

April 2003

An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals

John Felemegas

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

Recommended Citation

John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, 15 Pace Int'l L. Rev. 91 (2003)

DOI: <https://doi.org/10.58948/2331-3536.1174>

Available at: <https://digitalcommons.pace.edu/pilr/vol15/iss1/3>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

AN INTERPRETATION OF ARTICLE 74 CISG BY THE U.S. CIRCUIT COURT OF APPEALS

John Felemegas*

I. The Decision of the United States Seventh Circuit Court of Appeals in <i>Zapata Hermanos Sucesores v. Hearthside Baking Company</i>	92
II. The Remedy of Damages for Breach of Contract Under the Regime of the CISG	93
III. The United States Court of Appeals Interprets the Convention: "loss," Article 74 CISG.....	93
IV. Award of Damages for Breach of Contract: Attorneys' Fees as Foreseeable Consequential Loss – Article 74 CISG	96
A. Text	96
B. Doctrine	97
C. Jurisprudence	98
1. Appellate Courts.....	104
2. Commercial and Lower Courts.....	106
3. Arbitral Tribunals	110
4. ULIS Case Law	111
V. Criticism of the Seventh Circuit Court of Appeals Ruling in <i>Zapata</i>	114
A. Interpretative Methodology	114
1. Prescribed Rules of Interpretation – Article 7 CISG	114
2. Plain Meaning of the Language – Liberal and International Construction	114
3. CISG – UCC Comparative Approach: Challenges and Pitfalls	117
4. Consideration of International Jurisprudence.....	119

* Dr. John Felemegas is a Lecturer in the Faculty of Law of the University of Technology, Sydney, and a Fellow of the Institute of International Commercial Law of the Pace University School of Law.

B. Substantive Law v. Procedural Law	121
C. General Principles of the CISG v. Private International Law	122
D. Anomalous Results	125
E. International Judicial Interpretation v. Political Motivation	127
VI. Conclusions	128
ADDENDUM – Article 74 CISG case law	130

I. THE DECISION OF THE UNITED STATES SEVENTH CIRCUIT
COURT OF APPEALS IN *ZAPATA HERMANOS SUCESTORES V.*
HEARTHSHIDE BAKING COMPANY

In *Zapata Hermanos Suciores v. Hearthside Baking Company*,¹ the United States Court of Appeals for the Seventh Circuit upheld an appeal against the district court's decision² to award to the successful plaintiff, a Mexican seller, the recovery of his attorneys' fees as damages for breach of an international sales contract by the defendant, an American buyer.³

The position taken by the Court of Appeals for the Seventh Circuit in the *Zapata* ruling is consistent with the well-known "American rule," which generally calls for each litigant in United States courts to bear its own costs. The court of appeals reached its decision on two alternative grounds:

- (a) The court upheld the appeal on the ground that the interpretation of the provisions of the law that was applicable to the contract between the litigants, the United Nations Convention on Contracts for the International Sale of Goods, (CISG).⁴ They concluded that damages recoverable under Article 74 CISG for breach of contract do not include attorneys' fees incurred in the litigation by the successful plaintiff.⁵
- (b) The court upheld the United States appeal against the award of attorneys' fees also on an alternative ground relating to United States domestic law, the court's inherent power to

¹ F.3d 385 (7th Cir. 2002), available at <http://cisgw3.law.pace.edu/cases/021119u1.html>.

² See generally *Zapata Hermanos Suciores v. Hearthside Baking Co.*, No. 99 C 4040, 2002 U.S. Dist LEXIS 15191 (N.D. Ill. Aug. 28, 2001), available at <http://cisgw3.law.pace.edu/cases/010828u1.html>.

³ See *id.*

⁴ *Zapata Hermanos Suciores*, 313 F.3d at 387.

⁵ See *id.* at 389.

award attorneys' fees to punish a litigant or the litigant's lawyers for litigating in bad faith.⁶

The focus of this commentary is centered solely on the *Zapata* court's interpretation and application of the CISG. The interpretation of provisions of the CISG by the court of appeals is interesting in many respects, as will be seen below.

II. THE REMEDY OF DAMAGES FOR BREACH OF CONTRACT UNDER THE REGIME OF THE CISG

The provisions of the uniform sales law convention regulating the award of damages for loss suffered as a consequence of breach of contract are located in CISG Part III, Chapter V, Section II, Articles 74-77.⁷

The award of damages for such loss is perhaps the most important remedy available under the Convention.⁸ The present interpretative issue that arises as to the precise meaning of the damages provisions is whether the award of damages for loss suffered as a consequence of breach of a contract governed by the CISG also includes the attorneys' fees incurred by the wronged party in the pursuit of his rights under the Convention.

III. THE UNITED STATES COURT OF APPEALS INTERPRETS THE CONVENTION: "LOSS" ARTICLE 74 CISG

The reasoning followed by the Seventh Circuit in the *Zapata* ruling begins with the general remark that

⁶ *Id.* at 390.

⁷ See United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, reprinted in [1980] XI UNCITRAL Yearbook 149, available at <http://www.untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterX/treaty17.asp> [hereinafter CISG].

⁸ See JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION ¶¶ 403-04, at 445-46 (3d ed. 1999). See also FREDLICH ENDERLEIN AND DIETRICH MASKOW, INTERNATIONAL SALES LAW – UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 297-302 (1992), <http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html>. See generally ALBERT H. KRITZER, GUIDE TO THE PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 474-82 (1989).

[t]here is no suggestion in the background of the Convention or the cases under it that "loss" was intended to include attorneys' fees, but no suggestion to the contrary either.⁹

The above remark indicates that the court, in discharging its task of interpreting the relevant provisions of the CISG, consulted the Convention's legislative history and case law, but did not receive any fruitful results or other assistance. In the next sentence, the court drew the following conclusion, supported only by references to United States case law and principles:

Nevertheless it seems apparent that 'loss' does not include attorneys' fees incurred in the litigation of a suit for breach of contract, though certain pre-litigation legal expenditures, for example expenditures designed to mitigate the plaintiff's damages, would probably be covered as 'incidental' damages.¹⁰

The court made the further observation that the Convention governs only substantive law matters, not procedural matters. The Convention is about contracts, not about procedure.¹¹

The next step in the court's reasoning was to declare the procedural nature of the rules pertaining to attorneys' fees:

The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural law. For example, the 'American rule,' that the winner must bear his own litigation expenses, and the 'English rule' (followed in most other countries as well), that he is entitled to reimbursement, are rules of general applicability. They are not field-specific.¹²

This statement establishes the main premise for the conclusion ultimately drawn in the court's ruling on the relevant issue.

Although the court seems to have acknowledged that the uniform sales law Convention, in theory at least, could provide an exception to or modify the American *procedural rule* on attorneys' fees, it held that this is not the case here. In addition

⁹ Zapata Hermanos Sucesores, 313 F.3d at 388.

¹⁰ *Id.* at 388 (citing *Sorenson v. Fio Rito*, 413 N.E.2d 47, 50-52 (Ill. App. Ct. 1980)). *Cf.* *Tull v. Gundersons, Inc.*, 709 P.2d 940, 946 (Colo. 1985); RESTATEMENT (SECOND) OF CONTRACTS § 347, comment c (1981).

¹¹ See *Zapata Hermanos Sucesores*, 313 F.3d at 388.

¹² *Id.*

to the argument that is based on the technical distinction between *substantive law* and *procedural rules*, the court also referred to Article 7(2) of the CISG, which provides the Convention's gap-filling mechanism concerning matters governed but not expressly settled by the Convention, but not matters that are outside the Convention's sphere of application.¹³

An international convention on contract law *could* do the same. But not only is the question of attorneys' fees not 'expressly settled' in the Convention, it is not even mentioned.¹⁴

The court simply declared the lack of any general principles of the Convention that could aid in clarifying the question at hand, and concluded that the matter of attorneys' fees, also on account of the Convention's gap-filling procedure, should be resolved by reference to domestic law.

And there are no 'principles' that can be drawn out of the provisions of the Convention for determining whether 'loss' includes attorneys' fees; so by the terms of the Convention itself the matter must be left to domestic law (i.e., the law picked out by 'the rules of private international law,' which means the rules governing choice of law in international legal disputes).¹⁵

The court repeated its opinion as to the procedural nature of the issue at hand by highlighting that the divergence between the American rule and loser-pays regimes is

[a]n important difference but not a contract-law difference. It is a difference resulting from differing procedural rules of general applicability.¹⁶

In what is perhaps the strongest argument contained in the reasoning of the ruling, the court of appeals stated that the potential anomalies produced if attorneys' fees were awarded as damages to successful plaintiffs provide "another reason to reject the interpretation"¹⁷ of the CISG by the district court. The appellate court referred to the uncertainty of existence of a corresponding right of a successful *defendant* to recover its attor-

¹³ See *Zapata Hermanos Sucesores*, 313 F.3d at 388.

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

neys' fees as damages under the regime of the CISG, juxtaposed to what might be the case under domestic procedural law allowing such recovery.¹⁸ The court also contemplated whether, in certain cases, reliance on domestic procedural rules that are not subject to the duty of mitigation imposed by the Convention and circumscribed by the limits imposed by the principles of foreseeability and reasonableness, might be better than reliance on the damages provision in Article 74 of the CISG for a successful plaintiff.¹⁹

Finally, the court added another dimension to its interpretative approach by posing the following rhetorical question:

And how likely is it that the United States would have signed the Convention had it thought that in doing so it was abandoning the hallowed American rule?²⁰

also noting that

[t]o the vast majority of the signatories of the Convention, being nations in which loser pays is the rule anyway, the question whether 'loss' includes attorneys' fees would have held little interest; there is no reason to suppose they thought about the question at all.²¹

IV. AWARD OF DAMAGES FOR BREACH OF CONTRACT: ATTORNEYS' FEES AS FORESEEABLE CONSEQUENTIAL LOSS – ARTICLE 74 CISG

A. *Text*

Article 74 of the CISG provides that all foreseeable losses incurred as a consequence of a breach of contract are recoverable as damages.

Damages for breach of contract by one party consists 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

¹⁸ See *id.* at 388-89.

¹⁹ See *Zapata Hermanos Sucesores*, 313 F.3d at 388-89.

²⁰ *Id.* at 389.

²¹ *Id.*

of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.²²

B. *Doctrine*

Article 74 of the CISG provides for the award of damages for losses suffered by a wronged party due to a breach of contract, but does not identify such losses. The English-language edition of the text that has been cited most frequently by courts construing the CISG has the following to say on “loss” in the meaning of Article 74 of the CISG.

The Convention provides for damages for loss, including loss of profit, suffered as a consequence of a breach of contract (Article 74, first sentence), but does not define in more detail which are the losses for which compensation can be obtained. In order to identify the losses for which compensation may be demanded, regard must be had to the principle of *full* compensation for loss (see paragraphs 2 and 3 above) in the context of the particular contract concerned.²³

²² CISG, *supra* note 7, art. 74.

²³ HANS STOLL, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 558 (Peter Schlectriem ed., 1998) (emphasis added). The cited paragraphs, 2 and 3, introduce a section entitled “Basic Principle: Damages as Full Compensation.” The section commences with the statement that:

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

Id. at 553 (citations omitted).

“Full” has been defined as: “Containing all that can be held . . . ; containing a plentiful amount or number; or the maximum size, amount, extent or volume . . . ; complete or entire” THE LEXICON WEBSTER DICTIONARY, 393, v. 1 (1979). To the extent this definition is apt:

- Damages as full compensation for losses incurred, a basic principle of Article 74 CISG
- would seem to include (as a subset)
- compensation for (recovery of) losses incurred as legal fees prior to or during litigation by a successful plaintiff in a contractual dispute governed by the CISG pursuant to the substantive law provision of Article 74.

Recovery of such losses (as well as any other losses recoverable as damages under Article 74) is subject to the proviso that the other requirements of this Article would have to be satisfied. The requirements of Article 74 that are the most relevant to legal fees are:

The question whether attorneys' fees are a "loss" to which the full-compensation principle of Article 74 of CISG applies, and are therefore recoverable as damages for breach of contract governed by the CISG, has generated a healthy academic debate, especially following the district court's ruling in *Zapata*.

There is a divergence in scholarly opinion on this point. On the one hand, there is strong support for the position that the recovery of attorneys' fees does not fall within the scope of the CISG; rather, it is a matter for domestic procedural law.²⁴ On the other hand, the opposing view that attorneys' fees are properly recoverable as damages under Article 74 of the CISG by a successful plaintiff, as long as the other requirements of that provision are met, has also been expounded.²⁵

C. *Jurisprudence*

As long as the other requirements of Article 74 of the CISG are satisfied, the weight of authority of case law holds that dam-

-
- *Foreseeability*. The incurring of legal fees by the aggrieved party would have to be foreseeable as a possible consequence of the other party's breach of contract; and
 - *Mitigation*. In retaining counsel versus pursuit of rights in another manner, the aggrieved party would have to have taken such measures as are reasonable in the circumstances to mitigate the loss. Thus, the aggrieved party could only recover counsel fees as damages when, in the circumstances, it was reasonable for him to retain counsel; and where counsel is retained, counsel fees could only be allowable pursuant to Article 74 CISG in an amount that is reasonable, considering the circumstances of the case. Each case would thus have to be evaluated on its facts and merits.

²⁴ See Harry M. Flechtner, *Recovering Attorneys' Fees as Damages Under the UN Sales Convention: A Case Study on the New International Commercial Practice and the Role of Foreign Case Law in CISG Jurisprudence, With a Post-Script on Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 22 Nw. J. INT'L L. & BUS. (forthcoming 2002), <http://cisgw3.law.pace.edu/cisg/biblio/flechtner4.html>. See also J. Lookofsky, *Commentary: Zapata Hermanos v. Hearthside Baking*, 6 VINDOBONA J. INT'L COM. L & ARB. 27, 29 (2002), <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky5.html>.

²⁵ See John Felemegas, *The Award of Counsel's Fees Under Article 74 CISG, in Zapata Hermanos Sucesores v. Hearthside Baking Co.* (2001), 6 VINDOBONA J. INT'L COM. L & ARB. 29, 39 (2002), <http://cisgw3.law.pace.edu/cisg/biblio/felemegas1.html>. See generally Peter Schlechtriem, *Attorneys' Fees as Part of Damages*, 14 PACE INT'L L. REV. 205 (2002), <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem4.html>. Professor Schlechtriem discusses the reimbursement of counsel's fees as part of the consequential damages awarded under Article 74 of the CISG and points out that there are two limits imposed on such award, i.e., the two relevant rules found in the provisions of the Convention, *foreseeability* (Article 74 CISG) and *mitigation* (Article 77 CSIG). *Id.* at 208.

ages as *full compensation* for losses incurred is a basic principle of Article 74.²⁶

²⁶ There are numerous examples in the international case law where courts and arbitral tribunals in assessing and awarding damages under Article 74 of the CISG endorsed the concept of *full compensation*. They are as follows:

AUSTRIA: The Austrian Supreme Court has led the chorus of judicial statements favoring the principle of full compensation in assessing the damages awarded under Article 74 of the CISG. See Oberster Gerichtshof [Ob] [Supreme Court] 1 Ob 292/99v, 28 April 2000 (Aus.), <http://cisgw3.law.pace.edu/cases/000428a3.html>. This case concerns a contract for the sale of jewelry in which plaintiff, a German seller, brought an action against defendant, an Austrian buyer, claiming damages for non-performance and lost profit. *Id.* The buyer claimed a reduction in damages as the seller had not taken the reasonable measures to mitigate the loss. *Id.* The Austrian Supreme Court analyzed the operation of the CISG damages provisions in the following terms:

Under the second sentence of Art. 74, a claim for damages is *only limited* by the foreseeability of the loss for the party in breach. It is being said that loss of profit - the typical sales margin of the seller - is a damage that is foreseeable for a buyer who refuses to take delivery of the goods [. . .]. We concur in view of the above-mentioned literature and case law. As in Austrian law under §§ 920, 921 ABGB [Austrian Civil Code] the CISG enables the non-breaching party to calculate its loss 'concretely' by reference to a substitute transaction (Art. 75 CISG) or via an abstract calculation of loss by reference to the current price of the goods (Art. 76 CISG). However, neither Art. 75 nor Art. 76 excludes the possibility that, after the contract has been avoided, the promisee can calculate his damage for non-performance concretely according to the general rule under Art. 74 [. . .]. Where the party regularly concludes similar transactions, the abstract calculation of damages under Art. 76 CISG is excluded only if he identifies one of them as a specific substitute transaction [. . .]. Apart from the fact that the proceedings do not indicate the conclusion of such specific substitute transactions, [buyer's] objection that [seller] failed to mitigate the loss (Art. 77 CISG) is ineffective as far as the promisee, in performing the substitute transaction, would have lost another similar transaction bringing the same profit as the first transaction. In this case, the seller can assess his contractual interest according to the principle of *full reparation* by taking the difference between his own costs (i.e., the costs of acquisition or manufacture) and the contract price.

