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Keily, TA 2003, How does the cookie crumble? legal costs under a uniform interpretation of the United Nations Convention on Contracts for the International Sale of Goods, Nordic journal of commercial law, vol. 1, pp. 1-23.

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**HOW DOES THE COOKIE CRUMBLE?**

**LEGAL COSTS UNDER A UNIFORM INTERPRETATION  
OF THE UNITED NATIONS CONVENTION ON CONTRACTS  
FOR THE INTERNATIONAL SALE OF GOODS**

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Nordic Journal of Commercial Law  
issue 2003 #1

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## 1. INTRODUCTION

### 1.1 How does the cookie crumble - As it falls or following the event?

A family owned Mexican company, Zapata Hermanos Sucesores, S.A. ("Zapata"), sold approximately US\$950,000 worth of cookie tins over a period of four years to the Maurice Lenell Cooky Company ("Lenell"), an American company that produced baked goods. Lenell failed to pay Zapata for the cookie tins so Zapata sought legal advice and instituted legal proceedings against Lenell for breach of contract in the Federal District Court of Illinois.<sup>2</sup> The cookie tin sale contracts were governed by the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). Zapata succeeded in its Federal District Court claim and, as part of the Court's order, was awarded US\$550,000 as foreseeable loss under Article 74 of the CISG, being the amount of legal fees incurred by Zapata in bringing proceedings against Lenell. On appeal to the Federal Appellate Court, however, the award of legal fees was overturned.<sup>3</sup> The parties now find themselves contesting a leave application to appeal to the Supreme Court of the United States of America in a much anticipated debate over who should pay the lawyers.<sup>4</sup>

The decisions of the Federal District Court and Federal Appellate Court, and now the application to appeal before the Supreme Court, are significant for two reasons. First, the decisions consider whether legal costs are payable by a losing party as damages for loss under Article 74 of the CISG. For reasons that will be outlined below, this issue takes on even greater significance for parties litigating under the CISG in the United States. But the second and greater significance of these decisions is not what the courts decide but how they decide it. When interpreting the CISG, the means must justify the end.

The CISG is a uniform contract law adopted by 62 countries that together account for over two-thirds of all world trade. The purpose of the CISG was to harmonise contract laws and provide greater certainty to merchants trading in goods across state borders and thereby encourage international trade. However, the harmonisation of the international sale of goods law in the CISG also demands a uniform application of its principles by tribunals around the world. Recognising this need, Article 7 of the CISG guides merchants, lawyers and tribunals on how to promote a uniform interpretation and application of the CISG. This paper will critically consider the treatment accorded to Article 74 of the CISG by both the Federal District Court and the Federal Appellate Court in light of the principles of interpretation set out in Article 7.

This paper concludes that the end decision of the Federal District Court was wrong, although the means adopted by the court did in part respect the mandate of Article 7. The end decision of the Federal Appeal Court, on the other hand, was correct. However, the path taken by the Federal Appeal Court in reaching its decision did not accord with the requirements of Article 7. The failure of the Federal Appeal Court to pay due regard to Article 7 represents a

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<sup>2</sup> *Zapata Hermanos Sucesores, S.A. v Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Company* (2001) WL 1000927, also published at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/010828u1.html>>.

<sup>3</sup> *Zapata Hermanos Sucesores, S.A. v Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Company* 313 F. 3d 385, also published at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021119u1.html>>.

<sup>4</sup> No. 02-1318 in the Supreme Court of the United States of America. For a copy of Zapata's petition for writ of certiorari, Lenell's brief in opposition to petition for writ of certiorari, the motion for leave to file and brief amicus curiae and Lenell's reply brief, see links at <<http://www.cisg.law.pace.edu/cisg/text/e-text-74.html>>.

detrimental precedent to the future application of the CISG and ultimately undermines uniformity and the promotion of international trade.

In this context, the application to appeal to the Supreme Court of the United States of America is a momentous opportunity for some of the world's most respected jurists to make potentially the most significant jurisprudential contribution in the short history of the CISG. In addition, the application to appeal to the Supreme Court has also given rise to interesting developments for the future interpretation and stewardship of the CISG. This paper will also consider these developments.

Part two of this paper briefly introduces the CISG and, specifically, Articles 7 and 74. Part three looks at the facts of the *Zapata* case and various approaches in domestic legal systems to the payment of legal fees. The decisions of the Federal District Court and the Federal Appeal Court are examined in parts four and five respectively and part six presents the authors view on whether an interpretation of loss under Article 74 in accordance with Article 7 includes legal fees. Finally, part seven considers the significance of the appeal to the Supreme Court.

## 2. THE CISG

### 2.1 CISG in a Nutshell

Sixty two states are currently signatories to the CISG. This includes all major trading countries in the world with the notable exceptions of England and Japan. Accordingly, the importance of the CISG to the international trade in goods cannot be overstated. This significance is also recognised in the preamble of the CISG that records the commitment of contracting states to the view that:

*... the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade...*

This attestation to the goals of the CISG also pays tribute to the context in which the CISG was drafted. The delegates that contributed to the negotiation and drafting of the CISG represented an amalgam of different countries and legal systems including representatives from common law, civil law, socialist and third world countries. The delegates each sought to promote a harmonised law that most resembled their domestic legal system and accordingly the final text of the CISG represents an often hard won compromise between these different legal systems. The final result, however, was a contract law intended to operate independently from domestic laws as an autonomous instrument governing the formation of contracts for the international sale of goods, obligations of the seller and buyer and remedies for breach. Critical to the autonomy of the CISG, and the successful harmonisation of international sale of goods law, is Article 7.

### 2.2 Article 7 of the CISG: Interpretation Template

Phanesh Koneru states that Article 7 is "arguably the single most important provision in ensuring the future success"<sup>5</sup> of the CISG. Likewise, John Felemegas notes that the "area where the battle for international unification will be fought and won, or lost, is the interpretation of the CISG's provisions. Only if the CISG is interpreted in a consistent manner in all legal systems that have adopted it, will the effort put into its drafting be worth anything."<sup>6</sup> Article 7 mandates how the CISG is to be interpreted. It is the template through which the CISG must be read.

The text of Article 7 reads as follows:

*(1) 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.*

*(2) 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.*

The template prescribed in Article 7 to interpret the CISG can be broken down into the following three steps.

### **2.3 Step One: International Character, Uniformity and Good Faith**

First and foremost, the CISG directs those interpreting the CISG to have regard to its international character, the need to promote uniformity and the observance of good faith in international trade.<sup>7</sup> This component imposes positive obligations to adhere to the plain meaning of the text of the CISG and to refer to foreign decisions, the legislative history of the CISG and academic commentary for guidance. This component also imposes negative obligations to avoid the 'homeward trend' and domestic techniques of interpretation.

