

WALKING THE ARTICLE 7(2) TIGHTROPE BETWEEN CISG AND DOMESTIC LAW

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1. INTRODUCTION

As the CISG entered its 25th year (in the Spring of 2005),¹ we celebrated the success of the Convention by meeting in Vienna to discuss UNCITRAL's new *Case Digest*² and the many CISG decisions (reported in CLOUT and elsewhere)³ which lie at the core of that work.⁴

My contribution in Vienna—and to this special edition of the *Journal*—relates mainly to CISG Article 7, paragraph 2. After outlining the key features of that provision,⁵ I will illustrate its application by reference to four concrete cases relating to the buyer's right to avoidance and/or damages for breach.⁶ In particular, I will argue that each of these four cases *also* involves an issue within the Convention's "governed-but-not-settled" realm, though only one of them is cited (with some ambivalence) in the (2005) *Case Digest* of the Article 7(2) rule.⁷

I take this opportunity to supplement what the UNCITRAL case Digesters have told us about Article 7(2), in particular to highlight the sometimes

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1. The United Nations Convention on Contracts for the International Sales of Goods was "done" in Vienna on the 11th day of April, 1980 (see the end of the Convention text).

2. UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALES OF GOODS, available at http://www.uncitral.org/uncitral/en/case_law/digests.html [hereinafter *Case Digest*]. A prior draft of the *Case Digest* was published in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION* (Franco Ferrari et al eds., 2004).

3. The *Case Digest* helps "organize" CLOUT (Case Law on UNCITRAL Texts), available at http://www.uncitral.org/uncitral/en/case_law.html.

4. UNCITRAL's "Celebrating Success" Conference was held in Vienna, March 15-18, 2005. The present paper is an edited version of the author's contribution to that conference.

5. See *infra* Part 2.

6. See *infra* Part 3 regarding avoidance and Part 4 regarding damages.

7. See *infra* Part 3a.

complex interface between the CISG and domestic law, but also to illustrate that the *Digest*—with its compact and (UN) “politically correct” content⁸—says little (if anything) about the *ratio* which underlies the CISG decisions rendered by courts and arbitrators, and next to nothing about their “quality.”

So, while the *Digest* provides a valuable new source of CISG law, we need to recognize its limitations. Since the *Digest* itself provides few clues to help us determine whether a given CISG decision “makes (good) sense,” we hardly can evaluate the *persuasiveness* of any (Article 7(2) or other) CISG “precedent” simply on the basis of the *Digest* alone.⁹

2. INTRODUCTION TO ARTICLE 7(2): MATTERS GOVERNED BUT NOT SETTLED BY THE CISG

Article 7(2) is a significant, albeit elusive rule which—depending on the circumstances—may provide a helpful tool for plugging certain gaps in the CISG text. Using this tool, judges and arbitrators can sometimes stay “within” the CISG, as opposed to the often less appealing alternative of seeking solutions “outside” the treaty’s four corners: the decision maker who resolves a “governed but not settled” matter by the application of a CISG “general principle” need not revert to the private international law (PIL) of the forum in order to locate and then apply domestic (and arguably parochial) rules of substantive law.¹⁰

To take a simple, hardly controversial example: Suppose a court is faced with the issue of whether a telefax qualifies as a “writing” under the CISG. Although the Convention defines “writing” in terms which expressly include

8. Regarding the *Case Digest* as a (UN) “politically correct” and neutral document, see Joseph Lookofsky, *CISG foreign case law: how much regard should we have?*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND* 216, 218-19 (Franco Ferrari et al. eds., 2004); see also Joseph Lookofsky, *Digesting CISG Case Law: How Much Regard Should We Have*, 8 *VINDOBONA J. INT’L COM. L. & ARB.* 181, 187 (2004), also available at <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky9.html>. There are good practical reasons which support the decision to limit the *Case Digest* to “objective” case commentary: see generally Jernej Sekolek, *Digest of Case Law on the UN Sales Convention: The Combined Wisdom of Judges and Arbitrators Promoting Uniform Interpretation of the Convention*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND* 1-20 (Franco Ferrari et al. eds., 2004).

9. Regarding the issue of “how much regard” courts in a given CISG jurisdiction should have to foreign CISG precedent see generally Lookofsky, *supra* note 8, at 181. See also *infra* text with note 22 and the *Conclusion* of this article (text with notes 93 ff.) for a suggestion that *Case Digest* readers be (better) notified as to the inherent limitations of this new UNCITRAL tool.

10. See generally JOSEPH LOOKOFSKY, *UNDERSTANDING THE CISG IN THE USA* § 2.11 (2d ed. 2004). See also generally Peter Schlechtriem, in *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 93 ff. (Peter Schlechtriem & Ingeborg Schwenzer ed., 2d ed. 2005) [hereinafter *COMMENTARY*].

only telegram and telex,¹¹ a court, citing Article 7(2), might nonetheless conclude that the question of whether a telefax qualifies as a CISG “writing” is a matter “governed but not settled” by the CISG text. That court might then proceed to “settle” the matter in question by reading “between the lines,” i.e., discerning, at a slightly higher level of abstraction, a more general CISG principle which defines the term writing to include other, more modern means of communication, such as a telefax.¹²

Article 7(2) authorizes not only decision-making by analogy (with express written rules), but also on the basis of a broader principle,¹³ and CISG courts, arbitrators and commentators have had numerous opportunities to take advantage of both techniques. This has been made possible by the identification of numerous unwritten CISG “general principles,” including, e.g., the general principles of good faith,¹⁴ reasonableness,¹⁵ and (more controversially) estoppel.¹⁶

Before considering a few concrete applications, it should be emphasized that Article 7(2), by its own terms, affects only matters which are “governed” by the Convention (Articles 4 and 5),¹⁷ but which are not expressly “settled” in it. For this reason, Article 7(2) has no application whatsoever with respect to the large group of CISG “matters” which *are* “governed” and (expressly) “settled” by the rules in the Convention. As regards these many, more mundane CISG matters, we simply rely on the rules laid down in the express treaty text.¹⁸

11. CISG art. 13.

12. See LOOKOFSKY, *supra* note 10, § 2.11. This would accord with the elastic definition of “writing” in Article 1.10 of the UNIDROIT Principles. *Accord* (as regards e-mail) Ulrich Magnus, in JULIUS VON STAUDINGER, KOMMENTARZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN: WIENER UN-KAUFRECHT (CISG) (2000) Art. 13, Rd.Nr. 5, Art. 29, Rd.Nr. 13. *But compare* Schlechtriem, in COMMENTARY, *supra* note 10, at 173 (“open question” whether e-mail and other electronic communications equivalent to “writing”).

