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Zapata Retold: Attorneys' Fees are (Still) Not Governed by the CISG

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ARTICLES

ZAPATA RETOLD: ATTORNEYS' FEES ARE (STILL) NOT GOVERNED BY THE CISG

Joseph Lookofsky & Harry Flechtner***

HOW A REVOLUTIONARY MEXICAN HERO LOST HIS CAUSE

In *Viva Zapata* (the 1952 movie), a Mexican revolutionary hero named Zapata led a band of hungry peasants in a wild uprising against the government in power. In the film, Zapata (played by Marlon Brando, himself) scored some crowd-pleasing victories, but (historians tell us) the rule-making powers ultimately prevailed, reigning in the *Wild One* and ending (forever) Zapata's quixotic quest.¹

HOW A REVOLUTIONARY MEXICAN PLAINTIFF LOST HIS CASE

Nearly fifty years later (in 2001), another Mexican revolutionary named Zapata scored an improbable (initial) victory, this time in U.S. Federal District Court, by persuading a trial judge to buy the argument (quite a *wild one*, in our view) that Article 74 of the U.N. Convention on Contracts for the International

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1. See Bosley Crowther, "THE SCREEN IN REVIEW; Marlon Brando Plays Mexican Rebel Leader in 'Viva Zapata!' New Feature at the Rivoli," N.Y. TIMES, Feb. 8, 1952, available at http://movies2.nytimes.com/mem/movies/review.html?_r=1&title=Viva%20Zapata&title2=&reviewer=BOSLEY%20CROWTHER&pdate=19520208&v_id=52942&oref=slogin.

Sale of Goods² permits a successful claimant under the CISG to recover, as damages for breach of contract, the attorney fees incurred in litigating the claim.³ According to this decision, Article 74 of the Convention pre-empts (displaces) the long-standing “American rule” on attorney fees, which in U.S. courts requires (with certain exceptions) that each litigant shoulder its own attorneys’ fees, win or lose.

At the time that District Court decision was issued, some CISG commentators—including the leading one, Professor Peter Schlechtriem, himself—expressed approval for the District Court’s extension of the Convention’s sphere of application to include the way in which national courts allocate attorneys’ fees.⁴ In Pittsburgh and Copenhagen, however, the two of us—operating independently as “lone wolves”—arrived at remarkably similar positions that rejected the decision’s (wildly) “expansionist” CISG view.⁵ Our position was (and remains) based on several considerations, including the fact that the Convention’s *travaux préparatoires* contain nothing suggesting that the drafters intended Article 74 to encompass the recovery of attorneys’ fees as damages,⁶ the fact that awarding attorneys fees as CISG damages would yield absurd results,⁷ and the fact that permitting recovery of attorney fees as damages under Article 74 of the Convention would contradict the overwhelming majority (perhaps thousands) of CISG decisions from loser-pays jurisdictions, which have routinely awarded attorney fees not as damages under the Convention, but on the basis of the loser-pays rules of the tribunals’

2. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 19 I.L.M. 668 (1980) [hereinafter “CISG” or “Convention”] (entered into force on Jan. 1, 1988), available in 15 U.S.C.A. app. at 49 (West Supp. 1996), 52 Fed. Reg. 6262-80, 7737 (1987), U.N. Doc. A/CONF. 97/18 (1980).

3. Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., No. 99-C4040, 2002 WL 398521 (N.D. Ill., Aug. 28, 2001), *rev’d*, 313 F. 3d 385 (7th Cir. 2002), *cert. denied*, 540 U.S. 1068 (2003).

4. See Peter Schlechtriem, *Case Comment: Attorneys’ Fees as Recoverable Damages*, 14 PACE INT’L L. REV. 205 (2002), reproduced at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem4.html>.

5. See Joseph Lookofsky, *Comments on Zapata Hermanos v. Hearthside Baking [Attorneys fees: CISG article 74 damages vs. Domestic procedural rules]*, 6 VINDOBONA J. INT’L COMM. ARB. 27 (2002); Harry M. Flechtner, *Recovering Attorneys’ Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role Case Law in CISG Jurisprudence, with Comments on Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 22 N.W. J. INT’L L. & BUS. 121 (2002).

6. This despite the fact that allowing such recovery would work a radical change not only in jurisdictions that follow an “American-rule”-type approach, but also in States with domestic loser-pays rules. See Flechtner, *supra* note 5, at 151-52.

