Que Lastima Zapata! Bad CISG Ruling on Attorneys' Fees Still Haunts U.S. Courts

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I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] is an international treaty that establishes uniform rules to govern international commercial contracts in order to remove "legal barriers in . . . and promote the development of international trade."[2] CISG was the successor to the 1964 Convention relating to a Uniform Law on the International Sale of Goods (ULIS),[3] a result of over fifty years of international efforts to create uniform rules of commercial law,[4] or a *lex mercatoria*.[5] In 1986, the United States became a party to the CISG, which went into force in 1988.[6] As a self-executing treaty,[7] U.S. courts are required to apply the CISG, where appropriate, to settle international contract disputes rather than using the previously applicable Uniform Commercial Code (UCC) rules of the various states.[8]

CISG article 74, as well as article 82 of ULIS, provides the rules for calculating damages in cases of contract breach by one of the contracting parties. Damages "consist of a sum equal to the *loss*, including loss of profit, suffered by the other party as a conse-

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1. *See* United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3 [hereinafter CISG], *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf. The CISG currently has sixty-six state parties. *See* Status: 1980 – United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Jan. 1, 2007).

2. CISG, *supra* note 1, at Annex 1.

3. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S 107, *available at* http://www.unidroit.org/english/conventions/c-ulis.htm [hereinafter ULIS].

4. *See* Michael Joachim Bonell, *The Unidroit Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?*, 26 UNIFORM L. REV. 26-39 (1996).

5. *Lex Mercatoria* in English translates to law merchant, which is defined as "[a] system of customary law that developed in Europe during the Middle Ages and regulated the dealings of mariners and merchants in all the commercial countries of the world until the 17th century." BLACK'S LAW DICTIONARY (8th ed. 2004)

6. Sarah Howard Jenkins, *Evolving Sales Law: Highlights of the Shifting Landscape of Arkansas Purchasing Law*, 57 ARK. L. REV. 835 (2005) (citing JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 3 (3d ed. 1999) ("The United States ratified the Convention by December 11, 1986, with the [CISG] becoming effective on January 1, 1988.").

7. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987); *see also* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 51-64 (1996) [hereinafter PAUST, INTERNATIONAL LAW].

8. *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1933).

quence of the breach."[9] Over the past few years, there has been a healthy international debate whether "loss" as defined under CISG article 74 includes attorneys' fees and court costs.[10] The source of this debate originated from conflicting rulings in the case of *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.* (*Zapata*).[11]

In 2001, U.S. District Court Judge Shadur, of the Northern District of Illinois, Eastern Division, found "the normal unrestrained reading of article 74 . . . calls for Zapata's recovery of its attorneys' fees as foreseen consequential damages."[12] In 2002, Judge Posner of the Seventh Circuit Court of Appeals overturned the district court's opinion holding that "[t]here is no suggestion in the background of the [CISG] or the cases under it that 'loss' was intended to include attorneys' fees . . . . though certain pre-litigation legal expenditures . . . would probably be covered as 'incidental' damages."[13] Judge Posner also found the award of attorneys' fees to be part of domestic procedural law, not a matter of substantive treaty law.[14]

This Seventh Circuit opinion has been widely criticized for its

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9. CISG, *supra* note 1, art. 74 (emphasis added). CISG article 74 is essentially a verbatim restatement of article 82 of ULIS. *See* ULIS, *supra* note 3, art. 82.

10. *Compare* Harry M. Flechtner, *Recovering* ATTORNEYS' FEES as Damages Under the U.N. Sales Convention: The Role of Case Law in New International Commercial Practice, With Comments on Zapata Hermanos v. Hearthside Baking, 22 NW. J. INT'L L. & BUS. 121 (2002) [hereinafter Flechtner, *Recovering Attorneys' Fees*] (supporting the Seventh Circuit's ruling in *Zapata*), *and* Harry Flechtner & Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 VINDOBONA J. INT'L COM. L. & ARB. 93 (2003) [hereinafter Flechtner & Lookofsky], *and* Troy Keily, *How Does the Cookie Crumble? Legal Costs Under a Uniform Interpretation of the United Nations Convention on Contracts for the International Sale of Goods*, 2003 NORDIC J. COM. L. 1, *available at* http://cisgw3.law.pace.edu/cisg/biblio/keily2.html [hereinafter Keily], *with* John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Court of Appeals*, 15 PACE INT'L L. REV. 91 (2003) [hereinafter Felemegas] (opposing the Seventh Circuit's ruling in Zapata), *and* Jarno Vanto, *Attorneys' Fees as Damages in International Commercial Litigation*, 15 PACE INT'L L. REV. 203 (2003), *available at* http://cisgw3.law.pace.edu/cisg/biblio/vanto1.html [hereinafter Vanto], *and* Bruno Zeller, *Interpretation of Article 74 – Zapata Hermanos v. Hearthside Baking – Where Next?*, 2004 NORDIC J. COM. L. 1, *available at* http://www.njcl.fi/1_2004/commentary1.pdf [hereinafter Zeller].

11. *See generally* Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., No. 99 C 4040, 2001 WL 1000927 (N.D. Ill Aug. 29, 2001) (awarding Zapata contract damages); Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., No. 99 C 4040, 2002 WL 398521 (N.D. Ill. Mar. 14, 2002) (awarding attorneys' fees as consequential damages under CISG article 74), *rev'd*, 313 F.3d 385 (7th Cir. 2002) (overturning the award of attorneys' fees), *cert. denied*, 540 U.S. 1068 (2003).

12. *Zapata*, 2001 WL 1000927, at *3.

13. *Zapata*, 313 F.3d at 388.

14. *See id.*

lack of authority and questionable analysis of the CISG text.[15] *Zapata* has nevertheless become precedent in the Seventh Circuit, binding lower courts to follow suit. This casenote intends to add another voice to the chorus of those who disagree with Judge Posner's ruling in *Zapata*, and provide additional insight to this lingering debate.

Section II examines the international rules for treaty interpretation, a seemingly mysterious subject for many U.S. judges. Section III reviews the CISG text, explores its drafting history, and discusses its interpretation by courts of other CISG parties and arbitral panels. Section IV returns to the *Zapata* case, presenting the reasoning for both Judge Shadur's and Judge Posner's decisions. Lastly, section V discusses why Judge Posner incorrectly interpreted the CISG and seemingly ignored the international rules of treaty interpretation. It also addresses how Judge Posner's ruling in *Zapata* negatively affects other U.S. courts. Lastly this note suggests appropriate alternative approaches domestic judges could take to interpret the Convention.