13. Recognized, e.g., in both German and French domestic law. See HERBERT BERNSTEIN & JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE § 2.11 n.161 (2d ed. 2003).

14. *Re.* good faith under Article 7(1) see LOOKOFSKY, *supra* note 10, § 2.10. See *infra* the discussion in Part 3a.

15. The adjective “reasonable” (or “unreasonable”) appears 47 times in the CISG text.

16. *Venire contra factum proprium*, said to be reflected in Article 16(2)(b) and in the second sentence of Article 29(2). See LOOKOFSKY, *supra* note 10, §§ 3.6, 2.11.

17. See LOOKOFSKY, *supra* note 10, § 2.6.

18. For example, since the CISG contains rules which “govern” the passing of risk (Articles 66-70), and since these rules “settle” most risk-of-loss “matters,” there is little if any need to seek solutions by the application of CISG general principles or domestic rules of law.

Conversely, we note that *matters not governed* by the Convention can *only* be settled by resorting to *non*-Convention rules and principles.¹⁹ Since, for example, the Convention is generally “not concerned” with matters relating to sales contract validity or obligations grounded in delict,²⁰ such matters can hardly be “settled” by CISG general principles.

These clear-cut, introductory observations notwithstanding, Article 7(2) application is not always simple, nor do all of the Article 7(2) precedents thus far reported in the *Digest* seem persuasive. For one thing, the boundary-lines which some courts have drawn between matters which are “CISG-governed” and those which are not seem (highly) debatable. For another, courts have sometimes sought to settle CISG governed-but-not-settled matters with rather controversial means (“general principles”).

To be sure, the *Digest* can help practitioners “organize” the (increasingly numerous) reports of CISG case law collected in CLOUT. But the practitioner (lawyer, arbitrator or judge) who walks the treacherous Article 7(2) tightrope also needs to look “beyond” the *Digest*, seeking additional guidance as to what the relevant CISG “case law” really *means*.

To be sure, Article 7(1) commands us to have (some measure of) “regard” to foreign CISG case law.²¹ But since a decision rendered by a court in CISG State X is *never binding* for courts (let alone arbitrators) in CISG State Y, and since the Y-courts cannot evaluate the *possible persuasiveness* of such foreign (X) “precedent” solely on the basis of a succinct *Digest* “sound bite,” the Y-courts *must* look beyond the *Digest* to answer the most important case law questions: Does the foreign (X) precedent on point seem persuasive? Should we (Y) elect to follow that (non-binding) decision? Why (or why not)?²²

19. See, e.g., Joseph Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403, 407 (1991), also available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky6.html>. Accord Franco Ferrari, in PETER SCHLECHTRIEM, KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT—CISG Art. 7, Rd.Nr. 42 (4th ed. 2004).

20. According to the first sentence of CISG Article 4, “This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract.”

21. Regarding the issue of “how much regard” courts in a given CISG jurisdiction should have to foreign CISG precedent see generally Lookofsky, *supra* note 8. See also *supra* text with note 9.

22. CISG art. 13.

3. AVOIDANCE PURSUANT TO ARTICLE 49

3a. *Is an (Explicit) Avoidance Declaration Always Necessary?*

According to Article 49, a buyer faced with a fundamental breach can avoid a CISG contract by making a “declaration” to that effect. Does that, as some distinguished Convention commentators have claimed, represent a “rule without exception”?²³ If so, what kinds of “declarations” might satisfy that (arguably exception-free) rule? Do we find the tools we need to resolve these avoidance issues in Article 7, paragraphs 1 or 2?

The *Oberlandesgericht Hamburg* faced these (as well as other) avoidance questions in a case decided in 1997,²⁴ where a German seller failed to deliver iron-molybdenum as agreed to an English buyer. As reported in CLOUT, the court held the contract duly avoided under both paragraphs (a) and (b) of Article 49(1),²⁵ i.e., both by reason of seller’s fundamental breach and due to the fixing and expiration of an additional (reasonable) time for performance.

This was an interesting decision, not least because the *Hamburg* court interpreted a “CIF” clause in the contract to mean that delivery on the agreed date was of “fundamental” significance for the buyer.²⁶ Apparently (and, if so, puzzlingly), the court thought time was in effect “of the essence” *because* the parties’ contract included a CIF delivery term.²⁷

23. See Ulrich Huber, in PETER SCHLECHTRIEM, KOMMENTAR ZUM EINHEITLICHEN UNKAUFRECHT—CISG Art. 49, Rd.Nr. 23 (4th ed. 2004). Re. Art. 26 see Schlechtriem, *supra* note 10, at 302-03.

24. CLOUT Case No. 277 [Oberlandesgericht Hamburg, Germany, 28 Feb. 1997], available at <http://cisgw3.law.pace.edu/cases/970228g1.html>. See also the *Case Digest*, *supra* note 2, relating to Article 7, paragraph 2 (headed “Gap-filling and General Principles”), paragraph 8, text with note 20.

25. *Id.*

26. See the *Case Digest* of Article 49, paragraph 9 with note 14; Robert Koch, *The Concept of Fundamental Breach of Contract Under the United Nations Convention on Contracts for the International Sale of Goods*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 236 (Pace Int’l Law Review ed., 1998), available at <http://www.cisg.law.pace.edu/cisg/biblio/koch.html>.

The untimely delivery constitutes a fundamental breach according to art. 49(1)(a), 25 CISG.

Untimely delivery, it is true, does not always constitute a fundamental breach. This general rule under the Convention, however, does not apply to cases where, at the time of the formation of the contract, it was obvious to the seller that the buyer had a special interest in punctual delivery. . . .

In the pertinent case such special interest of the buyer follows from the reference to the Incoterm “CIF” in the contract.

Id. (emphasis added).

