

ARTICLES

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*

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The challenge facing the CISG is no less than the manufacture of a legal culture to envelope it before the centrifugal forces of nationalist tendency take over.¹

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¹ Michael R. Bridge, *The Bifocal World of International Sales: Vienna and Non-Vienna*, in *MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE* 288 (Ross Cranston ed., 1997).

I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods ("CISG"),² which has garnered an impressive array of ratifications from a geographically, politically and economically diverse group of countries,³ is the presumptive law governing international transactions worth billions of dollars.⁴ Its proper interpretation, therefore, is a significant concern for courts and arbitral panels around the world. Crucial for the task of interpretation is CISG Article 7(1), which mandates that the Convention be interpreted with regard for "its international character and ... the need to promote uniformity in its application and the observance of good faith in international trade."⁵ Many commentators and several courts have declared that Article 7(1) demands that those charged with construing the Convention take into account decisions by tribunals from other legal systems that have had occasion to interpret the CISG.⁶ Reference to decisions

² United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 19 I.L.M. 668 (1980) [hereinafter "CISG" or "Convention"] (entered into force on Jan. 1., 1988), available in 15 U.S.C.A. app. at 49 (West Supp. 1996), 52 Fed. Reg. 6262-80, 7737 (1987), U.N. DOC. A/CONF. 97/18 (1980).

³ At the time this is written, 57 countries have ratified the CISG. *Status of Conventions and Model Laws*, Website of the United Nations Commission on International Trade Law (UNCITRAL), at <http://www.uncitral.org/en-index.htm> (last visited Jan. 3, 2001) [hereinafter *Status of Conventions*]. These 57 "Contracting States" include large developed economies such as the United States and the largest economies of Western Europe (but notably excluding Japan and the U.K.), developing economies such as Burundi and Mongolia, and formerly-centralized economies such as China, the Russian Federation, and many now-independent former members of the Soviet Union and the Warsaw Pact. There are Contracting States located in the Northern, Southern, Eastern and Western hemispheres - indeed, on all six inhabited continents. As for political diversity, a trade-related convention that can attract ratifications from Cuba, Iraq and the United States has accomplished something notable.

⁴ See Michael G. Davies, *International Sale of Goods: Do Not Ignore United Nations Convention*, N.Y.L.J., Sept. 20, 1999, at S1 (noting the "billions of dollars of foreign trade between the U.S. and the CISG's other signatory nations"). Under Article 1(1)(a), the Convention applies to international contracts for the sale of goods if both parties are located in countries that have ratified the treaty ("Contracting States"). See *Status of Conventions, supra* note 3. Under Article 1(1)(b), it also applies to international sales contracts, regardless of where the parties are located, if the rules of private international law (i.e., choice of law rules) lead to the application of the law of a Contracting State - although five states (China, the Czech Republic, Singapore, Slovakia and the U.S.) have made a declaration that they are not bound by Article 1(1)(b). See Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 195-96 (1998) [hereinafter "Several Texts"]. It is thus clear that the Convention governs a vast number of international sales, unless (as permitted by Article 6) the parties opt out of the CISG in favor of other law.

⁵ CISG, *supra* note 2, art. 7(1).

⁶ See, e.g., JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 92 (3d ed. 1999); Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & COM. 245, 247 & n.18 (1998); Antonio Bog-

by tribunals from outside the jurisdiction of the interpreter is a particularly valuable tool to combat what is probably the most significant threat to the values embraced in Article 7(1) – the temptation to project the familiar rules of one's own national legal system onto the Convention's provisions, a phenomenon that a leading CISG scholar has termed the "homeward trend."⁷

Thus, for a commercial lawyer grounded in the domestic commercial laws of his or her own country (like myself), the Convention creates a brave new world in which one must discover and understand foreign decisions in unfamiliar languages decided according to alien legal systems in order to apply provisions that, through the treaty ratification process, are part of one's own national commercial legal system. This represents a new international commercial practice, arising out of treaties like the CISG that attempt to bring uniformity to the rules governing international trade, and it already confronts (and surely should terrify) practitioners, judges, and even the unwary academic who wanders too close to the international business field.

This new and difficult type of practice raises many questions. How does one obtain information on foreign cases that have interpreted the Convention, particularly when such decisions are in unfamiliar languages? How can one understand and account for the differences in procedural context and background law that inevitably influence decisions? Perhaps the most fundamental question concerns the precise role that foreign decisions should play in CISG jurisprudence. It is easy to assert in the abstract that

giano, *The Experience of Latin American States*, in INTERNATIONAL UNIFORM LAW IN PRACTICE/LE DROIT UNIFORM INTERNATIONAL DANS LA PRATIQUE [Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law (Rome 7-10 September 1997)] 47 (1988) ("Uniform law requires . . . a new common law" in which "[f]oreign precedents would not be precedents of a *foreign* law but of *uniform* law"). As Professor Honnold (among others) has noted, foreign scholarly commentary is also an important tool for achieving uniformity. *Id.* Exploration of the role of foreign scholarly commentary, however, is beyond the scope of this article.

⁷ John O. Honnold, *General Introduction*, in DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS AND DECISIONS THAT LED TO THE 1908 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS 1, 1 (John O. Honnold ed., 1989) [hereinafter "DOCUMENTARY HISTORY"]. See also John O. Honnold, *The Sales Convention in Action B Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207, 208 (1988) (noting "the tendency to think that the words we see [in the text of the CISG] are merely trying, in their awkward way, to state the domestic rule we know so well"). One might argue that the more "foreign" a tribunal is, the more valuable its decisions are in combating the homeward trend. Thus to a common lawyer, reference to decisions from civil law tribunals would arguably be more useful in maintaining an international perspective and promoting uniformity in interpreting the CISG than would be reference to decisions from other common law jurisdictions.

the demands of uniformity require lawyers and judges to take into account foreign decisions, but what does that mean in real cases?

One commentator has suggested that CISG decisions should bind the courts of other jurisdictions as a matter of *stare decisis*.⁸ This suggestion has been criticized, mainly because of the untoward consequences it would produce.⁹ Certainly it could lead to undesirable consequences if an unappealed decision by a country's lowest-level trial court became precedent binding on tribunals throughout the world, simply because it happened to be the first decision on a CISG question. Even a decision rendered by the highest court of a jurisdiction could not be deemed authoritative internationally without generating an unseemly (and potentially harmful) rush to be the first to pronounce on an issue. Thus it seems clear that, although CISG case law should have influence beyond the borders of the tribunal making the decision, existing CISG decisions should not be binding on courts of other jurisdictions. This answer, however, raises a very difficult question: exactly what authority should foreign case law be deemed to possess in CISG jurisprudence?

Several decisions by European tribunals confront U.S. courts and attorneys with an interesting test case on this issue. These decisions, originating mostly (but not exclusively) in German fora, appear to award a prevailing litigant compensation for attorneys' fees incurred in the course of the dispute, and they do so not on the basis of a "loser-pays" principle in the tribunal's own domestic law, but rather on the authority of the damages provisions of the CISG itself. The issue that these cases raise is whether U.S. courts should also be awarding damages to cover a prevailing litigant's attorneys' fees in disputes governed by the Convention.

The initial challenge in confronting this issue is to obtain a clear understanding of those foreign decisions that have awarded CISG damages for attorneys' fees – a step that turns out to be surprisingly difficult. Part II of this article will recount my struggles with this challenge, drawing some les-

⁸ See Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 136, 167 (1997).

"The Convention envisioned the use of an informal system of *stare decisis* to help ensure uniformity of interpretation. . . . The drafters envisioned that the national trial courts called on to interpret the Convention would act as informal international appellate courts. . . . The uniformity of decision mandated by the CISG requires U.S. courts to apply foreign decisions over conflicting domestic decisions. . . ." *Id.*

See also Larry A. DiMatteo, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, L=(ii)², 23 SYRACUSE J. INT'L L. & COM. 67, 79 (1997) (asserting that the CISG demands a system of "supranational *stare decisis*").

⁹ See Ferrari, *CISG Case Law*, *supra* note 6, at 259; Flechtner, *Several Texts*, *supra* note 4, at 211.

sons for the emerging practice of transnational commercial law based on uniform international law instruments.

The conclusion I ultimately draw is that, although the holdings of individual cases are ambiguous, as a group the relevant foreign decisions clearly sanction an award of CISG damages to cover attorneys' fees that would not normally be compensable under U.S. national law.

As I discuss in Part III of the article, the firmly-established "American rule" on recovery of attorneys' fees is that, in the absence of a statutory or contractual provision to the contrary, each party to a dispute must bear his or her own attorneys' fees. A line of U.S. cases construing Article 2 of the U.C.C. strongly suggests that the provisions of the CISG would not trigger the statutory exception to the American rule under the usual approach employed by U.S. courts. Thus if the damage provisions of the Convention appeared *verbatim* in domestic U.S. legislation, it is quite unlikely that U.S. courts would interpret them in the same way as have foreign tribunals.

The CISG, however, is *not* purely domestic U.S. legislation. It is, instead, a multi-party international convention that creates treaty obligations on the part of the U.S., including the obligation under Article 7(1) to interpret the Convention in a fashion that reflects its "international character" and that promotes "uniformity in its application."¹⁰ In Part IV of the article I turn to the ultimate question of how a U.S. court should comply with these obligations when confronting a claim that the CISG authorizes damages to cover an aggrieved party's attorneys' fees. A key issue is the extent to which U.S. courts (and other tribunals, both U.S. and foreign) should be influenced by the line of foreign decisions that interpret the damage provisions of the CISG to require a losing party to pay attorney costs of the prevailing party. Resolving this specific issue requires development of more generalized criteria for determining the authority that particular foreign decisions should have in CISG jurisprudence. I attempt to identify factors relevant to this determination and apply them to existing decisions awarding attorneys' fees as CISG damages. Demarcating the authoritative force of foreign decisions awarding attorneys' fees as damages under the CISG, however, does not provide a final answer to the question of how U.S. courts should resolve the issue. The last part of Part IV of the paper is devoted to that substantive question, concluding that the Convention should not be interpreted to provide for recovery of attorneys' fees as damages.

¹⁰ CISG, *supra* note 2, art. 7(1).

II. CISG DECISIONS ON THE RECOVERY OF ATTORNEYS' FEES AS DAMAGES

A. The Theory for Recovering Legal Expenses under the Convention

CISG Article 74 permits an aggrieved party to recover damages "equal to the loss, including loss of profit, suffered ... as a consequence of the breach," provided that the loss is one that "the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract ... as a possible consequence of the breach of contract."¹¹ The damages provided for in Article 74 include, *inter alia*, what U.S. law would label consequential damages.¹² Because the CISG is an *international* convention, however, Article 74 damages are not confined to consequential damages as defined by U.S. law.¹³ One can, therefore, plausibly argue that legal expenses incurred by a party who succeeds in proving that the other side has breached a sales contract governed by the CISG are recoverable Article 74 damages because they constitute "a loss ... suffered ... as a consequence of the breach," and such a loss would have been foreseeable at the time the contract was formed. This, in fact, is the reasoning of the foreign cases that have awarded damages to cover attorney costs of an aggrieved party.

If these cases have interpreted Article 74 correctly, U.S. courts hearing disputes concerning transactions governed by the CISG should take the same approach, despite the usual U.S. rule that each party to a dispute bears the cost of its own attorneys. In other words, if those foreign cases are correct, then the U.S., by ratifying the Convention, enacted new and different rules on recovering attorneys' fees in international sales transactions subject to the CISG, and its courts would be obligated by Article 7(1) to adopt the proper uniform international interpretation of those rules. Similarly, arbitral tribunals dealing with transactions governed by the Convention should award damages to cover the attorneys' fees of a party who proves the other side is in breach even if the tribunal would not have done so under its own arbitration rules. Given the significant change such an approach would make to the usual results under U.S. law and, in some cases, to the consequences of arbitration, it is vital to determine whether the foreign cases awarding CISG damages to cover attorneys' fees are correctly decided. It is also vital to determine what deference these foreign decisions are due in light of the mandate of Article 7(1) – in other words, should a court or arbitral panel that disagrees with the construction of Article 74 in these cases

¹¹ CISG, *supra* note 2, art. 74.

¹² See Harry M. Flechtner, *Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COMM. 53, 97, 106 (1988).

¹³ See Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & COM. 245, 246 & nn.9-12 (1998) (pointing out a scholarly consensus that the CISG should be interpreted "autonomously").

nevertheless follow it in order to promote uniformity and an international perspective in the application of the Convention? Thus the question whether a prevailing litigant's attorneys' fees are recoverable as damages under the CISG plunges us into the general issue of the proper treatment of foreign decisions interpreting the Convention.

