

VIVA ZAPATA! AMERICAN PROCEDURE AND CISG SUBSTANCE IN A
U.S. CIRCUIT COURT OF APPEAL

By Harry Flechtner* and Joseph Lookofsky**

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1 **INTRODUCTION: THE U.S. DISTRICT COURT DECISION IN ZAPATA
HERMANOS SUCESTORES**

In *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*,¹ a Mexican seller of cookie tins brought an action in a U.S. Federal District Court against an American buyer,² grounded on the buyer's allegedly unjustified failure to pay. The contract, clearly, was governed by the Vienna Sales Convention (CISG),³ because the parties had their respective places of business in different CISG Contracting States.⁴ The seller

* Professor, University of Pittsburgh School of Law. A.B. 1973, Harvard College; A.M. 1975, Harvard University; J.D. 1981, Harvard University School of Law.

** Professor of Law, University of Copenhagen. B.A. 1967, Lehigh University, J.D. 1971, New York University School of Law, cand.jur. 1981 et dr.jur. 1989, University of Copenhagen.

¹ 313 F.3d 385 (7th Cir. 2002), reversing 2002 WL 398521 (N.D. Ill.). The opinion in which the lower court held that the plaintiff could recover its attorney fees as damages, which was also in effect reversed by the Seventh Circuit, is found at 2001 WL 1000927 (N.D. Ill.). For other district court opinions relating to this litigation, see 2002 WL 221521; 155 F. Supp.2d 969 (N.D.Ill. 2001); 2001 WL 936112 (N.D.Ill.); 2001 WL 830973 (N.D.Ill.); 2001 WL 877538 (N.D.Ill.); and 2000 WL 1809988 (N.D.Ill.).

² Regarding the concurrent subject matter jurisdiction of U.S. Federal and State courts in a case like this, please see e.g. Lookofsky, J. and Hertz, K., *Transnational Litigation and Commercial Arbitration*, Ch. 2.5.1 (2d ed. forthcoming Spring 2003).

³ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 19 *I.L.M.* 668 (1980) [hereinafter 'CISG' or 'Convention'], available in 15 U.S.C App. at 49 (West Supp. 1996), 52 Fed. Reg. 6262-80, 7737 (1987), U.N. DOC. A/CONF. 97/18 (1980).

⁴ CISG arts. 1(1)(a) and 100. The Convention has been in force in the United States since January 1, 1988, and in Mexico since January 1, 1989. Please see the web site of the United Nations Commission on International Trade Law (UNCITRAL), <<http://www.uncitral.org/en-index.htm>> (visited February 13, 2003).

proved that the buyer breached the contract⁵ and that the breach caused the seller to sustain certain foreseeable and unavoidable losses, which entitled the seller to damages under the Convention.⁶

Since countless CISG plaintiffs have been awarded damages in similar instances by courts around the world, the *Zapata* case is, in this respect, quite ordinary. One particular point, however, makes the case interesting. The seller argued that, as a *successful* claimant that had established the other party's breach, it should be reimbursed for its *attorney fees as part of the damages* it suffered 'in consequence of the breach'. Citing CISG Article 74,⁷ and referring as well to CISG decisions of tribunals in other jurisdictions,⁸ the *U.S. District Court* (the court where the *Zapata* case was first tried) *agreed* with the seller and awarded it damages for its attorneys' fees, notwithstanding that such 'fee shifting' runs counter to the 'American rule', whereby the losing party in litigation before U.S. courts, both state and federal, is *generally not* required to reimburse the winning party for its lawyers' fees.

Working independently, the co-authors of this article each reached the conclusion that the District Court's decision on the fee-shifting issue was *wrong*, both as regards its result and its reasoning.⁹ We emphasised that although the 'American rule' looks like a qualification on the general 'expectation' measure of damages in breach of contract actions, the rule applies in *all* types of cases brought in American courts, whether state or federal, and this includes cases sounding purely in tort (delict). For this reason we argued that the 'American rule' is best understood as a general rule of *procedure*. Indeed, as a matter of international practice the rules governing the recovery of attorney fees appear generally to be regarded as procedural in nature,¹⁰ even when - as is the case

⁵ This is made clear by the opinion rendered on appeal, although the details remain surprisingly murky despite several opinions rendered by the court below. Please see the opinions cited in fn 1.

⁶ Articles 74 and 77 CISG.

⁷ *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 2001 WL 1000927, at p. 2 (N.D. Ill.).

⁸ *Ibid*, at p.4.

