

## ARE ATTORNEY FEES RECOVERABLE UNDER ARTICLE 74 OF CISG?

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### ABSTRACT

United Nations Convention on Contracts for the International Sale of Goods (CISG) consists of a set of rules which govern international commercial transactions related to contracts of sale of goods<sup>1</sup>. Article 74 of the CISG regulates requirements that need to be fulfilled for recovery of damages and stipulates that “damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by one party...”. It is not explicitly stated in this article whether attorney fees fall under the category of loss and this issue has been highly debated especially since US 7th Circuit Court of Appeals ruled in ‘Zapata case’ that attorney fees cannot be compensated under article 74 of CISG<sup>2</sup>.

In this article, firstly, so-called Zapata case will be analyzed and criticized in detail. Secondly, it will be argued that the CISG article 74 should be interpreted in a way that includes attorney fees.

**Keywords:** CISG, attorney fees

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(Geliş Tarihi : 12.11.2017 – Kabul Tarihi : 09.01.2018)

- 1 ‘United Nations Convention on Contracts for the International Sale of Goods’ (adopted 11 April 1980, entered into force 1 January 1988) Hereinafter referred to as the ‘CISG’ Available at: <<http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>>, l.a.d. 24.10.2017
- 2 United States 19 November 2002 Federal Appellate Court [7th Circuit] (Zapata Hermanos v. Hearthside Baking) available at: <<http://cisgw3.law.pace.edu/cases/021119u1.html>>, l.a.d. 18.10.2017.

## AVUKATLIK MASRAFLARI CISG'NİN 74. MADDESİ KAPSAMINDA TAZMİN EDİLEBİLİR Mİ?

### ÖZET

Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG) satım sözleşmelerine ilişkin uluslararası ticari işlemleri düzenleyen kurallardan oluşur. CISG'nin 74. maddesi zararların tazmin edilmesi için gerçekleşmesi gereken şartları düzenler ve bu maddeye göre: “Taraflardan birinin sözleşmeyi ihlâli halinde ödenecek tazminat, mahrum kalınan kâr dâhil olmak üzere, ihlâlden dolayı diğer tarafın uğradığı zararın toplamına eşittir”. Bu maddede avukatlık masraflarının ‘zarar’ kapsamına girip girmediği açıkça düzenlenmemiştir ve bu konu özellikle Amerikan 7. Temyiz Mahkemesinin ‘Zapata’ kararında bu zararların CISG m. 74’e göre tazmin edilemeyeceğine ilişkin kararından bu yana yoğun bir şekilde tartışılmaktadır. Bu makalede söz konusu ‘Zapata’ kararı detaylı bir şekilde analiz edilecek ve CISG m. 74’ün avukatlık masraflarını içerecek şekilde yorumlanmasının gerektiği tartışılacaktır.

**Anahtar Kelimeler:** CISG, avukatlık masrafları

## I. ARTICLE 74 CISG

### A. OVERVIEW

A breach of contract occurs under the CISG regime in the event that one of the parties does not discharge its obligations. In case seller fails to perform his/her obligations related to contract or CISG, the buyer may resort to certain legal remedies<sup>3</sup>. The remedies buyer can resort to include 'right to specific performance' (article 46 CISG), 'right to cure' (article 48) 'avoidance of contract' (article 49) 'reduction in price' (article 50) and 'damages claim' (article 74-77)<sup>4</sup> On the other hand, if buyer is the one who does not perform any of his obligations, remedies provided to the seller are regulated under article 61(1) CISG which set forth 3 types of remedies for seller<sup>5</sup>. Remedies that may be exercised by seller are 'right to specific performance' (article 62) 'avoidance of contract' (article 64) 'right to damages' (article 74-77 by virtue of the wording of article 61)<sup>6</sup> As can be observed from CISG's remedial system, when one of the parties fail to fulfill their obligations arising out of the contact or CISG, the opposite party, either buyer or seller, may exercise abovementioned rights including damages remedy.

Damages provisions are regulated between article 74 and 77 of the CISG. Under article 74 of the CISG, "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract." As can be seen in this article, CISG does not make any distinction between types of losses which can be incurred by the aggrieved party and it is based on the notion that "The promisee has the right to be fully compensated

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3 **Butler Allison E.** (2007) 'A Practical Guide to the CISG: Negotiations through Litigation' Chapter 6, Aspen Publisher, available at: <<http://www.cisg.law.pace.edu/cisg/biblio/butler6.html>>, l.a.d. 25.10.2017, p. 1.

4 See supra n. 1.

5 **Huber, Peter/Mullis, Alastair** (2007) 'The CISG A New Textbook for Students and Practitioners', Sellier European Law Publishers, p. 321.

6 See supra n. 1.

for all disadvantages suffered as a result of the breach of contract<sup>7</sup>. Furthermore, as it is articulated by CISG Advisory Council Opinion: “The purpose of Article 74 is to place the aggrieved party in the same pecuniary position it would have been in had the breach not occurred and the contract been properly performed<sup>8</sup>.” Article 74 CISG is a mere reflection of the principle of full compensation and its purpose is to fully reimburse the aggrieved party for the expenses it suffered.

For recovery of damages under article 74 CISG, one of the requirements that needs to be fulfilled is that aggrieved party has to prove that there is causation between the breach of contract and loss that it suffered<sup>9</sup>. Secondly, as the clear wording of the CISG 74 indicates, the loss must be foreseeable by the breaching party at the time of the conclusion of the contract<sup>10</sup>. Thirdly, the aggrieved party has a duty to mitigate its loss under article 77 CISG. “In combination, these provisions would allow courts to police in a general fashion the reasonableness of claimed attorneys' fees<sup>11</sup>.” These limitations on the recovery of damages will be briefly explained below.

### 1. Causation Requirement

Article 74 CISG requires that the loss must have been suffered “as a consequence of the breach”. It is suggested in the doctrine that the simple factual causation between loss and the breach is sufficient to satisfy the causation requirement, but other limitations placed on the liability such as foreseeability requirement should be kept in mind<sup>12</sup>. Legal fees are considered

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7 **Schwenzer, Ingeborg / Schlechtriem, Peter** (2010) *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edition, Oxford University Press, p. 1000.