B. The Challenges of Understanding Foreign Cases on the Attorneys' Fees Issue

The challenges that I faced in dealing with foreign decisions awarding CISG damages for attorneys' fees are illustrative of the obstacles any U.S. lawyer faces in working with foreign case law. Language differences are a very significant difficulty. Despite the appearance of an impressive array of tools designed to make CISG decisions accessible, in English, to lawyers and judges around the globe,¹⁴ foreign opinions present inevitable ambiguities and complexities. These problems are compounded by the unfamiliar legal systems in which the foreign tribunals work. Procedural context, of course, is crucial to the meaning of a case. Attempting to understand an opinion in a foreign language decided in a foreign procedural system can be like trying to read in dim light while wearing sunglasses.

English translations or summaries of at least seven foreign decisions that appear to award damages for the prevailing party's attorneys' fees have appeared in widely-available sources of information on CISG case law. Four of these decisions emanate from German courts, one from a German arbitral tribunal, one from a Swiss court working in German, and one from a French arbitration panel whose opinion was issued in English. In each case, it is clear that the tribunal awarded or claimed authority to award CISG damages to cover legal costs of the prevailing party, but it is not always clear exactly what those costs included.

A July 11, 1996 opinion of the Oberlandesgericht of Düsseldorf, Germany ("OLG Düsseldorf"), a regional court of appeal, is illustrative. English abstracts of this opinion are available from two sources – Unilex, a commercial computer database of CISG materials containing a wide variety of court and arbitral decisions with English summaries,¹⁵ and Case Law on

¹⁴ These resources include a commercial database of CISG materials ("Unilex"), world wide websites devoted to the CISG (including a website maintained by the Pace University Institute of International Commercial Law), and "Case Law on UNCITRAL Texts" ("CLOUT"), a service sponsored by the United Nations Commission on International Trade Law (UNCITRAL) that collects CISG decisions from the various states that have ratified the Convention. These resources are described in more detail below. For an ambitious program to make full texts of CISG decisions available in English, see *Taming the Dragons of Uniform Law Case Law: Sharing the Reasoning of Courts and Arbitral Tribunals*, available at <http://www.cisg.law.pace.edu/cisg/text/schedule.html>.

¹⁵ INTERNATIONAL CASE LAW AND BIBLIOGRAPHY ON THE 1980 UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ("UNILEX") D1996-9 AT 355 (Michael J. Bonell ed., Transnational Juris 1997) [hereinafter "Unilex Database"].

UNCITRAL Texts (“CLOUT”), a service of the arm of the U.N. that sponsored the Convention.¹⁶ The CLOUT abstract appears on the website for UNCITRAL¹⁷ as well as on the CISG website of the Pace University Institute of International Commercial Law.¹⁸ According to the English abstracts of the case, a German seller brought suit to recover the price of lawn mower engines that it had delivered to an Italian buyer, and the buyer asserted a set-off claim for damages based on the seller’s failure to make further deliveries of engines. The court rejected the buyer’s argument and awarded the seller the full purchase price of the delivered engines. The English abstracts make it clear that the seller also recovered damages under CISG Article 74 for attorney costs. The CLOUT abstract, however, describes the damage award as limited to “attorney fees for a reminder [i.e., a formal request to the buyer for payment] that was sent prior to the lawsuit,” whereas the Unilex summary indicates that the seller recovered the “full legal costs [the seller] sustained, including [but apparently not limited to] the costs for the non-judicial request of payment to the buyer.”¹⁹ An abridged version of the original German text of the opinion is available on Unilex (the original version is also available, upon request, through CLOUT), but my one-year of college German (used sporadically in the more than 25 years since) was not sufficient to clarify the holding of the case.

Fortunately, I had access to several sources proficient in German, including my University of Pittsburgh Law School colleague, Professor Vivian Curran, an expert on foreign languages and the law, and Sven Kill, a student from Augsburg, Germany in the LL.M. program at my home institution. With their help, I determined that the CLOUT summary appears to be more accurate – i.e., the court awarded damages under CISG Article 74 to cover only the aggrieved seller’s expenses for a pre-litigation notice sent to the buyer, and not the full legal expenses that the seller incurred in the course of the litigation. It was not clear from the edited version of the original German opinion available through Unilex whether the seller used

¹⁶ As established by UNCITRAL, the CLOUT system involves “national correspondents” who track judicial decisions construing the CISG (and other UNCITRAL-sponsored uniform laws) by courts in their home states. The national correspondents send the full text of such decisions to UNCITRAL, which then makes these decisions accessible by preparing and publishing abstracts or full translations in official languages of the U.N. The CLOUT abstracts are available in hard copy or at UNCITRAL’s web site, *available at* <http://www.uncitral.org/en-index.htm>.

¹⁷ United Nations, Commission on International Trade Law; *Case Law on UNCITRAL Texts*, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/12 (1997), *available at* <http://www.uncitral.org/english/clout/abstract/abst12.htm> [hereinafter “CLOUT Abstract of July 11, 1996 Decision”]. The abstract appears as case number 169.

¹⁸ Decision of July 11, 1996, Oberlandesgericht Düsseldorf (Germany), No. 6 U 152/95, *available at* <http://cisgw3.law.pace.edu/cases/960711g1.html>.

¹⁹ See Unilex Database, *supra* note 15; CLOUT Abstract of July 11, 1996 Decision, *supra* note 17.

other law (e.g., domestic German law) to recover the fees its lawyers charged for the actual litigation. With the generous help and guidance of Professor Dr. Thomas M.J. Möllers of the University of Augsburg, Germany – a colleague and friend who visited my home institution while I was writing this paper – I wrote the OLG Düsseldorf and obtained an un-abridged version of the decision. It revealed (to Mr. Kill, and through him, to me) that, while the court awarded damages under CISG Article 74 for attorneys' fees charged for the seller's pre-litigation notice, it also awarded the seller compensation for the litigation fees of its attorneys under the "loser-pays" rule of the German Code of Civil Procedure²⁰ (as opposed to the damage provisions of the CISG). Mr. Kill suggested that the court may have been motivated to award CISG damages to cover the cost of the pre-litigation notice because such costs would be beyond the scope of the recovery afforded by the domestic "loser pays" rule in Germany, and pre-litigation attorney expenses would be characterized as substantive damages under German national sales law.

Thus, after considerable effort, I was able to determine that the July 1996 decision of the OLG Düsseldorf stands for the proposition that damages under CISG Article 74 encompass compensation for pre-litigation attorney expenses of the aggrieved party, but it apparently does not hold that attorneys' fees for the litigation itself are recoverable as CISG damages. This holding, although narrower than I thought when I first read the English abstracts of the case, nevertheless presents a challenge to U.S. courts, because pre-litigation attorneys' fees of the type covered by the German court's award are generally not compensable under the traditional American rule.²¹

Other German decisions appear to make a similar distinction between pre-litigation lawyer costs, which (the cases hold) are recoverable as damages under CISG Article 74, and attorneys' fees for conducting the litigation itself. One such case is a 1993 decision of a German trial-level court, the Landgericht Krefeld, which generated a 1994 opinion on appeal by the OLG Düsseldorf.²² In this case, an Italian shoe seller declared a sales contract avoided pursuant to CISG Article 72 after the German buyer failed to pay for an earlier delivery of shoes under a different contract and then failed

²⁰ Section 91(1) of the German Code of Civil Procedure ("ZPO") provides: "The losing party bears the costs of the lawsuit . . ." [English translation from the Award of March 21, 1996 and June 21, 1996, Schiedsgericht der Handelskammer, Hamburg (Germany)], 22 Y.B. COM. ARB. 35, 44 n.35 (1997).

²¹ See the discussion of the American rule in Part III of this paper.

²² Decision of April 28, 1993, Landgericht Krefeld (Germany), No. 11 O 210/92, English Abstract appearing in *Unilex*, affirmed in part and reversed in part in Decision of January 14, 1994, Oberlandesgericht Düsseldorf (Germany), No. 17 U 146/93, English Abstracts appearing in *Unilex* and *CLOUT*. The *CLOUT* Abstract No. 130, abstracting the Decision of January 14, 1994, Oberlandesgericht Düsseldorf (Germany), No. 17 U 146/93, available at <http://cisgw3.law.pace.edu/cases/940114g1.html>.

to respond to a request for assurance of payment under the second contract. According to the Unilex abstract of the decision – the only English language version available – the trial court awarded the seller damages under CISG Article 74 to cover the seller’s “legal fees in Germany arisen until the avoidance of the contract.” A check of the original text (interpreted, again, with the aid of Mr. Kill) clarified that the court awarded Article 74 damages only for attorneys’ fees incurred in making a formal demand for payment to the buyer, and in giving the buyer notice of avoidance.²³ The seller was compensated for attorney costs incurred during the course of litigation under §§ 92 and 269 of the German Civil Procedure Code (ZPO). Thus the trial court’s award of Article 74 damages did not encompass the seller’s attorneys’ fees in litigating the dispute, but only covered certain pre-litigation lawyer costs. On appeal, the OLG Düsseldorf agreed that attorney costs were theoretically recoverable as damages under CISG Article 74, but it overruled the lower court’s award of such damages because, according to the CLOUT Abstract of the decision, “in the present case this would lead to double compensation as the attorney had demanded his costs already in the special procedure for fixing costs.” In other words, the seller’s lawyer had availed himself of the regular procedure for recovering attorneys’ fees under the “loser pays” rule of German domestic procedure law, and the court considered that any further compensation for lawyer expenses would amount to a double recovery (apparently even if the pre-litigation expenses for which the lower court awarded damages were not covered by the domestic loser-pays rule).²⁴

A 1995 decision by a German trial court, the Amtsgericht Alsfeld,²⁵ also supports the distinction, for purposes of awarding CISG damages, between pre-litigation lawyer costs and attorneys’ fees incurred for the litigation itself. In this case, a German buyer had contracted to purchase tiles from an Italian seller. The contract was concluded at a “market fair” (an exhibition?) with a “standhostess” who worked at the seller’s exhibition booth but who, apparently, was not an employee of the seller. The buyer paid the contract price to the standhostess, but the standhostess did not forward the money to the seller. The seller employed an Italian attorney to draft a demand for payment from the buyer. When the buyer failed to respond, the seller sued in Germany to recover the purchase price of the tiles (which the court granted the seller) along with damages for attorneys’ fees. Although

²³ The relevant portion of the original opinion specifies that the court awarded Article 74 damages for “die Anwaltskosten im Zusammenhang mit der Androhung und Erklärung der vorzeitigen Vertragsaufhebung.”

²⁴ I am once again indebted to Professor Möllers for help in obtaining the full text of the original German opinion of the OLG, and to Mr. Kill for guidance in interpreting it.

²⁵ Decision of May 12, 1995, Amtsgericht Alsfeld (Germany), No. 31 C 534/94, English abstract and original German text on Unilex, available at <http://cisgw3.law.pace.edu/cases/950512g1.html>.

the Unilex abstract is somewhat ambiguous on this point, examination of the original German opinion confirms that the seller sought CISG damages only for the costs of the demand letter by the Italian attorney. The court denied damages for this expense, holding that the seller violated the mitigation of damages principle in Article 77 of the CISG because the seller "should have done it through its German attorney who then filed the suit in the German court." The court's reasoning, however, implies that the seller would have recovered damages under the CISG for the Italian attorney's fees had the mitigation principle not been violated. At any rate, because the seller prevailed in its main argument for recovering the price of the goods, the court ordered the buyer to pay the seller's litigation-related attorneys' fees under § 91 of the German Code of Civil Procedure (ZPO).

In a 1996 decision, a German trial court, the Amtsgericht Augsburg, awarded a Swiss seller interest on the German buyer's late installment payment for a delivery of shoes.²⁶ According to the Unilex abstract of the case, "[t]he Court further awarded damages for the legal costs incurred by the seller."²⁷ The edited version of the original German text available in the Unilex report on the case is equally non-specific, although it does clearly refer not just to general legal costs but also specifically to attorneys' fees ("Anwaltskosten").²⁸ The full version of the original decision reveals, however, that the damage award was limited to pre-litigation attorneys' fees, whereas compensation for attorneys' fees incurred during the course of litigation was awarded under the domestic German loser-pay's provision (§§ 92(1) and 344) of the Civil Procedure Code (ZPO).

On the other hand, several foreign decisions appear to award CISG damages to cover the prevailing party's attorneys' fees incurred during the course of the litigation. The clearest of these decisions was rendered by an arbitral tribunal in Hamburg, the Schiedsgericht der Handelskammer. The tribunal found in favor of a Hong Kong seller seeking to collect the price of delivered goods from a German buyer in a transaction governed by the CISG.²⁹ In a separate opinion on costs, the tribunal held that, under Article 74 of the CISG, the buyer was liable to the seller in damages for the seller's legal expenses.³⁰ Although the English abstracts of the opinion from both

²⁶ Decision of January 29, 1996, Amtsgericht Augsburg (Germany), no. 11 C 4004/95, English abstract and original text on Unilex, available at <http://cisgw3.law.pace.edu/cases/960129g1.html>.

²⁷ The Unilex abstract is the only English-language source on this aspect of the case.

