

**DAMAGES UNDER CISG:
ATTORNEYS’ FEES AND OTHER LOSSES IN
INTERNATIONAL COMMERCIAL LAW**

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ABSTRACT

This Article examines judicial, arbitral, and scholarly interpretations of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) Article 74 and the recoverability of attorneys’ fees in CISG-governed contract disputes. The divergence in these interpretations and the locus of the resulting controversy is the *Zapata* decision of the U.S. Seventh Circuit Court of Appeals and the Court’s ruling that attorneys’ fees are not a recoverable loss under Article 74. Post-*Zapata*, mounting evidence exists of the lack of harmonization and uniformity on this interpretative issue. This Article analyzes the adjudicated outcomes of CISG-governed contract disputes in courts and arbitral tribunals throughout the world where attorneys’ fees were sought and reveals that almost all forums outside the U.S. award attorneys’ fees for litigation in CISG disputes. The debate is framed in the context of the significant disagreement among scholars as to the proper interpretation of Article 74’s loss provision as it relates to attorneys’ fees recovery. The disarray posed by discordant interpretations of this issue creates both practical and moral imperatives to adopt a consistent and coherent understanding of Article 74’s loss provision on the recoverability of attorneys’ fees. An excavation of the ethical and legal considerations underlying this interpretative issue demonstrates that the goals of harmonization, as well as the CISG, are best achieved by rejecting the *Zapata* rationale. Construing the loss provision of Article 74 to accord with its plain meaning does include attorneys’ fee recovery.

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I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (“CISG” or “Convention”) has overcome differences in language, culture, and legal systems to provide the world with an internationally recognized process for contracting for the sale of goods. The Convention’s potential for increasing the efficiency of international trade is directly linked to its ability to achieve its ultimate purpose of providing a harmoniously interpreted and applied body of contract law transnationally. As conceived and applied, the Convention’s harmonious body of law must afford contracting parties benefits that outweigh alternative

sources of law—e.g., the Uniform Commercial Code (“UCC”)—if it is to be adopted and utilized in lieu of domestic contract laws.

Perhaps the greatest benefit of utilizing the CISG is that victims of a contract breach have an explicit right under Article 74 of the CISG to recover all losses, including lost profit, that are a foreseeable consequence of a breach of contract. Article 74, the CISG’s general damages provision, provides a mechanism for ensuring that victims of contract breaches are made whole through the principle of full compensation for the breach of contract. As an international Convention, the CISG’s full compensation principle embedded in Article 74’s general damages provision is influenced by the overwhelming number of parties to the Convention (“contracting states”) that allow for losses to be recovered in breach of contract actions that would not otherwise be recoverable under the UCC or counterpart sales laws in other nations.

This animating principle of providing full recovery under the loss provision of Article 74 has been undermined by divergent interpretations of whether Article 74 provides for the recovery of attorneys’ fees incurred through contract dispute litigation or arbitration. The discord over the meaning of “loss” under Article 74 arises, in part, from contradictory domestic rules of the contracting states on the issue of attorneys’ fee recovery. The Loser-Pays Rule and the American Rule—as well as hybrid rules—confuse and confound courts and arbitral tribunals confronted with interpreting Article 74’s loss provision. Almost all contracting states allow recovery of attorneys’ fees in breach of contract litigation under national domestic laws. Most of the contracting states adopt some form of the Loser-Pays Rule, which holds the party that loses the lawsuit accountable for at least some of the attorneys’ fees and other costs generated by the litigation. The specific domestic rules for awarding attorneys’ fees for litigation vary substantially across the contracting states, however. Some nations cap the award of fees based on tariffs, others based on percentage, and yet others based on more flexible standards such as “necessary” or “reasonable.”¹ Some nations’ legal regimes have closer to mandatory fee-shifting requirements while others adopt a more discretionary approach.

The United States is one of the few countries in the world that does not adhere to a Loser-Pays regime, either formally or as a

1. *See generally* MATHIAS REIMANN, *COST AND FEE ALLOCATION IN CIVIL PROCEDURE: A COMPARATIVE STUDY* (2012) (discussing the variations among domestic methods of fee recovery and allocation in different countries).

general guideline for the allocation of costs and fees. The methodology of the United States—its “American Rule” on the issue of attorneys’ fees recovery in litigation—led one United States federal circuit court to exclude recovery of attorneys’ fees in CISG-governed breach of contract litigation from the ambit of recoverable losses under Article 74.² The U.S. Seventh Circuit Court of Appeals, in its widely criticized *Zapata* decision, held that the recovery of attorneys’ fees incurred through litigation is a procedural matter governed by the law of the forum and does not constitute recoverable losses under Article 74’s damages provisions. *Zapata* was the first judicial ruling anywhere in the world to suggest that Article 74’s loss provision did not extend to the recovery of attorneys’ fees, despite many cases outside the United States having adopted the opposite interpretation.³

The *Zapata* decision, authored by the highly regarded Judge Posner, has led to widespread international criticism and debate among CISG scholars and ushered in a lack of harmonized case law arising from domestic courts and arbitral tribunals throughout the world on the meaning of Article 74’s loss provision as it relates to attorneys’ fee recovery.⁴ Many courts and arbitral tribunals disagree with the *Zapata* rationale and rule that the losses recoverable under Article 74 include attorneys’ fees—both those fees that occur prior to litigation and fees incurred through litigation.⁵ Because CISG-governed disputes are resolved in the domestic courts of the contracting states or, when chosen, in arbitral tribunals, there is no court of last resort available to resolve differences in interpretation and application of the CISG across national boundaries. Disharmony and disunity in the interpretation of Article 74 are not easily cured.

Post-*Zapata*, mounting evidence exists of the lack of harmonization and uniformity on the interpretation of Article 74’s

2. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 389 (7th Cir. 2002), *cert. denied*, 540 U.S. 1068 (2003).

3. BRUNO ZELLER, *DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 156 (2d ed. 2009) [hereinafter *Damages Under the Convention*] (“More telling is that there is no case law suggesting that attorneys’ fees are explicitly excluded until *Zapata*.”).

4. See *infra* Parts II and III.

5. See Keith William Diener, *Recovering Attorneys’ Fees Under CISG: An Interpretation of Article 74*, 2008 NORDIC J. COM. L. 1, 8–17 (2008) (examining arbitral and court decisions that have awarded attorneys’ fees as a “loss” under Article 74); *Damages Under the Convention*, *supra* note 3, at 135–37 (examining cases that award attorneys’ fees under Article 74). There is currently little controversy that attorneys’ fees incurred prior to the breach of contract litigation are generally recoverable under the CISG. The recoverability of attorneys’ fees incurred through litigation, however, continues to be one of the most controversial aspects of contemporary CISG jurisprudence.

loss provision as it relates to attorneys' fee recovery. Part II of this Article analyzes the post-*Zapata* adjudicated outcomes of CISG-governed contract disputes in courts and arbitral tribunals throughout the world where attorneys' fees were sought. It begins by discussing the U.S. courts' reactions to *Zapata*, the adherents as well as the skeptics of the *Zapata* interpretation of Article 74's loss provision. The discussion continues with an analysis of decisions issued by domestic and arbitral tribunals outside the United States, which embrace a variety of interpretations on the application of Article 74's loss provisions to attorneys' fees recovery. Part III frames this debate in the context of the significant disagreement among scholars on the proper interpretation of Article 74's loss provision as it relates to attorneys' fees recovery. The views of various scholars and their commentary are explored, and a method of interpreting Article 74 employing its plain language is proposed.

Part IV investigates the fallout from the disarray posed by discordant interpretations of this interpretive issue. This lack of harmonization and uniformity creates both practical and moral imperatives to adopt a consistent and coherent understanding of Article 74's loss provision on the recoverability of attorneys' fees. Part V of this Article calls for a harmonized interpretation of Article 74's damages provisions by adopting internationally acceptable criteria for judging the validity of foreign CISG cases. The application of the criteria leads to the conclusion that cases deeming attorneys' fees for litigation as a "loss" under Article 74 should be given considerable deference by courts and tribunals faced with this question, and that the *Zapata* rationale should be abandoned. An excavation of the ethical and legal considerations underlying this interpretative issue demonstrates that the goals of harmonization, as well as the goals of the CISG, are best achieved by rejecting the *Zapata* rationale. Construing the loss provision of Article 74 to include attorneys' fee recovery is justified under both law and ethics.

II. Post-*Zapata*: A Brave New World

A. Divergent Approaches in Attorneys' Fees Recovery

Courts and arbitral tribunals in the United States and throughout the world adopt disparate approaches to their interpretations of Article 74's loss provision as it relates to attorneys' fees recovery. The spectrum of interpretations, analyses,

and rationales includes embracing the full compensation principle and allowing the recovery of litigation-incurred attorneys' fees by the victim of a contract breach;⁶ permitting the recovery of attorneys' fees related to contract compliance under Article 74 while excluding litigation-incurred fees;⁷ and the categorical refusal to interpret Article 74's loss provision to include the recovery of attorneys' fees.⁸ Surveying pre-*Zapata* and post-*Zapata* decisions issued by domestic courts and arbitral tribunals outside the United States suggests some evidence that these courts and tribunals are less inclined post-*Zapata* to interpret Article 74's loss provision to include litigation-incurred attorneys' fees.⁹ What this array of divergent decisions does demonstrate is a lack of harmonization and uniformity of adjudicated outcomes of CISG-governed contract disputes. Without a uniform and consistent interpretation that Article 74's loss provision includes the recovery of all attorneys' fees incurred by the victim of the contract breach, contracting parties confront formidable challenges of accurately predicting pre-dispute whether courts or arbitral tribunals will recognize their request for attorneys' fees and, if so, under what circumstances and variable conditions.

1. Post-*Zapata*: The U.S. Courts React

The judicial landscape in the United States post-*Zapata* bears the imprint of the *Zapata* interpretation of Article 74. The U.S. Supreme Court denied certiorari review of the Seventh Circuit Court of Appeals' ruling in *Zapata*, leaving undisturbed the

6. Damages Under the Convention, *supra* note 3, at 155 ("It must be noted that an increasing number of decisions specifically include attorneys' fees under loss pursuant to article 74."); *Rechtbank van Koophandel [Kh.] [Commerce Tribunal] Hasselt*, Feb. 25, 2004, A.R. 04/601 (Belg.).

7. *LG Potsdam [District Court]* Apr. 7, 2009, 6 O 171/08 (Ger.); *OLG München [Provincial Appellate Court]* Mar. 5, 2008 (Ger.), available at <http://cisgw3.law.pace.edu/cases/080305g1.html>.

8. *ECEM European Chem. Mktg. B.V. v. Purolite Co.*, 451 F. App'x 73, 80 (3d Cir. 2011).

9. See *Germany v. People's Republic of China*, Case No. CISG/1999/09 (China Int'l Econ. & Trade Arbitration Comm'n [CIETAC] Feb. 12, 1999), <http://cisgw3.law.pace.edu/cases/990212e2.html>. In a 1999 Award by the China International Economic and Trade Arbitration Commission, Chinese buyers were ordered to pay a German seller's attorneys' fees in a dispute involving the sale of nickel-plating machine production line equipment. *Id.* The arbitral tribunal applied the CISG and stated: "[T]he [Seller] submitted evidence of the above damages, and evidence of the attorneys' fee, investigation cost, and traveling fee, which was accepted by the Tribunal. According to Article 74, the Arbitral Tribunal decided that the above loss was a foreseeable loss that can be expected and should be expected by the [Buyers] because the dispute has arisen out of the [Buyers]' breach of the Contract." *Id.*; see also *Diener*, *supra* note 5, at 8–17 (examining arbitral and court decisions that have awarded attorneys' fees as a "loss" under Article 74).

Zapata rationale, which refused to recognize attorneys' fees as a recoverable "loss" under Article 74.¹⁰ This provided the U.S. judiciary persuasive, if not binding, precedent from a sole federal appellate court that the term "loss" employed in Article 74 of the CISG should not be judicially construed to include attorneys' fees.¹¹ Post-*Zapata*, the Seventh Circuit Court of Appeals authored a subsequent decision on the issue of the recoverability of attorneys' fees in a CISG-governed case—affirming the *Zapata* rationale—and it affirmed a lower court decision adopting the *Zapata* interpretation of this issue in another case.¹² The Third Circuit Court of Appeals reviewed and upheld the *Zapata* rationale in a post-*Zapata* case overturning a jury's award of attorneys' fees to a contract breach victim in a CISG-governed contract dispute.¹³ Several federal district courts post-*Zapata* have examined and ruled on this legal question as well.

In the wake of *Zapata*, the U.S. courts faced with interpreting CISG Article 74's scope with respect to the recoverability of attorneys' fees present varied perspectives on *Zapata's* analysis of this issue. The spectrum of federal court rulings includes unquestioning adoption of *Zapata* as settled law, acknowledgement of scholars' critiques of the *Zapata* rationale and the scant precedent other than *Zapata* to guide courts on this question, and outright skepticism about the correctness of *Zapata's* ruling on the "loss" provision language of Article 74. This lack of a cohesive and coherent understanding by the U.S. courts on the meaning of Article 74 as it relates to the recoverability of attorneys' fees reflects the fault lines underlying the *Zapata* view¹⁴ and also evidences the U.S. judiciary's limited experience with attorneys' fee requests in CISG contract disputes.¹⁵

10. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 540 U.S. 1068 (2003).

11. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 389 (7th Cir. 2002), *cert. denied*, 540 U.S. 1068 (2003). The *Zapata* decision remains the leading case in the United States on the recoverability of attorneys' fees pursuant to Article 74 of the CISG.

12. *VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 811 F.3d 247 (7th Cir. 2016); *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702 (N.D. Ill. 2004), *aff'd*, 408 F.3d 894 (7th Cir. 2005).

13. *ECEM European Chem. Mktg. B.V. v. Purolite Co.*, 451 F. App'x 73, 79–80 (3d Cir. 2011).

14. A crescendo of scholars continue to critique *Zapata's* interpretation of Article 74's "loss" provision on the issue of attorneys' fees, taking particular aim at the Seventh Circuit's interpretations of CISG, as a whole, and specific provisions of the CISG. *See infra* Part III.

15. In the almost two decades since *Zapata* was decided, a relatively small percentage of U.S. court decisions involve the adjudication of the issue of the recoverability of attorneys' fees under Article 74. Data exists which demonstrates that U.S. businesses increasingly exclude the CISG as the governing law in their contract negotiations. *See* John F. Coyle, *The*

a. *Zapata* as Settled Law

1) The Federal Appellate Courts Follow the *Zapata* Rationale

In three post-*Zapata* decisions, U.S. federal appellate courts that have examined the question of Article 74's loss provision and the recoverability of attorneys' fees explicitly or implicitly rely upon the *Zapata* rationale. The most recent federal appellate court to analyze this issue is the Seventh Circuit, which revisited its *Zapata* ruling in a 2016 decision. In *VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, the Seventh Circuit Court of Appeals adopted the *Zapata* interpretation of Article 74's "loss" provision and affirmed a district court's order that a contested attorneys' fees provision in a trailing invoice did not become part of the CISG-governed contract.¹⁶ The dispute involved the sale of frozen potatoes between a Canadian supplier and an Illinois reseller and resulted in a default judgment in favor of the Canadian supplier.¹⁷ The Seventh Circuit heard two appeals on this case. In the first appeal, the Seventh Circuit confirmed that the CISG applied to the contract dispute.¹⁸ In the second appeal, the Seventh Circuit reviewed the district court's refusal to award attorneys' fees.¹⁹ In this appeal, the Seventh Circuit cited the language of Article 74 and *Zapata*, and concluded that "[t]he Convention's definition of the 'loss' resulting from a breach of contract does not itself include attorneys' fees."²⁰ The Seventh Circuit Court of Appeals specifically interpreted the scope of Article 74 to exclude as recoverable damages an award of attorneys' fees.²¹ It explained that the recovery of attorneys' fees in a CISG-governed dispute is authorized only through the express, contractual language agreed to by the parties.²² The Seventh Circuit Court of Appeals ultimately rejected the Canadian supplier's argument that the parties entered into a binding attorneys' fee-shifting provision.²³

Role of the CISG in U.S. Contract Practice: An Empirical Study, 38:1 U. PA. INT'L L. 195, 220–21 (2016).

16. *VLM Food Trading Int'l, Inc.*, 811 F.3d at 247.

17. *Id.*

18. *VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 748 F.3d 780 (7th Cir. 2014).

19. *See VLM Food Trading Int'l, Inc.*, 811 F.3d 247.

20. *Id.* at 251.

21. *Id.* ("The Convention's definition of the 'loss' resulting from a breach of contract does not itself include attorney's fees.")

22. *Id.*

23. *Id.* at 254–55. The Seventh Circuit also rejected an argument by the Canadian supplier that industry practices on fee-shifting provisions should be considered: "Nothing in

The Seventh Circuit Court of Appeals in 2005 affirmed a district court's adjudication at a bench trial of a CISG-governed contract dispute between a Colorado seller of pork back ribs to a Canadian buyer.²⁴ The appeal before the Seventh Circuit did not raise the issue of the recoverability of attorneys' fees. However, the district court's opinion²⁵—affirmed by the Seventh Circuit—explicitly cited Article 74 as the basis for the Colorado seller's damages.²⁶ The district court explained that this provision is “designed to place the aggrieved party in as good a position as if the other party had properly performed the contract,”²⁷ and ruled that the agreed upon contract price plus pre-judgment interest constituted the recoverable damages under Articles 74 and 78.²⁸ The district court, however, refused to award the seller attorneys' fees on the grounds that attorneys' fees are a “procedural matter governed by the law of the forum”²⁹ and, relying upon the *Zapata* rationale, do not constitute a “loss” under Article 74: “The Seventh Circuit recently decided that the term ‘loss’ in Article 74 of the CISG does not include attorney's fees incurred in the litigation of a suit for breach of contract.”³⁰

The Third Circuit Court of Appeals in a 2011 decision affirmed a district court's ruling that recoverable compensatory damages in a CISG-governed contract dispute did not include the award of attorneys' fees.³¹ The Third Circuit agreed with the district court's decision to reduce the jury verdict in the amount of the requested attorneys' fees and interest awarded by the jury.³² The CISG governed this dispute, and the jury instruction on damages mirrored Article 74.³³ However, the district court ruled that attorneys' fees and interest could only be recovered if the parties had a “private agreement allowing for [the] recovery of attorney's

the Convention indicates that common industry practices are automatically grafted onto contracts; rather the content of each contract must be analyzed independently.” *Id.* at 254.

24. *See generally* *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894 (7th Cir. 2005).

25. *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702, 717 (N.D. Ill. 2004).

26. *Id.* at 715.

27. *Id.* (quoting *Delchi Carrier Spa v. Rotorex Corp.*, 71 F.3d 1024, 1029 (2d Cir. 1995)).

28. *Chi. Prime Packers, Inc.*, 320 F. Supp. 2d at 715.

29. *Id.*

30. *Id.* at 717 (citing *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 389 (7th Cir. 2002)).

31. *ECEM European Chem.Mktg. B.V. v. Purolite Co.*, 451 Fed. App'x 73, 74, 78 (3d Cir. 2011).

32. *Id.* at 80.

33. *ECEM European Chem.Mktg. B.V. v. Purolite Co.*, No. 05-3078, 2010 U.S. Dist. LEXIS 109893, at *6–7 (E.D. Pa. Oct. 15, 2010).

fees”—which they did not.³⁴ Based on the jury’s finding that the General Terms and Conditions of Sale which was governed by the law of the Netherlands did not form part of the agreement between the disputing parties, no attorneys’ fee recovery was permissible in this case.³⁵

2) *Zapata* Adherents in Federal District Courts

Multiple federal district courts have adhered to *Zapata*’s interpretation that the scope of Article 74’s “loss” provision does not include the recoverability of attorneys’ fees. One year after the Seventh Circuit issued its *Zapata* decision, the U.S. District Court for the Northern District of Illinois entered summary judgment in favor of a defendant on the issue of damages and the recoverability of attorneys’ fees in *Ajax Tool Works v. Can-Eng Mfg.*³⁶ The district court adjudicated a CISG-governed contract dispute brought by an Illinois buyer of an industrial furnace against a Canadian seller.³⁷ The district court stated that attorneys’ fees are a “procedural matter governed by the law of the forum.”³⁸ Citing *Zapata*, it ruled that the loss provision of Article 74 does not include attorneys’ fees.³⁹ The district court denied the buyer’s request for recovery of attorneys’ fees on these legal grounds.⁴⁰

In a 2006 decision,⁴¹ a district court for the Middle District of Pennsylvania refused to apply the CISG to a contract dispute that did not involve international contracting parties. Before dismissing the lawsuit on jurisdictional grounds, the district court noted attorneys’ fees are not a recoverable loss under Article 74 of the CISG based on the rulings in *Zapata* and *Chicago Prime Packers*.⁴² In 2008 another federal district court in Pennsylvania refused to allow the recovery of attorneys’ fees, citing Article 74 and *Zapata*.⁴³ In *Norfolk S. Ry. Co. v. Power Supply Source, Inc.*, a U.S. railroad company sued a Canadian supplier of locomotives,

34. *Id.* at *14–15.