8 **CISG-AC Opinion No. 6**, ‘Calculation of Damages under CISG Article 74’, Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA, available at: <[http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html#\\*](http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html#*)>, I.a.d. 20.10.2017.

9 **CISG-AC Opinion No. 6**, supra n. 4.

10 See supra n. 1.

11 **Fletcher, Harry M.** (2002) ‘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*’, V: 22 I: 2, *Northwestern Journal of International Law & Business*, p. 152.

12 **Huber**, p. 270.

as easily fulfilling the simple causation requirement<sup>13</sup>. “Had the other party not breached the contract, the aggrieved party would not have had to afford legal advice. Furthermore, the breaching party could have foreseen legal costs in case of a breach<sup>14</sup>.”

## 2. Foreseeability Requirement

As Professor Schlechtriem notes, not all attorney fees satisfy the foreseeability requirement under the CISG: For example, if, at the time of the conclusion of the contract, ‘contingency fee agreements’ are considered as unusual in the countries where parties are from, these types of attorney fees may not be considered as foreseeable and therefore would not be recoverable under article 74 of CISG<sup>15</sup>. As an example, if amount in dispute equals to 10.000€ but claimant hires a lawyer by a contingency fee agreement which costs 50.000€, this loss should be deemed as unforeseeable to the breaching party. Another example would be that if court proceedings lasts longer because of unforeseeable circumstances such as the death of judge, this is not foreseeable and at least attorney fees related to delayed proceedings should not be recoverable.

## 3. Duty to Mitigate Loss (Article 77)

Article 77 CISG stipulates the duty to mitigate loss in case of a breach which reads as follows: “A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.” This limitation also covers situations where a party incurs legal costs. Hence, “a breach of contract

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13 **Jochem, Helena** (2015) ‘Damages under the CISG – old and new challenges’ (LLM Research Paper) available at: <<http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/5087/paper.pdf?sequence=1>>, l.a.d. 24.10.2017.

14 **Jochem**, p. 34.

15 **Slechtriem, Peter** (2002) ‘Attorneys’ Fees as Part of Recoverable Damages’ Pace International Law Review, available at: <<http://cisgw3.law.pace.edu/cisg/biblio/slechtriem4.html>>, l.a.d.25.10.2017.

does not give the aggrieved party a blank check as to agreements on attorneys' fees in the preparation and execution of the pursuit of its legal claims<sup>16</sup>."

## B. POLICIES FOR ALLOCATING ATTORNEY FEES IN DIFFERENT LEGAL SYSTEMS

Once arbitral or court proceedings are initiated, parties will incur legal costs including attorney fees. There are two main approaches related to the allocation of attorney fees around the world, namely the American rule and the loser-pays rule.

According to the so-called American rule, each party that was involved in a lawsuit bears its own costs related to litigation process, including attorney fees, regardless of who is successful in the end<sup>17</sup>. Besides USA, Japan follows the American rule as well<sup>18</sup>. In contrast to American rule, loser-pays rule means that prevailing party may recover all or part of its attorney fees it suffered from the losing party<sup>19</sup>. Most of the countries around the globe, including Germany, France, England, Australia and Turkey adopt the loser-pays approach<sup>20</sup>.

## II. ZAPATA CASE AND ITS REASONING

### A. FACTS

Zapata (plaintiff), a Mexican company, and Lenell (defendant), an American company, entered into a sales contract according to which Zapata

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16 **Schletriem** (2002), dn.15.

17 **Fletcher**, p. 125.

18 **Fletcher**, p. 135.

19 **Fletcher**, p. 135.

20 **Gotanda, John Yukio** (1999) 'Awarding Costs and Attorneys' Fees in International Commercial Arbitrations', *Michigan Journal of International Law* V: 21 I: 1 available at: <<http://repository.law.umich.edu/mjil/vol21/iss1/1> >, l.a.d. 9.10.2017 p. 8. 'Countries that follow the principle that costs follow the event include, among others, Australia, Austria, Brazil, Canada, Chile, Colombia, Costa Rica, Denmark, Dominican Republic, France, Germany, Greece, Hungary, India, Italy, Iran, Luxembourg, Mexico, the Netherlands, New Zealand, Portugal, Romania, Switzerland, Turkey, and Yemen.' "In England, Germany, and Switzerland, the amount of attorneys' fees is determined by a fixed fee schedule, which may not reflect the actual fees incurred."

sold 1,600,000 tin cookies to Lenell but Lenell failed to fulfill its payment obligation. Following that, Zapata (plaintiff) initiated court proceedings in the Federal District Court of Illinois to recover payment for its delivered products. In the end, plaintiff was successful in its claim and defendant 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, plaintiff's apparent success was diminished by defendant'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 plaintiff could reimburse from defendant the legal fees it had suffered as loss under Article 74 of the CISG. The Federal District Court held that attorney fees are recoverable under CISG, but the Appellate Court disagreed and ruled that they are not. District Court's decision in favor of reimbursement of attorney fees was based on two grounds. Firstly, plain meaning of the article 74 CISG encompassed attorney fees. Secondly, CISG's purpose to achieve uniformity and certainty required recovery of attorney fees because American rule was not applicable to the case. District court reasoned that because fee-shifting rules are substantive in nature, the award of fees is governed by the CISG instead of domestic procedural rules<sup>21</sup>. Reasoning of the district court indicates that the court was not influenced by its domestic rules while applying CISG. However, the Appellate court reversed this decision holding that attorney fees are not recoverable under article 74 CISG.

## **B. REASONING BEHIND APPELLATE COURT'S ZAPATA DECISION**

While concluding that attorney fees are not recoverable under CISG, the Appellate Court, including Judge Richard Posner, set forth three main reasons.

Firstly, the court stated that attorney fees are a procedural issue which is not covered by the Convention's sphere of application. Judge Posner argued that: "The Convention is about contracts, not about procedure. The principles

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21 See Zapata Case, *supra* n. 2.

