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ATTORNEYS' FEES—LAST DITCH STAND?

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I. INTRODUCTION

MILENA Đorđević, in an excellent article, advances very compelling arguments that attorneys' fees are not governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG).¹ It is correct to say that arguments for and against the CISG governing attorneys' fees only go so far, but not all the way—otherwise, there would be no debate on this point.² The question that comes to mind after reading the article is not which of the arguments is correct, but which one goes the furthest and hence, can potentially resolve the issue. The fact that this is an important issue has been noted by Eric Schwartz: “When an international commercial dispute arises, the cost of resolving it may be as important to the parties as the merits of the claims themselves.”³ Furthermore, as Đorđević correctly states:

The possibility of recovering attorneys' fees as damages is particularly important in countries where legal costs are not recoverable under the pertinent procedural rules, but it is also important in “loser pays” countries since such a possibility would require change of their long established practice of awarding legal costs under the procedural code and rules (and not as part of the damages claim).⁴

If the issue of attorneys' fees could be resolved, it would enhance the harmonisation effort of international trade. The fact that in the majority of jurisdictions the recovery of legal costs is part of civil procedure does not render the CISG inapplicable. It is admitted that the CISG in general

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1. See generally Milena Đorđević, “Mexican Revolution” in *CISG Jurisprudence and Case-Law: Attorneys' Fees as (Non)Recoverable Loss for Breach of Contract*, in PRIVATE LAW REFORM IN SOUTH EAST EUROPE: LIBER AMORCORUM CHRISTA JESSEL-HOLST 199 (Mirko S. Vasiljevic, Rainer Kulms, Tatjana Josipovic & Maja Stanivukovic eds., 2010).

2. For an excellent article summarising and discussing the issues emanating from the debate, see Keith William Diener, *Recovering Attorneys' Fees Under CISG: An Interpretation of Article 74*, 2008 NORDIC J. COM. L. 1, 1 (2008), available at http://www.njcl.utu.fi/1_2008/article3.pdf.

3. Eric A. Schwartz, *The ICC Arbitral Process, Part IV: The Costs of ICC Arbitration*, 4 ICC INT'L CT. OF ARB. BULL. 8, 8 (1993).

4. Đorđević, *supra* note 1, at 203.

is only applicable to resolve substantive issues, but equally well, it is obvious that if procedural issues are within the four corners of the CISG, these issues will also be resolved. The words of Peter Schlechtriem ring true especially in relation to this debate, as he notes: “The question is often phrased as a problem of the borderline of substantive (CISG) rules and the procedural law of the forum, but this is avoiding the real issue in favor of a conceptual approach, resulting in solutions quite different from country to country.”⁵ It is of value to first note all the points that are not in dispute. The arguments in this Article can therefore concentrate on the points of diversion. There are, in general, two issues that seem to be the sticking points. First, and hence the question, is Article 74 applicable? Second, because attorneys’ fees are part of a procedural rule, are attorneys’ fees not covered by the CISG? However, the real question is if Article 74 was applicable, would it draw an otherwise applicable procedural rule into the now-substantive issues of Article 74?

First, it is acknowledged that Article 74 is based on the principle of full compensation, and hence, it can be concluded that “all kinds of losses, suffered by the party and caused by the breach, are recoverable *in principle* under the CISG.”⁶ Furthermore, it is also not in dispute that the CISG does not expressly exclude attorneys’ fees from the category of losses. The most serious challenge against an Article 74 argument has been advanced by Đorđević, who argues in brief that:

[T]he causal link between the breach and the claim for attorneys’ fees [is] interrupted. Consequently, in my view, once the litigation is instituted the incurred attorneys’ fees become a loss that is too distinct from the usual loss suffered as a consequence of breach of contract thus not allowing for its recovery under Article 74 of the CISG.⁷

This issue will be addressed in detail in Part III. This Article will argue that only two arguments have a valid claim to be seriously considered to resolve the issue of attorneys’ fees. Part II will lay out the main argument for an inclusion of the fees via Article 74 and Part III will address the issues brought up by Đorđević, supporting her claim that attorneys’ fees are not included in the regime of the CISG.