Id. (emphasis added)(references omitted).

A recent analysis of Austrian case law includes comments on the Supreme Court ruling quoted above. See Willibald Posch and Thomas Petz, *Austrian Cases on the UN Convention on Contracts for the International Sale of Goods*, 6 VINDOBONA J. INT'L COM. L & ARB. 1, 22-23 (2002). See also Oberster Gerichtshof [Ob] [Supreme Court] 6 Ob 311/99z, 9 Mar. 2000 (Aus.), <http://cisgw3.law.pace.edu/cases/000309a3.html>. The Supreme Court, in this case again, followed the wider approach of assessing damages under the CISG:

Failing an agreement to the contrary, Art. 45(1)(b) CISG excludes the application of national provisions for damages. The CISG follows the principle of *damages equal to the loss* suffered (Art. 74 CISG). The Convention provides more specific rules on the calculation of damages only in cases

where the contract is avoided following a breach of contract (Art. 75 CISG).

Id. (emphasis added) (references omitted).

Concerning this ruling of the Austrian Supreme Court, Posch and Petz note the following:

In its decision of 9 March 2000, the Austrian Supreme Court affirmed its decision of 6 February 1996 [*available at* <http://cisgw3.law.pace.edu/cases/960206a3.html>]. By doing so, the Court held with regard to damages under Article 74 CISG, that the Convention is based on the principle of *full compensation*, but only for cases in which, as a result of a breach of contractual obligations, a contract is declared void and where the methods of assessing damages are explicitly stated.

Willibald Posch and Thomas Petz, *Austrian Cases on the UN Convention on Contracts for the International Sale of Goods*, 6 VINDOBONA J. INT'L COM. L & ARB. 1, 22 (2002) (emphasis added).

See also Oberster Gerichtshof [Ob] [Supreme Court] 10 Ob 518/95, 6 Feb. 1996 (Aus.), <http://cisgw3.law.pace.edu/cases/960206a3.html>.

This case also offers an insight into the proper calculation of damages recoverable under Article 74 of the CISG:

[T]he [buyer's] damages in the present case have to be calculated in a way that is based on the existence and performance of the contract according to Art. 74 CISG. This may *include* the damages resulting from the delay of the delivery of the goods or from defects of the product, including loss of profit as *consequential* damages However, if the buyer loses profits, which [buyer] could have realized by reselling the goods had the seller not breached his obligations, the seller is only liable for this loss of profit if he had to reckon with the buyer's resale. In the case of the sale of commercial goods to a merchant, this can always be assumed without any further indications In addition, the [sellers] themselves admit that they knew that the [buyer] would sell the goods.

Id. (references omitted) (emphasis added).

The commentary by Posch and Petz on the 1996 ruling of the Supreme Court reads:

[This] is the leading case in the practice of the Austrian Supreme Court concerning Articles 74 *et seq.* CISG. In this context the Court held that the assessment of damages is determined by the 'foreseeability test' as provided by Article 74 CISG. Therefore, it is of significant importance for the assessment of damages what the loyal party may have *expected* at the time of the conclusion of the contract as result of the correct performance by the other party. Thus, damages for *all foreseeable loss, including loss of profits as well as consequential damages and damages for delayed performance*, are recoverable pursuant to Article 74 CISG.

Willibald Posch and Thomas Petz, *Austrian Cases on the UN Convention on Contracts for the International Sale of Goods*, 6 VINDOBONA J. INT'L COM. L & ARB. 1, 21-22 *op. cit.* (2002) (emphasis added).

FINLAND: Finnish courts also have acknowledged full compensation rather than narrower domestic concepts as the relevant method of assessing damages awarded under Article 74 of the CISG. See Helsingin Hovioikeus [Helsinki Court of Appeals] S 00/82, 26 Oct. 2000 (Fin.), <http://cisgw3.law.pace.edu/cases/001026f5.html>. The appellate court accepted the lower court's ruling on damages:

Consequently, [seller], in the manner described in and on the basis of the legal considerations of the judgment of the Court of First Instance, is under a duty to pay damages to [buyer] for loss resulting from liability to a third party, Company B.

Id.

The relevant excerpt from the ruling of the lower court, which was endorsed by the appellate court, reads:

- Damages: Law

[After reciting the text of Article 74 CISG, the court stated:]

In Finnish scholarly writings, the central form of damages is seen as compensation for positive contractual interest. The aim of this is to place the contracting party *in a position where he would have been if the contract had been duly performed*.

According to the Finnish Sale of Goods Act, damages for breach of contract consist of compensation for expenses, price differences, lost profit and other *direct and indirect* loss that resulted from the breach of contract. An indirect loss is a loss such as profit that has been lost because a contract with a third party has been avoided or has not been performed properly.

In contract law, damages as a concept has a *wider meaning* than in the Finnish Sale of Goods Act. Contract law knows *no general limitations as to types of loss*. A contracting party's liability for damages is seen as based on negligence. Additionally, there is a presumption of negligence which requires that a contracting party claiming damages must prove the existence of a contract and the coming about of a loss.

Id. (emphasis added).

GERMANY: German courts have long held that damages under Article 74 of the CISG are not limited to the loss of profit and rather cover the *total* loss resulting from non-performance by the party in breach. See Oberlandesgericht [OLG] [Provincial Court of Appeals] 1 U 31/99, 26 Nov. 1999 (F.R.G.), <http://cisgw3.law.pace.edu/cases/991126g1.html>.

The damages which [seller] must pay on the grounds of breach of contract are *not* limited to the lost profit under article 74 CISG, but fundamentally comprises the *total damages* caused by non-performance."

Id. (emphasis added). See also Amtsgericht [AG] [Petty District Court] 31 C 534/94, 23 June 1995 (F.R.G.), <http://cisgw3.law.pace.edu/cases/950623g1.html>.

The [buyer]'s claim for damages is based on Art. 74 CISG and encompasses *all of the loss* suffered by the [buyer] as a consequence of the [seller]'s breach.

Oberlandesgericht [OLG] [Provincial Court of Appeals] 1 U 31/99, 26 Nov. 1999 (F.R.G.), <http://cisgw3.law.pace.edu/cases/991126g1.html> (emphasis added).

Compensation of damages under Article 74 CISG includes all *reasonable* expenses incurred as a result of the breach.

See also Oberlandesgericht [OLG] [Provincial Court of Appeals] 27 U 58/96, 8 Jan. 1997 (F.R.G.), <http://cisgw3.law.pace.edu/cases/970108g1.html>.

Under Art. 74 CISG, 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. Costs incurred by reasonable efforts to mitigate the loss resulting from the breach may also be compensated It is sufficient for the compensation claim under Art. 74 CISG if the breach of contract forces the damaged party to incur expenses, and if

these expenses are *reasonable* Under German law, it is sufficient if a reasonable person in the position of the damaged party was entitled to assume that the expenses were *reasonable* The same is true in the application of Art. 74 CISG. Art. 74, para. 1, sent. 2, CISG *only restricts* the compensation in the way that 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. (emphasis added) (references omitted).

The German case law provides many examples of damages awards that include expenses incurred by the innocent party as a result of the breach.

See also Oberlandesgericht [OLG] [Provincial Court of Appeal] 2 U 27/99, 28 Oct. 1999 (F.R.G.), <http://cisgw3.law.pace.edu/cases/991028g1.html>.

The court provided further guidance for measuring damages under Article 74 of the CISG as loss suffered as consequence of breach – including expense for transportation, preservation and storage of the goods, additional loss of profit upon the resale of the deteriorated goods, as well as phone expenses relating to the necessary efforts by the [seller] to resell the goods. In the opinion of the appellate court, these losses represent additional expenditures which would not have been accrued had the contract concluded between the parties to this dispute been performed. The appellate court held that “[t]he Court of First Instance thus correctly included these *breach-induced costs* in the calculation of damages under Art. 74 CISG.”

Id. (emphasis added).

See also Oberlandesgericht [OLG] [Provincial Court of Appeal] 7 U 3771/97, 28 Jan. 1998 (F.R.G.), <http://cisgw3.law.pace.edu/cases/980128g1.html>. The appellate court allowed the seller's claim and held that the buyer was obliged to pay for the goods (Article 53 of the CISG). The award included damages for the reimbursement of seller's costs and bank charges relating to the dishonored check received from buyer (Articles 61 and 74 of the CISG). Financial expenses relating to higher than normal interest rate of credit may also be awarded under Article 74 of the CISG in order to compensate *fully* the losses suffered due to a breach of contract. *See also* Oberlandesgericht [OLG] [Appellate Court] 5 U 15/93, 18 Jan. 1994 (F.R.G.), <http://cisgw3.law.pace.edu/cases/940118g1.html>.

[I]t is not guaranteed that the domestic legal rate [of interest] *fully compensates* for . . . the advantage of non-payment and any other calculation of interest would erase the dividing line [between interest and] damages The practical disadvantage of eventually being obliged to investigate foreign law to calculate the interest has to be accepted because of the partial incompleteness of the Convention arising from unsettled disputes during the negotiation process Pursuant to Article 1284 Codice Civile [of Italy] . . . the interest rate amounts to 10% The [seller's] claim for default interest at an amount of 13.5% could not be awarded. CISG, Article 78 does not bar a claim for damages under CISG[] Article 74 to recover *additional loss* resulting from finance charges However, the [seller] has not shown evidence of any further loss caused by using credit

Id. (emphasis added)(references omitted).

UNITED STATES: The theory of awarding damages under Article 74 of the CISG as compensation of the *full* loss suffered by the innocent party has also been recognized by U.S. courts.

See *Delchi Carrier v. Rotorex*, 71 F.3d 1024 (2d Cir. 1995), <http://cisgw3.law.pace.edu/cases/951206u1.html>.

The Convention provides that a contract plaintiff may collect damages to *compensate for the full loss*. This includes, but is not limited to, lost profits, subject only to the familiar limitation that the breaching party must have foreseen, or should have foreseen, the loss as a probable consequence. CISG art. 74.

Id. at 1030 (citing *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854)). Note, however, that the Court's citation of *Hadley v. Baxendale* is problematic. See Citations to Comments on *Delchi Carrier v. Rotorex*, at <http://cisgw3.law.pace.edu/cases/951206u1.html#cabc>.

ARBITRAL TRIBUNALS: The principle of "full compensation" in the application of Article 74 of the CISG has also been recognized and applied in arbitral awards. See *FOB Rostock Case* (Aus. v. F.R.G.) Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitral Trib.] SCH 4318, 15 June 1994 (Aus.), <http://cisgw3.law.pace.edu/cases/940615a4.html>. See also *FOB Hamburg Case* (Aus. v. F.R.G.) Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitral Trib.] SCH 4366, 15 June 1994 (Aus.), <http://cisgw3.law.pace.edu/cases/940615a3.html>.

Professor Bonell, a leading CISG scholar, was the sole arbitrator in the above arbitral rulings and he held that "[o]ne of the general legal principles underlying the CISG is the requirement of 'full compensation' of the loss caused (cf. Art. 74 of the CISG)." *Id.* The concept of *full recovery* of all costs incurred due to the breach of contract is also supported by arbitral rulings of the Court of Arbitration of the International Chamber of Commerce.

See (Clothing Case) Int'l. Court Arb. 8786 (ICC Jan. 1997), <http://cisgw3.law.pace.edu/cases/978786i1.html>.

Art. 74 sentence one CISG which provides: Damages for breach of contract by one party consist of a sum equal to the loss of profit, suffered by the other party as a consequence of the breach Damages in the sense of Art. 74 CISG include compensation for suffered losses (*damnum emergens*) and, on the other hand, compensation for lost profits (*lucrum cessans*)

Id.

The arbitrator awarded the [buyer]'s claim for loss profits, indirect loss of profits, travel costs and design expenses on the basis that they were "reasonable." For a similarly wide approach to the calculation of a damages award under Art. 74 CISG, see *Electrical Appliance Plus Tooling Case* (Fr. v. Aus.), Int'l. Court Arb. 8769 (ICC Dec. 1996), <http://cisgw3.law.pace.edu/cases/968769i1.html>.

The Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry has also rendered relevant rulings, see (Russ. v. F.R.G.), Trib. of Int'l Comm. Arb. at the Russian Federation Chamber of Commerce and Industry, 38/1996, 28 Mar. 1997 (Russ.), <http://cisgw3.law.pace.edu/cases/970328r1.html>.

In that case, a seller received *full* reimbursement of a fine imposed on him by the Customs Authority as a result of the buyer's breach of the terms of payment under the contract as well as compensation for his traveling expenses incurred due to participation in the arbitration hearings (round trip to Moscow, hotel costs) as they were deemed "*reasonable*." See (Russ. v. F.R.G.), Trib. of Int'l Comm. Arb. at the Russian Federation Chamber of Commerce and Industry, 38/1996, 28 Mar. 1997 (Russ.), <http://cisgw3.law.pace.edu/cases/970328r1.html>.

There is international case law and arbitral support for recovery of losses incurred as legal fees prior to or during litigation by a successful plaintiff in a contractual dispute governed by the CISG pursuant to the substantive law provisions of Article 74, sometimes in combination with domestic procedural rules. Some of these decisions are discussed below.²⁷

The ruling of the court of first instance, United States District Court, in the *Zapata* case considered and adopted the rationale of the precedent; that attorneys' fees are recoverable under Article 74 of the CISG in the German jurisprudence pleaded by the plaintiff. The decision of the court of appeals reversing the decision of the district court made no reference at all to CISG jurisprudence.

1. Appellate Courts

#1. Oberlandesgericht [OLG] [Provincial Appellate Court] 17 U 146/93, 14 January 1994 (F.R.G.).²⁸

In that litigation, the plaintiff seller, an Italian shoe manufacturer, declared avoidance of a sales contract and demanded compensation for various damages – *inter alia*, damages for losses incurred as attorneys' fees – caused by the breach of contract committed by the defendant buyer, a German company.²⁹ The appellate court held that the plaintiff was entitled to avoid the contract under Article 72 of the CISG and consequently granted the successful plaintiff the rights provided in Articles 74 and 75 of the CISG.³⁰ However, the plaintiff's claim for attorney's fees was rejected.³¹

The English translation of the relevant part in the appellate court's decision, which deals with the recovery of attorneys' fees, reads:

It is true that Art. 74 CISG encompasses compensation for the cost of a reasonable pursuit of one's legal rights. However, the [seller]

²⁷ Professor Flechtner has also provided a thorough research and analysis of most of the case law discussed below in this commentary. See Flechtner, *supra* note 24.

²⁸ Oberlandesgericht [OLG] [Provincial Appeals Court] 17 U 146/93, 14 Jan. 1994 (F.R.G.), <http://cisgw3.law.pace.edu/cases/940114g1.html>.

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

is acting contrary to good faith if he claims the compensation of attorneys' fees from the [buyer], while the same attorney, whose fees the [seller] is seeking to recover, is requesting that his costs as a correspondence attorney (*Verkehrsanwalt*) are fixed as a cost of the current proceedings and are borne by the [buyer]. The avoidance of contract and the communication between the [seller] and his representing attorney in the present compensation proceedings regard the same matter in the meaning of §§ 13(2) and (5) and § 118(9) BRAGO. Therefore, the attorney is only allowed to demand one fee, the fee for his actions as a corresponding attorney.³²

The court clearly stated that attorneys' fees could be recovered as damages for breach of contract under Article 74 of the CISG.³³ However, in this particular case, recovery of attorney's fees was not allowed since it would lead to double compensation as the seller's attorney had also requested his costs, which is in the special procedure for fixing costs available under the German domestic procedural law.³⁴

#2. Oberlandesgericht [OLG] [Provincial Court of Appeals] 6 U 152/95, 11 July 1996 (F.R.G.).³⁵

There is no English translation of this case. However, the CLOUT abstract prepared by UNCITRAL³⁶ states that *the appellate court held that, under Articles 61(1)(b) and 74 of the CISG, the plaintiff, a German seller, could claim attorney's fees for a reminder that was sent to the defendant, an Italian buyer,*

³² *Id.* (emphasis added). The German term "*Verkehrsanwalt*" describes an attorney who does not deal wit (in this instance) pleading before a German Court. The abbreviation "BRAGO" [*Bundesrechtsanwaltsgebührenordnung*] refers to German Ordinance on Attorneys' Fees.