²⁸ "Darüber hinaus hat nach den genannten Bestimmungen der Beklagte der Klägerin die Anwaltskosten als Verzugsschaden zu ersetzen."

²⁹ Decision of March 21, 1996, Schiedsgericht der Handelskammer Hamburg (Germany), abstracted in English as part of CLOUT Abstract no. 166, available at <http://cisgw3.law.pace.edu/cases/960321g1.html>; English abstract and original text in Unilex; full English translation available at 22 Y.B. COMM. ARB. 35, 35-43 (1997).

³⁰ Decision of June 21, 1996, Schiedsgericht der Handelskammer Hamburg (Germany), abstracted in English as part of CLOUT Abstract no. 166, available at

CLOUT and Unilex are rather vague on this point, a full English translation of the opinion published in the *Yearbook Commercial Arbitration* makes it clear that the tribunal awarded the prevailing seller compensation for attorneys' fees incurred in the course of arbitrating the dispute.³¹ The tribunal's reasoning is not fully captured in the case abstracts, and can be gathered only from the translation of the full opinion. The tribunal's award of damages under CISG Article 74 to cover the prevailing seller's legal expenses was an alternative holding. The primary grounds for granting an award to cover the seller's legal fees – grounds discussed at far greater length than the holding based on CISG Article 74 – was an interpretation of the parties' contract as including an implied term requiring a breaching party to pay such compensation. The tribunal's willingness to imply such a term, in turn, was based on the fact that domestic procedural law in the home jurisdictions of the respondent and the tribunal (Germany) and of the claimant (Hong Kong, still a British colony at the time the transaction was entered into) adopted a "loser pays" approach.³² Presumably, those loser-pays rules did not directly apply to arbitration proceedings, necessitating the tribunal's resort to an implied contractual loser-pays provision or, alternatively, CISG damages to cover the prevailing party's legal costs.

<http://cisgw3.law.pace.edu/cases/960621g1.html>; English abstract and original text in Unilex; full English translation available at 22 Y.B. COMM. ARB. 35, 43-50 (1997) [hereinafter "CLOUT Abstract no. 166"].

³¹ According to the CLOUT abstract, the panel "held that the [seller] could claim its attorney's fees for the arbitration proceedings as damages, according to Articles 61 and 74 CISG." CLOUT Abstract no. 166, *supra* note 30. The Unilex abstract of the opinion states, "The Arbitral Tribunal had to decide on reimbursement by the buyer of the costs for legal assistance sustained by the seller. The Tribunal held that the parties were entitled to reimbursement of extrajudicial costs incurred for legal assistance." The reference to "extrajudicial costs" in the Unilex abstract is somewhat confusing. That is also the phrase used in the full English translation of the decision, 22 Y.B. COMM. ARB. 35, 43-50 (1997). Fortunately, the discussion appearing in the complete translation makes it clear that the tribunal was referring to the fees of the seller's lawyers for conducting the arbitration. "Extrajudicial costs" may refer to all costs other than direct costs of the arbitration proceeding itself, such as the compensation of the neutral arbitrator, or it may refer to costs incurred in connection with an arbitration as opposed to a court case.

³² The tribunal even went so far to raise the possibility (without deciding) that an arbitration award that failed to compensate the prevailing party for its attorney costs might be unenforceable in Germany on public policy grounds, as being in conflict with the loser pays provision of the German Code of Procedure. Decision of June 21, 1996, Schiedsgericht der Handelskammer Hamburg (Germany), 22 Y.B. COMM. ARB. 35, 44 (1997). The tribunal rejected an argument that liability for the prevailing party's legal costs could be based on trade usage, relying on the results of a contemporaneous survey that found only 55% of respondents expected compensation for legal costs in arbitration if the arbitration agreement did not expressly so provide.

From the viewpoint of a pure Anglophone, a 1997 decision from a court in the Swiss Canton of Aargau³³ is another opinion unambiguously awarding CISG damages for attorneys' fees incurred during litigation. The readily available information on the case, however, is sketchy. There is no Unilex abstract of the decision, nor is the original German text of the decision available through CLOUT or any other source easily accessible to me. The CLOUT abstract reports that the German seller, who received a default judgment for the purchase price of goods plus interest, also received "as damages the legal expenses of its lawyers in Germany and Switzerland." According to the abstract, "[t]he court stated 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)." Perhaps because there is only one English abstract of the case (thus eliminating the threat of inconsistent versions) and the original text was unavailable to me, the decision of the Handelsgericht Aargau seems unambiguous in granting damages under Article 74 of the CISG for all attorney costs of the prevailing party, including the fees incurred during the actual litigation.

Finally, a 1992 opinion of the Court of Arbitration (Paris) of the International Chamber of Commerce involving a transaction between an Italian seller and a Finnish buyer awarded the seller damages under CISG Article 74 to cover "costs and expenses (legal costs, arbitration)."³⁴ Although the language of the decision is English, it is not entirely clear what is included within the damage award. The damages probably covered the seller's attorneys' fees incurred in connection with the arbitration, even though the phrase "legal costs" might conceivably be limited to filing fees and the like and damages for the expenses of "arbitration" might cover only the arbitrators' fees and similar items.

Reaching an accurate understanding of foreign cases dealing with damages for attorneys' fees required a quite considerable effort, even though I came to the task with a head start in background information and resources. Before beginning I was already familiar with not only the CISG, but also the English-language resources on foreign CISG cases. My school library subscribes to the Unilex database, making it readily available to me. Although my foreign language skills are rudimentary, I had access to colleagues and students who were fluent in the languages of the decisions with which I was dealing. The typical practitioner, even one with an international practice, might well lack at least some of these advantages. The difficulties and potential additional expense created by the fact that foreign

³³ 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>.

³⁴ 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>.

cases construing the CISG are relevant, even critical, to a proper interpretation of the Convention is undoubtedly one reason that U.S. practitioners continue to advise clients engaged in international sales transaction to avoid the application of the CISG in favor of U.S. domestic sales law.³⁵ In short, the various resources that have developed to permit access to CISG case law from around the world have made it possible but by no means easy to find and understand foreign case law on a given topic.

Despite the difficulties of attempting to understand foreign case law, and the inherent ambiguities in the opinions themselves, 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. Furthermore, there is no case, foreign or domestic, that expressly rejects this reading of Article 74. These facts raise a crucial question: should U.S. courts grant damages under CISG Article 74 to cover an aggrieved party's attorneys' fees even though this would be a departure from the usual domestic U.S. law rule? To answer this question, I will first describe the U.S. domestic rule and (despite my lack of credentials as a comparativist) compare it to the approach in some civil law jurisdictions. I will then explore whether, in disputes governed by the CISG, the existing foreign case law mandates that U.S. courts grant damages for a prevailing litigant's attorneys' fees in order to achieve the uniformity of interpretation required by Article 7(1) of the Convention. In this discussion, I will attempt to identify factors that courts and arbitration panels should use to evaluate the deference due CISG decisions from other jurisdictions. Finally, I will inquire whether, irrespective of foreign precedent, Article 74 should be interpreted to provide for damages to cover a prevailing party's attorneys' fees.

III. RECOVERY OF ATTORNEYS' FEES UNDER NATIONAL LAW

The general rule in the United States is that each party to a lawsuit bears his or her own expenses of litigation, including the costs of attorneys, no matter who prevails in the dispute.³⁶ The rule, whose origins are some-

³⁵ See V. Susanne Cook, *CISG from the Perspective of the Practitioner*, 17 J.L. & COM. 343, 349-52 (1998). Ms. Cooke notes that "[m]ost U.S. practitioners...elect, without hesitation and little reflection, to apply the familiar and trusted U.C.C." *Id.* at 349. One reason for this attitude, she argues, is that "[a]ny case arising under CISG involves increased research time to understand the international context of CISG . . . and research prior U.S. and foreign decisions and scholarly writing that address the issues in the case." *Id.* at 351 (footnotes omitted).

³⁶ See, e.g., *In re Fried Group, Inc.*, 218 Bankr. 247, 252 (Bkrcty. M.D. Ga. 1998) ("Attorney's fees are generally not recoverable absent an express contractual provision or a statutory mandate"); *Indiana Glass Co. v. Indiana Mich. Power Co.*, 692 N.E.2d 886, 887 (Ind. Ct. App. 1998) ("We begin with our well-settled rule that each party to litigation is responsible for his or her own attorney's fees absent statutory authority, agreement, or rule to the contrary"); *Modine Mfg. Co. v. North East Indep. Sch. Dist.*, 503 S.W.2d 833, 844 (Tex.

what unclear,³⁷ was adopted by the United States Supreme Court in 1796³⁸ and has repeatedly (and recently) been reaffirmed by the same court.³⁹ Indeed, this method of dealing with attorneys' fees is known (at least in the United States) as the "American rule."⁴⁰ It stands in contrast to the approach in much of the rest of the world, including most European jurisdictions, where the general rule is that a party who prevails in litigation can recover some or all of the costs it incurred for legal representation (as well as other litigation costs) from the losing party – a "loser pays" or "costs follow the events" approach.⁴¹ The United States, however, is not alone in requiring that each party generally bear its own litigation costs. Japan has such a system for contract cases.⁴² Thus, the two largest economies in the world have adopted this approach for domestic sales transactions. Although the "loser-pays" principle apparently dominates the civil law jurisdictions of continental Europe,⁴³ it is worth noting that the two different approaches to the attorney-fees issue do not represent a common law/civil law split:

Civ. App.1973) ("the rule previously recognized as settled law . . . that attorney's fees are not recoverable either in an action in tort or a suit upon a contract unless provided by statute or by contract between the parties"); *Devore v. Bostrom*, 632 P.2d 832, 835 (Utah 1981) ("The general rule is that attorneys' fees are not recoverable unless provided by statute or contract"). The rule is applicable to attorneys' fees incurred by one party to a contract in litigating a dispute with the other party, and should be distinguished from the generally-accepted position in the U.S. that attorney costs incurred in disputes with *third parties* are recoverable in a suit for breach of contract if the breach caused the aggrieved party to incur such costs. See, e.g., *Bossier Bank & Trust Co. v. Union Planters Nat'l Bank*, 550 F.2d 1077, 1084 (6th Cir. 1977) (magistrate's opinion appearing as Appendix B); *Devore*, 632 P.2d 832, 835 (Utah, 1981). In this article, I will not deal with the issue of recovering attorneys' fees incurred in disputes with third parties. All references in the text are to the recovery of attorneys' fees incurred in the dispute with the party allegedly liable for such fees.

³⁷ See John Y. Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L L. 1, 10 n.40 (1999).

³⁸ *Id.* at 11 (citing *Arcambel v. Wiseman*, 3 U.S. 306 (1796)).

³⁹ See *Key Tronic Corp. v. U.S.*, 511 U.S. 809, 814-15 (1994); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

⁴⁰ See, e.g., *Crowl v. Berryhill*, 678 N.E.2d 828, 831 (Ind. Ct. App.1997). ("Indiana follows the American rule which requires each party to litigation to pay his or her own attorney's fees absent statutory authority, agreement, or rule to the contrary"); Gotanda, *supra* note 37, at 10-11.

⁴¹ See Gotanda, *supra* note 37, 6-10. "Most jurisdictions allocate costs and fees in litigation according to the principle that costs follow the event." *Id.* at 6. Of course there are significant variations in the "loser pays" rules of these jurisdictions, as Professor Gotanda's discussion points out.

⁴² See *id.* at 10 n.39 ("The practice in Japan is for the parties to bear their own expenses, including attorneys' fees. There is an exception in tort cases, in which a prevailing plaintiff can recover attorneys' fees and expenses as additional damage").

⁴³ European states that follow a loser-pays approach include Austria, Denmark, England, France, Germany, Greece, Hungary, Italy, the Netherlands, Portugal, Romania, Switzerland and Turkey. See *id.* at 5 n.14 & 6 n.20.

England, the homeland of the common law, has a loser-pays system.⁴⁴ Indeed, in the United States, the loser-pays approach is usually called “the English rule.”⁴⁵

There are several exceptions to the American rule that parties to litigation bear their own attorneys’ fees. Under U.S. law, a successful litigant can recover its attorneys’ fees from the losing party if that result is provided either by statute or by an enforceable contract provision between the parties.⁴⁶ The issue raised by foreign decisions permitting a prevailing litigant to recover attorneys’ fees as damages under the CISG is whether the damage provisions of the Convention trigger the statutory exception to the American rule. This exception has been narrowly construed.⁴⁷ In particular, courts have generally required that a statute explicitly and specifically authorize recovery of attorneys’ fees before it will trigger the statutory exception to the American rule.⁴⁸

The American rule on recovery of attorneys’ fees, including the statutory exception, has been applied in litigation governed by domestic U.S. sales law. Several litigants have argued that the incidental and/or consequential damages provisions of Article 2 of the Uniform Commercial Code (“UCC”)⁴⁹ authorized recovery of damages to cover a successful claimant’s attorneys’ fees.⁵⁰ None of the relevant UCC provisions specifically mention attorneys’ fees or other litigation expenses, but all include general language

⁴⁴ See *id.* at 5. Other common law jurisdictions with a loser-pays approach include Australia and Canada. *Id.* at 6 n.20.