#### **2.3.1 The Text**

The primary positive obligation is to look for the answer to all questions in the CISG. This places the pre-eminent importance on the text of the CISG. Felemegas rightly argues that "fidelity to the words of the statute"<sup>8</sup> is required which necessitates "adherence to the plain meaning of the text and comprehension of the full context of the Convention's provisions."<sup>9</sup>

##### **(a) Foreign Decisions**

The best measure of uniformity of interpretation of the CISG is to actually consider decisions of foreign tribunals. Accordingly, the international character and need to maintain uniformity requires tribunals to consider decisions from outside their domestic jurisdiction. However,

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<sup>5</sup> Phanesh Koneru, 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles' (1997) 6 *Minnesota Journal of Global Trade* 105.

<sup>6</sup> John Felemegas, 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' <<http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html>>.

<sup>7</sup> For a discussion on the meaning and role of good faith see Troy Keily, 'Good Faith & the Vienna Convention on Contracts for the International Sale of Goods' (1999) 3 *The Vindobona Journal of International Commercial Law and Arbitration* 15.

<sup>8</sup> Felemegas, above n7.

<sup>9</sup> *Ibid.*

there are significant practical problems with this requirement as will be demonstrated in part 6.1 below.

### 2.3.2 Travaux Préparatoires

Beyond the plain and contextual meaning of the text of the CISG and consideration of foreign decisions, the international character and the need to maintain uniformity requires the use of specific interpretative aids when determining the intended meaning of provisions in the CISG. The negotiation and drafting process of the CISG took many years and, as outlined above, required the involvement of delegates representing countries and legal systems from all corners of the globe. This rich legislative history or the *travaux préparatoires* should be referred to for guidance when interpreting the CISG.

#### (a) Academic Commentary

A further interpretive aid available when determining the application of the CISG is the use of expert academic commentary. The use of academic commentary does not generally sit well with the tradition of common law countries although civil law countries have always been accepted the important role of academic writing.<sup>10</sup> In the context of the CISG however, recognition of its international character and the need to maintain uniformity can only be assisted by the use of academic commentary.

### 2.3.3 Homeward Trend

The international character of the CISG requires recognition that it is not a piece of domestic legislation but rather a multinational treaty that has been incorporated into the domestic law of countries across the globe whose legal traditions vary considerably. Accordingly, in addition to the positive obligations outlined above mandated by the international character and need to maintain uniformity, these characteristics of the CISG also impose the negative obligation to avoid the 'homeward trend' when interpreting the meaning of the CISG.

The homeward trend is the propensity to interpret an international convention through a domestic lens and in accordance with domestic principles and concepts. It is the "temptation for judges and the parties settling disputes... to look at what is familiar especially as it appears to be so at first glance."<sup>11</sup> When interpreting the CISG, the danger of the homeward trend is most pronounced with the reflex tendency to interpret legal concepts found within the CISG as if they were the same as concepts found in the domestic law or with the over reliance of domestic judicial decisions at the expense of decisions of foreign tribunals.

### 2.3.4 Domestic Interpretative Techniques

The danger of the homeward trend warns against the reliance on domestic concepts to understand principles in the CISG and the use of foreign decisions. It also requires the use of techniques of legislative interpretation that are different to techniques applied to domestic legislation. Again, this reinforces the view when interpreting the CISG that it is not a normal piece of domestic legislation but an international treaty and that the CISG "should be seen as part of international law in the broad sense and should be entitled to an international, rather

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<sup>10</sup> Ibid.

<sup>11</sup> Bruno Zeller, 'The UN Convention on Contracts for the International Sale of Goods (CISG) - A Leap Forward Towards Unified International Sales Laws' (2000) 12 *Pace International Law Review* 79, 88.

than national, interpretation."<sup>12</sup> This warning is particularly pertinent to tribunals in the common law world given the common law tenancy to interpret domestic legislation narrowly. The CISG, however, should be given a broad interpretation as explained by Professor Bonell.

"Instead of sticking to its literal and grammatical meaning, courts are expected to take a much more liberal and flexible attitude to look, wherever appropriate, to the underlying purpose and policies of individual provisions as well as the Convention as a whole."<sup>13</sup>

#### **2.4 Step Two: General Principles of the CISG**

Steps two and three of the interpretation template prescribed by Article 7 are the CISG's gap filling mechanisms. They come into play where the text of the CISG has left a gap in relation to the legal rights and obligations of a buyer or seller. Such a mechanism is necessary because the CISG is not, and was never intended to be, an exhaustive body of rules providing solutions to all problems.<sup>14</sup>

The need to promote a uniform interpretation of the CISG is even more critical where the text of the CISG is silent because of the many divergent approaches that might be taken by tribunals around the world. Accordingly, to maintain a uniform interpretation Article 7(2) first directs those interpreting the CISG to settle matters that are governed by the CISG, but not expressly settled in it, in conformity with the general principles on which it is based. The CISG was designed as autonomous instrument as demonstrated by step two of the interpretation template that directs the reader to seek answers within the CISG by referring to its general principles.

General principles upon which the CISG is based may be both expressly referred to in the CISG, such as the principles of good faith and party autonomy, or inferred from provisions in the CISG, such as the principles of reasonableness and mitigation.<sup>15</sup>

#### **2.5 Step Three: Rules of Private International Law**

The third step of the Article 7 interpretation template is triggered only where the text of the CISG is silent on an issue and an answer is not otherwise provided by application of the general principles upon which the CISG is based. Only after these two steps are exhausted is it permissible to proceed to step three which directs questions to be settled in conformity with the law applicable by virtue of the rules of private international law. Accordingly, it is only at this stage that the CISG ceases to be autonomous and it is permissible to have recourse to the domestic law applicable under choice of law principles.

#### **2.6 Summary: The Steps of the Article 7 Interpretation Ladder**

The importance of maintaining a uniform interpretation of the CISG is enshrined in Article 7. To give effect to this goal, Article 7 offers an interpretation template or interpretation ladder.<sup>16</sup> To summarise, the rungs of this interpretation ladder require that, first, provisions of the CISG

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<sup>12</sup> Felemegas, above n7.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Frank Diedrich, 'Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG' (1996) 8 Pace International Law Review 303, also published at <<http://www.cisg.law.pace.edu/cisg/biblio/Diedrich.html>>.

be given a plain and contextual meaning with assistance from the CISG's own legislative history, academic commentary and, importantly, decisions of foreign tribunals. The international character and need to maintain uniformity of the CISG also warn against the homeward trend. That is, the interpretation of the CISG as a domestic statute or in reliance on domestic legal concepts or by recourse only to decisions of domestic tribunals. Where the first rung of the interpretation ladder fails to provide an answer, reference should then be made to the general principles of the CISG. Finally, it is only after these two steps are exhausted without determining the issue that recourse might be made outside the CISG to the domestic law applicable under choice of law principles.

This paper will consider the extent to which the Federal District Court and the Federal Appellate Court in *Zapata* kept in step with the Article 7 interpretation ladder in their respective interpretations of Article 74 of the CISG.