³³ See Oberlandesgericht [OLG] [Provincial Court of Appeals] 17 U 146/93, 14 Jan. 1994 (F.R.G.), <http://cisgw3.law.pace.edu/cases/940114g1.html>.

³⁴ See *id.*

³⁵ Oberlandesgericht [OLG] [Provincial Court of Appeals] 6 U 152/95, 11 Jul. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960711g1.html>.

³⁶ The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly of the United Nations in 1966. See G.A. Res. 2205 (XXI), U.N. GAOR, 21st Sess., Annex II, at 41-42, U.N. Doc. A/6394/Add.1/Add.2 (1966). The Secretariat of UNCITRAL is the International Trade Law Branch of the United Nations Office of Legal Affairs. It is located in Vienna, Austria. For the official website, visit UNCITRAL, at <http://www.uncitral.org>.

prior to the lawsuit.³⁷ The UNILEX³⁸ abstract of the case indicates that the court “awarded the seller the full legal costs it sustained, including the costs for the non judicial request of payment to the buyer.”³⁹

Further investigation made by Professor Flechtner of the original German text has revealed that “while the court awarded damages under the CISG Article 74 for attorneys’ fees charged for the seller’s pre-litigation notice, it also awarded the seller compensation for the litigation fees of its attorneys under the ‘loser-pays’ rule of the German Code of Civil procedure (as opposed to the damage provisions of the CISG).”⁴⁰

2. Commercial and Lower Courts

#3. Handelsgericht [HG] [Commercial Court] OR.97.00056, 19 December 1997 (Switz.).⁴¹

a) In this case, the plaintiff, a German seller, brought an action against the defendant, a Swiss buyer, for the purchase price, interest, and the seller’s legal costs. The court granted the seller’s claim of the purchase price and interest. The available English translation⁴² of the case reveals that *the plaintiff recovered as damages under Article 74 of the CISG the attorneys’ fees of lawyers in Germany and Switzerland incurred prior to as well as during the course of litigation.*⁴³

³⁷ See Oberlandesgericht [OLG] [Provincial Court of Appeals] 6 U 152/95, 11 July 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960711g1.html> (emphasis added).

³⁸ The Centre for Comparative and Foreign Law Studies in Rome maintains the UNILEX database, which provides a collection of case law and an international bibliography on the CISG. For a comment on UNILEX as a tool to promote the CISG’s uniform application, see Fabio Liguori, ‘UNILEX’: A Means to Promote Uniformity in the Application of CISG, in ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 600 (1996). For the importance of CLOUT, UNILEX and of other similar efforts concerning the development of CISG, see John Honnold, *The Sales Convention: From Idea to Practice*, in Symposium - Ten Years of the United Nations Sales Convention, 17 J. L. & Com. 181, 181-86 (1998), <http://cisgw3.law.pace.edu/cisg/biblio/honnold4.html>.

³⁹ Oberlandesgericht Dusseldorf, 11 July 1996, <http://www.unilex.info/case.cfm?pid=1&do=case&id=206&step=Abstract>.

⁴⁰ Flechtner, *supra* note 24.

⁴¹ Handelsgericht [HG] [Commercial Court] OR.97.00056, 19 Dec. 1997 (Switz.), <http://cisgw3.law.pace.edu/cases/971219s1.html>.

⁴² See *id.*

⁴³ See *id.*

b) In addition to the right to interest, 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 . . . [costs]⁴⁴ As the [seller] with place of business in Germany had to collect a debt from a debtor in Switzerland, hiring an attorney in Germany was justified.

Attorney . . . demands a fee of *DM* [Deutsche Mark] 868.80. Considering an amount in dispute of about *DM* 27,000, such a fee for pre-procedural services rendered seems in every way appropriate. This amount is to be awarded to the [seller].

c) The [seller] finally also demands pre-procedural costs of its current Swiss attorney in the amount of *Sf* [Swiss francs] 1,400.- plus costs for the letter of instruction and the payment order.

d) The costs of the current Swiss attorney of the [seller] are neither specified in detail nor unusually high. They are, therefore, according to general practice, to be considered in the final award regarding the parties' costs (Section 6(1) AnwT).

e) The costs of the letter of instruction of *Sf* 150.- are to be awarded to the [seller] according to Section 156 ZPO [= (*Schweizerisches*) *Zivilprozessrecht* = (Swiss) Code of Civil Procedure].⁴⁵

#4. Amtsgericht [AG] [Petty District Court] 31 C 534/94, 12 May 1995 (F.R.G.).⁴⁶

There is no English translation of this case. However, the CLOUT abstract informs that the plaintiff, an Italian seller, sent a reminder of payment prior to suing the defendant, a German buyer, for the purchase price and for the expenses of the reminder.⁴⁷ The court granted the plaintiff's claim under Arti-

⁴⁴ STOLL, *supra* note 23, at 561. The English-language edition of this text states that "since it is difficult to separate the extra judicial costs of pursuing rights from the costs of avoiding damage and in many legal systems no separation is made as regards costs of that type, it must be assumed that the recovery of such costs is a matter governed by the Convention's rules on damages (Article 7(2))." *Id.* A footnote to this statement cites District Court (*Landgericht*) Frankfurt 16 September 1991 for which an English abstract published by the Journal of Law and Commerce contains the statement that "[t]he losses that have to be compensated for under CISG, article 74 embrace expenses for appropriate legal proceedings" Landgericht [LG] [District Court] 3/11 03/91, 16 Sept. 1991 (F.R.G.), <http://cisgw3.law.pace.edu/cases/91096g1.html> (emphasis added).

⁴⁵ STOLL, *supra* note 23, at 561.

⁴⁶ See generally Amtsgericht [AG] [Petty District Court] 31 C 534/94, 12 May 1995 (F.R.G.), <http://cisgw3.law.pace.edu/cases/950512g1.html>.

⁴⁷ See *id.*

cle 53 of the CISG because the defendant had not fulfilled her obligation to pay the purchase price for the goods to the seller.⁴⁸ However, the court dismissed the claim relating to the costs for the reminder on the ground that "the seller had the possibility to entrust a German [advocate] with sending the reminder. When entrusting an Italian lawyer[,] the seller failed to take measures to mitigate the loss by virtue of Article 77 CISG."⁴⁹

The UNILEX abstract of the case also confirms that the court's reasoning for dismissing the plaintiff's claim to recover the Italian attorney's fees was based on the plaintiff's violation of the duty to mitigate the loss under Article 77 of the CISG. The court based its reasoning on the fact that the plaintiff requested payment through an Italian attorney rather than a German attorney who subsequently filed the suit.⁵⁰

The implication that may be deduced from the reasoning of the court is that the plaintiff would have recovered damages under the CISG if he had not violated the duty to mitigate. Nonetheless, the attorneys' fees incurred by the plaintiff during the litigation were awarded under the German Code of Civil Procedure.⁵¹

#5. Amtsgericht [AG] [Petty District Court] 11 C 4004/95, 29 January 1996 (F.R.G.).⁵²

There is no English translation of this case. The plaintiff, a Swiss seller, successfully claimed interest on the late installment payment of the purchase price by the defendant, a German buyer. The UNILEX abstract of the case informs that *the court also "awarded damages for the legal costs incurred by the seller (Art. 74 CISG)."*⁵³

Professor Flechtner's commentary on this case reveals that "the damage award was limited to pre-litigation attorneys' fees,

⁴⁸ See *id.*

⁴⁹ Amtsgericht [AG] [Petty District Court] 2 C 22/97, 13 Mar. 1997 (F.R.G.)<http://cisgw3.law.pace.edu/cisg/wais/db/cases/2/950512g1.html#unc>.

⁵⁰ See Amtsgericht Alsfeld, 13 Mar. 1997, <http://www.unilex.info/case.cfm?pid=1&do=case&id=146&step=Abstract>.

⁵¹ See Flechtner, *supra* note 24.

⁵² Amtsgericht [AG] [Petty District Court] 11 C 4004/95, 29 Jan. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960129g1.html>.

⁵³ Amtsgericht Augsburg, 19 Jan. 1996, <http://www.unilex.info/case.cfm?pid=1&do=case&id=228&step=Abstract> (emphasis added).

whereas compensation for attorneys' fees incurred during the course of litigation was awarded under the German loser-pays provision of the [German] Civil Procedure Code."⁵⁴

#6. Amtsgericht [AG] [Petty District Court] 2 C 22/97, 13 March 1997 (F.R.G.).⁵⁵

There is no English translation of this case. However, the case abstract prepared by UNCITRAL provides the following information about the case. The court held that costs incurred by the plaintiff, a Dutch seller, for debt collection from the defendant, a German buyer, are not covered under Article 74 of the CISG.⁵⁶ Although that claim for compensation of the debt collection costs was dismissed because the court found that the plaintiff failed to follow the most economical way, "*the court held that damages under article 74 CISG include court and lawyers fees.*"⁵⁷

#7. Amtsgericht [AG] [Petty District Court] 1 C 419/01, 11 April 2002 (F.R.G.).⁵⁸

The court granted a seller's claim to payment of the purchase price and also the attorney fees incurred in the litigation. The relevant part of the ruling states:

The seller is . . . entitled to payment of attorney[s'] fees in the amount of . . . under Arts. 64(1)(b), 74 sent. 1 CISG in connection with § 118(1) no. 2, § 12 BRAGO [German ordinance on attorneys' fees]. . . . [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 con-

⁵⁴ Flechtner, *supra* note 24.

⁵⁵ Amtsgericht [AG] [Petty District Court] 2 C 22/97, 13 Mar. 1997 (F.R.G.), <http://cisgw3.law.pace.edu/cases/970313g1.html>.

⁵⁶ *See id.*

⁵⁷ *Id.* (emphasis added).

⁵⁸ Amtsgericht [AG] [Petty District Court] 1 C 419/01, 11 Apr. 2002 (F.R.G.), <http://cisgw3.law.pace.edu/cases/020411g1.html>.

sultation fee under § 118(1) no. 2 BRAGO, which cannot be counted towards the litigation fee. . . .⁵⁹

3. *Arbitral Tribunals*

#8. Machinery for Production Line of Foamed Boards (Italy v. Finland), Int'l Comm. Arb. 7585 (ICC 1992).⁶⁰

The Court of Arbitration of the International Chamber of Commerce, in a dispute involving an Italian seller, claimant, and a Finnish buyer, respondent, approved the seller's declaration of avoidance and *the tribunal awarded damages including attorneys' fees to the successful claimant*.⁶¹ "Two categories of damages were claimed: [a] . . . damages for storage, care and maintenance of the non delivered machinery and costs and expenses (legal costs, arbitration); [b] . . . damages for loss of profit."⁶²

The arbitral tribunal awarded the first category of damages as foreseeable loss under Article 74 of the CISG, also noting the application of the duty to mitigate under Article 77 of the CISG.⁶³ The relevant part in the UNILEX full text⁶⁴ of the decision reads

Referring to these claims, Article 74 of the Vienna Sales Convention provides that '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.'

This article limits the amount of damages to the foreseeable loss. The claims under the present case are usual in situations of avoidance of a contract for breach of one party. They should therefore be considered as foreseeable and do not fall into the scope of the exclusion provided in the second sentence of Article 74 (which excludes non-foreseeable loss).

The first part of the claim (charges for storage . . . costs and expenses) belongs to the category of the well known Roman law *damnum emergens*.

⁵⁹ *Id.* (emphasis added).

⁶⁰ Machinery for Production Line of Foamed Boards (Italy v. Fin.), Int'l Comm. Arb. 7585 (ICC 1992), <http://cisgw3.law.pace.edu/cases/927585i1.html>.

⁶¹ *See id.* (emphasis added).

⁶² *Id.*

⁶³ *See id.*

⁶⁴ *See* ICC Court of Arbitration – Paris, 1992, <http://www.unilex.info/case.cfm?pid=1&do=case&id=134&step=FullText>.

The Convention, at Article 77 states that the 'party who relies on a breach of contract' has a duty 'to mitigate the loss, including loss of profit, resulting from the breach.'⁶⁵

#9. Chinese Goods (P.R.C. v. F.R.G.), Schiedsgericht der Handelskammer [Arbitral Trib.] Final Award, 21 June 1996.⁶⁶

In a dispute that arose out of a sales contract between the claimant, a Hong Kong seller, and the respondent, a German buyer, *the arbitral tribunal, in rendering its award on the costs of the proceedings, held that the seller could claim its attorney's fees for the arbitration proceedings based on an implied contractual term or, alternatively, as damages under Article 74 of the CISG in connection with Article 61 of the CISG.*⁶⁷

Independent of the decision based on procedural law, compensation for costs is also founded on civil law as damages for delay. This claim co-exists with the claim for the procedural compensation for the costs. [. . .] The claim for compensation for delay in the payment of goods is based on Art. 61(1) in connection with Art. 74 CISG.⁶⁸

4. *ULIS Case Law*

"The international character of the Convention should encourage courts to refer to the Convention's legislative history and prior instruments (i.e., the ULIS) in order to ascertain the most likely intent underlying the wording of a given provision."⁶⁹

⁶⁵ *Id.*

⁶⁶ Chinese Goods (P.R.C. v. F.R.G.), Schiedsgericht der Handelskammer [Arbitral Trib.] Final Award, 21 June 1996, <http://cisgw3.law.pace.edu/cases/960621g1.html>.

⁶⁷ *See id.*

⁶⁸ *Id.*

⁶⁹ Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, in *LEX MERCATORIA AND ARBITRATION* 188 (Thomas E. Carbonneau ed., rev. ed., 1998). Prior to the CISG, the relevant uniform law was to be found in ULIS (1964 Hague Convention). Article 82 of the ULIS was the source of Article 74 of the CISG. *See Secretariat Commentary on Article 70 of the 1978 Draft Convention [draft counterpart of Article 74 CISG]*, <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-74.html>. U.N. Doc. A/Conf.97/19 (1997). "ULIS Article 82 and CISG Article 74 are substantively identical. Therefore, ULIS Article 82 precedents may be relevant to the proper interpretation of CISG article 74." *Id.* *See also*

Selections from ULIS case law are presented below.

#10. Landgericht [LG] [District Court] 45 O 237/79, 10 June 1980 (F.R.G.).⁷⁰

The German court, in granting a Dutch seller's claim against a German buyer for payment of the unpaid purchase price and compensation for expenses accrued in employing a collection agency,⁷¹ made the following statement regarding the nature of the compensation for expenses incurred by the seller:

The [seller] is also entitled to compensation for collection expenses based on Article 82 [ULIS]. According to this provision the [seller's] loss resulting from the breach of contract is to be compensated. The principle of full compensation is applicable. This includes indirect losses. Expenses accrued in collecting an outstanding debt constitute such indirect damages, insofar as delay in payment was the reason for collection. This is the case in the present dispute.⁷²

The court also made the following statement regarding the extent of such expenses and the relevant legal principles underpinning recovery:

However, the extent of the collection expenses requires further examination. Such expenses are limited to damages that the party in breach ought to have foreseen at the time of the conclusion of the contract. The [buyer] could have foreseen at the time of the conclusion of the contract that non-payment would prompt the [seller] to seek collection of outstanding debts. Commissioning a Dutch collection agency suggested itself. In the present dispute,

Match-Up of Article 74 CISG and Article 82 ULIS, <http://cisgw3.law.pace.edu/cisg/text/matchup/matchup-u-74.html>. See also Albert H. Kritzer, *Editorial Remarks on the use of ULIS jurisprudence as an aid to interpreting the CISG*, <http://cisgw3.law.pace.edu/cases/800610g1.html#ce>, with references to F.A. Mann, *Uniform Statutes in English Law*, 99 LAW Q. REV. 382, 382-83 (1983) (in which Mann citing precedent "to the effect that where a term is used in one statute, a subsequent statute that incorporates the same term in a similar context must be construed so that the term is interpreted according to the meaning that has been previously assigned to it") Albert H. Kritzer, *Editorial Remarks on the use of ULIS jurisprudence as an aid to interpreting the CISG*, <http://cisgw3.law.pace.edu/cases/800610g1.html#ce>.

⁷⁰ Landgericht [LG] [District Court] 45 O 237/79, 10 June 1980 (F.R.G.), <http://cisgw3.law.pace.edu/cases/800610g1.html>.