35. *Id.* at *15.

36. *Ajax Tool Works v. Can-Eng Mfg.*, No. 01 C 5938, 2003 U.S. Dist. LEXIS 1306 (N.D. Ill. Jan. 30, 2003).

37. *Id.* at *21

38. *Id.*

39. *Id.*

40. *Id.*

41. *Am. Mint LLC v. Gosoftware, Inc.*, No. 1:05-CV-650, 2006 U.S. Dist. LEXIS 1569, at *15–16 (M.D. Pa. Jan. 5, 2006).

42. *Id.* at *18 n.7.

43. *Norfolk S. Ry. Co v. Power Source Supply, Inc.*, No. 06-58-J, 2008 U.S. Dist. LEXIS 56942, at *22 (W.D. Pa. July 25, 2008).

alleging contract and warranty law theories of recovery.⁴⁴ The district court held that the CISG governed the dispute⁴⁵ and adjudicated an unopposed motion for summary judgment, ruling in favor of the railroad company.⁴⁶ In its examination of the issue of damages under the CISG, the district court stated Article 74 is “designed to place the aggrieved party in as good a position as if the other party had properly performed the contract.”⁴⁷ On this basis, the district court awarded the balance due under the disputed contract but, citing *Zapata*, the district court refused unequivocally to interpret the CISG—Article 74 or any other provision—to allow for the recovery of attorneys’ fees: “Plaintiff is not, however, allowed attorneys’ fees under Article 74 or any other part of the CISG.”⁴⁸

In 2009, a federal district court in New Jersey examined the recoverability of attorneys’ fees in a CISG-governed contract.⁴⁹ In *In re San Lucio*, an Italian cheese exporter and its U.S. subsidiary sued New Jersey cheese importers in a CISG-governed breach of contract dispute.⁵⁰ In its adjudication of a partial motion for summary judgment, the district court analyzed the question of whether attorneys’ fees were recoverable in this dispute.⁵¹ The plaintiffs argued that Italian law controlled this issue and the district court noted that Italian law mandates that the losing party compensate the successful party for its legal fees.⁵² The district court further explained that the American Rule is the opposite of the Losers-Pay Rule, stating, “In the U.S., except in specifically delineated circumstances not present here, parties are responsible for payment of their own legal fees.”⁵³ Of note, the district court did not refer to Article 74 in its analysis of this issue. In a conclusory statement, it ruled that the CISG was silent on the issue of “payment of attorneys’ fees and which party is responsible for their payment.”⁵⁴ It resolved the issue by applying federal common law choice of law rules that pointed to the application of

44. *Id.* at *5.

45. *Id.*

46. *Id.* at *22.

47. *Id.* at *19 (quoting *Delchi Carrier Spa v. Rotorex Corp.*, 71 F.3d 1024, 1029 (2d Cir. 1995)).

48. *Norfolk S. Ry. Co.*, 2008 U.S. Dist. LEXIS 56942, at *19.

49. *In re San Lucio*, No. 07-3031, 2009 U.S. Dist. LEXIS 31681, at *4 (D.N.J. Apr. 15, 2009).

50. *Id.* at *3–4.

51. *Id.* at *4.

52. *Id.* at *4 n.1.

53. *Id.* at *5 n.1, *10–11.

54. *In re San Lucio*, No. 07-3031, 2009 U.S. Dist. LEXIS 31681, at *4 (D.N.J. Apr. 15, 2009).

U.S. law; under U.S. law, the district court stated that the responsibility falls on each party to pay its own attorneys' fees.⁵⁵ The *San Lucio* court engaged in a lengthy explication of the policies and equitable considerations underlying the American Rule's application in this dispute:

The U.S. legal system deliberately requires parties to pay their own legal fees in almost all situations, so as not to discourage parties from litigation and to remove barriers to entry into the judicial system. An examination of the justified expectations of the parties also points in favor of U.S. law. *San Lucio* was aware that its product was being sold into the U.S. and should have anticipated use of U.S. law in the event of a dispute. Finally, ease in determination and application of law in a U.S. court also apply in favor of the U.S. rule.⁵⁶

The policy implications and equitable considerations of the American Rule, when applied in international contract disputes governed by the CISG, have important ramifications.⁵⁷

In a 2012 decision issued by a federal district court in the Middle District of Florida, attorneys' fees in a CISG-governed contract dispute were not awarded to a prevailing party on the grounds that the CISG does not expressly provide for such an award and no statutory authority or contractual provision justified the fee shifting.⁵⁸ A year later, in 2013, a federal district court in the Eastern District of Virginia adopted the policy and equitable considerations articulated in *San Lucio* and ruled that the American Rule in a CISG-governed dispute dictated that each party bear the cost of their attorneys' fees.⁵⁹ In reaching this conclusion, the district court noted that "minimal case law" exists regarding the recoverability of attorneys' fees under the CISG but acknowledged that "other jurisdictions worldwide may

55. *Id.* at *10–11.

56. *Id.*

57. *See infra* Part III.

58. 2P Commercial Agency S.R.O. v. SRT USA, Inc., No. 2:11-cv-652-FtM-29SPC, 2012 U.S. Dist. LEXIS 112706, at *8 (M.D. Fla. Aug. 10, 2012). The court reviewed the language of Article 74 to ascertain the compensable damages in the dispute. By not including the recovery of attorneys' fees in this discussion of Article 74, the court impliedly ruled that the scope of the "loss" provision term in Article 74 does not extend to recovery of attorneys' fees. *Id.* at *6–8.

59. *Le Pupille v. Nickolas Imports LLC*, No. 1:12-cv-668, 2013 U.S. Dist. LEXIS 69915, at *2–3 (E.D. Va. May 15, 2013).

require that the loser in litigation pay the winner's expenses" in CISG-governed disputes.⁶⁰ The district court specifically acknowledged that contracting parties in CISG-governed disputes "risk" enforcement of their contract rights in the United States.⁶¹ This is a judicial acknowledgement that the disparity of rule application on attorneys' fees recovery under the CISG constitutes a risk in contracting.⁶² This dissonance in recoverability outcomes based on the forum in which the dispute is adjudicated creates both ethical and practical dilemmas that a harmonized interpretation of Article 74's "loss" provision as including attorneys' fees would cure.⁶³

In 2014, a federal district court from the Eastern District of New York⁶⁴ affirmed and adopted in its entirety a federal magistrate judge's Report and Recommendation on the issue of the recoverability of attorneys' fees in a CISG-governed contract dispute.⁶⁵ In *Profi-Parkiet Sp. Zoo v. Seneca Hardwoods LLC*, a federal magistrate judge recommended a default judgment in favor of a Polish purchaser of wooden planks who brought a breach of contract action against the New York supplier of these planks.⁶⁶ The federal magistrate judge also recommended a damages award for losses incurred as a result of the breach—pursuant to Article 74⁶⁷—as well as prejudgment interest.⁶⁸

However, the federal magistrate judge in *Profi-Parkiet* rejected the Polish buyer's request for attorneys' fees.⁶⁹ Relying on multiple sources, the federal magistrate judge reasoned:

- U.S. courts interpret the "loss" provision term in Article 74 of the CISG to exclude attorneys' fees incurred in litigating the contract breach;⁷⁰

60. *Id.* at *2.

61. *Id.* at *3.

62. *See infra* Part IV.A.1.

63. *See infra* Part IV.B.

64. *Profi-Parkiet Sp. Zoo v. Seneca Hardwoods, LLC*, No. 13-CV-4358, 2014 U.S. Dist. LEXIS 83128, at *3–4 (E.D.N.Y. June 18, 2014).

65. *Profi-Parkiet Sp. Zoo v. Seneca Hardwoods, LLC*, No. 13-CV-4358, 2014 U.S. Dist. LEXIS 71289, at *34–35 (E.D.N.Y. May 23, 2014).

66. *Id.* at *34.

67. *Id.* at *24–25.

68. *Id.* at *32.

69. *Id.* at *34.

70. *Profi-Parkiet Sp. Zoo v. Seneca Hardwoods, LLC*, No. 13-CV-4358, 2014 U.S. Dist. LEXIS 71289, at *34 (E.D.N.Y. May 23, 2014) (quoting *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702, 717 (N.D. Ill. 2004)); *Quanzhou Joerga Fashion Co., Ltd. v. Brooks Fitch Apparel Grp., LLC*, No. 10 Civ. 9078, 2011 U.S. Dist. LEXIS 92636, at *2 n.1 (S.D.N.Y. Aug. 11, 2011) (citing *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 313 F.3d, 385, 389 (7th Cir. 2002), *cert. denied*, 540 U.S. 1068 (2003)).

- While there is scant U.S. judicial precedent on this issue, the court decisions which analyze this issue hold that attorneys' fees are not recoverable under the CISG;⁷¹
- Absent a fee-shifting provision in the contract itself, the American Rule against a prevailing party's recovery of attorneys' fees applies to CISG-governed disputes litigated in the United States.⁷²

Finding the parties did not contractually negotiate a fee shifting provision, the federal magistrate judge refused to award attorneys' fees to the prevailing party.⁷³

A federal district court for the Southern District of New York followed the post-*Zapata* precedent forged by the U.S. courts and also denied recovery of attorneys' fees in a 2017 decision, *Victory Foodservice Distribs. Corp. v. N. Chr. Laitos & Co. Ltd.*⁷⁴ After granting a partial motion for a default judgment, the court was asked by the prevailing party to award it—prospectively—attorneys' fees for enforcement of the court-ordered default judgment in a Greek court.⁷⁵ Declining to award these fees, the court noted that there was “scant” authority on the issue of whether “the term ‘loss’ encompasses attorney’s fees” under Article 74 but that the existing precedent holds it does not include such fees.⁷⁶ Citing *Zapata*, *Granjas Aquanova*⁷⁷ and *San Lucio*, the court reasoned attorneys' fees are recoverable if the law of the forum—state law in the United States—permits recovery.⁷⁸ Under New York law, the applicable law in the case, the court held that the prevailing party was not entitled to recover the requested attorneys' fees.⁷⁹

71. *Profi-Parkiet Sp. Zoo*, 2014 U.S. Dist. LEXIS 71289, at *34 (quoting *Quanzhou Joerga Fashion Co., Ltd.*, 2011 U.S. Dist. LEXIS 92636, at *2 n.1).

72. *Profi-Parkiet Sp. Zoo*, 2014 U.S. Dist. LEXIS 71289, at *33-34 (quoting MODERN LAW OF CONTRACTS § 23:8 (2014); *Quanzhou Joerga Fashion Co., Ltd.*, 2011 U.S. Dist. LEXIS 92636, at *23).

73. *Profi-Parkiet Sp. Zoo*, 2014 U.S. Dist. LEXIS 71289, at *34.

74. *Victory Foodservice Distribs. Corp. v. N. Chr. Laitos & Co. Ltd.*, No. 17cv2227, 2017 U.S. Dist. LEXIS 187203 (S.D.N.Y. Nov. 13, 2017).

75. *Id.* at *1-2

76. *Id.* at *3.

77. *See Granjas Aquanova S.A. de C.V. v. House Mfg. Co.*, No. 3:07-CV-00168-BSM, 2010 U.S. Dist. LEXIS 128573 (E.D. Ark. Nov. 19, 2010).

78. *Victory Foodservice Distribs. Corpl*, 2017 U.S. Dist. LEXIS 187203 at *3-4.

79. *Id.* at *4.

b. *Zapata* Skeptics in the Federal Courts

Some U.S. federal courts have viewed *Zapata's* interpretation of Article 74's "loss" provision as it relates to attorneys' fee recovery with skepticism. These decisions parallel the crescendo of criticism in academic literature over *Zapata's* interpretation of Article 74. They reflect the inconsistent and disparate outcomes resulting both in the United States and internationally from restricting Article 74's "loss" provision language to exclude recovery of such fees.

In a 2010 decision, a federal district court in the Eastern District of Arkansas awarded over \$400,000 in attorneys' fees to a prevailing party in a CISG-governed contract dispute.⁸⁰ In *Granjas Aquanova S.A. de C.V. v. House Mfg. Co.*, the court directly engaged the controversy surrounding the established post-*Zapata* view that the "loss" provision of Article 74 of the CISG does not include attorneys' fees.⁸¹ First, the court spotlighted the widespread critique in academic literature of the holding in *Zapata* that attorneys' fees do not constitute a recoverable loss under Article 74 of the CISG: "*Zapata*, however, is widely criticized in academic literature both for its holding and for its reasoning. . . . The brunt of the criticism is focused on that court's perfunctory reliance on U.S. law, its cursory treaty analysis, and its failure to consider CISG Article 7."⁸²

Second, the district court explained that the prevailing plaintiff was entitled to recover attorneys' fees in the dispute whether it adopted the *Zapata* rationale or not.⁸³ The court reasoned that if it diverged from *Zapata's* holding and ruled that Article 74's "loss" provision can include attorneys' fees, the prevailing party in the case adequately demonstrated that the requested fees were foreseeable, as required by Article 74.⁸⁴ If the court follows *Zapata*, it is not permitted to authorize recovery of attorneys' fees pursuant to Article 74 of the CISG⁸⁵ but may award such fees if the law of the forum state permits such a recovery.⁸⁶

80. *Granjas Aquanova S.A. de C.V.*, 2010 U.S. Dist. LEXIS 128573, at *2.

81. *See id.*

82. *Id.* at *3; *see also* Quanzhou Joerga Fashion Co. v. Brooks Fitch Apparel Grp., LLC, No. 10 Civ. 9078, 2011 U.S. Dist. LEXIS 92636, at *2 n.1 (S.D.N.Y. Aug. 11, 2011) (citations omitted) ("We note that the few federal court decisions that have addressed the question of whether fees are recoverable under the Convention have rejected this reading, although academic literature has not concurred.").

83. *Id.* at *2.

84. *Id.* at *4.

85. *Id.*

86. *Id.* at *2-5.

The court remained agnostic on *Zapata's* interpretation of Article 74, however, and held that, pursuant to Arkansas law, it retained the discretion to award attorneys' fees, using a multi-factor analysis outlined by the Arkansas Supreme Court.⁸⁷

In a 2014 decision, *Stemcor United States v. Miracero, S.A. de C.V.*, a federal district court in the Southern District of New York confirmed an arbitration award of attorneys' fees in a CISG-governed contract dispute.⁸⁸ The analytical lens used by the district court to examine the recoverability of attorneys' fees as well as the commentary the court engaged in regarding the prudence and precedential value of the *Zapata* ruling demonstrates some judicial resistance against following lockstep *Zapata's* interpretation of Article 74.⁸⁹ The *Stemcor* case creates judicial room for other courts to independently evaluate the proper interpretation of the "loss" provision under Article 74.

The dispute in *Stemcor* involved a CISG-governed contract between a U.S. company, Stemcor, and a Mexican steel importer and distributor, Miracero, who purchased the steel coils from Stemcor.⁹⁰ Stemcor's failure to verify the origin of the goods, at the request of the Mexican authorities, resulted in Miracero's loss of preferential tax treatment on these imports and a multi-million dollar assessment by the Mexican tax authorities against Miracero.⁹¹ Miracero incurred \$340,000 in related legal fees and costs in a successful challenge of this assessment in Mexican legal proceedings.⁹² Miracero then commenced arbitration proceedings in New York pursuant to the arbitration clause in its contract with Stemcor to recover these legal fees and costs associated with the tax assessment legal challenge.⁹³ The New York arbitral panel awarded Miracero \$819,437.86, a sum which included both the legal costs associated with the tax challenge in Mexico as well as the attorneys' fees expended by Miracero in the arbitration proceeding in New York.⁹⁴

The district court refused to vacate this arbitration award. In its decision confirming the award of attorneys' fees in this CISG-governed dispute, the district court demonstrated a perspective on Article 74's "loss" provision that is analytically both independent of

87. *Id.* at *7.

88. *Stemcor USA, Inc. v. Miracero, S.A. de C.V.*, 66 F. Supp. 3d 394 (S.D.N.Y. 2014).

89. *Id.* at 401.

90. *Id.* at 395.

91. *Id.* at 396.

92. *Id.* at 395.

93. *Id.* at 396.

94. *Stemcor USA, Inc. v. Miracero, S.A. de C.V.*, 66 F. Supp. 3d 394, 396 (S.D.N.Y. 2014).

and different from the *Zapata* adherents of the U.S. judiciary.⁹⁵ The *Stemcor* court began its analysis with a review of Article 31 of the International Centre for Dispute Resolution Rules (“ICDR”), applicable to the arbitration proceeding brought by *Miracero*.⁹⁶ Article 31 of the ICDR states that an arbitral tribunal “shall fix the costs of arbitration in its award” and apportion such costs if the arbitral tribunal “determines that such apportionment is reasonable.”⁹⁷ The court then evaluated *Stemcor*’s argument that the arbitral panel’s reliance upon Article 31 of the ICDR to justify its award of attorneys’ fees was improper.⁹⁸ *Stemcor* argued: (1) the ICDR governs procedural not substantive matters in a CISG dispute; (2) the award of attorneys’ fees is a substantive law issue governed by the CISG; and (3) the attorneys’ fees awarded in the arbitration are not a recoverable “loss” under Article 74 of the CISG.⁹⁹

The district court rejected *Stemcor*’s argument and provided a unique analytical lens in which to view the recoverability of attorneys’ fees under CISG-governed contracts.¹⁰⁰ First, the court noted that judicial precedent establishes that choice-of-law provisions do not “override” the power of arbitrators to award fees.¹⁰¹ Second, the court pushed back on the post-*Zapata* precedent’s interpretation of “loss” under Article 74 of the CISG, stating:

CISG Article 74 does not unambiguously bar recovery of fees and costs. While one appellate court has held so, commentators are quite clear that the issue generally remains unresolved. Certainly the question is open in this Circuit. At most, then, *Stemcor* has identified an ambiguity in the law, which the arbitrators here resolved in favor of

95. *But see* Clayton P. Gillette, *Attorney’s Fees Under the CISG: Stemcor Does not Disagree with Zapata*, 15 INTERNATIONALES HANDELSRECHT 58, 58–59 (2015). In this brief essay, Professor Gillette minimizes the *Stemcor* court’s implied critique of and precedential impact on the post-*Zapata* precedent by emphasizing the *Stemcor* court’s failure to explicitly rule on the recoverability of attorneys’ fees pursuant to Article 74 as well as the nature of the court’s limited review of an arbitral award. *Id.*

96. *Stemcor USA, Inc.*, 66 F. Supp. 3d at 400.

97. *Id.* (quoting exhibits in the record).

98. *Id.* at 400.

99. *Id.*

100. *Id.* at 400–01.

101. *Id.* (stating the arbitrator’s power to award attorneys’ fees can derive from Article 31 ICDR or from its “general” powers.).

granting fees. Since that decision was at least reasonable, and certainly “barely colorable,” this Court will not disturb it.¹⁰²

The *Stemcor* court’s dissent interpretation of Article 74 on the issue of the recoverability of attorneys’ fees is remarkable in its refusal to view *Zapata*’s “loss” interpretation of Article 74 as settled law. Its characterization of the proper judicial interpretation of the meaning of “loss” under Article 74 as an “open” and “unresolved” question gives wide berth to courts both in the United States and internationally to interpret Article 74 as permitting the recovery of attorneys’ fees as a foreseeable loss contemplated under the CISG.¹⁰³ Its recognition of “ambiguity in the law” invites courts and arbitral tribunals to independently ascertain the meaning of Article 74 in pending disputes.¹⁰⁴ Finally, the *Stemcor* court’s acknowledgement that both academicians and international tribunals diverge from *Zapata* on the issue of the recoverability of attorneys’ fees under Article 74 of the CISG¹⁰⁵ encourages the U.S. judiciary to widen its lens and include in its analysis of this issue contrary views embraced by legal scholars and courts and tribunals in other countries. *Stemcor* shatters the post-*Zapata* majority view of the U.S. courts that recovery of attorneys’ fees under Article 74 is unauthorized and unwarranted.

In 2019, the U.S. District Court for the Eastern District of Texas implicitly criticized the *Zapata* ruling.¹⁰⁶ *Zodiac Seats* involved a dispute between Zodiac, a Texas manufacturer of commercial airplane seats, and Synergy, a South American conglomerate, that entered into a series of agreements to purchase seats from Zodiac.¹⁰⁷ After concluding that Synergy would be treated as a Colombian seller and thereby resolving that the CISG applies to this case, the district court turned to attorneys’ fees.¹⁰⁸

102. *Stemcor USA, Inc. v. Miracero, S.A. de C.V.*, 66 F. Supp. 3d 394, 401 (S.D.N.Y. 2014). The court cited academic discourses on the recoverability of attorneys’ fees under Article 74 and acknowledged German courts’ recognition of Article 74 of the CISG as a legal basis authorizing an award of attorneys’ fees. *Id.* at 401 n.7 (citing 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, 422 (2007)); Larry A. DiMatteo et al., *The Interpretative Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT’L L. & BUS. 299, 422–23 (2004).