27. As that CIF delivery term is commonly understood, it implies no such thing. See, e.g., LOOKOFSKY, *supra* note 10, § 5.2.

My main interest in this decision in the present context, however, relates to the *Hamburg* court's application of CISG Article 7. In particular, the court recognized the buyer's right to avoid, even though *no* "explicit" avoidance-declaration was made:

The court held that an *explicit declaration of avoidance was unnecessary* once the seller refused to perform its delivery obligation and that to insist on such a declaration would be contrary to the principle of *good faith* (Article 7(1) CISG). *Such a declaration is dispensable* as long as the avoidance of the contract is possible in principle and it is certain that the seller will not perform its obligations at the time the substitute purchase is made. . . .²⁸

As so reported (in CLOUT), the *Hamburg* court's decision would seem to represent an *expansive interpretation* of the black letter rule Article 49(1), holding that a buyer's avoidance "declaration" *need not be explicit*, since to insist on *such* a declaration would be contrary to the principle of *good faith* (Article 7(1) CISG).²⁹ According to this reading of the decision, the buyer's avoidance was rightful, both under Article 49(1)(a), as well as under Article 49(1)(b),³⁰ in that the court did not consider an "explicit" declaration necessary ("indispensable") in either respect.³¹

Assuming this reading puts the right "spin" on the *Hamburg* decision, one might wonder why the case is noted in the *Digest* section on "Gap-filling and General Principles," i.e., under Article 7, *paragraph 2*, but not (also) in the part of the *Digest* which deals with Article 7, *paragraph 1*. One possible explanation relates to the fact that the principle of "good faith" as set forth in Article 7, *paragraph 1*, is a *very general* CISG principle, i.e., a principle which is not only relevant for *interpretation* of the Convention's express provisions,

28. As reported in CLOUT Case No. 277, *supra* note 24 (emphasis added). The UNILEX abstract on this point, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=291&step=Abstract>, seems to accord.

The Court left open the question whether the buyer had terminated the contract before concluding the substitute transaction as required by Art. 75 CISG. Arguing from the need to promote observance of good faith in international trade (Art. 7 (1) CISG), the Court stated that *termination does not constitute a prerequisite for the application of Art. 75 CISG* when termination is in any case possible and it is undoubtedly clear before the conclusion of the substitute transaction that the other party will not perform its obligation (in the case at hand, the seller had expressly stated its impossibility to delivery within the fixed time).

Id.

29. CLOUT Case No. 277, *supra* note 24.

30. *Id.*

31. To achieve the desired result in this case (recognition of buyer's avoidance), the court need only interpret buyer's "implicit declaration" (statement or conduct) as sufficient under *either* Article 49(1)(a) *or* (b), not both.

but which is also capable of *filling gaps* in the (express) Convention text. For this reason, the Digester might simply have found it convenient to simply “collect” *all* cases relating to “good faith” in the *Digest* of paragraph 2, even though the “home” of the *good faith* principle is in paragraph 1.³²

However plausible that might seem, some *Digest* readers might find a very different explanation for the placement of the *Hamburg* decision within the context of paragraph 2, since that placement might well suggest that the *Hamburg* court—which did not itself even mention paragraph 2 in its opinion—in effect used the gap-filling mechanism in Article 7(2) and the *general good faith principle to create an exception* to the Article 49(1) rule (which requires that avoidance be “declared”). If that is a fair assessment of the Digester’s message (spin), the *Hamburg* holding, quite controversially, renders an avoidance *declaration dispensable altogether*, at least in circumstances like those in the case.³³

While not wanting to suggest that the current *Digest* abstract is “wrong,” I think it reflects a more *subjective* (“academic”) *interpretation* of the *Hamburg* holding, perhaps even a slight “stretch” of UNCITRAL’s otherwise objective envelope.³⁴ For this reason, and given the *express holding* of the *Hamburg* court, as accurately abstracted in CLOUT,³⁵ I think it would be helpful for the *Digest* to *also cite* this interesting case within the context of Article 7, *paragraph 1* (under the heading: “Observance of Good Faith in International Trade”).

3b. Can an Avoidance Declaration Be Revoked?

Having considered the precedent from *Oberlandesgericht Hamburg* (regarding the need for *explicit* avoidance declarations), we might ask a related, arguably more difficult question: Can a CISG buyer rightly *revoke* an avoidance declaration (which has been explicitly made)?

Unlike the *Hamburg* question, which involved the (good faith) *interpretation* of Article 49(1),³⁶ we could hardly answer the avoidance-

32. Concerning paragraph 1 of Article 7 and headed “Observance of Good Faith in International Trade.”

33. Compare the UNCITRAL *Case Digest* relating to Article 7, paragraph 2 (headed Gap-filling and General Principles), and paragraph 8, text with note 20.

34. Regarding the essentially “objective” nature of the *Case Digest*, see *supra* note 8, at 223.

35. CLOUT Case No. 277, *supra* note 24. I thank my colleague Morten Fogt in Kiel for help with the original *Hamburg* text.

36. *Id.* This was, at least, the *express* basis of the holding of the *Hamburg* court and the basis of the decision as reported in CLOUT. See *supra* Section 3a.

revocation question by putting a good faith “spin” on the black letter of Article 49. This is because Article 49 can only “settle” matters relating to the *making* of avoidance declarations; the rule says nothing whatsoever about whether (or when) an (explicit or implicit) avoidance declaration might rightly be revoked.