## 2.7 Article 74 of the CISG: Foreseeable Loss

Article 74 of the CISG provides the general rule for measuring damages in the case of breach.<sup>17</sup> The text of Article 74 reads as follows.

*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 the light of the facts and matter of which he then knew or ought to have known, as a possible consequence of the breach of contract.*

Accordingly, as a general rule, the CISG will award damages to an injured party that are foreseeable as a consequence of the breach. The reference to damages for 'loss of profit' in Article 74 suggest that the purpose underlying an award of damages is to place the injured party in the same economic position the injured party would have been in had the contract been performed. This principle of full compensation is also supported by the legislative history of the CISG.<sup>18</sup>

Unfortunately, the interpretation of Article 74 by an American court has already provided an example of a Court succumbing to the homeward trend and ignoring the template for interpreting the CISG set out in Article 7. In *Delchi Carrier S.p.A v Roterex Corp*<sup>19</sup> the Court found that the "CISG requires that damages be limited by the familiar principle of foreseeability established in *Hadley v. Baxendale*." *Hadley v Baxendale* is a case familiar to common law lawyers as authority on the principle of foreseeability. However, by construing Article 74 by reference to this common law case and legal concept, the Court failed to comply

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<sup>17</sup> Article 74 must be read together with other provisions of the CISG that regulate the award of damages. Briefly, the relevant provisions are, Article 45(1)(b) and Article 61(1)(b) which establish the right to claim damages; Article 75 and Article 76 that define the method of calculating damages in certain circumstances; Article 77 which sets out the rule of mitigation of damages; Article 79 that establishes rules on exemption from liability for damages due to an impediment to performance and Article 78 that provides that a claim by a party for interest is without prejudice to any claim for damages under Article 74: See Eric C. Schneider, 'Cross-Reference and Editorial Analysis: Article 74' <<http://www.cisg.law.pace.edu/cisg/text/cross/cross-74.html>>.

<sup>18</sup> Jeffrey S. Sutton, 'Measuring Damages Under the United Nations Convention on the International Sale of Goods' 50 Ohio State Law Journal (1989) 737-752; also published at <<http://www.cist.law.pace.edu/cisg/biblio/sutton.html>>.

<sup>19</sup> 71 F.3d 1024 (U.S. Ct. App 2d. Cir. 1995).

with Article 7.<sup>20</sup> In light of this and many other errors by American courts, the pending appeal to the Supreme Court represents an opportunity to correct the record.

### 3. THE COOKIE DISPUTE

#### 3.1 The Facts

Under Article 1(1)(a) of the CISG, contracts for the international sale of goods are subject to the CISG where the place of business of the parties to the contract are in different states and those states are signatories to the CISG. Zapata was a Mexican company that manufactured tin products in Mexico City. Lenell was an American company that sold cookies. Over a period of four years, Zapata sold some 1,600,000 cookie tins to Lenell valued at approximately US\$950,000. The cookie tins are clearly goods and both Mexico and America are signatories to the CISG. Accordingly, the CISG applied to the contracts for the sale of the cookie tins.

Lenell accepted and used the cookie tins without complaint, but failed to pay for them. Following this, Zapata requested payment of its outstanding account before filling orders for more cookie tins. Lenell responded by threatening not to pay unless all orders were filled. When Zapata ceased future orders Lenell made good its threat and refused payment requiring Zapata to institute proceedings in the Federal District Court of Illinois to recover payment.

Despite Lenell's recalcitrant conduct throughout the proceedings, in which Lenell continued to deny liability to pay for the cookie tins without any apparent defence, and its efforts to expand the scope and expense of the litigation through unnecessary discovery proceedings, Zapata was ultimately successful in its claim and Lenell was ordered to pay for the cookie tins.

Zapata's legal bill at this stage amounted to approximately US\$550,000, over half of Zapata's claim under the cookie contracts. Accordingly, Zapata's apparent success was diminished by Lenell's obstinate attitude to payment that required Zapata to incur significant legal fees to recover what it was due.

The Federal District Court was then asked to consider whether Zapata could recover from Lenell the legal fees Zapata had incurred as loss under Article 74 of the CISG. The Federal District Court held in the affirmative, which decision was overturned by the Federal Appellate Court and is presently pending an application to appeal to the Supreme Court.

Before proceeding to an analysis of these decisions however, it is necessary to give a context by briefly outlining the attitudes of different jurisdictions to the recovery of legal fees and expenses.

#### 3.2 American Rule – Loss as it falls

The United States is in the minority of countries to apply the 'American rule' in relation to legal fees and expenses. Under this general rule, parties to litigation bear their own expenses. That is, the legal expense incurred by each party lies as it falls. This 'every man for himself'

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<sup>20</sup> Susanne Cook, 'The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity' (1997) 16 *Journal of Law and Commerce* 257, also published at <<http://www.cisg.law.pace.edu/cisg/biblio/1cook.html>>.

approach encapsulated by the American rule is declared to be morally superior because of the uncertain nature of litigation meaning:

"one should not be penalised for merely defending or prosecuting a lawsuit, and ... the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel".<sup>21</sup>

Accordingly, the American rule is inconsistent with the view that loss under Article 74 of the CISG includes legal fees and expenses.

### 3.3 English Rule – Loss follows the event

The approach adopted by the majority of the countries around the world has been dubbed the 'loser pays' or 'English rule'. Under this rule the losing party to litigation is required to pay the legal fees of the winning party. That is, an award of legal costs follows the event of winning. This rule dates back to Roman times and "reflects the rationale that victory is not complete in civil litigation if it leaves substantial expenses uncovered."<sup>22</sup> Unlike the American rule, the English rule is designed to make the prevailing party to litigation whole by placing the winning party in the same economic position it would have been in had the contract been performed.

## 4. FEDERAL DISTRICT COURT

### 4.1 Decision

Lenell argued before the Federal District Court that, given they were in an American court, the American rule should apply to the proceedings and accordingly Lenell should not be required to pay the legal expenses of the winning party, Zapata. This view was rejected. Rather, the Court found that the plain meaning of loss in Article 74 included the legal fees incurred by Zapata.

### 4.2 Uniformity and the Homeward Trend

In what appeared to be a resounding victory for a uniform interpretation of the CISG and recognition of the dangers of the homeward trend, the Court criticised Lenell's misleading contention "for the parochial application of the American Rule."<sup>23</sup>

The Federal District Court recognised that a uniform interpretation of the CISG mandated universality rather than application of the purely home-town American rule. The Court also referred with approval to the following passage from an earlier decision of an American Court that considered the CISG:

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<sup>21</sup> W. Kent Davis, 'The International View of Attorney Fees in Civil Suits: Why is the United States the 'Odd Man Out' in how it pays its lawyers?' (1999) 16 *Arizona Journal of International & Comparative Law* 361, 401; see also John Yukio Gotanda, 'Awarding Costs and Attorneys' Fees in International Commercial Arbitration' (1999) 21 *Michigan Journal of International Law* 1, 10.