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.” Judge Posner’s approach found support among scholars such as Lookofsky and Fletcher who also argued that the awarding of attorney fees should be treated under domestic law instead of CISG because it is part of procedural law<sup>22</sup>. While it is true that the CISG only governs formation of contracts and rights and obligations of buyer and seller as is stipulated in article 4 of CISG, on what grounds Judge Posner and the Court made this procedural-substantive distinction for attorney fees is not addressed in the case as there were no reference to either doctrine or case law.

Secondly, the court alleged that recovery of attorney fees under the convention would result in anomalies. The court noted that a successful claimant would be able to recover its attorney fees since it is established that the defendant breached the contract and requirements under CISG 74 would be met. However, in a case where the respondent prevails in the proceedings, defendant would not be able to recover its attorney fees given that there is no breach of contract on plaintiff’s part. The court concluded that this would cause a violation of the principle of equality between parties. Damages provisions (Article 74-77) of CISG apply both to the obligations of the buyer and the seller and this seems to be the logic behind court’s reason although there was no reference to this. In this case, both parties would suffer from attorney fees but only a successful claimant would be reimbursed. This argument set forth by the Appellate court stands out as the most convincing. According to Felemegas, CISG is based on the consideration that buyer and seller should be treated equally and allowing recovery of attorney fees under CISG would create inequalities between seller and buyer (plaintiff and defendant) which would be contrary to the intention of the drafters of the CISG<sup>23</sup>.

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22 **Fletcher, Harry M./Lookofsky, Joseph** (2008) ‘Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal’, *The Vindobona Journal of International Commercial Law & Arbitration*, V : 7; University of Pittsburgh Legal Studies Research, available at SSRN: <<https://ssrn.com/abstract=1311456>>, l.a.d. 23.10.2017, p. 95.

23 **Felemegas, John** (2002) ‘An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals’, *Pace International Law Review*, available at: <<https://www.cisg.law.pace.edu/cisg/biblio/felemegas4.html>> , l.a.d. 21.10.2017, Pp. 91-147.



Thirdly, in *Zapata*, the court referred to the travaux préparatoires (preparatory work) of CISG and stated that if the U.S. delegation had known that the application of CISG could displace the American Rule at the time the Convention was signed, they would have refused to sign convention<sup>24</sup>. The appellate court reasoned that USA would not have abandoned its ‘each party bears his own costs rule.’ Furthermore, court also stipulated that drafters of the CISG was silent on the issue of attorney fees and because they left it to domestic law.

### III. CRITICISMS AND COUNTER-ARGUMENTS AGAINST ZAPATA CASE

*Zapata* case and reasoning behind it has received heavy criticism over the years although there was strong support for its conclusion in rejecting the recovery of attorney fees<sup>25</sup>. These criticisms will be discussed below.

#### A. SUBSTANTIVE-PROCEDURE DISTINCTION

Classifying an issue related to litigation process as substantive or procedural and subjecting is not resolved easily in some instances<sup>26</sup>. If an issue has substantive law character, it is treated under *Lex causae* (law applicable to substantive matters); if it is procedural in nature, it is subject to *Lex fori* (law of the forum)<sup>27</sup>.

There are four primary theories which addresses how the substantive-procedural distinction should be made. First of these theories is classification based on *Lex fori*. According to this theory, “interpretation of legal rules of a country should be made based on the rules of that country; because every legal system should determine how a certain norm that it has should be understood<sup>28</sup>.” Second theory is called classification based on *Lex causae*. This

24 See supra n. 2.

25 **Flechter/Lookofsky**, Pp. 93-103.

26 **Şanlı Cemal/Esen Emre/Figanmeşe-Ataman İnci** (2016) *Milletlerarası Özel Hukuk*, 5. Bası, İstanbul, Vedat Yayıncılık, p. 332.

27 **Şanlı/Esen/Figanmeşe-Ataman**, p. 333.

28 **Erdoğan, Ersin** (2016) *Medeni Usul Hukuku Kurallarının Yer Bakımından Uygulanması*, Ankara, Yetkin Yayınları, p. 49.

theory stipulates that a certain matter should be classified as procedural or substantive according to the law applicable to the substantive issues<sup>29</sup>. Third theory is autonomous classification which is based on the notion that legal terms in different jurisdictions should be examined by comparison and a common pool of legal terms should be constituted and applied<sup>30</sup>. Fourth theory, namely the functional classification theory, sets forth that classification should be made by creating independent systematic terms and then, by comparing the function, meaning and purpose of these foreign law terms<sup>31</sup>.

Analyzing and explaining these theories in detail is beyond the scope of this article. However, it is sufficient to say that the Appellate Court in Zapata case has adopted the Lex fori classification and ruled that attorney fees are labelled as procedural matter under US law.

The Appellate Court in Zapata relied on the idea that attorney fees were not governed by the Convention because attorney fees are a mere procedural matter which should be resolved according to domestic procedural law. The appellate Court reasoned that “The [CISG] is about contracts, not about procedure.”

Qualifying attorney fees as a mere procedural matter was the basis for The Appellate Court’s decision. However, procedural-substantive distinction should not be decisive criteria on the issue of attorney fees. As commentator Bruno Zeller points out, even if an issue, such as attorney fees, is considered as procedural, it can still be governed by CISG if it is within the sphere of application of the CISG<sup>32</sup>. If attorney fees are classified as substantive, they may be dealt with under CISG 74, if they are deemed to be procedural, they can still be covered by the Convention. Furthermore, attorney fees are strongly linked with the breach of contract because breach forces the aggrieved party to commence litigation process and incur attorney costs. Schletriem touches on this specific character of the attorney fees by saying:

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29 **Erdoğan**, p. 50.

30 **Erdoğan**, p. 52.

31 **Erdoğan**, p. 53.

32 **Zeller**, p. 2.

