International Sales Law

A GLOBAL CHALLENGE

Edited by
Larry A. DiMatteo
Warrington College of Business Administration,
University of Florida

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

32 Avenue of the Americas, New York, NY 10013-2473, USA

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107020382

First published 2014

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data
International sales law : a global challenge / Larry A. DiMatteo, Warrington College of Business Administration, University of Florida.
pages cm
Includes bibliographical references and index.
ISBN 978-1-107-02038-2 (hardback)
1. Export sales contracts. 2. United Nations Convention on Contracts for the International Sale of Goods (1980) I. DiMatteo, Larry A., editor of compilation.
K1030.I585 2014
343.08'7–dc23 2013030074

ISBN 978-1-107-02038-2 Hardback

17 Litigation Costs as Reimbursable Damages

*Burghard Piltz**

I. Introduction

For more than 200 years, the so-called "American Rule" applicable in the United States provides that – independent of the outcome of judicial proceedings[1] – each party generally pays the costs and legal fees they incur as a consequence of the legal action.[2] The same principle is applicable in Japan.[3] However, in Germany, the legal situation is entirely different: Section 91 of the German Code of Civil Procedure (*Zivilprozessordnung* or ZPO) provides that at the conclusion of a judicial proceedings, the defeated party has to reimburse the other party for all costs, including those for their legal counsel, which were necessary for an adequate legal defence or in order to sufficiently assert legal rights (loser pays rule). The legal situation is similar in, for example, the Russian Federation.[4] Indeed, other legal systems contain, in principle, methods for costs to be decided according to the extent of success or defeat. However, such methods are different and are not as comprehensive as Section 91 of the ZPO.[5] On the whole, the reimbursement of costs awarded in cross-border proceedings in these countries does not suffice to cover those costs actually incurred for assertion of legal rights or for a legal defence. The rules regarding the reimbursement of costs as provided in the common rules of arbitration also display a high degree of variation.[6]

* This chapter is an updated version of the German text, which has been published in Büchler and Muller-Chen, *Private Law, Festschrift für Ingeborg Schwenzer zum 60. Geburtstag* (Bern: Stämpfli Verlag AG, 2011), 1387.

1 Keith William Diener, "Recovering Attorneys' Fees under CISG: An Interpretation of Article 74," *Nordic J. of Commercial Law* (2008), available at http://www.njcl.fi/1_2008/article3.pdf, 1, 27.

2 Ingeborg Schwenzer, "Rechtsverfolgungkosten als Schaden?," in *Mélanges en L'honneur de Pierre Tercier* (ed. P. Gauch, F. Werro, and P. Pichonnaz) (Zurich: Schulthess Verlag, 2008), 417, 419; Harry M. Flechtner, "Recovering Attorneys' Fees as Damages under the U.N. Sales Convention," 22 *Northwestern J. Int'l L. & Business* 121, 135 (2002), available at: http://www.cisg.law.pace.edu/cisg/biblio/flechtner4.html.

3 Flechtner, "Recovering Attorneys' Fees," 35.

4 Sergej Kopylov, "Marcus Antonius Hofmann, das Verfahren vor dem Wirtschaftsgericht (Arbitragegericht) der Russischen Föderation," 30 *Praxis des Internationalen Privat- und Verfahrensrechts* 268, 271 (2010).

5 As is, for instance, the legal situation in Argentina, Denmark, France, Portugal, Switzerland, Spain, and the Czech Republic. See Thomas Försterling, "Fabienne Kutcher-Puis, Kosten des Zivilverfahrens in Frankreich – ein Überblick," 22 *Praxis des Internationalen Privat- und Verfahrensrechts* 245 (2002)).

6 For more detail see Schwenzer, "Rechtsverfolgungkosten als Schaden?," 420, as well as Schiedsgericht der Handelskammer Hamburg, Rechtsprechung kaufmännischer Schiedsgerichte B 5 Nr. 21, 21.6.1996, 42 *Recht der Internationalen Wirtschaft* 771 (1996).

At present, UN Sales Law (CISG)[7] stipulates a party is liable to pay damages for any loss suffered by the other party that was a foreseeable consequence of a breach of contract.[8] There are no additional requirements, such as fault, in order to recover damages.[9] The CISG seeks to award full compensation for the injured party as a consequence of breach ("principle of complete reparation").[10] Under the full compensation principle, given the different national approaches regarding the reimbursement of litigation or arbitration costs and legal fees,[11] it is not implausible to recognize costs or fees as recoverable damages under applicable national laws and through the relevant provisions of the CISG.

II. Practice of Recovering Legal Costs as Damages

The next two sections briefly review the case law and legal literature dealing with the issue of the recoverability of a party's legal expenses as damages.