⁷¹ See *id.*

⁷² *Id.*

it did not constitute a failure to mitigate damages on the part of the [seller] to employ a collection agency at his place of business. Consequently, the Court only needs to ascertain the amount of the collection costs.⁷³

Finally, the court stated its disapproval of the invocation and use of domestic legal principles and interpretative methodology in relation to the application of the uniform international law on damages under Article 82 of the ULIS:

The Court does not follow the [buyer's] opinion that the German national principle regarding collection fees should be applied. Under this principle, the compensable amount for employing a collection agency is limited by the official attorney fee for a request for payment. These judge-made German rules cannot automatically be applied to the determination of damages under Art. 82 ULIS, both for reasons of private international and material law.⁷⁴

#11. Landgericht [LG] [District Court] 3 HO 55/83, 3 June 1983 (F.R.G.).⁷⁵

In this litigation, which arose out of non-payment under an international contract of sale, the plaintiff, an Italian seller, brought a claim against the defendant, a German buyer, for payment of the purchase price, interest and damages. The relevant excerpt in the case presentation informs that

[a]side from the claim for interest, the Court also awarded the [seller] damages under Art. 82 ULIS for costs incurred by employing a collection agency. The court held that these expenses belonged to the costs to be compensated in cases of delayed payment 'which the [buyer] ought to have foreseen as a possible consequence of the breach at the time of the conclusion of the contract'⁷⁶

⁷³ *Id.*

⁷⁴ Landgericht [LG] [District Court] 45 O 237/79, 10 June 1980 (F.R.G.), <http://cisgw3.law.pace.edu/cisg/cases/800610g1.html>.

⁷⁵ Landgericht [LG] [District Court] 3 HO 55/83, 3 June 1983 (F.R.G.), <http://cisgw3.law.pace.edu/cases/830603g1.html>.

⁷⁶ *Id.*

V. CRITICISM OF THE SEVENTH CIRCUIT COURT OF APPEALS
RULING IN *ZAPATA*

The methodology followed by the Court of Appeals for the Seventh Circuit in the interpretation and application of the Convention is questionable on the following grounds.

A. *Interpretative Methodology*

1. *Prescribed Rules of Interpretation – Article 7 CISG*

The Convention comes with its own, built in interpretation guidelines in Article 7 that provides the rules and principles of interpretation and application of the Convention's provisions. Article 7 of the CISG states:

(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.⁷⁷

2. *Plain Meaning of the Language – Liberal and International Construction*

The mandate in Article 7(1) of the CISG, regarding the international character of the Convention, reflects the special nature of the CISG as a piece of legislation prepared and agreed upon at an international level. To maintain the Convention's independence from any domestic legal system entails an avoidance of resorting to rules and techniques traditionally followed in interpreting ordinary domestic legislation because they are unsuitable for the proper interpretation and development of a supranational animal such as the CISG. For instance, "in most common law countries domestic legislative instruments are tra-

⁷⁷ CISG, *supra* note 7, art. 7.

ditionally interpreted narrowly so as to limit their interference with the law developed through jurisprudence.”⁷⁸

The consequence of realizing the essence of the Convention’s international character and autonomy is that there should be no reason to adopt a narrow interpretation of the CISG.⁷⁹ In certain instances, American⁸⁰ and English⁸¹ courts have shown a willingness – and the ability to take a similar liberal approach when called to deal with other international Conventions.

The United States Court of Appeals for the Seventh Circuit in *Zapata* did not show such willingness. The court stated that:

[N]ot only is the question of attorneys’ fees not ‘expressly settled’ in the Convention, it is not even mentioned.⁸²

While it is a truism to state that the text of Article 74 of the CISG does not specifically mention “attorneys’ fees” as one of the relevant categories of loss recoverable as damages under the

⁷⁸ M.J. Bonell, *General provisions: Article 7*, in COMMENTARY ON INTERNATIONAL SALES LAW 72-73 (Bianca and Bonell eds., 1987).

⁷⁹ See *id.* at 78. Professor Bonell expresses support for this point in the preceding note. “Instead of sticking to its literal and grammatical meaning, courts are expected to take a much more liberal and flexible attitude and to look, wherever appropriate, to the underlying purposes and policies of individual provisions as well as of the Convention as a whole.” *Id.* See also Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods (CISG) - A Leap Forward Towards Unified International Sales Laws*, 12 PACE INT’L L. REV. 79, 105-06 (2000), <http://cisgw3.law.pace.edu/cisg/biblio/zeller3.html>.

⁸⁰ See, e.g., *Lisi v. Alitalia S.p.A.*, 370 F.2d 508 (2d Cir. 1966). See also *Day v. Trans World Airlines Inc.*, 528 F.2d 31 (2d Cir. 1975). Both cases addressed the Warsaw Convention on International Carriage by Air (1929). See also *Mitsui & Co. Ltd. v. American Export Lines Inc.*, 636 F.2d 807 (2d Cir. 1981) (addressing the Brussels Convention on Bills of Lading 1924).

⁸¹ See *Baltic Insurance Group v. Jordan Grand Prix Ltd.*, 2 A.C. 127 (H.L. 1998), <http://www.parliament.the-stationery-office.co.uk/pa/id199899/iddjudgmt/jd981216/baltic.htm> (Lord Steyn, speaking of the Brussels Convention (1968) stated “[T]he primary search must be for an objective and independent interpretation capable of accommodating the needs of a diversity of legal systems.”) *Id.* See also *Corocraft Ltd. v. Pan American World Airways Inc.*, 1 Q.B. 616 (C.A. 1969); *Fothergill v. Monarch Airlines*, 1981 A.C. 251 (H.L. 1981) (Both of these cases addressed the Warsaw Convention on International Carriage by Air of 1929); *The Hollandia*, 1 A.C. 565 (H.L. 1982) (which addressed the 1924 Brussels Convention on Bills of Lading); *Buchanan v. Babco Forwarding and Shipping*, Q.B. 208 (C.A. 1977); *Thermo Engineers Ltd. and Anhydro A/S v. Ferrymaster Ltd.*, 1 W.L.R. 1470 (Eng. 1981) (addressing the Geneva Convention on International Carriage by Road of 1956).

⁸² *Zapata Hermanos Sucesores*, 313 F.3d at 385-88.

CISG, it must be noted that the text does not expressly mention *any* category of loss – apart from “loss of profit.”⁸³ The nature of the provision in Article 74 of the CISG is inclusive, not exhaustive. Furthermore, the voluminous case law on Article 74 documents the fact that there are many different categories of loss recoverable as damages, none of which is specifically mentioned in the text of Article 74.⁸⁴ Thus, it is questionable whether it is proper for a court to single out one non-specific mention of a category of loss (in this case, “attorneys’ fees”) when the general approach of Article 74 of the CISG is not to specifically mention any of the categories of loss encompassed by its express language.⁸⁵

⁸³ “The specific reference to loss of profit is necessary because in some legal systems the concept of ‘loss’ standing alone does not include loss of profit.” *Secretariat Commentary on Article 70 of the 1978 Draft [draft counterpart of CISG Article 74]* Comment 3, at 14-66, U.N. Doc. A/Conf.97/19 (1997), <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-74.html>. It must be noted that, although the Secretariat Commentary is on the 1978 Draft of the CISG and not the Official CISG text, the commentary is the closest counterpart to an Official Commentary on the CISG and, thus, perhaps the most authoritative source on the CISG that one can cite. A match-up of corresponding Article of the 1978 Draft with the version adopted for the Official CISG text is necessary to assess the relevancy of the Secretariat Commentary to the interpretation of Article 74 CISG. This match-up indicates that Article 70 of the 1978 Draft and Article 74 CISG are substantively identical. See *Legislative history of CISG article 74: Match-up with 1978 Draft to assess relevance of Secretariat Commentary*, at <http://cisgw3.law.pace.edu/cisg/text/matchup/matchup-d-74.html>. Therefore, the Secretariat Commentary is relevant to the interpretation of Article 74 of the CISG.

⁸⁴ See addendum for citations to additional cases addressing Article 74 of the CISG. There is an ever-growing volume of Article 74 case law. For a current compilation of updated cases, see *Schedule of case and arbitral proceedings*, at <http://cisgw3.law.pace.edu/cisg/text/caselit.html>.

See also Secretariat Commentary, *supra* note 83, at Comment 4.

Since [A]rticle 70 [draft counterpart of CISG Article 74] is applicable to claims for damages by both the buyer and the seller and these claims might arise out of a wide range of situations, including claims for damages ancillary to a request that the party in breach perform the contract or to a declaration of avoidance of the contract, no specific rules have been set forth in [A]rticle 70 [draft counterpart of CISG Article 74] 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.

Id.

⁸⁵ The category of loss may vary depending on the particular obligation breached by the defendant.

See Handelsgericht [HG] [Commercial Court] HG 970238.1, 10 Feb. 1999 (Switz.), <http://cisgw3.law.pace.edu/cases/990210s1.html>.

3. CISG – UCC Comparative Approach: Challenges and Pitfalls

The court of appeals asserted certain rather questionable conclusions that are based on a comparative analysis between the CISG and American law:

Nevertheless it seems apparent that 'loss' does not include attorneys' fees incurred in the litigation of a suit for breach of contract, though certain pre-litigation legal expenditures, for example expenditures designed to mitigate the plaintiff's damages, would probably be covered as 'incidental' damages.

The court's reference to "incidental damages" is questionable and, arguably, misleading. "Incidental" damages are referred to, defined and distinguished from "consequential damages" in UCC Section 2-715. However, there is no mention of "*incidental* damages" in the CISG. Article 74 of the CISG refers specifically to "*consequential* damages":

Damages for breach of contract by one party consists of a sum equal to the loss, including loss of profit, suffered by the other party as a *consequence* of the breach⁸⁶

Although there are instances where the value of comparative analysis of broadly similar instruments may be insightful and thus beneficial for the difficult task of the interpreter, it must be noted that the CISG adopts a more general approach, while the UCC adopts a more specific approach. The UCC has provisions that are more situation-oriented, in comparison to the CISG that is more general-principle oriented.⁸⁷

In principle, the liability for damages is a liability for the guaranteed performance of the seller's obligations, which is independent of the seller's fault. In the meaning of this provision, 'obligations of the seller' are all obligations which the seller is subject to because of the specific legal transaction. They may result from an explicit provision or interpretation of the contract, from the supplementary provisions of the Convention as well as the relevant trade usages or the usages established between the parties.

Id.

⁸⁶ CISG *supra* note 7, art. 74.

⁸⁷ See Jacob S. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 9-5 (Nina M. Galston & Hans Smit eds., 1984) (where Professor Ziegel states that the

The language employed by the court perhaps reveals the reflexes of the American judges, their unconscious intellectual response, shaped and nurtured by their education and experience with domestic law, to the interpretative stimulus provided by the task of interpreting and applying an international treaty of uniform law. In effect, the Court of Appeals for the Seventh Circuit in *Zapata*, like a modern-day Procrustes, may be trying to fit the body of law that is the CISG onto the bed that is American legal heritage which, by design, does not fit.

A leading American CISG scholar discussed the essence of the intrinsically difficult task given to judges of common law heritage in interpreting the CISG. Citing Article 7 of the CISG, Professor John Honnold states:

[The CISG] presents a delicate balance between (1) developing the Convention's general principles and (2) recourse to domestic law — a choice that inevitably will be influenced by the traditions and mind-set of the tribunal. . . . [C]ivil law practice is generally hospitable to the first alternative and common law to the second. Which is more compatible with the objectives of the Convention? This writer, although nurtured in the common law has come to believe that international unification calls for us to re-examine our traditional approach.⁸⁸

In defense of the court of appeals, it should be recognized that it can be difficult for common law judges to make the appropriate changes to their approach as advocated by Honnold. As Honnold points out:

The Convention, *faute de mieux*, will often be applied by tribunal (judges or arbitrators) who will be intimately familiar only with their own domestic law. These tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation⁸⁹

However, regardless of this natural, ingrained tendency, the United States Constitution provides that international treaties

provisions of the Convention differ from those of the UCC in their "emphasis on broad statements of principle and general lack of situational setting.") *Id.*

⁸⁸ JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 156 (2d ed. 1991).

⁸⁹ JOHN O. HONNOLD, *DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES* 1 (1989).

are the "supreme law of the land,"⁹⁰ and therefore United States judges are obligated to read the uniform sales law provided in the CISG as it is written (not through the lens of their UCC) and to apply this law and its principles in the manner intended by its drafters.

The liberal and autonomous interpretation that is required when construing the CISG is not simply a consequence of the "international" characterization of the Convention, but also a necessary step towards achieving the objective of uniformity in the Convention's application as mandated in Article 7 CISG. Conversely, the "nationalization" of the uniform rules (*i.e.*, reliance upon domestic rules and techniques), would deprive the uniform law of its unifying effect.

4. *Consideration of International Jurisprudence*

Arguably the most effective means of achieving uniformity in the application of the CISG consists in having regard to the way it is interpreted in other countries.⁹¹ Thus, it is arguable that as a matter of principle and common sense, courts should, at least, consider the jurisprudence developed by foreign courts

⁹⁰ U.S. CONST. art VI., cl. 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding . . .

Id.

⁹¹ The tendency of national tribunals to apply law in accordance with ingrained national patterns was discussed at the Twelfth International Congress of Comparative Law (Sydney, Australia 1986). See John Honnold, *Methodology to Achieve Uniformity in Applying International Agreements, Examined in the Setting of the Uniform Law for International Sales Under the 1980 U.N. Convention 1986*, in REPORT TO THE TWELFTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW, Aug. 18-26, 1986 (Sydney & Melbourne, Australia) [General Report: Honnold; National Reports: Bonnell, Clarke, Cova Arria, Eörsi, Farrar, Horsmans. Kanda, Khoo, Maskow, Popow, Rajski, Samson, Schlechtriem, Sevón, Sutton, van der Velden, Ziegel]. See also Leif Sevón, *Method of Unification of Law for the International Sale of Goods, National Report: Finland (Topic I.C.1)*, 12th Congress, International Academy of Comparative Law, in THE FINNISH NATIONAL REPORTS TO THE TWELFTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 11-26 (Burre-Hägglund, ed. 1986); F.J.A. van der Velden, *Indications of the Interpretation by Dutch Courts of the United Nations Convention on Contracts for the International Sale of Goods 1980*, in NETHERLANDS REPORTS TO THE TWELFTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW-SYDNEY/MELBOURNE 1986, 21 (P. Gerver, E. Hondius, & G. Steenhoff, eds., 1987)

applying the CISG.⁹² The House of Lords' decision in *Fothergill v. Monarch Airlines*⁹³ and the United States decision in the case of *Air France v. Saks*⁹⁴ provide recognition of that point and support for such a desirable development.

An addendum to this commentary identifies two hundred seventy six case law references to interpretations of Article 74 of the CISG.⁹⁵ The list of Article 74 cases provided in the addendum includes rulings by courts of sister signatories of Australia, Austria, Belgium, Canada, China, Egypt, Finland, France, Germany, Hungary, Israel, Italy, Netherlands, Spain and Switzerland, as well as arbitral awards handed down under the auspices of institutes such as the International Chamber of Commerce and the Stockholm Chamber of Commerce.

The Court of Appeals for the Seventh Circuit in its *Zapata* opinion failed in its approach to the interpretation of the CISG because it did not evidence any attention at all to the several hundred available international cases⁹⁶ on Article 74 of the

⁹² For the necessity of having regard to other countries' decisions, see ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 108-09 (1989). See also JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES ¶ 92, at 95 (3d. ed 1999). "The Convention's requirement of regard for 'uniformity in its application' calls for tribunals to consider interpretations of the Convention established in other countries." *Id.* See Philip T. Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 LA. L. REV. 479 (2001). "[W]hen interpreting the Convention, a court should look to other courts' interpretations of the Convention, including the interpretation of courts from other countries." *Id.*

⁹³ 2 All E.R. 696 (1980).

⁹⁴ 470 U.S. 392 (1985).

⁹⁵ Of these cases, 140 are in English text or full-text English translation. To obtain these case texts – and other Article 74 case texts that have not yet been translated (English abstracts are available for most of them), see *Schedule for Country and Arbitral Proceedings*, at <http://cisgw3.law.pace.edu/cisg/text/casecit.html>.

The website maintained by the Pace Law School Institute of International Commercial Law at <http://cisgw3.law.pace.edu> provides an updated source of CISG-related information, including a bibliography on the CISG, extensive commentary on all of the CISG's articles and related materials, as well as case law presentations.