II. ARGUMENTS AGAINST INCLUSION OF ATTORNEYS’ FEES

In essence, Đorđević, after examining the arguments of other authors, lists five major objections against the inclusion of attorneys’ fees, of which only the first two issues are discussed in this Article. The other

5. Peter Schlechtriem, *Non-Material Damages—Recovery Under the CISG?*, 19 PACE INT’L L. REV. 89, 96–97 (2007).

6. Đorđević, *supra* note 1, at 205.

7. *Id.* at 216.

three points are not of prime importance and can be subsumed into the first two points. The objections are advanced by:

1. “[T]hose who are basing their argument on the drafter’s intent” (or lack thereof);
2. “[T]hose who find recovery of attorneys’ fees . . . against the equality of the parties to the sales contract”;
3. “[T]hose who find the CISG principles not well-suited to deal with the calculation of attorneys’ fees as recoverable loss”;
4. Those who combine one or two of the above reasons; and
5. The majority of case law is against a recovery under the CISG.⁸

The first two points arguably can be dismissed without great effort. Just because the drafters are silent on a point does not automatically suggest that attorneys’ fees are excluded. The words within the four corners of any legislation, including the CISG, must be consulted first. If there is a gap, or if the words or meaning are not clear, extrinsic material such as the *travaux préparatoires* can be consulted. As the drafters did not comment on this particular issue of inclusion, it does not mean that the question of attorneys’ fees has been decided in the positive or negative form.

It is left to the interpreter to come to a conclusion and to make sense of the text of the conventions. In the case of the CISG this inquiry is guided by Article 7, which states that the CISG’s general principles should assist in coming to a conclusion. It is argued that the full compensation argument is more compelling in this case than the lack of authority in the *travaux préparatoires*, as an argument cannot be simply based on a lack of the drafters’ intent. The opinion of the CISG Advisory Council supports this point:

The issue of whether litigation expenses should be considered as damages for purposes of Article 74 cannot be resolved through a substance/procedure distinction. Whether a matter is considered substantive or procedural may vary from jurisdiction to jurisdiction and may depend on the circumstances of a particular case. Relying upon such a distinction in this context is outdated and unproductive. Instead, the analysis should focus on whether the payment of litigation expenses is deliberately excluded from the Convention and, if not, whether the issue may be resolved “in conformity with the general principles on which [the Convention] is based or, in the absence of such principles, in conformity with law applicable by virtue of the rules of private international law.”⁹

8. *See id.* at 206.

9. Int’l Sales Convention Advisory Council, Calculation of Damages Under CISG Article 74, Advisory Council Opinion No. 6, cmt. 5.2 (2006) (footnotes omitted), available at <http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html>.

Closely connected to a lack of the drafters' intent is the observation made by the Advisory Committee in relation to the substantive and procedural distinction within the CISG. This is topical considering that *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*¹⁰ in the end was decided on the procedural issue. As Judge Posner stated: "The Convention is about contracts, not about procedure. The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural law."¹¹

However, it is important to draw some parallels to the substantive and procedural distinction in association with the general principles as noted in Article 7(2). A very good example is the burden of proof, and it is of value to address this issue by analogy.