A. *Case Law*

Courts in Belgium,[12] Germany,[13] the Netherlands,[14] and Switzerland[15] have applied Article 74 CISG to award, without exception, the compensation of costs for asserting legal rights, including legal fees. The cases awarding costs, under CISG Article 61(1)(b),

[7] Currently, there are eighty countries that have adopted the CISG. A compilation of all contracting states is available at http://www.uncitral.org.

[8] See CISG Articles 45, 61, and 74.

[9] Ingeborg Schwenzer in *Kommentar zum Einheitlichen Un-Kaufrecht – CISG*, 5th ed. (ed. P. Schlechtriem and I. Schwenzer) (Munich: Beck-Verlag, 2008), Article 74, marginal note 12; Ulrich Magnus in *J. Von Staudingers, Kommentar Zum Bürgerlichen Gesetzbuch: Staudinger Bgb-Buch 2* (ed. J. von Staudinger) (Berlin: Sellier-de Gruyter, 2013) (hereafter referred to as *Staudinger*), Article 74 CISG marginal note 11; Bruno Zeller, *Damages under the Convention on Contracts for the International Sale of Goods* (New York: Oxford University Press, 2005), 63; Christoph Brunner, *Un-Kaufrecht – CISG* (Bern: Stämpfli Verlag, 2004), Article 61, marginal note 6; Marco Torsello, "Remedies for Breach of Contract under the 1980 Convention on Contracts for the International Sale of Goods (CISG)," in *Quo Vadis CISG* (ed. F. Ferrari) (Brussels: Sellier–de Gruyter, 2005), 42, 80.

[10] Schwenzer, supra note 9, Article 74, marginal note 3; Peter Mankowski in *Münchener Kommentar zum Handelsgesetzbuch: Hgb; Band 6: Viertes Buch*, 2nd ed. (Munich: Beck-Verlag, 2007), Article 74, marginal note 10; Magnus in *Staudinger*, Article 74, marginal note 19; Brunner, *Un-Kaufrecht – CISG*, Article 74, marginal note 1.

[11] *Supra* notes 1–6.

[12] Rechtbank van Koophandel te Hasselt, CISG-online no. 1107.

[13] Landgericht München, 10 *Internationales Handelsrecht* 150 (2010), CISG-online no. 1998; Landgericht Potsdam, 9 *Internationales Handelsrecht* 205 (2009), CISG-online no. 1979; Landgericht Hamburg, CISG-online no. 1999; Amtsgericht Freiburg, CISG-online no. 1596; Oberlandesgericht Köln, CISG-online no. 1218; Oberlandesgericht Düsseldorf, 5 *Internationales Handelsrecht* 29 (2005), CISG-online no. 916; Landgericht Berlin, CISG-online no. 785; Amtsgericht Viechtach, CISG-online no. 755; Amtsgericht Tiergarten, CISG-online no. 412; Oberlandesgericht Düsseldorf, 12 *Neue Juristische Wochenschrift-Rechtsprechungsreport* 822 (1997), CISG-online no. 201; Amtsgericht Augsburg, CISG-online no. 172; Landgericht Krefeld, CISG-online no. 101.

[14] Rechtbank Rotterdam, CISG-online no. 2098; Rechtbank Rotterdam, CISG-online no. 1815; Rechtbank Zutphen, *Nederlands Internationaal Privaatrecht* 126 (2001); Hof's-Hertogenbosch, CISG-online no. 550.

[15] Kantonsgericht Zug, CISG-online no. 2024; Tribunal Cantonal Valais, 18 *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 206 (2008), CISG-online no. 1532; Amtsgricht Willisau, CISG-online no. 961; Handelsgericht Aargau, 9 *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 192 (1999), CISG-online no. 418.

involved a refusal or delay by the buyer to pay. With the exception of three Dutch decisions,[16] which are ambiguous in this regard, the cases allowed for the reimbursement of legal costs. Recovery of legal costs was considered as reimbursable damages under CISG Article 74. However, the reimbursement of the costs for court proceedings was not at issue in any of the cases; rather, the reimbursement of the costs for the legal counsel incurred prior to the court proceedings was sought in each case. An ICC arbitral award qualified "legal costs, arbitration" as "foreseeable according to Article 74."[17]