II. TREATY INTERPRETATION FRAMEWORK

There are two bodies of law that U.S. judges should consult before passing judgment on treaty interpretation. The first, of course, is the well-developed doctrine of the U.S. Constitution's Supremacy Clause as interpreted by the Supreme Court. The second is the well-developed rule of treaty interpretation of international law embodied in the Vienna Convention on the Law of Treaties (Vienna Convention), as well as decisions from the International Court of Justice (ICJ) and the Permanent Court of International Justice (PCIJ).

A. Supremacy Clause and Treaty Interpretation Under the U.S. Constitution

Article 6, paragraph 2 of the Constitution (the Supremacy Clause) asserts that treaties are supreme federal law.[16] Since 1796, the United States Supreme Court has recognized that fed-

15. *See* Felemegas, *supra* note 10, at 99-128 (criticizing the *Zapata* decision for its lack of authority and incorrect analysis); *see also* Flechtner & Lookofsky, *supra* note 10, §§ 5.1-5.7; Keily, *supra* note 10, at 10-13; Vanto, *supra* note 10, at 220-21; Zeller, *supra* note 10, §§ 3-6.

16. U.S. CONST. art. VI, § 1, cl. 2. ("The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made*, or which

eral judges are bound to apply treaty law.[17] Treaties, however, are subject to the "last-in-time rule." This means that should a Legislative act come after the ratification of the treaty, and the purpose of the act was to clearly supersede the treaty, or if the act and the earlier treaty provision cannot be fairly reconciled, the act will overrule the treaty.[18]

Because self-executing treaties are supreme federal law and presumably coequal with acts of Congress, they should trump inconsistent judicially created federal procedural doctrine.[19] Seemingly, only a subsequent controlling Congressional act on procedural rules could trump treaty law under the Constitution.[20] Even in situations where judicially created procedural rules are controlled by Congress and used to interpret a treaty, in view of the *Charming Betsy* doctrine, these rules of procedure should be interpreted consistently with international law.[21] Thus, U.S. courts should, almost reflexively, find that that treaty law overrides domestic procedural law. Yet, this is not always the case, as illustrated in *Zapata*.

The issue of whether treaty law trumps judicially created procedural rules has been addressed recently in a number of cases

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shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .") (emphasis added).

17. *See, e.g.*, Maiorano v. Baltimore & Ohio R.R., 213 U.S. 268, 272-73 (1909); Hauenstein v. Lynham, 100 U.S. 483, 488 (1879); Fellows v. Blacksmith, 60 U.S. 366, 372 (1857); Strother v. Lucas, 37 U.S. 410, 439 (1838); Worcester v. Georgia, 31 U.S. 515, 593 (1832); Owings v. Norwood's Lessee, 9 U.S. 344, 348-49 (1809); United States v. The Schooner Peggy, 5 U.S. 103, 110 (1801); Ware v. Hylton, 3 U.S. 199, 237, 244, 261, 272 (1796); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).

18. *See, e.g.*, Edye v. Robertson, 112 U.S. 580, 599 (1884); Whitney v. Robertson, 124 U.S. 190 (1888); Chae Chan Ping v. United States, 130 U.S. 581, 599 (1889); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987).

19. *See* Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 AM. J. INT'L .L. 691, 692 (1998) (stating that self-executing treaties, as supreme federal law, should trump inconsistent judicially created federal procedural doctrines).

20. *See, e.g.*, Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 9-10 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States . . . ." (citation omitted)).

21. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("[A]n act of Congress . . . can never be construed to violate [] rights . . . further than is warranted by the law of nations . . . ."); *see also* PAUST, INTERNATIONAL LAW, *supra* note 7, at 107-8 n.9; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

interpreting the Vienna Convention on Consular Relations (VCCR),[22] including cases before the U.S. Supreme Court and the ICJ.[23] On three separate occasions, the ICJ has ruled that the United States has breached aliens' rights under the VCCR by applying domestic procedural rules to deny the aliens' treaty claims.[24] The Supreme Court, despite the ICJ's holdings, has ruled that the use of state procedural default rules to dismiss treaty claims was Constitutionally sound.[25]

Recently, the Supreme Court granted a writ of certiorari to readdress the issue.[26] The Supreme Court, however, subsequently dismissed the writ as being improvidently granted following the release of a Presidential memorandum that stated the United States would discharge its international obligations under the ICJ judgment by having state courts give effect to the decisions "in accordance with general comity principles."[27] Because the Supreme Court's unwillingness to address this issue, in conjunction with the Presidential memorandum, the issue of whether rights under the VCCR trump procedural default rules was raised again in the Texas courts. Ultimately, however, the case was dismissed after the court concluded that the President's memorandum violated the separation of powers doctrine by intruding into

22. *See* VIENNA CONVENTION ON CONSULAR Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

23. *See, e.g.*, Medellin v. Dretke, 544 U.S. 660 (2005) (dismissing certiorari in order for the Texas state court to consider an executive memorandum stating the U.S. would comply with the ICJ's ruling in Avena); Breard v. Greene, 523 U.S. 371 (1998) (denying a petition for a writ of certiorari by enforcing a procedural default against a habeas petitioner's attempt to litigate a VCCR claim on the day of his scheduled execution; holding that the treaty did not trump the procedural rules of the federal courts); Commonwealth v. Diemer, 785 N.E.2d 1237 (Mass. App. Ct. 2003) (holding VCCR article 36 does not supersede procedural default rules); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31) (finding individual rights under VCCR article 36 trump state procedural default rules); Lagrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) (finding individual rights under VCCR article 36 trump state procedural default rules); Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 426 (Nov.10) (finding individual rights under VCCR article 36 trump state procedural default rules).

24. *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31); LAGRAND Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 426 (Nov.10).

25. *See* Breard v. Greene, 523 U.S. 371 (1998) (holding that absent a clear and express statement to the contrary, the procedural rules of the forum state govern the implementation of a treaty in that state).

26. *See* Medellin v. Dretke, 544 U.S. 660, 661 (2005).

27. *Id.* at 663 (citing George W. Bush, Memorandum for the Attorney General Regarding the Compliance with the Decision of the International Court of Justice in Avena (Feb. 28, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html) (unpublished presidential memorandum)).

the judiciary's domain.[28] Therefore, despite the rulings of the ICJ and the determination of the U.S. President that treaty law trumps state procedural law, there is still resistance by courts to recognize or enforce such treaty rights.