This does not, however, mean that we have no choice but to go “outside” the Convention to settle the revocation matter, since we might be able to use Article 7(2) to save the day. We might, e.g., argue that the avoidance-revocation “matter”—while not expressly “settled” by the black letter of Article 49—is nonetheless “governed” by the Convention, including its larger avoidance regime.³⁷ If so, a court or arbitral tribunal faced with this unsettled matter should first try to resolve (settle) it by the application of a relevant CISG “general principle,” assuming such an unwritten principle “exists” (and can be “found”). This methodology—if workable without resort to excessively arcane mental gymnastics—seems preferable to the fall-back solution set forth in Article 7(2), i.e., using PIL rules to designate a substantive rule in a CISG-unrelated domestic regime.³⁸

So far, the *Case Digest* of Article 49 reports no case law applications on this particular (avoidance-revocation) point. On the other hand, the *Digest* of Article 7(2) does indicate that some courts have recognized “estoppel” as a CISG general principle,³⁹ and if we go beyond the *Digest*, we find that several Convention commentators have suggested that estoppel might be capable of settling the precise (avoidance-revocation) matter at hand.⁴⁰

This view also finds supports in an (as yet) unreported award rendered by an *ad hoc* arbitral tribunal in Denmark. In this case a buyer of machinery (in State X) had avoided a CISG contract by reason of fundamental breach (non-conformity). When the seller (in State Y) refused to acknowledge that avoidance (i.e., refused to retake the machinery and/or repay the price), the buyer—rather than let the goods stand useless for an indefinite period (perhaps years, until an arbitral tribunal could declare the avoidance rightful)—undertook to have the non-conformity repaired for the seller’s account, thus impliedly “revoking” its avoidance declaration. In the

37. Arguably at least, the whole “matter” of avoidance is “governed” by the Convention.

38. See generally *supra* Part 2.

39. See the *Case Digest*, *supra* note 2, relating to Article 7, paragraph 2 (headed Gap-filling and General Principles), paragraph 10, text with notes 21 and 22.

40. See Schlechtriem, in COMMENTARY, *supra* note 10, at 314-15; Markus Müller-Chen, *Analysis of Specific Performance (Art. 28) and Remedies for Breach of Contract by the Seller (Arts. 45-52)*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 525 (Peter Schlechtriem & Ingeborg Schwenzer ed., 2d ed. 2005).

arbitration proceeding which ensued, the tribunal—having held the avoidance rightful (by reason of seller’s fundamental breach)—acknowledged the buyer’s *right to revoke* its avoidance (and claim compensation for repairs undertaken for the seller’s account).⁴¹

4. DAMAGES FOR BREACH

4a. Can Attorney’s Fees Be Recovered as Damages Under Article 74?

Shifting from avoidance to the remedy of damages, we find another Article 7(2) conundrum, this time involving the interface between the Convention and domestic law: Do the general Convention rules on damages for breach “govern” the special “matter” of whether the party who loses a sales litigation should compensate the winner for its *attorney fees*? If so, can we find a CISG “general principle” to settle that matter? Or need we resort to domestic law?

This issue came to the fore in the *Zapata* case,⁴² decided in the first instance by a U.S. Federal District Court, where a Mexican seller of cookie tins brought—and won—an action against an American buyer grounded on the buyer’s unjustified failure to pay. The case became more difficult, however, when the seller, citing CISG Article 74 and foreign CISG case law, argued that it—as a *successful CISG claimant*—also should be reimbursed for its *attorney’s fees as part of the damages* it suffered “in consequence of the [buyer’s] breach.”⁴³

Since the Convention expressly governs the “rights and obligations” of the parties to a CISG contract,⁴⁴ and since an injured CISG party is generally entitled to “full” (expectation-interest) protection,⁴⁵ several decisions by

41. By reason of litigation currently pending before the Danish courts (involving a claim by the unsuccessful party in the arbitration against a third party), it may later be possible to provide a more complete description of the avoidance-revocation aspect of the award.

42. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385 (7th Cir. 2002), *reversing* 2002 WL 398521 (N.D. Ill. 2002), CLOUT Case No. 434 [United States Court of Appeals for the Seventh Circuit, 19 Nov. 2002]. The opinion in which the lower court held that the plaintiff could recover its attorney fees as damages, which was also in effect reversed by the Seventh Circuit, is found at 2001 WL 1000927 (N.D. Ill. 2001), also *available at* <http://cisgw3.law.pace.edu/cases/010828u1.html>.

43. *See generally* Harry Flechtner & Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 *VINDOBONA J. INT’L COMM. L. & ARB.* 93, 94 (2003), also *available at* <http://cisgw3.law.pace.edu/cisg/biblio/flechtner5.html>.

44. *See* CISG art. 4.

45. Such “full” protection is, however, provided within the limits of “foreseeability.” *See* CISG art. 74; LOOKOFSKY, *supra* note 10, § 6.15.

courts in Europe lent support to the *Zapata* seller's proposition that it, as the prevailing party, *should* recover its attorneys' fees by virtue of Article 74.⁴⁶ Following these precedents, the (lower) U.S. Federal District Court in *Zapata* held that the *Zapata* buyer *should* recover its attorneys' fees.⁴⁷ But since the prevailing party in an *American* litigation is *generally not* entitled to recover its attorneys' fees,⁴⁸ and since this "American rule" applies in all civil cases (not just contract cases), American jurists were hardly surprised when that lower court decision was *reversed* by Judge Posner (himself) in the U.S. Court of Appeal.⁴⁹

As we might expect, the Court of Appeals decision in *Zapata*—as well as the European attorney's fees cases—are discussed in the Article 74 part of the *Digest*.⁵⁰ The various courts, the *Digest* tells us, are "split" as to whether attorney's fees for litigation may be awarded as damages under Article 74.⁵¹ Taking a closer look at the *Digest*, however, we realize that *Zapata* is the "lone wolf" (*nearly all* the decisions cited in the *Digest* point to "full" Article 74 compensation, including attorney fees).⁵² Indeed, some *Digest* readers

46. See generally Harry M. Flechtner, *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 Sucesores, S.A. v. Hearthside Baking Co.*, 22 NW. J. INT'L L. & BUS. 121 (2002), available at <http://www.cisg.law.pace.edu/cisg/biblio/flechtner4.html#iv>.

47. CLOUT Case No. 434, *supra* note 42:

[T]he court awarded litigation expenses, including attorneys' fees, as part of the damages recoverable by plaintiff. Although the "American rule" normally requires each litigant to bear its own legal expenses, the court stated that the rule did not apply when there was a law that provided otherwise. The court held that article 74 CISG was such a law. Under that article, the plaintiff is entitled to recover a sum equal to its loss, including losses suffered as a consequence of the defendant's breach. The defendant could foresee that there might be litigation and legal expenses if it failed to pay sums admittedly due. The result, the court stressed, is consistent with the almost universal rule that a successful party may recover its legal expenses and, therefore, promoted the CISG policies of promoting uniformity and certainty.