The question of attorneys' fees and the burden of proof have in common that there is no clear "in or out" evidence within the four corners of the CISG. However, the distinguishing feature is that the *travaux préparatoires* are very clear on this point. In relation to the burden of proof, the express exclusion of the burden of proof from the text of the CISG is in itself a deliberate move by the drafters of the CISG to ensure that the burden of proof is dealt with on a domestic law level.¹²

In this respect, it has been contended that:

[D]elegations speaking on the burden of proof . . . were all quite definite that it was not the intention to deal in the Convention with any questions concerning the burden of proof. The consensus was that such questions must be left to the court as matters of procedural law.¹³

Peter Schlechtriem and Franco Ferrari argue that the burden of proof issues are governed by the Convention and that, as it is not mentioned expressly, there is an "internal gap" which should be resolved with reference to the two-step methodology in Article 7(2), referring first to the general principles underlying the CISG, and only in the absence of such principles, private international law.¹⁴ Most compelling are the arguments put forward by Ulrich Magnus, who strongly argues that the burden of proof is governed by general principles.¹⁵ John Gotanda also argues:

Applying national laws to determine the level of proof needed to recover damages under article 74 can lead to differential treat-

10. 313 F.3d 385 (7th Cir. 2002).

11. *Id.* at 388.

12. See Stefan Kröll, *The Burden of Proof for the Non-Conformity of Goods Under Art. 35 CISG*, 3 BELGRADE L. REV. 162, 168 (2011).

13. Harry M. Flechtner, *Selected Issues Relating to the CISG's Scope of Application*, 13 VINDOBONA J. INT'L COM. L. & ARB. 91, 102 (2009) (citation omitted).

14. See *id.* at 103.

15. See generally Ulrich Magnus, *General Principles of UN-Sales Law*, 3 INT'L TRADE & BUS. L. ANN. 33 (1997).

ment of similarly situated parties. This is because national laws differ not only on the level of proof needed to recover damages, but also on whether the matter is governed by substantive or procedural law.¹⁶

The conclusion is that, in relation to the burden of proof—and no doubt any procedural issues where a general principle can be found—the observation can be made that the issue is “so closely connected with the application of the substantive provisions that it would be impracticable to separate the two.”¹⁷ If the argument made by many scholars, that the burden of proof is governed within the CISG, is accepted, then it becomes difficult to reject the argument that attorneys’ fees cannot potentially be included as well.

The whole argument hinges on Article 7(2), namely, the gap-filling function. It is universally accepted that in order to have a gap, the issue in question cannot be explicitly governed within the CISG nor explicitly excluded. That said, both the burden of proof and attorneys’ fees would qualify as potentially falling under general principles. The point is that the burden of proof has been rejected in the *travaux préparatoires*, whereas attorneys’ fees have not. From that point of view alone, the burden of proof should be excluded and governed by domestic law, which it is not.

The simple fact is that the CISG has not only included substantive legal issues, but also perhaps inadvertently included procedural issues. Hence, the argument that an issue is procedural in nature and therefore must be excluded from the CISG is simply not sustainable. Stefan Kröll correctly noted in relation to the burden of proof that it is “not a mere rule of procedure with no or only limited influence on material justice. Quite to the contrary it resolves about material considerations which are comparable to those underlying the substantive requirements for the creating and existence of rights.”¹⁸ The same argument also holds for the inclusion of attorneys’ fees to be governed by the CISG. In relation to the drafters’ intention, Schlechtriem should have the last word on this issue as he notes: “Codes age. So do Conventions promulgating Uniform Law. Provisions on interpretation and gap-filling, like the CISG’s Article 7 . . . may be used to prevent petrification.”¹⁹

The second issue set forth by Đorđević also does not have any merits, as the issue of attorneys’ fees is a breach of contract and not a question of equality. Admittedly, Articles 45 and 61 provide very similar remedies to buyers and sellers. However, the important aspect of both articles is that the remedies are directly linked to a breach of contract by either buyer or

16. John Y. Gotanda, *Awarding Damages Under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation*, 37 GEO. J. INT’L L. 95, 109 (2005).