B. The Vienna Convention on the Law of Treaties

The general principle of treaty interpretation is expressed by the maxim *ut res magis valeat quam pereat*,[29] meaning a treaty should be interpreted to give effect to its object and purpose. Often referred to as the rule of effectiveness, this principle has been used when the meaning of the text is unclear, preferring the interpretation that gives some effect to a provision over one that does not.[30]

The rule of effectiveness is now embodied in article 31 of the Vienna Convention.[31] Although the United States is not a party to the Vienna Convention, U.S. courts have found that article 31 is an accurate restatement of the customary international law of treaties.[32] The ICJ also consistently finds that the Vienna Convention article 31 is an international custom.[33] Article 31 states, *inter alia*, that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[34]

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28. *See Ex parte* Medellin, No. AP-75207, 2006 WL 3302639, at *9 (Tex. Crim. App. 2006). The case was heard on a successive application for writ of habeas corpus to consider the Presidential memorandum's effect on the Texas state courts ruling in the case. *Id.* at *2.

29. *See* Nat'l Pemberton Bank v. Lougee, 108 Mass. 371 (1871). *Ut res magis valeat quam pereat* literally means "to give effect to the matter rather than having it fail." BLACK'S LAW DICTIONARY (8th ed. 2004).

30. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) [hereinafter Corfu Channel]. In *Corfu*, the ICJ stated that "[i]t would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect." *Id.* at 24.

31. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

32. *See, e.g.*, MARIAN LLOYD NASH, DIGEST OF U.S. PRACTICE IN INT'L LAW 703-705, 767, 769 (1979); Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702, 707 n.6 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir.1973) (applying article 31 to interpretation of Warsaw Convention); Day v. Trans World Airlines, Inc., 528 F.2d 31, 33, 36 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); Denby v. Seaboard World Airlines, Inc., 575 F. Supp. 1134, 1138 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 172 (2d Cir. 1984).

33. *See, e.g.*, Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 1995 I.C.J. 6, 18 (Feb. 15).

34. Vienna Convention, *supra* note 31, art. 31.

The International Law Commission's (ILC) commentary regarding article 31 further supports the effectiveness principle of treaty interpretation. The commentary notes that the ILC

> [i]n so far as the maxim *ut res magis valeat quam pereat*[,] reflects a true general rule of interpretation, [which] is embodied in [article 31] . . . . When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purpose of the treaty demand that the former interpretation should be adopted.[35]

The ILC, therefore, clearly incorporated the effectiveness principle into the text of article 31.[36]

Furthermore, along with article 32, article 31 of the Vienna Convention provides that a treaty is generally to be interpreted according to the four corners of the document.[37] Only in situations where the text of the convention is not sufficiently clear should outside materials be consulted.[38] Article 32 provides for this limited availability to consult supplementary materials when the plain meaning of the text "leaves the meaning ambiguous or obscure [or] . . . leads to a result which is manifestly absurd or unreasonable."[39]

Lastly, and perhaps most relevant to the analysis of this casenote, the Vienna Convention provides interpretive guidance for domestic courts *not* to use domestic laws to interfere with treaty obligations.[40] To this end, article 27 states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[41] Article 27 is consistent with the Supremacy Clause, at least when treaties have not been superseded by a subsequent act of Congress.

Therefore, under the Vienna Convention, U.S. courts should sit as if they are an international law tribunal when interpreting the CISG. State and common law should be set aside when approaching a question of international law, and the issue should

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35. Draft Articles on the Law of Treaties with Commentaries, art. 28(6), U.N. Doc. A/CN.4/SER.A/1967/Add.1 (68.V.2) (1966).

36. *See* Corfu Channel, *supra* note 30, at 24.

37. *See* Vienna Convention, *supra* note 31, art. 31. In addition, article 1 states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty."

38. *See id.* art. 32.

39. *Id.*

40. *Id.* art. 27.

41. *Id.*

be determined by the plain language of the CISG.[42] It is only when the plain language of the text is ambiguous or would lead to an unreasonable result that a court is to look to subsidiary means of interpretation, such as the drafting history or interpretive case law.[43]

III. INTERPRETING WHAT CONSTITUTES "LOSS" UNDER ARTICLE 74

A. *Treaty Provisions*

When an international contract governed by the CISG is breached, the adversely effected party, whether it is the buyer[44] or seller,[45] can seek remedies in the form of damages under articles 74 to 77. Article 74 sets out the general means of calculating these damages where "[d]amages for breach of contract by one party consist of a sum *equal to the loss* . . . suffered by the other party as a consequence of the breach."[46] This amount is reduced by factors set out in the second sentence of article 74 and in article 77.[47] Article 74 also provides that "[s]uch damages may not exceed the loss which the party in breach *foresaw or ought to have foreseen* at the time of the conclusion of the contract in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.[48] Article 77 reduces the allowable damages by requiring the injured party to "take such measures as are reasonable in the circumstances to mitigate the[ir] loss."[49]

In summary, damages for breach of contract under the CISG are calculated by including the total loss of the injured party as a consequence of the breach, minus what was not foreseen or fore-

42. *See* Vienna Convention, *supra* note 31, arts. 27, 31.

43. *See id.* art. 32.

44. CISG, *supra* note 1, art. 45 ("If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may . . . claim damages as provided in articles 74 to 77.").

45. CISG, *supra* note 1, art. 61 ("If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may . . . claim damages as provided in articles 74 to 77.").

46. *Id.* art. 74 (emphasis added).

47. *See id.* arts. 74, 77.

48. *Id.* art. 74 (emphasis added).

49. *See id.* art. 77 ("A party who relies on a breach of contract must take 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.").

seeable by the breaching party, and minus what was not mitigated by the injured party. Note that articles 75 and 76 merely modify the terms for calculating damages under article 74 in situations where the contract has been avoided[50] and alternative goods have been purchased,[51] or where there have been a variation in the market price between the time of the contract and time of avoidance.[52] Articles 75 and 76 address issues beyond the scope of this casenote and are largely irrelevant in *Zapata* attorneys' fees and cost situations.