103. *Id.* at 373.

104. *Stemcor USA, Inc.*, 66 F. Supp. 3d at 401.

105. *Id.* at 401 n.47.

106. *Zodiac Seats US LLC v. Synergy Aerospace Corp.*, No. 4:17-cv-00410-ALM-KPJ, 2019 WL 1776960 (E.D. Tex. Apr. 23, 2019).

107. *Id.* at *3–4.

108. *Id.* at *4.

It concluded that attorneys' fees could be awarded under a Texas statute in CISG-governed disputes.¹⁰⁹ While not addressing the specific question of whether attorneys' fees are a "loss" within the meaning of Article 74, the *Zodiac Seats* case adds to a growing number of federal district courts maneuvering around the *Zapata* holding and allowing for the award of attorneys' fees in CISG-governed disputes. The district court provided its obligatory nod to *Zapata*, explained why *Zapata* didn't apply in this matter, and following *Granjas Aquanova*, determined that a Texas statute governs the decision of whether to award attorneys' fees.¹¹⁰ While the rationales of *Zodiac Seats* and *Granjas Aquanova* successfully side-step *Zapata* in states that have statutory exceptions to the American Rule for breaches of contracts, district courts sitting in those states that do not have this exception may be required to challenge *Zapata* on other grounds. For instance, these courts might rule that attorneys' fees are a "loss" within the plain meaning of Article 74. Such a challenge could be supported by the interpretative mandates of Article 7 and the case law and arbitral decisions from outside the United States.

2. Post-*Zapata*: Domestic Courts and Arbitral Tribunals outside the United States and Attorneys' Fees Recovery

Domestic courts and arbitral tribunals outside of the United States apply varying rationales when examining the issue of recoverability of attorneys' fees under Article 74. These courts and arbitral tribunals do not refer to *Zapata* in their rulings. Their analyses—explicitly or implicitly—focus primarily on the language of Article 74. Post-*Zapata* courts and arbitral tribunals outside the United States do not adhere to a uniform, consistent interpretive principle for the "loss" provision of Article 74. In some decisions, these courts or arbitral tribunals directly address whether the meaning of "loss" under Article 74 includes attorneys' fees. More often, these decisions impliedly answer that question by bypassing Article 74 as a basis for the recovery of attorneys' fees, relying upon domestic law to supply the legal basis for recovery of such fees. These decisions present a kaleidoscope of rationales and an array of adjudicated outcomes on the recoverability of attorneys' fees in CISG-governed contract disputes. This divergence in the analytical frameworks used to interpret and adjudicate this issue and the lack of coherent,

109. *Id.* at *4–7 (citing to TEX. CIV. PRAC. & REM. CODE § 38.001 (1985)).

110. *Zodiac Seats US LLC*, 2019 WL 1776960, at *4–6.

uniform outcomes in the decisions by courts and arbitral tribunals outside the United States further confirm the need for harmonization in the interpretation of Article 74's "loss" provision.

This section presents the decisions of domestic courts and arbitral tribunals outside the United States that address the recoverability of attorneys' fees in disputes invoking the CISG. First, case law from Germany, Switzerland, the Netherlands, Spain, Belgium, and Finland are reviewed. Second, awards from arbitral tribunals in China, the Russian Federation, and Serbia are examined.

a. Domestic Courts Outside the United States

1) Germany

German courts post-*Zapata* permit the recoverability of attorneys' fees under Article 74 if those fees were incurred pre-litigation and include attempts by a party to obtain contract compliance.¹¹¹ These courts point to Article 74 as a source of compensable damages for legal costs but define such fees as those attorneys' fees related to the contract breach. The recovery of attorneys' fees incurred through the breach of contract litigation are generally awarded under domestic law, but cases indicate that Article 74 has been used by some German courts to award such fees.

In 2009, a German court issued a ruling stating that a Turkish buyer of pharmaceutical compounds and implements owed a German seller attorneys' fees incurred by the seller "before the trial."¹¹² The court ruled that this contract dispute was governed by the CISG and that pursuant to Article 74, the seller incurred recoverable attorneys' fees related to the buyer's refusal to pay on the contract.¹¹³ Specifically, the court held the seller could recover attorneys' fees incurred when it hired a lawyer to write a collection letter to the buyer as a "reminder" of the due payment.¹¹⁴ However, the court did not extend the recovery of attorneys' fees to those arising from the litigation itself.¹¹⁵

A German appellate court¹¹⁶ in 2008 also applied this principle. In that appeal, the court held that an Italian buyer of an

111. LG Berlin [District Court] Mar. 21, 2003, 103 O 213/02 (Ger.).

112. LG Potsdam [District Court] Apr. 7, 2009, 6 O 171/08 (Ger.).

113. *Id.*

114. *Id.*

115. *Id.*

116. OLG München [Provincial Appellate Court] Mar. 5, 2008, 7 U 4969/06 (Ger.).

automobile from a German seller was entitled to damages under Article 74, which included damages arising from “pre-procedural attorneys’ fees.”¹¹⁷ In a similar rule application, a German court in 2007 issued an opinion in a CISG-governed contract dispute involving a German buyer of shoes and a seller whose country was not identified in the opinion.¹¹⁸ In ruling in favor of the seller in the dispute, the court employed somewhat ambiguous language to distinguish which attorneys’ fees are recoverable, stating, “The seller can claim out of court-legal expenses as part of the further damages according to 74 CISG.”¹¹⁹

Another German court in its 2006 adjudication of a CISG-governed dispute between a German buyer and an Austrian seller of a dust ventilator appears to adopt a similar rule. This court distinguished between Article 74 attorneys’ fees damages incurred through “legal counseling” and those attorneys’ fees not recoverable under Article 74 because they are related to “procedural costs.”¹²⁰ In its opinion, the court used this distinction to identify which attorneys’ fees the buyer was entitled to claim as damages under Article 74: “[Buyer]’s claim for damages for default covers all expenses for legal counseling as far as they do not count as procedural costs upon which the Court decides *ex officio*.”¹²¹ Another German court invoked Article 74 to authorize the recoverability of attorneys’ fees related to contract compliance.¹²² In this 2003 case, the court awarded an Italian seller of fabrics “reimbursement of attorney’s fees incurred in connection with a reminder to the [German] buyer” pursuant to Articles 61 and 74 of the CISG. Litigation-related fees were recoverable under domestic law, in this case German law.¹²³

Some decisions handed down by the German courts are less clear as to the legal basis for an award of attorneys’ fees. In 2012, a German court¹²⁴ adjudicated a contract dispute between an Italian seller of printed work and a German buyer. In its decision, the court ordered the seller to pay the cost of the proceedings, although it did not state whether such costs included the recovery of attorneys’ fees for the litigation itself.¹²⁵ The court did determine that Article 74 provided the legal basis for compensation to the

117. *Id.*

118. AG Freiburg [Lower Court] July 6, 2007, 4 C 4003/06 (Ger.).

119. *Id.*

120. AG Landsberg am Lech [Lower Court] June 21, 2006, 1 C 1025/05 (Ger.).

121. *Id.*

122. LG Berlin [District Court] Mar. 21, 2003, 103 O 213/02 (Ger.).

123. *Id.*

124. LG Köln [District Court] May 29, 2012, 88 O 57/11 (Ger.).

125. *Id.*

buyer of “reasonable pre-trial lawyer fees.”¹²⁶ In analyzing the scope of damages permissible under Article 74, the court stated, “According to Art. 74 CISG the [Buyer] can claim all costs that it in reliance on the performance of the contract could reasonably spent [sic] which now seem useless (frustrated expenses).”¹²⁷ The court additionally ruled that reasonable prosecution costs were recoverable as well but limited such fees to those incurred “pre-trial”: “The prosecution of its rights resulted for the [Buyer] in pre-trial lawyer fees . . .”.¹²⁸

In a 2002 decision issued the same year as *Zapata*, a German court specifically recognized that certain kinds of attorneys’ fees constitute a “loss” under Article 74 and are recoverable under this provision.¹²⁹ The case involved a CISG-governed dispute between a German seller of pallets to a Slovakian buyer.¹³⁰ The court concluded that the seller was “entitled to payment of the attorneys fees” pursuant to CISG Articles 74 and 61(1)(b) as well as German law.¹³¹ In reasoning that this recovery was warranted, the court relied upon the “loss” language of Article 74:

[T]he [buyer] was in default of payment of the purchase price, which constitutes a breach of contract in the meaning of Art. 61(1) CISG. The term “loss” in Art. 74 sent. 1 CISG, encompasses the cost of pursuing one’s rights. The [seller] was entitled to commission an attorney, because the [buyer] persistently refused payment. Before the start of litigation, the telephone conversations between the [seller]’s attorney and the [buyer] caused a consultation fee under 118(1) no. 2 BRAGO, which cannot be counted towards the litigation fee.¹³²

Pre-*Zapata* case law in Germany also recognized the distinction between attorneys’ fees incurred to obtain contract compliance pre-litigation and those arising from the contract

126. *Id.*

127. *Id.*

128. *Id.*

129. AG Viechtach [Lower Court] Apr. 11, 2002, 1 C 419/01 (Ger.).

129. *Id.*

130. *Id.*

132. *Id.* The court further stated that the “attorneys’ fees constitute ‘any other sum that is in arrears’ in the meaning of Art. 78 CISG.” *Id.*

breach litigation itself. The German courts have long held that the former are recoverable fees under Article 74, but litigation fees may be awarded under domestic law.¹³³

2) Switzerland

The case law in Switzerland post-*Zapata* is less uniform in its approach to the recoverability of attorneys' fees under Article 74 than decisions of the German courts. The Swiss courts are idiosyncratic in their analyses, adopting in each case a unique rationale for their rulings. Some Swiss courts cite the academic literature surrounding this issue to justify their analysis; yet none reference the *Zapata* decision.

In 2009, a Swiss appellate court heard an appeal involving a dispute between a Ukrainian buyer and a Swiss seller of watches.¹³⁴ The appellate court acknowledged that the CISG governed this dispute and cited scholars Ingeborg Schwenzer and Bruno Zeller in its discussion of the application of Article 74 of the CISG.¹³⁵ In its adjudication of the dispute, the appellate court reversed in part the lower court decision dismissing all of the buyer's claims and remanded the case back to the lower court.¹³⁶

133. OLG Hamm [Provincial Appellate Court] Nov. 12, 2001, 13 U 102/01 (Ger.). A 2001 German appellate court upheld the recoverability of attorneys' fees in a dispute between a Chinese seller of computer parts to a German buyer. *Id.* The lower court concluded that attorneys' fees were recoverable by the seller pursuant to Articles 74 and 61(1) of the CISG. *Id.* The appellate court agreed: "Costs of extra-procedural legal advice are recoverable under Art. 74 CISG if these constitute appropriate and necessary expenses for obtaining legal protection." *Id.* The court went on to note that "[i]t was helpful for [Seller] to commission attorneys in order to enforce its claims. In that respect it constituted an adequate exercise of the legal mandate when the attorneys entered into negotiations with the opponents which finally resulted in an economically reasonable conclusion of a partial settlement." *Id.*; see also AG Berlin-Tiergarten [Petty District Court] Mar. 13, 1997, 2 C 22/97 (Ger.). (citing Article 74, pre-litigation expenses were awarded by a 1997 German court to a Dutch seller in a debt collection action brought against a German buyer for reimbursement of debt collection costs); OLG Düsseldorf [Provincial Court of Appeal] July 11, 1996, 6 U 152/95 (Ger.). (citing Articles 74 and 61(1)(b) as the basis for its ruling that a German manufacturer of lawn-mower engines could recover attorneys' fees for a reminder letter sent to an Italian distributor prior to commencement of litigation); AG Augsburg [Petty District Court] Jan. 29, 1996, 11 C 4004/95 (Ger.). (ruling in 1996 that a Swiss seller of shoes was entitled to recover as damages attorneys' fees pursuant to CISG articles 78, 59, and 74 from a German buyer but did not identify the type of attorneys' fees recoverable). *But see* OLG Düsseldorf [Provincial Court of Appeal] Jan. 14, 1994, 17 U 146/93 (Ger.). (ruling that Articles 74 and 75 of the CISG governed the damages claims in a dispute between an Italian seller of shoes to a German buyer). The court denied the seller's claim for attorneys' fees incurred through the avoidance of the contract, arguing such a recovery constituted a form of double recovery in this case. *Id.* The court did state: "It is true that Art. 74 CISG encompasses compensation for the cost of a reasonable pursuit of one's legal rights." *Id.*

134. Bundesgericht [BGer] [Supreme Court] Dec. 17, 2009, 4A_440/2009 (Switz.).

134. *Id.*

135. *Id.*

Without citing a legal basis for its ruling on the recovery of attorneys' fees, the Swiss court ordered the parties to "split the legal fees" proportional to the success of each party on the merits of the claims: "[A]pproximately 5/6 for [Buyer] and 1/6 for [Seller]."¹³⁷

Also in 2009, a Swiss appellate court¹³⁸ heard an appeal in a case involving fiberglass materials sold by a German seller to a Swiss buyer. In its decision, the appellate court ruled that portions of the CISG governed this dispute as well as the official rules of the International Chamber of Commerce and German law.¹³⁹ The Swiss appellate court ordered the parties to proportionally split the legal fees incurred (with the German seller paying 7/8 of the fees and the Swiss buyer paying 1/8 of the fees), appearing to cite Swiss law on the specific issue of fee recovery.¹⁴⁰

In 2008, a Swiss court adopted the contract compliance interpretation of Article 74 attorneys' fees recovery while employing the domestic law of Switzerland to decide the issue of litigation fee recovery.¹⁴¹ The Swiss court adjudicated a dispute involving the sale of packaging foils by a Swiss seller to an Irish buyer and ruled that the CISG governed the claims.¹⁴² The court explained in its opinion that where the CISG was silent on a specific issue such as the interest rate applicable to damages, the court would apply its own domestic law, which in this dispute was Swiss law.¹⁴³ The court then examined the recoverability of certain types of legal fees requested in the case. First, the court labeled costs incurred by an "Irish legal representative" as "pre-trial enforcement costs" arising from a settlement agreement entered into by the parties.¹⁴⁴ The court ordered the seller to bear half of such costs.¹⁴⁵ Next, the court analyzed whether attorneys' fees incurred by the seller in Ireland in an effort to seek compliance with a settlement agreement constituted a "loss" recoverable under Article 74.¹⁴⁶ On this question, the court drew the distinction between foreseeable legal costs related to contract

137. *Id.*

138. Germany v. Switzerland, Case No. C1 08 45, (Tribunal Cantonal [Higher Cantonal Court] du Valais Jan. 28, 2009), <http://cisgw3.law.pace.edu/cases/090128s1.html>.

139. *Id.*

140. *Id.*

141. Kantonsgericht Zug [District Court] Nov. 27, 2008, A3 2004 112 (Switz.).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

compliance which are recoverable under Article 74 and those attorneys' fees arising from contract breach litigation which are not.

Therefore, it must be examined whether the costs incurred [sic] by the Irish legal representative can be enforced as [a] separate loss under Art. 61(1)(b) in conjunction with Art. 74 CISG. Doctrine and jurisprudence generally argue that reimbursement for such pre-trial enforcement costs is subject to the CISG because such costs are hard to separate from claims regarding damages and in domestic law they are often not separated. However, such costs may be reimbursed only if they are business-related expenses in a legal sense, incurred as a result of the debtor's conduct violating the contract and which the debtor could foresee as a reasonable reaction to its conduct (Schlechtriem-Schwenzer, *op. cit.* no. 20 on Art. 74 CISG).

The Irish legal representative was engaged by [Seller] because despite a written reminder [Buyer] failed to comply with its obligation arising out of the Termination and Settlement Agreement, i.e., to de-register the Irish company As in-depth knowledge of Irish law was necessary to perform the request to de-register the company, that [Seller] and its Swiss representative did not possess, employment of the Irish legal representative was justified and [Buyer] had to foresee that as a result of its non-compliant conduct.

Under these circumstances, [Seller] incurred justified pre-trial enforcement costs regarding its Irish legal representative and they can be reimbursed as specific damages under [Article] 74 CISG.¹⁴⁷

147. Kantonsgericht Zug, *supra* note 140 (citing Schlechtriem Schwenzer, *op. cit.* no. 20 on Art. 74 CISG). Swiss court's contract compliance interpretation of Article 74 is evident in pre-*Zapata* rulings by Swiss courts as well. *Id.* See also Handelsgericht Aargau [HG Aargau] [Commercial Court] Sept. 26, 1997, OR.96.0-0013 (Switz.). A 1997 Swiss court cited Article 74 as the legal basis for recovery of the "cost of preliminary legal counseling" incurred by a German seller of cutlery in a CISG-governed dispute with a Swiss buyer. *Id.* See also Handelsgericht des Kantons Aargau [Commercial Court] Dec. 19, 1997, OR.97.00056 (Switz.). A 1997 Swiss court, applying Article 74, awarded attorneys' fees to a German garment seller for pre-litigation legal expenses incurred in both Switzerland and Germany in a contract dispute with a Swiss buyer. *Id.* The court issuing the default

On the issue of the recoverability of attorneys' fees by the seller in the contract breach litigation, the court applied Swiss procedural law.¹⁴⁸

The use of domestic law—not Article 74 of the CISG—to examine the recoverability of attorneys' fees related to litigation is evident in a 2003 Swiss court decision.¹⁴⁹ The court applied Article 74 of the CISG to a dispute between a German buyer of a machine and its Swiss seller and dismissed the claim brought by the German buyer, ruling it had not established “concrete damages” under Article 74.¹⁵⁰ The court then turned to its own domestic law, Swiss law, and ordered the losing party—the buyer—to bear the legal costs of the litigation.¹⁵¹

3) The Netherlands

The Dutch courts have adjudicated multiple CISG-governed disputes in which the question of the recoverability of attorneys' fees arose. These post-*Zapata* court decisions do not provide clear rationales for the adoption or rejection of Article 74 as a legal basis for the recovery of attorneys' fees. The opinions are opaque and offer little guidance on how a Dutch court views compensable attorneys' fees under Article 74.

In 2015, a Dutch court adjudicated a dispute involving the sale of a truck by a Dutch seller to a Belgian buyer.¹⁵² The court concluded the Dutch seller was liable for damages sustained by the Belgian buyer for delivery of a truck that did not comply with the contract and awarded damages to the buyer pursuant to Article 74 of the CISG.¹⁵³ In considering the buyer's request for reimbursement of attorneys' fees, the court stated that the “claim for compensation for this damage item is therefore rejected” because the buyer failed to substantiate “what work has been done” and had “not explained on the basis of which the costs involved are eligible for separate compensation.”¹⁵⁴

judgment stated that, “a seller is also entitled to further damages according to Art. 74 CISG (Art. 78 [CISG]). Pre-procedural legal costs are part of recoverable damages as long as the breach of contract gave sufficient rise for such.” *Id.*

148. Kantonsgericht Zug [District Court] Nov. 27 2008, A3 2004 112 (Switz.).

149. KG Appenzell Ausserhoden [Cantonal Court] Mar. 10, 2003, Proz. Nr. 433/02 (Switz.).

150. *Id.*

151. *Id.*

152. Rb Gelderland 22 april 2015, C/05/253028 / HA ZA 13-723 (Vadagro BVBA/Clean Mat Trucks BV) (Neth.).

153. *Id.*

154. *Id.*

A 2013 Dutch court applied various provisions of the CISG to determine the merits of a Serbian buyer's claim against a Dutch seller of cranes.¹⁵⁵ In rejecting the buyer's claims, the court ordered the buyer to pay the seller's attorneys' fees since the buyer was "the party that is largely unsuccessful."¹⁵⁶ It is unclear from the court's opinion whether it relied upon Dutch civil law as the basis of the attorneys' fees award. Similarly, a 2012 Dutch court ruled a buyer's legal action lacked merit in a CISG-governed dispute.¹⁵⁷ The court awarded the seller its attorneys' fees on the grounds that the buyer was unsuccessful and "must therefore bear the costs of the proceedings."¹⁵⁸ The court did not provide a legal basis—under Dutch law or the CISG—for the attorneys' fees award. In a 2012 decision issued by a Dutch appellate court, the court applied the CISG to a dispute between a German seller of floor heating materials and a Dutch buyer. Rejecting the Dutch buyer's appeal, the appellate court ordered the buyer to pay the seller's attorneys' fees.¹⁵⁹

In a 2010 decision, a Dutch court¹⁶⁰ explained its rationale for the award of "extrajudicial costs." The case involved a CISG-governed contract dispute between a Spanish seller of grapes to a Dutch buyer.¹⁶¹ In ordering the buyer to compensate the seller for "extrajudicial costs," the court stated that these:

[C]osts are reasonably incurred, with a different criterion for assessment than that of corresponding article . . . under the Dutch Civil Code. Unlike the Dutch Civil Code, the CISG does not contain a rule that excludes compensation for certain activities, because these must be considered to be covered by the costs of the proceedings. On the other hand, the criterion of reasonableness, which also applies to the CISG, precludes a payment being granted, in so far as this is already included in the costs of the proceedings.¹⁶²

155. Rb Rotterdam 3 juli 2013, C/10/409349 / HA ZA 12-830 (Cranes Case) (Neth.).

156. *Id.*

157. Rb Arnhem 15 augustus 2012, 208092 (-/T&G Wood International BV) (Neth.).

158. *Id.*

159. Rb Leeuwarden 6 maart 2012, 200 086 453/01(-/Herotec Flächenheizung GmbH) (Neth.).

160. Rb. Rotterdam 17 maart 2010, 306752 / HA ZA 08-1162 (Potipora Alimentos S.L. v. _____) (Neth.).

159. *Id.*

162. *Id.*

Later in the court's opinion, the Dutch court concluded that the seller was entitled to recover its attorneys' fees from the buyer,¹⁶³ although the court did not specifically cite the legal basis for this recovery.