17. Kröll, *supra* note 12, at 169 (footnote omitted).

18. *Id.*

19. Schlechtriem, *supra* note 5, at 89 (footnote omitted).

seller. If the respondent wins the legal issue, then the court in essence decides that there was no breach. In this case specifically, the question of the applicability of Article 74 does not arise. What has happened is that now a gap exists which needs to be filled by domestic law. This is so because the remedy of claiming attorneys' fees is not contemplated within both Articles 45 and 61, and hence falls outside the sphere of the CISG. Does it create an inequality? The answer is no. In the first place, if there is a breach, then the CISG potentially applies. If there is no breach—that is, the defendant wins—the remedy must be sought under the applicable domestic law, as the CISG is silent on attorneys' fees. Equality is guaranteed not entirely via the CISG, but by the applicable governing law.

III. ARGUMENTS FOR INCLUSION OF ATTORNEYS' FEES

The following main arguments are listed in support of the inclusion of attorneys' fees under the CISG:

- The plain meaning of Article 74;
- The principle of full compensation;
- The principle of foreseeability;
- The duty to mitigate;
- The general principle of reasonableness; and
- The reading of the preamble that is the endeavour to promote uniformity.

The district court's decision in *Zapata* correctly notes that the harmonisation of sales law, being a cornerstone of the CISG, must, where possible, overcome variations in domestic laws.²⁰ The best tool to do so is Article 7 combined with Article 8.²¹

It is admitted that court judgements are not a clear indication as to the recovery of attorneys' fees under the CISG and hence, it is not a persuasive argument to rely on court decisions.²² Case law arguably cannot fully support one or the other side of the argument, including *Zapata*. As Đorđević quoted a maxim,²³ the liberty is taken here to do so as well, namely that “one Swallow does not a summer make.”²⁴ David Dixon put it succinctly when he noted:

20. See *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, No. 99 C 4040, 2001 WL 1000927, at *3 (N.D. Ill. Aug. 29, 2001) (quoting *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.F.A.*, 144 F.3d 1384, 1391 (11th Cir. 1998)).

21. It should not be forgotten that Article 8, in effect, excludes the parol evidence rule and hence, to exclude the “American rule” does not create a precedent.

22. See Đorđević, *supra* note 1, at 214.

23. See *id.* at 219.

24. ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, ch. 7 (W.D. Ross trans., Oxford Univ. Press 9th ed. 1954).

Regardless whether scholars are supporters or opponents of Judge Posner's opinion, they all agree on three things. First, that Judge Posner did not follow the rules of analysis of CISG article 7. Though some supporters believe that attorneys' fees are not governed by the CISG, and the opponents believe that they are, both sides agree that Judge Posner misapplied the rules of article 7. Second, though somewhat related to the first, both sides agree that Judge Posner was careless in not attempting to analyze the general principle of the CISG. If attorneys' fees are governed by the CISG, then there is an abundance of authority to suggest the general principle of full compensation would apply, leading to the conclusion that attorneys' fees should be included in loss. Third, both sides agree that Judge Posner improperly cited exclusively to U.S. cases and completely ignored case law from other CISG state parties.²⁵

Given the above and ignoring the weaknesses in Judge Posner's judgment, the argument can be boiled down to the fact that the main objection against attorneys' fees is that the loss is not a consequence of the breach of the contract, and the very nature of the recovery of attorneys' fees speaks against a consequential loss.²⁶ However, it must be noted that the payment of attorneys' fees is closely linked to the breach of the contract and is solely caused by that breach. In other words, but for the breach, there would be no cost, as this author states:

To put a party into a position—it would have been financially—is simply asking the question, has the balance sheet changed? If the asset base is diminished as a consequence of the breach, then those items diminishing the asset base must be understood to fall under the principle of full compensation pursuant to Article 74.²⁷

Đorđević does agree with the fact that attorneys' fees constitute a financial loss.²⁸ Prevailing opinion notes that Article 74 limits the recovery to material losses emanating from the breach of contract. Financial losses fulfil this requirement.