⁴⁵ See *id.* at 5 (“The practice of requiring the losing party to pay the winning party’s costs...is known as the principle that costs follow the event or the English rule”).

⁴⁶ See, e.g., *New Amsterdam Cas. Co. v. Texas Industries, Inc.*, 414 S.W.2d 914, 915 (Tex. 1967) (“Attorney’s fees are not recoverable either in an action in tort or a suit upon a contract unless provided by statute or by contract between the parties.”). U.S. courts have also recognized an exception to the American rule permitting a prevailing party to recover its attorneys’ fees if the other party has engaged in bad faith behavior or other misconduct. *Gotanda*, *supra* note 37, at 13.

⁴⁷ See, e.g., *New Amsterdam Cas. Co.*, *supra* note 46, at 915. “Statutory provisions for the recovery of attorney’s fees are in derogation of the common law, are penal in nature and must be strictly construed.” *Id.*

⁴⁸ E.g. *Olbrys v. Peterson Boat Works, Inc.*, 1996 U.S.App.Lexis 10100 1, 12 (1996). (unpublished opinion noted at 81 F.3d 161). “Several Michigan Court of Appeals decisions have found that attorney fees as an element of costs or damages are authorized only when the language of a statute explicitly provides for them.” *Id.* *Hughes v. Bemby*, 470 P.2d 151, 153 (Or. 1970). “We have adopted a narrow policy on the allowance of attorney fees and held that they will not be allowed unless expressly authorized by a statute or a contract.” *Id.*

⁴⁹ UCC §§ 2-710, 2-715(1) & 2-715(2). These and all other references to the UCC in this article are to the 2000 Official Text promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

⁵⁰ Specific litigation involving sales governed by domestic U.S. law may be subject to special rules that authorize a prevailing party to recover attorneys’ fees. For example, in certain consumer sales actions a prevailing buyer can recover attorneys’ fees under § 110(d)(2) of the Magnuson Moss Warranty Act, §110(d)(2), 15 U.S.C. § 2072.

stating that recoverable damages include expenses or losses "resulting from the breach."⁵¹ Two cases decided by Michigan Courts of Appeal accepted the argument that a prevailing buyer's incidental damages under UCC § 2-715(1) encompass compensation for the buyer's attorneys' fees.⁵² These cases, however, appear to be isolated frolics. A federal appeals court applying Michigan law and charged with divining how the Michigan Supreme Court would rule on the issue strongly criticized these cases, and refused to follow them.⁵³ This federal decision and at least 18 other decisions applying the law of 14 different states have rejected the argument that the damage provisions of UCC Article 2 authorize recovery of attorneys' fees incurred in the litigation between the parties to a sale.⁵⁴

⁵¹ UCC § 2-710 (seller's incidental damages include "any commercially reasonable charges, expenses or commissions . . . otherwise resulting from the breach"); UCC § 2-715(1) ("Incidental damages resulting from the seller's breach include . . . any other reasonable expense incident to the delay or other breach"); UCC § 2-715(2) ("Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . .").

⁵² See *Cady v. Dick Loehr's Inc.*, 299 N.W.2d 69, 71 (Mich. Ct. App. 1980) (holding that UCC § 2-715(1) "confers on the trial court discretion to award attorneys' fees as an element of the damages incurred as a result of a breach of warranty," and affirming the trial court's award of attorneys' fees); *Kelynack v. Yamaha Motor Corp.*, 394 N.W. 2d 17, 21-22 (Mich. Ct. App. (1986) (following *Cady*). A Utah Supreme Court case holding that an aggrieved buyer's damages under UCC § 2-715 do not encompass attorneys' fees produced a vigorous dissent arguing that such expenses came within a buyer's incidental damages under UCC § 2-715(1). See *Devore v. Bostrom*, 632 P.2d 832, 836-37 (Utah 1981) (Stewart, J., concurring and dissenting). Lower courts have also awarded incidental damages for attorneys' fees under the UCC only to be reversed on appeal. See *Olbrys*, *supra* note 48 (applying Michigan law and reversing district court's award of attorneys' fees to aggrieved buyer under UCC § 2-715(1)); *East Girard Savings Assoc. v. Citizens Nat'l Bank & Tr. Co.*, 593 F.2d 598, 604 (5th Cir. 1979) (applying Texas law and reversing district court's award of attorneys' fees to aggrieved seller under UCC § 2-710); *Brownie's Army & Navy Store, Inc. v. E.J. Burke, Jr., Inc.*, 424 N.Y.S. 2d 800, 803-04 (App. Div., 1980) (reversing lower courts' awards of attorneys' fees to aggrieved seller under UCC § 2-710); *King's Aircraft Sales, Inc. v. Lane*, 846 P.2d 550, 558 (Wash. App. Div. 1993) (reversing trial court's award of attorneys' fees).

⁵³ See *Olbrys*, *supra* note 48 (holding that the Michigan Supreme Court would reject the statutory construction of the Michigan Court of Appeals decisions that allow UCC damages for attorneys' fees).

⁵⁴ See *East Girard Savings Assoc. v. Citizens Nat'l Bank & Tr. Co.*, 593 F.2d 598, 604 (5th Cir. 1979) (applying Texas law); *Bossier Bank & Trust Co. v. Union Planters Nat'l Bank*, 550 F.2d 1077, 1078 (affirming magistrate's opinion appearing as Appendix B at 1083-84) (6th Cir. 1977) (applying Tennessee law); *In re Fried Group, Inc.*, 218 Bankr. 247, 252-53 (Bkrcty M.D. Ga.) (applying Georgia law); *Great Western Sugar Co. v. Mrs. Allison's Cookie Co.*, 563 F. Supp. 430, 433 (D.C.Mo., 1983) (applying Missouri law); *Jelen v. Bandimere*, 801 P.2d 1182, 1185 (Co. 1990); *Florida Nat'l Bank v. Alfred and Ann Goldstein Found., Inc.*, 327 So.2d 110, 111 (Ct. App. Fla. 1976); *Indiana Glass Co. v. Indiana Michigan Power Co.*, 692 N.E.2d 886, *passim* (Ct. App. Ind. 1998); *Landmark Motors, Inc. v. Chrysler Credit Corp.*, 662 N.E.2d 971, 977 (Ind. Ct. App., 1996); *Nick's Auto Sales, Inc. v. Radcliff Auto Sales, Inc.*, 591 S.W.2d 709, *passim* (Ky. App., 1979); *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 79 (Minn. 1981) (rejects argument that UCC § 2-

The primary reason that the vast majority of U.S. courts refuse to award UCC Article 2 damages to cover a prevailing litigant's attorneys' fees is that the statutory provisions in question do not provide for that result with sufficient explicitness and particularity.⁵⁵ As one court succinctly concluded with respect to § 2-710 of the UCC, "[t]o change the long-standing law in respect of attorneys fees, the statute must be much more explicit."⁵⁶ Another court noted that, "[h]ad the drafters of the Uniform Commercial Code intended attorneys' fees to be included as incidental damages, they could easily have mentioned them and no doubt would have, since the exclusion of attorneys' fees is such a well known exception to the general rule of damages."⁵⁷ In short, under the usual approach of U.S. courts, statutory damage provisions will not be construed to authorize recovery of a successful litigant's attorneys' fees absent a specific reference to such recovery in the express language of the statute.

715 authorizes recovery of attorneys' fees as incidental damages, but awards attorneys' fees on basis of Minnesota Consumer Protection Act); *Neri v. Retail Marine Corp.*, 285 N.E. 2d 311, 315 (N.Y. 1972); *Brownie's Army & Navy Store, Inc. v. E.J. Burke, Jr., Inc.*, 424 N.Y.S. 2d 800, 803-04 (App. Div., 1980); *Hardwick v. Dravo Equip. Co.*, 569 P.2d 588, 592 (Or. 1977); *Modine Mfg. Co. v. North East Indep. Sch. Dist.*, 503 S.W.2d 833, 844 (Ct. Civ. App. Tex. 1974); *Devore v. Bostrom*, 632 P.2d 832, 835-36 (Utah 1981); *Johnson Tire Service, Inc. v. Thorn, Inc.*, 613 P.2d 521, 524 (Utah, 1980); *King's Aircraft Sales, Inc. v. Lane*, 846 P.2d 550, 558 (Wash. App. Div. 1993); *Murray v. Holiday Rambler, Inc.*, 265 N.W.2d 513, 527-28 (Wis. 1978).

⁵⁵ *See, e.g.*, *Olbrys v. Peterson Boat Works, Inc.*, noted at 91 F.3d 161, opinion available at 1996 WL 143466 at **4 - **5 (6th Cir. 1996); *East Girard Savings Assoc. v. Citizens Nat'l Bank & Tr. Co.*, 593 F.2d 598, 604 (5th Cir. 1979); *Bossier Bank & Trust Co. v. Union Planters Nat'l Bank*, 550 F.2d 1077, 1078 (affirming magistrate's opinion appearing as Appendix B at 1083-84) (6th Cir. 1977); *Indiana Glass Co. v. Indiana Michigan Power Co.*, 692 N.E.2d 886, 889 (Ct. App. Ind. 1998); *Hardwick v. Dravo Equip. Co.*, 569 P.2d 588, 592 (Or. 1977); *Modine Mfg. Co. v. North East Indep. Sch. Dist.*, 503 S.W.2d 833, 844 (Ct. Civ. App. Tex. 1974). The other primary argument for denying UCC Article 2 damages to cover attorneys' fees is based on precedent. *See, e.g.*, *Olbrys v. Peterson Boat Works, Inc.*, noted at 91 F.3d 161, opinion available at 1996 WL 143466 at **4 - **5 (6th Cir. 1996); *In re Fried Group, Inc.*, 218 Bankr. 247, 252-53 (Bkrcty M.D. Ga.); *Indiana Glass Co. v. Indiana Michigan Power Co.*, 692 N.E.2d 886, 888 (Ct. App. Ind. 1998); *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 79 (Minn. 1981); *Devore v. Bostrom*, 632 P.2d 832, 835-36 (Utah 1981). One opinion, involving a claim by an aggrieved seller for damages to cover its attorneys' fees, argued that such expenses are in the nature of consequential damages rather than incidental damages, and that under UCC Article 2 sellers are not entitled to recover consequential damages. *See Johnson Tire Service, Inc. v. Thorn, Inc.*, 613 P.2d 521, 524 (Utah 1980).

⁵⁶ *Brownie's Army & Navy Store, Inc. v. E.J. Burke, Jr., Inc.*, 424 N.Y.S. 2d 800, 804 (App. Div., 1980).

⁵⁷ Magistrate's opinion in *Bossier Bank & Trust Co. v. Union Planters Nat'l Bank*, reprinted as Appendix B in *Bossier Bank & Trust Co. v. Union Planters Nat'l Bank*, 550 F.2d 1077 at 1083, 1083 (6th Cir. 1977).

IV. DOES THE CISG, PROPERLY INTERPRETED IN ACCORDANCE WITH ARTICLE 7(1), AUTHORIZE THE RECOVERY OF ATTORNEYS' FEES AS DAMAGES?

The question whether the damage provisions of UCC Article 2 permit an aggrieved party to recover its attorneys' fees as damages offers an interesting domestic-law parallel to the issue of recovering attorneys' fees under the CISG. It is now time, however, to return to the question that is the focus of this paper: should a U.S. court interpret the CISG to authorize a prevailing litigant to recover attorneys' fees as damages? Under the usual approach employed in American law the answer clearly would be no, because the damage provisions of the Convention do not provide for such a recovery with sufficient specificity: Article 74 of the CISG is no more explicit on the recovery of damages for attorneys' fees than are the incidental and consequential damages provisions of Article 2 of the UCC (§§ 2-710 and 2-715) which have been overwhelmingly (although not quite unanimously) interpreted not to authorize the aggrieved party to recover damages for lawyer costs. The first question, therefore, is whether the approach that U.S. courts have taken to resolving the attorneys' fee issue under domestic legislation is properly applicable to the CISG, which is not purely U.S. domestic legislation, but is a multilateral treaty intended to create uniform international law and to be interpreted, according to CISG Article 7(1), with regard for its "international character."

Furthermore, several foreign decisions have held that damages for a variety of attorney costs incurred by an aggrieved party are recoverable under Article 74 of the CISG. In keeping with the mandate of CISG Article 7(1) to interpret the Convention with regard for "the need to promote uniformity in its application," a U.S. court must take these decisions into account and must be careful to resist the "homeward trend" that pulls it toward interpreting the CISG to reproduce the results under American national law. Part IV of this article explores how these strands should be untangled.