48. See, e.g., *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269 (1975). Although the judgment rendered by an American court will usually require the losing party to pay the *costs* of the successful party (e.g., fees paid to the court), such "costs" do *not* generally include attorney's fees. Although this principle has been modified by "fee shifting" statutes in certain instances, *no* fee-shifting is still the overwhelming "American rule." See *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 614-15 (2001). The same rule does *not*, however, necessarily apply in (American) *arbitrations*.

49. See *Zapata*, *supra* note 42.

50. See the *Case Digest* of Article 74, para. 26 (under the sub-heading "Expenditures for Debt Collection; Attorney's Fees"), with note 85.

51. *Id.*

52. See *id.*:

Several arbitral tribunals have awarded, citing Article 74, recovery of attorney's fees for the arbitration proceedings. In a carefully reasoned award, another arbitral tribunal concluded that a

might even be led by the not entirely “objective” *Digest* to believe that the CISG majority got it “right.”⁵³

But while *Zapata* stands alone—at least when compared to the *conscious* majority of national courts⁵⁴—that does *not* mean Judge Posner got it “wrong.” Quite the contrary! To understand why, readers can surely start with the *Digest* of *Zapata*, but they also need look “beyond.”

In *Zapata*, the *Digest* tells us, “[a]n appellate court reversed a decision awarding attorney’s fees as damages under Article 74 on the ground, *inter alia*, that the Convention did not implicitly overturn the “American rule” that the parties to litigation normally bear their own legal expenses, including attorneys’ fees.”⁵⁵ That *Digest* statement is correct, as far as it goes, but the *Digester’s* “*inter alia*” covers over the (important) fact that the *Zapata* ruling was *also grounded* on an application of the “governed-but-not-settled” provision in Article 7(2).⁵⁶

Indeed, the opinion by Judge Posner makes it perfectly clear that Article 7(2) was considered in relation to the fee-shifting question,⁵⁷ since, in Posner’s view, the (shifting of) attorney’s fees is a matter “governed” but not “expressly settled in” the CISG Convention text. At the end of the day, however, the Judge—who failed to locate any “general [Convention-based] principle” with which to settle the fee-shifting matter—felt he had no choice but to “settle” that matter in conformity with *American* (domestic) rules of

supplemental interpretation of the arbitration clause by reference to both Article 74 and local procedural law authorized the award of attorney’s fees before a tribunal consisting of lawyers. Another court stated that, in principle, legal costs could be recovered although the court in that case did not award them. Many cases award attorney’s fees without indicating whether the award is for damages calculated under Article 74 or pursuant to the court’s rules on the allocation of legal fees. Several decisions have limited or denied recovery of the amount of the claimant’s attorney’s fees on the grounds that the fees incurred were unforeseeable or that the aggrieved party had failed to mitigate these expenses as required by Article 77.

53. *See id.*, especially the phrase “carefully reasoned award.”

54. Although *most* of the courts which (when the *Case Digest* was prepared) awarded attorney fees to a successful CISG claimant seem to have done so on the basis of domestic *procedural* rules (the CLOUT reports are usually silent on the issue), Professor Flechtner’s analysis, *supra* note 46, suggests that the clear *majority* of CISG cases—indeed, until *Zapata* came along, the *unanimity* of cases—that *consciously* addressed the issue found that Article 74 provides authority for an award of damages to cover the prevailing claimant’s fees.

55. *See Case Digest, supra* note 50.

56. *See generally* Flechtner & Lookofsky, *supra* note 43.

57. *I.e.*, the question of whether a successful claimant in a CISG case is, as part of his damages, entitled to recover his own attorney’s fees.

procedure which he “picked out” by the private international law rules of the forum.⁵⁸

Those CISG commentators who view the *Zapata* decision (i.e., *no* fee-shifting by reason of Article 74) as “right” understand that the *main ratio* of the decision conforms with good common sense: in America—as (e.g.) in Europe—the question of fee-shifting is rightly regarded as a *procedural* question,⁵⁹ and obviously (to quote Judge Posner), “The Convention is about contracts, not about procedure.”⁶⁰ In other words, the *whole* fee-shifting “matter” is *not governed* by the Convention (at all)!⁶¹ Fortunately so (I might add), since a contrary holding would have led to serious anomalies which even advocates of “expansive” CISG interpretation and gap-filling would be hard-put to “explain away.”⁶²

The failure of the *Case Digest* to say *anything* about *Zapata* in relation to Article 7(2) might seem like a significant omission. Then again, the omission might be intentional, especially given the fact that Judge Posner’s handling of the Article 7(2) problem involves an *internal inconsistency*: having (rightly) declared that the CISG is “about contracts, not about

58. See generally Flechtner & Lookofsky, *supra* note 43.

59. Re. as regards the Danish Code of Procedure (*Retsplejeloven*) see BERNHARD GOMARD, CIVILPROCESSEN 584 (Copenhagen, 2000):

The losing party must generally reimburse the winning party for expenses incurred in connection with the litigation, unless the parties have made a different agreement, or the court, due to special circumstances finds good reason to depart from this rule The losing party’s obligation . . . to compensate the winning party for its costs is *not* dependent on whether the winning party could have demanded compensation for these costs under general substantive liability principles [*almindelige erstatningsregler*]

Id. (translation by the present author).

60. See page 3 of Judge Posner’s opinion in *Zapata*, *supra* note 42.

61. See LOOKOFSKY, *supra* note 10, at 142-43. See also Joseph Lookofsky, *Comments on Zapata Hermanos v. Hearthside Baking*, 6 VINDOBONA J. INT’L COM. L. & ARB. 27 (2002), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky5.html>; Flechtner, *supra* note 46. But see John Felemegas, *The Award of Counsel’s Fees Under Article 74 CISG*, in *Zapata Hermanos v. Hearthside Baking Co.*, 6 VINDOBONA J. INT’L COM. L. & ARB. 20 (2002), available at <http://cisgw3.law.pace.edu/cisg/biblio/felemegas1.html> and compare Peter Schlechtriem, *Case Comment: Attorneys’ Fees as Part of Recoverable Damages*, available at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem4.html>.