Various approaches to this subject have appeared in other legal systems. In Russia, a court held that legal costs were not recoverable under Article 74.[18] Two Chinese arbitration awards[19] allowed for the recovery of legal costs, but the decisions were unclear if the legal basis for the awards was CISG Article 74 or Article 46 of the CIETAC Rules.[20] An Argentinian court argued that prima facie legal costs are covered by Article 74, but as a procedural matter are excluded from the CISG's scope of application.[21] U.S. courts consistently held that legal costs do not fall within the scope of Article 74.[22] However, in one court decision,[23] which was overturned on appeal, the reimbursement of such costs was awarded due to an "extreme bad faith refusal to pay" (Zapata decision).[24] However, an attorney's fees can be awarded if there is a private agreement between the parties allowing such recovery, for instance provided by general terms and conditions forming part of a contract of sale.[25]

B. *Literature Review*

The Zapata decision has attracted the most attention.[26] The court reasoned that reimbursement of legal fees is a matter of procedural law and, therefore, does not fall within

[16] Rechtbank Rotterdam, CISG-online no. 2098; Rechtbank Rotterdam, CISG-online no. 1815; Hof's-Hertogenbosch, CISG-online no. 550.

[17] ICC Arbitration Case no. 7585 of 1992, CISG-online no. 105.

[18] Arbitration Court for the Moscow Region (August 24, 2000), CISG-Pace.

[19] China International Economic and Trade Arbitration Commission, CISG-online no. 1472, and China International Economic and Trade Arbitration Commission (December 18, 1996).

[20] See Sabine Stricker-Kellerer and Michael Moser, "Schiedsordnung der China International Economic and Trade Arbitration Commission," in *Institutionelle Schiedsgerichtsbarkeit* (ed. R. Schütze) (Cologne: Carl Heymanns Verlag, 2006), 447, 480.

[21] Cámara Nacional de Apelaciones en lo Comercial – Sala F, Buenos Aires, CISG-online no. 2132.

[22] CISG-online no. 851; CISG-online no. 772, 3 *Internationales Handelsrecht* 128 (2003), CISG-online no. 684; CISG-online 1836 (based on the same assumption).

[23] For extensive detail, see Diener, "Recovering Attorneys' Fees," 17; Harry Flechtner and Joseph Lookofsky, "Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal," 93 *Vindobona J. Of Int'l Commercial Law & Arbitration* 93 (2003).

[24] CISG-online no. 599.

[25] 2010 U.S. Dist. LEXIS 109893 (E.D. Pa. 2010).

[26] Cf., e.g., Diener, "Recovering Attorneys' Fees," 17; Peter Schlechtriem, "Verfahrenskosten als Schaden in Anwendung des UN-Kaufrechts," 6 *Internationales Handelsrecht* 49 (2006); Bruno Zeller, "Interpretation of Article 74 – Zapata Hermanos v Heartside Banking – Where Next?," *Nordic J. of Commercial Law* (2004), available at http://www.njcl.fi/1_2004/commentary1.pdf, 2; Troy Keily, "How Does the Cookie Crumble? Legal Costs under a Uniform Interpretation of the United Nations Conventions on Contracts for the International Sale of Goods," *Nordic J. of Commercial Law* (2003), available at http://www.njcl.fi/1_2003/commentary2.pdf, 2; John Felemegas, "An Interpretation of Article 74 by the U.S. Circuit Court of Appeals," 15 *Pace Int'l L. Rev.* 91 (2003), available at http://www.cisg.law.pace.edu/cisg/biblio/felemegas4.html); Flechtner, "Recovering Attorneys' Fees"; Peter Schlechtriem, "Anwaltskosten als Teil des ersatzfähigen Schadens," 22 *Praxis des Internationalen Privat- und Verfahrensrechts* 226 (2002).

the scope of the CISG; consequently, the awarding of such fees is determined by the *lex fori*.[27] However, in some instances a reimbursement pursuant to Article 74 CISG is granted insofar as the costs of asserting legal rights have incurred outside of the pending proceedings,[28] or if the rules of the *lex fori* are not sufficient to compensate all expenses incurred in the assertion of legal rights.[29]

A number of scholars argue that legal fees are not recoverable under Article 74. One rationale is that a winning plaintiff may plausibly recover legal fees as a direct consequence of the breach of contract, however, a winning defendant is unable to make such a causal connection. Such asymmetry violates the equal treatment of seller and buyer and can only be avoided if the reimbursement of legal fees incurred in connection to judicial proceedings is not a matter regulated by the CISG and is best entrusted to domestic law.[30] In principle, costs incurred in preparation of judicial proceedings,[31] as well as expenses not compensated under the procedure of the *lex fori*,[32] are subject to this rule also.