B. The CISG's Internal Rules of Interpretation

In interpreting the meaning of "loss" in article 74, courts must follow the CISG's internal rules of interpretation found in article 7.[53] Article 7(1) requires that when interpreting the CISG, "regard is to be had to its international character, and the need to promote uniformity in its application, and the observance of good faith in international trade."[54] Article 7(2) additionally provides a three-part test for how the treaty is to be interpreted.[55] First, if a topic is governed by the CISG, then courts look to the four corners of the document to settle it.[56] Second, as a "gap-filling" measure, should the CISG govern issues "which are not expressly settled in it . . . ," recourse should be "in conformity with the general principles on which [the CISG] is based."[57] Third, in the absence of such princi-

50. CISG article 49 allows the buyer, and article 64 allows the seller, to avoid the contract if there has been a failure in performance of the contract amounting to "fundamental breach." *Id.* arts. 49 & 64. A fundamental breach is defined by article 25 which states that "[a] breach of a contract committed by one of the parties is fundamental if it results in such a detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." *Id.* art. 25

51. *Id.* art. 75.

52. *Id.* art. 76.

53. *Id.* art. 7.

54. *Id.* art. 7(1).

55. *See id.* art. 7(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.").

56. *See id.* This is based on the language that "matters governed by this convention wich are not expressly settled in it." *Id.* Thus, if there is matter governed by the convention that *is* expressly settled within the treaty, the text of the treaty alone governs. *See id.*; *see also* Bruno Zeller, *Four-Corners-The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods* (May 2003), http://www.cisg.law.pace.edu/cisg/biblio/4corners.html.

57. *Id.* art. 7(2).

ples, as a last resort, the issue is to be settled "in conformity with the law applicable by virtue of the rules of private international law[,]"[58] which is interpreted to stand for the choice of law of the domestic forum.[59]

Professor Bruno Zeller has succinctly described the importance of article 7 for interpreting the CISG where he stated that

> [the] legal theory on which the CISG relies is contained in [A]rticle 7. Whether a domestic or an international law is examined such an understanding is essential in order to elicit the very purpose of the law in question. Only through such an understanding will consistent and predictable outcomes be achieved. The logical product of failure to achieve uniformity besides a possible loss of confidence is a search for the best solution resulting in 'forum shopping.'[60]

C. General Principles on Which the CISG is Based

The above internal rules for interpretation purport an important question that must be answered. *What are the general principles on which the CISG is based with regard to assigning damages?* The CISG commentary to article 74 and annotated text of article 7 provides some insight to this question. The commentary illustrates that article 74 suggests that the tern "sum equal to the loss" incorporates the general principle of "full compensation."

> Article 74 is a basic rule defining the general extent of the obligation to pay damages for all cases in which the Convention provides for such an obligation. The rule that in general both the loss suffered by the promisee and his loss of profit are to be compensated expresses *the principle of full compensation: the promisee has a right to be fully compensated for all disadvantages he suffers as a result of the promisor's breach of contract.*[61]

The Commentary adds that this principle of "full compensation" is to be used in order to identify the losses which are to be compensated.

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58. *Id.*

59. *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 96-99 (3d ed. 1999).

60. Zeller, *supra* note 10, at 2 (citation omitted).

61. HANS STOLL & GEORG GRUBER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 553 (Peter Schlectriem & Ingeborg Schwenzer eds., 1998) (citations omitted) (emphasis added).

> [T]he Convention provides for damages for loss, including loss of profit, suffered as a consequence of a breach of contract . . . , [but] does not define which losses are compensatable in greater detail. Compensability is therefore determined by the general principle of full compensation . . . taking into account the particular purpose of the contract concerned.[62]

Presumably, under this general principle, "full compensation" for damages includes compensation for losses incurred by a successful plaintiff for their attorneys' fees as a result of the litigation. The recovery of such losses, however, would be subject to the other requirements of articles 74 and 77 in that losses must be foreseeable and preventable losses mitigated.[63]

Furthermore, the annotated text of CISG article 7 sets out a number of general principles with regard to interpreting the CISG.[64] Of these general principles, the one that most directly influences the interpretation of article 74 is the principle of unity, which is expressed in article 7(1).[65] Professor Honnold suggests that where there is both a reasonable basis for resolving an issue within the confines of the CISG, and a reasonable basis for resolving it by resort to domestic choice of law rules, a court should use the unity principle to determine the issue without resorting to domestic law.[66] Professor Honnold has stated that:

> Article 7(2), in calling for gap-filling through use of the Convention's 'general principles,' avoids the intrusion of diverse rules of domestic law. A corollary is the fact that only development under the aegis of the Convention contributes to the body of international jurisprudence and doctrine. . . . For example, let us assume that a question "governed by the Convention" but not specifically solved by its provisions is answered by recourse to private international law and the domestic law of State A. This solution will not be available when the question arises again and rules of private international law point to the domestic law

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62. *Id.* at 752.

63. CISG, *supra* note 1, arts. 74, 77.

64. ANNOTATED TEXT OF CISG: ARTICLE 7 WORDS AND PHRASES: GENERAL PRINCIPLES OF THE CISG (Albert H. Kritzer, ed. 1999), http://cisgw3.law.pace.edu/cisg/text/principles7.html [hereinafter ANNOTATED TEXT OF CISG].

65. CISG, *supra* note 1, art. 7(1); *see also* ANNOTATED TEXT OF CISG, *supra* note 64, at the Unity Theme.

66. John O. Honnold, *Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice*, *in* EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 140 (Schlechtriem ed., 1987).

> of States B, C or D . . . . On the other hand, recourse to "general principles" of the Convention will contribute to an international body of case law that [ ] support[s] the Convention's objective to unify the law.[67]

D. International Case Law

There are hundreds of international cases that have interpreted CISG article 74.[68] The majority of these cases hold that damages for losses should be decided in light of the general principle of full compensation.[69] Many of these cases also interpret article 74 to include attorneys' fees as recoverable losses.[70] Of those cases that award attorneys' fees, however, it is uncertain where the courts found authority to award these fees. Some awarded attorneys' fees based only on article 74, while others award these fees based both on article 74 and domestic law.[71] Others still award pre-trial attorneys' fees under article 74 and trial related fees according to domestic law.[72] Several arbitral tribunals have also awarded recovery of attorneys' fees for the arbitration proceedings citing article 74.[73] Furthermore, there were several cases under ULIS interpreting article 82 to award attorneys' fees.[74]

This ambiguity whether the courts have the authority to award attorneys' fees, either through CISG article 74 or domestic "loser-pays" rules, lies at the center of the debate of the correctness of Judge Posner's ruling in *Zapata*.[75] For instance, some commentators are of the opinion that attorneys' fees are governed by article 74 and thus should be interpreted under the CISG exclusively.[76] Conversely, others are of the opinion that the CISG does

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67. *Id.*

68. *See* Felemegas, *supra* note 10, at 130-147 (citing 276 cases that interpret CISG article 74).