⁹ See Joseph Lookofsky, 'Commentary: *Zapata Hermanos v. Hearthside Baking*' (2002) 6 *VJ* 27, available on the Internet at <<http://www.cisg.law.pace.edu/cisg/biblio/lookofsky5.html>>; Flechtner, H.M., '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 *Northwestern J. Int'l L. & Bus.* (forthcoming, 2002); draft available on the Internet at <http://www.cisg.law.pace.edu/cisg/biblio/flechtner4.html#iv>.

¹⁰ There is a survey of European rules on the recovery of attorney fees in Flechtner, please see fn 9, at fn. 87 (fn. 84 in the draft posted at <<http://www.cisg.law.pace.edu/cisg/biblio/flechtner4.html#iv>>). For discussion of the situation in Denmark, please see Lookofsky, fn 9, at p 28 fn. 10.

in most countries outside the U.S. - those rules provide for a 'loser-pays' regime that departs sharply from the 'American rule' in substance. As they fall in the procedural realm, the rules governing the recovery of attorney fees, we concluded, are subject to *lex fori* and *not* the CISG regime. We held (and still hold) that particular view, notwithstanding the fact that some earlier non-U.S. decisions applying the CISG appear to have interpreted Art. 74 as permitting a prevailing claimant to recover attorney fees as damages. Those decisions, however, generally have not approached the issue with the international perspective demanded by Art. 7(1) of the CISG, and upon closer inspection several did not even stand for the proposition that attorney fees incurred during the course of litigation were recoverable as Art. 74 damages.¹¹ The small number of sometimes-ambiguous and ill-reasoned precedents favouring an award of Art. 74 damages to cover attorney fees, furthermore, fades to virtual insignificance when compared to the vast - nay, overwhelming - majority of CISG decisions in which the recovery of attorney fees has apparently been treated, without comment by the deciding tribunal, exactly as we believe it should be - as a matter governed by the domestic law of the forum.¹²

2 THE U.S. CIRCUIT COURT OF APPEAL DECISION

Recently, the District Court's decision in *Zapata* was *reversed* by a U.S. Circuit Court of Appeal.¹³ Although this decision, by a distinguished jurist,¹⁴ does not cite either of us as 'authority', we certainly agree with it at least to the extent that the opinion (1) *denies* the successful *Zapata* plaintiff its attorney's fees, and (2) as its main *ratio*, puts considerable weight on the *substance-procedure* distinction. However, since we also disagree with certain *implications* of the *ratio* (what Americans call the 'holding') and certain aspects of the methodology, and since the *Zapata* case continues to attract

¹¹ Flechtner, H.M., please see fn 9, text accompanying fn 14-35 (fn 12-32 in the draft posted at <<http://www.cisg.law.pace.edu/cisg/biblio/flechtner4.html#iv>>) and text accompanying fn 77-78 (notes 74-75 in the draft posted at <<http://www.cisg.law.pace.edu/cisg/biblio/flechtner4.html#iv>>).

¹² Please see Flechtner, fn 9, text accompanying fn 74-76 (fn 71-73 in the draft posted at <<http://www.cisg.law.pace.edu/cisg/biblio/flechtner4.html#iv>>).

¹³ *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385 (7th Cir. 2002).

¹⁴ Judge Richard Posner, former professor of law at the University of Chicago and at Stanford University, is widely acknowledged to be the 'father' of the law and economics discipline.

considerable attention and comment worldwide,¹⁵ we think it important to explain our position as regards the holding on appeal.

As we see it, the key passages in Judge Posner's opinion for the Seventh Circuit in *Zapata* are the following (which for convenience we label A, B, C and D):

- A. *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. They are not field-specific. There are, however, numerous exceptions to the principle that provisions regarding attorneys' fees are part of general procedure law. . . . An international convention on contract law could do the same. But not only is the question of attorneys' fees not 'expressly settled' in the Convention, it is not even mentioned. And there are no 'principles' that can be drawn out of the provisions of the Convention for determining whether 'loss' includes attorneys' fees; so 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 choice of law in international legal disputes).*¹⁶