[27] Roeland I.V.F. Bertrams and Sonja A. Kruisinga, *Overeenkomsten in het Internationaal Privaatrecht en het Weens Koopverdrag*, 4th ed. (Deventer: Wolters-Kluwer, 2010), 248; Herbert Schönle and Thomas Koller in *Kommentar zum Un-Kaufrecht*, 2nd ed. (ed. H. Honsell) (Heidelberg: Springer-Verlag, 2010), Article 74, marginal note 32; Peter Huber in *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Bgb Band 3*, 6th ed. (Munich: Beck-Verlag, 2012), Article 74, marginal note 43; Martin Brölsch, *Schadensersatz und Cisg* (Frankfurt: Peter Lang Verlag, 2007), 72; Ingo Saenger in Bamberger and Roth, *Kommentar BGB*, vol. 1, 3rd ed. (ed. H.G. Bamberger and H. Roth) (Munich: Beck-Verlag, 2012), Article 74, marginal note 8; Joseph Lookofsky and Harry Flechtner, "Zapata Retold: Attorneys' Fees Are (Still) Not Governed by the CISG," 25 *J. of Law & Commerce* 1, 9 (2006), available at http://www.cisg.law.pace.edu/cisg/biblio/lookofsky-flechtner.html; Magnus in *Staudinger*, Article 74, marginal note 52; Brunner, *Un-Kaufrecht – CISG*, Article 74, marginal note 31; Herbert Bernstein and Joseph Lookofsky, *Understanding the CISG in Europe*, 2nd ed. (The Hague: Wolters-Kluwer, 2003), 164; Flechtner and Lookofsky, "Viva Zapata!," 100; Flechtner, "Recovering Attorneys' Fees," 153, 155.

[28] John Gotanda in *Un-Convention on Contracts for the International Sale of Goods (CISG)* (ed. S. Kröll, L. Mistelis, and P. Perales Viscasillas) (Munich: Beck-Verlag, Hart-Publishing, Nomos, 2011), Article 74, marginal note 73; Huber in *Münchener Kommentar*, Article 74, marginal note 42; Bertrams and Kruisinga, *Overeenkomsten*; Brölsch, *Schadensersatz und Cisg*, 73; Saenger in Bamberger and Roth, *Kommentar BGB*, Article 74, marginal note 8; Mankowski in *Münchener Kommentar*, Article 74, marginal note 33; Magnus in *Staudinger*, Article 74, marginal note 52; Brunner, *Un-Kaufrecht – CISG*, Article 74, marginal note 31.

[29] Gotanda in *Un-Convention*; Mankowski in *Münchener Kommentar*, Article 74, marginal note 35; Magnus in *Staudinger*, Article 74, marginal note 52; Rolf Herber and Beate Czerwenka, *Internationales Kaufrecht* (Munich: Beck-Verlag, 1991), Article 74, marginal note 7.

[30] Gotanda in *Un-Convention*, marginal note 72; Markus Jäger, *Reimbursement for Attorneys's Fee* (The Hague: Eleven International Publishing, 2010), 162; Clayton P. Gillette and Steven D. Walt, *Sales Law: Domestic and International*, 2nd ed. (New York: Foundation Press, 2009), 407; Djakhongir Saidov, *The Law of Damages in International Sale* (Portland: Hart Publishing, 2008), 52; Schwenzer, "Rechtsverfolgungkosten als Schaden?," 423; Schwenzer in *Kommentar zum Einheitlichen Un-Kaufrecht*, Article 74, marginal note 29; Ingeborg Schwenzer and Pascal Hachem in *Contract Damages* (ed. D. Saidov and R. Cunnington) (Oxford: Hart Publishing, 2008), 104; Alastair Mullis, "Twenty-Five Years On: The United Kingdom, Damages and the Vienna Convention," 71 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* 35, 45 (2007); Keily, "How Does the Cookie Crumble?," 21f.; CISG Advisory Council, Opinion No. 6, Calculation of Damages under CISG Article 74, para. 5.4, *Zeitschrift für Internatliones Handelsrecht* 250, 260 (2007).

[31] Jäger, *Reimbursement for Attorneys' Fee*, 162; Saidov, *The Law of Damages*; Schwenzer, "Rechtsverfolgungkosten als Schaden?," 425; Schwenzer in *Kommentar zum Einheitlichen Un-Kaufrecht*, Article 74, marginal note 30; Schwenzer and Hachem in *Contract Damages*, 105.

[32] Schwenzer in *Kommentar zum Einheitlichen Un-Kaufrecht*, Article 74, marginal note 29.

There are only a handful of opinions arguing that legal costs fall within the meaning of Article 74.[33] An alternative view considers Article 74 as a residual rule, which supplements national law to the extent that national law does not provide a sufficient reimbursement.[34] However, those authors who are in favor of acknowledging legal cost as losses covered by Article 74 CISG see the primary or at least an equal, competing approach in Article 74 CISG.