62. Treating the recovery of attorney fees as a question of damages recoverable under Article 74 yields a patently absurd result: it would allow successful claimants to recover their attorney fees but would deny any such recovery to successful defendants. It has been suggested that this offensive partiality might be avoided by finding that a claimant who brings an unsuccessful action against the other party breaches a “duty of loyalty to the contract,” thus permitting the defendant to recover attorney’s fees as damages for such “breach,” but this elaborate, result-oriented solution, without support in the text of the Convention or the *travaux préparatoires*, carrying unknown implications for other issues, demonstrates how completely unsuitable the rules of the Convention are for regulating the attorney’s fee question—an issue clearly not in contemplation when the Convention was drafted. See Flechtner & Lookofsky, *supra* note 43, at 97 n.20.

procedure,” Posner (wrongly) reasoned that fee-shifting is somehow “governed” by the Convention, which—given Posner’s *own* substance/procedure distinction—it is not!⁶³ This (minor) “technical” flaw does not, however, diminish the basic soundness of the *Zapata* decision. The recovery of attorney’s fees by a successful (CISG) litigant *is* rightly regarded as a *procedural* matter,⁶⁴ and the CISG *is* “about contracts, not about procedure.”⁶⁵

Since *Zapata* represents an important application of Article 7(2), and not just Article 74, it also deserves to be cited in the *Digest* of CISG Part I. But since the poor Digester who one day reports on the Article 7(2) aspect of the decision will *not be allowed* to critique its reasoning (let alone separate Judge Posner’s wheat from his chaff),⁶⁶ this particular chunk of CISG case law will remain “hard to Digest.”

*4b. Does Article 79 Preempt the Application of Domestic Hardship Rules?*⁶⁷

To introduce my final Article 7(2) conundrum, I refer to an Italian case decided in 1993, as abstracted in CLOUT and reported in the *Digest* of the Article 79 “exemptions” rule.⁶⁸ In this case an Italian seller who had failed to deliver goods as agreed to a Swedish buyer claimed avoidance of the contract by reason of *hardship*, since the price of the goods concerned had increased (after conclusion of the contract and before delivery) by almost 30%.

Not surprisingly, the Italian court held the CISG *not applicable* by virtue of subparagraph (a) of Article 1(1), since, at the time of the conclusion of the

63. Harry Flechtner and I share the view that the issue of attorneys’ fees is simply *not governed*—and therefore, of course, not (expressly) “settled”—by Article 74 or any other part of the Convention. In fact, if Judge Posner had heeded the command in Article 7(1), which requires that all those interpreting the CISG seek an *international* perspective, he would surely have learned that neither case law nor scholarly opinion support his “novel” application of Article 7(2) to an issue that is, in his own view, *not governed* by the Convention at all. *See generally id.*

64. This is the correct view in both American and European jurisdictions. *See, e.g.,* GOMARD, *supra* note 59.

65. This is true notwithstanding the fact that certain burden-of-proof issues have been held “governed” by the CISG. *See the Case Digest* of Article 4 (“Issues Dealt with by the Convention”).

66. This is because the Digesters are not allowed to criticize. *See text supra* with note 8.

67. This portion of my paper draws upon material contained in my contribution to “Commercial Law Theory and the CISG,” held by New York University at La Pietra (Italy), 14-16 October 2004. *See* Joseph Lookofsky, *Impediments and Hardship in International Sales*, INT’L REV. L. & ECON. (forthcoming 2006).

68. *See* CLOUT Case No. 54 [Tribunale Civile di Monza, Italy, 14 Jan. 1993], noted in the *Case Digest* of Article 79, section headed “Treatment of Particular Impediments: Change in the Cost of Performance or the Value of the Goods.” *See also* the English translation *available at* <http://cisgw3.law.pace.edu/cases/930114i3.html>.

contract, the Convention was in force in Italy, but not (yet) in Sweden. It was, however, very surprising—and almost surely wrong—when the court also excluded the application of the Convention on the ground that the parties had chosen “Italian law” as the law governing their contract, since (according to the court) Article 1(1)(b) operates only in the *absence* of a choice of law by the parties.⁶⁹

Having rendered that initial (incorrect) decision—i.e., that the Convention did not apply to the transaction (at all)—the Italian court then *opined* that, *even if* the CISG had applied, the seller *could not* have relied on “hardship” (*eccessiva onerosità sopravvenuta*) as a ground for avoidance, since the CISG “does not seem to contemplate” such a remedy (in Article 79 or elsewhere), just as a domestic court (in Italy) could not “integrate” into the CISG provisions of domestic law recognizing avoidance based on hardship.⁷⁰

Since I regard this Italian *dictum*—which I understand to mean that the CISG *preempts* the application of domestic rules of hardship⁷¹—to be *unpersuasive*,⁷² and since I have not found any other CISG cases on point (in the *Digest* or elsewhere), I will now indulge in a bit of speculation as to what other courts or tribunals *might* do if faced with that kind of claim, (e.g.) in a hypothetical case like this:⁷³

A (in State X) makes a contract to sell goods to B (in State Y) at a price stated (in the currency of State Z). One month later, but before the parties are scheduled to exchange delivery and payment, a political crisis leads to a sudden and massive (80%) devaluation of the Z-currency, making the deal a “steal” for B, but a nightmare for A.

69. See CLOUT Case No. 54, *supra* note 68, and compare Franco Ferrari’s well-justified critique in *Uniform Law of International Sales: Issues of Applicability and Private International Law*, 15 J.L. & COM. 159-74 (1995).

70. CLOUT Case No. 54, *supra* note 68. The explanation is that “hardship is not a matter expressly excluded in Article 4 CISG from the scope of the Convention.” Compare the [supplemented] translation, *id.* (emphasis added):

Dissolution of the contract for supervening excessive onerosness affects neither the validity of the contract nor the property in the goods (except indirectly . . .). [*I.e.*, dissolution for excessive onerosness is a matter within the scope of the Convention]. Because the Convention is “special” law [*i.e.*, one that applies to specific types of transactions] we must conclude that, *if it were applicable* to the case, *it would preempt* the general law of Article 1467 *et seq.* of the Civil Code.