The question that needs to be looked at is: what is included within "material losses" and is it directly linked to the breach as well? This is so because the main argument against attorneys' fees being covered by Article 74 is that there is no direct link to the breach. It is argued that the question which needs to be asked is did the balance sheet change because

25. David B. Dixon, *Que Lastima Zapata! Bad CISG Ruling on Attorneys' Fees Still Haunts U.S. Courts*, 38 U. MIAMI INTER-AM. L. REV. 405, 428 (2007).

26. See Đorđević, *supra* note 1, at 215–16.

27. BRUNO ZELLER, DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 151 (2005).

28. See Đorđević, *supra* note 1, at 215.

of, or but for, the breach and was such a loss foreseeable? It is argued that, as an example, goodwill has been recognised as falling under Article 74 as it fulfils the above requirements.²⁹ In the end, the question is: was the damage foreseeable? This can be answered in the positive.

It is of value to briefly look at the question of whether breaches of ethical standards give rise to a demand of damages under Article 74. This is so because those “who [are] interested in compliance with ethical standards—want[] to claim damages from the buyer who does not use the goods in an ethical way.”³⁰ This is an interesting point because the loss is not directly attributed to a physical fault of the goods, but rather, a philosophical fault that taints the goods. Ingeborg Schwenzer and Benjamin Leisinger argue that:

In this regard, it is submitted that the loss of the seller equals the eventual difference between the contractual value of the goods—i.e. the purchase price—and the real value of the goods, taking into account the unethical use that is intended and the possible consequences arising there from. Such claims for damages serve two functions. First, the equilibrium of the contract is reestablished. The seller’s unethically generated profit is transferred to the buyer who—hypothetically—either would not have concluded the sales contract or would have bought the goods at a much lower price.³¹

The authors argue that the balance sheet has been disturbed; hence, Article 74 will re-establish the necessary equilibrium. In relation to attorneys’ fees, the same argument can be mounted on the grounds that the buyer would not have bought the goods had he known that they were unsuitable.

IV. DISCUSSION

Đorđević indeed advances a very powerful argument, namely:

[T]he recovery of attorneys’ fees incurred in litigation indeed differs from recovery of such fees before litigation. The difference results from the nature of litigation itself, since its initiation (filing a claim in the court and delivering the claim to the defendant) transforms the two-party relationship i.e. sales contract (buyer-seller) into a three party relationship i.e. litigation (plaintiff-court/arbitration tribunal-defendant).³²

29. See ZELLER, *supra* note 27, at 125.

30. Benjamin Leisinger & Ingeborg Schwenzer, *Ethical Values and International Sales Contracts*, in COMMERCIAL LAW CHALLENGES IN THE 21ST CENTURY—JAN HELLNER IN MEMORIAM 249, 275 (Ross Cranston, Jan Ramberg & Jacob Ziegel eds., 2007).

31. *Id.*

32. Đorđević, *supra* note 1, at 216.

The argument, therefore, is that the three-party relationship shifts the costs onto the court-plaintiff relationship that is focused on the litigation and not the breach. Therefore, it is argued that the causal link between breach and loss is interrupted.³³ The point that is made is that a tripartite relationship has now been created because the court has, at the same time, a relationship not only with the buyer but also with the seller. This observation is correct, and it also supports the argument that awarding attorneys' fees is against the equality of the parties to the sales contract.

However, the problem with the above argument is that it relies on the fact that the causal link between breach and loss has been interrupted. Indeed, but for the breach, such a tripartite relationship would not have been created and attorneys' fees would not have been incurred. In other words, the tripartite relationship is causally linked to the breach of the contract.

It is obvious that a breach will trigger many tripartite relationships. As an example, the party suffering the damages must mitigate the losses pursuant to Article 77. If the party relying on the breach enters into a contract with a warehouse to store the goods, putting them at the seller's disposal creates a three party relationship. The three parties are the seller, buyer, and the warehouse owner. There is no debate that the buyer can recover the costs he incurred as part of the Article 74 argument. It is also not disputed if the court finds against the buyer, that he cannot recover any mitigation costs. The contract has been confirmed and the buyer must bear all the costs he incurred. No inequality arguments have been raised in this context.