In 2008, a Dutch court ordered a Dutch buyer to compensate a Belgian seller of fire-resistant paint for attorneys' fees in a case in which the court applied both Dutch law and the CISG to the dispute.¹⁶⁴ The court offered a confused analysis to justify the legal basis for this award.¹⁶⁵ The court ruled that under Article 35 of the CISG the buyer's claim against the seller lacked merit.¹⁶⁶ The court then ordered the buyer to compensate the seller for its "legal costs."¹⁶⁷ The court further noted that pursuant to the Dutch Civil Code the "additional claim for payment of the legal commercial interest" should be awarded.¹⁶⁸ The court then turned to Article 74 and explicitly stated that this provision provides the seller with the:

[R]ight to have non legal [sic] expenses compensated. This concerns the costs that have been reasonably incurred, taking into account that this is a different review standard than the review standard of the corresponding Article 96 Unlike the [Dutch Civil Code], the CISG does not contain a rule that exclude [stet] the reimbursement of particular work, because this reimbursement should be considered to fall within the system of the legal costs. On the other hand[,] however, it is contrary to the using [sic] measure of reasonableness, which also applies to the CISG that an allowance is granted as far as this allowance is already implicit in the ordering of the legal costs. Considering this, the district court will award ex aequo et bono an amount of €904, 00 for non legal [sic] costs.¹⁶⁹

161. *Id.*

164. Rb. Rotterdam 15 oktober 2008, 295401 / HA ZA 07-2802 (Eyroflam S.A./P.C.C. Rotterdam B.V.) (Neth.).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

4) Belgium

A survey of Belgian court cases post-*Zapata* provides further evidence of the divergence in judicial interpretations on the issue of whether attorneys' fees constitute a recoverable "loss" under Article 74. Though confusing in their respective presentations of the legal basis for recovery, two Belgian courts appear to take diametrically opposed views on whether the CISG or domestic law provides attorneys' fees to litigants seeking damages for such losses.

A Belgian court in 2004 adjudicated a CISG-governed dispute involving the sale of goods between a Dutch seller and a Belgian buyer.¹⁷⁰ The court ordered the buyer to pay the seller "for the legal costs incurred" which excluded "the costs to be incurred in the event of enforcement of [the] judgment."¹⁷¹ Though the court's decision is unclear—either in its analysis or due to translation barriers—the court noted that if the law of the contract was Belgian law, the seller would not be entitled to recovery of the legal fees permissible—and awarded—under the CISG: "[T]he [Seller] would not be entitled to compensation for legal costs."¹⁷²

In another 2004 Belgian case, a Belgian court heard a carpet sales dispute between a Belgian seller and a Dutch buyer.¹⁷³ The court discussed the applicability of Articles 74 and 78 of the CISG with respect to "the principle of damages and interest charged" but stated that Belgian law controlled the applicable rate of interest.¹⁷⁴ The court further noted that the seller was not entitled to the recovery of "legal costs" under Belgian law.¹⁷⁵ The court impliedly determined that Article 74 was not the basis for recovery of attorneys' fees; the court relied upon domestic law to determine the attorneys' fees recoverability issue.¹⁷⁶

5) Spain

A court in Spain in 2006 awarded attorneys' fees to a German buyer in an international sales contract dispute governed by the

170. Rechtbank van Koophandel [Kh.] [Commerce Tribunal] Hasselt, Feb. 25, 2004, A.R. 04/601 (Belg.).

171. *Id.*

172. *Id.*

173. Rechtbank van Koophandel [Kh.] [Commerce Tribunal] Hasselt, Feb. 25, 2004, A.R. 04/79 (Belg.).

174. *Id.*

175. *Id.*

176. *Id.*

CISG.¹⁷⁷ This dispute arose when a German buyer sued a Spanish seller of Bermuda shorts for breach of contract.¹⁷⁸ With respect to the damages award, “the court awarded to the buyer, under the heading of consequential damages, the costs of lawyers’ fees in relation to extrajudicial claims addressed to the plaintiff outside Spain.”¹⁷⁹ It is unclear from the available reporting source on this case whether the court based this attorneys’ fee recovery on Article 74’s damages provision.

6) Finland

Decided the same year as *Zapata*, a Finnish court in 2002 permitted the recovery of attorneys’ fees in a CISG-governed contract dispute.¹⁸⁰ Having lost the case, the German buyer of forestry equipment was ordered by the court to pay the Finnish seller “and its owner for their legal expenses in their entirety.”¹⁸¹ The court applied the CISG as well as Finnish law to the legal fees request but did not explicitly identify the legal basis for the award of attorneys’ fees in this case.¹⁸²

b. Arbitral Tribunal Awards Outside the United States

Arbitral tribunals outside the United States analyze the recoverability of attorneys’ fees under CISG Article 74 using an array of different and, in certain instances, contradictory approaches.

1) China

The arbitral tribunals in China post-*Zapata* uniformly rely upon arbitration rules—not Article 74—as the legal justification for an Award of attorneys’ fees in a CISG-governed contract dispute. By contrast, pre-*Zapata* rulings by arbitral tribunals in China were either silent¹⁸³ or unclear¹⁸⁴ as to the legal basis for

177. S. Juz. Prim., May 22, 2006 (574/2003-A) (Spain).

178. *Id.*

179. *Id.*

180. Hovioikeus [Court of Appeal] Apr. 12, 2002, S97/324 (Fin.).

181. *Id.*

182. *Id.*

183. [Lacquer handicraft case], (CIETAC Aug. 6, 1996) (China). Attorneys’ fees were awarded in a 1996 dispute involving the sale of lacquer handicraft between a Canadian buyer and a Chinese seller. *Id.* Issuing a default Award in favor of the seller, the arbitral tribunal applied Articles 74 and 78 of the CISG to the seller’s claim for damages. *Id.* Without providing a legal basis, the arbitral tribunal also awarded the seller its attorneys’ fees. *Id.*

recoverability of attorneys' fees. In one pre-*Zapata* Award, the arbitral tribunal ruled that attorneys' fees are a foreseeable loss under Article 74 that contract parties can and should expect to incur if a breach occurs.¹⁸⁵ Post-*Zapata*, arbitral tribunals in China are lockstep in their use of arbitration rules to determine the right of a party to recover attorneys' fees.

In 2008, the China International Economic and Trade Arbitration Commission refused to include an award of attorneys' fees when calculating compensable losses suffered by a Hong Kong buyer who purchased metallic silicon from a Chinese supplier.¹⁸⁶ The arbitral tribunal ruled that the contract between the buyer and seller specified that the CISG, Chinese law, and Incoterms for international usages applied to the dispute.¹⁸⁷ The arbitral tribunal awarded the buyer expected profits pursuant to the CISG but refused the buyer's request for an award of attorneys' fees, noting simply—without reference to a legal basis: “The Tribunal finds that taking into account the arbitral requests of the [Buyer] and the extent to which the Tribunal supports these requests, as well as the liability of both parties arising out of the dispute, the [Buyer] should be responsible for its attorneys' fee.”¹⁸⁸

In another 2008 decision, the China International Economic and Trade Arbitration Commission issued an Award of attorneys' fees in an arbitration dispute brought by a Chinese buyer of PTA powder (waste product) against a Swedish seller.¹⁸⁹ The arbitral

184. [Lentil case], (CIETAC Dec. 18, 1996) (China). The China International Economic and Trade Arbitration Commission awarded the buyer from the United States attorneys' fees against the seller from China in a dispute involving the sale of lentils. *Id.* The 1996 Award cited Article 74 as the basis for the award of damages. *Id.* In this section of the Award, the arbitral tribunal noted that the arbitrator permitted recovery of a portion of the requested attorneys' fees incurred by the buyer. *Id.* It is not clear from the decision of the arbitral tribunal that these attorneys' fees were awarded pursuant to Article 74, however.

185. [Nickel plating machine production line equipment case], (CIETAC Feb. 12, 1999) (China). In a 1999 Award by the China International Economic and Trade Arbitration Commission, Chinese buyers were ordered to pay a German seller's attorneys' fees in a dispute involving the sale of nickel-plating machine production line equipment. The arbitral tribunal applied the CISG and stated: “[T]he [Seller] submitted evidence of the above damages, and evidence of the attorneys' fee, investigation cost, and traveling fee, which was accepted by the Tribunal. According to Article 74, the Arbitral Tribunal decided that the above loss was a foreseeable loss that can be expected and should be expected by the [Buyers] because the dispute has arisen out of the [Buyers]' breach of the Contract.” *Id.* See also [Lindane case] (CIETAC Dec. 31, 1997) (China). The China International Economic and Trade Arbitration Commission issued an Award in 1997 against a French buyer of lindane from a Chinese seller. Applying the CISG to this contract dispute, the arbitral tribunal awarded damages to the buyer. It granted part of the requested attorneys' fees, citing Article 59 of the Convention. *Id.*

186. [Metallic silicon case] (CIETAC Jan. 9, 2008) (China).

185. *Id.*

188. *Id.*

189. [PTA powder case] (CIETAC Apr. 18, 2008) (China).

tribunal issued a default judgment against the seller, applying the CISG to the contract claims.¹⁹⁰ On the issue of the requested award of attorneys' fees, the arbitral tribunal ruled that the recovery of attorneys' fees was warranted under applicable arbitration rules.¹⁹¹

A similar analytical approach was employed by the China International Economic and Trade Arbitration Commission in its examination of a request for recovery of attorneys' fees by a Chinese buyer of film from a German seller.¹⁹² The 2006 arbitral tribunal entered a default judgment against the German seller and applied Article 74 to determine the amount of damages to which the buyer was entitled.¹⁹³ However, in authorizing the recoverability of attorneys' fees incurred by the buyer, the arbitral tribunal relied upon applicable arbitration rules, not Article 74.¹⁹⁴

In another 2006 arbitration Award issued by the China International Economic and Trade Arbitration Commission, a buyer was awarded attorneys' fees pursuant to the applicable arbitration rules.¹⁹⁵ The arbitral tribunal awarded these fees in a contract dispute between a Chinese buyer of diesel generators and two Singapore companies.¹⁹⁶ The arbitral tribunal applied the CISG to the contract claims and the law of Singapore to the alleged agency relationship between two Singapore companies involved in the transaction.¹⁹⁷ The arbitral tribunal awarded damages in the buyer's favor and cited Article 74 of the CISG as well as Articles 45 and 46 of the CISG.¹⁹⁸ The arbitral tribunal, however, did not cite Article 74 as the basis for recovery by the buyer of its attorneys' fees. It held that the attorneys' fees were recoverable because the arbitration rules warranted such an Award.¹⁹⁹

Issuing an Award in 2002, the year the *Zapata* case was decided, the China International Economic and Trade Arbitration entered a default award against a Chinese seller of DVD players and in favor of the Australian buyer.²⁰⁰ The arbitral tribunal analyzed and determined the buyer's compensable losses using

190. *Id.*

191. *Id.*

192. [LDPE film case] (CIETAC May 2006) (China).

193. *Id.*

194. *Id.*

195. [Diesel generator case] (CIETAC May 31, 2006) (China).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. [DVD HiFi case] (CIETAC July 23, 2002) (China).

Article 74.²⁰¹ However, the arbitral tribunal did not in this analysis of allowable damages under Article 74 address the issue of the recoverability of attorneys' fees.²⁰² While the arbitral tribunal permitted the buyer to recover its attorneys' fees, it remained silent on the legal basis justifying this part of the award.²⁰³

2) The Russian Federation

The Award of attorneys' fees pursuant to Article 74 was authorized by at least one Russian arbitral tribunal post-*Zapata*. The Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry in a 2002 decision ruled in favor of a Russian seller in a dispute with an Estonian buyer.²⁰⁴ Applying the CISG as part of the Russian substantive law applicable through the contractual language binding on the parties, the arbitral tribunal awarded damages to the seller pursuant to Article 74:

The damages suffered by the seller as the result of breach of the contract included the sum of money equal to an administrative penalty paid by the seller pursuant to a decision of the Russian Customs authorities due to the seller's failure to timely deposit foreign currency proceeds under the contract, and compensation of arbitration and attorneys' fees.²⁰⁵

Pre-*Zapata* rulings by arbitral tribunals in Russia analyzing the recoverability of attorneys' fees in CISG-governed disputes do not explicitly link this type of fee award to Article 74's loss provision.²⁰⁶

201. *Id.*

202. *Id.*

203. *Id.*

204. Russ. Federation v. Estonia, Case No. 37/2002 (Tribunal of Int'l Com. Arb. at the Russ. Federation Chamber of Com. & Industry Dec. 24, 2002), <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021224r1.html>.

205. *Id.*

206. Russ. Federation v. Ger., Case No. 160/1997 (Tribunal of Int'l Com. Arb. at the Russ. Federation Chamber of Com. & Industry Mar. 5, 1998), <http://cisgw3.law.pace.edu/cases/980305r2.html>. A buyer's request for recovery of attorneys' fees was granted pursuant to arbitration rules in a 1998 Award by the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry. A German buyer successfully convinced the arbitral tribunal that it was a victim of a contract breach by the Russian seller, entitling it to damages under Article 74 of the CISG. *Id.* See also Russ. v. Ecuador, Case No. 166/1995 (Tribunal of Int'l Com. Arb. at the Russ. Federation Chamber of Com. & Industry Mar. 12, 1996), <http://cisgw3.law.pace.edu/cases/>

3) Serbia

The Serbian arbitral tribunals post-*Zapata* cite and interpret the “loss” provisions of Article 74 of the CISG to apply to attorneys’ fees incurred in a pre-litigation context, custom fees, and VAT, as well as costs related to loans. This interpretation of Article 74 damages does not extend to attorneys’ fees related to the arbitration proceedings. The arbitral tribunals consider the award of such fees under arbitration rules or the domestic law of Serbia.

In 2008, a Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce tribunal issued a decision in a CISG-governed dispute involving a Serbian seller of white crystal sugar to an Italian buyer.²⁰⁷ The contract required the seller to provide a certificate of origin of goods.²⁰⁸ The European Anti-Fraud Commission ordered an inspection of certain of these certificates; the origin of the goods for seven certificates could not be confirmed.²⁰⁹ The Italian buyer incurred custom fees, VAT, and other related expenses as a result of proceedings before a tax commission.²¹⁰ It sought recovery of these damages as well as the cost of legal representation related to the tax commission proceedings.²¹¹ The arbitral tribunal cited and applied CISG as well as other legal sources including the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts.²¹² It cited CISG Articles 74 and 45 as providing the legal basis for the buyer’s right to damages, among other legal sources such as UNIDROIT Principles.²¹³ The arbitral tribunal awarded damages under these provisions, which included the buyer’s legal fees associated with the tax commission proceedings.²¹⁴ The arbitral tribunal also awarded attorneys’ fees associated with the arbitration—under “Cost of the proceedings”—

960312r1.html. The Tribunal for the International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry issued a ruling in 1996 in a dispute between a Russian seller and an Ecuadoran buyer of unspecified goods. The arbitral tribunal awarded partial compensation for legal fees “incurred in connection with presentation of the [buyer]’s claims before the Tribunal, considering the level of difficulty of the case,” although the tribunal did not provide the legal authority for issuing this award. *Id.*

207. Serbia v. Italy, Case No. T-9/07 (Foreign Trade Ct. of Arb. Attached to the Serbian Chamber of Comm. Jan. 23, 2008), <http://cisgw3.law.pace.edu/cases/080123sb.html> [hereinafter White Crystal Case].

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. White Crystal Case, *supra* note 207.

214. *Id.*

based on the buyer's successful prosecution of its claim against the seller.²¹⁵ The arbitral tribunal did not cite the legal basis for this aspect of the Award.

A 2009 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce tribunal²¹⁶ issued an Award entitling a Serbian seller of mineral water to damages under Article 74 in a case brought against a Macedonia buyer for a claim of unreturned packaging. Citing Article 74's principle of full compensation for loss suffered, the arbitrator concluded that:

[t]he application of this principle is warranted in order to enable the aggrieved party to be in a situation it would have been in had there been no loss caused by the other party, and to benefit from the contract concluded with the other party. In the situation at hand, it could have been expected that the [Seller], in order to compensate for the unreturned packaging had to buy other packaging in order to continue its trading operations, and that for those purposes, in the ordinary course of business, it would have to take a loan. In consistence with that, in international trade the [Seller] is entitled to the interest rate equal to the average interest rate that applies to short-term loans for the currency in which the payment would be made, in the country where the [Seller] has its seat.²¹⁷

With respect to the seller's claim for attorneys' fees, however, the arbitrator relied on Serbian law to determine the propriety of that Award; it awarded the Serbian seller attorneys' fees incurred during the arbitration proceedings, relying on Serbian Law on Civil Procedure to justify the attorneys' fee award.²¹⁸

In a 2008 dispute between a Serbian seller of cheese products to a buyer and an assignee from Macedonia and Kosovo/Serbia, the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce stated it would apply CISG principles and,

215. *Id.*

216. Serbia v. Macedonia, Case No. T-6/08 (Foreign Trade Ct. Arb. Attached to the Serbian Chamber Comm. Oct. 19, 2009), <http://cisgw3.law.pace.edu/cases/091019sb.html> [hereinafter Mineral Water].

217. *Id.*

218. *Id.*

in the absence of such principles, Serbian law to this dispute.²¹⁹ Citing multiple CISG provisions including Articles 61–65, and 74–77, the arbitral tribunal ruled that the Serbian cheese seller was entitled to damages resulting from the buyer’s and assignee’s contract breach.²²⁰ In evaluating and awarding the seller’s request for attorneys’ fees, the arbitral tribunal resorted to Serbian arbitral tribunal rules, not Article 74 of the CISG.²²¹

Post-*Zapata*, courts and arbitral tribunals in the United States and throughout the world fail to adhere to a uniform, consistent interpretive principle for the loss provision of Article 74 in CISG-governed contract disputes. The decisions of these courts and arbitral tribunals demonstrate a kaleidoscope of jurisprudential approaches to Article 74’s loss provision. This spectrum includes embracing the full compensation principle and allowing the recovery of litigation or arbitration-incurred attorneys’ fees by the victim of a contract breach; permitting the recovery of attorneys’ fees related to contract compliance under Article 74 while excluding litigation and arbitration-incurred attorneys’ fees; and categorically refusing to interpret Article 74’s loss provision to include the recovery of any attorneys’ fees. This lack of harmonization and uniformity in adjudicated outcomes of CISG-governed contract disputes contravenes the prescriptive mandate of CISG Article 7(1) to interpret the Convention’s provisions to promote uniformity in accord with the international character of the treaty. The disarray and confusion caused by these divergent and conflicting jurisprudential approaches to Article 74’s loss provision fuels the scholarly debate on the recoverability of attorneys’ fees in CISG-governed disputes.

III. SCHOLARLY APPROACHES TO DAMAGES UNDER CISG: THE DOG, THE DUCKS, AND THE MOUSE

The divergent interpretations and outcomes arising from courts and arbitral tribunals’ application of Article 74’s loss provision has led to inconsistency in the application of the provisions of the Convention transnationally. This contravenes the mandate for uniform application embedded in Article 7(1).²²²

219. Serbia v. FYR Macedonia & Kosovo/Serbia, Case No. T-23/06-13 (Foreign Trade Ct. Arb. Attached to Serbian Chamber Comm. 2008), <http://cisgw3.law.pace.edu/cases/080915sb.html> [hereinafter *Feta Cheese & Other Cheese Products*].