69. *Id.* at 98-99.

70. *Id.* at 104 n.27; *see also* Flechtner, *Recovering Attorneys' Fees*, *supra* note 10, at 146-47.

71. *See* Felemegas, *supra* note 10, at 104-109 (providing detailed outlines of seven international cases awarding attorneys' fees).

72. *Id.*

73. *Id.* at 109-111 (providing detailed outlines of two arbitration tribunals awarding attorneys' fees).

74. *Id.* at 111-113 (providing detailed outlines of two international cases under ULIS article 82 awarding attorneys' fees).

75. *See* Zeller, *supra* note 10.

76. Felemegas, *supra* note 10, at 128 ("If the proper interpretation of the [CISG] entailed that attorneys' fees is foreseeable consequential loss that may be recovered as damages for a breach of contract . . . , then the 'hallowed American rule' could not be used to trump the provision of the [CISG].").

not govern awards of attorneys' fees and therefore the award should be granted under domestic procedural laws.[77] This later interpretation was apparently convincing to Judge Posner, even though he did not cite any CISG scholars in his ruling.

IV. THE ZAPATA CASE

The facts of the case are relatively straightforward. Zapata, a Mexican seller of biscuit tins, sold its products to the Lenell Cookie Company (Lenell), a U.S. corporation.[78] This relationship lasted for more than four years, until Lenell failed to pay Zapata for a large number of tins. Zapata subsequently sued Lenell for breach of contract in U.S. federal court, which was governed by the CISG.[79]

A. The District Court Decision in Zapata

In 2001, the District Court awarded Zapata compensatory contractual damages for the cost of unpaid tins delivered to Lenell, as well as $550,000 in attorneys' fees.[80] Judge Shadur found that "the normal restrained reading of article 74 . . . calls for Zapata's recovery of its attorneys' fees as foreseen consequential damages."[81] Judge Shadur reasoned that because fee-shifting rules are substantive in nature, the award of fees is governed by the CISG instead of domestic procedural rules.[82] Because CISG article 74 calls for uniformity of construction, and fee shifting is mostly universal among commercial nations, the "make-whole" expectation of Zapata is best achieved by conforming to Mexico's own adherence to such fee-shifting rules.[83]

B. The Seventh Circuit Court of Appeals Decision in Zapata

On appeal, the Seventh Circuit Court of Appeals reversed

77. Flechtner, *Recovering Attorneys' Fees*, *supra* note 10, at 158-59 (comparing article 74's damages provision with general damages language in the UCC that have "repeatedly been interpreted not to authorize recovery of damages for attorney fees").

78. *See* Zeller, *supra* note 10; *see also* Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., No. 99 C 4040, 2002 WL 398521 (N.D. Ill. Mar. 14, 2002).

79. *See id.*

80. *See id.*

81. Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., No. 99 C 4040, 2001 WL 1000927, at *3 (N.D. Ill Aug. 29, 2001).

82. *See id.* at *2.

83. *See id.* at *4.

Zapata's district court's decision.[84] Judge Posner, who wrote the opinion of the Seventh Circuit, found that legal fees were neither clearly included, nor clearly excluded, from article 74.[85] The Seventh Circuit found that "'loss' does not include attorneys' fees incurred in the litigation of a suit for breach of contract, though certain pre-litigation legal expenditures . . . would probably be covered as 'incidental' damages."[86] Yet, Judge Posner only cited to domestic law and referred to "incidental" damages, a term specific to the UCC, while CISG article 74 also contemplates "consequential" damages.

Judge Posner's reasoning was based primarily on three grounds: 1) awards for attorneys' fees are not part of substantive law, but are procedural rules to be determined by the local forum; 2) awards of attorneys' fees as consequential damages were not contemplated in the four-corners of the CISG or in the general principles on which the convention was based; and 3) interpreting the CISG to include attorneys' fees in damage awards would cause abnormalities in its application. Judge Posner reasoned that:

> The [CISG] is about contracts, not about procedure. The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural law. For example, the 'American rule,' that the winner must bear his own litigation expenses, and the 'English rule' (followed in most other countries as well), that he is entitled to reimbursement, are rules of general applicability. They are not field-specific. There are, it is true, numerous exceptions to the principle that provisions regarding attorneys' fees are part of general procedure law . . . . An international convention on contract law *could* do the same.[87] But not only is the question of attorneys' fees not 'expressly settled' in the [CISG], it is not even mentioned. And there are no 'principles' that can be drawn out of the provisions of the [CISG] for determining whether 'loss' includes attorneys' fees; so by the terms of the Convention itself the matter must be left to domestic law . . . .
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> . . . .
>
> The interpretation of 'loss' for which Zapata contends

84. Zapata Hermanos Sucesores S.A. v. Hearthside Baking Co. Inc., 313 F.3d 385, 391-92 (7th Cir. 2002).

85. *Id.* at 388

86. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 347, cmt. c (1981)).

87. *Id.*

> would produce anomalies . . . On Zapata's view the prevailing plaintiff in a suit under the [CISG] would . . . get his attorneys' fees reimbursed more or less automatically . . . . But what if the defendant won? Could he invoke the domestic law, if as is likely other than in the United States that law entitled either side that wins to reimbursement of his fees by the loser? Well, if so, could the plaintiff waive his right to attorneys' fees under the Convention in favor of domestic law, which might be more or less generous than Article 74, since Article 74 requires that any loss must, to be recoverable, be foreseeable, which beyond some level attorneys' fees, though reasonable ex post, might not be? And how likely is it that the United States would have signed the Convention had it thought that in doing so it was abandoning the hallowed American rule? To the vast majority of the signatories of the Convention, being nations in which loser pays is the rule anyway, the question whether 'loss' includes attorneys' fees would have held little interest; there is no reason to suppose they thought about the question at all.[88]

V. DISCUSSION

Judge Posner's *Zapata* opinion has been universally criticized for its lack of authority and incorrect analysis of the CISG.[89] Yet, even some of Judge Posner's most vocal critics of the decision's reasoning agree with its final outcome.[90] This section will explore this debate. First, it will discuss the reasons why many believe the outcome of the case was correct, despite Judge Posner's allegedly flawed reasoning. Second, it will set out reasons why Judge Posner's decision in *Zapata* was in fact incorrect. Third, it will discuss aspects of Judge Posner's decision that are universally criticized.

