again, this generalization is based on the countries that are surveyed in this essay and the culmination of present sources available on the topic. It is unlikely, but it could turn out to be otherwise as more courts in a greater number of countries-party to the CISG issue opinions on the topic. See also: David B. Dixon, *Que Lastima Zapata! Bad Ruling on Attorneys’ Fees Still Haunts U.S. Courts*, 38 U. MIAMI INTER-AMERICAN LAW REVIEW 405 (Winter 2006-2007).

²⁸⁵ CISG Article 6 allows parties to “opt-out”, it reveals that: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” V. Susanne Cook, *Recent Developments Relating to CISG: The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to abandon Legal Ethnocentricity*, 16 J.L. & COM. 257 (Spring 1997) (arguing that the lack of predictability leads to attorneys’ opting out).

²⁸⁶ *Id.* at 258.

²⁸⁷ *Id.*

²⁸⁸ V. Susan Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 JOURNAL OF LAW AND COMMERCE 257, 262 (1997).

²⁸⁹ Philip Hackney, *In the United Nations Convention on the International Sale of Goods Achieving Uniformity?* 61 LA. L. REV. 473, 476 (Winter, 2001). See also: Frank Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE INTERNATIONAL L. REV. 303 (1996).

²⁹⁰ Troy Keily, *Harmonisation and the United Nations Convention on Contracts for the International Sale of Goods*, 1 NORDIC JOURNAL OF COMMERCIAL LAW 1-21, 8 (2003).

law without consistent interpretations. In short, by allowing attorneys' fees to be recoverable under Article 74 of the CISG, both uniformity and predictability of result will be promoted, which will increase the use of the Convention and contribute to its success. Predictability and uniformity will, hence, benefit all countries party to the Convention.

8.3.3. The Principle of "Equality between States"

The principle of equality between states requires that Article 74 be interpreted so as to include attorneys' fees because a disparity in distribution of CISG cases across national boundaries will arise if attorneys' fees are left to domestic law. An uneven distribution of CISG cases is in violation of the principle of equality explicitly stated in the Preamble to the CISG, and will be destructive to the friendly relations among states. As the U.S. Chamber Institute for Legal Reform stated, "In today's global economy, many companies conduct business all over the world. When disputes arise from these global activities, plaintiffs now can search the world for the most favorable jurisdiction in which to press their claims."²⁹¹ The preclusion of attorneys' fees from the ambit of the CISG will make jurisdictions that do not preclude the recovery of attorneys' fees under their domestic laws more favorable than jurisdictions that preclude attorneys' fees.

As the Italian Tribunale di Rimini magnified in dicta of a CISG opinion,

the application of substantive uniform law has an additional advantage compared to the application of the rules of private international law: the avoidance of forum shopping, an activity which aims at reaching the most favorable jurisdiction for the interests of the litigating parties. Forum shopping would be avoided by the application of the same substantive law in different Contracting States...²⁹²

The Italian court also determined that forum shopping was not alone a *per se* reason that substantive international law should be used over domestic law, but that forum shopping is a relevant factor among many.²⁹³ Disallowing the recovery of attorneys' fees under the CISG, and leaving attorneys' fees to be awarded under the laws of each signatory country will lead to forum shopping as well as an uneven distribution of cases across national boundaries. Uneven

²⁹¹ U.S. Chamber Institute for Legal Reform, *Global Forum Shopping: An International Dilemma*, March 24, 2004. Available at: http://www.instituteforlegalreform.com/issues/GlobalForum_INTL%20dilemma.pdf (last visited March 7, 2007). The status quo that existed before the implementation of a uniform sales law created problems of law, choice of law, and animosity between states; hence the attempt to create a uniform sales law across national boundaries.

²⁹² Italy 26 November 2002 District Court Rimini (*Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*) (quoting the English translation). Available at: <http://www.cisg.law.pace.edu/cases/021126i3.html> (last visited March 7, 2007).

²⁹³ *Id.* See also: Franco Ferrari, *International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini 26 November 2002*, 23 JOURNAL OF LAW AND COMMERCE 169 (2004).

distribution of a case load is in violation of the principle of equality between states so attorneys' fees should be recoverable as damages under the CISG.

Therefore, an interpretation of CISG Article 74 in conformity with the recognized principles of equality between states, mutual benefit, and reasonableness requires that attorneys' fees be recoverable under the CISG, and that the matter not be left to the domestic law of the judicial forum.

9. Implications of and Alternatives to the Proposed Interpretation

9.1. *Introducing the Implications and Alternatives*

The interpretation of Article 74 presented in this essay has a number of implications for United States Courts, if the interpretation were to be adopted by, say, a U.S. Circuit Court. This section discusses the implications of adopting an interpretation of Article 74 that allows for the recovery of attorneys' fees as well as some thoughts on an international, autonomous meaning of "loss"; comity; and a method by which parties entering into CISG contracts can ensure that attorneys' fees are recoverable under their CISG governed contracts.

