INTERPRETATION OF ARTICLE 74 – ZAPATA HERMANOS V HEARTHSIDE BAKING – WHERE NEXT?

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1. INTRODUCTION

The facts are simple. The Mexican seller supplied biscuit tins to the American firm for over four years. The American firm failed to pay for the tins and were subsequently sued in the Federal District Court of Illinois.[1] Besides winning the action the court also awarded $550,000 as foreseeable loss under article 74 for incurring legal fees. On Appeal to the Federal Appellate Court[2] the decision in relation to attorneys' fees only was overturned. The whole matter was contested in a leave application to the Supreme Court of the United States of America. "A Petition for a Writ of Certiorari, an Amicus Brief in support of the Petition, a Brief in Opposition to the Petition, a Reply Brief and a Supplemental Brief for the Petitioner were filed with the U.S. Supreme Court."[3] In the end the Supreme Court invited the Solicitor General to express the views of the United States in an Amicus Curiae Brief. The Solicitor General put the proposition forward that in his view the Petition ought to be rejected.

The dispute in essence is not so much concerning article 74 but rather how article 7 is to be interpreted and applied. The Supreme Court of the United States had the unique opportunity to make a significant contribution to the interpretation of the CISG as a whole. It is important therefore to be aware of the fact that it is not only article 74 which is on trial but also article 7 and therefore the interpretation and application of the CISG as a whole.

The importance of the matter has been recognised by leading scholars and both sides of the dispute are well represented. It is argued that courts and many academics are looking for "the needle in the haystack" despite incantations that the words in the CISG with the help of article 7 must be given a plain meaning .It appears that in this debate the approach advocated by Honnold has been forgotten. He advocated that to overcome the problem of literary "deconstruction" the CISG consciously "root[ed] out words with domestic legal connotations in favour of non-legal earthy words to refer to physical acts."[4]

This paper attempts to have another look at he debate considering that the "heat of the battle" has subsided. It is argued that any solution - at least in a theoretical way - needs to look at the words as they appear at "first glance" without loosing sight of the purpose of the convention as a whole. In other words "attorneys" fees are placed back into the four corners of the convention and applied within that context. Attention is given to the fact that, as the words in the CISG are not "technical" in nature, the method of interpretation cannot be "technical" in nature either.

Attention is specifically directed to the distinction between procedural and substantive law. The Appeal Court and some academic writers found this distinction to be of such importance as a tool as to exclude attorneys' fees as a possible loss due to a breach of a contract. This paper will argue that such a distinction is founded on municipal law and is only sustainable if the mandate of article 7 is disregarded which would do violence to the very purpose of an international legal instrument..

2. INTERPRETATION OF THE CISG

Simply put the function of a common legal theory on which the CISG relies is contained in article 7.[5] Whether a domestic or an international law is examined such an understanding is essential in order to elicit the very purpose of the law in question. Only through such an understanding will consistent and predictable outcomes be achieved. The logical product of failure to achieve uniformity besides a possible loss of confidence is a search for the best solution resulting in "forum shopping."

The Court of Appeal unfortunately as one of their arguments contended that attorneys' fees are not clearly included nor are they excluded.[6] The court in effect appears to have looked for a clear instruc-

tion or term that attorneys' fees are part of "loss" without paying sufficient attention to article 7 which holds the key to the understanding of the CISG.
Arguably the court did not take into consideration the important interpretational difference between clear and unclear terms which form the basis for an understanding specifically of article 7(2). It can be argued that:

> "... officially 'clear and unambiguous terms' as well as 'unclear terms' form the unique rules [of the CISG] based on compromise between various legal systems, a clear grasp of the mandate of article 7 is essential."[7]

Furthermore despite of all the available knowledge the interpretation of the CISG suffers in many instances from a homeward trend and the lack of logical application of an international instrument. What is familiar at first glance appears to distract courts too many times from the fact that domestic law and domestic statutory interpretation have no place in an international instrument. Bonell commented correctly that:

> "in most common law countries domestic legislative instruments are traditionally interpreted narrowly so as to limit their interference with the law developed though jurisprudence."[8]

However it can now be stated that many domestic courts have shown a willingness to abandon the ethnocentric approach and embrace a less narrow interpretation specifically for international instruments. In Australia *Povey v Civil Aviation Safety Authority and Ors*[9] is instructive. It deals with the Warsaw Convention and Bongiorno J made three important observations. First he noted that it must be "constructed by reference to the principles of construction appropriate to an international convention."[10] Secondly these principles of construction can be found in the Vienna Convention on the Law of Treaties and thirdly foreign jurisprudence of an appropriate court is highly persuasive if no jurisprudence is available in Australia.[11] Arguably Bongiorno J. supplied a template which can be applied to an application and interpretation of any international instrument.

3. THE DECISION OF THE APPEAL COURT

Keeping the above template in mind it can be argued that the approach of the Federal Court is faulty on three counts. First they did not construct the matter "by reference to the principles of construction appropriate to an international convention" that is without recourse to domestic principles. Secondly they did not fully appreciate and apply these principles of construction which would have been found in article 7 of the CISG. Thirdly they did not consult foreign jurisprudence of an appropriate court.

In essence the Appeal Court chose a narrow view which is expressed in the fact that they did not focus on "loss" as a general term. Attention was given to attorneys" fees as something different to expenses. It is not the fact of attorneys" fees, which is important, but whether an expense whatever it may be is a consequence of the breach of the contract and is foreseeable as stipulated by article 74.

In general the category of loss or items which are categorized as losses are dependent on the facts of a case and cannot be readily described. In addition the federal court argued that:

> "it seems apparent that 'loss' does not include attorneys" fees incurred in the litigation for a suit for breach of contract, though certain pre-litigation legal expenditures, for example expenditure designed to mitigate the plaintiff's damages, would probably be covered as 'incidental' damages."[12]

First it is not *apparent* that "loss does not include attorneys' fees"[13] otherwise this whole debate would

never have eventuated. Secondly, besides the fact that Posner J supported his statement by reference to American decisions, his argument is confusing. It appears to suggest that there is a difference between being "just a little bit dead" and being "really dead." How can it be apparent that one category of legal expenses is not included in "loss" whereas another legal expense is unless this difference is due to a municipal principle.

Perhaps he attempted to suggest that expenses which mitigate the plaintiff's damages –or are reducing the defendant's losses – are admissible irrespective of their label or source. It is not logical to suggest that those expenses, which help the breaching party to reduce their costs, are allowed but those costs, which are incurred by the innocent party, must withstand scrutiny beyond those where mitigation is the purpose. This is indeed an interesting point considering the facts of the case. Lenell exhibited an extraordinary recalcitrant attitude and made a very good effort to increase legal fees admittedly for both parties. If one would argue mitigation then indeed Lenell did not mitigate the losses for both parties. Arguably therefore Lenell is in breach of the good faith principle which however does not carry any penalty under the CISG.

An example may illustrate this point further. A purchases machines from B. The machines after installation by A are not working. A engages an expert to ascertain whether the goods are faulty or whether it is the installation which stops the machines from working. As it turns out the machines are faulty and A will sue B for breach of contract. Nobody would suggest that the cost of the technical expert does not form part of the full compensation claim pursuant to article 74.The costs of A only became necessary because B breached the contract. If there had been no breach these expenses would not have eventuated. Furthermore there is nowhere in the legislative history where expert advice is mentioned as falling under or adversely does not fall under claims covered by article 74. In Zapata it is argued that attorneys" fees are not covered by the CISG. Arguably the question can be asked what distinguishes technical advise from legal advise? Both are a consequence or an incident of a breach of a contract otherwise such steps would not have to be taken. In essence if both parties perform their end of the bargain additional costs are not necessary.