220. *Id.*

221. *Id.*

222. CISG Article 7(1) provides that “[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.” United Nations

The divergence has led to a scholarly debate about the proper interpretation of Article 74.²²³ While scholars disagree about the proper method of interpreting Article 74, scholars on both sides of the debate do agree that parties desiring to recover attorneys' fees for breaches of CISG-governed contracts (1) should include an express contractual provision in their CISG-governed contracts authorizing the award of fees to the prevailing party, and (2) should stipulate dispute resolution forums in those contracts (whether national courts or arbitral tribunals) that allow for the recovery of fees for the prevailing party.²²⁴ The latter option, if taken alone, does lead to the exclusion of much of the U.S. court system. The former option, if taken alone, leads to issues regarding the enforceability of the express contractual provisions. The most risk-averse method is to meet the criteria of both by including an express fee-shifting provision and stipulating a forum that allows for the recovery of fees for the prevailing party. While this is prudent, practice-oriented advice, this two-pronged method does not tend toward harmonization, nor does it ensure victims of breaches of contract who do not abide by this method are made whole through the dispute resolution process.

Resolving interpretational differences through contractual stipulations should be a last resort because this method falls short of remedying disharmony and is not an effective method for resolving other interpretational disagreements arising under Article 74. Beyond attorneys' fees, courts and arbitral tribunals have issued a variety of divergent opinions about what constitutes a "loss" under Article 74.²²⁵ Among other areas, courts and arbitral tribunals have issued contradictory opinions as to whether other types of damages should be included as a "loss" within Article 74. First, decisions from various forums diverge as to whether non-

Convention on Contracts for the International Sale of Goods art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

223. CISG Article 74 reads: "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract." *Id.* art. 74.

224. Peter Schlechtriem, *Legal Costs as Damages in the Application of UN Sales Law*, 26 J.L. & COM. 71, 78–80 (2007); Diener, *supra* note 5, at 62; 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 AMICORUM CHRISTA JESSEL-HOLST 199, 220 (Mirko Vasiljević et al. eds., 2010).

225. UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 334–35 (2016 ed. 2016), http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf [hereinafter UNCITRAL Digest].

material interests (such as loss of reputation or goodwill) are recoverable as a loss.²²⁶ Second, decisions from various forums diverge as to whether changes in currency exchange rates (i.e., devaluation of the currency of payment) are recoverable as a loss.²²⁷ Third, decisions from forums diverge as to whether certain incidental expenses are recoverable as a loss.²²⁸ Accommodating these and other uncertainties through contractual stipulations would prove an insurmountable task that would complicate the efficient utilization of CISG as a vehicle for international contracting. Stipulating contractual provisions to address potential incidental and non-material losses is not always feasible; it could exacerbate contractual negotiations. While such stipulations, to the extent they can be attained, are prudent short-term solutions for international contracting parties, harmonization of interpretations of Article 74 assures long-term uniform and consistent results.

Since the Seventh Circuit Court of Appeal's *Zapata* decision, scholarly support for a uniform interpretation of Article 74 that allows fees to be recovered directly as a "loss" has increased.²²⁹

226. *Id.* at 335 (citing Hovioikeus [Court of Appeal] Oct. 26, 2000, S 00/82 (Fin.)); Handelsgericht Zürich [HG Zürich] [Commercial Court] Feb. 10 1999, HG970238 (Switz.); Cour d'appel [CA] [regional court of appeal] Grenoble, Oct. 21, 1999 (Fr.); S.A.P., June 20, 1997, 4 Revista Jurídica de Catalunya 110 (Spain); Postanovlenie Mejdunarodnogo Commercheskogo Arbitrajnogo Syda ot 3 marta 1995 g. No. 304/1993 [Ruling of the International Commercial Arbitration Court of Mar. 3, 1995, No. 304/1993], MIKHAIL ROZENBERG, PRACTIKA OF MEJDUNARODNOGO COMMERCHESKOGO ARBITRAJNOGO SYDA: HAYCHNO-PRACTICHESKIY COMMENTARIY [Practice of the International Commercial Arbitration Court: Scientific-Practical Comments] 1997, No. 21, p. 46 (Russ.); Landgericht Darmstadt [District Court] May 9, 2000, 10 O 72/00 (Ger.).

227. *Id.* at 335–36

228. UNITED NATIONS COMM'N ON INT'L TRADE LAW, *supra* note 224, at 335.

229. All of the following authors advocate for fees as a "loss" under CISG Article 74: Ulrich Magnus, *Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation*, in INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 257, 267 (Larry A. DiMatteo ed., 2014); Burghard Piltz, *Litigation Costs as Reimbursable Damages*, in INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 286, 287 (Larry A. DiMatteo ed., 2014); Diener, *supra* note 5, at 2; John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, 15 PACE INT'L L. REV. 91, 128–29 (2003); JOHN FELEMEGAS, AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW 470–73 (2007); 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'L COM. L. & ARB. 30, 32–35 (2002); Stefan Kroll et al., *Cost and Burden of Proof Under the CISG – A Discussion Amongst Experts*, 20 INT'L TRADE & BUS. L. REV. 176, 201–05 (2017); 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, 406–08 (2006); Peter Schlectriem, *Attorneys' Fees As Part of Recoverable Damages*, 14 PACE INT'L L. REV. 205, 208 (2002); Jay Forester, *Who Pays the Bill? Recoverability of Attorneys' Fees Under the CISG*, 17 VINDOBONA J. INT'L COM. L. & ARB. 191, 192–93 (2013); BRUNO ZELLER, DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 139 (2nd ed., 2009); Bruno Zeller, *Attorneys' Fees-Last Ditch Stand?*, 59 VILL. L. REV. 761, 770 (2013) [hereinafter Last Ditch Stand]; Bruno

Judicial deference to Judge Posner's opinion in *Zapata* effectively nullified this progress within U.S. courts. A uniform application of Article 74 is unlikely to occur in near time (if at all) within the United States. Even if another U.S. federal appellate court were to disagree with the Seventh Circuit's opinion, this disagreement would not impact the rule within the Seventh Circuit's jurisdiction. District courts sitting in other federal circuits, outside of the Seventh Circuit, having no guidance from their own circuit courts, have almost universally appealed to *Zapata*, when rendering their decisions on attorneys' fees.²³⁰ Post-*Zapata*, the only means of attaining a uniform application of Article 74 within the whole of the United States is for the U.S. Supreme Court to settle the issue.²³¹ Thus, for now and indefinitely, transnational contracting is left with a non-uniform interpretation of Article 74 that leads to disharmony in the application of the CISG's provisions.

A. *The Orwellian Revolution of Fees*

Scholars have likened the controversy following *Zapata* to the Mexican revolution.²³² Another revolution took place in George Orwell's classic, *Animal Farm*, wherein the animals revolted against their masters, took over the farm, and developed their own views about how best to run the farm.²³³ There are many animal analogies in the discussion of CISG, and to carry the Orwellian metaphor a step further, these animal analogies are classified here. The differing scholarly viewpoints reflect how attorneys' fees for litigation continue to remain unsettled.

1. View of the Dog: There Is No Use Trying to Convince American Courts

Maintaining such a different opinion (i.e., holding "litigation costs as special damages" to be reimbursable under Art. 74 CISG) in the hopes of influencing the American courts would be like

Zeller, *Interpretation of Article 74—Zapata Hermanos v. Hearthside Baking—Where Next?*, 2004 NORDIC J. COM. L. 1, 10 (2004) [hereinafter Interpretation of Article 74]; Ingeborg Schwenzer, *Ethical Standards in CISG Contracts*, 22 UNIFORM L. REV. 122, 131 (2017).

²³⁰. See *supra* Part II.

²³¹. Or, an unlikely scenario, the Seventh Circuit could modify its ruling in another case. However, as noted *supra* Part II, the Seventh Circuit has reaffirmed the *Zapata* rationale.

²³². Joseph Lookofsky & Harry Flechtner, *Zapata Retold: Attorneys' Fees Are (Still) Not Governed by the CISG*, 26 J.L. & COM. 1, 1 (2007); Đorđević, *supra* note 224, at 200.

²³³. See generally GEORGE ORWELL, ANIMAL FARM (1945).

trying to wag the dog with the tail, or even with just the fur of the tail; consequently it should no longer be earnestly asserted or followed.²³⁴

The “view of the dog” arose in the aftermath of *Zapata*. This view takes the realist position that it is futile to attempt to wag a dog by the tail, and it is equally futile to try to convince U.S. courts that they should modify their practices.²³⁵ In other words, U.S. courts maintain the power to treat attorneys’ fees as a procedural matter that falls outside the CISG. Scholarly disagreement is unlikely to prompt these courts to reconsider this position particularly in light of the longstanding American Rule.²³⁶

While a realist position, this view simultaneously reflects a defeatist attitude, and one which does not tend toward a uniform application of the Convention. Prior to the Seventh Circuit’s decision in *Zapata*, Peter Schlechtriem took the dog by the tail when asserting that, “[i]f legal costs are claimed as damages under the CISG, the claim has to be based on CISG Article 74.”²³⁷ He formally contended that these attorneys’ fees are, in most cases, a loss that is a foreseeable consequence of the breach (subject to the duty to mitigate).²³⁸ Following the Seventh Circuit’s opinion holding fees a procedural matter, Schlechtriem released the dog’s tail, but not before giving it a little shake.²³⁹ At that time, he intricately critiqued the *Zapata* rule by calling its reasoning and outcome into question before finally letting go of the dog’s tail.²⁴⁰

Slechtriem made three very influential points which did shake the dog, even if ever so slightly. First, he noted that “the compensatory damages awarded to the plaintiff in actuality [may] fall far short of covering his losses, and for the victorious defendant winning a case can be a pyrrhic victory.”²⁴¹ Indeed, and further, injured victims of breaches may be deterred from seeking enforcement of their rights when it may cost them more to recover damages under a contract than they would attain if successful in litigation. Second, Schlechtriem noted that the substantive-procedural distinction should not be used to resolve international issues because it is merely a “legal *façon de parler*

234. Schlechtriem, *supra* note 223, at 78.

235. *Id.*

236. *Id.*

237. Schlechtriem, *supra* note 223, at 208 (citations omitted).

238. *Id.*

239. *See generally* Schlechtriem, *supra* note 223.

240. *Id.*

241. *Id.* at 72.

[way of speaking].”²⁴² The variation in the substantive-procedural classification as to fee awards differs within and across national boundaries.²⁴³ Third, Schlechtriem noted that the risks of fees can be allocated through contractual drafting of fee-shifting provisions and forum selection clauses.²⁴⁴ These three points have continued to influence scholars in the debate that followed *Zapata*. Although it may be futile to attempt to wag a dog by the tail, Schlechtriem’s critique of the *Zapata* decision has continued to inspire many who continue to attempt to hold onto that tail and wag that dog.²⁴⁵

2. View of the Duck: Fees Are a Procedural Matter that Fall Outside the Convention

‘If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck.’ In other words, if it (i.e. recovery of attorneys’ fees) is governed by the procedural codes, requested and awarded under procedural rules, and caused by initiation of the proceedings, then it probably is a procedural expenditure (and not the loss suffered as a consequence of breach of contract) that should be excluded from the (substantive) realm of the CISG.²⁴⁶

Scholars in the “duck” camp assert, among other arguments, that courts and arbitral tribunals generally treat attorneys’ fees as a procedural matter that is governed by the forum and not the CISG, and because most treat it that way, attorneys’ fees should be excluded from the CISG.²⁴⁷ A variation of this argument was most cogently presented by Harry M. Flechtner who, prior to the Seventh Circuit’s decision in *Zapata*, provided a multi-pronged analysis opposing including fees under the substantive term

242. *Id.* at 76.

243. MARKUS JAGER, REIMBURSEMENT FOR ATTORNEY’S FEES 148–52 (2010) (discussing the differing treatment of the recovery of attorneys’ fees as substantive and/or procedural in different nations).

244. Schlechtriem, *supra* note 224, at 78–80.

245. *Id.*; see e.g., Jay Forester, *Who Pays the Bill? Recoverability of Attorneys’ Fees Under the CISG*, 17 VINDOBONA J. INT’L COM. L. & ARB. 191, 199 (2013).

246. Đorđević, *supra* note 224, at 219 (citations omitted).

247. *Id.*; see also 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 v. Hearthside Baking*, 22 NW. J. INT’L L. & BUS. 121, 159 (2002) [hereinafter *Recovering Attorneys’ Fees*].

“loss” in Article 74.²⁴⁸ Following the Seventh Circuit’s decision, Flechtner joined forces with Joseph Lookofsky²⁴⁹ to continue to oppose awarding fees under Article 74. Flechtner and Lookofsky support their view by claiming that the Convention’s *travaux préparatoires* is silent as to attorneys’ fees recovery, that awarding fees as CISG damages would lead to “absurd results,” and that most CISG decisions appeal to the local procedural rules of the forum when deciphering fee awards.²⁵⁰ Milena Đorđević later joined this chorus by contending that fees are not a consequence of the breach.²⁵¹

Flechtner and Lookofsky repeatedly argue that fees are a procedural matter that fall outside of the Convention.²⁵² However, they are rarely responsive to the legitimate arguments proffered by opponents of their view but instead, to carry the duck analogy a bit further, continue to recurrently quack the same arguments despite many flaws and inconsistencies in these arguments.²⁵³ Rarely have Flechtner and Lookofsky taken opposing viewpoints seriously in their published analyses of fees under CISG. Nevertheless, despite these shortcomings in reasoning, as per *Zapata*, the duck view continues to be the predominant view in the United States today. It is unlikely to be overturned without significant changes to the political landscape. The obvious shortcoming of this view, to borrow a line from Orwell’s classic, is that “all animals are equal but some animals are more equal

248. *Id.*

249. *See, e.g.*, Harry Flechtner & Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 VINDOBONA J. INT’L COM. L. & ARB. 93 (2003); Lookofsky & Flechtner, *supra* note 232. Lookofsky has previously reached a similar conclusion to Flechtner before joining forces. *See* Joseph Lookofsky, *Commentary: Zapata Hermanos v. Hearthside Baking*, 6 VINDOBONA J. INT’L COM. L. & ARB. 27 (2002).

250. Lookofsky & Flechtner, *supra* note 248, at 2–3.

251. Đorđević, *supra* note 223, *passim*.

252. *See, e.g.*, Recovering Attorneys’ Fees, *supra* note 246, at 155; JOHN O. HONNOLD & HARRY M. FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 578–81 (4th rev. ed. 2009); Joseph Lookofsky, *Walking the Article 7(2) Tightrope Between CISG and Domestic Law*, 25 J.L. & COM. 87, 98–99 (2005); Lookofsky, *supra* note 248, at 27. For other arguments in support of excluding fees under the CISG; *see* Jarno Vanto, *Attorneys’ Fees as Damages in International Commercial Litigation*, 15 PACE INT’L L. REV. 203, 221 (2003) (agreeing with the outcome of the 7th Circuit’s *Zapata* decision but noting that the “court failed to create internationally acceptable grounds for excluding attorneys’ fees from the sphere of Article 74”); 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, 112–16 (2005).

253. Little new argumentation has been offered in favor of the “procedural” view by scholars in recent years. For a critique of the procedural view, *see* Damages Under the Convention, *supra* note 3, at 139–60. However, for an analysis of the application of the substantive-procedural distinction in CISG contexts, *see generally* Clayton P. Gillette & Steven D. Walt, *Judicial Refusal to Apply Treaty Law: Domestic Law Limitations on the CISG’s Application*, 22 UNIFORM L. REV. 452 (2017).

than others.”²⁵⁴ That is, victims of breaches of contract will be able to recover their attorneys’ fees for litigation of CISG disputes in most countries, but not in much of the United States, leading to some equality but still not for all.

3. View of the Wood Duck: Fees Are a Loss Under Article 74

“[T]here is an animal called the wood duck. It looks like a duck, swims like a duck, and also quacks like a duck, but in fact belongs to the family of geese.”²⁵⁵ Although certain animals may look, swim and quack like a duck, it does not mean that these animals are in fact ducks. The “wood duck” view acknowledges that contemporarily favored practices may indicate merely a lack of attention, as opposed to a normative ideal. When rendering decisions based upon local domestic (sometimes procedural) law, judges and arbitrators, for the most part, did not examine the CISG closely enough to consider whether it would provide an alternative means of providing similar relief. In other words, having never seen a wood duck before, they merely concluded it was a duck without considering Article 74 as a basis for the award of attorneys’ fees for litigation.

Bruno Zeller, a prolific scholar, has developed a well-reasoned approach to fees under the CISG by utilizing the plain language and four corners of the CISG to conclude that a “loss” within the meaning of Article 74 includes attorneys’ fees.²⁵⁶ The crux of Zeller’s argument is that attorneys’ fees, within the meaning of Article 74, are a substantive loss that are a foreseeable consequence of a breach of contract, and so fall within the ambit of recoverable damages.²⁵⁷ The drafters of the CISG could have excluded attorneys’ fees from the Convention, as they excluded “liability of the seller for death or personal injury caused by the goods to any person,”²⁵⁸ but they did not. Given the lack of exclusion and nothing in the Convention’s *travaux préparatoires* to the contrary, attorneys’ fees, like other losses, are governed by the general damages provision of Article 74, as informed by the principle of full compensation pursuant to Article 7(2). Support for awarding fees directly under Article 74 is growing, and more

254. ORWELL, *supra* note 232, at 112.

255. Last Ditch Stand, *supra* note 228, at 770.

256. Damages Under the Convention, *supra* note 3, at 139–60; Zeller, Last Ditch Stand, *supra* note 228, at 770; *Interpretation of Article 74*, *supra* note 228, at 2–4.

257. Damages Under the Convention, *supra* note 3, at 139–60; Last Ditch Stand, *supra* note 228, at 770; *Interpretation of Article 74*, *supra* note 228, at 2–4.

258. CISG, *supra* note 221, art. 5.

scholars now adhere to this view than ever before.²⁵⁹ Adherence to this view would promote uniformity and harmonize international trade.

4. View of the Mouse: Perceptions Can Change

An image of three circles put together in a specific way, with two on top of the third larger circle, renders an image of Mickey Mouse. These three circles in no way resemble a mouse. Yet, as long as it is convenient to refer to these three circles as a mouse, people will continue to do so. They may alternatively be called “three circles” and if it is convenient to refer to them as such at some point in the future, people will.

Some scholars are marrying themselves to the view that attorneys’ fees are a procedural matter not governed by the Convention. This is convenient because it works in the world as it is. Yet, statutes, treaty provisions, and other laws authorizing attorneys’ fees awards can also be viewed as substantive when it is suitable to view them as such. The result is a “mouse-effect” where, for now, it is immediately convenient to continue to refer to the three circles as a mouse. This approach, however, as suggested below, leads to many practical and moral problems. Eventually the international community may be forced to recognize that the mouse is (in reality) merely three interconnected circles. A change in these perceptions, at least in the United States, will not easily be achieved (if ever), and yet, for this reason as well, it is imperative to continue to point out that this mouse is three interconnected circles. A learned judge sitting before the right case may one day agree.

B. The Mouse Is in the House: Addressing Recent Commentary

In an early edition of his well-known work, John O. Honnold called for a “new generation of scholars” to “probe deeply” into Article 74, as it “may well be one of the areas where international scholarship and jurisprudence under the Convention could make a special contribution to legal science.”²⁶⁰ The academic dialogue regarding the recovery of attorneys’ fees under Article 74 is ongoing. It has birthed cross-cultural innovation by professional

259. *See supra* note 228.

260. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 408 (2d ed. 1991).

academics, judges, and students of law. The question of whether attorneys' fees are a recoverable "loss" under Article 74 has prompted a transnational conversation, has inspired student essays,²⁶¹ and has stimulated student arguments in international moot competitions.²⁶² The issue has led to a scholarly debate about the interpretation of the Convention's provisions and the identification and application of the general principles on which the Convention is based. While appearing contentious at times,²⁶³ the conversation continues to be fruitful and to engage scholars, students, judges, and arbitrators across national boundaries.

The recoverability of attorneys' fees for litigation under Article 74 continues to remain unsettled. There is significant support for including attorneys' fees as a recoverable "loss" under Article 74,²⁶⁴ and yet some scholars persist in asserting otherwise.²⁶⁵ The Secretariat Commentary is silent as to attorneys' fees awards, and the only examples of loss calculations provided pertain to limited-context situations.²⁶⁶ The examples are not comprehensive; however, one of those examples explicitly acknowledges that "there may be additional damages, such as those arising out of additional expenses incurred as a result of the breach."²⁶⁷ It is generally accepted that pre-litigation attorney fee expenses are recoverable losses, even though these expenses are not included in these examples;²⁶⁸ attorneys' fees for litigation and court costs similarly constitute additional expenses.

A recoverable "loss" under Article 74 explicitly includes a "loss of profit" and is qualified only by (1) a foreseeability requirement,

261. For student essays arguing for the recovery of fees under the CISG, see Ella Rutter, *Are Counsel Costs Incurred for Domestic Court Proceedings Prior to Arbitration Recoverable During Arbitral Proceedings as Damages under the CISG?* (2015–2016) (unpublished LL.M thesis, Ghent University), (on file with Universiteit Gent); Ali Talip Pinarbasi, *Are Attorney Fees Recoverable Under Article 74 of CISG?*, 2018 YILDIRIM BEYAZIT HUKUK DERGISI 177, 200 (2018).