¹⁵ For commentary on the attorney fees aspect of *Zapata* see, in addition to our articles cited in fn 9, Lookofsky, J., 'Viva Zapata! Article 74 and the 'American Rule', University of Copenhagen, Law Faculty, Newsletter (December 2002), available on the Internet at <<http://cisgw3.law.pace.edu/cisg/biblio/lookofsky7.html>> (agreeing with appeals court decision); Felemegas, J., 'An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals', 15 *Pace Int'l L.R.* (forthcoming Spring 2003), available on the Internet at <<http://cisgw3.law.pace.edu/cisg/biblio/felemegas4.html>> (criticizing appeals court decision); Vanto, J., 'Attorneys' Fees as Damages in International Commercial Litigation', 15 *Pace Int'l L.R.* (forthcoming Spring 2003) <<http://cisgw3.law.pace.edu/cisg/biblio/vantol.html>> (agreeing with result but criticising reasoning of appeals court decision); Schlechtriem, P., 'Case Comment: Attorneys' Fees as Part of Recoverable Damages', 14 *Pace Int'l L.R.* 205 (2002), available on the Internet at <<http://cisgw3.law.pace.edu/cisg/biblio/slechtriem4.html>> (commenting on district court opinion); Felemegas, J., 'The Award Of Counsel's Fees under Article 74 CISG, in *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, (2002) 6 *VJ* 30, available on the Internet at <<http://cisgw3.law.pace.edu/cisg/biblio/felemegas1.html>> (agreeing with district court opinion).

¹⁶ 313 F.3d, at p. 388 (emphasis added).

- B. *The interpretation of 'loss' for which Zapata contends would produce anomalies, which is another reason to reject the interpretation. On Zapata's view 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?*¹⁷
- C. *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? To the vast majority of the signatories of the Convention, being nations in which loser pays is the rule anyway, the question whether 'loss' includes attorneys' fees would have held little interest; there is no reason to suppose they thought about the question at all.*¹⁸
- D. *For these reasons, we [the Court of Appeals] conclude that 'loss' in Article 74 does not include attorneys' fees*¹⁹

As already indicated above (and in our previously published positions), we agree with Judge Posner on what we see as his main point in passage A: the CISG is about contracts, not procedure, and the rules governing the recovery of attorney fees are matters of procedure. We also agree that the question of attorneys' fees is not mentioned, let alone 'expressly settled', in the Convention, and that - to the extent this point is relevant - no 'principles' can be drawn out of the Convention for determining whether 'loss' as the term is used in Art. 74 includes attorneys' fees. We thus also agree that the matter must be left to domestic law (*i.e.*, the law 'picked out by the rules of private international law').

We also agree with passage B: the interpretation of 'loss' for which the plaintiff in *Zapata* contended would produce 'anomalies'. Judge Posner mentions the 'anomaly' that arises if the 'defendant won' - *i.e.*, if a party successfully defends against an allegation that it breached the contract. Article 74 is a provision governing damages for breach. If a party proves that there was no breach, how can it recover its attorney fees under Art. 74? In other words, treating the recovery of attorney fees as a question of damages recoverable under Art. 74 yields a patently absurd result: it would allow successful claimants to recover their attorney fees but would deny any such recovery to

¹⁷ 313 F.3d, at pp. 388-89 (emphasis added).

¹⁸ 313 F.3d, at p. 389 (emphasis added).

¹⁹ 313 F.3d, at p. 389.

successful defendants. It has been suggested that this offensive partiality might be avoided by finding that a claimant who brings an unsuccessful action against the other party breaches a 'duty of loyalty to the contract', thus permitting the defendant to recover attorney fees as damages for such 'breach'.²⁰ This elaborate, result-oriented 'solution', without support in the text of the Convention or the *travaux préparatoires* and carrying unknown implications for other issues, merely demonstrates how completely unsuitable the rules of the Convention are for regulating the attorney fee question, and that the issue, clearly, was not in contemplation when the Convention was drafted. And the reason it was not contemplated by the drafters or the delegates at the 1980 Vienna diplomatic conference that adopted the final CISG text, we believe, is that the question of recovering attorney fees was simply assumed to be a procedural matter beyond the scope of the Convention.

Equally, if not more important, we agree with passage C that there is no reason to suppose that any Convention signatories (neither 'loser-pays' countries nor countries like the United States) so much as thought about the fee-shifting question when the Convention was made, and that the fee-shifting issue, if it had been considered, could well have been a 'deal-breaker'. In other words, the United States might well not have signed the Convention had it thought that in doing so it was abandoning the American rule for international sales transactions litigated in its domestic courts, particularly when the Art. 74 regime that would replace it appears so ill-designed for the task.