4. PROBLEM OF CLASSIFICATION OF EXPENSES

There is absolutely no logic in an argument that certain expenses are within the sphere of article 74 and others are not unless they are either specifically excluded or they are not covered by a general principle. Whether the law in question is a procedural one or a substantive one in a municipal system is of no consequence as the question is whether the CISG covers "the field." Only if there is a gap and hence as a last resort pursuant to article 7(2) can domestic law be applied to fill the gap.

Article 74 speaks of two important variables. If any of the two variables cannot be met recovery of an expense as "loss" is problematic if not impossible. First the loss must be a consequence of the breach and secondly the loss must have been foreseen or ought to have been foreseen.[14] Article 74 also describes the upper limit of any claim namely "a sum equal to the loss including loss of profit."[15] In other words the principle of full compensation can be extracted from article 74

The argument therefore can be narrowed down to two possibilities. Attorney's fees are not envisaged to be a result of a breach of contract or are not foreseeable and hence pursuant to article 7(2) gap filling would lead to an application of domestic law. Simply put both possibilities can be dispensed with quickly. Arguably there is no debate that attorney's fees are a foreseeable expense due to any breach of contract.

The Federal Appeal Court argued simply that there

> "is no suggestion in the background of the Convention or the cases under it that 'loss' was intended to include attorney's fees, but no suggestion to the contrary either."[16]

If as the court suggests legal fees are not clearly in but also not clearly out then the only solution is to apply article 7 and find out whether a gap exist. The whole argument again reverts to the question of whether full compensation is a general principle of the CISG. Arguably the weight of academic writing and decided cases would suggest that it is

This only leaves one point to argue namely that attorneys' fees are not within the sphere of full compensation pursuant to article 74. The question therefore is what is included into a "loss" or more appropriately what do we understand under the term "full compensation". It has been suggested that the asset test is the appropriate test to determine whether a particular item falls under article 74. If one accepts the proposition that "the sum equal to the loss ... suffered by the other party"[17] can be determined or measured through the asset test full compensation can be measured. PECL in this instance is by analogy supplying a confirmation that the asset test is an appropriate tool to measure damages. Article 9:502 states:

> *"The general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed."*

To put a party into a position it would have been financially is simply asking the question has the balance sheet changes? If the asset base is diminished as a consequence of the breach then those items diminishing the asset base must be contemplated to fall under the principle of full compensation pursuant to article 74. The commentary to Article 7.4.2 of the UNIDROIT principles confirm the above observation as they specifically include the asset test into their explanations. The commentary states:

> "The notion of loss suffered must be understood in a wide sense. It may cover a reduction in the aggrieved party's assets or an increase in its liabilities"

It follows that the next question which must be asked is whether the asset test is a legitimate test anchored within the four corners of the CISG. It is argued that it is the only legitimate and practical test. This argument is given weight when Honnold's observation is to be taken into consideration namely that " the CISG consciously "root[ed] out words with domestic legal connotations in favour of non-legal earthy words to refer to physical acts."[18] What can be more physical in ascertaining full compensation than an asset test?

The logical conclusion therefore is that if the asset base is diminished as a consequence of the breach then those items diminishing the asset base must be contemplated to fall under the general principle of full compensation pursuant to article 74. However it is interesting to note that the Federal Court referred to article 7(2) and stated that:

> "there are no 'principles' that can be drawn out of the provisions of the Convention for determining whether 'loss' includes attorneys" fees."[19]

Arguably the Federal Court did intend to state "general principles" and not merely principles or perhaps a definition of loss.. There is indeed no suggestion anywhere in the CISG that "loss" is a general principle. The general principle is "full compensation" which includes and consists of losses including loss of profits which are foreseeable

The reason to point to article 7(2) is to determine whether general principles can be drawn out of the

provisions of the convention. To do that an examination of the provisions themselves that is the four corners of the CISG will supply such an answer. .
"It is concerning to note the dismissive examination by Posner J of the general principles of the CISG"[20] specifically considering that he ignored the statements made by the Federal District Court on the matter. The Appeal Court merely stated that there are no general principles and hence the matter was closed as far as they were concerned. Felemegas is correct to point out that:

"... any issue that has not been expressly excluded by the CISG and which can be resolved by applying the general principles of the CISG should be solved accordingly."[21]

To suggest that full compensation is not a general principle of the CISG would indeed be a novel approach not yet advocated by any serious academic. It is well embedded in article 74.