262. Benjamin Teng et al., *The Twenty-Third Annual Willem C. International Commercial Arbitration Moot (2015–2016)*, 20 INT'L TRADE & BUS. L. REV. 376, 377 (2017).

263. Lookofsky & Flechtner, *supra* note 232, at 9 ("[A]ll but the most obstinate internationalists appear to have accepted the outcome of Judge Posner's opinion in *Zapata*.").

264. See UNCITRAL Digest, *supra* note 224.

265. See *Recovering Attorneys' Fees*, *supra* note 246, at 158.

266. Secretariat Commentary to CISG art. 70, Apr. 11, 1980, 1489 U.N.T.S. 3, http://www.uncitral.org/pdf/english/texts/sales/cisg/a_conf.97_5-ocred.pdf.

267. *Id.*

268. See *supra* Part II; *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 388 (7th Cir. 2002), *cert. denied*, 540 U.S. 1068 (2003) ("Nevertheless it seems apparent that 'loss' does not include attorneys' fees incurred in the litigation of a suit for breach of contract, though certain prelitigation legal expenditures, for example expenditures designed to mitigate the plaintiff's damages, would probably be covered as 'incidental' damages.").

(2) an interrelated consequence requirement, and (3) expressly excluded categories of damages.²⁶⁹ The principle of “full compensation” underlies Article 74, which mandates an inclusive approach to awarding damages as a “loss” under Article 74 without regard to fault.²⁷⁰ When it is unsettled whether something falls within the meaning of a “loss” within Article 74, the principle of “full compensation” fills the gap by mandating that judges and arbitrators should err on the side of inclusion.²⁷¹ Other principles, such as the principles of equality between states, reasonableness, and mutual benefit also play a role in ensuring awards of losses.²⁷²

Many commentators concur that fees are a “loss” within the meaning of Article 74. Many courts and arbitral tribunals have awarded attorneys’ fees, ruling such fees are a foreseeable consequence of a breach of contract.²⁷³ Nevertheless, there are three textual arguments that must be acknowledged against the award of fees under CISG: (1) fees are not a loss within the meaning of Article 74, (2) fees are not a consequence of a breach of contract, and (3) the general principles on which the Convention is based lead to the exclusion of fees.²⁷⁴ As will be shown, none of these textual arguments withstand scrutiny. Opponents of including fees under the CISG are thus left with only pragmatic and strategic reasons that support the position.

269. See e.g., CISG, *supra* note 221, art. 74. See also *id.* art. 5 (“This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.”).

270. CISG ADVISORY COUNCIL, OPINION NO. 6: CALCULATION OF DAMAGES UNDER CISG ARTICLE 74 cmt. 1.2 (2006). “The principle of full compensation for breach of contract established by Article 74 is expressed in many national laws. In addition, the principle is set forth in both the UNIDROIT Principles and the Principles of European Contract Law (PECL). It is also consistent with decisions of many international tribunals.” *Id.* (citations omitted).

271. *Id.* The Convention’s interpretational methodology is set forth in Article 7, which provides:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CISG, *supra* note 221, art. 7.

272. Diener, *supra* note 5, at 53–58.

273. *Id.* at 8–17.

274. While a fourth line of argument could be made based on foreseeability, there is little, if any dispute, that this requirement is satisfied. See, e.g., Interpretation of Article 74, *supra* note 228, at 4 (“Arguably there is no debate that attorney’s fees are a foreseeable expense due to any breach of contract.”).

1. Attorneys' Fees Are a Loss Within the Meaning of Article 74

In a compelling *sic et non*, Zeller and Đorđević propose two diametrically opposed views regarding whether attorneys' fees constitute a loss within the meaning of Article 74 and, if so, whether that loss is a consequence of a breach.²⁷⁵ The first question is addressed here, and the second below. As a matter of textual interpretation, both questions can be answered affirmatively.

Đorđević provides three interrelated arguments that attorneys' fees should not be considered a "loss" within the meaning of Article 74: (a) no jurisdiction "treats attorneys' fees incurred in litigation as a 'loss for a breach of contract'"; (b) attorneys' fees are a procedural matter that falls outside the substantive terms of the Convention; and (c) every country allows for fees to be recovered if agreed by the parties in the contract.²⁷⁶

Drawing from United States' jurisprudence, the first of these arguments, at first blush, seems convincing. Within the United States, attorneys' fees are not typically included as consequential or incidental damages under the American Rule. However, this argument fails because it does not distinguish between general contract damages and damages arising under governing instruments authorizing the award of attorneys' fees as a "loss." In the latter case, it is not uncommon to read the word "loss" to include attorneys' fees even in the United States. One such governing instrument is a contract. In the context of contractually stipulated indemnity clauses, courts do read the word "loss" to include attorneys' fees.²⁷⁷ Another such governing instrument is a statute. Courts do read the words "actual loss[es]" in statutes to include attorneys' fees.²⁷⁸

It is important to recognize that UCC 2-715 refers only to a very particular kind of loss, namely the "loss resulting from general or particular requirements and needs."²⁷⁹ While this language itself is not unambiguous, it is apparent that the UCC consequential damages provision is narrower in scope than Article

275. See generally Đorđević, *supra* note 223; see also Last Ditch Stand, *supra* note 228.

276. See generally Đorđević, *supra* note 223

277. *Monarch Fire Prot. Dist. v. Freedom Consulting & Auditing Servs.*, 678 F. Supp. 2d 927, 940 (E.D. Mo. 2009), *aff'd*, 644 F.3d 633 (8th Cir. 2011) ("[C]ourts allow for the recovery of attorneys' fees in breach of contract actions under indemnity clauses that refer to losses incurred in the enforcement of contractual rights.").

278. *In re Mariner Post-Acute Network, Inc.*, 312 B.R. 520, 523 (Bankr. D. Del. 2004) ("Where, however, by statute or decisional law, attorneys [sic] fees may be awarded to the prevailing party, we conclude that they are an actual loss.").

279. U.C.C. § 2-715 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

74 which provides for the “sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.”²⁸⁰ It is also important to recognize that “[t]he mere fact that the wording of a particular CISG provision corresponds to that of a specific domestic rule (whether created by statute or case law) is *per se* insufficient to allow one to resort to interpretations of that domestic rule.”²⁸¹ Interpretations of similar UCC provisions should not be utilized when interpreting Article 74—a broader provision underpinned by the principle of full compensation.

The CISG is a governing instrument that authorizes the award of a “loss.” A reading of this word to include attorneys’ fees would not be contrary to common understanding, and the preceding examples demonstrate that in the United States, attorneys’ fees can be a loss for a breach of contract. Looking solely to U.S. case law to interpret the word “loss” in Article 74 would result in the homeward trend, so we must simultaneously examine if there is an internationally acceptable means of defining the word “loss.” The preceding examples come from distinct questions placed before certain U.S. courts. Nevertheless, these preceding cases are indicative of a meaning of “loss” consistent with the meaning espoused by proponents of fees under CISG.

An internationally acceptable means of defining terms of the Convention is the utilization of the plain meaning of the language of the Convention, as informed by the *travaux préparatoires*. Attorneys’ fees fall within the plain meaning of the word “loss,” and the plain meaning does conform with the principle of reasonableness underlying the CISG (as well as the principle of full compensation).²⁸² Article 74 does contain a no-fault, full compensation scheme, and under this scheme, attorneys’ fees are a “loss.”²⁸³ There is considerable support for this reading; it has been said to be one of the “good arguments” for awarding fees under Article 74 of CISG.²⁸⁴ This argument also conforms to the language suggested by the Secretariat Commentary to the Convention. The Secretariat Commentary expressly considers limits to the full

280. CISG, *supra* note 221, art. 74. There is also a minority view, even in the United States, that the UCC damages provisions, despite their narrower scope, should allow for the recovery of attorneys’ fees. See, e.g., *Cady v. Dick Loehr’s Inc.*, 299 N.W.2d 69, 71 (Mich. Ct. App. 1980); *Kelynack v. Yamaha Motor Corp.*, 394 N.W.2d 17, 21–22 (Mich. Ct. App. 1986). Cf. *Nick’s Auto Sales, Inc. v. Radcliff Auto Sales, Inc.*, 591 S.W.2d 709, 711 (Ky. Ct. App. 1979) (“[The] overwhelming weight of authority is that attorney’s fees are not recoverable under [the Code].”).

281. Franco Ferrari, *Homeward Trend and Lex Forism Despite Uniform Sales Law*, 13 VINDOBONA J. INT’L COM. L. & ARB. 15, 26–27 (2009).

282. Diener, *supra* note 5, at 53–58.

283. Kroll et al., *supra* note 228, at 207.

284. *Id.* at 239.

compensation scheme, but attorneys' fees are not a part of these limits except to the extent that they are unforeseeable. The Secretariat Commentary provides that "[t]he principle of recovery of the full amount of damages suffered by the party not in breach is subject to an important limitation . . . [foreseeability]."²⁸⁵ The limits to recovery of losses are explained by the Secretariat Commentary and attorneys' fees do not fall within those limits.

The plain meaning approach also substantially conforms to the reading of the Convention that Zeller proffers. Financial expenses, such as fees, are recoverable under Article 74, and such financial expenses would change the "balance sheet" of a victim of a breach of contract, which is the central question of a "loss" under CISG.²⁸⁶ The "balance sheet" approach substantially conforms to the no-fault scheme set forth in the language of Article 74 which includes all losses, including losses of profit that are a foreseeable consequence of the breach. Financial expenses as "losses" conforms also with the Secretariat Commentary which, in its discussion of additional damages that are recoverable under Article 74, refers to "additional expenses" resulting from the breach of contract.²⁸⁷ Attorneys' fees are financial expenses (and they can be quantified). They do fall within the plain meaning of the word "loss" as informed by the Convention's *travaux préparatoires*.

As to the second argument—that fees are procedural and thus fall outside the Convention—such an assessment runs parallel to calling those three interconnected circles a mouse. Drawing again, initially, from U.S. court decisions, these courts treat the governing instrument authorizing the recovery of attorneys' fees as substantive in some instances and procedural in other instances. U.S. courts classify a single statute authorizing the recovery of attorneys' fees as procedural in some contexts and substantive in others. For example, the Tenth Circuit Court of Appeals decided, "attorney's fees are a substantive issue in the litigation" even though they may be treated as procedural in another litigation.²⁸⁸ The widely criticized *Zapata* case from the Seventh Circuit Court of Appeals, to the contrary, deemed attorneys' fees as procedural.²⁸⁹ The substance-procedure distinction is not helpful in

285. Secretariat Commentary to CISG art. 70, *supra* note 265, ¶8.

286. Last Ditch Stand, *supra* note 228, at 767 (quoting Damages Under the Convention, *supra* note 3, at 151).

287. Secretariat Commentary to CISG art. 70, *supra* note 265, ¶8.

288. *Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1128 (10th Cir. 1999).

289. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 388 (7th Cir. 2002), *cert. denied*, 540 U.S. 1068 (2003) ("The Convention is about contracts, not about procedure. The principles for determining when a losing party must reimburse the

resolving this issue for the most part, because national courts both within and outside of the United States lack consensus as to the difference between substantive and procedural categorizations.²⁹⁰

Substantive law involves the creation of rights and duties, and procedural law involves the mechanisms for enforcing substantive rights and duties. In other words, there must first be a substantive right or duty before there can be a procedure for enforcing it. A governing instrument that creates the right to recover attorneys' fees is substantive law. The mechanisms for awarding those fees are procedural law. Article 74 creates a substantive right to recover all qualifying losses. The mechanisms for awarding those losses arise under procedural law. Even if a right to attorneys' fees is granted in something designated as a procedural code (or rule), there must first be a substantive right to fees before there can be a procedure to enforce that substantive right. In short, substance precedes procedure.

Within the United States, whether a state statute authorizing awards of attorneys' fees is deemed substantive or procedural law may determine whether the statute will be applicable law in federal courts.²⁹¹ Several state legislatures have created statutory exceptions to the American Rule, which could allow for a prevailing party in a breach of contract action to recover fees under the law of the state. Arkansas,²⁹² Arizona,²⁹³ Hawaii,²⁹⁴ Idaho,²⁹⁵ Oklahoma,²⁹⁶ and Texas²⁹⁷ have all promulgated state statutes to allow for fee recovery in certain contract actions. Arkansas and Texas have both determined that their state statutes may apply to award fees in CISG-governed disputes.²⁹⁸ It has yet to be tested

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.”).

290. JAGER, *supra* note 242, at 150 (“In Switzerland and Germany, only few scholars seem to criticize the current practice that attorney’s fees are reimbursable based on substantive law.”).

291. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938); *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994). *See also Zapata Hermanos Sucesores, S.A.*, 313 F.3d at 390 (“It is true that this is not a diversity case, but the *Erie* doctrine applies to any case in which state law supplies the rule of decision.”).

292. ARK. CODE ANN. § 16-22-308 (2019).

293. ARIZ. REV. STAT. ANN. § 12-341.01 (2019).

294. HAW. REV. STAT. ANN. § 607-14 (2019). *See also Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 884 (9th Cir. 2000) (citations omitted) (“It is well settled under Hawai’i law that ‘an action in the nature of assumpsit includes all ‘possible contract claims.’”).

295. IDAHO CODE ANN. § 12-120 (2019).

296. OKLA. STAT. ANN. tit. 12, § 936 (2019).

297. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (2019).

298. *Granjas Aquanova S.A. de C.V. v. House Mfg. Co. Inc.*, No. 3:07-CV-00168-BSM, 2010 WL 4809342, at *2 (E.D. Ark. Nov. 19, 2010); *Zodiac Seats US LLC v. Synergy*

whether the other state statutes will allow for fee recovery in CISG-governed disputes, or if the *Erie* doctrine and its progeny can lead to the basis for such recovery.²⁹⁹ Alaska has also adopted a procedural rule that allows for the recovery of fees in state court actions,³⁰⁰ and Oregon has promulgated a statute for contract actions of \$10,000 or less.³⁰¹

The *Granjas Aquanova* case determined that *Zapata* should be read to mean that “attorneys’ fees are governed by the law of the forum state”; the *Granjas Aquanova* court issued an award for attorneys’ fees in a CISG dispute under Arkansas law.³⁰² The *Zodiac Seats* case agreed with this approach and similarly determined that fees could be awarded in a CISG dispute under Texas law.³⁰³ If this reading of *Zapata* is correct, there will continue to be anomalies within the U.S. court decisions arising from disagreement within the U.S. judiciary regarding substantive and procedural law, because of varying exceptions to the American Rule, and because of the potentially varying application of these statutes in the context of CISG-governed disputes. Some parties will be able to recover their fees for CISG-governed contracts, but others will not.³⁰⁴ As a result of the substantive-procedural distinction and corresponding variant viewpoints, significant disharmony in the application of the CISG will continue within the United States. This detracts from predictability, uniformity, and a harmonious application of CISG.

As to the third argument, as discussed above, there are many reasons why resolving the Convention’s interpretational disagreements through contract should be a last resort.³⁰⁵ While parties to CISG contracts are well-advised to include fee-shifting provisions in their contracts, there is no guarantee that such

Aerospace Corp., No. 4:17-cv-00410-ALM-KPJ, 2019 WL 1776960, at *5–6 (E.D. Tex. Apr. 23, 2019).

299. See e.g., *Structural Metals, Inc. v. S&C Elec. Co.*, 590 Fed. App’x 298, 304 (5th Cir. Oct. 6, 2014).

The award of attorney’s fees in a diversity case is governed by state law. “Texas follows the American Rule, which provides that there can be no recovery of attorney’s fees unless authorized by contract or statute.” Despite that general rule, Texas law specifically provides for the recovery of attorney’s fees in breach of contract cases.

Id. (citations omitted).

300. Alaska R. Civ. P. 82.

301. OR. REV. STAT. ANN. § 20.082 (2019).

302. *Granjas Aquanova S.A. de C.V.*, 2010 WL 4809342, at *2.

303. *Zodiac Seats US LLC*, 2019 WL 1776960, at *1.

304. Cf. *Victory Foodservice Distributors Corp. v. N. Chr. Laitso & Co.*, No. 17CV2227, 2017 WL 5256762, at *2 (S.D.N.Y. Nov. 13, 2017).

305. See *supra* introduction to Part III.

provisions will be enforced. Many U.S. states have very particular rules regarding when contractual fee-shifting provisions will be enforced,³⁰⁶ and some states have deemed fee-shifting clauses to be against public policy.³⁰⁷ CISG Article 6 does endorse freedom of contract and the Secretariat Commentary explicitly authorizes parties to “derogate from or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the Convention.”³⁰⁸ Despite the CISG’s authorization to contract freely, it is unlikely that U.S. courts would enforce contractual provisions that violate public policy, as contract validity is outside the concern of the Convention.³⁰⁹

In summary, none of the arguments suggesting that attorneys’ fees are not a “loss” within the meaning of CISG Article 74 withstand scrutiny. When governing instruments authorize the recovery of “losses” for breaches of contract, this word includes fees; the plain meaning of “loss” includes attorneys’ fees; the right to recover attorneys’ fees is a substantive right that precedes the procedural method for enforcing it; and contractual stipulations should be rejected as the method for ensuring fee awards under CISG. Utilizing the plain meaning of the word “loss” has other benefits insofar as it can be utilized to harmonize other contested issues of damages under the CISG including non-material losses, exchange rates, and incidental damages. While no reason remains to exclude attorneys’ fees from the ambit of a recoverable “loss,” practical politics continue to prevent such a reading in many cases. Next, this Article considers if attorneys’ fees are losses that are a consequence of the breach of contract.

306. For example, some states have held unilateral fee shifting provisions to be contrary to public policy. Other states will only enforce them under certain circumstances.

307. *Parkert v. Lindquist*, 693 N.W.2d 529, 531 (Neb. 2005) (“We have additionally held that a contract provision requiring that in the event of litigation the prevailing party will be entitled to attorney fees is contrary to public policy and void.”).

308. Secretariat Commentary to CISG art. 70, *supra* note 265, ¶1.

309.

Generally one cannot expect enforcement of contracts which are illegal in the jurisdiction concerned or which may have such an object that redress to enforcement authorities is unavailable. This is true for most illegal contracts as one cannot very well expect organs of the state to extend a helpful hand to those who have engaged in prohibited or undesirable activities (contracts *contra bonos mores*).

CISG, *supra* note 221, art. 4. See also JAN RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTION 1 (4th ed. 2011).

2. Attorneys' Fees Are a Consequence of the Breach

Dorđević also contests the prevailing view that attorneys' fees are a consequence of a breach of contract. She argues that "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," and so "the nature of litigation itself, since its initiation . . . transforms the two-party relationship i.e. sales contract (buyer-seller) into a three party relationship i.e. litigation (plaintiff-court/arbitration tribunal-defendant)."³¹⁰ Dorđević's argument can be read to mean either or both of the following: (1) that the attorneys' fees for litigation are not a foreseeable consequence of the a breach of contract, or (2) that the plaintiff's filing of a lawsuit creates a break in causality (thus, the fees are caused by the litigation instead of the breach). Neither argument can be supported by the prevailing approaches to evaluating causality under Article 74. To the contrary, under all generally recognized theories of causality underlying Article 74, litigation attorneys' fees are a consequence of a breach of contract.

Notably, scholars debate the appropriate standard for causation under Article 74. There are two prevailing approaches to deciphering causation under Article 74: (1) the foreseeability test, and (2) the *conditio sine qua non* (but-for test).³¹¹ According to Riku Korpela, "the majority of scholars share the prevailing opinion that the adequate causal connection is evaluated as a part of the foreseeability of the loss."³¹² This measure of causation is closely tied to the plain language of Article 74 which reads:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. *Such damages* may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract,

310. Dorđević, *supra* note 223, at 216.

311. See generally Djakhongir Saidov, *Causation in Damages: The Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2004–2005, 225, 228 (Pace Int'l Law Review ed., 2006).

312. Riku Korpela, *Article 74 of 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 (CISG) 2004–2005, *supra* note 310, at 73, 164.

in the light of the facts and matters of which he then knew or ought to have known, *as a possible consequence of the breach of contract*.³¹³

The explicit reference to “such damages” in the second sentence of Article 74 refers back to the first sentence. The syntax suggests that foreseeability should set the limit of recoverable damages. This view is also supported by the Secretariat Commentary which explicitly discusses foreseeability as the important limitation to full compensation under Article 74 and integrates the causation requirement into that standard.³¹⁴ The placement of the “possible consequence of the breach of contract” at the end of the second sentence supports this reading, as the possible consequences are those that are foreseeable (or ought to have been) at the time of conclusion of the contract. The consequences of the breach analysis, in this way, is analyzed pursuant to the foreseeability standard set forth in sentence two and not independently. Such a reading of Article 74 suggests that the central question of whether fees are recoverable under Article 74 is: whether the loss was or ought to have been a foreseeable possible consequence of the breach of contract, in light of the facts and matters known at the time of conclusion of the contract? When that loss is attorneys’ fees for litigation, this question can almost always be answered affirmatively.³¹⁵ That is because the purpose of having a contract is

313. CISG, *supra* note 221, art. 74 (emphasis added).

314. Secretariat Commentary to CISG art. 70, *supra* note 266, para 8.

The principle of recovery of the full amount of damages suffered by the party not in breach is subject to an important limitation. The amount of damages that can be recovered by the party not in breach ‘may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract’. Should a party at the time of the conclusion of a contract consider that breach of the contract by the other party would cause him exceptionally heavy losses or losses of an unusual nature, he may make this known to the other party with the result that if such damages are actually suffered they may be recovered. This principle of excluding the recovery of damages for unforeseeable losses is found in the majority of legal systems.