A. Why Some Commentators Believe That Judge Posner Was Right

There are two main reasons why some commentators support Judge Posner's final decision in *Zapata*. First, they suggest that the CISG does not govern the award of attorneys' fees. Therefore there is no need to consult the gap-filling measures under article 7(2) to interpret its application. Second, and most notably, is the

88. *Id.* at 388-89.
89. *See* sources cited *supra* note 10.
90. *See generally id.*

belief that procedural rules are general in their application and should apply to both domestic and international cases.

To begin, some commentators agree with Judge Posner that "loser-pays" (or fee shifting) countries did not consider the question of whether attorneys' fees should be included in the CISG, and therefore believe that the issue is not governed by the CISG at all.[91] On this point, some have criticized Judge Posner's decision for even addressing the issue of "principles" of CISG article 7(2). For example Professors Flechtner and Lookofsky, two of Judge Posner's most ardent supporters, criticize the erroneous use of article 7(2) by stating that:

> [t]he seemingly 'technical' (yet, in terms of CISG precedent, significant) problem with [Judge Posner's application of gap-filling measures in article 7(2)] is that it leads to internal inconsistency. If Judge Posner, on the one hand, determines . . . that the [CISG] is *about contracts, not about procedure*, and . . . that there is no reason to suppose that any of those who drafted the [CISG] even thought about the fee-shifting question, then how can he logically maintain . . . that the vary same fee-shifting question is governed by the [CISG] at all?[92]

Other commentators have expressed agreement with Professor Flechtner's opinion that procedural rules are general in their application and should apply to both domestic and international cases.[93] To support this assertion, Professor Flechtner cites multiple international cases where domestic procedural rules were either the sole reason or a supporting reason cited for awarding attorneys' fees.[94] He concluded that while no international case affirmatively rejected the idea of awarding CISG damages to cover attorney costs, the prevailing practice in "loser-pays" countries was to award attorneys' fees based on procedural rules.[95] Thus, in order to insure uniform application of the CISG, each country should "uniformly" use their procedural rules in applying article 74.[96]

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91. *See* Flechtner & Lookofsky, *supra* note 10, at 101; Keily, *supra* note 10, at 18.

92. Flechtner & Lookofsky, *supra* note 10, at 101.

93. *See* Flechtner, *Recovering Attorneys' Fees*, *supra* note 10, at 134-46; Flechtner & Lookofsky, *supra* note 10, at 97; *see also* Keily, *supra* note 10, at 18.

94. *See* Flechtner, *Recovering Attorneys' Fees*, *supra* note 10, 127-133.

95. *Id.* at 147.

96. *Id.* at 150.

B. Why Judge Posner Was Wrong

Professor Felemegas argued that "[t]he [Seventh Circuit] paid no attention to the plain language of the CISG, failed to refer to international doctrine and jurisprudence, offered no analysis of the general principles of the [CISG], and exhibited a clear preference for the domestic classification and solution of the issue at stake."[97] This section will follow up on this assertion by setting out five reasons why the case was determined incorrectly.

First, Judge Posner disregarded the international character of the CISG by ignoring international doctrine and case law, and by not consulting international rules of treaty interpretation. Second, the plain language of article 74 contemplates the inclusion of attorneys' fees in the calculation of loss. Third, Judge Posner ignored the CISG's general principle of "full compensation" for contract damages. Fourth, Judge Posner's distinction between substantive and procedural law was inappropriate. Fifth, Judge Posner's suggestion that awarding attorneys' fees would cause "abnormalities" was irrelevant to the case he was addressing and even if it was relevant, it could easily be disposed of under existing rules of interpretation.

1. Disregard for the CISG's International Character

As stated *supra*, CISG article 7(1) states that when interpreting the CISG, "regard is to be had to its international character and to the need to promote uniformity in its application."[98] Despite this mandate, Judge Posner's interpretation of article 74 has been criticized for not citing any CISG authority, international or domestic, which could have aided him to promote uniformity in the interpretation of the CISG.[99] Judge Posner also opined that when the CISG was drafted, "loser-pays" countries had not contemplated awarding attorneys' fees as loss under article 74.[100] Considering the numerous cases addressing attorneys' fees as "loss" under CISG article 74 in fee-shifting countries, however, it seems that these countries did, in fact, have a significant amount of interest in the subject.[101] Judge Posner may have had a different opinion on the subject if he had consulted international cases or commentary before making his decision. Because his

97. Felemegas, *supra* note 10, at 128.
98. CISG, *supra* note 1, art. 7(1).
99. *See* Flechtner & Lookofsky, *supra* note 10, at 102.
100. *Id.*
101. *See* Vanto, *supra* note 10, at 221.

opinion made no attempted to promote a uniform application of the CISG, some have suggested that methodologically it was a step backward from other CISG opinions that attempt to enlist the aid of commentary and decisions from beyond the tribunal's jurisdiction to promote uniformity.[102]

Furthermore, the ruling neglected to reference the principles of construction appropriate to an international convention.[103] Judge Posner's reference to principles of domestic law, particularly his reference to "incidental" damages found in the UCC but not the CISG, opens his decision to criticism that the court had a reflexive, or possibly unconscious, domestic legal bias.[104] For instance, Professor Zeller suggests Judge Posner's ruling contributes to a homeward trend in interpreting the CISG, moving U.S. CISG jurisprudence away from a perspective that transcends domestic ideology.[105] Zeller provides an instructive example of how a domestic court should interpret a treaty by citing the Australian Supreme Court of Victoria's interpretation of the Warsaw Convention in *Povey*.[106] There, the Australian court made three important observations about the method of constructing international conventions, which could be used as a template by U.S. domestic courts.

> First [the Court] noted that it must be 'constructed by reference to the principles of construction appropriate to the international convention.' Secondly these principles of construction can be found in the Vienna Convention on the Law of Treaties and thirdly foreign jurisprudence of an appropriate court is highly persuasive if no jurisprudence is available in [the domestic jurisdiction].[107]

Thus, it seems apparent that Judge Posner's familiarity with U.S. law and legal interpretive frameworks appears to have inappropriately distracted him from the international rules of treaty interpretation which prohibit internal laws as being justification for failure to enforce an international instrument such as the

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102. *See* Flechtner & Lookofsky, *supra* note 10, at 102.

