

**Case 611: CISG 74**

United States: [Federal] Court of Appeals, Seventh Circuit; Nos. 01-3402, 02-1867 and 02-1915

Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Company, Inc.

19 November 2002; corrected 17 December 2002

Published in English:

<http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=01-3402&submit=show-dkt&yr=01&num=3402>

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The issues before the Court were whether the fees of a successful litigant's lawyers are "losses" within the meaning of the Convention and an automatic entitlement of a plaintiff who prevails in a suit under the Convention, and whether they can alternatively be awarded on the inherent authority of the courts to punish the conduct of litigation in bad faith.

The defendant appealed the decision of the district court to award lawyers' fees as damages under article 74 of the Convention ("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 district court stated that this provision changed the "American rule" that each litigant must bear its own legal expenses.

The court of appeals reversed the district court's decision. The court distinguished procedural law and substantive contract law. It found that the question of whether a losing party must reimburse the winner for the latter's expense of litigation is normally a question of procedural law, not covered by the Convention. The court also pointed out that the position would be anomalous if the Convention were to include such fees as part of the "loss", in that a successful plaintiff would normally recover them, but a successful defendant would not. The court also found that there was no evidence in the drafting history or ratification hearings to suggest that the Convention was intended to include lawyers' fees incurred in the litigation as part of a "loss", and that by the terms of the Convention itself any issue not addressed in the Convention must be decided according to domestic law. Hence the Convention would not change the "American rule" on lawyers' fees.

In its opinion, the court also distinguished lawyers' fees incurred in litigation from prelitigation legal fees that might be recovered as incidental damages where, for example, the expenses were designed to mitigate damages. It further found that there were no grounds to award the fees under the "inherent authority" described above.

[The U.S. Court of Appeals denied a rehearing *en banc* on 9 January 2003 (2003

U.S. App. LEXIS 375). On 16 June 2003 the U.S. Supreme Court requested the U.S. Solicitor General to file a brief requesting the United States to express a view in this case (Supreme Court Reporter 123, 2599.)]