<sup>22</sup> Davis, above n20.

<sup>23</sup> *Zapata Hermanos Sucesores, S.A. v Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Company* (2001) WL 1000927, also published at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/010828u1.html>>.

"One of the primary factors motivating the negotiation and adoption of the CISG was to provide the parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply... Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substitution familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of [the CISG]".<sup>24</sup>

#### 4.3 Plain Meaning

Having rejected the application of the American rule, the Court resolved the issue of whether Zapata was entitled to payment of its legal fees and expenses by Lenell by focusing on the plain language and meaning of Article 74. As explained by the Court, "[w]hen the searchlight of analysis is thus properly focused on the language of the Convention without any inappropriate overlay from the American Rule, the question becomes a simple one."<sup>25</sup>

Referring to the language of Article 74, the Court held that "the normal unstrained reading of Article 74... calls for [Zapata's] recover of its attorneys' fees as foreseen consequential damages."<sup>26</sup> That is, Lenell "foresaw or should have foreseen that if Lenell failed to pay for the tins that it ordered, received and accepted, [Zapata] would incur litigation costs including attorneys fees, to seek payment of the invoices for said tins."<sup>27</sup>

#### 4.4 Legislative History

The Court also found support for its decision that loss under Article 74 included legal fees and expenses in the CISG's legislative history. The Court noted that, in the context of discussion on appropriate interest rates payable on damages under the CISG, the drafters of the CISG intended to protect the "injured seller's make-whole expectations".<sup>28</sup> The Court then commented that Zapata could only be made whole "by freeing its damages recovery from the burden of attorney's fees."<sup>29</sup>

In its discussion on the American rule, the Federal District Court recognised that the American rule was at odds with the approach adopted by the majority of commercial jurisdictions and that the American rule fails to place "the winners in contract disputes in the same economic position as if the breaching parties had performed their required obligations under the contracts".<sup>30</sup> The legislative history of the CISG does support the view that the policy underlying Article 74 of the CISG is to award damages such that the injured party is in the same economic position it would have been in had the contract been performed.

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<sup>24</sup> *MCCMarble Ceramic Ctr., Inc. v Ceramica Nuova D'Agostino, S.F.A.*, 144 F.3d 1384,1391 (11<sup>th</sup> Cir. 1998).

<sup>25</sup> *Zapata Hermanos Sucesores, S.A. v Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Company* (2001) WL 1000927, also published at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/010828u1.html>>.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.* The court referred to a stipulation entered into by the litigants prior to the trial.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

#### **4.5 Foreign cases**

Importantly, the Court also referred to decisions of foreign tribunals that purportedly supported the proposition that Article 74 loss included legal fees. Unfortunately, the reference to these foreign decisions was fleeting and the Court failed to analyse these decisions in any depth. As will be discussed in part 6.1 below, a closer analysis of these foreign decisions suggests the Court's unquestioning reliance on these decisions was misguided.

#### **4.6 Comment**

The Federal District Court made one significant omission in its decision. Despite keeping in step with the interpretation template set out in Article 7, the Court neglected to state that Article 7 was the provision actually guiding the Court in its interpretation. The Court failed to refer to Article 7.

In any event, the Court did pay due regard to the plain meaning of the text of Article 74 and sought assistance from decisions of foreign tribunals and the legislative history of the CISG. Also, the Court was mindful of the need to promote a uniform interpretation of the CISG and to avoid the lure of the homeward trend by rejecting automatic application of the American rule. Further, as the Court found Article 74 expressly settled the question in the affirmative that legal fees and expenses could be recovered as loss, the Court did not proceed to consider the CISG's gap filling mechanisms. Accordingly, the decision of the Federal District Court did respect the mandate of Article 7. However, whether the decision was correct is altogether a different issue.

### **5. FEDERAL APPELLATE COURT**

#### **5.1 Decision**

Judge Posner, writing the unanimous judgment of the Federal Appeal Court, overturned the decision of the Federal District Court and held that Zapata could not recover its legal fees and expenses as loss under Article 74 of the CISG for two reasons. First, Posner J held that the award of legal fees and expenses was not a substantive issue governed by the CISG but a procedural issue to be determined by the law of the forum. And second, Posner J held that, in any event, the CISG does not allow for the recovery of legal fees and expenses.

This paper will now consider each of these arguments and concludes that, whilst the ultimate decision of the Federal Appellate Court was correct and the CISG does not allow for the recovery of legal fees, the methodology and path employed by the Court in reaching its end decision was flawed.

#### **5.2 Substance v Procedure**

Article 4 of the CISG stipulates that the CISG "governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract." While Posner J did not expressly refer to Article 4, he noted that.

"The Convention is about contracts, not about procedure. The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural law. For example, the 'American rule', that the winner must bear his own litigation expenses, and the 'English rule' (followed in most other countries as well), that he is entitled to reimbursement, are rules of general applicability."

In effect, Posner J held that the CISG governs substantive issues in relation to the formation of contract and the rights of parties, but not procedural issues. Further, Posner J held that principles governing the recovery of legal fees are generally procedural. Accordingly, he found that this issue should be determined by the procedural law of the forum, being the State of Illinois which applies the American rule.

There are significant problems with this approach. First and foremost, the approach taken to determining whether a particular rule is substantive or procedural has significant potential to detrimentally impact on a uniform interpretation of the CISG. For example, on Posner J's approach it is open for a Court to merely declare an issue to be procedural and not substantive and therefore outside the scope of the CISG. For this reason, commentators note that extreme caution must be taken in labelling a rule as procedural or substantive and that the "label that the state law bears should be irrelevant."<sup>31</sup> Rather, the CISG should be given the widest possible interpretation guided by Article 7 and the urgency of uniformity. However, the analysis of the procedural and substantive law issue offered by Posner J was relatively dismissive and represents a detrimental precedent for the future interpretation and application of the CISG.<sup>32</sup>

The preferred approach is to consider whether the substance of the dispute, in this instance whether a party could recover legal costs, is a matter governed by the CISG interpreted in accordance with Article 7, not merely to consider whether a matter is generally considered procedural or substantive under domestic law. Only this approach ensures a uniform interpretation of the CISG.

### 5.3 Article 74: International Character, Uniformity & Good Faith?

The decision of the Federal District Court relied on the plain meaning of Article 74 of the CISG to hold that loss included legal fees and expenses. The Federal Appeal Court, after holding that this was a matter governed by the domestic procedural law of the forum and therefore outside the purview of the CISG, also considered whether legal fees could otherwise be recovered as loss under the CISG. It is not clear why the Court also considered this issue after holding that the matter was not one governed by the CISG. Indeed, the arguments were not even offered by the Court as alternatives but merely presented together, adding to the confusion. This demonstrates a misunderstanding by the Court of the operation of the CISG and provides a disappointing and potentially misleading template for future courts or tribunals seeking to interpret and apply the CISG.