103. *See* discussion *supra* Part II.B.

104. *See* Felemegas, *supra* note 10, at 118 ("[T]he Court of Appeals for the Seventh Circuit in Zapata, like a modern-day Procrustes, may be trying to fit the body of law that is the CISG onto the bed that is American legal heritage which, by design, does not fit.").

105. *See* Zeller, *supra* note 10.

106. *Id.* (citing Povey v. Civil Aviation Safety Auth. & Ors. (2002) VSC 580 (20 December 2002)).

107. *See* Zeller, *supra* note 10 (citing CISG, *supra* note 1, art. 7).

CISG in domestic courts.[108]

2. Article 74 Contemplates the Inclusion of Attorneys' Fees

Judge Posner stated "not only is the question of attorneys' fees not "expressly settled" in the [CISG], it is not even mentioned."[109] This is likely an incorrect and possibly disingenuous reading of article 74. The plain language of article 74 arguably contemplates the inclusion of attorneys' fees in the calculation of loss. "The nature of [a]rticle 74 is inclusive, not exhaustive."[110] There are many different categories of loss recoverable as damages, none of which is specifically mentioned in the text of article 74.[111] If attorneys' fees can be removed from the article 74's coverage, then so could all other forms of damages except lost profits, the only specific form of damages mentioned.[112] The voluminous case law on article 74 documents this fact.[113] Therefore, it is suspect for Judge Posner to have singled out one non-specific category of loss when the general approach of CISG article 74 is not to specifically mention any of the categories of loss encompassed by its express language.[114]

3. The Ignored CISG General Principle of Full Compensation

Judge Posner found that there were no principles that could be drawn out of the provisions of the CISG to suggest "loss" included attorneys' fees.[115] The problem with this decision, however, is that there is overwhelming evidence to show that article 74 is based on the general principle of "full compensation."[116] The commentaries of both the CISG and ULIS, as well as over two-hundred cases on the subject, directly support the fact that CISG article 74 is based on the general principle of "full compensation."[117] There are also eleven cases that interpret the CISG arti-

108. *See* Vienna Convention, *supra* note 31, art. 27.
109. Zapata Hermanos Sucesores S.A. v. Hearthside Baking Co. Inc., 313 F.3d 385, 388 (7th Cir. 2002).
110. Felemegas, *supra* note 10.
111. *See id.*
112. *See* CISG, *supra* note 1, art. 74.
113. *See* Felemegas, *supra* note 10, at 120.
114. *Id.* at 117.
115. *Zapata*, 313 F.3d at 389.
116. *See* Felemegas, *supra* note 10, at 98-99.
117. *Id.* at 120.

cle 74 or ULIS article 82 that specifically included attorneys' fees in the calculation of loss.[118] The CISG's general principles can also be found in the *lex mercatoria*, which appear in such documents as the UNIDROIT Principles of International Commercial Contracts[119] and the Principles of European Contract Law.[120] Both article 7.42 of the UNIDROIT principles and article 9:502 of the Principles of European Contract Law confirm, by analogy, that "full compensation" is a general principle of the CISG.[121]

Furthermore, the principle of full compensation has become a principle of customary international law. In 1928, the PCIJ found this to be the case in the Chorzow Factory Case, a case where Poland was found to have breached contractual rights of German citizens.[122] There the PCIJ made a commonly quoted ruling on the international law of damages. It stated that "[r]eparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[123] Being that customary international law is also U.S. law, there would be no domestic prohibition to apply the general principle of full compensation in U.S. courts.[124]

Therefore, if legal fees are not clearly included, but also not clearly excluded, from article 74 as Judge Posner suggests, then the only solution would be to apply article 7(2) to determine whether a gap exists.[125] If a gap does exist, the court is first obli-

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118. *Id.* at 99-103.

119. UNIDROIT, *Principles of International Commercial Contracts*, INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW (1994), http://www.unidroit.org/english/principles/main.htm.

120. PRINCIPLES OF EUROPEAN CONTRACT LAW PARTS I AND II (O. Lando & H. Beale eds., 2000).

121. Zeller, *supra* note 10, at 5.

122. Case Concerning the Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 13 (Sept. 13).

123. *Id.* at 21.

124. *See* The Paquete Habana, 175 U.S. 677 (1900). In Paquete Habana, Justice Gray provided a foundational framework of for determining customary international law. The Court stated that "[i]nternational law is part of [American] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *Id.* at 700.

125. *See* discussion *supra* Part III.B; *see also* CISG, *supra* note 1, art. 7(2).

gated to attempt to settle the matter through the general principles on which the CISG is based.[126] Thus, under this reasoning, Judge Posner was required to determine whether the CISG general principle of "full compensation" included attorneys' fees. Arguably, the weight of academic writing and past cases suggests that it does.

4. Inappropriate Distinction Between Substantive and Procedural Law

Judge Posner's most persuasive argument in *Zapata* was that the CISG "is about contracts not procedure," and that "principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually . . . part of procedural law."[127] Unfortunately, his decision does not provide any authority to substantiate the decision. It was presumably based on the Eleventh Circuit's decision in *MCC-Marble v. Ceramica,*[128] which found that CISG article 8(3) trumped the domestic parole evidence rule based on the fact that it was a substantive rule, as opposed to a procedural rule, of evidence.[129] Nevertheless, by making such claims, Judge Posner confused domestic law with international law. The appropriate question was not whether attorneys' fees are part of procedural or substantive law in domestic setting but whether attorneys' fees are part of a foreseeable expense pursuant to article 74.

Professor Honnold has suggested, when noting "labels that the state law bears should be irrelevant" under international law, that the problem with Judge Posner's argument is that the domestic label of "procedural law" distorts the application of article 7(1), which calls for the uniform application of the CISG.[130] Professor Orlandi argues that when parties from different countries with different legal heritages turn to the courts for equal enforcement of their contractual rights pursuant to the uniform rules of the CISG, "abstract distinctions between substantive and procedural

126. *See* CISG, *supra* note 1, art. (7)(2).

127. Zapata Hermanos Sucesores S.A. v. Hearthside Baking Co. Inc., 313 F.3d 385, 388 (7th Cir. 2002).

128. MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nouva D'Agostino, S.P.A., 144 F.3d 1384 (11th Cir. 1998)

129. *Id.* at 1388-1389.