The same observation concerning hesitancy to ratify applies, perhaps even more strongly, to 'loser-pays' jurisdictions. If Art. 74 governs the recovery of attorney fees in the United States, surely the same is true when the Convention is applied in other countries. Thus the approach of the lower court in *Zapata* would mean that, for international sales transactions, the time-tested, carefully-crafted and elaborated domestic rules governing recovery of attorney fees in loser-pays Contracting States would be replaced by the vagaries of the Art. 74 regime. This uniform approach - not just of a question of uniform interpretation, but more fundamentally a matter of all parties to a common text being bound by the text - is required.

²⁰ Felemegas, J., 'An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals', please see fn 15 (see the text accompanying fn 58-62 of the text on the Internet). Cf Flechtner, H.M., please see fn 9 (see the text between fn 80 and 81 in the draft on the Internet) (suggesting that tribunals might attempt to avoid the anomalous result of permitting successful claimants but not successful defendants to recover attorney fees by finding that an unsuccessful claimant breached an implied obligation, but noting that '[a]n 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').

The achievement of uniformity in the treatment of attorney fees, indeed, is one of the main goals of those who defend the awarding of attorney fees as damages under Article 74. Thus it has been stated:

The CISG is the uniform law of sales of all signatory States. If the proper interpretation of the Convention entailed that attorneys' fees is foreseeable consequential loss that may be recovered as damages for a breach of contract under the CISG, then the 'hallowed American rule' could not be used to trump the provision of the Convention.²¹

The same reasoning, of course, would apply to all Contracting States. If the recovery of attorney fees is a matter governed by Art. 74 of the CISG, then the domestic loser-pays rules of Contracting States (whether or not those rules are 'hallowed') could not be used to trump the provisions of the Convention. If the Convention governs the recovery of attorney fees, then in all jurisdictions attorney fees should be recoverable when allowed by Art. 74 and not recoverable when not allowed by Art. 74 - that is the only approach that is uniform and consistent with the text of Art. 74 (if interpreted to apply to attorney fees). If, for example, the CISG cannot be tortured into providing for a recovery by a prevailing defendant who shows the contract was not breached, then there should be no recovery by such defendants even in loser-pays jurisdictions. In fact, this result would at least have the virtue of representing a true international compromise between loser-pays jurisdictions and countries that follow an 'American-style' rule on attorney fees. The result is absurd, of course, but it is uniform. It also escapes the charge of representing a 'narrow, national and, therefore, improper interpretation of the provisions of the Convention'²² - a charge leveled against the appeals court opinion in *Zapata*, but which would be equally applicable to loser-pays jurisdictions if they would continue to follow their own non-uniform domestic law on attorney fees while the United States was bound by a purported international regime.

We strongly suspect the United States would not have been alone in refusing to ratify the Convention if it were known to preempt domestic rules on the recovery of attorney fees. We believe that loser-pays jurisdictions, particularly those whose domestic rules impose limitations on the amount of recoverable attorney fees or who have other special

²¹ Felemegas, J., please see fn 20 (Section 5(e) 'International judicial interpretation vs. Political motivation').

²² Felemegas, J., please see fn 20 (Section 6 'Conclusions').

regulations not reflected in the CISG, would also howl in protest at the prospect of replacing their specially-designed, well-understood domestic rules on attorney fees - an integral part of their domestic procedural systems - with the uncertainties and apparent absurdities of applying Art. 74.²³ The basis for such objections by the United States and other Contracting States would simply be that they never imagined the CISG was intended to cover this matter - and that, we believe, is in fact the proper construction of the CISG.

For all these reasons, we agree with the Court of Appeals conclusion in passage D, 'that "loss" in Article 74 does not include attorneys' fees [...]'.²³

3 CRITICISM OF THE COURT OF APPEAL'S DECISION

Since we agree with so much in the Seventh Circuit's *Zapata* opinion, what then is our 'beef'? One answer lies in certain implications inherent in Judge Posner's remarks concerning the distinction between CISG 'substance' and domestic 'procedure', insofar as this reasoning seems based on CISG Article 7(2), which provides as follows:

(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 [emphasis added].