9.2. *Potential Implications*

A number of worries arise when faced with a possible Circuit Court split, but I insist that the dichotomy of views within U.S. law is a temporary, necessary occurrence that progresses towards the long-term aim of uniformity in CISG interpretation. As has been discussed, the aims of the CISG as a whole, as set out in its Preamble, include *inter alia*: uniformity and that the Convention be interpreted with regard to its international character. The importance of these aims of an international interpretation and uniformity are further magnified in the hierarchy of interpretation stated in CISG Article 7.

Circuit Courts that interpret Article 74 so as to include attorneys' fees under the substantive term, "loss" will digress little from the purposes of uniformity and international regard in the short term, and will be essential to achieving these aims in the long term. Given the current, inconsistent state of the law regarding the recovery of attorneys' fees under CISG governed contracts among domestic courts of the many nations, a Circuit Court split within the United States will digress little from the aim of uniformity because there is already a lack of uniformity in this area of law.²⁹⁴ Additionally, the small digression from uniformity caused by a Circuit Court split is overwhelmed by the potential for unanimous uniformity of interpretation and application that could potentially be the result of the split. In other words, although on its face a split of Circuits will hinder the goals of the CISG by digressing from uniformity, it is the only

²⁹⁴ See: *supra*, Section III.

way (absent an amendment to the United States' laws) that uniformity in interpretation and application can truly be achieved in the long term.

Circuit Courts that adopt an interpretation of Article 74 that allows for attorneys' fees to be recoverable as a "loss" will lead to temporary problems of predictability within the United States, but these problems of predictability will influence the Supreme Court to hear the question and resolve the issue. As mentioned above, predictability is one reason that contracting parties opt-out of the Convention in favor of the domestic law of a particular forum.²⁹⁵ Predictability, in this manner, plays into the principle of mutual benefit, a principle that is vital to the CISG and explicitly recognized in its Preamble. A decision by a Circuit Court to interpret Article 74 so as to allow for the recovery of attorneys' fees will lead to problems of predictability for potential contractual parties because parties litigating in U.S. circuits that have not rendered a final decision on the recoverability of attorneys' fees under the CISG could adopt either an interpretation that allows for the recovery of attorneys' fees or an interpretation that does not, such as that of the Seventh Circuit court's *Zapata* opinion.

These problems of predictability will perhaps lead to more opting-out of the Convention by prospective contractual parties and will contravene the principle of mutual benefit. Nevertheless, the transitory Circuit split will, in this author's view, lead to the Supreme Court hearing the issue and resolving the international controversy over attorneys' fees under the CISG within the United States once and for all. Upon resolution by the U.S. Supreme Court, the transitory predictability problems will likely be resolved.

9.3. *An Autonomously International Interpretation*

The interpretation given to the term "loss" in Article 74 that includes attorneys' fees need not be extended beyond the unique, international context of the CISG. There is a distinction between the meaning attributed to the term "loss" in U.S. statutes that would, under the "American rule," purportedly exclude attorneys' fees from its ambit and the meaning of the term "loss" in the context of the CISG which includes attorneys' fees within its scope. The latter of these meanings is the autonomous, international definition of "loss" within the context of Article 74 CISG, and need not be extended beyond this niche of international sales law.

A multitude of support is available for the proposition that the terms used in the CISG are to be given an autonomous, international meaning.²⁹⁶ Additionally, all courts, in their

²⁹⁵ See: Section VI to this paper.

²⁹⁶ See: Secretariat Commentary, available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html> (last visited January 14, 2007); and, HONNOLD, *supra* note 13 at 88-114; and, ZELLER, *supra* note 33 at 43-167.

interpretation of the CISG, should avoid the homeward trend.²⁹⁷ The homeward trend is the tendency to use domestic legal meanings in the interpretation of the CISG, rather than adopting the autonomous, international meaning.²⁹⁸ Therefore, by interpreting the term “loss” in Article 74 in accord with an international, autonomous meaning that is distinct from the meanings given to the term “loss” in the U.S., there is no likelihood that the meaning attributed to “loss” in the context of the CISG will spill over into other areas of United States law.

9.4. A Note on Comity

Even if the interpretation of Article 74 that allows for the recovery of attorneys’ fees is not adopted by other Circuit courts, comity requires that attorneys’ fees be recoverable. United States law requires that when U.S. law and the law of another country are in conflict, then the U.S. law should give way to the foreign law.²⁹⁹ As was determined in the U.S. Supreme Court case, *Societe Nationale*,³⁰⁰ the question of comity is whether “there is in fact a true conflict between domestic and foreign law,” and if there is a true conflict, then comity requires that the U.S. law give way to the foreign law.³⁰¹

If attorneys’ fees are truly a matter of the domestic law of the forum as *Zapata* indicates, then for the purposes of the comity analysis, the “American Rule” is the law of the U.S. and the “Loser-pays Rule” is the law of the foreign country (because almost every country party to the CISG adopts this domestic rule aside from the U.S.).³⁰² These two rules are diametrically opposed: the U.S. rule does not allow for the recovery of attorneys’ fees and yet the foreign country’s rule requires the recovery of attorneys’ fees. Because there is a direct conflict between U.S. law and foreign law, the law of the U.S. must give way to the foreign law under the Supreme Court precedent of *Societe Nationale*. Therefore, even if the Circuit Court does not determine that attorneys’ fees are directly recoverable under Article 74, the Circuit Court should determine that the foreign rule which allows for the recovery of attorneys’ fees will apply because of the direct conflict between the foreign rule and the U.S. rule. In other words, comity requires the application of the foreign rule which allows for the recovery of attorneys’ fees in CISG governed disputes.