130. John O. Honnold, *Uniform Law for International Sales; The 1980 United Nations Convention, in* 18 ASIAN PAC. REGIONAL TRADE LAW SEMINAR 181, 195 (1984); *see also* Zeller, *supra* note 10, at 8.

laws become redundant, if not harmful . . . ."[131]

Furthermore, even if attorneys' fees were an aspect of procedural law, they are so closely connected with the substantive issue of damages under international law that it is not possible to separate the two.[132] This is particularly evident based on the view that in the vast majority of the CISG's member states, the procedural laws regarding the award of attorneys' fees are uniform, with the "American rule" being in the exception.[133] Thus, maintaining an artificial distinction to deny the recovery of attorneys fees based on procedural rules violates CISG article 7(1)'s mandate of uniform interpretation.[134]

5. Awarding Attorneys' Fees Would Not Cause "Abnormalities"

Lastly, Judge Posner argued that if CISG article 74 were to be interpreted to contemplate attorneys' fees it would create "abnormalities."[135] These abnormalities, as argued by the Court, would occur in the CISG application where a victorious defendant would not be able to invoke the same relief against a plaintiff since article 74 only contemplates damages for a breach of contract.[136] Presumably, the loosing plaintiff in such a case would not have breached the contract to trigger article 74. This abnormities argument, however, suffers from many problems, the most glaring of which is that it is a hypothetical situation that had no relevance to the facts of the case.[137]

Even if the abnormalities argument was relevant, critics suggest that it can easily be disposed of in one of two ways. First, 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).[138] Thus, the defendant would be entitled to collect damages under article 74. Alternatively, if the plaintiff is

131. Chiara Giovannucci Orlandi, *Procedural Law Issues and Law Conventions*, 1 UNIF. L. REV. 25 (2000); *see also* Zeller, *supra* note 10, at 8.

132. Zeller, *supra* note 10, at 9.

133. For discussion on varying rules in different countries see John Gotonda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations,* 21 MICH. J. INT'L L. 1 (1997).

134. Zeller, *supra* note 10, at 9.

135. Zapata Hermanos Sucesores S.A. v. Hearthside Baking Co., Inc., 313 F.3d 385, 388-89 (7th Cir. 2002).

136. CISG, supra note 1, art. 74.

137. *See* Zeller, *supra* note 10, at 9.

138. *See* Felemegas, *supra* note 10, at 127.

found not to have breached the contract, because it is not a situation contemplated under the CISG, then it should be dealt with under the gap-filling rules of article 7(2) based on general principles or domestic choice of laws rules.[139]

C. *Consensus Interpretation of Article 74*

Regardless whether scholars are supporters or opponents of Judge Posner's opinion, they all agree on three things. First, that Judge Posner did not follow the rules of analysis of CISG article 7. Though some supporters believe that attorneys' fees are not governed by the CISG, and the opponents believe that they are, both sides agree that Judge Posner misapplied the rules of article 7. Second, though somewhat related to the first, both sides agree that Judge Posner was careless in not attempting to analyze the general principle of the CISG. If attorneys' fees are governed by the CISG, then there is an abundance of authority to suggest the general principle of full compensation would apply, leading to the conclusion that attorneys' fees should be included in loss. Third, both sides agree that Judge Posner improperly cited exclusively to U.S. cases and completely ignored caselaw from other CISG state parties.

VI. CONCLUSION

Judge Posner's ruling in *Zapata* has led U.S. courts to interpret CISG article 74 to exclude awards for attorneys' fees merely by applying *stare decisis*, as opposed to actually interpreting the treaty itself. Soon after the Seventh Circuit's ruling in *Zapata*, the U.S. District Court for the Northern District of Illinois, Eastern District, granted summary judgment on the issue of attorneys' fees in *Ajax Tool Works*.[140] It reasoned that "[a] claim for attorneys' fees is a procedural matter governed by the law of the forum. As the Seventh Circuit recently held, "loss" in article 74 does not include attorneys' fees.'"[141]

Most recently, in *Chicago Prime Packers*,[142] the U.S. District

139. *See* Zeller, *supra* note 10, at 10.

140. Ajax Tool Works, Inc., v. Can-Eng Mfg. Ltd., No. 01 C 5938, 2003 WL 223187, at *7 (N.D.Ill. Jan. 30, 2003) (granting for summary judgment denying attorneys' fees).

141. *Id.* at 7 (citing Zapata Hermanos Sucesores S.A. v. Hearthside Baking Co. Inc., 313 F.3d 385, 388-89 (7th Cir. 2002)).

142. Chi. Prime Packers, Inc. v. Northam Food Trading Co., 320 F.Supp.2d 702, 717 (N.D. Il. 2005).

Court for the Northern District of Illinois also refused to consider the issue of attorneys' fees under the CISG stating that "[a] claim for attorneys' fees is a procedural matter governed by the law of the forum. The Seventh Circuit recently decided that the term 'loss' in article 74 of the CISG does not include attorneys' fees incurred in the litigation of a suit for breach of contract."[143]

Fortunately, the infectious decision of *Zapata* has been contained within the Seventh Circuit. However, this is likely because no other circuits have faced this precise issue. Hopefully, before other U.S. courts blindly follow the Seventh Circuit's misguided decision, they will consider the rules of international treaty interpretation, take into consideration the case law from sister state parties to the CISG and the magnitude of criticism by noted scholars that followed the *Zapata* decision.

In addition, U.S. courts should consider the effect that divergent jurisdictional positions on awarding attorneys' fees have on forum selection. It is reasonable to presume that international disharmony in interpreting damages under the CISG will lead to forum shopping in contract actions. Furthermore, considering the costs of international litigation regarding domestic and foreign attorneys' fees, the *Zapata* precedent could produce a chilling effect on foreign corporation's decision to bring CISG claims in U.S. courts. Today, at least in the Seventh Circuit, foreign corporations do not get full compensation from U.S. companies that breach its contract. Looking forward, courts in other U.S. Circuits should have the wisdom not to make the same mistakes as the Seventh Circuit. Que Lastima Zapata!

143. *Id.* at 717 (citing Zapata Hermanos Sucesores S.A. v. Hearthside Baking Co. Inc., 313 F.3d 385, 388-89 (7th Cir. 2002)).