III. Interpreting the CISG on Recovering Legal Costs

In answering the question whether the litigation expenses are reimbursable under Article 74, the starting point is to review the CISG.[35] CISG's Article 4 delegation of issues of validity of contracts to national law is not applicable because legal costs come within the area of remedies, which are expressly within the scope of the CISG. Furthermore, the reimbursement of legal costs is not expressly excluded from the CISG's remedial scheme.[36] Because the costs of asserting legal rights or of legal defences are a type of financial loss, the "plain meaning" of Article 74 would hold that such foreseeable losses caused by a breach of contract qualify as reimbursable damages.[37] Thus, the broad scope of CISG damages and its failure to provide a specific exclusion should allow a party to collect reasonable legal costs.[38]

One counterargument is that the CISG is a body of substantive rules and the awarding of legal costs is a matter of procedural law.[39] However, the interpretation of the reimbursement of legal costs as a matter of procedural law is questionable.[40] First, the CISG's underlying principle of full compensation requires the payment of all foreseeable, provable losses that are caused by a seller's or buyer's breach of an obligation under the contract. Thus, the recovery of legal costs is supported by the substantive rules of the CISG. Second, the CISG in no place restricts itself to substantive rules of law.[41] In fact, the CISG contains rules of a procedural nature, such as Article 11's "no writing requirement" and the permissibility of witness testimony. In these areas, the CISG

[33] Schiedsgericht der Handelskammer Hamburg, 774; Keith William Diener, "Recovering Attorneys' Fees under CISG: An Interpretation of Article 74," *Nordic J. of Commercial Law* (2008), available at http://www.njcl.fi/1_2008/article3.pdf; Burghard Piltz, *Internationales Kaufrecht* (Munich: Beck-Verlag, 2008), marginal note 5–539; Zeller, *Damages under the Convention*, 162; Zeller, "Interpretation of Article 74," 9; Felemegas, "An Interpretation of Article 74," 91.

[34] *Supra* notes 28 and 29.

[35] Cf. Schwenzer, "Rechtsverfolgungkosten als Schaden?," 418; Mankowski in *Münchener Kommentar*, Article 74, marginal note 35.

[36] Schwenzer, "Rechtsverfolgungkosten als Schaden?," 423; CISG Advisory Council, Opinion No. 6, paras. 5.3 and 5.4; Flechtner, "Recovering Attorneys' Fees," 134.

[37] Schwenzer, "Rechtsverfolgungkosten als Schaden?," 423; Diener, "Recovering Attorneys' Fees," 55; CISG Advisory Council, Opinion No. 6, paras. 5.3 and 5.4; Schlechtriem, "Anwaltskosten als Teil des ersatzfähigen Schadens," 51; Keily, "How Does the Cookie Crumble?," 18; Flechtner, "Recovering Attorneys' Fees," 126. See also Piltz, *Internationales Kaufrecht*, marginal note 5–512 et seq.

[38] Likewise Schwenzer, "Rechtsverfolgungkosten als Schaden?," 423; CISG Advisory Council, Opinion No. 6, paras. 5.3 and 5.4; Zeller, "Interpretation of Article 74," 3 et seq.

[39] *Supra* note 27.

[40] Schwenzer, "Rechtsverfolgungkosten als Schaden?," 422; Zeller, supra note 26, 7.

[41] Cf. Diener, "Recovering Attorneys' Fees," 31 et seq.

preempts conflicting national procedural law.[42] Thirdly, the mainstream scholarly view has abandoned the substantive–procedural distinction.[43] The substantive law–procedural law distinction is not a functional test due to its generality and lack of generally acceptable criteria for applying the distinction.[44]

A further argument can be made that the underlying purpose of an international sales law is to reduce the legal obstacles to transborder trade related to divergences in national sales laws.[45] Given this mandate, when there is a dispute as to the scope of the CISG, that dispute should be resolved in favor of CISG coverage. The supranational nature of the CISG is founded on the basis of international law. Thus, conflicts between national laws and the CISG in areas of scope should be solved by a presumption in favor of the CISG's applicability. This precedence of the CISG can be seen with respect to the qualification of certain national provisions on validity that fall within the scope of the CISG. The issue of contract validity, when unclear, should result in the application of the CISG and not presumed to be within the scope CISG Article 4.[46] This argument is supported by the principle of autonomous interpretation manifested in CISG Article 7. A reasonable autonomous interpretation, free of homeward trend bias, would be that the payment of legal costs is a form of damages recoverable under Article 74.[47]

Another counterargument against the "plain-meaning understanding"[48] of CISG Article 74 is the asymmetrical nature of Article 74 if applied to recover legal costs. The

[42] Schlechtriem and Schmidt-Kessel in *Kommentar zum Einheitlichen Un-Kaufrecht – CISG*, 5th ed. (ed. P. Schlechtriem and I. Schwenzer) (Munich: Beck-Verlag, 2008), Article 11, marginal note 12.