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<sup>31</sup> John O Honnold quoted in Albert H Kritzer 'Editorial Remarks: Delchi Carrier S.p.A. v. Rotorex Corp.' <<http://www.cisg.law.pace.edu/cisg.wais/db/editorial/951206u1editorial.html>>.

<sup>32</sup> John Felemegas, 'An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals' <<http://cisgw3.law.pace.edu/cisg/biblio/felemegas4.html>>.

The Federal Appeal Court rejected the decision of the Federal District Court and found that the loss under Article 74 of the CISG did not include legal fees and expenses. In reaching this conclusion, the Federal Appeal Court noted that there:

"is no suggestion in the background of the Convention or the cases under it that 'loss' was intended to include attorneys' fees, but no suggestion to the contrary either."<sup>33</sup>

It is true that the legislative history of the CISG does not expressly indicate one way or the other whether loss was intended to include attorneys' fees. However, the legislative history does detail the underlying policy of Article 74, being to make the injured party whole, which is relevant when determining the legal fees issue. This aspect of the CISG's legislative history was completely ignored by the Federal Appeal Court.

Also, the suggestion that there is no case law able to shed light on the issue is clearly incorrect and demonstrates a disturbing reluctance to look for or consider decisions of foreign tribunals. It is true to say that no American case law has considered the payment of legal fees under Article 74, but as was recognised by the Federal District Court, there were several decisions of foreign tribunals that had considered the issue. The Federal Appeal Court's reluctance to consider judgments from beyond the borders of the United States jeopardises a uniform interpretation of the CISG and is contrary to the principles set out in Article 7.

The Court's reluctance to consider foreign judgments is made worse by the Court's reference to other American court decisions in relation to domestic sales legislation to support the proposition that:

"it seems apparent that 'loss' does not include attorneys' fees incurred in the litigation for a suit for breach of contract, though certain pre-litigation legal expenditures, for example expenditures designed to mitigate the plaintiff's damages, would probably be covered as 'incidental' damages."<sup>34</sup>

This passage from Posner J's judgment was supported by reference to decisions of American courts. The reference to 'incidental damages' demonstrates how the homeward trend and reliance on domestic legal concepts and decisions to inform the meaning of the CISG undermines the uniformity of the CISG. Article 74 speaks of consequential damages. There is no reference to incidental damages in Article 74 or the CISG. Rather, incidental damages are a concept found in the domestic American sales legislation and are in fact defined and distinguished from consequential damages.<sup>35</sup> The decision of the Court has thus opened the door for pre-litigation legal expenses to be recovered as incidental damages under the CISG which is a category of damages that the CISG does not recognise.

#### 5.4 General Principles of the CISG

Having satisfied itself that the plain meaning of Article 74, assisted by the CISG's legislative history and 'lack' of case law, suggested that legal fees could not be recovered as loss, the Court also referred to Article 7(2) in stating that:

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<sup>33</sup> *Zapata Hermanos Sucesores, S.A. v Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Company* 313 F. 3d 385, also published at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021119u1.html>>.

<sup>34</sup> *Ibid.*

<sup>35</sup> Felemegas, above n31.

"there are no 'principles' that can be drawn out of the provisions of the Convention for determining whether 'loss' includes attorneys' fees".<sup>36</sup>

There is an inherent contradiction in this statement that demonstrates a complete misunderstanding by the Court of the operation of Article 7(2). The Court had previously stated that the issue of legal fees was not a substantive issue governed by the CISG but a procedural issue governed by the procedural law of the forum. It concluded that legal fees are not an issue governed by the CISG. However, Article 7(2) would only need to be considered by the Court if the payment of legal fees was a matter governed by the CISG because Article 7(2) only operates to fill gaps by the application of general principles of the CISG in relation to "[q]uestions concerning matters governed by this Convention." On the one hand, the Court stated that the payment of legal fees is a procedural matter not governed by the CISG but then analyses this issue under Article 7(2) which only applies to matters governed by the CISG.<sup>37</sup>

Putting this somewhat confusing anomaly to one side, it is also concerning to note the dismissive examination by Posner J of the general principles of the CISG. Posner J merely offered the statement that there were no general principles concerning loss and legal fees. In so doing, the Posner J ignored a general principle expressly referred to by the Federal District Court, being the principle of full compensation. As discussed above, this general principle can be derived both from the text of Article 74 which provides for damages for loss, including loss of profit, and from the legislative history of the CISG which clearly states that the policy underlying the damages provisions in the CISG is to place the injured party in the same position he would have been in had the contract been performed. The general principle of full compensation could be used to assist an interpretation of loss in Article 74 that includes legal fees and expenses so as to fully compensate the injured party.<sup>38</sup>

### 5.5 Rules of Private International Law

After a derisory examination and conclusion by the Court that there were no general principles to be drawn from the CISG in relation to loss and legal fees, the Court stated that:

"by the terms of the Convention itself the matter must be left to domestic law (i.e., the law picked out by 'the rules of private international law,' which means the rules governing the choice of law in international legal disputes)."<sup>39</sup>

The Court failed to examine the choice of law rules or to expressly state the domestic law that would apply as a result. However, it is inferred from the judgement that this process led to the application of the American rule and thus the Court had reached the same conclusion by two different means. First the Court held that the American rule applied because it was a procedural issue beyond the scope of the CISG. And second, the Court found that as there were no general principles in relation to loss and legal fees and that therefore the issue was to be determined by the domestic law applicable under the choice of law principles - being the American rule as the law of the State of Illinois.

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<sup>36</sup> *Zapata Hermanos Sucesores, S.A. v Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Company* 313 F. 3d 385, also published at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021119u1.html>>.

<sup>37</sup> Harry Flechtner & Joseph Lookofsky 'Viva Zapata! America Procedure and CISG Substance in a U.S. Circuit Court of Appeal' (2003) 7 *The Vindobona Journal of International Commercial Law and Arbitration* 93, 100.

<sup>38</sup> Felemegas, above n30.

<sup>39</sup> *Zapata Hermanos Sucesores, S.A. v Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Company* 313 F. 3d 385, also published at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021119u1.html>>.

Commentators have noted the danger posed by courts who too quick take recourse to the rules of private international law in interpreting the CISG in accordance with Article 7. Courts may take this avenue as it offers an easy gap filling solution rather than examining and relying on general principles of the CISG. For example, Gyula Eorsi stated that "it is enough to state that no general principles can be found and therefore the only way out is to resort to private international law."<sup>40</sup>

This indeed may have occurred in this case. It appears that Posner J's brief examination and dismissal of the contention that legal fees were included as loss under Article 74 of the CISG was merely intended as an exercise to lead to the conclusion that the American rule should apply "by the terms of the Convention itself"<sup>41</sup> under the rules of private international law. This is not to suggest that the conclusion of the Court of Appeal in this regard was wrong. However, the uniform interpretation of the CISG and its ultimate success as a harmonised law demands that courts around the world respect Article 7. The Court of Appeal failed to respect the mandate of Article 7.