A. The Methodology of Analysis

As has been demonstrated, U.S. courts will not interpret domestic legislation to authorize recovery of attorneys' fees unless the law expressly and specifically refers to such recovery. Only a statute that satisfies this special specificity requirement⁵⁸ will trigger the statutory exception to the usual

⁵⁸ This specificity requirement is "special" in the sense that it is not applied to recovery of damages for other losses caused by breach. For example, courts routinely interpret § 2-715 of the U.C.C. to permit recovery of damages for labor costs even though this item is not specifically mentioned in the provision. *See, e.g., Latex Equipment Sales & Service, Inc. v. Apache Mills, Inc.*, 484 S.E.2d 274, 276 (Ga. App. 1997) ("While we have found no Georgia cases addressing the issue, increased labor costs have been held to qualify as incidental dam-

American rule that each party bears the expenses of his or her own lawyers. It is also clear that the language of the relevant CISG damages provision, Article 74, would not satisfy the specificity requirement so that, if subjected to the usual interpretational methodology employed by U.S. courts, the Convention would not be construed to authorize recovery of attorneys' fees. It is equally clear, however, that the foreign decisions permitting recovery of damages for attorneys' fees under the CISG impose no requirement that a provision specifically refer to such recovery. The foreign cases find the general language of Article 74 – “[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” – quite sufficient to authorize recovery of damages for the aggrieved party's attorney costs.

When a U.S. court confronts the question whether CISG Article 74 authorizes an aggrieved party to recover its attorneys' fees, should the court apply the specificity requirement usually imposed under U.S. domestic law? The answer, clearly, is no. The requirement that legislation must expressly refer to recovery of attorneys' fees is a matter of the interpretational methodology of U.S. national law, and it is grounded in the domestic law background of the American rule. Application of this requirement would violate the mandate of CISG Article 7(1) that the Convention be interpreted with regard for its “international character,” as well as the resulting principle – widely recognized in scholarly writing – that the CISG be interpreted “autonomously”⁵⁹ rather than simply as part of a State's domestic legal system. The fact that the specificity requirement of U.S. law is not followed internationally (as demonstrated by the foreign cases interpreting CISG Article 74 to permit recovery of damages for attorneys' fees) shows that it has no place in interpreting the international text of the CISG. A U.S. court trying to decide whether CISG Article 74 encompasses damages for an aggrieved party's lawyer costs should approach the question without the baggage of special specificity requirements for this item of damages.

B. A Method for Determining the Precedential Authority of Foreign Decisions

What influence should foreign cases authorizing the recovery of damages for lawyer costs under CISG Article 74 have on a U.S. court facing the attorneys' fee issue? As was noted earlier, courts and commentators agree

ages under the UCC and other states' versions thereof. See *Ohline Corp. v. Granite Mill*, 849 P.2d 602, 605(II) (Utah App.1993); see generally *Jay V. Zimmerman Co. v. General Mills*, 327 F.Supp. 1198, 1205(11) (E.D.Mo. 1971)”).

⁵⁹ See e.g., Michael J. Bonell, *Article 7*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 65, 74 (C.M. Bianca & M.J. Bonell eds., 1987) (“[T]o have regard to the ‘international character’ of the Convention also implies the necessity of interpreting its terms and concepts autonomously”).

that decisions from beyond one's national borders have force and authority in interpreting the Convention.⁶⁰ In discussing this authority, it is important to distinguish between the persuasive value of a foreign court's reasoning and the influence that a foreign decision has purely as precedent for a proposition. The influence to be accorded the former is clear: to the extent that a foreign opinion has analyzed an issue in a fashion that a U.S. court finds persuasive, the U.S. court obviously should take it into account, just as it would take into account persuasive arguments of the parties' advocates.⁶¹ The court, furthermore, should strive to assess the persuasive force of a foreign court's reasoning from an international perspective, and avoid measuring the arguments by the parochial standards of its domestic law methodology. Consulting foreign opinions in order to benefit from their reasoning is an important technique for complying with the mandate of CISG Article 7(1) to interpret the Convention with regard for its international character.

But foreign judicial decisions should have a precedential influence beyond the persuasive force of their analyses. This additional influence derives from the mandate of CISG Article 7(1) to interpret the Convention with regard for uniformity in its application. To obey this mandate, actual practice and concrete results in other jurisdictions must be taken into account independently of the persuasive force of the analyses that produced these results. In other words, for the sake of uniformity in the application of the Convention, a U.S. court may be obliged to follow the results in foreign decisions simply as a matter of precedent, even if the U.S. court does not find the reasoning of those decisions persuasive.

A U.S. court, however, clearly is not bound to follow the results of foreign CISG cases in all circumstances.⁶² The CISG did not create a *de facto* international court system in which foreign decisions must be treated as binding precedent as a matter of *stare decisis*. Courts remain free to disagree with positions taken by sister-tribunals from beyond their national borders. Article 7(1) itself does not require that those interpreting the CISG achieve strict uniformity in its application, but only that they have "regard" for uniformity along with several other values – the Convention's interna-

⁶⁰ See authorities cited *supra* note 6.

⁶¹ See Jürgen Schwarze, *The Role of the European Court of Justice (ECJ) in the Interpretation of Uniform Law among the Member States of the European Communities*, in INTERNATIONAL UNIFORM LAW IN PRACTICE, *supra* note 6, at 221, cited in Commentary on CISG Case Law, *Pace University Database on the CISG and International Commercial Law* [website of the Pace University Institute for International Commercial Law], at <http://www.cisg.law.pace.edu/cisg/text/caseschedule.html#guides> (visited July 6, 2001) (asserting that, for uniform law questions, foreign judgments have "integrative force . . . based on the persuasive reasoning which the decisions of the Court bring to bear on the problem at hand").

⁶² See *supra* text accompanying notes 8-9.

tional character and the promotion of good faith in international trade.⁶³ The result is that, while foreign decisions do not have the authority of binding precedent, “[i]nterpretations of an international convention by sister signatories are entitled to considerable weight,”⁶⁴ and are to be taken into account “in a comparative and critical manner.”⁶⁵ I have suggested an analogy to the authority that courts in one state accord decisions from another state in construing the UCC.⁶⁶

If tribunals in one country are not bound by decisions from another country, and uniformity is only one of several considerations for a court construing the CISG, how does one determine the precedential authority that a particular foreign decision should have? I find it helpful to think of the question in terms of a spectrum of authority. At one end of the spectrum would be a foreign case that should be followed only if the deciding court found that all other arguments and considerations (including other foreign cases that reached a contrary result)⁶⁷ left it in absolute equipoise, with no preference for one position over another. In such a case, the uniformity consideration identified in CISG Article 7(1) suggests following the result in the foreign case, even though the arguments in favor of the foreign tribunal’s position are no more persuasive than the reasoning supporting the alternative position. This is the theoretical minimum precedential authority that a foreign case could possess – enough to tip the balance only where all other factors cancelled each other out. At the opposite extreme of the spectrum would be a foreign decision that should be followed even if the deciding court disagreed with the approach in the foreign case and found all analyses supporting that position unpersuasive. This is the theoretical maximum authority that a foreign case could have, equivalent to the author-

⁶³ See Flechtner, *The Several Texts of the CISG*, *supra* note 4, at 205-06. As I observed in that earlier piece, it is even possible that the various considerations mentioned in Article 7(1) -- uniformity in the application of the Convention, its international character, good faith in international trade -- could be in conflict, pointing to different resolutions of a particular issue. *Id.* at 205, 213.

⁶⁴ Commentary on CISG Case Law, *Pace University Database on the CISG*, *supra* note 61, (citing *Air France v. Saks*, 470 U.S. 392, 404 (1985)).

⁶⁵ Commentary on CISG Case Law, *Pace University Database on the CISG*, *supra* note 61, citing Antonio Boggiano, *The Experience of Latin American States*, in INTERNATIONAL UNIFORM LAW IN PRACTICE/LE DROIT UNIFORM INTERNATIONAL DANS LA PRATIQUE [Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law (Rome 7-10 September 1997)], Oceana: New York (1988) 47.

⁶⁶ See Flechtner, *The Several Texts of the CISG*, *supra* note 4, at 214-16.

⁶⁷ The uniformity consideration in Article 7(1) supports according precedential authority to a foreign decision only if there is a consensus -- or at least a clear favored position -- among foreign cases dealing with an issue. In other words, it would not promote uniformity in the application of the CISG to follow one line of foreign cases if there is an equally authoritative line of cases that reach a different result. I account for the possibility of contrary foreign cases in the methodology I propose for determining the precedential authority of a foreign case. See *infra*, text accompanying note 69.

ity (in a common law system) of a decision of a higher appeals court in the deciding court's own system. The authority of a foreign decision, of course, could easily fall somewhere between these two extremes.

The task, then, is to devise a methodology for determining where a foreign case falls on this spectrum of authority. The idea of locating a given decision's place on a spectrum, however, can be misleading, for it suggests a precise quantitative assessment of a foreign decision's precedential authority. At least in my hands, such precision is not possible. The "spectrum" concept is merely a metaphor suggesting that a case may possess gradations of authority. The metaphor also facilitates expressing what I mean by "authority" in the way that the extremes of the spectrum are defined. The best method I can devise to analyze the authority of foreign decisions is to identify factors that a jurist should consider, and to leave the process of weighing and comparing the factors to the mysterious black box that is the judgment of a tribunal. And I do not claim to be up to even this modest task, for I only purport to identify *some* of the factors that should be considered. Others commentators may, and I hope will, add to, refine, and correct the preliminary list of factors that I suggest.

I will describe four factors that I believe should be considered in determining the precedential authority of a foreign case. In defining these factors I have maintained the distinction I made earlier between the persuasive value of a decision's reasoning, and its authority as precedent for purposes of promoting uniformity in the application of the CISG. The factors I identify go to the latter aspect of a decision's authority, although the two aspects inevitably overlap. It is important to keep in mind that the precedential authority of relevant foreign decisions is only one of several factors that a tribunal charged with deciding a CISG issue must weigh, and even foreign cases with quite strong precedential authority may be overcome by other considerations. The four factors follow.

1. The Authority of the Tribunal Rendering the Decision within Its Own Legal System

The higher the authority of the tribunal, the more deference the case is due. Thus a decision of the *Bundesgerichtshof* – the highest German court with jurisdiction over CISG issues – is due more deference than a decision of a lower tribunal such as an *Oberlandesgericht* (court of appeal), and a decision of an *Oberlandesgericht* is due more deference than a decision of a *Landgericht* (trial court) or *Amtsgericht* (petty trial court).⁶⁸ This factor seems fairly self-evident, if only because a decision of a higher court will

⁶⁸ For foreign courts attempting to assess the deference due a decision of an American federal court, a decision of the Supreme Court is due more deference than a decision of a Court of Appeals, and a Circuit Court decision is due more deference than a decision of a District Court. Where the decisions of state courts would fit within this hierarchy is an interesting question (i.e., I am ducking that one).

bind a larger group of transactions and thus refusing to follow it will have a greater impact on uniformity. The higher the tribunal that renders a decision, furthermore, the less likely it is to be changed by subsequent appeals or later decisions of a higher tribunal. This factor tends to work against deference for decisions of arbitral tribunals, which bind only the parties to the arbitration.

2. The Extent to Which Decisions of Other Tribunals Are or Are Not in Accord with the Decision at Issue

The more support that a decision has from other tribunals considering an issue, the more deference it is due. On the other hand, the more that other decisions disagree with the decision at issue, the less deference it is due. If there is an even split of foreign authority on an issue, it does not advance uniformity to choose one position over another. In that situation, the precedential forces of the various foreign decisions cancel each other out, and a tribunal facing a CISG issue must resolve it simply by reference to the arguments and analyses it finds more persuasive. A decision supported by the clear majority of foreign tribunals that have considered an issue, in contrast, is certainly due more deference, and the larger the number of cases that have taken the same position the more deference that position is due.⁶⁹ In conformity with the mandate in CISG Article 7(1) to have regard for the international character of the Convention, a stance taken by tribunals from a variety of states with diverse legal traditions, economic circumstances and political systems is due particular deference. Thus a German decision supported by decisions of non-German tribunals – particularly tribunals from LDC's or from outside the Civil Law tradition – is due more deference than a German decision supported only by other German cases.

3. The Amount of International Trade in the Tribunal's Jurisdiction

The more international trading activity connected to the jurisdiction of a foreign tribunal, the more deference its CISG decisions are due. This factor is a controversial one (I myself have doubts) because it tends to devalue decisions from developing and/or smaller countries. Note, however, that the importance of consulting the views of such states is emphasized in factors two and four. I include factor three not because tribunals in jurisdictions with a large volume of international trade are likely to have more experience and expertise in handling international commercial issues – that consideration goes more to the persuasiveness of a foreign tribunal's rea-

⁶⁹ The more authority the other supporting decisions would have under the other factors I have identified (e.g., the higher the authority of the courts rendering those supporting decisions), the more their support should count in favor of the precedential authority of the decision in question.

soning than to its precedential authority for purposes of uniformity.⁷⁰ Rather, I include this factor because taking a position contrary to that of a tribunal in an active international trading jurisdiction is likely to cause a more serious breach of uniformity in the application of the CISG, due to the number of transactions likely to be governed by the foreign tribunal's contrary position. This factor is therefore similar to factor one (the level of authority of the court rendering a decision), and like factor one it tends to work against the precedential authority of arbitral decisions that bind only the immediate parties.