[43] Cf., e.g., on the proof of the damage Saidov, *The Law of Damages*, 162, 168, and on jurisdiction agreements in the past, Peter Schlechtriem, *Internationales Un-Kaufrecht*, 1st ed. (Tübingen: Mohr-Siebeck, 1996), marginal note 58; Ulrich Magnus, "Das UN-Kaufrecht: Fragen und Problem seiner praktischen Bewährung," 5 *Zeitschrift für Europäisches Privatrecht* 823, 838 (1997); Peter Schlechtriem, *Internationales Un-Kaufrecht*, 4th ed. (Tübingen: Mohr-Siebeck, 2007), marginal note 58; Ferrari in Schlechtriem and Schwenzer, *Kommentar zum Einheitlichen Un-Kaufrecht*, Article 4, marginal notes 33 and 40.

[44] See also Jäger, *Reimbursement for Attorneys's Fee*, 160; Saidov, *The Law of Damages*, 52; Schwenzer in *Kommentar zum Einheitlichen Un-Kaufrecht*, Article 74, marginal note 28; Mankowski in *Münchener Kommentar*, Article 74, marginal note 35.

[45] Quinto Tribunal Colegiado en Materia Civil del Primer Circuito, decision of 20.05.2005 (293/2005), CISG-Pace, 5 *Zeitschrift für Internatliones Handelsrecht* 237, 239 (2003); Arbitration Court for the Moscow Region, decision of 11.02.2002, CISG-Pace; ICC Arbitration Case No. 7645 of 1995, 26 *Yearbook Commercial Arbitration* 130 (2001); Piltz, *Internationales Kaufrecht*, marginal note 2–125; Schlechtriem and Schmidt-Kessel, *Kommentar zum Einheitlichen Un-Kaufrecht*, Article 11, marginal note 12; Ulrich G. Schroeter, *Un-Kaufrecht und Europäisches Gemeinschaftsrecht* (Munich: Sellier, 2005), 83; Urs P. Gruber, *Methoden des Internationalen Einheitsrechts* (Tübingen: Mohr-Siebeck-Verlag, 2004), 229, 267; Felemegas, "An Interpretation of Article 74," 91; Schlechtriem, "Verfahrenskosten als Schaden in Anwendung des UN-Kaufrechts," 52 (doubting enforceability).

[46] Cf. Gillette and Walt, *Sales Law*, 170; Patrick C. Leyens, "CISG and Mistake: Uniform Law vs. Domestic Law, The Interpretative Challenge of Mistake and the Validity Loophole, Review of the Convention for the International Sale of Goods (CISG)," 3, 26, 36 (Pace Int'l L. Rev. ed., Sellier: Munich 2003–2004); Magnus in *Staudinger*, Article 4, marginal note 11; along the same lines, Ferrari in Schlechtriem and Schwenzer, *Kommentar zum Einheitlichen Un-Kaufrecht*, Article 4, marginal note 16; Anne-Kathrin Schluchter, *Die Gültigkeit von Kaufverträgen unter Dem Un-Kaufrecht* (Baden-Baden: Nomos Universitätsschriften Recht, 1996), 45.

[47] See also, Saidov, *The Law of Damages*, 52; Schwenzer, "Rechtsverfolgungkosten als Schaden?," 417, 422; CISG Advisory Council, Opinion No. 6, 259; Mankowski in *Münchener Kommentar*, Article 74, marginal note 35; Schlechtriem, "Verfahrenskosten als Schaden in Anwendung des UN-Kaufrechts," 51; Zeller, *Damages under the Convention on Contracts*, 149; Keily, "How Does the Cookie Crumble?," 12.

[48] *Supra* note 37.

principle of equal treatment of buyers and sellers is infringed on if legal expenses were deemed to be damages pursuant to Article 74[49] because, technically, only the party claiming a breach of contract is allowed to collect such damages. However, the CISG distinguishes between sellers and buyers. The principle of equal treatment of buyers and sellers is not clearly supported by the text of the CISG[50] and is rarely a principle that governs the conduct of the contracting parties usually.[51] The principle of equal treatment of buyers and sellers is further refuted given the primary obligations of the seller and buyer laid down in CISG Articles 30 et seq. and 53 et seq. The rules on the place of delivery (CISG Article 31) and on the place of payment (CISG Article 57) are examples where sellers and buyers are not treated equally. Thus it is implausible after reviewing the CISG as a whole to support the existence of an implied principle of equal treatment that would prevent the awarding of legal costs.