### 5.6 Anomalies

To further support the Court's contention that loss in Article 74 does not include legal fees, the Court identified two anomalies that would result from this interpretation.

First, the Court noted that while a party who successfully brought a breach of contract claim may recover its legal fees as loss under Article 74, the CISG does not provide for the successful defendant. There is no comparable provision in the CISG that would enable a party who successfully defended a breach of contract claim to recover the loss it suffered as a consequence of incurring legal fees. The CISG requires a breach of contract to trigger the right to damages. A defendant successfully defending a breach of contract claim would not be able to refer to a breach to trigger a damages claim.

This successful defendant anomaly was an important point identified by the Court of Appeal. The impact of the successful defendant anomaly on the interpretation of Article 74 of the CISG will be further considered in part 6.2 below.

The second anomaly identified by the Court of Appeal considers whether a successful plaintiff could waive its rights under Article 74 of the CISG to the payment of legal fees in favour of the domestic law where that domestic law is more generous, that is, where the plaintiff would be better off under the domestic law. This anomaly gives rise to a further issue which the Court did not consider in detail, namely, how the quantum of legal fees under Article 74 should be determined. This issue will also be considered below.

### 5.7 Comment

Unlike the Federal District Court, the decision of the Federal Appeal Court showed little regard for Article 7. Accordingly, the decision of the Federal Appeal Court sets a dangerous precedent for future courts and tribunals and may undermine the uniform interpretation of the CISG. However, the finding of the Federal Appeal Court, that legal fees are not included

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<sup>40</sup> Gyula Eorsi quoted in Felemegas, above n31.

<sup>41</sup> *Zapata Hermanos Sucesores, S.A. v Hearstside Baking Co., Inc., d/b/a Maurice Lenell Cooky Company* 313 F. 3d 385, also published at <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021119u1.html>>.

as loss under Article 74, is arguably correct. This paper will now set out the method and reasons that justify this conclusion but will, unlike the Federal Appeal Court, conform to the mandate of Article 7.

Before proceeding it is worthy to note one further comment of the Federal Appeal Court. After finding that a party could not recover legal fees under the CISG the Court stated the following.

"And 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?"<sup>42</sup>

This comment reveals that the Federal Appeal Court was predisposed to its own domestic law and susceptible to the homeward trend and unwilling to recognise and respect the CISG's international character and need for uniformity that is required by Article 7.

## 6. DOES ARTICLE 74 ALLOW THE RECOVERY OF LEGAL FEES?

### 6.1 Step One: International Character, Uniformity and Good Faith

#### 6.1.1 The Text

Article 7(1) requires an interpretation of the CISG that respects its international character and the need to promote uniformity in its application. This requires fidelity to the words of the CISG. Fidelity to the words of Article 74 of the CISG provide the strongest argument in favour of the proposition that legal fees and expenses are recoverable as loss. This is because a party in breach of a contract must foresee that the injured party will seek to enforce the broken contract and accordingly seek legal assistance and incur legal fees and expenses in doing so.

#### (a) Foreign Decisions

The Federal Appeal Court failed to refer to decisions of foreign tribunals to aid its interpretation of Article 74. The Federal District Court did refer to foreign case law to support its finding that loss included legal fees under Article 74. However, the Federal District Court did not provide any analysis of these decisions. Harry Flechtner has provided a comprehensive analysis of decisions of foreign tribunals that have considered this issue.<sup>43</sup> However, Flechtner's analysis also suggests the Federal District Court's reliance on these decisions may have been misplaced.

Flechtner identified only seven decisions where English translations or summaries were available. These decisions were from German courts, a German arbitral tribunal, a Swiss court and a French arbitral tribunal. After considering these decisions, Flechtner concludes that:

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<sup>42</sup> Ibid.

<sup>43</sup> Harry M. Flechtner, 'Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Foreign Case law in CISG Jurisprudence, with a Post-Script on Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.' <<http://cisgw3.law.pace.edu/cisg/biblio/flechtner4.html>>.

"[i]n each case, it is clear that the tribunal awarded or claimed authority to award CISG damages to cover legal costs of the prevailing party, but it was not always clear exactly what those costs included."<sup>44</sup>

In some instances, legal fees were only awarded as loss under the CISG in respect of pre-litigation expenses whereas legal expenses incurred during the litigation were awarded as loss under domestic procedural laws, not under the CISG. In another case, legal fees were awarded under the CISG but only as an alternative to the primary ground being an implied term between the parties agreeing to pay for the legal fees. In the decision of the Swiss court however, legal fees were granted as "damages under Article 74 of the CISG for all attorney costs of the prevailing party, including the fees incurred during the actual litigation."<sup>45</sup> Importantly, Flechtner also notes that there are no cases that expressly reject a reading of Article 74 that allows the recovery of legal fees as loss.

Accordingly, there is support in case law for the proposition that legal fees are recoverable as loss under Article 74 of the CISG. However, it is by no means clear that the case law is unanimous in its reasoning. Some cases distinguished between legal expenses incurred before and during litigation. Also, some cases in part relied on domestic procedural laws or an agreement between the parties, in addition to the CISG, as the source of the obligation to pay for legal expenses.

Also, the commentary provided by Fletchner demonstrates the inherent difficulties in sourcing and understanding foreign case law. For example, consideration of foreign case law assumes that accurate and reliable translations are freely available. Flechtner's analysis however, uncovered discrepancies and contradictions between different translations of the same decisions and the original decision. Flechtner also makes the following interesting observation:

"It turns out that resolving the focused and easily-stated question of whether Article 74 of the CISG should be interpreted to permit recover of damages for the attorney costs incurred by a successful litigation plunges one into a forest of challenges, such as determining the proper interpretative standards to apply to an international document like the Convention, ascertaining the meaning of decisions by foreign courts construing the CISG, fixing the proper deference to be accorded such decisions, and a host of other difficulties... I emerged from the adventure with a new appreciation of the immense difficulties of practising in a genuinely international commercial law system, and even with some pessimism over whether the legal profession is truly ready for such practice."<sup>46</sup>

Further, after taking into consideration such factors as the authority of the court in its own jurisdiction, the extent of consensus amongst the decisions and, importantly, the extent to which the foreign decision itself complied with Article 7(1), Flechtner concludes that:

"the foreign cases that have granted an aggrieved party CISG damages to cover attorneys' fees are due little deference as precedent."<sup>47</sup>

#### (a) Travaux Preparatoires

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

The reference in Article 7(1) to the CISG's international character also requires consideration of the CISG's legislative history. There is nothing in the legislative history to suggest that the issue of legal fees was expressly considered. Indeed, the Federal Appeal Court notes that:

"To the vast majority of the signatories of the Convention, being nations in which loser pays is the rule anyway, the question of whether 'loss' includes attorneys' fees would have held little interest; there is no reasons to suppose they thought about the question at all."