Furthermore, the law often creates inequalities. As an example, a seller supplies defective goods, clearly breaching Article 35. The buyer, however, does not examine the goods in a timely fashion and hence did not notify the seller of the defect within a reasonable time. The CISG would, in such a case, deny the buyer a right to claim damages. If it is asked whether justice has prevailed, the answer is yes, because the buyer did not follow the law. Simply put, both parties are in breach of the CISG, but the breach of Articles 38 and 39 negate the breach of Article 35 because of policy considerations that are not in dispute. The difference between the relationship of breach and notification is akin to the relationship between breach and costs, particularly with attorneys' fees. The exception being, of course, in the latter case, the CISG is not clear.

V. CONCLUSION

The argument of Đorđević in relation to a tripartite relationship is very convincing and powerful. However, it is also argued that the balance sheet approach is equally convincing because it shows that there is a potential break between the legal action of breach and the court action.

33. *See id.*

Đorđević supports her argument by citing a maxim that reflects the guiding idea: “If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck.”³⁴ However, it is only “probably a duck,” and in retort, there is an animal called the wood duck.³⁵ It looks like a duck, swims like a duck, and also quacks like a duck, but in fact belongs to the family of geese.

Where does this leave the debate, or would the real duck please stand up? A court could follow either argument, which of course is not conducive to a uniform application of the CISG. It is argued that the solution lies in the reading of the CISG preamble. The object of the CISG is to establish “a New International Economic Order.”³⁶ The parties to the Convention were also of the opinion that the adoption of the CISG “would contribute to the removal of legal barriers in international trade and promote the development of international trade.”³⁷

John Gotanda notes specifically in relation to procedural issues:

The practice of determining whether an issue is governed by applicable procedural law instead of the Convention is outdated, counterproductive, and should be abandoned. Instead, tribunals should try to fill gaps by trying to find a solution within the Convention itself, through an analogical application of specific provisions or on the basis of principles underlying the Convention as a whole, before turning to domestic law. This approach would lead to more consistent and predictable awards of damages and would ultimately further the goal of the Convention to create uniform commercial law.³⁸

The conclusion is that, arguably, only two arguments are viable. First, the balance sheet approach, and secondly, the break in causation as advocated by Đorđević. Which one is the better one? It depends whether the court believes that the fundamental underlying principle of Article 74 is full compensation, namely, the balance sheet approach, or whether, procedurally, the causation of the breach is broken. In the end, unfortunately, there are still two competing arguments, and if harmonisation is the deciding factor, the preamble would lean towards full compensation. Hence, attorney’s fees are governed by the CISG.

However, it is recognised that the above academic view might be at odds with the application of Article 74 by courts and tribunals, and will not find favour. Unfortunately, the preponderance of case law shows that the

34. *Id.* at 219.

35. It is an Australian native species of geese, but commonly called a wood duck.

36. United Nations Convention on Contracts for the International Sale of Goods pmb., Apr. 11, 1980, 1489 U.N.T.S. 3, *available at* <http://www.cisg.law.pace.edu/cisg/text/preamble.html>.

37. *Id.*

38. Gotanda, *supra* note 16, at 140.

courts deal with attorneys' fees pursuant to the relevant domestic procedural rules and not under the CISG. The same can be said in arbitration proceedings, as arbitrators refer to the relevant applicable arbitration rules to determine the issue of attorneys' fees. The possibility to achieve unification on this issue arguably can come from other sources such as the American Law Institute and the International Institute for the Unification of Private Law's Principles on transnational civil procedure. However, the problem with development of soft law instruments is that they seldom achieve harmonisation. To that end, time will tell whether the courts and arbitral tribunals will include attorneys' fees into the regime of Article 74, as indicated in this Article.