Before we specify why we see some reason to quibble with Judge Posner's logic in this particular regard, we should emphasise that Art. 7(2) affects only 'matters' which are governed by the Convention but *not expressly settled* in it. In other words, Art. 7(2) has no application to the very large group of CISG 'matters' that are both 'governed by' and

²³ In his commentary on the district court opinion in *Zapata*, Professor Peter Schlechtriem suggests that the German domestic loser-pays rules in its Code of Civil Procedure continue to apply in CISG transactions as 'lex specialis'. Schlechtriem, P., 'Case Comment: Attorneys' Fees as Part of Recoverable Damages', (2002) 14 *Pace Int'l L.R.* 205, at pp. 206-07, available on the Internet at <<http://cisgw3.law.pace.edu/cisg/biblio/slechtriem4.html>>. Of course, if the German rules on recovering attorney fees are *lex specialis* that preempt the CISG, U.S. rules on attorney fees would appear to enjoy the same status. If the common law origins of the American rule somehow seemed to interfere with its characterisation as *lex specialis*, then the U.S. could simply adopt a statute that says attorney fees are not recoverable as damages for breach in contract actions - even listing the particular kinds of breaches subject to the rule, if necessary. In our view, such an approach smacks of creating, in effect, non-permitted reservations to the Convention, which is one reason we prefer the procedure-substance approach to the *lex specialis* approach. Please see also fn 10.

(expressly) *settled* in the rules in the Convention text: in these instances, we rely on the rules laid down in the treaty text. For example, since the CISG contains rules that ‘govern’ the passing of risk (Arts. 66-70), and since these rules ‘settle’ (most) risk-of-loss ‘matters’, there is no need to seek solutions to risk-questions by the application of CISG general principles or domestic rules of law.²⁴

Moving to the other extreme, we note that ‘matters’ *not governed* by the Convention can *only* be ‘settled’ by resorting to *non*-Convention rules and principles.²⁵ For example, since the Convention is generally ‘not concerned’ with matters relating to the ‘validity’ of the sales contract and/or obligations grounded in delict,²⁶ such (clearly non-governed) matters cannot be settled by CISG general principles. In this situation, the decision-maker has no choice but to resort to domestic rules of law as ‘picked out’ by the private international law (choice-of-law) rules of the forum.

There is, however, a set of issues between these two extremes - matters governed-by-but-not-settled-in-the-Convention - for which the rule in Art. 7(2) comes into play. Suppose, for example, that a decision-maker needs to determine whether (under what circumstances) a CISG buyer’s declaration of avoidance can be *revoked*.²⁷ Rather than seek to resolve this particular question (not expressly dealt with in the Convention) by using domestic rules (obviously unrelated to the CISG regime), we might regard the ‘unsettled [revocation] matter’ as one which is ‘governed’ by the CISG,²⁸ and then seek to ‘settle’ the problem by applying the CISG *general* estoppel principle (*venire contra*

²⁴ As to the passing of risk in CISG contracts see (e.g.) Herbert Bernstein & Joseph Lookofsky, *Understanding the CISG in Europe*, Ch. 5 (2d ed. 2002).

²⁵ *Ibid.*, Ch. 2, Section 2-11. See also Lookofsky, J., ‘Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules’, (1991) 39 *Am. J. Comp. L.* 403, at p. 407 and Ferrari, F. in Schlechtriem, P., *Kommentar zum Einheitlichen UN-Kaufrecht - CISG*, Art.7, Rd.Nr. 42 (3d ed. Munich 2000).

²⁶ In relation to Art. 4 CISG, see (e.g.) Bernstein & Lookofsky, please see fn 24, at Chapter/Section 2-6.

²⁷ Because avoidance can have serious consequences for the party in breach, Art. 26 CISG provides that a declaration of avoidance of the contract, e.g. under Art. 49, is effective only if made by notice to the other party; the contract is avoided as of the point in time when the notice is given.

²⁸ Since the narrow ‘matter’ in question (whether a declaration of avoidance is binding upon the declaring party) was left untouched by the CISG drafters, it might seem difficult to regard it as ‘governed’ by the Convention. On the other hand, since avoidance is, in most respects, clearly a CISG-governed ‘matter’, the same may be said of the revocability of avoidance-declarations.

factum proprium).²⁹ Then, if a seller refused to accept the buyer's (otherwise rightful) avoidance declaration, this could give the buyer good grounds to revoke.³⁰

It appears to us that the language of passage A from the *Zapata* opinion (quoted above) indicates that Judge Posner analysed as follows. First, he made an attempt to use CISG Art. 7(2) to find an answer to the fee-shifting 'question', *i.e.*, the question of whether a successful claimant in a CISG case is, as part of his damages, entitled to recover his own attorneys' fees. Second, Judge Posner decided that the fee-shifting 'matter' is 'governed' but not 'expressly settled in' the Convention. Third, he declared the 'absence' of any 'general [Convention-based] principle' with which to settle the fee-shifting matter. Fourth, he saw no choice but to settle it in conformity with the (American domestic procedural) law 'picked out' by the private international law rules (of the American forum).