As discussed earlier, the CISG's rules on primary obligations do not support the denial of assessing legal costs as damages under a principle of equal treatment. Additionally, a review of the CISG remedial provisions[52] does not support the equal treatment argument. The catalogues of remedies found in CISG Articles 45 and 61 treat the seller who does not fulfil his or her obligations in the same manner as the buyer who is in breach of the contract. This applies irrespective of other differences with respect to the further arrangements concerning the remedies, in particular with regard to the remedy of damages. However, the aforementioned articles also prove that it is only the party in breach of the contract who is liable for damages toward the other party. The party in breach is exposed to the remedies of the other party and insofar is subject to a different system of rules than the nonbreaching party. The equal treatment structure of Articles 45 and 61 only applies when both parties claim a breach of contract. In the case of one-party breach, the CISG explicitly provides for different legal consequences. Only the party in breach of the contract is obliged to reimburse the other party in terms of "complete reparation."[53]

If, for instance, a party to the contract does not fulfil his obligations, causing the other party to incur expenses in order to enforce its rights out of court, such expenses are generally recoverable as damages.[54] Reimbursement of expenses arising extrajudicially,

[49] *Supra* note 30.

[50] In addition, the equal treatment of buyer and seller is not a general principle enunciated in CISG Article 7(2). Cf., e.g., André Janssen and Sörren Kiene, "The CISG and Its General Principles," in *A CISG Methodology* (ed. A. Janssen and O. Meyer) (Munich: Sellier, 2009), 261 et seq.; Ferrari in Schlechtriem and Schwenzer, *Kommentar zum Einheitlichen Un-Kaufrecht*, Article 7, marginal note 48 et seq.; Schlechtriem, *Internationales Un-Kaufrecht*, marginal note 48 et seq.; Diener, "Recovering Attorneys' Fees," 50.

[51] Cf. Diener, "Recovering Attorneys' Fees," 50.

[52] Cf. Schwenzer, "Rechtsverfolgungkosten als Schaden?," 417, 423; CISG Advisory Council.

[53] See CISG Articles 45, 61, and 74; *supra* note 10.

[54] Schönle and T. Koller in Honsell, *Kommentar zum Un-Kaufrecht*, Article 74, marginal note 32; Schwenzer in *Kommentar zum Einheitlichen Un-Kaufrecht*, Article 74, marginal note 33; Huber in *Münchener Kommentar*, Article 74, marginal note 42; Bertrams and Kruisinga, *Overeenkomsten in het Internationaal Privaatrecht en het Weens Koopverdrag*, 248; Brölsch, *Schadensersatz und Cisg*, 72; Saenger in Bamberger and Roth, *Kommentar BGB*, Article 74, marginal note 8; Peter Huber in *The CISG* 279 (ed. P. Huber and A. Mullis) (Munich: Sellier, 2007); Mankowski in *Münchener Kommentar*, Article 74, marginal note 33; Brunner, *Un-Kaufrecht – CISG*, Article 74, marginal note 31; Magnus in *Staudinger*, Article 74, marginal note 51; Wolfgang Witz in *Internationales Einheitliches Kaufrecht* (ed. W. Witz, H. C. Salger, and M. Lorenz) (Heidelberg: Verlag Recht und Wirtschaft, 2000), Article 74, marginal note 39; Martin Karollus,

including ancillary legal expenses, is recoverable in most jurisdictions.[55] In consideration of the full compensation objective of Article 74,[56] the use of different standards for recovering judicial-related and extrajudicial legal costs is not justified. The party's role as claimant or defendant is of no significance for the application of UN Sales Law. Ultimately, the only standard for awarding legal costs of any kind, whether claimed by the plaintiff or defendant, should be whether the expenses, the reimbursement of which are sought, are a consequence of a breach of contract under Articles 45 and 61.

It should be noted that not all claims are for damages related to a breach of contract. For example, the buyer may seek negative declaratory action in contemplation of a seller's suit for payment.[57] If the buyer is unsuccessful because the claim for the purchase price rightly exists, then the prevailing defendant on the basis of Articles 61 and 74 should be able to claim reimbursement of the costs of the legal defence.[58] In this case, the prevailing defendant is entitled to damages because the plaintiff is in breach of the contract through the negation of the valid claim for the purchase price.[59] If, however, the declaratory action is decided in favor of the plaintiff, he or she is not entitled to damages pursuant to Article 74 due to a lack of a breach of contract by the defendant. A different outcome would arise if the seller were held in breach by making an unjustified demand for payment.[60]

This analysis shows that the defendant, as well as the plaintiff, is entitled to recover legal costs under Article 74. Thus, the statement that the award of costs of judicial proceedings as damages according to Article 74 favors the plaintiff[61] is not accurate as a generalization. It is correct to state that the party to a sales contact whose claims are not met as stipulated in the contract is privileged because of the remedies provided by Articles 45 and 61. However, this is the explicitly formulated objective of the CISG:[62] to restore the balance of the bargain (contract) after the occurrence of a breach.