“Merely because the rules concerning cost-bearing for litigation costs and/or attorney’s fees contained in domestic civil procedure codes are classified as “procedural laws” should not obscure regard for the compensatory character of such rules<sup>33</sup>”. Article 74 of CISG covers all types of losses if breach of contract results in loss and it is obvious that breaching party’s act causes the aggrieved party to seek for legal counsel. Hence, attorney fees are within the boundaries of CISG; even if they are deemed as procedural, they can still be resolved by the Convention. Article 11 of CISG can be provided as an example to demonstrate how issues labelled as ‘procedural’ can be treated under the Convention. Article 11 states that “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses”. Prohibition on proving a contract by witnesses is considered to be subject to domestic procedural law<sup>34</sup>. In countries where domestic rules foresee that certain contracts can only be proven by means of a writing, this domestic rule is modified by CISG article 11 so that contract may be proven by any means contrary to domestic procedural rules<sup>35</sup>.

Article 7(1) CISG requires that courts and tribunals should have regard for the international character of the Convention<sup>36</sup>. International character criteria means that provisions of the Convention should be interpreted independent of any local law concept and they should be given ‘CISG-meaning’<sup>37</sup> Commentator Lookofsky puts forth that if courts interpret CISG under the guidance of their domestic law perspectives, erroneous CISG results may occur<sup>38</sup>. CISG is an International Convention which has the purpose of removing legal barriers in

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33 **Schletriem** (2007), dn.15.

34 **Erdoğan**, p. 270.

35 **McMahon, Anthony J.** (2006) ‘Differentiating between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining “Governed by” in the Context of Article 7(2)’, Volume 44 of Columbia Journal of Transnational Law, available at: <<https://www.cisg.law.pace.edu/cisg/biblio/mcmahon1.html#iii>>, l.a.d. 25.10.2017.

36 CISG article 7(1) Supra n.1.

37 **Huber**, p. 7.

38 **Lookofsky, Joseph** (2000) ‘The 1980 United Nations Convention on Contracts for the International Sale of Goods’, Published in J. Herbots editor / R. Blanpain general editor, International Encyclopaedia of Laws - Contracts, Suppl. 29, available at: <<http://www.cisg.law.pace.edu/cisg/biblio/lookofsky.html#77-6>>, l.a.d. 28.09.2017, Pp. 1-192.

international trade and promoting the development of international trade as is stated in its preamble<sup>39</sup>. For this reason, when courts and tribunals apply and interpret CISG, they should abstain from making reference to domestic law approaches and act as if they sit as an international court.

CISG Advisory Council Opinion's comments on substantive-procedural distinction shed light on the argument that why qualifying a certain issue as procedural or substantive is not in conformity with the CISG:

"The issue of whether litigation expenses should be considered as damages for purposes of Article 74 cannot be resolved through a substance/procedure distinction. Whether a matter is considered substantive or procedural may vary from jurisdiction to jurisdiction and may depend on the circumstances of a particular case. Relying upon such a distinction in this context is outdated and unproductive<sup>40</sup>."

Procedural-substantive distinction to resolve the issue of attorney fees should be rejected for two primary reasons. Firstly, such distinction which has a local law origin is not compatible with the application and interpretation of the CISG which mandates an international character. Secondly, this distinction is not decisive criteria because CISG can be applied to procedural matters as well.

## B. PRINCIPLE OF EQUALITY

In Zapata case, the Court bring forth the point that whereas the successful claimant would reimburse its attorney fees owing to defendant's breach of contract, successful defendant would not be able to recover its costs since there was no breach and therefore recovery of attorney fees under CISG would lead to inequalities between parties. Damages provision of CISG (74-77) is regulated under Chapter 5 and the title of this Chapter is as follows: 'Provision Common to the Obligations of the Seller and of the Buyer. Hence, both seller and buyer are entitled to resorting to damages remedy.

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39 CISG Preamble states that 'The States Parties to this Convention, ...Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,'... see supra n. 1.

40 CISG-AC Opinion No. 6, see supra n. 4.

In a case where plaintiff wins the case, it will be awarded its attorney expenses because breach of contract on defendant's part is established. However, if the defendant succeeds in its defense, it means that the contract was breached by neither party so that the breach of contract requirement is not fulfilled and CISG 74 is not applicable<sup>41</sup>. Therefore, in this case, both parties would incur financial losses in form of attorney fees in the dispute but only plaintiff would be compensated for that and parties would not be treated equally under the Convention. The issue becomes how then, equality principle can be ensured. For this problem, Bruno Zeller presents a very compelling argument which reads as follows:

“If the respondent wins the legal issue, then the court in essence decides that there was no breach. In this case specifically, the question of the applicability of Article 74 does not arise. What has happened is that now a gap exists which needs to be filled by domestic law. Does it create an inequality? The answer is no. In the first place, if there is a breach, then the CISG potentially applies. If there is no breach that is, the defendant wins the remedy must be sought under the applicable domestic law, as the CISG is silent on attorneys' fees. Equality is guaranteed not entirely via the CISG, but by the applicable governing law<sup>42</sup>.”

If it is determined that neither of the parties breached the contract, the article 74 of the CISG would not be applicable to the expenses parties suffered from. In this case, successful defendant may resort to domestic law remedies since ‘what has happened is that now a gap exists which needs to be filled by domestic law<sup>43</sup>.’ This gap-filing method to address the violation of equality problem set forth by Professor Zeller ensures that both claimant and respondent are reimbursed for their legal fees, successful plaintiff under CISG and prevailing respondent under domestic law, and principle of equality is not violated. Another solution to the inequality issue has been proposed based on

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41 **Zeller, Bruno** (2013) ‘Attorneys' Fees -- Last Ditch Stand?’, Villanova Law Review: 761 V:58 I: 4 available at: <[http://digitalcommons.law.villanova.edu/vlr/vol58/iss4/16?utm\\_source=digitalcommons.law.villanova.edu%2Fvlr%2Fvol58%2Fiss4%2F16&utm\\_medium=PDF&utm\\_campaign=PDFCoverPag](http://digitalcommons.law.villanova.edu/vlr/vol58/iss4/16?utm_source=digitalcommons.law.villanova.edu%2Fvlr%2Fvol58%2Fiss4%2F16&utm_medium=PDF&utm_campaign=PDFCoverPag)>, l.a.d. 25.10.2017, p. 6.

42 **Zeller**, p. 6.