Furthermore it has been suggested that the Federal Appeal court ignored the *travaux preparatoires* completely.[22] Arguably such documents ought to be consulted only in extreme circumstances as the text of the Convention is the starting point. *Travaux preparatoires* can disclose perceived problems but it must be remembered that the views expressed are aspects frozen in time.[23]

The court supplied their own answer to the above when they noted that:

> "[to] 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."[24]

This statement is absolutely correct the delegates did not think about it at all otherwise a debate would have been recorded in the history. There are three points to be made. First the convention is not a law devised by some but a law borne out of consensus. Furthermore if the U.S. delegation would have been vehemently opposed to such an inclusion no doubt it would have been recorded.

Secondly as the U.S. delegation has not made any representation to the contrary it is too late to complain as the United States have ratified the CISG. Strange to see that the Appeal Court found it necessary to question 20 years too late:

> "... 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?"[25]

The only answer one can give is by asking another question namely would the United States also not have signed the Convention if they would have known that they abandoned the "hallowed American parol evidence rule?"

The most important of the reasons is the third point. A lack of debate suggests strongly that attorneys" fees are included in the contemplated losses under article 74. By analogy history supplies us the answer. Nobody tells another person, or writes in a letter information which is known to the recipient. Such knowledge is assumed hence included into the knowledge base and not worthy of repeating. The same can be said in regards to attorneys" fees. The Court of Appeal themselves supplied to correct answer why full compensation includes legal fees because there was absolutely no reason to think about the question at all in the first place.[26]

5. PROCEDURAL VS SUBSTANTIVE LAW

The question whether the awarding of attorneys' fees is a procedural issue in essence needs to be analysed correctly. There are several positions to be taken. First - and it is argued that this assumption was not contemplated by Posner J, - is that the CISG contains procedural rules. Arguably there is no arguments that the CISG is about contract and not about procedure. Such a statement was made by Posner J. in *Zapata* and it is a correct observation.

The second argument is that attorneys' fees are a procedural matter in domestic law and hence excluded form the sphere of the CISG. However it is of little value to ague this point as article 7 forbids the importation of municipal laws. This leads to he third and only argument, which deserves any merits. The essential argument is that attorneys' fees are not included in the general principle of full compensation and therefore pursuant to article 7(2) a gap exists which must be settled "in conformity with the law applicable by virtue of the rules of private international law."[27]

Plainly speaking it not an argument to merely suggest that attorneys" fees fall under procedural law and therefore are outside the sphere of the CISG. It is the same false logic to suggest that fitness of purpose is a domestic law therefore the CISG does not apply. Such a thought would not be entertained because it is plain that article 35 rules on that matter. In other words there is no gap whatsoever in the CISG which would make recourse to domestic law imperative pursuant to article 7(2). Here is where the problem lies. The court instead of focusing on article 7 attempted to draw a distinction between procedural law and substantive law. Indeed Posner J noted "The Convention is about contracts not procedure"[28] He is correct to note that but he should have expanded that statement by pointing out that everything which is contained within the four corners of the CISG is about contracts. He then continued to note:

> "The principles for determining when a losing party must reimburse the winner for the latter's expenses of litigation are usually not part a part of a substantive body of law, such as contract law, but a part of procedural law."[29]

Posner J in his homeward trend appeared to confuse domestic law with international law. It is not a question whether attorneys" fees are part of substantive law in a domestic setting but whether attorneys" fees are part of foreseeable expenses pursuant to article 74. In other words is the general principle of full compensation applicable. Honnold correctly noted that "label that the state law bears should be irrelevant."[30]