The argument that the reimbursement of litigation or arbitration expenses is outside of the scope of the CISG[63] runs counter to the goal of unification of law upon which the CISG is premised. In the area of collecting legal costs, bringing the issue within the scope of the CISG avoids the various and complicated criteria for awarding such damages

Un-Kaufrecht (Vienna and New York: Springer, 1991), 213; Herber and Czerwenka, *Internationales Kaufrecht*, Article 74, marginal note 7.

55 *Supra* notes 12–15.

56 For more detail, see CISG Advisory Council, Opinion No. 6, para. 1.1, at 251.

57 Such arrangements occur, for example, if the buyer wants to deny the seller the ability to select the court of the dispute in cases were various courts would have jurisdiction over the case.

58 Cf. *supra* note 54.

59 Günter Hager and Felix Maultzsch in *Einheitliches Un-Kaufrecht*, 5th ed. (ed. P. Schlechtriem and I. Schwenzer) (Munich: Beck-Verlag, 2008), Article 64, marginal note 5; Christoph Benicke in *Münchener Kommentar zum Handelsgestzbuch: Hgb, Band 6: Viertes Buch*, 2nd ed. (Munich: Beck-Verlag, 2007), Article 64, marginal note; Magnus in *Staudinger*, Article 64, marginal note 13.

60 Cf., e.g., Bundesgerichtshof, 62 *Neue Juristische Wochenschrift* 1262, 1263 (2009) ("A contracting party which asks for something from the other party to which it is not obliged to by the contract or which exercises a right to alter a legal relationship which does not exist, violates its obligation of consideration pursuant to Section 241 (2) German Civil Code").

61 Schwenzer, "Rechtsverfolgungkosten als Schaden?," 417, 423; Schwenzer in *Kommentar zum Einheitlichen Un-Kaufrecht*, Article 74, marginal note 30.

62 *Supra* note 10.

63 *Supra* notes 27 and 30.

found in the national legal systems[64] and purports a solid basis for the reimbursement of contingency fees or costs for party funding, issues that are generally not covered by the national procedural laws.

Even when applying the CISG generously, it is important to recognize that the mere incurring of costs is not sufficient to claim damages; the costs have to be causally related to a prior breach of contract. However, situations are conceivable where an unjustified claim can qualify as a violation of contractual obligations and constitute a breach of contract.[65] This particularly applies if a claim is clearly unsubstantiated, the amount claimed is deemed to be abundantly excessive, or the claim is an act of bad faith, such as where its primary purpose is exercising pressure on the other party.

IV. Remarks

The CISG's remedial provisions sanction every breach of contract by allowing damage claims that aim to fully compensate the nonbreaching party. This remedial objective supports recover of legal expenses. However, it is conceivable that a party cannot, despite favorable ruling, claim such costs as damages because the other party is not in breach of contract. This is often the case when the defendant is the winning party. This result is consistent with the CISG principle that damages are only justified when there is a breach of contract. However, because legal costs are monetary losses, and the purpose of the CISG is as a unifying law, legal costs should be recognized as recoverable damages under Article 74. Any prevailing party should be able to make a claim for reimbursement of legal costs.

[64] In such way, Section 91 of the German Code of Civil Procedure generally regulates the allocation of costs by means of the principle of instigation regardless of fault, Max Vollkommer in Zöller, *Zivilprozessordnung*, 28th ed. (ed. R. Geimer et al.) (Cologne: Verlag Dr. Otto Schmidt, 2010), §88, marginal note 11; Bundesgerichtshof, 59 *Neue Juristische Wochenschrift* 2490 no. 19 (2006).

[65] Cf., e.g., Bundesgerichtshof, 62 *Neue Juristische Wochenschrift* 1262, 1263 (2009); Magnus in *Staudinger*, Article 7, marginal note 47; Brunner, *Un-Kaufrecht – CISG*, Article 30, marginal note 7; Annette Kock, *Nebenpflichten im UN-Kaufrecht* (Regensburg: Roderer Verlag, 1995), 32; for criticism, see Schlechtriem, "Verfahrenskosten als Schaden in Anwendung des UN-Kaufrechts," 51.