71. *Id.*

72. See, e.g., the following passage in the translation at *id.*: “Under the Convention the remedy of dissolution is associated with breach, whereas the excessive onerosness doctrine *does not fit within the structure* of the Convention when invoked either as a defense or as a reason to avoid (*rectius*: dissolve) the contract.”

73. This example is based on the similar Illustration in the 2004 version of UNIDROIT Principles art. 6.2.2 (*Definition of Hardship*).

Suppose further that X is a CISG Contracting State and that the contract is subject to “the law of X.” That makes the CISG applicable,⁷⁴ but would the case then fall *solely* within Article 79? If, for example, X is the Netherlands (where hardship is recognized)⁷⁵ or Denmark (with its infamous General Clause),⁷⁶ should Article 79 *preempt* the application of domestic law? Or should the international and domestic rules be allowed to “*compete*”?⁷⁷

I realize other Convention commentators have asked and answered similar questions, and that some—perhaps even the majority—of these scholars have “ruled” in favor of “preemption” (without using that word).⁷⁸ In other words, these commentators—like the court in the Italian hardship case—prefer to deal with hardship (if at all) within the “four corners” of the Convention, either (a) by denying the possibility of “hardship” solutions to CISG problems, (b) by applying the black letter of Article 79 to “settle” the hardship question, or (c) by describing the hardship “matter” as “governed” but not “settled” (by the CISG) and by then settling that matter on the basis of Convention general principles, including those which might be said to lie “between the lines” of Article 79.

But until we see some *persuasive precedents* which favor preemption within this context, I think “competition” between an Article 79 “exemption” and domestic rules of hardship remains a viable option. Just as the *Unidroit* (general) *Principles of International Commercial Contracts* are sufficiently “roomy” to accommodate two, *distinctly separate conceptions and different*

74. Unless, as seems unlikely, that there is convincing evidence of a contrary intent.

75. Article 6:258(1) of the New Dutch Civil Code provides (emphasis added):

Upon the demand of one of the parties, the court may modify the effects of a contract or it may *set it aside, in whole or in part*, on the basis of unforeseen circumstances of such a nature that the other party, according to *standards of reasonableness and fairness*, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect.

76. The black letter of this (very) General Clause expressly authorizes a court to deny enforcement of—or amend—*any unreasonable contract or term*, and that includes a term which *becomes unreasonable after* the contract is made. See generally Joseph Lookofsky, *The Limits of Commercial Contract Freedom Under the UNIDROIT 'Restatement' and Danish Law*, 46 AM. J. COMP. LAW 485, 497 ff. (1998), available at <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky6.html>.

77. See *id.* If we—the moot court in this hypothetical case—decide to rule in favor of *competition* between rule-sets, then A (the party disadvantaged by this unexpected “occurrence”) will *not* be liable for breach of her obligation under the contract (to deliver at the price stated) if she can convince us that *either* the conditions for the granting of a CISG Article 79 (“force majeure”) exemption *or* the relevant domestic (hardship/unreasonableness) requirements are met.

78. See generally Hans Stoll, in KOMMENTAR, *supra* note 19, Art. 79, Rd.Nr. 39-40 and the numerous, sometimes conflicting, sources cited there. In my own, most recent writings on the subject, I have leaned towards concurrence and competition (as opposed to preemption): see LOOKOFSKY, *supra* note 10, at 26 with note 102 (“Since Article 79 was hardly designed to cover *hardship*, courts and arbitrators should apply applicable *domestic law*.”).

remedial solutions for force majeure and hardship,⁷⁹ the same may be said of the interface between CISG Article 79 and (e.g.) Dutch and Danish law,⁸⁰ especially (a) since force majeure and hardship have *different functions*,⁸¹ (b) since the CISG is (generally) “*not concerned*” with rules of validity,⁸² and (c) since hardship is clearly a *validity-related* conception.⁸³ Since the Convention drafters were not ready (in 1980) to legislate on sales contract validity,⁸⁴ they can hardly have intended to put hardship into the Convention “through the back (Article 7(2)) door,” especially since this conception is rightly regarded as a blood relative to other validity-based defenses to (sales) contract enforcement which (Dutch, Danish and other) courts regularly use to “police” contracts for *unfairness*.⁸⁵

For these reasons, I predict that at least some arbiters faced with the issue in our hypothetical would opt for rule-*concurrency* (as opposed to preemption), e.g., in situations where the applicable domestic law⁸⁶ provides authority for the censorship and/or *modification* of contract terms which—though perhaps fair when originally agreed to—have *become unreasonable*.⁸⁷ In other words, I think a Dutch or Danish arbiter confronted by a truly “hard” hardship problem (not otherwise amenable to solution by

79. See (re. hardship and force majeure) UNIDROIT Principles of International Commercial Contracts, art. 6.2.2 (*Definition of Hardship*), cmt. 6 (2004), making it clear that in situations which can, at the same time, be considered as cases of hardship and *force majeure* (art. 7.1.7), it is for the party affected to decide which remedy to pursue.

80. Compare *supra* notes 75 and 76 with accompanying text.

81. See Tom Southerington, *Impossibility of Performance and Other Excuses in International Trade*, University of Turku, Faculty of Law, Private law publication series B:55, available at <http://www.cisg.law.pace.edu/cisg/biblio/southerington.html>, text following n.57. Compare the text of the Dutch and Danish provisions, cited *supra* notes 75 and 76.

82. “[E]xcept as otherwise expressly provided in this Convention.” See CISG art. 4; LOOKOFSKY, *supra* note 10, § 2.6. The General Clause in the Danish Contracts Act is clearly a rule of validity, and the same might well be said of the Dutch rule on hardship (which is similarly based on a reasonableness-test). See *supra* notes 75 and 76 and accompanying text.

83. See, e.g., (as regards Danish law) MADS BRYDE ANDERSEN & JOSEPH LOOKOFSKY, *LÆREBOG I OBLIGATIONSRET* § 5.1.h (Copenhagen, 2d ed. 2005).

84. See Schlechtriem, in COMMENTARY, *supra* note 10, at 64 with n.7.

85. See generally E.A. FARNSWORTH, *CONTRACTS* ch. 4 (4th ed. 2004).

86. I refer here to the domestic law which may be applicable, under Article 7(2), by virtue of the private international law of the forum.