It is only if there is gap, which as a last resort must be filled by domestic law, will such an argument have any bearing on the matter. As it stands no attempt has been made to determine whether fees are part of general foreseeable expenses and hence fall under the gambit of the CISG. Only with such an approach can a faithful application of the CISG and hence uniformity be guaranteed

If one consults the travaux préparatoire the whole issue unfortunately will rest on assumptions. The only fact is that nowhere in the history of the convention is there a definitive pointer one way or another. Flechtner and Lookofsky argue that because of the silence on this issue the "recovering [of] attorney fees was *simply assumed* to be a procedural matter beyond the scope of the convention."[31] However in law nothing is ever simple and such an assumption is unfounded and not based on any sound reasoning. They further argue that "if it had been considered it *could* have been a 'deal breaker' and ... the United States *might* well not have signed the Convention."[32] These arguments are purely speculative and lack any basis. It is inconceivable considering that this point is so important that it could be a 'deal breaker' that no discussion whatsoever took place and it "was simply assumed to be a procedural matter."[33] Furthermore whether the United States would have signed the convention or

not does little in advancing the argument that attorneys" fees are not included in article 74.

Arguably as pointed out above the arguments relating to the drafting history of the CISG at least make some sense as they explain by analogy that if something is not mentioned then one strong reason is that it was not news worthy - that is - every body knew about it. Such an argument is given weight by the fact that most delegates came from countries were the loser pays system operates. Therefore the only statement which is defendable is simply to state that there is no explicit indication as to the intentions of the drafters of the CISG whether attorneys' fees are to be included into the CISG or not. In sum the history of the CISG is at best of limited help in this determination.

A further argument has been advanced in *Zapata* namely that:

> *"the time tested, carefully-crafted and elaborated domestic rules governing recovery of attorney fees in loser-pays Contracting states would be replaced by the vagaries of the Art, 74 regime."*[34]

Indeed it is true to say that recovery of legal fees is an elaborate rule. Taking the broad international view two distinct environments can be discovered depending which municipal system one is looking at. Not all systems include pre-trial expenses and in some domestic systems foreseeability does not need to be established whereas in others it does.[35] The question simply is can these "different environments be neatly packed under the umbrella of article 74"[36] or will they be replaced by 'the vagaries of article 74? As pointed out above there are no vagaries in following the mandate of article 74 specifically the asset test. Only in unified international laws is there a chance that "different environments can be nearly packed under one umbrella."[37]

Arguably the same question could be asked when attacking article 8, which trumps the "time-tested, carefully-crafted and elaborated domestic rule" of the parol evidence rule. Nobody so far has advanced such an argument. The fact is that whenever an international instrument is enacted compromises must be made and many "time-tested, carefully-drafted" domestic substantive or procedural rules had to be abandoned.

The problem remains that domestic labels can distort the application of article 7(1) which calls for a uniform application and importantly regard has to be had to the international character of the convention. Admittedly for article 7 to apply the matter must be ruled by the convention. It has been argued above that attorney fees cannot be logically excluded from 'loss' which is based on the full compensation principle. There always will be tensions between domestic and international law and as a result depending on the jurisdiction varying judgements are the outcomes. It is crucial for international laws that:

> "abstract distinctions between substantive and procedural law 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."[38]

Orlandi furthermore argues that the "outcome determinative test" must be one of the tools the courts ought to consider when a matter is not clearly settled and a possibility exists whether an issue is substantive or procedural. Judges should:

> "look at the actual impact of the CISG provision on the outcome of the decision and apply the Convention whenever this best guaranteed the policy goals of international uniformity."[39]

There can be little debate that the best guarantee to achieve international uniformity would be to include attorneys' fees under the umbrella of "loss" pursuant to article 74.