4. The Extent to Which the Foreign Decision Itself Comports with the Mandates of CISG Article 7(1) to Have Regard for the International Character of the CISG, the Need to Promote Its Uniform Application and the Need to Promote the Observance of Good Faith in International Trade

This factor strikes me as the most important of the four. Why should a decision that itself ignores or violates the requirements of CISG Article 7(1) be deferred to in the name of that same article? How can it promote uniformity to follow the lead of a decision that does not itself attempt to promote uniformity and the other values articulated in Article 7(1)? The decision of a tribunal that has not met its Article 7(1) obligations is due very little deference as precedent no matter how high the ranking of the court, no matter how many other decisions agree with it, and no matter how important the foreign tribunal's jurisdiction is in international trade. On the other hand, a foreign decision that genuinely attempts to cultivate an international perspective on the Convention, to promote uniformity in its application, and to promote good faith in performance under its terms, should possess considerable precedential authority independent of the other factors listed above.⁷¹ From this perspective, decisions that have taken into account case law and commentary from outside the legal system of the deciding tribunal will often be due more deference because they are likely to reflect an

⁷⁰ Just because a tribunal is located in an important trading nation, furthermore, does not guarantee that it hears a large volume of international commercial disputes. This point may suggest that the experience a foreign tribunal has in hearing international commercial disputes should be listed as a separate, additional factor to consider in assessing the precedential authority of its CISG decisions. To me, however, this consideration goes more to the persuasiveness of the foreign court's opinion than to its precedential authority, and I have therefore not included such a factor.

⁷¹ One could argue that factor four goes to the persuasiveness of a foreign opinion and thus should not be considered in assessing the authority of a foreign decision as precedent. Factor four certainly straddles (or breaches) the distinction I have maintained between persuasiveness and precedential authority, for the reasoning of a foreign tribunal that has fulfilled its obligation under Article 7(1) should indeed thereby be more persuasive. The increased persuasiveness of such an opinion, however, is an indirect effect of complying with Article 7(1). It seems to me that direct recognition of the soundness of a foreign tribunal's approach under Article 7(1) (in the form of increased precedential authority) is due.

international perspective on the Convention. Similarly, a foreign decision that interprets the CISG to provide for a result contrary to the domestic sales law of the tribunal's jurisdiction (or, in the case of an arbitration, contrary to the domestic sales law of the legal systems in which a majority of panel members usually work) is more likely to have escaped the gravitational pull of the "homeward trend" and thus may deserve to be accorded more authority as precedent. In some instances, factor four may give decisions of arbitral panels – which frequently encompass an international perspective in their make-up and which are less bound by the residual national law of any particular country – an advantage in claiming precedential authority.

C. Assessing the Precedential Authority of Foreign Cases on Recovering Attorneys' Fees

Applying the approach just outlined, I conclude that the foreign cases that have granted an aggrieved party CISG damages to cover attorneys' fees are due little deference as precedent. None of those decisions were rendered by the highest ranking court in the country of origin, and most were from low-ranking trial-level tribunals – although two decisions of intermediate German appellate courts (the *Oberlandesgerichten*) are among those sanctioning the recovery of attorneys' fees under the CISG. Thus the decisions fare neither particularly well nor particularly badly under factor one. The decisions originate from jurisdictions that are important players in international trade (particularly Germany, which accounts for five the seven cases), and they thus rank fairly high under factor three. Application of the remaining two factors, however, suggests that the decisions deserve only very modest deference as precedent for other tribunals facing the attorneys' fee issue.

Factor two – the extent to which there is agreement among foreign decision that have addressed an issue – plays out in an interesting fashion when applied to the decisions granting CISG damages for attorneys' fees. In one sense there is unanimity in the foreign cases on the attorneys' fees issue: the seven cases discussed above all authorize recovery of such damages, and no case of which I am aware has affirmatively held that CISG Article 74 excludes damages for attorneys' fees. While seven is not a particularly large number of cases in light of the many hundreds of CISG decisions that have been reported⁷² and the fact that the attorneys' fee issue

⁷² In his latest compilation, Professor Michael R. Will has catalogued over 600 decisions applying the CISG. See TWENTY YEARS OF INTERNATIONAL SALES LAW UNDER THE CISG (THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS): INTERNATIONAL BIBLIOGRAPHY AND CASE LAW DIGEST, Part II at 5, 9-249 (1980-2000) (Michael R. Will ed., 2000). As of this writing, the CISG web site maintained by the Pace University School of Law catalogues over 900 cases that apply or discuss the CISG. See <http://www.cisg.law.pace.edu/cisg/text/caselit.html>.

could arise in any of them, neither is the number trivial. Several considerations, however, suggest that factor two cuts against giving deference to the decisions awarding CISG damages for attorneys' fees.

First, there is little evidence that the cases granting CISG damages for attorneys' fees represent a genuinely international consensus. Of the seven cases that authorize such recovery, five are from a single jurisdiction – Germany – and another is from a German-speaking Swiss court. The only other decision was by an arbitration panel sitting in France, another civil law jurisdiction with a loser-pays approach to attorneys' fees in its domestic law. In short, there is little diversity in geography or legal background among the tribunals that have authorized recovering CISG damages for attorneys' fees.⁷³

The unanimity on the attorneys' fee issue among foreign cases, furthermore, may be more apparent than real. It is interesting to ask what happened with respect to lawyer expenses in the hundreds of decisions in which the courts do not mention awarding CISG damages to cover attorneys' fees. Did the prevailing party stoically bear its own lawyer costs despite the fact that many of these cases come from jurisdictions with a loser-pays rule? The answer, almost certainly, is no. The prevailing litigant quite likely recovered its litigation expenses under the loser-pays rule of the jurisdiction's domestic law of procedure, although mention of this recovery is frequently omitted from the English summaries and even the original opinions (which are often edited to exclude non-CISG material) available from CISG research resources. At least some of the available CISG opinions do make it clear that there was an award of attorneys' fees based on national procedural law.⁷⁴ Indeed, there is evidence for this practice even among the

⁷³ There is, however, an important caveat to this conclusion. The sources of information on foreign CISG cases accessible to me -- i.e., those that give English language summaries of foreign cases (CLOUT, Unilex, the website maintained by the Pace University Institute of International Commercial Law) -- depend on individuals located in the states that have ratified the CISG for information about CISG decisions. [In the case of CLOUT, the individuals are appointed national reporters; in the case of the other services, information comes from an informal network of volunteers.] As a result, uneven reporting of decisions is a distinct possibility. In fact, the decisions reported in these sources come overwhelmingly from Europe and the United States, and there are few reported decisions from elsewhere.

Thus it is quite possible that there are other decisions on the attorneys' fee issues that I have not discovered.

⁷⁴ See, e.g., decision of July 12, 2000, Tribunale (Regional Court) di Vigevano (Italy), Docket No. 405, English abstract and commentary by Charles Sant'Elia *available at* <http://cisgw3.law.pace.edu/cases/000712i3.html>. According to the English abstract by Mr. Sant'Elia, one party in this case was ordered to pay the prevailing party's "court costs and attorney's fees." According to a translation of this opinion prepared by Francesco Mazzotta (LL.M., University of Pittsburgh School of Law, 2000), the court ordered payment of 6,600,000 lire for "the expenses of trial" based upon the Italian "loser pays" rule. This amount was broken down into 2,200,000 lire for "court expenses," 3,200,000 lire for "lawyer's fee," and the balance for other items required by law.

decisions that have granted CISG damages for an aggrieved party's attorney costs. Several of the German court decisions granted such damages only as a supplement to an award of litigation costs under the loser-pays rule of German national law – i.e., to cover certain pre-litigation lawyer expenses that could not be recovered under the domestic law.⁷⁵ The 1996 opinion of the Schiedsgericht der Handelskammer (Hamburg arbitration panel) that awarded compensation for the prevailing party's attorney costs invoked CISG Article 74 only as an alternative justification for the award. The main rationale for the award was the panel's interpretation of the arbitration clause in the parties' contract as providing for recovery of the prevailing party's lawyer costs – an interpretation that was expressly founded on the loser-pays policies of German and British national law.⁷⁶

Thus while no cases affirmatively reject the idea of awarding CISG damages to cover attorney costs, the prevailing practice in countries with a domestic loser-pays rule apparently is to compensate for attorneys' fees under the procedural rules of national law. One might argue that this approach could co-exist with recovering CISG damages for attorneys' fees, but ultimately the two approaches conflict. If compensation for attorney costs incurred as a consequence of a breach is governed by the CISG, the Convention should preempt domestic rules on this matter. In other words, if recovering attorneys' fees is a matter within the scope of the Convention, that should mandate uniform international results rather than a variety of approaches based upon different national laws. The standards for recovering attorney costs under the CISG, furthermore, likely differ from the standards imposed by the loser-pays rules of the various Contracting States: recovery of damages under the CISG is limited by the mitigation principle in Article 77 and the foreseeability requirement in Article 74, whereas recovery of attorneys' fees under domestic loser-pays rules undoubtedly are subject to different limitations and principles. Thus the cases that award attorneys' fees under domestic loser-pays rules in disputes governed by the CISG (probably the vast majority of European cases, although that can be difficult to ascertain) could well be viewed as counter-precedents to the cases that have awarded CISG damages to cover the aggrieved party's lawyer costs.

In light of these considerations, I conclude that the cases awarding CISG damages to cover the aggrieved party's attorney costs fare poorly with respect to factor two of my scheme for analyzing precedential authority.

Factor four of my scheme also suggests that the cases awarding CISG damages for attorneys' fees are due little deference as precedent. Factor

⁷⁵ See *supra* text accompanying notes 15-28.

⁷⁶ See decision of June 21, 1996, Schiedsgericht der Handelskammer Hamburg (Germany), 22 Y.B. COMM. ARB. 35, 48-49 (1997).

four focuses on the extent to which a foreign decision conforms to the mandate of Article 7(1) to interpret the CISG with regard for three considerations: the international character of the Convention, the need to promote its uniform application, and the need to promote good faith in international trade. None of the foreign cases awarding CISG damages for attorneys' fees display any particular concern for these values. In fact, they are notably deficient with respect to viewing the CISG from an international perspective. In discussing recovery of CISG damages for attorneys' fees, none of the decisions cite any authority from outside their own jurisdictions.⁷⁷ Indeed, with only one exception, the cases do not even display awareness that legal systems elsewhere in the world (such as the U.S.) do not routinely allow prevailing litigants to recover attorney costs.⁷⁸ Instead, the tribunals are content to interpret the Convention in a way that reproduces the results under the rules of national law with which they are familiar – the loser-pays approach of their own domestic law – blithely ignoring alternative approaches. In short, the decisions granting damages for attorney costs under CISG Article 74, far from regarding the Convention as an international document meant to apply in states without a domestic loser-pays tradition, appear to be in thrall to the homeward trend. While this lack of international perspective does not establish that the results of these cases are wrong, it does suggest that the decisions are due little deference as precedent for other tribunals facing the attorneys' fee issue.

The lack of an international perspective displayed by the foreign decisions awarding attorneys' fees as CISG damages spills over into a lack of

⁷⁷ Two of the German decisions cite commentary on the CISG by German authorities. See decision of July 11, 1996, Oberlandesgericht Düsseldorf (Germany), Number 6 U 152/95, original opinion available on Unilex database, *supra* note 15 (citing the CISG commentary by von Caemmerer, Schlechtriem & Stoll, as well as the CISG commentary of Piltz); decision of June 21, 1996, Schiedsgericht der Handelskammer Hamburg (Germany), 22 Y.B. COMM. ARB. 35, 50 (1997), (citing CISG commentaries by von Caemmerer & Schlechtriem; Herber & Czerwenka; Reinhardt; and Rudolph). For the decision of December 19, 1997 of the Handelsgericht des Kantons Aargau (Switzerland) I had access only to an English abstract and not to the original opinion. The English abstract does not indicate that the court cited any authority in connection with its discussion of recovering attorney costs as CISG damages.