Id.

315. Last Ditch Stand, *supra* note 228, at 768; *see also* Ferrari, *supra* note 280, at 30; William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72, 92 (2000) (“This means that the breaching party ought to be liable for a greater range of consequential damages under the CISG (those that were foreseeable as a ‘possible’ consequence of the breach) than under the common law or UCC (only those that were foreseeable as a ‘probable’ consequence of the breach).”).

to have a means of enforcing one's rights in the event the agreement is breached. Such enforcement inevitably involves attorneys' fees.

The alternative prevailing view of causation within Article 74 contexts is the *conditio sine qua non*, or the "but-for" test. This standard for causation is applied in most cases.³¹⁶ The central question under the but-for test is: whether the loss would not have occurred but for the breach of contract. In other words, would the loss have occurred if the contract was not breached? There is absolutely no possibility that attorneys' fees for breach of contract litigation would have been incurred if not and but for the breach of contract. Attorneys' fees for litigation would not have occurred if the contract was not breached. Common sense approaches to causality support this assessment.³¹⁷ In the event that the but-for test is utilized, then the foreseeability inquiry must be made separately. Zeller stated it concisely: "[B]ut 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."³¹⁸ The breach is the but-for cause of attorneys' fees for litigation.³¹⁹

Under either of the prevailing standards of causation, attorneys' fees for litigation meet the requirements of causality. Before moving on, however, let us consider a hypothetical: imagine that a seller who provided goods to a buyer, but never received payment from the buyer, brings a lawsuit for a breach of a CISG-governed contract to recover that payment (pursuant to Articles 61(1)(b) and 74). On his way into the courthouse on the day of trial for this breach, the seller slips on the courthouse steps, injures himself, and incurs medical expenses. Would these expenses

316. Other, although less broadly accepted, theories of causation in CISG contexts include: direct-indirect causation, theories of adequate causation, common sense approaches, and results-oriented approaches. See Saidov, *supra* note 310, at 228 (discussing major theories of causation including the results-oriented approach and the common sense approach); Ramberg, *supra* note 308, at 126 (discussing theories of adequate causation); INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 7.4.3, cmt. 3 (2016), <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> (utilizing the direct-indirect distinction).

317. Saidov, *supra* note 310, at 228.

318. Last Ditch Stand, *supra* note 228, at 769.

319. It should be noted as well that in some U.S. cases, attorneys' fees have been deemed to be a "direct consequence" of a breach of contract, and thus recoverable under state legislation. See, e.g., *Newport Ltd. v. Sears, Roebuck & Co.*, No. CIV. A. 86-2319, 1995 WL 688799, at *9 (E.D. La. Nov. 21, 1995) ("[T]his court believes attorneys' fees were a direct consequence of the breach and that an award of attorneys' fees under [Louisiana Civil Code] art. 1997 is appropriate."); see also LA. CIV. CODE ANN. art. 1997 ("An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.").

constitute a “loss” within the meaning of Article 74? Neither of the prevailing standards of causation would suggest that such a loss is recoverable. First, medical expenses incurred due to slipping on steps is not a foreseeable consequence of the contract breach. Second, the breach is not the but-for cause of the medical expenses—the slipping is. The fact that the slipping took place at the courthouse is not relevant to the causation analysis. Attorneys’ fees for litigation expenditures, like attorneys’ fees for pre-litigation expenditures (i.e., demand letters sent in advance of litigation), are both foreseeable consequences of the breach of contract. The fact that one set of fees is incurred at the courthouse and the other is incurred before the parties reach the courthouse doors is (similarly) irrelevant to the causation analysis.

3. The Convention’s General Principles Lead to Recovery of Fees

The final textual argument concerns the general principles on which the Convention is based. Article 7(2) provides that matters governed by the Convention but not expressly settled in it “are to be settled in conformity with the general principles on which it is based.”³²⁰ To avoid the application of general principles, which lead to the awarding of fees as a “loss” under CISG, some commentators contend that fees are procedural, and so they do not fall within the Convention at all.³²¹ These commentators continue to strategically call those three interrelated circles a mouse. This mouse is merely three interconnected circles because: (1) the right to recover losses is entailed in the substantive provisions of Article 74;³²² (2) some procedural matters are governed by the Convention;³²³ (3) other inconsistent procedures of domestic national courts, such as how to prove the existence of a contract (e.g., witnesses), are trumped by the CISG’s provisions;³²⁴ and (4) many courts treat the awarding of fees as an issue of substantive law.³²⁵ These points suggest that

320. CISG, *supra* note 221, art. 7(2)

321. *See supra* Part III-A(2) for the “view of the duck.”

322. Damages Under the Convention, *supra* note 3, at 139–60; Diener, *supra* note 5, at 2.

323. *See, e.g.*, CISG, *supra* note 221, art. 11.

324. CISG Article 11 provides that “[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.” *Id.*

325. *See, e.g.*, *Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1128 (10th Cir. 1999); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 155 F. Supp. 2d 969 (N.D. Ill. 2001); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, No. 99 C 4040, 2001 WL 1000927, at *6 (N.D. Ill. Aug. 29, 2001).

the recovery of attorneys' fees is an unsettled matter governed by the Convention, and so the issue should be settled by the general principles on which it is based.

The Convention itself, being treated as a "rule of recognition"³²⁶ should be the first place from which to draw general principles, as so informed by the *travaux préparatoires*. The text of the Convention explicitly recognizes principles of good faith,³²⁷ full compensation (also known as "full recovery of loss"),³²⁸ reasonableness,³²⁹ equality between states,³³⁰ mutual benefit,³³¹ and uniform application.³³² These principles should lead a learned judge or arbitrator to award fees under CISG as a "loss." Arguments that the principle of equality between the buyer and seller should prevent such an award have largely been repudiated.³³³ If such a principle exists, it is limited in scope, and does not extend to all damages.³³⁴ Moreover, either the buyer or seller could recover attorneys' fees as a loss by bringing a successful breach of contract action and claiming damages under Article 74. In light of these considerations, there is no textual basis to exclude attorneys' fees from the ambit of recoverable losses. Furthermore, such an exclusion leads to many practical and moral issues. These issues are discussed in the following sections.

IV. IMPACT OF SCHISM: PRACTICAL AND MORAL IMPERATIVES

Although there is no sound textual reason to exclude attorneys' fees from the scope of Article 74's "loss" provision, there are pragmatic and strategic reasons why courts and commentators opt to exclude attorneys' fees for litigation from the scope of the CISG under the guise of "procedural rules." This section first outlines the pragmatic and strategic arguments in support of categorizing attorneys' fees as procedural, and then explains the practical implications and moral issues associated with this approach. The practical implications and moral issues arising from categorizing such fees as procedural vastly outweigh any pragmatic or strategic advantage to supporting this argument.

326. See generally H. L. A. HART, *THE CONCEPT OF LAW* (1961).

327. CISG, *supra* note 221, art. 7(1) (and accompanying Secretariat Commentary).

328. *Id.* art. 74 (and accompanying Secretariat Commentary).

329. Diener, *supra* note 5, at 53–58.

330. *Id.*; see also CISG, *supra* note 221, pmbl.

331. Diener, *supra* note 5, at 53–58. See also CISG, *supra* note 222, pmbl.

332. See CISG, *supra* note 221, art. 7(1).

333. Diener, *supra* note 5, at app. A.

334. *Id.*

Having no textual basis and no basis in the *travaux préparatoires* for excluding attorneys' fees for litigation from the domain of recoverable losses under Article 74, commentators have turned to strategic and pragmatic arguments for excluding fees from its ambit. These reasons include: (1) That the method allows each forum to award (or not award) fees by use of familiar domestic methodologies. A significant number of courts already award (or do not award) fees in this manner, it is easily implemented, and so should be the method utilized.³³⁵ (2) That treating a "loss" as including attorneys' fees would result in anomalies.³³⁶ In particular, in the United States, in most cases, only a victim of a breach of contract who was successful in litigation would be able to recover attorneys' fees, and not an innocent defendant, who successfully defends a breach of contract action. Yet, in most other countries, the loser would pay (at least a portion) of the winner's fees.

There are compelling reasons to reject both arguments. As to (1), this argument fails on its face as a violation of the naturalistic fallacy. In other words, one cannot derive an "ought" from an "is." Simply because courts may handle things a certain way, does not mean they should be handled that way. This is a classical fallacy in logical reasoning.³³⁷ Moreover, such an interpretation conflicts with the text, plain meaning, and *travaux préparatoires* of the Convention. As to (2), there are different kinds of anomalies occurring in the United States due to *Zapata's* treating of attorneys' fees as procedural matters outside of the Convention—*viz.*, sometimes U.S. courts award fees in CISG-governed disputes, and sometimes they do not.³³⁸ Anomalies are also occurring across national boundaries due to differing "loser-pays" systems, and varying caps on the recovery of fees under domestic procedural rules.³³⁹ In an effort to prevent anomalies, the *Zapata* decision actually results in more severe anomalies both within and outside the United States. In addition to these salient concerns, the

335. See, e.g., Dorđević, *supra* note 223, at 218 for the "everybody else is doing it" argument.

336. See, e.g., *Zapata Hermanos Sucesores, S.A.*, 313 F.3d at 388 for the "anomalies" argument.

337. Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252, 253 (1994) (quoting G. E. MOORE, PRINCIPIA ETHICA 10–14 (1903)) ("To suppose that one can deduce an 'ought' from an 'is,' or, what amounts to the same thing, that one can deduce a normative ethical conclusion from empirical research, is to commit a logical mistake some dub the 'naturalistic fallacy.'").

338. See *supra* Part II.

339. See generally Reimann, *supra* note 1.

practical implications and moral issues associated with adopting this approach provide further reason for treating attorneys' fees for litigation as a "loss" under Article 74.

A. Practical Implications

The practical implications of courts' and tribunals' inconsistent, non-uniform and at times contradictory approaches to the recoverability of attorneys' fees in CISG-governed disputes include deleterious impacts on CISG contracting parties, commercial activity, judicial economy and efficiency, and globalization. Divergent rule interpretations of Article 74's "loss" provision as it relates to attorneys' fees damage and impede progress on all of these concerns.

1. Risk Rises for Parties to CISG Governed Contracts

Discordant and divergent interpretations of Article 74's "loss" provision increases the risk assumed by contracting parties in CISG-governed contracts. This risk relates to the inability of these parties to accurately predict the costs associated with contract noncompliance and the expenditures related to enforce their rights for such noncompliance. The global nature of CISG contracts requires parties to assume the risk that a contract breach may be litigated in varying legal regimes. That uncertainty inherent in global contracting is augmented by the inability of the contracting parties to know in advance of the contract consummation what rule will be adopted and applied to the issue of attorneys' fees recovery.³⁴⁰

In addition, the risk of contracting itself increases because contracting parties cannot accurately calculate the costs of pursuing their rights in the event of a contract breach. This becomes essentially a "hidden" cost to the contract itself that cannot easily be accounted for through the negotiated consideration. The lack of a coherent view on this aspect of Article 74 unnecessarily and detrimentally impacts contracting parties in CISG-governed contracts by raising the risk ratio of such transactions.

340. Diener, *supra* note 5, at 34–35; Larry A. DiMatteo & Daniel T. Ostas, *Comparative Efficiency in International Sales Law*, 26 AM. U. INT'L L. REV. 371, 392 (2011). In the context of addressing economic analysis of law principles as applied to the CISG, the authors explain: "The importance of predictability and stability in the law is particularly important in the international context of the CISG. Transacting parties need to be alerted to gaps in the CISG and to interpretations developed by CISG tribunals." *Id.* at 392.

2. Commercial Activity Decrease

Risk assessment in private contracting is a critical component of whether and how commercial activity will increase, decrease, or cease altogether to exist.³⁴¹ Inconsistent or uncertain rule applications of Article 74 hinder contracting parties' attempts to negotiate profitable contracts. In practical terms, this impedes contracting parties' risk assessment in CISG-governed contracts; these parties may fail to adequately account for attorneys' fees recovery in the negotiation of the contract terms and suffer unanticipated losses as a result.³⁴²

By hampering parties' ability to mitigate their risks in this area, the willingness of parties to enter into these contracts decreases.³⁴³ This stifles commercial activity in the arena of the international sale of goods. The critical relationship that risk assessment and risk mitigation have to increased and robust commercial activity makes inconsistent rule application in this area damaging to economic growth at both a micro and macro level.

3. Judicial Economy and Judicial Efficiency Suffer

There is widespread evidence that, globally, courts and arbitral tribunals struggle to understand and interpret the "loss" provision language of Article 74.³⁴⁴ The lack of a uniform and consistent interpretation of the meaning of this provision—enabling predictable and uniform adjudicated outcomes transnationally—creates confusion, imprecision, and ambiguity in the adjudication

341. Avery Weiner Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 526–27 (2004). The author explains how contracting parties—who "usually dislike risk"—use risk management (correlative with contracting parties' different risk aversions and abilities to spread or diversify risk). *Id.* at 526. The authors note: "Variation in interpretive outcomes introduces risk into the contractual relationship." *Id.* at 526. *See also* DiMatteo & Ostas, *supra* note 339, at 389. The authors detail contract law's relationship to market activity: "Market activities are promoted by providing contract rules that reduce the costs of private exchanges, including the costs of negotiation, performance, and enforcement." *Id.* at 389.

342. *Id.* at 391 ("Most contract or default terms allocate risk between contracting parties.").

343. Pinarbasi, *supra* note 260, at 200. The author advocates for an interpretation of the "loss" provision of Article 74 of the CISG to include the recoverability of attorneys' fees and links this interpretation to increased commercial activity in the area of international contracting: "Consequently, application of more harmonized, predictable rules of CISG to the issue of attorney fees (CISG 74) will contribute to establishing a more trustworthy environment in which international trade will flourish more because commercial enterprises will be more encouraged to involve in international sales contract." *Id.* at 200.

344. *See supra* Part II.

of attorneys' fees recovery.³⁴⁵ The variance in how courts or arbitral tribunals examine this issue dramatically increases the unpredictability of the outcome of dispute resolutions of CISG-governed contract disputes. Forum shopping is a likely result as well.³⁴⁶

Because the precedent on this issue is not consistent and not coherent, courts and arbitral tribunals waste judicial resources and time analyzing and pondering the meaning of Article 74 and the impact applicable case law has on their rulings. Judicial economy and judicial efficiency are sacrificed in this process, and can lead to protracted litigation, including appellate review, on this precise issue.³⁴⁷ The detrimental impact on the judiciary and arbitral tribunals imposes needless strain and costs to dispute resolution bodies throughout the world.

4. Goals are Subverted

The goals of globalization are subverted when enforcement of global treaties create unreliable results and inconsistent obligations.³⁴⁸ The lack of a uniform interpretation and application of Article 74's "loss" provision as it relates to the recoverability of attorneys' fees is an unfortunate example of this. The intended consequences of a harmonized and coherent body of law applicable to international contracts involving the sale of goods are not achieved.³⁴⁹ This poor track record of results delegitimizes cooperative and collaborative efforts to construct legal and commercial avenues of global trade. Ultimately, globalization itself is negatively impacted.

345. *Id.*

346. S. I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT'L L. 1027, 1046 (2014).

347. See *VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 811 F.3d 247, 253 (7th Cir. 2016); *ECEM European Chem. Mktg. B.V. v. Purolite Co.*, No. 10-4343, 2010 U.S. App. LEXIS 2287, at **4-6 (3d Cir. Nov. 14, 2011).

348. Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 745 (2014). The authors cite "[t]he difficulties associated with the creation and implementation of 'hard' international legal mechanisms" such as treaties and customary international law and advocate for a reframed notion of "soft" law enactment and enforcement which they identify as a key partner in the globalization efforts involving "markets, externalities, and public goods that cross borders." *Id.* at 745.

349. *Last Ditch Stand*, *supra* note 228, at 770. "The object of the CISG is to establish 'a New International Economic Order.' 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.'" *Id.* (quoting United Nations Convention on Contracts for the International Sale of Goods pmbl., Apr. 11, 1980, 1489 U.N.T.S. 3).

*B. Ethical Issues Arise with the Procedural
View of Attorneys' Fees*

In addition to the practical implications that arise from disharmonious applications, there are a variety of interrelated moral issues that result from excluding attorneys' fees as a recoverable loss for breaches of CISG-governed contracts. Schwenger and Leisinger contend that public lawmaking bodies have a primary responsibility to ensure ethical standards are satisfied, and a secondary responsibility to react to states that fail to comply with ethical standards.³⁵⁰ Among other arguments, they contend that this involves ensuring "the equilibrium of the contract is reestablished" through damage awards.³⁵¹ Courts both within and outside the United States and arbitrators should respond to *Zapata's* failure to ensure this equilibrium by explicitly acknowledging in their decisions that attorneys' fees for litigation are a loss under Article 74. To assert otherwise would result in unequal application of the law, harm to victims of breaches of contract, injustice and unfairness, and a failure to assure equitable results under the Convention.

1. Equal Application of the Law: A General and Moral Principle

Article 7 of the United Nations Declaration of Human Rights declares that all are entitled to equal protection of the laws.³⁵² Equal protection guarantees under U.S. law are secured by the Fifth and Fourteenth Amendments of the U.S. Constitution.³⁵³ This moral imperative is further supported by Article 7(1) of the CISG which calls for a uniform application of the Convention. Article 7(1) recognizes "the need to promote uniformity in its application" across national boundaries. When interpreting the Convention, this need should be acknowledged to ensure a uniform and equal application of the Convention to all. While leaving the awarding of attorneys' fees to domestic law could promote a uniform interpretation, that is not what the CISG calls for, because even such a uniform interpretation leads to a disharmonious application of the CISG across national boundaries.

350. Ingeborg Schwenger & Benjamin Leisinger, *Ethical Values and International Sales Contracts*, in *COMMERCIAL LAW CHALLENGES IN THE 21ST CENTURY*; JAN HELLNER IN *MEMORIUM* 249, 253 (Ross Cranston et al. eds., 2007).

351. *Id.* at 274.

352. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 7, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

353. U.S. CONST. amend. V and XIV.

Allowing a United Nations Convention to be applied differently in different countries violates the mandates of the United Nations Declaration of Human Rights, which should provide equal protection to all regardless of the national court in which the Convention is applied.

2. Harm to Victims of Breaches of Contract: Strategic Advantage-Seeking

The first-mover strategy may lead to greater harm to victims of breaches of CISG-governed contracts. That is, if there are two parties, both of whom have viable claims for breach of a CISG-governed contract, either may maneuver themselves to a jurisdiction which benefits themselves by filing suit first. A buyer who has a weak claim for breach of contract may initiate claims in a U.S. court, to avoid having to pay fees to the seller, who may have stronger claims for breach of contract and who would have preferred to bring suit in the courts of another nation which would have allowed fees to be recovered. This buyer may “game the system” by filing first in the United States to reduce the potential payout to the seller. This strategy helps, particularly, U.S. parties who have breached their CISG-governed contracts and are savvy enough to take advantage of the first-mover strategy. It would force the other party to the contract into a U.S. court with no possibility of recovering the attorneys’ fees, thereby harming that party even further than the initial breach of contract.

3. Fairness and Justice

As one commentator suggested, “The essence of the American Rule is that prevailing parties pay more in attorney's fees than they recover in costs from the defeated party.”³⁵⁴ In some cases, this rule leads to a prevailing party paying more in attorneys’ fees than is recovered as damages from the defeated party. Due to the unfairness that results from such Pyrrhic victories, if there is a means of preventing such occurrences, such means should be utilized. Article 74 provides the means of ensuring that these unfair outcomes are avoided, and that victims of breaches of CISG contracts do not suffer greater losses for having enforced their rights.

354. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 L. & CONTEMP. PROBS. 9, 13 (1984).