Another – and perhaps the real question, which needs to be addressed, is what is the relationship between substantive and procedural law? In essence

> "Substantive law, in that it addresses all citizens, has a much wider audience. By contrast, procedural law ... addresses all those involved in the administration of justice, for the most part lawyers."[40]

Furthermore it has also been suggested that procedure "governs the exercise of judicial power and therefore belongs to public law."[41] This leads back to the question what is the CISG attempting to achieve. No doubt the Convention addresses all citizens and hence the question again needs to be asked whether all foreseeable losses are included in the mandate of article 74. Considering that procedural law is lawyers' law[42] a strong argument must be advanced – and nobody has done so yet - that only some losses due to a breach of a contract are not relevant to citizens as they are lawyers' law whereas the remainder of losses is relevant to citizens that is it is substantive in nature. Only if such a proposition is powerfully and convincingly argued is there a possibility to detach attorneys' fees from the general principle of full compensation. It is simply not enough to merely state that before the introduction of the CISG attorney's fees were procedural in nature therefore nothing has changed.

The problem is that arguably attorneys" fees as an aspect of procedural law are so closely connected to the substantive issue of damages that a separation is not possible. This is specially so as the procedural law of attorneys' fees is not uniform and hence a separation will be unhelpful and a "backward step" in the endeavour to create a uniform international law. It is compelling to note that:

> *"... no proper international commercial intercourse is possible if the States engaged in international trade and other cooperation apply, under the principle of lex fori, totally divergent rules [like the American rule].*[43]

If by analogy arbitral decisions are consulted where the line between procedure and substance is often by the very nature of arbitration in dispute. It can be noted that such a line is not always easy to draw.[44] The closeness of the two issues give rise to an argument that even if attorneys' fees could be ruled under domestic laws, in the interest of harmonisation such a distinction should be abandoned. Much weight is given to this argument if one considers that in the whole *Zapata* debate no compelling reason is given that attorneys' fees are not part of a loss which a party will suffer if a contract is breached. The only reason given is that attorneys' fees are procedural in nature and therefore do not form part of the CISG article 74. Plainly speaking a 'loss' remains a 'loss' irrespective of how it is dressed up. It appears that the argument is caught up in an unnecessary procedural trap.

6. ANOMALIES

The Federal Court supported their rejection of attorneys" fees as falling under article 74 by pointing out that it would create an anomaly. The court noted that a successful defendant cannot recover attorneys" fees under the CISG because in order to fall under article 74 there has to be a breach of a contract and a successful defendant would not be in breach.[45] On the contrary he would have just proven that he has fulfilled the obligations as stipulated in the contract.

There are several answers the most important one being that the court not only discussed a hypothetical question but they used the outcome as a determinative factor in the decision of a real situation. The facts in *Zapata* are clear the original plaintiff won the case, This decision was never tested and still stands. The court therefore never had to give a decision - nor should they take into consideration

what would happen - in a hypothetical situation.

Even given that one could muse over such a question the conclusion simply is that the Appeal Court discovered a gap. The convention does not cover this situation either by a provision or through a general principle. Therefore in this case article 7(2) is applicable and domestic law will provide the answer. It is doubtful that the promoters of the CISG ever stated that there are no oversights in the text of the convention. After all the CISG is a political instrument which had to gain consensus of various interest groups and legal systems. It was after all ratified by States "warts and all". It is a testimony to the drafters that very few anomalies are found in the CISG.

7. CONCLUSION

Admittedly there are robust arguments to either reject or include attorneys" fees as part of article 74. The Federal Court found it necessary to comment that attorneys' fees are not included nor are they excluded and that the travaux preparatoires are silent on this issue. However it is interesting to speculate why an assembly of distinguished jurist did not comment on such an issue unless they thought it was so obvious that it did not merit any comments?