43 **Zeller**, p. 7.

the duty to act in good faith: “In such a situation as Judge Posner's hypothetical, the plaintiff could be found to have breached contract by bringing a non-meritorious claim in violation of the duty of good faith in international trade under article 7(1). Thus, the defendant would be entitled to collect damages under article 74<sup>44</sup>.” However, considering CISG 7(1) does not explicitly impose good faith duty on parties, this argument is hard to justify. If this issue is left to domestic law as Zeller argues, it would be more viable. In conclusion, violation of equality argument should not prevent recovery of attorney fees under CISG because this problem may be overcome by abovementioned methods.

### C. DRAFTING HISTORY

One of the reasons of the Appellate Court’s decision was based on lack of intent of Convention drafters because they chose to not regulate the issue of attorney fees under the CISG and left it to *Lex fori*. Although the court first stated that attorney fees was a gap within CISG, it then concluded that there were no general principles to resolve the issue in accordance with article 7(2) CISG, therefore the issue should be decided by domestic law. The Court argued that since attorney fees are not referred to under CISG article 74 specifically, it is a gap to be filled. Article 7(2) provides that “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.” Unfortunately, the court ignored that principle of full compensation could be incurred from article 74 CISG as a general principle to fill the gap if there is any<sup>45</sup>.

Commentator Bruno Zeller argues that because the attorney fees were never addressed during preparatory work, the issue hasn’t been determined in

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44 **Dixon, David B.** (2007) ‘Que Lastima Zapata! Bad CISG Ruling on Attorneys’ Fees Still Haunts U.S. Courts’ *University of Miami Inter-American Law Review*: 405 available at: <<http://repository.law.miami.edu/umialr/vol38/iss2/4>>, l.a.d. 13.10.2017, p. 427.

45 **Dixon**, p. 424.

positive or negative way and principle of full compensation weighs more compared to the lack of intent regarding filling the gap in accordance with CISG 7(2)<sup>46</sup>. Convention drafter's silence on the issue of attorney fees does not make attorney fees outside the scope of the Convention<sup>47</sup>. According to Zeller, if the Appellate Court deemed that there was a gap within the Convention, the Court then should have considered the words of the provisions within the four corners of the CISG first, before resorting to extrinsic materials such as preparatory work. Unfortunately, the Appellate Court ignored the clear wording of CISG article 74 and principle of full compensation by directly using the preparatory work for gap-filing.

Professor Zeller also compares attorney fees with the issue of burden of proof to counter-argue Appellate Court's reasoning:

"It is universally accepted that in order to have a gap, the issue in question cannot be explicitly governed within the CISG nor explicitly excluded. That said, both the burden of proof and attorneys' fees would qualify as potentially falling under general principles. The point is that the burden of proof has been rejected in the travaux préparatoires, whereas attorneys' fees have not. From that point of view alone, the burden of proof should be excluded and governed by domestic law, which is not<sup>48</sup>." This example illustrates that even if an issue is excluded during preparation phase by the drafters, as evidenced by burden of proof, that issue can still be governed by CISG because preparatory work and drafters' intention is not always determinative. Drafters' intention can be taken into account, but it is crucial to keep in mind that it is not the sole factor to give regard to.

Therefore, Appellate Court's reference to preparatory work of the Convention does not stand on solid grounds given that it ignores more powerful criteria, namely the principle of full compensation in favor of lack of intent on drafter's part to include attorney fees.

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46 Zeller (2013), p. 3.

47 Zeller (2013), p. 3.

48 Zeller (2013), p. 3.

#### IV. OTHER CASES ON THE ISSUE OF ATTORNEY FEES

Although Zapata case is the one that triggered lively discussions on the issue of attorney fees, there are other cases which addressed this issue. Below, some of these cases will be addressed but it should be noted that full texts of some of these cases are available on the internet only in their original language and they are not translated into English. However, they demonstrate that the issue of attorney fees remains unresolved because some courts have awarded attorney fees as damages under CISG whereas some others have awarded them under procedural rules.

A court from Swiss Canton has concluded that, in a dispute concerning parties from Germany and Switzerland, attorney fees were reimbursable under article 74 CISG in 1997<sup>49</sup>. According to the abstract, "the court reasoned that all costs incurred in the reasonable pursuit of a claim are refundable, which included retaining a lawyer in the country of each party (article 74 CISG)<sup>50</sup>." According to Harry Fletcher, there are several other foreign cases in which attorney fees were addressed but, due to the fact that there are no full proper English translations of these cases, it is not clear on what grounds the issue was resolved and what was considered as attorney fees<sup>51</sup>. For example, Oberlandesgericht of Duisseldorf (regional court of Appeal) awarded attorney fees under German Code of Civil Procedure whereas pre-litigation costs were reimbursed under CSG 74 though the court's reasoning is not explicit<sup>52</sup>. In an ICC arbitration case attorney fees were recovered under article 74 CISG although the scope of the attorney fees are unknown<sup>53</sup>. In a 1996 decision, a

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49 Decision of December 19, 1997, Handelsgericht des Kantons Aargau (Switzerland), No. OR.97.00056, English abstract available as CLOUT Abstract no. 254, available at <<http://cisgw3.law.pace.edu/cases/971219s1.html>>, l.a.d. 23.10.2017.

50 English abstract available as CLOUT Abstract no. 254, available at <<http://cisgw3.law.pace.edu/cases/971219s1.html>>, l.a.d. 23.10.2017.

51 **Fletcher**, p. 127.

52 **Fletcher**, p. 128. Also see: Decision of July 11, 1996, Oberlandesgericht Diisseldorf (Germany), No. 6 U 152/95, available at <http://cisgw3.law.pace.edu/cases/960711g1.htm>>, l.a.d. 23.10.2017.

53 ICC Arbitration Case No. 7585 of 1992, ICC International Court of Arbitration Bulletin 60 (1995), full text and abstract available on Unilex, abstract available as CLOUT Abstract no. 301, available at <<http://cisgw3.law.pace.edu/cases/927585i1.html>>, l.a.d. 22.10.2017.