However, as outlined above there is commentary on Article 74 that is of assistance in determining the meaning of 'loss'. The legislative history clearly indicates that the concept of 'full compensation' underlies Article 74. The principle of full compensation coupled with the plain meaning of Article 74 suggests that loss under Article 74 should include legal fees and expenses. It is only by recovering this loss that a party can be said to be fully compensated.

#### 6.1.2. Academic Writing

Following the decisions of the Federal District Court and the Federal Appeal Court, there has been considerable interest by academics around the world given to the question of recovering legal fees under the CISG. Views, however, are divided with arguments presented both in favour<sup>48</sup> and against<sup>49</sup> the recovery of legal fees as loss under the CISG.

### 6.2 Step Two: General Principles of the CISG

While the plain language of Article 74 and the principle of full compensation embodied in its language, and confirmed by the CISG legislative history, support the view that 'loss' under Article 74 includes legal fees, this is not determinative of the issue. Article 7(2) therefore requires consideration of general principles of the CISG.

As explained above, Article 7(2) requires that matters governed by the CISG but not expressly settled in it to be determined in conformity with the general principles on which the CISG is based. Some authors have suggested that it is not appropriate to consider the gap filling mechanism under Article 7(2) in relation to this issue because 'legal fees' are not a matter governed by the CISG.<sup>50</sup> This author respectfully disagrees with this position. Legal fees are not expressly referred to in the CISG. However, the recovery of loss is certainly a matter governed by the CISG and whether 'loss' includes legal fees is not expressly settled. Accordingly, whether legal fees are included as loss is a matter to be settled in conformity with the general principles on which the CISG is based.

This paper will now discuss the general principles of full compensation, equality, reasonableness and mitigation and consider how they settle the question of legal fees and loss under the CISG.

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<sup>48</sup> Felemegas, above n31.

<sup>49</sup> See Flechtner, above n42; Flechtner & Lookofsky, above n35; Joseph Lookofsky, 'Zapata Hermanos v Hearthsides Baking' (2002) *The Vindobona Journal of International Commercial Law and Arbitration* 27.

<sup>50</sup> Flechtner & Lookofsky, above n36.

### 6.2.1 Full Compensation

Full compensation is a general principle of the CISG.<sup>51</sup> As noted above, it is embodied in the language of Article 74 and confirmed by the CISG's legislative history. Interpreting loss in accordance with the general principle of full compensation suggests that loss should include legal fees.

### 6.2.2 Equality

The CISG treats the seller and the buyer under an international sale of goods contract equally.<sup>52</sup> The rights of the buyer and the seller under the CISG are reciprocal. Indeed, the CISG would not have enjoyed the acceptance it has around the world if it favoured either buyers or sellers, and therefore importing or exporting nations, over the other. Accordingly, it is reasonable to suggest that the CISG recognises a general principle of equality or reciprocity between the buyer and seller.

The general principle of equality impacts on the definition of loss under Article 74. The Federal Appeal Court identified the anomaly that would result from an interpretation of loss under Article 74 that included legal fees. The Court noted that this interpretation would allow a successful plaintiff to recover its legal costs as loss, but that the CISG did not contain a reciprocal provision enabling the same relief to flow to a successful defendant. Accordingly, the general principle of equality suggests that loss under Article 74 does not include legal fees because this interpretation would lead to unequal treatment of the parties.

John Felemegas concurs with this approach, noting that:

"In the light of the structural and institutional equality enjoyed by seller and buyer under the CISG, it is reasonable to conclude that the drafters of the Convention would not have intended such a divergence in the result between sellers and buyers -- plaintiffs and defendants."<sup>53</sup>

However, Felemegas also suggests a solution that would allow a successful defendant to recover legal fees and thereby uphold the general principle of equality. The right to damages for loss under the CISG is triggered only by a breach. Accordingly, Felemegas proposes that:

"it is arguable that there exists a duty of loyalty to the contract which would be breached by a party filing a suit for a breach of contract where a court later holds that party's suit to be lacking a proper foundation."<sup>54</sup>

This approach has little merit. As argued by Harry Flechtner:

"An approach that requires such a result-oriented jurisprudential stretch (with collateral consequences that are hard to predict) in order to avoid egregious partiality, however, does not recommend itself."<sup>55</sup>

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<sup>51</sup> Arthur B Colligan Jr, 'Applying the general principles of the United Nations Convention on Contracts for the International Sale of Goods to fill the Article 78 interest rate gap in *Zapata Hermanos, S.A. v Hearthside Baking Co. Inc.*(2001)' (2002) 6 *The Vindobona Journal of International Commercial law and Arbitration* 40, 50.

<sup>52</sup> Felemegas, above n31; Jarno Vanto, 'Attorneys' fees as damages in international commercial litigation' <<http://cisgw3.law.pace.edu/cisg/biblio/vanto1.html>>.

<sup>53</sup> Felemegas, above n31.

<sup>54</sup> *Ibid.*

Accordingly, the general principle of equality suggests that loss under Article 74 of the CISG does not include legal fees.

### 6.2.3 Reasonableness and Mitigation

The decision to allow the recovery of legal fees under the CISG would obviously have a significant impact in jurisdictions that follow the American rule. However, jurisdictions that follow the English rule would also be affected by the decision to include legal fees as loss under Article 74. For example, domestic rules in English rule jurisdictions commonly regulate the recovery of legal fees with the use of schedules of permissible expenses or allow only the recovery of a percentage of the legal fees. These regulations or limitations on the recovery of legal fees would be lost in English rule jurisdictions if loss under Article 74 included legal fees. Rather, it would be necessary to look to the CISG to determine what, if any, limitations regulated the recovery of legal fees.<sup>56</sup> Article 74 and general principles of the CISG provide some assistance here. For example, Article 74 would require any legal fees to be foreseeable. Beyond this, the CISG recognises the general principles of reasonableness and mitigation. These principles could operate to limit the legal fees that can be recovered under Article 74. However, in comparison to the tightly regulated systems that follow the English rule, the general principles of foreseeability, reasonableness and mitigation offer little concrete guidance. As explained by Flechtner, the CISG "is not well designed for this purpose."<sup>57</sup>

Uniformity of interpretation requires certainty. Where buyers, sellers and courts are not certain about the laws or principles that regulate their affairs, uniformity of interpretation inevitably is the victim. While the general principles of reasonableness and mitigation would operate to regulate to some extent the legal fees that might be recovered under Article 74, these general principles would not provide either the certainty of the American rule, under which no legal fees would be recoverable, or of the English rule, which has in place systems to regulate the quantum of fees that might be recovered. Accordingly, the need for a certain and uniform interpretation of the CISG might best be served by holding that loss under Article 74 does not include legal fees.