²⁹⁷ ZELLER, *supra* note 33 at 43-167.

²⁹⁸ ZELLER, *supra* note 33 at 43-167.

²⁹⁹ See e.g.: *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993); and, *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 555 (1987).

³⁰⁰ *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 555 (1987).

³⁰¹ *Id.*

³⁰² Vanto, *supra* note 2 at 204.

9.5. *Freedom of Contract*

Contractual parties that desire to ensure that attorneys' fees will be recoverable in the case of breaches of CISG governed contracts can contractually stipulate that attorneys' fees must be recoverable. CISG Article 6 allows parties to a contract to "derogate from or vary the effect of any of its [the Convention's] provisions." Under Article 6, the parties to the contract can derogate from Article 74 by stating explicitly that attorneys' fees are to be recoverable under their contract even in the United States. Although there is no guarantee that the U.S. will enforce a contractual provision requiring the recovery of attorneys' fees, there is a strong policy argument that freedom of contract trumps this procedural rule of the jurisdiction.

Parties can also contractually stipulate that the location of the CISG governed trial will take place in a jurisdiction and under the laws of a country that awards attorneys' fees, such as Switzerland. Although such 'forum shopping' is in contravention of the principle of equality between states, there may be few other choices unless the United States' Circuit Courts determine that Article 74 allows for the recovery of attorneys' fees. Therefore, through careful contractual stipulations, parties can assure that they are fully compensated for these foreseeable losses that arise as a consequence of a breach of the contract (viz., attorneys' fees).

10. **Concluding Remarks**

An international, uniform interpretation of the CISG requires that attorneys' fees be recoverable under the substantive term "loss" in Article 74. The substantive term "loss," when interpreted in conformity with the "general principles" on which the Convention is based also requires that attorneys' fees are a recoverable "loss." In accord with the CISG text, the context of Article 7, and the object and purpose of the CISG, the "principles" of Article 7(2) are the rule-like principles recognized and validated by the CISG. A natural law reading of the CISG both betrays the text of the Convention and derogates from a uniform interpretation of the CISG. An interpretation of CISG Article 74 in conformity with the general principles on which the Convention is based requires attorneys' fees to be recoverable under the substantive term, "loss."

United States Circuit Courts can justifiably interpret CISG Article 74 in an autonomous, international manner so as to include attorneys' fees under the substantive term, "loss." In lieu of this interpretation, comity requires the application of the 'Loser-pays' rule, and parties can contractually stipulate the recovery of attorneys' fees and jurisdictions that allow the recovery of attorneys' fees in the clauses of their CISG governed contracts.

APPENDIX A

Variant Rights and Obligations of the Seller and the Buyer

<i>CISG Article</i>	<i>Rights of the Buyer</i>	<i>Corresponding Article for Rights of the Seller</i>
Article 46(1)	The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.	Article 62
Article 46(2)	If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.	X
Article 46(3)	If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.	X
Article 47(1)	The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.	Article 63(1)
Article 47(2)	Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.	Article 63(2)
Article 48(1)	Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.	*
Article 48(2)	If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.	*
Article 48(3)	A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.	*
Article 48(4)	A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.	*

Article 49(1)	The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.	Article 64(1)
Article 49(2)	However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) in respect of any breach other than late delivery, within a reasonable time: (i) after he knew or ought to have known of the breach; (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.	Article 64(2) «
Article 50	If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.	X
Article 51(1)	If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.	X
Article 51(2)	The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.	X
Article 52(1)	If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.	X
Article 52(2)	If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.	X

Key to Data Tables:

X = No corresponding rights or obligations to those of the designated Article.

* = Contains variant rights or obligations of both the buyer and the seller in the designated Article.

« = There are minor differences (certain rights or obligations added or deleted) between the corresponding provisions.

<i>CISG Article</i>	<i>Rights of the Seller</i>	<i>Corresponding Article for Rights of the Buyer</i>
Article 62	The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.	Article 46(1)
Article 63(1)	The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.	Article 47(1)
Article 63(2)	Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.	Article 47(2)
Article 64(1)	The seller may declare the contract avoided: (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.	Article 49(1)
Article 64(2)	However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so: (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or (b) in respect of any breach other than late performance by the buyer, within a reasonable time: (i) after the seller knew or ought to have known of the breach; or(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.	Article 49(2) «
Article 65(1)	If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.	X
Article 65(2)	If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.	X