⁹⁶ In failing to cite international CISG case law, the Seventh Circuit Court of Appeals was in accord with an earlier United States Circuit Court of Appeals ruling on damages under Article 74 CISG. See *Delchi v. Rotorex*, 71 F.3d 1024, 1028 (2d Cir. 1995), <http://cisgw3.law.pace.edu/cases/951206i1.html>. The court explained by expressing its belief that "there is virtually no case law under the Convention." *Id.* The extent to which this belief has migrated to other United States courts is illustrated by similar statements by other, but not all, United States

CISG, citing solely United States domestic case law in support of the conclusion that “loss” does not include attorneys’ fees.

B. *Substantive Law v. Procedural Law*

The distinction drawn by the court of appeals between damages as *substantive law* provisions of the CISG and attorneys’

courts. United States district courts that have followed this decision are from the Second Circuit as well as other circuits. See *Helen Kaminski v. Marketing Australian Products*, 1997 WL 414137, at *3 (S.D.N.Y. July 23, 1997), <http://cisgw3.law.pace.edu/cases/970723u1.html> (stating “there is little to no case law on the CISG”) *Id.* See also *Calzaturificio Claudia v. Olivieri Footwear*, 1998 WL 164824, at *4 (S.D.N.Y. Apr. 6 1998), <http://cisw3.law.pace.edu/cases/980406u1.html> (“The case law interpreting the CISG is sparse . . . there is ‘little to no case law on the CISG’ . . .” *Id.* at *13 citing *Kaminski v. Marketing Australian Products*, 1997 WL 414137, at *8); *Mitchell Aircraft Spares v. European Aircraft Service*, 23 F. Supp. 2d 915 (N.D. Ill. 1998), <http://cisgw3.law.pace.edu/cases/981007u1.html> (“[t]here is virtually no case law under the Convention” *Id.* at 919); *Supermicro Computer v. Digitechnic*, 145 F. Supp. 2d 1147 (N.D. Cal. 2001), <http://cisgw3.law.pace.edu/cases/010130u1.html> (“[t]he case law interpreting and applying the CISG is sparse.” *Id.* at 1151). The belief by the Delchi court that “there is virtually no case law under the Convention” has been followed by another United States Circuit Court of Appeals. See *Schmitz-Werke v. Rockland*, 37 Fed. Appx. 687 (4th Cir. 2002), <http://cisgw3.law.pace.edu/cases/020621u1.html>. As recently as mid 2002, the United States Court of Appeals for the Fourth Circuit restated the belief that “case law interpreting the CISG is rather sparse.” *Id.* at 691. *International case law interpreting the CISG is not sparse* and, as to whether it should be examined and the manner in which it should be examined, the United States Supreme Court and, among others, scholars of sister signatories have stated respectively, “the opinions of our sister signatories [to an international convention] are to be entitled to considerable weight.” *Air France v. Saks*, 470 U.S. 392, 404 (1985). They are to be taken into account “in a comparative and critical manner” with the “integrative force of a judgment . . . based on the persuasive reasoning which the decisions of the court bring to bear on the problem at hand.” *Id.* (the case defines the word ‘accident’ as used in the Warsaw Convention). See Antonio Boggiano, *The Experience of Latin American States*, in *INTERNATIONAL UNIFORM LAW IN PRACTICE* 47 (1998). See also Juergen Schwarze, *The Role of the European Court of Justice (ECJ) in the Interpretation of Uniform Law among the Member States of the European Communities*, in *INTERNATIONAL UNIFORM LAW IN PRACTICE* 221 (1988). Judge Lief Sevón of Finland further states that a judge ought to be “obliged to search for and take into consideration foreign judgments . . . at least the judgments from other Contracting States, when he is faced with a problem of interpretation of an international convention.” Statement of Lief Sevón to the 3rd UNIDROIT International Congress (Sept. 7-10, 1987), in *INTERNATIONAL UNIFORM LAW IN PRACTICE* 135 (1988). For an examination of case law of sister signatories by an Italian court, which was decided during the United States circuit court and district court rulings cited previously, and is in accord with the jurisprudence of the United States Supreme Court’s *Air France* opinion and the doctrine of the cited scholars, see Tribunale di Vigevano [District Court] n. 405, 12 July 2000, <http://cisgw3.law.pace.edu/cases/000712i3.html>.

fees as domestic *procedural rules* finds strong support amongst some commentators.⁹⁷ However, the court employing that distinction, which arguably could be termed artificial or technical, to resolve the given dispute, does not offer any evaluation or analysis of the noteworthy arguments raised by commentators who urge attention to instances where the CISG, by its terms, purports to govern and resolve a matter, in lieu of settling that matter in accordance with domestic labels or characterizations.⁹⁸ The international juridical discourse necessary for the proper interpretation and application of the CISG was not furthered in this instance by the United States Court of Appeals for the Seventh Circuit.

C. *General Principles of the Convention v. Private International Law*

Article 7(2) of the CISG provides the gap-filling mechanism of the Convention. The first part of Article 7(2) states that gaps in the Convention are to be filled in conformity with the Convention's general principles. The second part of Article 7(2) of the CISG provides that, in the absence of general principles,

⁹⁷ See Flechtner, *supra* note 24. See also Lookofsky, *supra* note 24, at 275. *Contra* Felemegas, *supra* note 25, at 39.

⁹⁸ See John Honnold, *Uniform Law for International Sales - The 1980 United Nations Convention*, 18 ASIAN PACIFIC REGIONAL TRADE SEMINAR 195 (1984). "[T]he label that the state law bears should be irrelevant." *Id.* See also Warren Khoo, *Questions to be Covered by Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 48 (C. M. Bianca & M. J. Bonell eds., 1987).

The substance rather than the label or characterization of [the] . . . rule of domestic law determines whether it is displaced by the Convention. In determining [this], . . . the tribunal . . . should be guided by the provisions of Article 7, and give to the Convention the widest possible application consistent with its aim as a unifier of legal rules governing the relationship between parties to an international sale.

Id.

See also Chiara Giovannucci Orlandi, *Procedural law issues and law Conventions*, UNIFORM LAW REVIEW, Vol. V(1) 23, 23 (2000), <http://cisgw3.law.pace.edu/cisg/biblio/orlandi.html> (where the author states that "in interpreting international Conventions, all abstract distinctions between substantive and procedural laws become redundant, if not harmful, especially when the parties turn to the courts for equal enforcement of their contractual rights pursuant to these uniform bodies of rules") *Id.* at 25. In light of the CISG's mandate of uniformity, "[r]ecourse to the domestic procedural law must be the exception, not the rule." *Id.* at 29.

gaps must be filled “in conformity with the law applicable by virtue of the rules of private international law.”⁹⁹

The balance of scholarly opinion seems to be that recourse to the rules of private international law represents “a last resort to be used only if and to the extent that a solution cannot be found either by analogical application of specific provisions or by the application of ‘general principles’ underlying the uniform law as such.”¹⁰⁰

However, warnings have been issued against the danger of an abuse of the recourse to the rules of private international law during gap-filling in the CISG, since the gaps can too easily be filled by virtue of the rules of private international law. As one commentator has noted, “it is enough to state that no general principles can be found and therefore the only way out is to resort to private international law.”¹⁰¹

The court of appeals in *Zapata* declared that there were no general principles that could aid in resolving the question of whether attorneys’ fees may be awarded as damages under Article 74 of the CISG. This overruled the decision of the district court, which allowed the recovery of attorneys’ fees incurred by a successful litigant in a breach of contract governed by the CISG on the basis “that [seller] may be made whole for the damages and expenses it has been forced to bear due to [buyer’s] misconduct.”¹⁰²

While the CISG does not list the general principles on which it is based, it is possible to extract a number of those principles from the text of the CISG and from its legislative history.¹⁰³ In identifying these general principles, it should be kept in mind that the overall objective of the CISG, as stated in its Preamble, is to promote international trade by removing legal barriers that arise from different social, economic, and legal

⁹⁹ CISG, *supra* note 7, art. 7(2).

¹⁰⁰ Bonell, *supra* note 78, at 83.

¹⁰¹ Gyula Eörsi, *General Provisions*, in *INTERNATIONAL SALES: THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2-12* (Nina Galston and Hans Smit eds., 1984).

¹⁰² *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 2002 U.S. Dist. LEXIS 4656, *16 (N.D. Ill., Aug. 28, 2001), <http://cisgw3.law.pace.edu/cases/010828u1.html>.

¹⁰³ See *Report of the Working Group on the International Sale of Goods, First Session*, [1970] 1 U.N. Int’l. Trade Law Y.B. UNCITRAL176, 182 ¶ 59 (Jan. 5-16, 1970) U.N. Doc. A/SER.A/1970 (English version).

systems of the world.¹⁰⁴ The presence of and aggressive search for general principles can reduce the need to revert to domestic law and nationally divergent legal concepts' in construing specific CISG provisions. Thus, any issue that has not been expressly excluded by the CISG,¹⁰⁵ and which can be resolved by applying the general principles of the CISG, should be solved accordingly. A faithful application of Article 7 requires this interpretative approach. In this sense, the general principles provide a safety net, without which domestic law will be applied whenever the CISG has not expressly provided for the resolution of an issue, thus critically undermining the effectiveness of the CISG as a living uniform law by limiting its potential for development in the way it was intended.

It is submitted¹⁰⁶ that the district court's decision is in accord with one of the most fundamental general principles upon which the Convention is based: *full compensation*.¹⁰⁷

The text of Article 74 of the CISG¹⁰⁸ provides that a party injured by a breach of contract may recover as damages "a sum equal to the loss, including loss of profit, suffered . . . as a consequence of the breach."¹⁰⁹ The Secretariat Commentary makes it clear that "the basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed."¹¹⁰ However, since no specific rules have been set forth in Article 74 describing the appropriate method of determining "the loss," the court or arbitral tribunal "must calculate that loss in the manner which is best suited to the circumstances."¹¹¹

It is arguable that a party committing a breach of contract governed by the CISG ought to have foreseen that the other

¹⁰⁴ See CISG, *supra* note 7, pmb.

¹⁰⁵ See CISG, *supra* note 7, arts. 2-6.

¹⁰⁶ See Felemegas, *supra* note 25.

¹⁰⁷ There is strong academic support for the opinion that the rule in Article 74 expresses the principle of full compensation. "[T]he promisee has a right to be fully compensated for all *disadvantages* he suffers as a result of the promisor's breach of contract." STOLL, *supra* note 23, at 553.

See also relevant case law, *supra* Section 4(c), Jurisprudence.

¹⁰⁸ The language of Article 74 of the CISG should be read in conjunction with Articles 77 and 79 CISG, as well as in the context of the CISG as a whole.

¹⁰⁹ CISG, *supra* note 7, art. 74.

¹¹⁰ Secretariat Commentary, *supra* note 83, Comment 3.

¹¹¹ Secretariat Commentary, *supra* note 83, Comment 4.

party would incur attorneys' fees in pursuing the exercise of rights under the Convention.

The Secretariat Commentary also notes that "the principle of recovery of the full amount of damages suffered by the party not in breach is subject to an important limitation,"¹¹² foreseeability. The district court in *Zapata* relied on the plain language of the Convention, which provides that *all damages* incurred as *foreseeable consequential losses of a breach* of contract are *recoverable*.¹¹³ The district court's interpretation of the relevant provisions of the Convention was properly based on the "*normal unstrained reading of Article 74*" and the plain meaning of "*the language of the Convention without any inappropriate overlay from the American Rule.*"¹¹⁴

The court of appeals, however, distanced itself from that interpretative approach, found no applicable general principles, cited no CISG case law and relied on United States domestic case law in support of the conclusion that "loss" does not include attorneys' fees.¹¹⁵

D. *Anomalous Results*

The court of appeals in *Zapata* spoke of certain anomalies that could result if the term "loss" in Article 74 of the CISG included attorneys' fees, for instance, the uncertainty concerning the existence of corresponding rights of a successful defendant under the CISG as compared to the position under domestic procedural law.¹¹⁶ The court also contemplated whether, in certain cases, reliance on domestic procedural rules might be better for a successful plaintiff rather than reliance on the damages provision in Article 74 of the CISG (e.g., a successful plaintiff might be tempted to claim his attorneys' fees under a domestic procedural rule, which might not be subject to the limitation principles of foreseeability and mitigation of loss under the CISG).¹¹⁷

¹¹² Secretariat Commentary, *supra* note 83, Comment 8.

¹¹³ CISG, *supra* note 7, art. 74 (emphasis added).

¹¹⁴ *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 2002 U.S. Dist. LEXIS 4656, *9 (N.D. Ill., Aug. 28, 2001), <http://cisgw3.law.pace.edu/cases/010828u1.html> (emphasis added).

¹¹⁵ *See id.*

¹¹⁶ *See Zapata*, 2002 U.S. Dist. LEXIS 4656, at *11-12.

¹¹⁷ *See id.* at *13 (emphasis added).

However, these observations cannot by themselves provide a sound doctrinal ground for rejection of an interpretation, which in all other respects is in accord with the Convention's recommended interpretative methodology and Article 7 of the CISG mandates. Nonetheless, the point made by the court, that a successful defendant might not recover its attorneys' fees under Article 74 of the CISG on the basis that there was no breach of contract, merits further consideration. It should be noted that under the regime of the Convention the remedies for breach of contract are similar for both buyer and seller. If all the required conditions are fulfilled, the aggrieved party may require performance of the other party's obligations, claim damages, or avoid the contract. The remedies of the buyer for breach of contract by the seller are set forth in connection with the obligations of the seller¹¹⁸ and the remedies of the seller are set forth in connection with the obligations of the buyer.¹¹⁹ Other remedial provisions of the CISG are provided in Chapter V of Part III of the text, appropriately entitled "Provisions Common to the Obligations of the Seller and of the Buyer."¹²⁰ In the light of the structural and institutional equality enjoyed by the seller and the buyer under the CISG, it is reasonable¹²¹ to conclude that the drafters of the Convention would not have intended such a divergence in the result between sellers and buyers – plaintiffs and defendants. Based on such a premise, it is arguable that there exists a duty of loyalty to the contract, which would be breached by a party filing a suit for a breach of contract where a court later holds that party's suit to be lacking a proper foundation.

Under such a theory, breach of this contract duty by a party who brings an unsuccessful suit for breach of contract under the CISG would result in the innocent party (i.e., the successful defendant to the suit) being entitled to be compensated for any

¹¹⁸ See CISG, *supra* note 7, arts. 45-52, 74-77.

¹¹⁹ See CISG, *supra* note 7, arts. 61-65, 74-77.

¹²⁰ CISG, *supra* note 7, Part III, Ch. V.

¹²¹ For editorial comments on the concept of "reasonableness" as a general principle of interpretation of the Convention to be read into each article of the CISG whether or not specifically mentioned, see Albert H. Kritzer, *Reasonableness*, at <http://cisgw3.law.pace.edu/cisg/text/reason.html#over>. See also View of Commentators on References to Reasonableness in the CISG, at <http://cisgw3.law.pace.edu/cisg/text/reason.html#view> (for further references and confirming citations).

losses it suffered (i.e., its attorneys' fees) as damages under Article 74 of the CISG. In the sense of Article 7(2) of the CISG, such a general principle would be consistent with the general tenor of many other CISG provisions¹²² and restore the perceived inequality created between the parties in the context of the award of attorneys' fees. Furthermore, it is arguable that the principle of good faith in Article 7(1), as a tool of interpretation of the provisions of the Convention, would also support, or, at least, it would not prohibit such an interpretative development, that is the invocation of a general principle of loyalty¹²³ to the contract by the parties.

E. *International Judicial Interpretation v. Political Motivation*

Finally, after contemplating the possibility of the anomalies referred to above, the court of appeals in *Zapata* asked itself a rhetorical question of political rather than juridical content, which begs the question of the proper interpretation of the CISG:

¹²² See CISG, *supra* note 7, art. 77.

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Id.

See also CISG, *supra* note 7, arts. 85-88; art. 79 (impediment excusing a party from damages); art. 80 (failure of performance caused by the other party).

¹²³ For reference to "loyalty to the contract" as a general principle of the Convention by a leading jurist of a sister signatory to the UN Sales Convention, see Leif Sevón, *Method of Unification of Law for the International Sale of Goods, National Report: Finland (Topic I.C.1)*, in THE FINNISH NATIONAL REPORTS TO THE TWELFTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 11-26 (1985), cited by John O. Honnold, *Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice*, in EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONRECHT 139-40 (Peter Schlechtriem ed. 1987).

In Sevón's paper he discusses methods of implementation and the principles of interpretation of international Conventions from the Finnish perspective. In addition to mentioning loyalty to the contract as a general principle of the Convention, Sevón refers to the operation of Article 7 of the CISG and an interpretation that promotes uniformity in application of the Convention. See *id.* at 19-23. Sevón discusses in a positive light the practice of having regard to interpretations given in other Contracting States, to legal doctrine and to the legislative history of the Convention. See *id.* at 19-23.