German court has considered attorney fees under German Civil Procedure Code and awarded attorney fees accordingly; the court did consider attorney fees as a procedural matter governed by domestic civil procedural rules<sup>54</sup>. Fletcher, who is still a strong advocate for exclusion of attorney fees from CISG, further notes that despite inherent ambiguities in these cases, “it is clear that a number of non-U.S. decisions interpret Article 74 of the CISG to permit recovery of damages for attorneys' fees that would not be compensable under the traditional American rule on attorneys' fees<sup>55</sup>.”

Unfortunately, since the full texts of most of these cases are not available in English, it is not possible to fully comprehend how the courts and tribunals approached this issue in the abovementioned cases. However, it can be inferred from the English abstracts of these cases that there are conflicting approaches regarding the recovery of attorney fees under CISG and the issue remains unresolved in litigation practice.

## V. INTERPRETATION WITH REGARD TO TRANSNATIONAL CIVIL PROCEDURE

### A. ARE ATTORNEY FEES A GAP UNDER CISG?

Article 7 of the CISG provides rules regarding the interpretation of the Convention and filling gaps under the Convention. This provision 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.”

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54 Decision of January 29, 1996, Amtsgericht Augsburg (Germany), no. 11 C 4004/95, English abstract and original text on Unilex, available at: <<https://cisgw3.law.pace.edu/cases/960129g1.html>>, l.a.d. 23.10.2017

55 Fletcher, p. 134.

It should be noted that Article 7(2) CISG only covers situations where a matter is governed by Convention but not expressly settled by it<sup>56</sup>. Therefore, issues which are not governed by Convention, such as validity of contract and third party rights, are not subject to gap-filing mechanism of CISG 7(2) because they are directly subject to domestic law regulations<sup>57</sup>. These types of gaps are called external gaps in the doctrine<sup>58</sup>. In regards to gaps which will be filled under CISG, Zeller sets forth that “A gap occurs when the legislator has not explained how a particular legal issue can be solved. It is an unintentional or intentional incompleteness in a code<sup>59</sup>.”

Sometimes, it can be difficult to draw a certain line between interpretation and gap-filing. To make this distinction, firstly, it should be determined whether interpretation of a provision in CISG provides a solution: if it does, that provision needs to be interpreted without resorting to gap-filing methodology<sup>60</sup>. Therefore, if the interpretation of a specific provision provides an answer, gap-filing should not be resorted to.

In Zapata Case, the Appellate Court claimed that attorney fees were a gap within the Convention because they were not addressed during the preparatory work and they were not named specifically in article 74 of CISG. The author of this article contends that the Appellate Court’s resorting to article 7(2) was not justified for following reasons.

First, the interpretation of the CISG 74 cover the issue of attorney fees and resorting to gap-filing method is unnecessary. CISG article 74 reads that: “Damages for breach of contract by one party consist of a sum equal to the loss...” CISG avoids making any reference to domestic law classifications such as ‘non-performance loss, incidental loss or integrity interest’ and in principle, any types of loss are recoverable<sup>61</sup>. However, It is also true that the term “loss” in article 74 carries ambiguity to a certain extent given it does not specifically

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56 **Lookofsky** p. 1-192.

57 **Lookofsky** p. 1-192.

58 **Zeller, Bruno** (2003) ‘Four-Corners- The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods’, available at: <<http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>>, l.a.d. 25.10.2017.

59 **Zeller** (2003), dn.58.

60 **Zeller** (2003), dn. 58.

61 **Huber**, p. 269.

describe which types of losses are reimbursable or if there are any non-reimbursable loss.

Considering there is some unclarity on the scope and meaning of the term 'loss', this term should be interpreted in accordance with article 7(1) to decide if attorney fees fall under the category of loss. Guidelines provided by article 7(1) CISG can provide an answer to this question. Unfortunately, The Appellate Court in Zapata case did not make any effort to interpret the Convention as required by article 7(1) and directly resorted to gap-filing methodology (7/2) while it was unnecessary.

Secondly, The Appellate Court reasoned that since there was no suggestion in the background of the Convention which indicates that "loss" should include attorney fees, it was not governed by CISG article 74. Court's analysis of the CISG 74 is erroneous because circumstances that may result in breach of contract are not limited in number and CISG only states the basic principles to govern compensation in case of a breach which can all be expected from an International Convention<sup>62</sup>.

If the Appellate Court's arguments are to be followed, any type of loss such as loss of goodwill or loss of resale profit can be deemed as a gap within the Convention given that these losses are not specifically referred to in article 74 of CISG or not addressed during preparatory work of the Convention. However, it is beyond doubt that damages for loss of goodwill and pecuniary loss are reimbursable under CISG article 74<sup>63</sup>. "The nature of article 74 is inclusive, not exhaustive<sup>64</sup>." Therefore, considering attorney fees issue as a gap is inconsistent with the article 74 because this provision does not exclude any type of loss. If attorney fees are considered to be a gap, then any type of loss can be deemed as a gap, given that except for loss of profit, no type of loss is specifically named, and this would be quite contrary to the principle of full compensation and clear wording of article 74 of CISG.

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62 **Honnold, John O.** (1999) Uniform Law for International Sales under the 1980 United Nations Convention 3rd edition, 1999 available at: <<http://cisgw3.law.pace.edu/cisg/biblio/ho74.html>>, l.a.d. 12.09.2017, Pp. 445-448.

63 **CISG-AC Opinion No. 6**, see supra. n. 4.

64 **Dixon**, p. 424.

To conclude this part, there is a hierarchy between interpretation of the Convention (7/1) and gap-filing (7/2). The term loss carries some ambiguity and this term should be interpreted under article 7/1 to determine if it covers attorney fees. Therefore, gap-filing mechanism can not be used for attorney fees because interpretation of article 74 provides a solution in this matter as will be explained below.

## **B. HOW TO PROPERLY INTERPRET ARTICLE 74 CISG UNDER ARTICLE 7(1) AND CISG'S PREAMBLE TO RESOLVE THE ISSUE OF ATTORNEY FEES?**

CISG Article 7(1) stipulates how the text of the Convention needs to be interpreted and calls for the convention to be interpreted with regard to "its international character" and the "need to promote uniformity in its application."