⁷⁸ The exception is the opinion by the Hamburg arbitration panel, decision of June 21, 1996, Schiedsgericht der Handelskammer Hamburg (Germany), 22 Y.B. COMM. ARB. 35, (1997). In discussing the primary grounds for its holding -- that the arbitration clause of the parties' agreement, properly interpreted, provided for recovery of attorneys' fees incurred in connection with the arbitration -- the court noted that the loser-pays approach does not apply in the U.S. and the former socialist countries of the COMECON. See 22 Y.B. COMM. ARB. at 48-49. It is significant, however, that the court does not allude to this contrary transnational practice when it discusses the alternative grounds for its award -- treating attorney costs as damages recoverable under CISG Article 74. In that discussion, the court mentions only a German domestic law rule treating lawyer costs incurred by an unpaid seller as recoverable consequential damages caused by the buyer's delay in payment. See 22 Y.B. COMM. ARB. at 49-50.

regard for the uniform application of the Convention. The decisions fail to display any concern for the difficulty that tribunals in states without a domestic loser-pays tradition might have in following their holdings. Such tribunals might include fora in states that have not ratified the Convention but who have jurisdiction over disputes governed by the CISG. The decisions granting damages for lawyer costs also ignore the alternative approach, apparently adopted in a great many other CISG decisions, of awarding attorney costs under the procedural rules of the forum rather than as damages under the CISG. Again, these failures do not necessarily mean that the decisions granting CISG damages for attorneys' fees are wrong – but they do suggest that the decisions should command little authority as precedent for other tribunals seeking to interpret the CISG in a fashion that promotes its uniform application.

Thus application of the four factors leads me to conclude that the decisions interpreting Article 74 of the CISG to allow recovery of damages for an aggrieved party's attorneys' fees are due minimal deference as precedents. U.S. courts facing this issue should be swayed to follow these foreign decisions in the name of a uniform application of the Convention only if the substantive arguments on both sides of the issue are equally persuasive and leave the court undecided about the proper outcome. I believe, however, that the arguments against awarding Article 74 damages for an aggrieved party's attorneys' fees are in fact considerably stronger than those favoring the position, and strong enough to overcome the precedent of the seven decisions I have discussed. There is an alternative approach to the attorneys' fee issue that is superior when judged by international concepts and practices, the drafting history of the Convention, policy considerations, and even the majority of cases that have applied the CISG. It is to these substantive arguments concerning the proper interpretation of Article 74 with respect to the recovery of attorneys' fees that I now turn.

D. Resolving the Issue: Should CISG Article 74 Be Interpreted to Provide for Damages to Cover an Aggrieved Party's Attorneys' Fees?

Having determined that the decisions awarding CISG damages for a prevailing claimant's attorneys' fees are due little deference, the way is clear to take a fresh look at the issue of recovering lawyer costs as damages under the Convention. There is a strong argument that Article 74 of the Convention should not be construed to permit such recovery.

First, the text of Article 74 is ambiguous on the issue. Although the general language of Article 74 (“[d]amages ... consist of a sum equal to the loss ... suffered by the other party as a consequence of the breach”) is broad enough to encompass damages for attorneys' fees, we have seen that equivalent language in U.S. domestic sales law has not been so inter-

preted.⁷⁹ Although simply applying U.S. domestic interpretative methodology to CISG Article 74 would violate the mandate of Article 7(1) of the Convention requiring that the CISG be interpreted with regard for "its international character,"⁸⁰ the U.S. experience nevertheless demonstrates that the text of Article 74 is at least ambiguous on the question of recovering attorneys' fees. Thus the plain language of the provision does not mandate such recovery.

Regard for the international character of the Convention, in fact, suggests a substantial argument against construing the ambiguous text of Article 74 to permit recovery of damages for a prevailing litigant's attorneys' fees. Referring to the *travaux préparatoires* of the CISG, as commentators agree one must to maintain an international perspective on the text,⁸¹ it appears that those who drafted and approved the final text of the Convention never indicated that Article 74 encompassed damages for the prevailing party's attorney costs – a significant omission given the lack of an international consensus on the recovery of such costs.⁸² Indeed, from the formal records of the history of the CISG it appears that the subject of recovering attorneys' fees never arose during the drafting and negotiation of the treaty.⁸³ This strongly suggests that the United States and other countries that generally require litigants to bear their own attorneys' fees did not expect or intend that the CISG would change such a significant aspect of the litigation process. Of course parties to a treaty need not specifically refer to a particular result during the drafting process, and countries may well be bound to a treaty obligation even though their representatives did not consciously intend or even become aware of the obligation before ratifying. Nevertheless, in resolving the ambiguity in the text of Article 74 it is telling that nothing in the legislative history of the Convention suggests that those

⁷⁹ See *supra* discussion accompanying notes 49-57.

⁸⁰ See *supra* discussion accompanying notes 58-59.

⁸¹ See, e.g., HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 6, at 88-91; Ferrari, *supra* note 6, at 247 & n.19.

⁸² Professor John Honnold has gathered the formal documents relating to the drafting and approval of the text of the Convention, including the records of drafting committees and of the 1980 diplomatic conference at which the text of the Convention was approved, into an extraordinarily useful and convenient DOCUMENTARY HISTORY, *supra* note 7. In none of the discussions of what became Article 74 of the CISG, nor in discussions of any other damages provision, is recovery of attorneys' fees even mentioned. The most elaborate discussion in the *travaux préparatoires* of what became Article 74 is found in the commentary by the secretariat of UNCITRAL on the 1978 draft of the Convention, which is reprinted in the DOCUMENTARY HISTORY, *supra* note 7, at 404 ff. In the commentary to Article 70 of the 1978 draft (the *verbatim* predecessor to current Article 74), the Secretariat Commentary gives several detailed and rather elaborate examples of how damages would be calculated under the provision. *Id.* at 448-450. None of the examples mention recovery of damages for the aggrieved party's lawyer's fees.

⁸³ An index-guided search through the documents collected in the DOCUMENTARY HISTORY, *supra* note 7, failed to turn up any discussion of attorneys' fees.

involved in producing the text ever consciously contemplated that the CISG might provide for damages to compensate for attorneys' fees.

In addition, Article 74 does not yield sensible or desirable results if construed to encompass recovery of lawyer costs. For one thing, Article 74 provides for damages only if there has been a breach of the sales agreement. Only those who successfully claim that the other side breached could recover their attorneys' fees. Suppose a seller or buyer successfully defends against a claim of breach brought by the other party. If the defense does not involve a counter-claim that the other side has breached, on what basis could a forum award damages for the prevailing party's attorneys' fees? Claimants who themselves had not breached could sue without concern over liability for the defendant's lawyer costs because even a successful defendant would have no breach on which to base a damage claim. Perhaps a tribunal could avoid this one-sided result by holding that unsuccessful claimants breach an implied obligation by suing when (it is ultimately determined) their claims lack merit. An approach that requires such a result-oriented jurisprudential stretch (with collateral consequences that are hard to predict) in order to avoid egregious partiality, however, does not recommend itself.

Even in those jurisdictions with a loser-pays approach, furthermore, construing CISG Article 74 to provide for damages to cover attorneys' fees would undoubtedly work substantial changes that have not been carefully considered. The domestic rules governing recovery of attorneys' fees in these jurisdictions undoubtedly regulate such recoveries with some care, whereas the CISG damage provisions contain nothing specifically directed to this issue. Of course CISG Article 74 provides that only losses foreseeable at the time the contract is concluded are recoverable, and Article 77 requires that those 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. Even courts that have been willing to permit recovery of lawyer costs as CISG damages seem to sense that the Convention is not well designed for this purpose. Thus several of the German decisions that awarded CISG damages for attorneys' fees limited them to pre-litigation lawyer costs, whereas compensation for fees incurred during the litigation itself was awarded under domestic law loser-pays rules.⁸⁴ On what basis these courts

⁸⁴ See *supra* discussion accompanying notes 15-28.

made the distinction between pre-and post-litigation attorneys' fees is entirely unclear: if the CISG provides damages to cover pre-litigation lawyer costs, why should the successful party not recover Article 74 damages for attorneys' fees incurred during the course of the litigation as well?

Despite the strong argument against awarding CISG damages for lawyer costs, if failure to construe the CISG damage provisions as encompassing compensation for attorneys' fees meant that a successful litigant could not recover such expenses from the losing party in transactions governed by the CISG, it would certainly present a very difficult issue. Much of the world follows a loser-pays principle, and there is nothing in the *travaux préparatoires* of the Convention to suggest that these countries contemplated changing to the American rule for attorneys' fees in litigation involving international sales. Indeed, the idea that the Convention must be construed to incorporate either the American rule or a loser-pays approach is unsatisfactory. Legal systems are divided into those that follow the loser-pays approach and those that decree each party should bear its own lawyer costs, and there is nothing in the history of the Convention to suggest that States in either group intended to change this important aspect of their litigation systems. It seems improper to interpret the CISG to mandate that either group change their usual approach to attorneys' fees in international sales transactions.

Fortunately, and despite the strong claims of uniformity in interpreting the CISG, there need not be a single, global answer to the issue of recovering attorneys' fees in transactions governed by the Convention. Those cases – apparently the vast majority⁸⁵ – in which tribunals from loser-pays jurisdictions have awarded attorney costs in CISG transactions on the basis of their domestic law rules rather than as CISG damages point the way to escape the dilemma. These cases in effect treat the question of recovering attorneys' fees as a matter beyond the scope of the CISG, governed instead by domestic law. The best explanation is that these courts are, *sub silentio*, viewing recovery of attorneys' fees as a procedural matter governed by the law of the forum. A U.S. court has explicitly recognized that the CISG governs substantive sales law and that procedural rules are beyond its scope.⁸⁶ This procedural/substantive limitation on the reach of the CISG offers the proper resolution of the attorneys' fees issue: recovery of attorneys'

⁸⁵ See *supra* discussion accompanying notes 74-77.

⁸⁶ See *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384 (11th Cir. 1998), *cert. denied* *Ceramica Nuova D'Agostino, S.p.A. v. MCC-Marble Ceramic Center, Inc.*, 526 U.S.1087 (1999). For a discussion of the procedural/substantive distinction made by this case, see Harry M. Flechtner, *The UN Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule*, 18 J.L. & COM. 259, 284-86 (1999).

fees should be treated as a procedural question beyond the scope of the CISG and governed by the domestic law of the forum.

This solution appears to be consistent with international practice regarding the rules governing recovery of attorneys' fees. For example, the domestic loser-pays rules of European countries generally appear in their procedural codes.⁸⁷ In addition, treating the recovery of attorneys' fees as a procedural issue beyond the scope of the Convention provides the most sensible resolution because it allows the question to be handled consistently with the litigation system of the deciding forum. The various tribunals that hear disputes involving the CISG have domestic rules governing procedural aspects of litigation before that tribunal, such as rules of evidence, the qualifications of those who can appear before the tribunal, the timing and formality of documents, etc. These domestic procedural rules apply in CISG litigation, and it makes most sense to apply the local rules on recovery of attorneys' fees that were developed to fit with the particular litigation system of the forum. Thus in jurisdictions where the litigation system is geared to a loser-pays rule, the domestic loser-pays rule would continue to apply. Recovery of attorney costs in arbitration proceedings would be governed by applicable arbitration rules. Similarly, the American Rule on recovering attorneys' fees would apply before U.S. courts. In the United States, therefore, such recovery would generally be denied absent a contract clause providing otherwise – not because CISG Article 74 fails expressly to

⁸⁷ For example, the German loser-pays provision is found in § 91(1) of the German Code of Civil Procedure ("ZPO"), which provides, "[t]he losing party bears the costs of the lawsuit . . ." [English translation from the Award of March 21, 1996 and June 21, 1996, Schiedsgericht der Handelskammer, Hamburg (Germany)], 22 Y.B. COM. ARB. 35, 44 n. 35 (1997). For a discussion of this aspect of German procedure, see NORBERT HORN, HEIN KÖTZ & HANS G. LESER, GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 48-50 (Tony Weir trans., 1982). The Swedish loser-pays provisions are found in Chapter 18:1 and 18:8 of the Swedish Code of Judicial Procedures (the *Rättegångsbalk*), which includes the procedural rules for the courts. See RUTH BADER-GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 33, 367-75 (1965). In France, the loser-pays provision is found in the new Code of Civil Procedure, Articles 696 ("The losing party is ordered to pay costs unless the judge, by a reasoned decision, requires another party to pay the whole or part of the costs") and 695(7) (defining costs to include "Remuneration of *avocats* in accordance with regulations, including fees for oral argument") [English translations from FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION 7-85 (Henry P. de Vries and Nina M. Galston, eds., Nina M. Galston and Regina B. Loening, trans., 1987)]. Article 91 of the *Codice di Procedure Civile* provides the loser-pays rule in Italian law ("*Il giudice, con la sentenza che chiude il processo davanti a lui, condanna la parte soccombente al rimborso delle spese a favore dell'altra parte e ne liquida l'ammontare insieme con gli onorari di difesa*"). For other examples of European domestic laws that treat fee shifting provisions as procedural rules, see Joseph Lookofsky, *Case Commentary on Zapata Hermanos v. Hearthsides Baking*, 6 VINDOBONA J. INT. COM. L. & ARB. n. 10 (forthcoming, 2002), available at <http://cisgw3.law.pace.edu/cases/010828u1.html>.

provide for such a recovery, but rather because the issue is beyond the scope of the CISG and is governed by U.S. domestic law.⁸⁸

In short, treating the recovery of attorneys' fees not as a substantive matter governed by the damage provisions of the CISG, but rather as a procedural issue beyond the scope of the Convention and governed by domestic law, offers the best solution to the issue addressed in this article. This solution is most consistent with regard for the international character of the CISG, with the evidence of the drafters' intent from the *travaux préparatoires* of the Convention, and with a sensible approach to the attorneys' fees issue. Although the approach runs counter to several cases that have granted CISG damages to cover a prevailing party's attorneys' fees, and thus would appear to undermine the principle of uniform interpretation of the CISG, there are good reasons for questioning the international influence those cases should enjoy. Indeed, following the lead of these cases would run counter to the apparently much larger group of cases from around the world that have, *sub silentio*, treated the recovery of attorneys' fees as a matter governed by the forum's domestic law rather than by the damage provisions of the CISG.