### 6.3 Do General Principles Provide the Answer?

Article 7(2) requires that matters governed by the CISG which are not expressly settled in it are to be settled in conformity with the general principles on which it is based. The discussion above demonstrates that there are various general principles of the CISG that can be used to determine whether loss under Article 74 includes legal fees. These general principles, however, suggest contrasting conclusions. The general principle of full compensation requires the definition of loss to include legal fees. On the other hand, the general principle of equality suggests loss under Article 74 was not intended to include legal fees. Further, assuming loss does include legal fees the general principles of reasonableness and mitigation do provide some guidance about the quantum and limitations on the recovery of legal fees. However, these general principles are unlikely to provide the certainty a uniform interpretation of the CISG requires.

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<sup>55</sup> Flechtner, above n42.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

In light of the contradictory guidance offered by the general principles of the CISG on the definition of loss under Article 74, the interpretation of loss that should be adopted is the interpretation that best ensures uniformity. It is the opinion of this author that a uniform interpretation of the CISG would be best served by defining loss to exclude legal fees and expenses.

The plain meaning of Article 74 does permit a reading of loss under Article 74 to include legal fees. This is further supported by the general principle of full compensation found within the CISG and confirmed by its legislative history. However, the legislative history of the CISG is otherwise silent on the actual question of whether legal fees are recoverable as loss under Article 74. Further, decisions of foreign tribunals on this issue offer little authoritative weight and the general principle of equality would be offended by a reading of Article 74 that allowed only one party to recover legal fees as loss. An interpretation of loss that includes legal fees is likely to lead to great uncertainty, unpredictable and inconsistent interpretations and, ultimately, distrust of the CISG. Accordingly, certainty and uniformity would best be served by reading loss under Article 74 to exclude legal fees.

#### **6.4 Step Three: Rules of Private International Law**

Recourse to the rules of private international law under Article 7(2) of the CISG is only required in the absence of general principles that settle the matter. This author has concluded that, while various general principles lead to conflicting answers, the general principle of equality together with the need for uniform interpretation of the CISG require a conclusion that loss under Article 74 does not include legal fees and expenses. Having reached a conclusion on the meaning of loss based on the CISG's international character, the need to maintain uniformity and general principles, it is not necessary to look further to the rules of private international law.

#### **6.5 The CISG Surrounded by a Sea of Procedure**

It should also be noted that, while as a matter of substantive law, according to the above analysis, the CISG does not allow the recovery of legal fees as loss under Article 74 of the CISG:

"the CISG does not attempt to provide all the law that fora will have to apply in litigation involving international sale of goods. The rules of procedure governing such litigation... remain subject to applicable domestic law. Thus when applied to actual disputes the Convention resembles an island of international rules surrounded by an ocean of still-applicable national law. This means the courts will often face difficult boundary questions as to exactly where the sovereignty of the CISG ends and domestic law takes over."<sup>58</sup>

Accordingly, while the CISG does not give a party the substantive right to recover legal fees as loss, it is important to remember that the CISG operates within a domestic system of procedural law. So while a party to a contract for the international sale of goods may not recover legal fees as loss under the CISG, depending on whether the procedural law of the

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<sup>58</sup> Harry M Flechtner, 'The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D'Agostino, S.p.A.: The Eleventh Circuit weighs in on interpretation, subjective intent, procedural limits to the Convention's scope, and the parol evidence rule' (1999) 18 *The Journal of Law and Commerce* 259, 286.

forum follows the American rule or the English rule, the party may be entitled to recover legal fees and expenses as a procedural right. This ultimately was the conclusion of the Federal Appeal Court although the short cut path taken by the Court to reach this end did not respect the mandate of Article 7 of the CISG.

## 7. UNITED STATES SUPREME COURT

### 7.1 Supreme Court Guidance

The success of the CISG as a uniform law governing the international sale of goods depends on the correct observance by courts and tribunals around the world of the template of interpretation mandated by Article 7. As demonstrated by the decision of the Federal Appeal Court, the proper application of Article 7 and the CISG has not been appreciated. In this climate, a direction by the Supreme Court of the United States of America on the proper application of Article 7 of the CISG is a momentous opportunity. This author concurs with other commentators in calling for the Supreme Court to accept the application to appeal from the decision of the Federal Appeal Court in order to provide judicial guidance for courts in the United States and around the world on the proper application of Article 7.<sup>59</sup>

### 7.2 Amicus Curiae Application

The application to appeal to the Supreme Court has also given rise to an interesting development for the future interpretation and stewardship of the CISG. The application to appeal the decision of the Federal Appeal Court has been joined by a supporting *amicus curiae* application from The International Association of Contract and Commercial Managers ("IACCM") and the Institute of International Commercial Law of the Pace University School of Law ("Pace University").<sup>60</sup>

IACCM is a professional association representing international corporations in over 80 countries and represents the interests of the traders that rely on the CISG in their business. The Pace University under the guidance of Professor Albert Kritzer has developed into a centre of expertise on the CISG and through its most impressive website shares knowledge on the CISG including academic commentary and case law from around the world.

The joint petition of IACCM and Pace University notes the following.

"The *Zapata* case offers the Supreme Court a unique opportunity to correct U.S. judicial errors and rule on a proceeding of national and international significance in a manner that puts the U.S. judiciary in the forefront of guidance to the bar and bench and the business community:

- On the proper interpretation of uniform international sales law: autonomously, within its four corners; and

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<sup>59</sup> Felemegas, above n31.

<sup>60</sup> See the Motion for leave to file brief amicus curiae and brief Amicus Curiae of the IACCM and Pace University available at <<http://cisgw3.law.pace.edu/cisg/biblio/zamicus.html>>.

- On attention to relevant case law: comity to foreign decisions much the same as U.S. courts give comity to interpretations of the UCC in sister states. Drawing on the positive experience of the U.S. judiciary with uniform-law case law under the UCC, the U.S. Supreme Court is well postured to lead the global jurisconsultorium on the CISG.<sup>61</sup>

Uniformity of the CISG is problematic because responsibility to achieve this end lies on courts and tribunals scattered around the world. There is no supranational judicial body able to give authoritative statements of the law. In light of this fact the move by IACCM and Pace University to take an active interest in the stewardship of the CISG by urging the Supreme Court to lead the global jurisconsultorium on the CISG is to be welcomed.

## 8. CONCLUSION

### 8.1 Global Jurisconsultorium

Applying the interpretation template set out in Article 7 of the CISG, loss under Article 74 of the CISG does not include legal fees and expenses. This interpretation is assisted by the CISG's legislative history, the general principle of equality and, decisively, the need for uniformity. The Federal District Court reached the opposite conclusion, although the judgment showed an understanding of the requirements of Article 7. The Federal Appeal Court on the other hand found that loss under Article 7 does not include legal fees and expenses. Unfortunately, the judgment of the Federal Appeal Court demonstrated either a disregard or complete misunderstanding of Article 7. The opportunity now exists for the Supreme Court of the United States to set the record straight and promote uniformity of the CISG.

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<sup>61</sup> Ibid.