4. Equitable Concerns

The only true method to ensure recovery of fees under CISG-governed contracts is to account for them as a “loss” within Article 74. However, such an approach does give rise to another fear. That is, if attorneys’ fees are not recoverable under CISG for an innocent defendant, then it could lead to very high costs for the defendant that would not be reimbursable under CISG (and also not in most U.S. states). This fear is a legitimate concern of opponents of fee recovery under CISG who desire to protect potentially innocent defendants from possibly having to expend fees for cases of non-breach. The fear of frivolous or unmerited litigation drives opponents of awarding fees under CISG.³⁵⁵

Recent scholarship suggests, however, that these fears should extend far beyond the U.S. court system. In Reimann’s compilation of cost and fee allocations across thirty-five nations, she reveals that the procedures for enforcing the substantive rights to recover attorneys’ fees, court costs, and evidence expenses across national boundaries entails more variation than the simple American Rule versus Loser-Pays dichotomy suggests.³⁵⁶ Indeed, based on her study, it seems the rare case that full compensation is provided to a winner of a lawsuit even in many Loser-Pays jurisdictions. Reading a “loss” within Article 74 to include attorneys’ fees would potentially provide more compensation to victims of breaches of contract than they would otherwise be due under most domestic laws.³⁵⁷ The American Rule is thus better perceived as existing on one end of a spectrum, with full compensation on the other, and most Loser-Pays methods somewhere in between. The CISG “loss” provision ensures consistency across this spectrum, thus rebalancing equities for victims of breaches of contract across national boundaries. Simultaneously, applicable rules for recovery for innocent defendants, which vary substantially across national boundaries would purportedly still be available under the rules of domestic courts.

355. Essentially every state in the United States as well as federal law allows for fee recovery by an innocent defendant if litigation is brought in bad faith, is meritless, frivolous, etc. Truly innocent defendants are protected from frivolous litigation in the United States. Tort actions in the United States provide another recourse to protect from such frivolous litigation. Thus, the equities are more balanced than may at first blush appear.

356. Reimann, *supra* note 1, at 9–10.

357. It should be noted, however, that almost every U.S. state limits the recovery of attorneys’ fees to those fees that are deemed “reasonable.” See generally Keith William Diener, *A Battle for Reason: The Unconscionable Attorney-Client Fee Agreement*, 2016 J. PROF. LAWYER 129, 129 (2016).

V. HARMONIZATION OF FEE RECOVERY UNDER CISG

A. Harmonization as an Aim of CISG

Treating attorneys' fees as procedural matters that are excluded from the ambit of recoverable losses under Article 74 results in many practical and moral problems. This method also detracts from the CISG's purpose of harmonizing international sales law.³⁵⁸ The *Zapata* approach to attorneys' fees is detracting from harmonization. Courts are thus left with the option of perpetuating a judicial fiction by adhering to the *Zapata* view, or signaling the desire for unification by explicitly acknowledging that an Article 74 "loss" includes attorneys' fees for litigation.

Many authors have proclaimed the benefits of a harmonized international sales law. As Schwenger has said, leaving questions "to be dealt with by the otherwise applicable domestic law would undermine the uniformity reached by the CISG and must be prevented."³⁵⁹ Spagnolo discusses how the CISG "is the result of a major effort of many decades to harmonize the law relating to the international sale of goods. The basic rationale behind this movement was that a uniform sales law would lead to improved efficiency of cross-border sales and promote international trade."³⁶⁰ The failure to implement the plain language of the CISG, and instead resorting to domestic law, undermines the aim of harmonization and decreases the potential for the CISG to increase efficiency on a broad scale.

There are other benefits of a harmonized international sales law including reduced costs and an increased potential for settlement. A uniform interpretation and application of CISG could play a role in reducing litigation costs.³⁶¹ The utilization of the CISG, if harmoniously interpreted by domestic courts, could reduce costs for parties relative to the application of foreign law, or the utilization of private arbitral tribunals.³⁶² A uniform interpretation of the CISG's damages provisions would make quantifying damages more concrete, thus increasing the ease of

358. Larry A. DiMatteo, *Harmonization of International Sales Law*, in COMMERCIAL CONTRACT LAW: TRANSATLANTIC PERSPECTIVES 559, 560 (Larry A. DiMatteo et al. eds., 2013) ("[The CISG] has been heralded as the most successful substantive private law convention in history. In some respects, this has been true; however, by some measures it has failed its intended purpose of harmonizing international sales law.").

359. Schwenger, *supra* note 228, at 131.

360. See LISA SPAGNOLO, CISG EXCLUSION AND LEGAL EFFICIENCY 1 (2014) for an excellent analysis of these issues.

361. *Id.* at 122.

362. *Id.* at 122–23.

calculating damages for settlement. An interpretation of Article 74 that includes attorneys' fees for litigation may motivate breaching parties to provide payment or otherwise settle prior to going to court, to avoid having to pay out significant fee awards. The broad reach of the "loss" provision in Article 74 is one of the strategic benefits of utilizing the CISG. A harmonized interpretation of its broad reach to include full compensation could decrease opting out of the Convention, by providing remedies and full fee compensation not otherwise available under the domestic law of contracting states. However, the benefits of harmonization will not be attained if courts continue to resort to domestic law in lieu of giving meaning to the Convention's plain language, as informed by its *travaux préparatoires*.

Within the United States, federal law (including treaties) aims to be applied uniformly and consistently nationwide.³⁶³ While the U.S. Supreme Court can settle conflicts in interpretation and application of federal laws in the United States, there is no such counterpart for the CISG. There is no court of last resort that can provide the final word on interpretational differences under CISG among the signatory nations to the Convention. It is thus left primarily to courts of the first and second instance, in contracting states, to ensure that the CISG's aims are attained, and that attorneys' fees and other losses are awarded in accordance with the principle of full compensation. It is imperative, if the aims of the CISG are to be attained, that domestic courts provide a uniform interpretation of Article 74 that leads to a uniform application of the CISG regardless of locus of contractual enforcement.

B. Methodology of a Harmonized Article 74

A uniform and harmonized methodology for interpreting Article 74 is attainable without resorting to legal fictions or stretches of imagination. The method lies within the text of the Convention as informed by its *travaux préparatoires*.³⁶⁴ Ensuring

363. See e.g., *Jerome v. United States*, 318 U.S. 101, 104 (1943) (suggesting federal law should be interpreted uniformly); *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011) ("As a treaty, the CISG is a source of federal law.").

364. While common and civil law jurisdictions vary in some respects, both begin with the language of a promulgated law, as informed by the intention of the legislating body. Cf. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 704 (2000) ("In civil law jurisdictions, the first step in interpreting an ambiguous law . . . is to discover the intention of the legislator by examining the legislation as a whole, including the '*travaux préparatoires*', as well as the provisions more immediately

this method requires a rethinking of the criteria by which we test the validity of foreign CISG cases. Flechtner argues against including attorneys' fees as a recoverable loss by providing four criteria for deciphering the precedential authority of foreign cases.³⁶⁵ According to Flechtner, courts should: (1) provide more deference to tribunals with higher authority; (2) provide more deference to issues that are consistently decided across tribunals; (3) provide more deference to courts from areas with high amounts of international trade; and (4) provide more deference to decisions that fulfill Article 7(1)'s mandates.³⁶⁶ In light of these four criteria, Flechtner concludes that cases interpreting Article 74 to include attorneys' fees should be given little deference.³⁶⁷ Flechtner acknowledges that these criteria are only a starting point for analyzing cases from other countries, and encourages commentators to critique, refine, and add to his tentative criteria.³⁶⁸ In response to Flechtner's call, this section contends that these four criteria should be re-evaluated because the criteria suffer from the homeward trend, violate the CISG's general principles, and provide an incomplete framework for the analysis of cases from other countries. This section first refines and revises the criteria to resolve these issues and, according to the revised criteria, suggests that Flechtner's conclusion should be reassessed. The plain language interpretation of Article 74 will lead to harmonization, uniform application, and diminish the practical and moral issues spurring from a contrary reading.

1. The Homeward Trend Reflected in the Criteria

Within a common law system, precedential authority plays an important role, but this is not the same in all legal systems.³⁶⁹

surrounding the obscure text."); Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229 (2004).

365. Flechtner, *supra* note 247, at 140–50.

366. *Id.*

367. *Id.*

368. *Id.* at 143 (“[F]or I only purport to identify *some* of the factors that should be considered. Others [sic] commentators may, and I hope will, add to, refine, and correct the preliminary list of factors that I suggest.”).

369.

One of the basic characteristics of the civil law is that the courts main task is to apply and interpret the law contained in a code, or a statute to case facts. The assumption is that the code regulates all cases that could occur in practice, and when certain cases are not regulated by the code, the courts should apply some of the general principles used to fill the gaps.

Flechtner's use of the language of "precedential authority" as the measure of a case's validity reflects the homeward trend.³⁷⁰ This language imputes characteristics of the U.S. (common law) legal system into the criteria for deciphering the validity of CISG decisions—decisions that are rendered across different legal systems.³⁷¹ The homeward trend is regularly rebuked by CISG scholars. It "is deplorable because it promotes parochialism and thus defeats the very purpose of the CISG, namely the creation of a uniform sales law aimed at the creation of legal certainty and 'the removal of legal barriers in international trade.'"³⁷² The analysis of the validity of CISG cases should not, therefore, be termed in the language of "precedential authority." To the contrary, the inquiry into the validity of a CISG decision from a foreign court should hinge upon whether the court properly gave meaning to the language of the Convention, while ensuring the Convention's mandates are satisfied.

Having due regard for the international character of the Convention requires, among other things, that courts recognize that the starting place for any interpretation of the Convention is the language of the Convention itself. Uniform decisions under the CISG can only be reached by a harmonious, good faith reading of the Convention by the domestic courts interpreting those provisions, regardless of the legal system or varying customs adopted in each country. The starting place must be the language of the Convention. Decisions that ignore the language of the Convention or its unique role as an international Convention in favor of familiar domestic methodologies should be given little weight.

2. The Third Criterion Violates the General Principles of the Convention

The text of the CISG does not provide a method for deciphering a foreign case's validity. Because foreign case validity is a matter governed by, but not expressly settled in the CISG, as is apparent by the call for uniformity per Article 7(1), foreign case validity should be "settled in conformity with the general principles on which [the CISG] is based."³⁷³ Flechtner's third criterion (to give

Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICTORIA U. WELLINGTON L. REV. 817, 819 (2001).

370. Flechtner, *supra* note 247, at 140–50.

371. *Id.* at 141.

372. Ferrari, *supra* note 280, at 20 (quoting CISG, *supra* note 221, pmb1.).

373. CISG, *supra* note 221, art. 7(2).

more deference to courts in countries that have more international trade than those that do not) violates two general principles underlying the Convention: (i) the principle of equality between states, and (ii) the principle of mutual benefit. The CISG explicitly acknowledges that “the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States.”³⁷⁴ The principle of equality between states requires, at a minimum, that decisions from the courts of all contracting states are treated equally, regardless of how prosperous their economies are or the extent of international trade conducted by each state. Flechtner’s third criterion could also undermine the potential for the CISG to mutually benefit all contracting parties and the continued friendly relations among states. This third criterion is not only irrelevant to deciphering the validity of a CISG case, but it also violates the principles underlying the Convention.

Flechtner acknowledges that his third criterion is controversial, but pragmatically adopts it because, in practice, he contends that following a decision from a country with high international trade (such as the United States) will result in more uniformity in the application of the Convention.³⁷⁵ Such a justification for violating the principles of mutual benefit and equality between states is insufficient. Courts in all countries should be given equal regard. If a high-trade country’s court makes a “Bad CISG Ruling,” it should be given no more deference than a bad CISG ruling from a court in a low-trade country.³⁷⁶ Uniformity across national boundaries cannot be expected to come swiftly; there will inevitably be growing pains. Bad CISG rulings should be directly opposed by other courts, with the aim of a long-term uniform interpretation that complies with the language and mandates of the Convention.

3. The Fourth Criterion Is Incomplete

Flechtner does acknowledge that the most important criterion is to ensure that judicial decisions fulfill Article 7(1)’s mandate. Article 7(1) explicitly requires courts to have regard for the Convention’s international character, the need to promote uniformity in application, and the observance of good faith.³⁷⁷

374. *Id.* at pmb. See also Diener, *supra* note 5, at 56–59 (identifying the general principles of mutual benefit and equality between states as underpinning the CISG).

375. Flechtner, *supra* note 247, at 145.

376. See Dixon, *supra* note 228, at 422.

377. CISG, *supra* note 221, art. 7(1).

The Secretariat Commentary explains that “[t]he principle of good faith . . . applies to all aspects of the interpretation and application of the provisions of this Convention.”³⁷⁸ The principle of good faith, per the commentary, reaches across all aspects of international contracting. Compliance with these three principles plays an integral role in ensuring a CISG decision is valid. However, the criterion should also invoke Article 7(2). In other words, courts that do not (when required by the Convention) identify and apply the general principles on which the Convention is based should be given little deference. Article 7(2) plays an important gap-filling function for the Convention—and if this function is not utilized in practice, then there will be increasing resolution via domestic law.

4. Less Deference Should Be Given to Decisions that Undermine the Potential for Friendly Relations Among CISG Contracting States

The interpretation and application of the CISG cannot be conducted in a vacuum, but instead, the Convention’s role as a unifying document promulgated by the United Nations to promote friendly relations among states must be considered.³⁷⁹ As a starting place, two components of friendship relevant to this inquiry are analyzed. First, what kind of friendship is involved? Second, how does compliance with ethical standards benefit a long-term and sustainable friendship among contracting states?

As to the first question, Aristotle provides an intimate study of different types of friendships including friendships of utility, pleasure, and virtue.³⁸⁰ Friendship among contracting states arises, initially, from utility and engagement in the shared activity of trade. A harmonized sales law promotes utility and engagement in this shared activity, which is beneficial to states and their constituents. The CISG will purportedly continue so long as it is mutually beneficial to those friendly states. However, as Aristotle articulates, friendships of utility last only for as long as they are useful to the participants, who are motivated primarily by the benefits they receive from the relationship.³⁸¹ If one desires for a friendship of utility to last, and continue to benefit all parties, there must be basic compliance with ethical standards by all

378. Secretariat, Commentary on the Draft Convention on Contracts for the International Sale of Goods, A/CONF.97/5, 18 (1979), http://www.uncitral.org/pdf/english/texts/sales/cisg/a_conf.97_5-ocred.pdf (Commentary to Article 6[4]).

379. CISG, *supra* note 221, pmb1.

380. ARISTOTLE, NICOMACHEAN ETHICS, BOOK VIII, XIII (W.D. Ross trans., 350 B.C.E.).

381. *Id.*

involved in the relationship (in order for the friendship to continue to be mutually beneficial). The CISG, for this reason, cannot be interpreted or applied in a manner that would violate generally accepted ethical principles, such as those embodied in the United Nations Declaration of Human Rights.³⁸² To do so would undermine the potential for maintaining friendly relations among the states party to the Convention. Maintaining these friendly relations plays an integral role in the peace-keeping and peace-building process.

It is for these reasons that an additional criterion of deciphering the validity of a foreign decision is necessary. This criterion shall give more deference to decisions that tend to promote friendly relations among the states by, among other things, complying with basic ethical standards (such as those set forth in the United Nations Declaration). Less deference should be given to foreign decisions that do not.

5. Lexical Ordering of the Revised Criteria: First and Second-Order Criteria Should Be Distinguished

Evaluating the validity of foreign decisions requires distinguishing between first order and second order criteria for assessing foreign decision validity. Lexical priority should be given to the first-order criteria; evaluators (e.g., judges examining cases from other countries) should only resort to the second-order criteria when all the first-order criteria are satisfied. The first-order criteria are identified directly in the language of the Convention, and include: (1) more deference should be given to cases that utilize the plain meaning of the language of the Convention, as informed by its *travaux préparatoires* (and less deference to those that do not); (2) more deference should be given to cases that comply with the mandates of Article 7(1) and Article 7(2) (and less deference to those that do not); and (3) more deference should be given to cases that tend to promote friendly relations among the states (and less deference to those that do not). If a foreign CISG ruling satisfies all first-order criteria, then the foreign decision is due considerable deference.

The two criteria remaining from Flechtner's framework are second-order criteria, because they are not identified directly in the language of the Convention. Only if a ruling satisfies all the first-order criteria, could the second-order criteria potentially be

382. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 7, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

utilized to, for example, resolve conflicting decisions on the same issue. The second-order criteria include: (4) more deference should be given to cases that are decided by higher tribunals (and less deference to those that are not); and (5) more deference should be given to cases involving issues that are consistently decided across tribunals (and less deference to those that are not). However, for criteria (5) to apply, there must be explicit acknowledgement and consideration of an issue. Silence is insufficient to result in deference under this criterion. To repeat, these second-order criteria are irrelevant if a foreign decision does not pass muster under the first-order criteria. It is necessary, however, to identify second-order criteria to resolve conflicts when the first-order criteria do not provide an unambiguous answer.

These first and second-order criteria build upon and refine Flechtner's framework to make it conform to the language and intention of the Convention. Further development of these criteria as measures of foreign case validity is encouraged.

6. Application of the Revised Criteria to Attorneys' Fees Recovery

The application of the revised criteria results in two interrelated conclusions: (1) the *Zapata* case and its progeny (in the U.S. courts) should be given little deference because they do not satisfy the first-order criteria; and (2) the many decisions that have awarded attorneys' fees for litigation as a "loss" should be given significant deference because they satisfy the first-order criteria. In relation to *Zapata*, the Seventh Circuit did not utilize the plain meaning of the word "loss," nor did it incorporate the *travaux préparatoires* into its decision.³⁸³ Further, the decision cuts against a uniform and international interpretation of the word "loss" and, further, did not identify any general principles upon which the Convention is based to attempt to resolve the issue.³⁸⁴ The Seventh Circuit's decision in *Zapata* thus unequivocally fails the first two criteria. Finally, the decision undercuts the mandate for equal application of the law across national boundaries, thus not only violating Article 7(1) of the CISG, but also Article 7 of the United Nations Declaration of Human Rights.³⁸⁵ By violating

383. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385, 389 (7th Cir. 2002) (erroneously stating that "we conclude that 'loss' in Article 74 does not include attorneys' fees").

384. *Id.* at 388 (erroneously stating that "there are no 'principles' that can be drawn out of the provisions of the Convention for determining whether 'loss' includes attorneys' fees").

385. CISG, *supra* note 221, art. 7(1); U.N. General Assembly, Universal Declaration of Human Rights, 217 A (III) art. 7 (1949).

generally accepted ethical standards, the Seventh Circuit's *Zapata* decision detracts from the potential for friendly relations among contracting states. On the other hand, the many courts and arbitral tribunals that have deemed litigation attorneys' fees to be a "loss" within the meaning of Article 74 do accord with the plain meaning of the Convention, as informed by the *travaux préparatoires*, and do provide a means of uniform and equal application of the Convention consistent with its mandates and ethical standards.³⁸⁶ Thus, the Seventh Circuit's *Zapata* decision should be given little deference, and the many other cases that have found to the contrary should be given significant deference under the revised criteria.

VI. CONCLUSION

While the CISG has made strides towards harmonization in certain areas of international sales law, as one leading CISG scholar notes, "[i]n the short term, it is unclear whether the CISG will achieve even a modicum of its goal to harmonize international sales law."³⁸⁷ The long-term aim of the "evolutionary process" of the CISG's reach across national boundaries is ultimately to provide a uniform, consistent, and coherent law.³⁸⁸ This harmony cannot be achieved if courts defer to familiar domestic standards instead of giving due credence to the United Nations Convention's laudable goals. Deferring to domestic standards will lead the Orwellian ducks to look like the pigs and the pigs like the ducks.³⁸⁹ In other words, the substantive terms of the Convention could forever be trumped by national law, and eventually it will be "impossible to say which was which."³⁹⁰

The interpretation of the "loss" provision of Article 74 of the CISG can be viewed through many lenses, but only one approach will lead to the consistent application of the CISG across national boundaries. Harmonization is achieved by utilizing the plain meaning approach, as informed by the Convention's *travaux préparatoires*, when interpreting and applying the CISG to the adjudication of disputes. This is consistent with the interpretative mandates of Article 7, including the unique international

386. Diener, *supra* note 5, at 8-17.

387. DiMatteo, *supra* note 357, at 575.

388. *Id.*

389. ORWELL, *supra* note 232, at 118 ("No question, now, what had happened to the faces of the pigs. The creatures outside looked from pig to man, and from man to pig, and from pig to man again; but already it was impossible to say which was which.")

390. *Id.*

character of the CISG and the principles upon which it is based. The principle of full compensation provides a supporting mechanism for filling such gaps. Moreover, the decisions that have deemed all attorneys' fees (including litigation-incurred fees) as recoverable losses are due considerable deference, particularly in light of the practical problems and moral issues that arose in the wake of *Zapata*. The discretion that the Secretariat Commentary provides in determining damage awards under Article 74 is aimed at attaining eventual uniformity. The approach set forth herein accords with the Secretariat Commentary by providing a uniform methodology for application of the CISG's general damages provision and thereby ushering CISG contracts into the brave new world that harmonization hopes to achieve.³⁹¹

391. Secretariat Commentary to CISG art. 70, *supra* note 266, para. 4 (“[N]o specific rules have been set forth in article 70 describing the appropriate method of determining ‘the loss . . . suffered . . . as a consequence of the breach.’ The court or arbitral tribunal must calculate that loss in the manner which is best suited to the circumstances.”).