87. Reasonableness is, in both these jurisdictions, the key consideration: see *supra* notes 75 and 76 and the accompanying text.

“covert techniques”)⁸⁸ might find it most *reasonable* to “settle” that “matter” by resort to a *risk-sharing* (hardship) approach.⁸⁹

GENERAL CONCLUSIONS: A FEW MODEST SUGGESTIONS FOR *CASE DIGEST-IMPROVEMENT*

I have enough practical experience to know it is more difficult for a lawyer, judge or arbitrator to play the “real” dispute resolution game than it is for us academics to play “Monday-morning quarterback.” A decision which, after the fact, seems theoretically flawed may still represent the “right” result for the parties. For this reason, I hesitate to criticize the decisions which constitute my limited sampling of CISG case law, and the same goes for the knowledgeable Digesters’ reporting of those cases in the UNCITRAL *Digest*.

I am, however, inspired by my case studies here (and elsewhere) to make a few modest, yet practical suggestions to those responsible for promulgating the *Digest* as a whole. First, I suggest that UNCITRAL strive to better *coordinate the reporting* of the CISG case law which is presented in the *Digest*. In those instances where a given decision bears a *significant relation to more than one* CISG provision (e.g., Articles 7 and 74), that decision should, of course, be reported—or at least cited—in *all* of the relevant *Digest* parts.⁹⁰

(Though I hesitate to offer concrete suggestions as to how UNCITRAL might seek to implement this goal, I note the complication that a Digerster who is assigned to “cover” a given CISG provision (e.g., Article 74), will naturally focus on *that* particular aspect of a given case, and the problem may be aggravated if that same Digerster feels the need to report on “his” part of the case *before* that case has been (more broadly) reported in CLOUT.⁹¹)

88. *E.g.*, by an “expansive interpretation” of the Article 79 rule. In similar fashion, arbiters deciding contract disputes between merchants in Scandinavia will often shy away from § 36 of the Scandinavian Contracts Act in favor of more covert solutions, *e.g.*, declaring that an onerous standard term was not “incorporated” in the larger contract or giving such a term a “narrow interpretation.” As to this phenomenon *see* Lookofsky, *supra* note 76, at 501.

89. Risk-sharing stands in contrast to the all-or-nothing solutions available under Article 79. Regarding risk-sharing in Danish and American contract law, *see* JOSEPH LOOKOFSKY, *CONSEQUENTIAL DAMAGES IN COMPARATIVE CONTEXT* 248-54 (Copenhagen, 1989).

90. To take an example from the cases discussed previously, it would be helpful if the *Zapata* case—currently digested in relation to Article 74 (*see text supra* with note 50)—also were digested in relation to Article 7(2).

91. This seems to have been the situation as regards the U.S. Court of Appeals decision in *Zapata*—a decision reported (in the Digest of Article 74: *see id.*) *before* that decision was reported in CLOUT. Indeed, that decision remained unreported in CLOUT as of June 2005.

Second, to make such “expanded” *Digest* coverage more user-friendly, I suggest that the case references in any given section of the *Digest* be *cross-referenced* (in the footnotes) with references in other sections, so that a *Digest* reader who “stumbles” upon a given case in one context (at its relates to, say, Article 7 or Article 74) will be more likely to obtain a better “snapshot” of the case as a whole, i.e., of all the (main) CISG rules which the court concerned considered significant for its decision.⁹²

Finally, I suggest that UNCITRAL provide those who seek information in the *Digest* with a *more accurate and conspicuous notice* of its limited scope, as well as the principle of objectivity (neutrality) which regulates its (limited) content.⁹³ Such an expanded notice could, *inter alia*, account for the fact that the *Digest* “summary” says nothing about which decisions are “persuasive,” let alone “right.”⁹⁴ The current, hardly sufficient notice (set forth in the star (*) footnote which accompanies the heading of each *Digest* section)⁹⁵ might, for example, be amended and expanded to read:

* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The digest may, in some cases, also take account of the CISG legislative history (*travaux préparatoires*). The abstracts are intended to serve only as **SUMMARIES OF THE DECISIONS** and may not reflect all the points made therein. The digest provides **SELECTED INFORMATION** which does not take account of other CISG sources, such as legal commentary or scholarly writing, nor does the digest express any views as to the decisions themselves. See the Introduction to the Digest, A/CN.9/562, available at http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html. Readers are therefore advised to consult the full texts of the decisions rather than relying solely on the abstracts

92. See text *supra* with note 90. As regards *Zapata (id.)*, for example, the case digest which appears in relation to Article 7(2) should refer to the digest in relation to Article 74 (and vice-versa).

93. Compare Introduction to the digest of case law on the United Nations Sales Convention—Note by the Secretariat, U.N. Doc. A/CN.9/562, a link to which currently precedes the on-line version of the *Case Digest* itself. As noted in paragraph 15 of that Introduction, UNCITRAL “requested a tool specifically designed to present selected information on the interpretation of the Convention in a clear, concise *and objective* manner (emphasis added *here*).” This brief message—in a document those who visit http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html are unlikely to read—hardly qualifies as informative, let alone “conspicuous.”

94. See preceding note. See also generally Sekolek, *supra* note 8.

95. The current standard note which (as of July 2005) accompanies each *Case Digest* section states that the “present digest” was prepared using the full text of the *decisions* cited (in CLOUT and the footnotes), but it does *not* state that some digests *also* were prepared using the CISG *legislative history (travaux préparatoires)*, nor does it indicate that the digest does *not* account for *any other* source of CISG law. The same readers who, in the current footnote, are “advised” to consult the decisions (in full text) “rather than relying solely on the CLOUT abstracts” (because the “abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest”) should also be advised not to rely “solely” on the *Case Digest* (or on the abstracts *and* the Digest, for that matter).

or on the digest, just as some readers may find it appropriate to consult additional sources.

I make this final suggestion without regard to the pros and cons of UNCITRAL's neutrality policy (though I lean towards the view that the pros outweigh the cons).⁹⁶ I am rather simply suggesting that UNCITRAL make that policy clear for *Digest* readers, even if the clarification might subtly imply that *some courts sometimes* render an "unpersuasive" decision or two.

96. See generally Sekolek, *supra* note 8; Lookofsky, *supra* note 8.