[H]ow likely is it that the United States would have signed the Convention had it thought that in doing so it was abandoning the hallowed American rule?¹²⁴

The recoverability of counsel's fees by the successful litigant is consistent with the international norm.¹²⁵ The CISG is the uniform law of sales of all signatory States. If the proper interpretation of the Convention entailed that attorneys' fees is foreseeable consequential loss that may be recovered as damages for a breach of contract under the CISG, then the "hallowed American rule" could not be used to trump the provision of the Convention. It is submitted that the subject of the court's inquiries should have been the proper interpretation of the Convention, not the political motivation for the United States government's diplomatic action in ratifying the Convention.

VI. CONCLUSIONS

The decision of the United States Court of Appeals for the Seventh Circuit in the *Zapata* case is rather disappointing and it displays many of the symptoms associated with a narrow, national and, therefore, improper interpretation of the provisions of the Convention. Unfortunately, the court of appeals did not engage in the required, albeit difficult for reasons explained earlier in this paper – discourse of interpretation of the Convention according to the guidelines provided by the drafters in Article 7(1) and (2) of the CISG. The court of appeals paid no attention to the plain language of the Convention, failed to refer to international doctrine and jurisprudence, offered no analysis of the general principles of the Convention and exhibited a clear preference for the domestic classification and solution of the issue at stake.

The ruling of the court of appeals failed to provide a clear and proper doctrinal interpretation of the Convention and reversed the sound approach followed earlier by the district court in the *Zapata* litigation. According to the reasoning of the court of appeals, "loss" in Article 74 of the CISG does not include attorneys' fees either because the recovery of such costs is a proce-

¹²⁴ *Zapata*, 2002 U.S. Dist. LEXIS 4656, at *10.

¹²⁵ For a thorough analysis of the subject and an examination of the prevailing practice internationally, see generally John Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L. L. 1 (1999).

dural issue and thus outside the scope of the substantive law provisions of the Convention, or because the question, being a matter governed but not expressly settled by the Convention, should be settled in accordance with domestic law pursuant to the gap-filling operation of Article 7(2) of the CISG. Both lines of reasoning are fallacious. It is hoped that, should the opportunity arise, the United States Supreme Court would provide the appropriate jurisprudential leadership and sound doctrinal clarity necessary for the proper interpretation and application of the Convention's provisions.

ADDENDUM

Article 74 CISG – Case law

Source: Pace Law School Institute of
International Commercial Law

<http://cisgw3.law.pace.edu/cisg/text/caselit.html>

1. Zapata Hermanos Sucesores v. Hearthside Baking Co., 313 F.3d 385 (7th Cir. 2002),
<http://cisgw3.law.pace.edu/cases/021119u1.html>.
2. Oberlandesgericht [Appellate Court] 2 U 27/01, 26 July 2002 (F.R.G.), <http://cisgw3.law.pace.edu/cases/020726g1.html>.
3. Oberlandesgericht [Appellate Court] 10 O 5423/01, 1 July 2002 (F.R.G.), <http://cisgw3.law.pace.edu/cases/020701g1.html>.
4. (R.B.V. NV. V. J.V. BV.) Rechtbank can Koophandel [District Court] A.R. 01/1710, 22 May 2002 (Belg.),
<http://cisgw3.law.pace.edu/cases/020522b1.html>.
5. Hovratt [Appellate Court] 12 Apr. 2002 (Fin.) [translation available], <http://cisgw3.law.pace.edu/cases/020412f5.html>.
6. Amtsergericht [Petty District Court] 1 C 419/01, 11 Apr. 2002 (F.R.G.) [translation available],
<http://cisgw3.law.pace.edu/cases/020411g1.html>.
7. Zapata Hermanos Sucesores v. Hearthside Baking Co.,
<http://cisgw3.law.pace.edu/cases/020313u1.html>.
8. (Zapatos Mediterraneos SL v. Shoe Bizz B.V.B.A.) Rechtbank van Koophandel [District Court] A.R. 2671/01, 6 Mar. 2002 (Belg.), <http://cisgw3.law.pace.edu/cases/020306b1.html>.
9. Zapata Hermanos Sucesores v. Hearthside Baking Co.,
<http://cisgw3.law.pace.edu/cases/020212u1.html>.
10. Tribunal de commerce [District Court] R.G. no. 985/01, 15 Jan. 2002 (Belg.), <http://cisgw3.law.pace.edu/cases/020115b1.html>.
11. Bundesgerichtshof [Federal Supreme Court] VII ZR 304/00, 9 Jan. 2002 (F.R.G.) [translation available],
<http://cisgw3.law.pace.edu/cases/020109g1.html>.
12. Bundesgerichtshof [Federal Supreme Court] VII ZR 60/01 31 Oct. 2001 (F.R.G.) [translation available],
<http://cisgw3.law.pace.edu/cases/011031g1.html>.
13. Rechtbank can Koophandel [District Court] A.R. 3669/2000, 3 Oct. 2001 (Belg.),
<http://cisgw3.law.pace.edu/cases/011003b1.html>.
14. Landgericht [District Court] 12 HKO S593/01, 30 Aug. 2001 (F.R.G.), <http://cisgw3.law.pace.edu/cases/010830g1.html>.

15. Zapata Hermanos Sucesores v. Hearthside Baking Co., 2002 U.S. Dist. LEXIS 4656 (N.D. Ill., Aug. 28, 2001), <http://cisgw3.law.pace.edu/cases/010828u1.html>.
16. Landgericht [District Court] 21 O 703/01 (028), 30 July 2001 (F.R.G.), <http://cisgw3.law.pace.edu/cases/010730g1.html>.
17. Zapata Hermanos Sucesores v. Hearthside Baking Co., <http://cisgw3.law.pace.edu/cases/010718u1.html>.
18. (S.r.l.R.C. v. BV BA R.T.) Hof van Beroep [Appellate Court] 1997/AR/1554, 27 June 2001 (Belg.) [translation available], <http://cisgw3.law.pace.edu/cases/010627b1.html>.
19. (H v. D.) Rechtbank van Koophandel [District Court] A.R. 04576/00, 4 Apr. 2001 (Belg.), <http://cisgw3.law.pace.edu/cases/010404b1.html>.
20. Landergericht [District Court] 7 HKO 204/99, 29 Mar. 2001 (F.R.G.), <http://cisgw3.law.pace.edu/cases/010329g1.html>.
21. Helsingin hovioikeus [Helsinki Court of Appeals] S 00/82, 26 Oct. 2000 (Fin.) [translation available], <http://cisgw3.law.pace.edu/cases/001026f5.html>.
22. (FCF S.A. v. Adrafil Commerciale S.r.l.) Bundesgericht [Federal Supreme Court] 4C 105/2000] 15 Sept. 2000 (Switz.) [translation available], <http://cisgw3.law.pace.edu/cases/000915s1.html>.
23. (Rheinland Verscherungen v. S.r.l. Atlarex and Allianz subalpina S.p.A.) Tribunale [District Court] n. 405, 12 July 2000 (Italy) [translation available], <http://cisgw3.law.pace.edu/cases/000712i3.html>.
24. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 406/1998, 6 June 2000 (Russ.) [translation available], <http://cisgw3.law.pace.edu/cases/000606r1.html>.
25. Oberster Gerichtshof [Supreme Court] 1 Ob 292/99v, 28 Apr. 2000 (Aus.) [translation available], <http://cisgw3.law.pace.edu/cases/000428a3.html>.
26. Amtsgericht [Petty District Court] 49 C 502/00, 13 Apr. 2000 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/000413g1.html>.
27. Landgericht [District Court] 12 HKO 4174/99, 6 Apr. 2000 (F.R.G.), <http://cisgw3.law.pace.edu/cases/000406g1.html>.
28. (EMC v. C. de ABSL) Audencia Provincial [Appellate Court] 27 Mar. 2000 (Spain), <http://cisgw3.law.pace.edu/cases/000327s4.html>.
29. Oberster Gerichtshof [Supreme Court] 6 Ob 311/992, 9 Mar. 2000 (Aus.) [translation available], <http://cisgw3.law.pace.edu/cases/000309a3.html>.

30. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 54/1999, 24 Jan. 2000 (Russ.) [translation available], <http://cisgw3.law.pace.edu/cases/000124r1.html>.
31. (Tessile 21 S.r.l. v. Ixela S.A.) Tribunale [District Court] 29 Dec. 1999 (Italy) [translation available], <http://cisgw3.law.pace.edu/cases/991229i3.html>.
32. Oberlandesgericht [Provincial Court of Appeal] 2 U 2723/99, 27 Dec. 1999 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/991227g1.html>.
33. Landgericht [District Court] 89 O 20/99, 30 Nov. 1999 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/991130g1.html>.
34. Oberlandesgericht [Provincial Court of Appeal] 1 U 31/99, 26 Nov. 1999 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/991126g1.html>.
35. Veste Landsret [Western High Court] b-29-1998, 10 Nov. 1999 (Den.), <http://cisgw3.law.pace.edu/cases/991110d1.html>.
36. Oberlandesgericht [Provincial Court of Appeal] 2 U 27/99, 28 Oct. 1999 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/991028g1.html>.
37. (Ste. Calzados Magnanni v. SARL Shoes General Int'l.) Cour d'appel [Appellate Court] 21 Oct. 1999 (Fr.) [translation available], <http://cisgw3.law.pace.edu/cases/991021f1.html>.
38. Obergericht [Canton Appellate Court] 40-99160 (A15), 5 Oct. 1999 (Switz.) [translation available], <http://cisgw3.law.pace.edu/cases/991005s1.html>.
39. (Books) International Court of Arbitration [ICC] case 9083, Aug. 1999 [translation available], <http://cisgw3.law.pace.edu/cases/999083i1.html>.
40. (Goods) Tribunal of Int'l Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 302/1996, 27 July 1999 (Russ.) [translation available], <http://cisgw3.law.pace.edu/cases/990727r1.html>.
41. (Roller Bearings) International Court of Arbitration [ICC] case 9448, July 1999 [English text], <http://cisgw3.law.pace.edu/cases/999448i1.html>.
42. Oberster Gerichtshof [Supreme Court] 1 Ob 74/99k, 29 June 1999 (Aus.) [translation available], <http://cisgw3.law.pace.edu/cases/990629a3.html>.
43. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 238/1998, 7 June 1999 (Russ.) [translation available], <http://cisgw3.law.pace.edu/cases/990607r1.html>.

44. (S.A. Isocab France v. E.C.B.S.) Rechtbank van Koophandel [District Court] A.R. 1079/99, 2 June 1999 (Belg.), <http://cisgw3.law.pace.edu/cases/990602b1.html>.
45. (Coke) International Court of Arbitration [ICC] case 9187, June 1999 [English text], <http://cisgw3.law.pace.edu/cases/999187i1.html>.
46. (Vandermaesen Viswaren N.V. v. Euromar Seafood B.V.) Hof van beroep [Appellate Court] A.R. 3312/96, 18 May 1999 (Belg.), <http://cisgw3.law.pace.edu/cases/990518b1.html>.
47. Oberlandesgericht [Appellate Court] 9 U 146/98, 27 Apr. 1999 (F.R.G.), [translation available], <http://cisgw3.law.pace.edu/cases/990427g1.html>.
48. Bundesgerichtshof [Federal Supreme Court] VII ZR 121/98, 24 Mar. 1999 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/990324g1.html>.
49. Landgericht [District Court] 2 O 291/98, 24 Mar. 1999 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/990324g2.html>.
50. (Goods for Factory Construction Contract) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 227/1996, 22 Mar. 1999 (Russ.), <http://cisgw3.law.pace.edu/cases/990322r1.html>.
51. (Goods) International Court of Arbitration [ICC] case 9978, Mar. 1999 [English text], <http://cisgw3.law.pace.edu/cases/999978i1.html>.
52. Kantonsgericht [District Court] A3 1998 153, 25 Feb. 1999 (Switz.), <http://cisgw3.law.pace.edu/cases/990225s1.html>.
53. Handelsgericht [Commercial Court] HG 970238.1, 10 Feb. 1999 (Switz.) [translation available], <http://cisgw3.law.pace.edu/cases/990210s1.html>.
54. (SARL Ego Fruits v. Ste. La Verja Begasti) Cour d'appel [Appellate Court], 4 Feb. 1999 (Fr.) [translation available], <http://cisgw3.law.pace.edu/cases/990204f1.html>.
55. Oberlandesgericht [Appellate Court] 3 U 83/98, 13 Jan. 1999 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/990113g1.html>.
56. Oberster Gerichtshof [Supreme Court] 1 Ob 294/98m, 19 Jan. 1999 (Aus.), <http://cisgw3.law.pace.edu/cases/990119a3.html>.
57. (Cheese) Schiedsgericht Hamburger Freundschaftliche [Arbitral Tribunal] 29 Dec. 1998 (Czech. v. F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/981229g1.html>.
58. (Nova Tool Mold Inc. v. London Industries Inc.) Ontario Court General Division, 97-GD-41311 Windsor, 6 Dec. 1998 (Can.), <http://cisgw3.law.pace.edu/cases/981216c4.html>.

59. (Bielloni Castello S.p.A. v. EGO S.A.) Corte di Appello [Appellate Court] 11 Dec. 1998 (Italy) [translation available], <http://cisgw3.law.pace.edu/cases/981211i3.html>.
60. (M. v. N.V.M.) Rechtbank can Koophandel [District Court] 2 Dec. 1998 (Belg.), <http://cisgw3.law.pace.edu/cases/981202b1.html>.
61. Bundesgerichtshof [Federal Supreme Court] VIII 2R 259/97, 25 Nov. 1998 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/981125g1.html>.
62. Bezirksgericht [District Court] A 98/126, 5 Nov. 1998 (Switz.) [translation available], <http://cisgw3.law.pace.edu/cases/981105s1.html>.
63. (C.V.I.S. Trading v. B.V. Vadotex) Hof can beroep [Appellate Court] 1995/AR/1558, 4 Nov. 1998, <http://cisgw3.law.pace.edu/cases/981104b1.html>.
64. (E.K., L. und A. v. F.) Bundesgericht [Federal Supreme Court] 4C.179/1998/odi, 28 Oct. 1998, <http://cisgw3.law.pace.edu/cases/981028s1.html>.
65. Oberlandesgericht [Appellate Court] 12 U 62/97, 5 Oct. 1998 [translation available], <http://cisgw3.law.pace.edu/cases/981005g1.html>.
66. (A. S.p.A. v. E.S.AG) Handelsgericht [Commercial Court] HG 960527/0, 21 Sept. 1998, <http://cisgw3.law.pace.edu/cases/980921s1.html>.
67. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 131/1996, 14 Sept. 1998 (Russ.), <http://cisgw3.law.pace.edu/cases/980914r1.html>.
68. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 407/1996, 11 Sept. 1998 (Russ.), <http://cisgw3.law.pace.edu/cases/980911r1.html>.
69. Oberlandesgericht [Appellate Court] 3 U 246/97, 2 Sept. 1998 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/980902g1.html>.
70. Landgericht [District Court] 2 HKO 43/98, 29 Jul. 1998 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/980729g1.html>.
71. Oberlandesgericht [Provincial Court of Appeal] 8 U 1667/97, 26 May 1998 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/980526g1.html>.
72. Oberlandesgericht [Provincial Appellate Court] 8 U 46/97, 31 Mar. 1998 (F.R.G.), <http://cisgw3.law.pace.edu/cases/980331g1.html>.

73. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 160/1997, 5 Mar. 1998 (Russ.), <http://cisgw3.law.pace.edu/cases/980305r1.html>.
74. Oberster Gerichtshof [Supreme Court] 2 Ob 328/97t, 12 Feb. 1998 (Aus.) [translation available], <http://cisgw3.law.pace.edu/cases/980212a3.html>.
75. Oberlandesgericht [Appellate Court] 7 U 3771/97, 28 Jan. 1998 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/980128g1.html>.
76. (Flippe Christian v. SARL Dove & Sport Collections) Tribunal de commerce [District Court] 97009265, 19 Jan. 1998 [translation available], <http://cisgw3.law.pace.edu/cases/980119f1.html>.
77. Tribunale d'appello [Appellate Court] 12.97.00193, 15 Jan. 1998 (Switz.) [translation available], <http://cisgw3.law.pace.edu/cases/980115s1.html>.
78. (Steel Bars) Stockholm Chamber of Commerce [Arbitral Tribunal] award 107/1997, 1998 (Rus. V. Ger.) [English text], <http://cisgw3.law.pace.edu/cases/980107s5.html>.
79. Handelsgericht [Commercial Court] OR 97.00056, 19 Dec. 1997 (Switz.) [translation available], <http://cisgw3.law.pace.edu/cases/971219s1.html>.
80. (Societe Romay AG v. Societe Behr France SARL) Tribunal de commerce [District Court] 18 Dec. 1997 (Fr.) [translation available], <http://cisgw3.law.pace.edu/cases/971218f1.html>.
81. Ladnergericht [District Court] 3 0842/96, 11 Dec. 1997 (F.R.G.), <http://cisgw3.law.pace.edu/cases/971211g1.html>.
82. (Barley) Vienna Arbitration [Arbitral Tribunal] award s 2/97, 10 Dec. 1997 (Aus. v. Pol.), <http://cisgw3.law.pace.edu/cases/971210a3.html>.
83. (Food Products) International Court of Arbitration [ICC] case 8817, Dec. 1997 (Den. v. Spain) [translation available], <http://cisgw3.law.pace.edu/cases/978817i1.html>.
84. Landesgericht [District Court] 1 R 189/97d, 21 Oct. 1997 (Aus.), <http://cisgw3.law.pace.edu/cases/971021a3.html>.
85. Landesgericht [District Court] 22 O 90/97, 15 Oct. 1997 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/971015g1.html>.
86. Gerechtshof [Appellate Court] 1034/95/BR, 2 Oct. 1997 (Neth.), <http://cisgw3.law.pace.edu/cases/971002n1.html>.
87. Handelsgericht [Commercial Court] OR 96.0-0013, 26 Sept. 1997 (Switz.), <http://cisgw3.law.pace.edu/cases/970926s1.html>.
88. Landergericht [District Court] 3 KfH 0653/93, 15 Sept. 1997 (F.R.G.), <http://cisgw3.law.pace.edu/cases/970915g1.html>.

89. (Glass Commodities) International Court of Arbitration [ICC] case 8962, Sept. 1997 [English text], <http://cisgw3.law.pace.edu/cases/978962i1.html>.
90. Oberlandesgericht [Provincial Court of Appeal] 18 U 121/97, 21 Aug. (F.R.G.), <http://cisgw3.law.pace.edu/cases/970821g1.html>.
91. Landgericht [District Court] 7 III O 25/96, 18 Jul. 1997 (F.R.G.), <http://cisgw3.law.pace.edu/cases/970718g1.html>.
92. Oberlandesgericht [Provincial Court of Appeal] 7 U 2246/97, 9 July 1997 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/970709g2.html>.
93. Bundesgerichtshof [Federal Supreme Court] VIII ZR 300/96, 25 June 1997 (F.R.G.), <http://cisgw3.law.pace.edu/cases/970625g2.html>.
94. Audiencia Provincial [Appellate Court] 755/95-C, 20 June 1997 (Spain) [translation available], <http://cisgw3.law.pace.edu/cases/970620s4.html>.
95. Landgericht [District Court] 6 O 307/96, 6 June 1997 (F.R.G.), <http://cisgw3.law.pace.edu/cases/970606g1.html>.
96. (Alpha v. Premjee) Arrondissementsrechtbank [District Court] 2149/95, 22 May 1997, <http://cisgw3.law.pace.edu/cases/970522n1.html>.
97. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 3/1996, 13 May 1997 (Can. v. Russ.) [translation available], <http://cisgw3.law.pace.edu/cases/970513r1.html>.
98. Arbitration of Chamber of Comm. and Indus. of Budapest [Arbitral Tribunal] award Vb 96036, 8 May 1997 (Hun. v. Italy), <http://cisgw3.law.pace.edu/cases/970508h1.html>.
99. Landgericht [District Court] 16 HKO 24030/96, 6 May 1997, <http://cisgw3.law.pace.edu/cases/970506g1.html>.
100. Oberlandesgericht [Appellate Court] 6 U 87/96, 24 Apr. 1997, <http://cisgw3.law.pace.edu/cases/970424g1.html>.
101. (Celli S.p.A. v. Agrolang BV) Gerechtshof [Appellate Court] 95/570, 15 Apr. 1997, <http://cisgw3.law.pace.edu/cases/970415n1.html>.
102. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 38/1996, 28 Mar. 1997 (Russ. v. F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/970328r1.html>.
103. (Moulinages Poizat v. Filinter) Tribunal [District Court] c/ 21501/96-10, 14 Mar. 1997 (Switz.), <http://cisgw3.law.pace.edu/cases/970314s1.html>.
104. Amtsgericht [Petty District Court] 2 C 22/97, 13 Mar. 1997 (F.R.G.), <http://cisgw3.law.pace.edu/cases/970313g1.html>.

105. Bezirksgericht [District Court] T 171/95, 20 Feb. 1997 (Switz.) [translation available], <http://cisgw3.law.pace.edu/cases/970220s1.html>.
106. Handelsgericht [Commercial Court] HG 95 0347, 5 Feb. 1997 (Switz.), <http://cisgw3.law.pace.edu/cases/970205s1.html>.
107. (Goods) International Court of Arbitration [ICC] case 8716, Feb. 1997 [English text], <http://cisgw3.law.pace.edu/cases/978716i1.html>.
108. Oberlandesgericht [Appellate Court] 2 U 31/96, 31 Jan. 1997 (F.R.G.), <http://cisgw3.law.pace.edu/cases/970131g1.html>.
109. (C. & M. S.r.l. v. D.Bankintzopoulos & O.E.) Pretura [District Court of First Instance] 30 Jan. 1997 (Italy v. Greece) [translation available], <http://cisgw3.law.pace.edu/cases/970130i3.html>.
110. (Butter) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 155/1996, 22 Jan. 1997 (F.R.G. v. Russ.), <http://cisgw3.law.pace.edu/cases/970122r1.html>.
111. (Epsilon BVBA v. Interneon Valkenswaard BV) Rechtbank can Koophandel [District Court] A.R. 1972/96, 21 Jan. 1997 (Belg.), <http://cisgw3.law.pace.edu/cases/970121b1.html>.
112. Oberlandesgericht [Appellate Court] 27 U 58/96, 8 Jan. 1997 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/970108g1.html>.
113. Landgericht [District Court] 6 O 110/96, 8 Jan. 1997 (F.R.G.), <http://cisgw3.law.pace.edu/cases/970108g2.html>.
114. Obergericht [Appellate Court] 11 95 123/357, 8 Jan. 1997 (Switz.) [translation available], <http://cisgw3.law.pace.edu/cases/970108s1.html>.
115. (Clothing) International Court of Arbitration [ICC] case 8786, Jan. 1997 [English text], <http://cisgw3.law.pace.edu/cases/978786i1.html>.
116. (Industrial Equipment) International Court of Arbitration [ICC] case 8611/HV/JK, 1997 (F.R.G. v. Spain) [translation available], <http://cisgw3.law.pace.edu/cases/978611i1.html>.
117. Landgericht [District Court] 6 O 307/96, 12 Dec. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/961212g1.html>.
118. Landgericht [District Court] 14 HKO 3315/96, 9 Dec. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/961209g1.html>.
119. (Electrical Appliances Plus Tooling) International Court of Arbitration [ICC] case 8769, Dec. 1996 (Fr. v. Austria) [English text], <http://cisgw3.law.pace.edu/cases/968769i1.html>.
120. (Societe Karl Schreiber GmbH v. Societe Thermo Dynamique Service et autres) Cour d'appel [Appellate Court] 94118531, 21

- Nov. 1996 (Fr.) [translation available],
<http://cisgw3.law.pace.edu/cases/961121f1.html>.
121. (Biesbrouck v. Hulzer Export BV) Arrondissementsrechtbank [District Court] 95-3590, 21 Nov. 1996,
<http://cisgw3.law.pace.edu/cases/961121n1.html>.
122. Amtsgericht [Lower Court] 16 C 1056196, 12 Nov. 1996 (F.R.G.) [translation available],
<http://cisgw3.law.pace.edu/cases/961112g1.html>.
123. Karakaoikeus [District Court] 95/3214, 5 Nov. 1996 (Fin.) [translation available],
<http://cisgw3.law.pace.edu/cases/961105f5.html>.
124. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 309/1995, 1 Nov. 1996 (Russ. v. F.R.G.),
<http://cisgw3.law.pace.edu/cases/961101r1.html>.
125. (Scea.Gaec des Beauches B. Bruno v. Societe Tesotes Eisen GmbH & Co.) Cour d'appel [Appellate Court] 94/3859, 23 Oct. 1996 (Fr.) [translation available],
<http://cisgw3.law.pace.edu/cases/961023f1.html>.
126. (Nargon S.r.l. v. NV Sadelco) Rechtbank can Koophandel [District Court] A.R. 975/96, 9 Oct. 1996 (Belg.),
<http://cisgw3.law.pace.edu/cases/961009b1.html>.
127. (Vandermaesen Viswaren NV v. Euromar Seafood BV) Rechtbank van Koophandel [District Court] A.R. 975/96, 8 Oct. 1996 (Belg.), <http://cisgw3.law.pace.edu/cases/961008b1.html>.
128. Landgericht [District Court] 037/96 KfHII, 2 Oct. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/961002g1.html>.
129. Nor. V. Nor (Russian Coal) International Court of Arbitration [ICC] case 8740, Oct. 1996 [English text],
<http://cisgw3.law.pace.edu/cases/968740i1.html>.
130. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 433/1994, 26 Sept. 1996 (Russ. v. Den.) [translation available],
<http://cisgw3.law.pace.edu/cases/960926r1.html>.
131. Oberlandesgericht [Appellate Court] 17 U 18/96, 13 Sept. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960913g1.html>.
132. (Foodstuff) Schiedsgericht der Handelskammer [Arbitral Tribunal] 4 Sept. 1996 (F.R.G. v. Liech.) [translation available (excerpt)], <http://cisgw3.law.pace.edu/cases/960904g1.html>.
133. (Metal Concentrate) International Court of Arbitration [ICC] case 8574, Sept. 1996 [English text],
<http://cisgw3.law.pace.edu/cases/968574i1.html>.

134. Landgericht [District Court] 12 O 120/95, 2 Aug. 1996 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/960802g1.html>.
135. Oberlandesgericht [Appellate Court] 6 U 152/95, 11 July 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960711g1.html>.
136. Handelsgericht [Commercial Court] HG 940513, 10 July 1996 (Switz.), <http://cisgw3.law.pace.edu/cases/960710s1.html>.
137. Landgericht [District Court] 7 O 147/94, 25 June 1996 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/960625g1.html>.
138. (Chinese Goods) Schiedsgericht der Handelskammer [Arbitral Tribunal] final award, 21 June 1996 (H.K. v. F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/960721g1.html>.
139. (Roberto Catinari & Oval do Raccosta v. Florencemoda GmH) Landgericht [District Court] 417 O 165/95, 17 June 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960617g1.html>.
140. (Rus v. Argentina & Hungary Aluminum) Zurich Chamber of Commerce [Arbitral Tribunal] ZHK 273/1995, 31 May 1996 (Switz.) [English text], <http://cisgw3.law.pace.edu/cases/960531s1.html>.
141. Oberlandesgericht [Appellate Court] 22 U 4/96, 21 May 1996 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/960521g1.html>.
142. (Tess Design v. Santoso) Arrondissementsrechtbank [District Court] H94.1364, 15 May 1996 (Neth.), <http://cisgw3.law.pace.edu/cases/960515n1.html>.
143. Landgericht [District Court] 43 O 70/95, 19 Apr. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960419g1.html>.
144. (Chinese Goods) Schiedsgericht der Handelskammer [Arbitral Tribunal] Partial Award, 21 Mar. 1996 (H.K. v. F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/960321g1.html>.
145. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 166/1996, 12 Mar. 1996 Arbitration award 166/1996 [translation available], <http://cisgw3.law.pace.edu/cases/960312r2.html>.
146. Tribunal Cantonal [Canton Appellate Court] 01 93 0661, 11 Mar. 1996 (Switz.), <http://cisgw3.law.pace.edu/cases/960311s1.html>.
147. Tribunal Cantonal [Canton Appellate Court] 01 93 1061, 11 Mar. 1996 (Switz.) [translation available], <http://cisgw3.law.pace.edu/cases/960311s2.html>.
148. Landgericht [District Court] 36 O 178/95, 5 Mar. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960305g1.html>.

149. Landgericht [District Court] 12 O 2943/94, 28 Feb. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960228g1.html>.
150. Landgericht [District Court] 11 O 4187/95, 15 Feb. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960215g1.html>.
151. Landgericht [District Court] 11 O 4187/95, 15 Feb. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960215g2.html>.
152. Oberster Gerichtshof [Supreme Court] 10 Ob 518/95, 6 Feb. 1996 (Aus.) [translation available], <http://cisgw3.law.pace.edu/cases/960206a3.html>.
153. Amtsgericht [Petty District Court] 11 C 4187/95, 29 Jan. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960129g1.html>.
154. Landgericht [District Court] 12 HKO 2648/95, 25 Jan. 1996 (F.R.G.), <http://cisgw3.law.pace.edu/cases/960125g1.html>.
155. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 40/1995, 22 Jan. 1996 (Russ. v. U.K.) [translation available], <http://cisgw3.law.pace.edu/cases/960122r1.html>.
156. Landgericht [District Court] 12 O 160/93, 19 Dec. 1995 (F.R.G.), <http://cisgw3.law.pace.edu/cases/951219g1.html>.
157. Delchi Carrier v. Rotorex (2d Cir. 1995), <http://cisgw3.law.pace.edu/cases/951206u1.html>.
158. (Waste Containers) Arb. Ct. of the Chamber of Comm. and Indus. of Budapest, [Arbitral Tribunal] case Vb 9413, 5 Dec. 1995 (Hun. v. Aus.) [translation available], <http://cisgw3.law.pace.edu/cases/951205h1.html>.
159. (Goods) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 22/1995, 1 Dec. 1995 (Russ. v. Cyprus), <http://cisgw3.law.pace.edu/cases/951201r2.html>.
160. (Meat) Kantonsgericht [District Court] 30 Nov. 1995 (F.R.G. v. Switz.), <http://cisgw3.law.pace.edu/cases/951130s1.html>.
161. Landgericht [District Court] 5 O 189/94, 16 Nov. 1995 (F.R.G.), <http://cisgw3.law.pace.edu/cases/951116g1.html>.
162. (SA. A.t. v. NVB.) Rechtbank can Koophandel [District Court] 18 Oct. 1995 (Fr. v. Belg.), <http://cisgw3.law.pace.edu/cases/951018b1.html>.
163. Landgericht [District Court] 7 HO 78/95, 12 Oct. 1995 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/951012g1.html>.
164. Landgericht [District Court] 11 Oct. 1995 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/951110g1.html>.
165. Oberlandesgericht [Appellate Court] 11 R 24/95-27, 5 Oct. 1995 (Aust.), <http://cisgw3.law.pace.edu/cases/951005a3.html>.

166. Cairo Chamber of Commerce & Industry [Arbitral Tribunal] 50/1994, 3 Oct. 1995 (Egypt) [translation available], <http://cisgw3.law.pace.edu/cases/951003e1.html>.
167. Handelsgericht [Commercial Court] HG 930476, 21 Sept. 1995 (Switz.), <http://cisgw3.law.pace.edu/cases/950921s1.html>.
168. (Skandinaviska Meterno AB v. Hunan Co. for International Economy & Trade) Chansha Intermediate People's Court Economic Chamber, 8 Sept. 1995 (P.R.C. v. Swed.), <http://cisgw3.law.pace.edu/cases/950918c1.html>.
169. Landgericht [District Court] 1 KfH 0 32/95, 21 Aug. 1995 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/950821g2.html>.
170. Oberlandesgericht [Appellate Court] 1 U 247/94, 27 July 1995 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/950727g1.html>.
171. Landericht [District Court] 41 0 111/95, 20 July 1995 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/950720g1.html>.
172. Amtsgericht [Lower Court] 271 C 189 68/94, 23 June 1995 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/950623g1.html>.
173. Oberlandesgericht [Appellate Court] 11 U 191/94, 9 June 1995 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/950609g1.html>.
174. Landgericht [District Court] 21 023363194, 29 May 1995 (F.R.G.), <http://cisgw3.law.pace.edu/cases/950529g1.html>.
175. Oberlandesgericht [Appellate Court] 1R 64/95-34, 3 May 1995 (Aust.), <http://cisgw3.law.pace.edu/cases/950523a3.html>.
176. Oberlandesgericht [Appellate Court] 5 U 209/94, 23 May 1995 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/950523g1.html>.
177. Amtsgericht [Petty District Court] 31 C 534/94, 12 May 1995 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/950512g1.html>.
178. (Vital Berry Marketing NV v. Dira Frost NV) Rechtbank can Koophandel [District Court] A.R. 1849/94, 4205/94, 2 May 1995 (Belg.), <http://cisgw3.law.pace.edu/cases/950502b1>.
179. (Benetton I) Landgericht [District Court] 12 0 4366/94, 2 May 1995 (F.R.G.), <http://cisgw3.law.pace.edu/cases/950502g1.html>.
180. (Roder Zelt-und Hallenkons truktionen GmbH v. Rosedown Party Pty Ltd et al) [Federal South Australian District Court] SG 3076 of 1993 Fed. No. 275/95, 28 Apr. 1995 (Austl.), <http://cisgw3.law.pace.edu/cases/950428a2.html>.