V. CONCLUSION

The specific legal issue addressed in this article is whether Article 74 of the UN Sales Convention provides for the recovery of the attorneys' fees incurred by a litigant who succeeds in establishing that the other party breached a contract governed by the CISG. Treating the issue as a procedural question beyond the scope of the Convention provides a satisfactory and convincing resolution consistent with the purposes and underlying principles of the CISG.

The larger point of this article is to provide a case study of an attempt to practice what might be termed the "new international commercial law" growing out of uniform international law initiatives like the CISG. The practice of the new international commercial law requires lawyers to dis-

⁸⁸ Treating the recovery of lawyer costs as a procedural question governed by local law also provides sufficient flexibility to deal with complicated situations. Thus, for example, it appears that the loser pays rule in the German Procedural Code governs only the recovery of attorneys' fees incurred after litigation is begun, and relegates the recovery of pre-litigation lawyer expenses to applicable substantive law. The approach I propose dictates that the question of recovering damages for pre-litigation attorneys' fees in transactions otherwise governed by the CISG would be referred to the substantive domestic contract law of Germany, which presumably has rules that fit well with the German procedural rules. In other words, in Germany the recovery of pre-litigation attorneys' fees would be treated as a question not expressly provided for in the CISG, to be settled (according to Article 7(2)) first by reference to "the general principles on which [the Convention] is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." For this question, the "general principle" of the CISG appears to be that such procedural questions are left to local law.

cover, understand, evaluate and apply foreign legal authority (including foreign court decisions and commentary) in an attempt to achieve a genuine international perspective on international legal texts. As a case study in this practice, the article provides lessons that may be less satisfactory – or at any rate, less hopeful – than I expected when I began. It turns out that resolving the focused and easily-stated question of whether Article 74 of the CISG should be interpreted to permit recovery of damages for the attorney costs incurred by a successful litigant plunges one into a forest of challenges, such as determining the proper interpretative standards to apply to an international document like the Convention, ascertaining the meaning of decisions by foreign courts construing the CISG, fixing the proper deference to be accorded such decisions, and a host of other difficulties. I brought to the task many advantages: an extensive in-house law library with virtually all available resources for CISG research; information and expertise developed over more than ten years devoted largely to researching and writing on the Convention; access to colleagues and students with extensive language skills and familiarity with foreign legal systems; and the extraordinary boon of being free to devote the very substantial time necessary to the task. I needed all these advantages (some will undoubtedly feel I needed more) to get an accurate grasp of the attorneys' fees issue and reach a satisfactory resolution.

I emerged from the adventure with a new appreciation of the immense difficulties of practicing in a genuinely international commercial law system, and even with some pessimism over whether the legal profession is truly ready for such practice. In the "real world," few if any practicing lawyers advising on or litigating CISG issues would have the resources and advantages I enjoyed. Without them, the chances that one can properly interpret and apply the Convention in a manner that promotes a uniform global commercial system are diminished significantly. Although great strides have been made in developing what might be termed the "infrastructure" of the practice of the new international commercial law – resources that make it feasible (if not yet easy) to discover relevant foreign legal materials – I have my doubts whether it is yet practicable for the average practitioner, with limited resources and time, to achieve the international perspective needed to implement a truly global international commercial law system.

VI. POSTSCRIPT

After the foregoing article had been completed, but before it was printed, the United States District Court for the Northern District of Illinois issued its opinion in *Zapata Hermanos Sucesores, S.A. v. Hearthside Bak-*

ing Co.⁸⁹ The decision awarded damages under Article 74 of the CISG for the attorney fees incurred by the plaintiff, a seller located in Mexico, in successfully litigating a claim for breach against the U.S. buyer.⁹⁰ In holding that CISG Article 74 should be interpreted to provide for recovery of a party's attorney costs incurred in pursuing a claim under the Convention, the decision takes a position opposed to the one urged in this article. The court reasoned that the plain meaning of Article 74 encompassed recovery of attorney costs as damages if they were foreseeable consequences of the breach, and it emphasized the parties' stipulation that the plaintiff's attorney fees were in fact foreseeable results of the defendant's failure to pay for the goods. The court also argued that unspecified foreign court and arbitral decisions cited by the plaintiff supported its construction of Article 74. The court therefore found that the seller's claim for attorney fees fell within the "statutory exception" to the American rule on attorney fees, and that CISG Article 74 mandated an award of damages covering the seller's lawyer costs.

I remain convinced that the position advocated in this article – which would treat the issue of a prevailing litigant's right to recover attorney fees as a procedural question beyond the scope of the CISG, and subject to the rules of the forum⁹¹ – is correct. If applied in *Zapata*, this approach would

⁸⁹Zapata Hermanos Sucesores v. Hearthside Baking Co., No. 99 C 4040, 2001 U.S. Dist. LEXIS 15191 (N.D. Ill. Mar. 18, 2002).

⁹⁰The court awarded Article 74 damages for the prevailing claimant's attorney fees and also decided, as an alternative ground for its ruling, that the defendant had acted in bad faith and thus was liable for the plaintiff's attorney fees under the "bad faith" exception to the American rule on attorney fees. For a description of the American rule and its exceptions, see *supra*, text accompanying notes 36-57. The seller also sought to hold the defendant's litigation counsel liable for attorney fees under 28 U.S.C. § 1927 which applies when an attorney "multiplies the proceedings in any case unreasonably and vexatiously." In *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 155 F. Supp.2d 969 (N.D.Ill.); the court held that defendant's counsel was liable under the statute.

⁹¹At one point the *Zapata* court seems to be rejecting the idea that rules on the recovery of attorney fees are procedural matters separate from the substantive law governing a claim. The court states that "the existence or nonexistence of a fee-shifting rule is one of substantive policy," citing in support note 31 from the Supreme Court's decision in *Alyeska Pipeline Serv. Co., v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975). The cited note from *Alyeska*, however, merely asserts that a U.S. federal court exercising diversity jurisdiction over a state law claim should apply the state law rules on recovering attorney fees. This point has no particular relevance to the question whether the recovery of attorney fees is beyond the scope of the CISG. The notion that procedural matters are outside the province of the CISG has already been accepted by the Eleventh Circuit Court of Appeals. *MCC-Marble Ceramic Ctr, Inc. v. Ceramica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384, 1388-89 (11th Cir. 1998), *cert. denied* *Ceramica Nuova D'Agostino, S.p.A. v. MCC_Marble Ceramic Ctr, Inc.*, 526 U.S.1087 (1999). For a discussion of the procedural/substantive distinction made by this case, see Harry M. Flechtner, *The UN Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule*, 18 J.L. & COM. 259, 284-86 (1999).

preclude damages for the plaintiff's attorney costs based on Article 74.⁹² The court's argument that the plain meaning of Article 74 mandates an award of damages to recover attorney fees is undercut by the fact that equivalent general language in damage provisions of the UCC have repeatedly been interpreted *not* to authorize recovery of damages for attorney fees.⁹³ These cases, which apparently were not brought to the court's attention, rebut the notion that the extremely general language of Article 74 is unambiguous with respect to the recovery of attorney fees.⁹⁴ The ambiguity of Article 74 is reinforced by the complete absence in the *travaux préparatoires* for the CISG of any indication that the drafters or the delegates to the diplomatic conference at which the text of the Convention was adopted even considered the recovery of attorney fees in connection with Article 74⁹⁵ – another matter that the *Zapata* court apparently did not consider. Thus the main reasoning behind the *Zapata* opinion – that the plain meaning of Article 74 mandates an award of damages for a claimant's attorney fees – is clearly wrong.

As is demonstrated in this article's discussion of the foreign decisions awarding Article 74 damages to cover attorney fees,⁹⁶ the unspecified foreign precedents upon which the court relies to bolster its position almost certainly do not stand for anything like a clear consensus that Article 74 requires compensation for the attorney costs a claimant incurs in litigation.

⁹²In his discussion of *Zapata* in the forthcoming second edition of his book UNDERSTANDING THE CISG IN EUROPE (2d ed., forthcoming 2002), Professor Joseph Lookofsky of the University of Copenhagen also takes the view that the award of Article 74 damages for the seller's attorney fees in that case was incorrect, and that the recovery of attorney fees in CISG litigation should be treated as a procedural matter beyond the scope of the Convention. A preview of this discussion can be found in Joseph Lookofsky, *Case Commentary on Zapata Hermanos v. Hearthside Baking*, 6 VINDOBONA J. INT. COM. L. & ARB. (forthcoming, 2002), available at <http://cisgw3.law.pace.edu/cases/010828u1.html>. Although Professor Lookofsky graciously cites the pre-*Zapata* draft of my article in his discussion, he reached his position on the holding in *Zapata* before he had read the article or discussed the question with its author. Professor Lookofsky insightfully notes that, if recovery of attorney fees is treated as a procedural question beyond the scope of the Convention (as both of us advocate), the award of lawyer costs in *Zapata* might still be proper on the alternative grounds advanced by the court – the “bad faith” exception to the American rule on attorney fees. For a contrary view, see John Felemegas, *The Award of Counsel's Fees under Article 74 CISG, in Zapata Hermanos Sucesores v. Hearthside Baking Co. (2001)*, 6 VINDOBONA J. INT. COM. L. & ARB. (forthcoming 2002), a draft of which was generously made available to me by the author.

⁹³See *supra* text accompanying notes 49-57.

⁹⁴Although the methodology used in these cases represents a peculiarly American domestic law approach to statutory construction which should not be applied to the international sales rules of the CISG, see *supra*, text accompanying notes 58-59, that does not undercut their significance in establishing that the very general language of CISG Article 74 is at least ambiguous with respect to recovering attorney fees.

⁹⁵See *supra* text accompanying notes 81-83.

⁹⁶See *supra* text accompanying notes 14-35.

The court's understanding of those cases may well reflect inaccurate or incomplete English summaries of the decisions. Indeed, the vast majority of decisions by foreign tribunals, which are silent on the question of recovering Article 74 damages for attorney fees and which apparently award compensation for attorney costs based on the domestic loser-pays rules of the tribunal's jurisdiction, suggest a strong consensus that the right to claim reimbursement for lawyer costs is a procedural matter governed by the rules of the forum.⁹⁷ The decision of the Northern District of Illinois, furthermore, never addresses the extremely thorny practical issues that awarding Article 74 damages for attorney fees would create – issues such as whether, in the United States, recovery of attorney fees would be limited to those who successfully pursue a breach of contract claim (and thus are entitled to damages), leaving those who successfully defend against a breach of contract claim (but who themselves have no claim of breach upon which to base damages) to bear their own attorney costs.⁹⁸

In short, the *Zapata* decision appears clearly incorrect. Although the court is to be congratulated for pursuing an international perspective that permitted it to construe the CISG in a fashion that departs from the domestic law rules with which it is familiar, and for attempting to take into account foreign case law interpreting the Convention, it is important that its misconstruction of Article 74 be corrected quickly. Litigants in U.S. courts are sure to notice an opportunity to include claims for attorney fees under the CISG, and the *Zapata* court's error could spread rapidly. The misconstruction could also infect practice outside the United States, where claims for Article 74 damages to cover attorney fees could undermine domestic loser-pays schemes and their principles for determining (and limiting) compensation for attorney costs.⁹⁹ Indeed, unless courts around the world unanimously accepted the *Zapata* approach and abandoned their apparent current practice of awarding attorney fees in CISG litigation on the basis of their domestic loser-pays rules, the *Zapata* error could generate substantial non-uniformity in the application of the Convention – exactly the opposite of the result that the *Zapata* court indicated it was trying to achieve.¹⁰⁰ It is hoped that the foregoing article, which discusses a variety of arguments and considerations apparently not presented to the *Zapata* court, will aid in establishing a better-reasoned approach to the attorney fee issue.

⁹⁷See *supra* text accompanying notes 85-86.

⁹⁸See *supra*, text accompanying notes 83-84.

⁹⁹See *supra*, text accompanying note 84.

¹⁰⁰The fact that a leading European CISG scholar also disapproves of the decision in *Zapata* (see the discussion of Professor Joseph Lookofsky's views, *supra* note 92) demonstrates the opinion's potential for creating non-uniformity in the interpretation of the Convention.