'The requirement to take into account the international character of the CISG seeks to secure the principle of autonomous interpretation of the principles of the CISG and prohibits the use of technical terms and principles of domestic laws, especially the domestic law of the user<sup>65</sup>.'

In addition to article 7(1), the preamble of the CISG may also provide guidance for interpretation. The preamble of the CISG calls for the "removal of legal barriers in international trade and promoting the development of international trade<sup>66</sup>."

Three criteria set out by the preamble of the CISG and article 7(1) should be taken into account in understanding the meaning and scope of 'loss' and determine if attorney fees are reimbursable under CISG 74: 'International character of the Convention, the need to promote uniformity in its application, removal of legal barriers in international trade and promoting the development of international trade'. Considering these criteria, ALI/

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65 **Schlechtriem, Peter/Butler, Petra** (2009) UN Law on International Sales The UN Convention on the International Sale of Goods, Springer-Verlag Berlin Heidelberg, p. 48.

66 CISG Preamble: 'The States Parties to this Convention, being of the opinion 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' see supra n. 1.

UNIDROIT Transnational Civil Procedure's published rules may provide guidance in the interpretation of the CISG because these rules have 'the aim of reconciling differences among various national legal systems'<sup>67</sup>. Similar to these rules, CISG's goal is to unify the set of rules which applies to international contracts instead of diverse legal regimes<sup>68</sup>. Commentator Bruno Zeller noted that ALI/UNIDROIT Transnational Civil Procedure's rules can be used to decide on the issue of attorney fees and this may be a helpful way in achieving unification purpose of CISG<sup>69</sup>.

As can be seen, these principles can be a tool in achieving uniform application and interpretation of CISG article 74 with regard to issue of attorney fees since they share the same goals as CISG. Principle 25.1 of ALI/UNIDROIT Transnational Civil Procedure, states that a "winning party ordinarily should be awarded all or a substantial portion of its reasonable costs... [including] lawyers' fees." The commentary on Principle 25.1, notes that the "award of attorneys' fees is the rule prevailing in most legal systems," with the exception for China, Japan, and the United States [ALI/UNIDROIT, pg. 46]. In light of this principle, the term loss in article 74 CISG should be interpreted in a way that includes the attorney fees for following reasons.

Firstly, this mode of interpretation would be more efficient to bolster the development of international trade and promoting uniformity in CISG's application as is stipulated in CISG's preamble and article 7(1). Commercial enterprises from different jurisdictions enter into complex contractual relationships which involves high-finance-related risks and therefore, certainty and predictability is of utmost concern. Despite the fact that the loser-pays approach is dominant among jurisdictions, each country's rules and policies on this issue varies significantly<sup>70</sup>. It is also important to note that there are different variables in the calculation of the reimbursable attorney

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67 'ALI/UNIDROIT Principles of Transnational Civil Procedure' available at: <<http://www.unidroit.org/english/principles/civilprocedure/aliunidroitprinciples-e.pdf>>, P. 2.

68 **Felemegas, John** (2001) 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)', Kluwer Law International, available at: <[http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html#N\\_1](http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html#N_1)>, la.d. 22.10.2017, Pp. 115-265.

69 **Zeller**, p. 11.

70 See **Gotanda**, 'in England, Germany, and Switzerland, the amount of attorneys' fees is determined by a fixed fee schedule, which may not reflect the actual fees.' p. 8.

fees such as ‘the amount in controversy, the degree to which the claim was successful, possible delay in proceedings by a party and its general conduct, and (also) the complexity of the questions to be decided<sup>71</sup>.’ “The existence of different legal systems around the world acts as a hindrance to the smooth operation of international trade, as the diversity of national laws produces conflict and legal uncertainty<sup>72</sup>.” In case the issue of attorney fees are dealt with by domestic laws which contain such a wide range of calculation methods and perspectives, the international commercial parties involved in litigation proceedings will suffer from attorney fees which is directly linked to breach of contract ( a contract which is governed by CISG in principle), but they will be subject to very diverse legal regimes in each different country for the recovery of those expenses and consequently, this will have adverse effects on the harmonization process and further development of the international trade.

On the contrary, if recovery of attorney fees are governed by CISG, differences caused by diverse domestic legal regimes will be set aside and one single uniform law (CISG) will govern how attorney fees should be allocated. Scholars Fletcher and Lookofsky’ comments that if attorney fees are subject to the provisions of CISG instead of domestic law regimes, this solution would at least realize the Convention’s goal of uniformity because it strikes a delicate balance between loser-pays and American-rule jurisdictions although it should be noted that these authors strongly support the Appellate Court’s decision to exclude attorney fees<sup>73</sup>.

At first sight, this solution may give the impression that it favors loser-pays rule over American-rule. However, a closer analysis would reveal that this is not the case. As Professor Harry Fletchner points out, subjecting attorney fees to CISG would introduce material alterations to the loser-pays rule countries<sup>74</sup>. Fletchner further illustrates this point:

“CISG Article 74 provides that only losses foreseeable at the time the contract is concluded are recoverable, and Article 77 requires that those

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71 **Schlechtriem Peter** (2007) ‘Legal Costs as Damages in the Application of UN Sales Law’ *Journal of Law and Commerce*, V: 26:71, p. 73.

72 **Felemegas**, Pp.115-265.

73 **Flehtner/Lookofsky**, p. 99.

74 **Fletchner**, p. 152.

claiming damages "take such measures as are reasonable in the circumstances to mitigate the loss." In combination, these provisions would allow courts to police in a general fashion the reasonableness of claimed attorneys' fees. Other more specific safeguards against abuse, however, would be lost. For example, loser-pays regimes may set a schedule of legally recoverable fees, or provide only for recovery of a percentage of legal costs. Such domestic law limitations would be unavailable if the CISG damages provisions (which contain no such regulations) were construed to provide for damages to cover a prevailing claimant's attorneys' fees<sup>75</sup>."