Arguably it is time to revisit early commentaries on the CISG and take note of the fact that the CISG consciously "rooted out words with domestic legal connotations in favour of non legal earthy words to refer to physical acts"[46]. An unconstraint reading of the CISG with the aid of article 7 and 8 can overcome the problem of "literary deconstruction" [47]

In the end the question must be posed whether, in the light of increased globalisation and internationalisation of trade, an application of the CISG is more important or whether the homeward trend and the refuge behind municipal laws is superior. The path taken in the end depends whether the feet are firmly planted within the CISG or whether it is perceived that the grass is greener in the domestic paddock. However this paper attempted to demonstrate that there is more than sufficient ground to support a decision that legal fees should be subject to the full compensation principle pursuant to article 74. After all an international contract is not merely a domestic sale with incidental foreign elements.[48] And most importantly of all the foreseeable losses due to a breach of a contract nothing is more certain and universal than attorneys' fees.

(Footnotes)

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[1].(2001) WL 1000927 [http://cisgw3.law.pace.edu/cisg/wais/db/cases2/010828u1.html]

[2] see 2002 Federal Appellate Court [7th Circuit] [http://cisgw3.law.pace.edu/cases/021119u1.html]

[3] see heading of Petition for Certiorari (Reply Brief) [http;// cisgw3.law.pace.edu/cisg/biblio/zreply.html]

[4] Honnold, J. "Uniform Laws for International Trade: Early "Care and Feeding" for Uniform Growth", (1993) *1 International Trade and Business Law Journal*., 1, at 2.

[5] For a detailed discussion see Zeller, B. "Four Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods." http://www.cisg.law.pace.edu/cisg/biblio/4corners.html

[6] Zapata above n 2.

[7] Zeller, B. above n 5, p 47.

[8] Biance & Bonell (eds) "Commentary on International Sales Law" (1987) at 72-73.

[9] [2002] VSC 580 (20 December 2002)

[10] ibid 17.

[11] ibid

[12] Zapate above n 2.

[13] Ibid.

[14] see article 74

[15] see article 74

[16] Zapata above n2.

[17] article 74.
[18] Honnold, J. "Uniform Laws for International Trade: Early "Care and Feeding" for Uniform Growth", (1993) *1 International Trade and Business Law Journal*., 1, at 2. It ought to be remembered that Honnold was a member of the promoters of the CISG and his opinion must be given consideration.
[19] Zapata above n 2, at .
[20] Keily. T., "How does the Cookie Crumble? Legal Costs Under a Uniform Interpretation Of The United Nations Convention On Contracts For The International Sale Of Goods." 1 *Nordic Journal of Commercial Law* 2003, at 14.
[21] Felemegas, J. An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals http://www.cisg.law.pace.edu/cisg/biblio/felemegas4.html .
[22] Keily, T, above n 20..
[23] See Zeller above n 5. chapter 2.
[24] Zapata above n 2.
[25] Ibid.
[26] see fn 15 above.
[27] Article 7(2)
[28] Zpata above n 56, at
[29] ibid
[30] Quoted by Albert Kritzer "Editorial Remarks*" Delchi Carrier S.p.A. v Rotorex Corp* [http://cisgw3.law.pace.edu/cisg/wais/db/editorial/951206u.1.html]
[31] Flechtner, H. and Lookofsky, J. "Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal." (2003*) 7 VJ 92*, 97.
[32] Ibid.
[33] ibid
[34] ibid
[35] Vanto, J. "Attorneys" fees as damages in international commercial litigation" *15 Pace International Law Review* (Spring 2003) 203-222
[36] ibid
[37] ibid.
[38] Orlandi, C.G., "Procedural law issues and law conventions" (2000) *Uniform Law Review Vol V. 1,* 23-41.
[39] Ibid.
[40] Kerameus, K., Some Reflections on Procedural Harmonisation: Reasons and Scope, *Uniform Law Review* 2003-1/2, 443, 445.
[41] Ibid 448.
[42] Ibid.
[43] ibid at 446.
[44] See for instance *International Tank and Pipe SAK v Kuwait Aviation Fuelling Co KSC* [1975] QB 224.
[45] Zapata above n 2.
[46] Honnold see fn 4.
[47] Honnold see above n 4.
[48] Audit B., "The Vienna Sales Convention and the Lex Mercatoria" in Carbonneau, T.E. (ed) "Lex Mercatoria and Arbitration" (1998) at 174