181. Handelsgericht [Commercial Court] HG 920670, 26 Apr. 1995 (Switz.), <http://cisgw3.law.pace.edu/cases/950426s1.html>.
182. (Trucks) Tribunal of Int'l. Comm. Arb. at Russ. Fed. Chamber of Comm. and Indus. [Arbitral Tribunal] award 142/1994 74A, 25 Apr. 1995 (Czech v. Russ.), <http://cisgw3.law.pace.edu/cases/950425r2.html>.
183. Landgericht [District Court] 54 0644/94, 5 Apr. 1995 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/950405g1.html>.
184. Landgericht [District Court] 10 HKO 23750/94, 20 Mar. 1995 (F.R.G.) [translation available], <http://cisgw3.law.pace.edu/cases/950320g1.html>.
185. Russia 16 March 1995 Arbitration award 155/1994, <http://cisgw3.law.pace.edu/cases/950316r1.html>.
186. Germany 8 March 1995 *Amtsgericht* [Lower Court] Wangen, <http://cisgw3.law.pace.edu/cases/950308g2.html>.
187. Russia 3 March 1995 Arbitration award 304/1993 [translation available], <http://cisgw3.law.pace.edu/cases/950303r1.html>.
188. Netherlands 1 March 1995 *Arrondissementsrechtbank* [District Court] Zwolle, <http://cisgw3.law.pace.edu/cases/950301n2.html>.
189. ICC March 1995 *International Court of Arbitration*, Case 7645 [English text], <http://cisgw3.law.pace.edu/cases/957645i1.html>.
190. Germany 8 February 1995 *Oberlandesgericht* [Appellate Court] München [7 U 1720/94] [translation available], <http://cisgw3.law.pace.edu/cases/950208g1.html>.
191. Germany 8 February 1995 *Oberlandesgericht* [Appellate Court] München [7 U 3758/94], <http://cisgw3.law.pace.edu/cases/950208g2.html>.
192. Germany 8 February 1995 *Oberlandesgericht* [Appellate Court] Hamm, <http://cisgw3.law.pace.edu/cases/950208g3.html>.
193. Austria 13 January 1995 *Landesgericht* [District Court] Salzburg, <http://cisgw3.law.pace.edu/cases/950113a3.html>.
194. China 1995 CIETAC Arbitration award, <http://cisgw3.law.pace.edu/cases/950000c1.html>.
195. ICC 1995 *International Court of Arbitration*, Case 8128, <http://cisgw3.law.pace.edu/cases/958128i1.html>.
196. Switzerland 15 December 1994 *Kantonsgericht* [District Court] Zug, <http://cisgw3.law.pace.edu/cases/941215s1.html>.
197. Germany 14 December 1994 *Oberlandesgericht* [Appellate Court] Hamburg, <http://cisgw3.law.pace.edu/cases/941214g1.html>.
198. Russia 23 November 1994 Arbitration award 251/1993, <http://cisgw3.law.pace.edu/cases/941123r1.html>.

199. Russia 17 November 1994 Arbitration award 493/1993,
<http://cisgw3.law.pace.edu/cases/941117r1.html>.
200. Germany 9 November 1994 *Landgericht* [District Court] Oldenburg [translation available],
<http://cisgw3.law.pace.edu/cases/941109g1.html>.
201. Russia 9 September 1994 Arbitration award 375/1993,
<http://cisgw3.law.pace.edu/cases/940909r1.html>.
202. Delchi Carrier v. Rotorex, (need cite) (N.D.N.Y. 1994) 74A;
74A11 ; 74B1, <http://cisgw3.law.pace.edu/cases/940909u1.html>.
203. Switzerland 1 September 1994 *Kantonsgericht* [District Court] Zug, <http://cisgw3.law.pace.edu/cases/940901s1.html>.
204. Germany 25 August 1994 *Landgericht* [District Court] Düsseldorf, <http://cisgw3.law.pace.edu/cases/940825g1.html>.
205. Germany 14 July 1994 *Landgericht* [District Court] Kassel,
<http://cisgw3.law.pace.edu/cases/940714g1.html>.
206. Germany 23 June 1994 *Landgericht* [District Court] Düsseldorf [translation available],
<http://cisgw3.law.pace.edu/cases/940623g1.html>.
207. Austria 15 June 1994 Vienna Arbitration award SCH-4318 [translation available],
<http://cisgw3.law.pace.edu/cases/940615a4.html>.
208. Austria 15 June 1994 Vienna Arbitration award SCH-4366 [translation available],
<http://cisgw3.law.pace.edu/cases/940615a3.html>.
209. Netherlands 15 June 1994 *Arrondissementsrechtbank* [District Court] Amsterdam,
<http://cisgw3.law.pace.edu/cases/940615n1.html>.
210. Germany 14 June 1994 *Amtsgericht* [Lower Court] Nordhorn [translation available],
<http://cisgw3.law.pace.edu/cases/940614g1.html>.
211. Germany 4 May 1994 *Amtsgericht* [Lower Court] Charlottenburg [translation available],
<http://cisgw3.law.pace.edu/cases/940504g1.html>.
212. Belgium 16 March 1994 *Rechtbank van Koophandel* [District Court] Hasselt, <http://cisgw3.law.pace.edu/cases/940316b1.html>.
213. Netherlands 16 March 1994 *Arrondissementsrechtbank* [District Court] Zwolle, <http://cisgw3.law.pace.edu/cases/940316n1.html>.
214. Germany 2 March 1994 *Oberlandesgericht* [Appellate Court] München [translation available],
<http://cisgw3.law.pace.edu/cases/940302g1.html>.
215. Belgium 23 February 1994 *Rechtbank van Koophandel* [District Court] Hasselt, <http://cisgw3.law.pace.edu/cases/940223b1.html>.

216. Germany 10 February 1994 *Oberlandesgericht* [Appellate Court] Düsseldorf [6 U 32/93] [translation available], <http://cisgw3.law.pace.edu/cases/940210g1.html>.
217. Germany 10 February 1994 *Oberlandesgericht* [Appellate Court] Düsseldorf [6 U 119/93] [translation available], <http://cisgw3.law.pace.edu/cases/940210g2.html>.
218. Netherlands 4 February 1994 *Arrondissementsrechtbank* [District Court] Hertogenbosch, <http://cisgw3.law.pace.edu/cases/940204n1.html>.
219. Germany 24 January 1994 *Kammergericht* [Appellate Court] Berlin [translation available], <http://cisgw3.law.pace.edu/cases/940124g1.html>.
220. Germany 18 January 1994 *Oberlandesgericht* [Appellate Court] Frankfurt [translation available], <http://cisgw3.law.pace.edu/cases/940118g1.html>.
221. Hungary 17 January 1994 Budapest Arbitration award Vb 92068, <http://cisgw3.law.pace.edu/cases/940117h1.html>.
222. Germany 14 January 1994 *Oberlandesgericht* [Appellate Court] Düsseldorf [translation available], <http://cisgw3.law.pace.edu/cases/940114g1.html>.
223. ICC 1994 *International Court of Arbitration*, Case 7531 [English text], <http://cisgw3.law.pace.edu/cases/947531i1.html>.
224. ICC 1994 *International Court of Arbitration*, Case 7565 [English text], <http://cisgw3.law.pace.edu/cases/947565i1.html>.
225. ICC 1994 *International Court of Arbitration*, Case 7660 [English text], <http://cisgw3.law.pace.edu/cases/947660i1.html>.
226. Switzerland 6 December 1993 *Tribunal Cantonal* [Appellate Court] Vaud, <http://cisgw3.law.pace.edu/cases/931206s1.html>.
227. Germany 1 December 1993 *Landgericht* [District Court] Hannover, <http://cisgw3.law.pace.edu/cases/931201g1.html>.
228. Germany 1 December 1993 *Landgericht* [District Court] Memmingen, <http://cisgw3.law.pace.edu/cases/931201g2.html>.
229. Germany 17 September 1993 *Oberlandesgericht* [Appellate Court] Koblenz, <http://cisgw3.law.pace.edu/cases/930917g1.html>.
230. Switzerland 1 September 1993 *Handelsgericht* [Commercial Court] Zürich, <http://cisgw3.law.pace.edu/cases/930901s1.html>.
231. Israel 22 August 1993 Supreme Court (*Examin v. Textile and Footware*), <http://cisgw3.law.pace.edu/cases/930822i5.html>.
232. Germany 2 July 1993 *Oberlandesgericht* [Appellate Court] Düsseldorf [translation available], <http://cisgw3.law.pace.edu/cases/930702g1.html>.
233. Germany 24 May 1993 *Landgericht* [District Court] München, <http://cisgw3.law.pace.edu/cases/930524g1.html>.

234. Germany 14 May 1993 *Landgericht* [District Court] Aachen [translation available], <http://cisgw3.law.pace.edu/cases/930514g1.html>.
235. Switzerland 7 May 1993 *Richteramt* [District Court] Laufen [translation available], <http://cisgw3.law.pace.edu/cases/930507s1.html>.
236. Netherlands 6 May 1993 *Arrondissementsrechtbank* [District Court] Roermond, <http://cisgw3.law.pace.edu/cases/930506n1.html>.
237. Germany 28 April 1993 *Landgericht* [District Court] Krefeld, <http://cisgw3.law.pace.edu/cases/930428g1.html>.
238. Germany 14 April 1993 *Amtsgericht* [Lower Court] Cloppenburg, <http://cisgw3.law.pace.edu/cases/930414g1.html>.
239. China 1 April 1993 CIETAC Arbitration award [translation available], <http://cisgw3.law.pace.edu/cases/930401c1.html>.
240. China 27 February 1993 CIETAC Arbitration award, <http://cisgw3.law.pace.edu/cases/930227c1.html>.
241. Germany 13 January 1993 *Oberlandesgericht* [Appellate Court] Saarbrücken, <http://cisgw3.law.pace.edu/cases/930113g1.html>.
242. China 1993 People's Court (*International Industrial Company C of Hong Kong v. Five Mines Machinery Industrial Chemicals and Chinese Medicine Import-Export Company*), <http://cisgw3.law.pace.edu/cases/930000c1.html>.
243. China 31 December 1992 Xiamen Intermediate People's Court (*Lian Zhong v. Xiamen Trade*), <http://cisgw3.law.pace.edu/cases/921231c1.html>.
244. Germany 19 November 1992 *Landgericht* [District Court] Göttingen, <http://cisgw3.law.pace.edu/cases/921119g1.html>.
245. Belgium 13 November 1992 *Tribunal commercial* [District Court] Bruxelles, <http://cisgw3.law.pace.edu/cases/921113b1.html>.
246. Germany 6 October 1992 *Landgericht* [District Court] Berlin [translation available], <http://cisgw3.law.pace.edu/cases/921006g1.html>.
247. Germany 30 September 1992 *Landgericht* [District Court] Berlin, <http://cisgw3.law.pace.edu/cases/920930g1.html>.
248. Germany 22 September 1992 *Oberlandesgericht* [Appellate Court] Hamm, <http://cisgw3.law.pace.edu/cases/920922g1.html>.
249. Germany 3 July 1992 *Landgericht* [District Court] Heidelberg, <http://cisgw3.law.pace.edu/cases/920703g1.html>.
250. ICC 1992 *International Court of Arbitration*, Case 7197, <http://cisgw3.law.pace.edu/cases/927197i1.html>.
251. ICC 1992 *International Court of Arbitration*, Case 7585 [English text], <http://cisgw3.law.pace.edu/cases/927585i1.html>.

252. Netherlands 27 November 1991 *Gerechtshof* [Appellate Court]'s Hertogenbosch, <http://cisgw3.law.pace.edu/cases/911127n1.html>.
253. China 30 October 1991 CIETAC Arbitration award [translation available], <http://cisgw3.law.pace.edu/cases/911030c1.html>.
254. Germany 16 September 1991 *Landgericht* [District Court] Frankfurt, <http://cisgw3.law.pace.edu/cases/910916g1.html>.
255. Netherlands 13 September 1991 *Hoge Raad* [Supreme Court], <http://cisgw3.law.pace.edu/cases/910913n1.html>.
256. Germany 2 September 1991 *Oberlandesgericht* [Appellate Court] Celle, <http://cisgw3.law.pace.edu/cases/910902g1.html>.
257. Germany 14 August 1991 *Landgericht* [District Court] Baden-Baden [translation available], <http://cisgw3.law.pace.edu/cases/910814g1.html>.
258. Germany 18 January 1991 *Landgericht* [District Court] Bielefeld, <http://cisgw3.law.pace.edu/cases/910118g1.html>.
259. Germany 21 December 1990 *Amtsgericht* [Lower Court] Ludwigsburg, <http://cisgw3.law.pace.edu/cases/901221g1.html>.
260. Netherlands 13 November 1990 *Arrondissementsrechtbank* [District Court] Breda, <http://cisgw3.law.pace.edu/cases/901113n1.html>.
261. Germany 26 September 1990 *Landgericht* [District Court] Hamburg, <http://cisgw3.law.pace.edu/cases/900926g1.html>.
262. Germany 24 April 1990 *Amtsgericht* [Lower Court] Oldenburg, <http://cisgw3.law.pace.edu/cases/900424g1.html>.
263. Germany 3 April 1990 *Landgericht* [District Court] Aachen [translation available], <http://cisgw3.law.pace.edu/cases/900403g1.html>.
264. China post-1989 [date claim filed] CIETAC Arbitration award (*Contract #QFD890011*) [translation available], <http://cisgw3.law.pace.edu/cases/900000c1.html>.
265. Germany 31 August 1989 *Landgericht* [District Court] Stuttgart 74A [translation available], <http://cisgw3.law.pace.edu/cases/890831g1.html>.
266. Iran/U.S. Claims Tribunal 28 July 1989 (*Watkins-Johnson v. Islamic Republic of Iran*) [English text], <http://cisgw3.law.pace.edu/cases/890728i2.html>.
267. Germany 3 July 1989 *Landgericht* [District Court] München [translation available], <http://cisgw3.law.pace.edu/cases/890703g1.html>.
268. China 13 June 1989 CIETAC Arbitration award, <http://cisgw3.law.pace.edu/cases/890613c1.html>.
269. ICC 1989 *International Court of Arbitration*, Case 6281 [English text], <http://cisgw3.law.pace.edu/cases/896281i1.html>.

270. Iran/U.S. Claims Tribunal 16 June 1988 (*Islamic Republic of Iran v. U.S.*) [English text],
<http://cisgw3.law.pace.edu/cases/880616i2.html>.
271. Germany 3 June 1983 *Landgericht* [District Court] Konstanz [ULIS precedent] [translation available],
<http://cisgw3.law.pace.edu/cases/830603g1.html>.
272. Germany 26 June 1980 *Oberlandesgericht* [Appellate Court] Hamm [ULIS precedent] [translation available],
<http://cisgw3.law.pace.edu/cases/800626g1.html>.
273. Germany 10 June 1980 *Landgericht* [District Court] Essen [ULIS precedent] [translation available],
<http://cisgw3.law.pace.edu/cases/800610g1.html>.
274. Germany 24 October 1979 *Bundesgerichtshof* [Federal Supreme Court] [ULIS precedent] [digest available],
<http://cisgw3.law.pace.edu/cases/791024g1.html>.
275. Germany 23 March 1978 *Oberlandesgericht* [Appellate Court] Hamm [ULIS precedent] [translation available],
<http://cisgw3.law.pace.edu/cases/780323g1.html>.
276. Germany 24 May 1977 *Landgericht* [District Court] Münster [ULIS precedent] [translation available],
<http://cisgw3.law.pace.edu/cases/770524g1.html>.