As can be seen, allowing reimbursement of attorney fees under CISG does not favor loser-pays rule because loser-pays rule countries' rules on attorney fees demonstrate distinct differences from CISG regime. As an example, Turkey is a country which adopts loser-pays rule in principle under article 326 of the Turkish Code of Civil Procedure number 6100. This rule is subject to different limitations such as article 327 of Procedural Code which states that 'a party who caused the legal proceedings to last longer or caused the expenses to increase unnecessarily by acting in bad faith, may be ordered to pay all or part of the legal costs even if he wins the case. Even though Turkey adopts the loser-pays approach, a concept such as bad faith may play a role in modifying this rule. Therefore, reimbursement of attorney fees under CISG would not favor either loser-pays rule or American-rule because it brings substantial changes to both systems' approach.

To put this argument into context, let's assume that party A and party B conclude a sales contract and the contract is breached by party B. Party A will initiate court proceedings against the breaching party and incur legal costs related to breach. If the issue of attorney fees is left to the domestic legal system, aggrieved party may face uncertainties in terms of calculation, scope and allocation of attorney fees. For instance, courts in some jurisdictions rely on the concept of bad faith while deciding on the recovery of attorney fees<sup>76</sup>. It is also crucial to keep in mind that good faith is not introduced as a duty for commercial parties to comply with under the CISG because domestic legal

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75 **Fletcher**, p. 152.

76 **Gotanda**, p 8.

regimes follow diverse approaches and this would result in ambiguities in the application of the convention<sup>77</sup>. In this case, party A or party B (or both) may face unpredictable results in the recovery of attorney fees because they deal with the so-called good faith concept which varies from jurisdiction to jurisdiction and which they are probably not familiar with at all. As is demonstrated in this situation, if attorney fees are treated by local laws, international commercial parties are bound to face and deal with arbitrary and unforeseeable set of rules and concepts for reimbursing their incurred attorney expenses. Diverging approaches on reimbursement of attorney fees under CISG may result in forum-shopping<sup>78</sup>. A commercial party may choose to start litigation proceedings where it deems as the most appropriate to reimburse its attorney fees. However, application of CISG 74 to attorney fees would prevent such actions.

To conclude, domestic law-oriented views on the issue of attorney fees impedes the proper application of the convention and harmonization and development of international trade. Therefore, if recovery of attorney fees are dealt with by CISG 74 and its interpretation rules, any party who is involved in an international sales contract (to which the CISG applicable) will be able to foresee how attorney fees are recovered and allocated as opposed to diverging local law regimes which can be vague and unpredictable. This will guarantee commercial parties the legal certainty that they expect when they enter into international sales contracts. Consequently, application of more harmonized, predictable rules of CISG to the issue of attorney fees (CISG 74) will contribute to establishing a more trustworthy environment in which international trade will flourish more because commercial enterprises will be more encouraged to involve in international sales contract. Furthermore, uniform application of CISG 74 to the issue attorney fees serves well to the article 7(1) of the Convention which requires uniformity in CISG's application and also to the aim of removing of legal barriers as stipulated in its preamble.

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77 **Honnold** (1999), Pp. 88-114.

78 **Dixon**, p. 429.



## VI. CONCLUSION

Article 74 CISG does not explicitly state if the attorney fees are recoverable under the Convention. In Zapata case appellate court held that attorney fees are not recoverable because it is a procedural matter beyond the scope of the convention. The court also reasoned that recovery of attorney fees under CISG would create inequalities between parties because successful defendant would not be reimbursed. Third reason given by the court was that USA would not have signed the Convention had it known that attorney fees was recoverable.

Reasoning of the Appellate Court in Zapata case drew some criticism from doctrine. Firstly, procedural-substantive distinction is unproductive and reflect a domestic law-oriented approach to Convention. Secondly, no inequality would occur given when respondent prevails there would be no breach of contract and article 74 would not be triggered. Thirdly, preparatory work does not include any comments on the attorney fees issue and therefore is not a decisive factor.

Substantive procedural distinction should not be the decisive criteria to resolve the issue of attorney fees. Firstly, it is considered as an outdated and unproductive approach by CISG Advisory Council Opinion because it varies from jurisdiction to jurisdiction. Secondly, CISG applies to procedural matters as evidenced by Article 11 which introduces rules on rules of evidence. Therefore, even if attorney fees are deemed as a procedural matter, CISG may still be applicable. If it is qualified as a substantive matter, CISG deals with substantive matter in principle and it would cover the issue of attorney fees under article 74.

To resolve this issue, solution should be found within the CISG itself. CISG article 7 regulates interpretation of the Convention and how gaps in the Convention should be filled. There is a hierarchy between interpretation and gap-filing; if interpretation of a provision provides an answer, this answer should be adopted and resorting to gap-filing is unnecessary. CISG 74 states that every type of loss is recoverable, but it does not define the scope and meaning of 'loss' in detail and therefore it is ambiguous. Hence, the term 'loss' should be interpreted to decide if attorney fees is a type of recoverable loss under CISG 7(1).

The author of this article contends that attorney fees should be treated under the category of loss under CISG article 74. The term 'loss' should be interpreted according to criteria set out by article 7(1) and CISG's preamble. The need to promote uniformity, removal of legal barriers and development of international trade are factors to consider in interpreting the term 'loss'. ALI/UNIDROIT Transnational Civil Procedure is a set of rules which share the same goal with the CISG, namely realizing a more uniform international trade. For this reason, principle 25.1 of these rules is of some use for interpretation of CISG. Under this rule, attorney fees are defined as a type of reimbursable loss and CISG should be construed to cover the reimbursement of attorney fees because it conforms to CISG's aim of removing legal barriers, nurturing the advancement of international trade and the need to achieve a more uniform application of the Convention around the globe. This would be a one step-forward to a more unified international trade. Furthermore, article 74 of CISG is based on the principle of full compensation. "The purpose of Article 74 is to place the aggrieved party in the same pecuniary position it would have been in had the breach not occurred and the contract been properly performed<sup>79</sup>." Therefore, given that attorney fees arise because of breach of contract, they should be recoverable under CISG.

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79 See supra n. 8.

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