The seemingly 'technical' (yet, in terms of CISG precedent, significant) problem with this approach is that it leads to an internal inconsistency. If Judge Posner, on the one hand, determines in passage A that the Convention is *about contracts, not about procedure*, and in passage C that there is no reason to suppose that any of those who drafted the Convention even *thought about the fee-shifting question*, then how can he logically maintain (as parts of passage A imply) that the very same fee-shifting question is *governed* by the Convention at all? Had Judge Posner heeded the command in Art. 7(1), which requires all those interpreting the CISG to seek an international perspective, he would surely have learned that neither case law nor scholarly opinion support his 'novel' application of Art. 7(2) to an issue that is, in his own view, not governed by the CISG. We would advise other decision makers not to follow this aspect of the *Zapata* precedent - an aspect that, fortunately, does not diminish the basic soundness of the court's decision. In other words, the compelling logic of Judge Posner's decision in *Zapata* is that the recovery of attorney fees by a successful litigant is a procedural matter not governed by the CISG, and thus is not subject even to the general principles of the CISG under Art.7(2), but rather is governed simply by applicable domestic law.

²⁹ Regarding this (and other) CISG general principles see (e.g.) Bernstein & Lookofsky, please see fn 24, Chapter/Section 2-10.

³⁰ *Ibid*, Chapter/Section 6-8 with fn 82, and Schlechtriem, P., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, at p. 197 (Oxford 1998) and compare the similar result reached (using somewhat different reasoning) by Huber, U., *Ibid.*, at p. 365. See also Schlechtriem, P., please see fn 25, at p. 283.

The Seventh Circuit's failure in *Zapata* to achieve an international understanding of the application of Art. 7(2) CISG is closely related to our other criticism of the opinion: the decision is bereft of reference to any authority - non-U.S. decisions, or foreign or even American commentary on the CISG - that could assist the court in achieving an international perspective on the Convention. Methodologically, therefore, the opinion represents a step backward from other recent CISG opinions - both in the U.S.³¹ and elsewhere (Italy is a prominent example)³² - that have made a virtuous attempt to enlist the aid of commentary and decisions from beyond the tribunal's own borders, thus countering the magnetic 'homeward trend' and moving towards a CISG perspective that transcends domestic ideology. Fortunately, the Seventh Circuit's opinion in *Zapata* managed to achieve a sound interpretation of the Convention even without the benefit of 'foreign' assistance, but in the future, we think that American courts should have more 'regard' for the international view.

4 CONCLUSION

In conclusion, we believe that, despite background flaws in its interpretative methodology and some analytical confusion regarding the of application Art. 7(2) CISG, Judge Posner's opinion in *Zapata* represents a well-reasoned and proper resolution of the question whether a successful party can recover its attorneys' fees as damages under Art. 74. This is a question of great significance for CISG jurisprudence in the United States and, as was shown earlier in this article, around the world. The Court of Appeal's decision in *Zapata* has already begun to guide other American courts,³³ and we hope that any tribunal faced with the question in the future will recognise the essential

³¹ E.g., *Medical Marketing Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L.*, 1999 WL 311945 (U.S. Dist. Ct. E.D. La.1999); *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384 (11th Cir. 1998), commented on in Flechtner, H.M., '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) 19 *J.L. & Com.* 259.

³² E.g., *Al Palazzo S.r.l. v. Bernardaud S.A.*, Tribunale di Rimini, Italy, 26 November 2002, English abstract available on the Unilex database at <<http://www.unilex.info/dynasite.cfm?dssid'2376&dsmid'13354&x'1>>; *Rheinland Versicherungen v. Atlarex*, Tribunale di Vigevano, Italy, 12 July 2000, CLOUT case No. 378, English translation available on the Internet at <<http://cisgw3.law.pace.edu/cases/000712i3.html>>.

³³ *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*, U.S. Dist. LEXIS 1306 (Illinois), 29 January 2003, <<http://cisgw3.law.pace.edu/cases/030129u1.html>>.

soundness of the Seventh Circuit's conclusion that a party's recovery of its attorney fees is a procedural issue beyond the scope of the CISG. *Viva Zapata!*³⁴

³⁴ Readers too young to understand our cinematic source of inspiration can simply search for 'Viva Zapata' (e.g.) at <<http://www.google.com>>.