7. Such as limiting such recovery to successful claimants while denying reimbursement to parties who successfully defend against claims of breach. See Joseph Lookofsky & Harry Flechtner, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 VINDOBONA J. INT’L COMM. ARB. 93, 97-98 (2003); Flechtner, *supra* note 5, at 152.

domestic legal system.⁸ As a result, we concluded, the question of reimbursement for attorney fees incurred in the course of litigating a claim under the CISG should be treated as a “procedural” issue *beyond the scope of the CISG* and governed by the tribunal’s domestic law.⁹

In 2002, Circuit Judge Richard Posner (The Father of Law & Economics, himself) *reversed* the District Court’s (*wild*) decision,¹⁰ thus “siding with us”¹¹ and cutting the revolutionary Zapata plaintiff—and the CISG’s Sphere of Application—back down to size. Later that year, we (lone wolves) joined forces to write *Viva Zapata!*,¹² which explained (carefully) why the *Zapata trial judge* had reached the *wrong result* for the *wrong reasons*. At the same time, we explained why Judge Posner, in reversing the trial court, reached the *right result* for *at least some of the right reasons*—although he also fell into some confusion. In particular, we emphasized what we then saw (and still see) as an inconsistency between Posner’s analysis and the implications of his legal logic: although his opinion indicates that the “matter” of attorneys’ fees is “*governed, but not settled*” by the Convention, the logic of Posner’s ratio actually leads to the conclusion that the attorneys’ fees “matter” is simply *not governed* by the CISG.

In December 2003 the U.S. Supreme Court put the final nail in the *Zapata* plaintiff’s coffin by refusing to grant a petition for *certiorari*,¹³ to the dismay of those CISG-expansionist fans who had hoped for Supreme Court review.¹⁴

THE ACADEMIC AFTERMATH

In this issue of the *Journal* Professor Schlechtriem presents his own analysis of Judge Posner’s decision in *Zapata*.¹⁵ As we did in our *Viva*

8. See Flechtner, *supra* note 5, at 149-54.

9. See Lookofsky, *supra* note 5; Flechtner, *supra* note 5, at 152-54.

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

11. Without *citing* us (or any other academic authority), however.

12. Lookofsky & Flechtner, *supra* note 7.

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

14. See Association of Contract and Commercial Managers and the Institute of International Commercial Law of the Pace University School of Law, Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* Supporting Petitioner on Petition for Writ of Certiorari, *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 540 U.S. 1068 (2003) (No. 02-1318), available at <http://cisgw3.law.pace.edu/cisg/biblio/zamicus.html>.

15. Peter Schlechtriem, *Legal Costs as Damages in the Application of UN Sales Law*, 26 J.L. & COM. 71 (2007-08).

Zapata! piece,¹⁶ Professor Schlechtriem reduces the *ratio* of the decision to three main arguments. The *first* of these is that *the Convention is about contracts, not about procedure, and recovery of attorneys' fees is a matter of procedure*. Commenting on this argument, Professor Schlechtriem states: "In international cases at least, without an international uniform classification the categorization of a question as substantive or procedural can at best be a legal *façon de parler* [way of speaking] for a demarcation based on aspects of the case, but it cannot answer the substantive issue itself."¹⁷ Now, we have no problem with that (French) proposition, especially since Judge Posner himself uses the substance-procedure distinction as a "way of speaking." Quite obviously (at least to Professor Posner and us), the Convention on *Contracts for the International Sale of Goods* is *mainly* "about" *substantive rules of contracts*: Just look at the name of the Convention, not to speak of its content! The common-sense logic of this argument is not refuted—or rendered *passé*—by the fact the Convention also manages, *en passant*, to "say" a few things about procedural matters such as the burden of proof¹⁸ and proving contracts by means of witnesses.¹⁹

Commenting on the second head of Judge Posner's analysis, Professor Schlechtriem concedes that the trial court's approach in *Zapata* would lead to *serious anomalies* (another one of our arguments²⁰), and he attaches "great weight" to Posner's (and our²¹) *third* (and final) argument that the United States presumably *would have abstained from ratifying the CISG* rather than "abandon the hallowed American rule." Well, isn't that (just) like "saying" (*façon de parler*) that the *CISG was never intended to encompass recovery of attorney fees because that was presumed to be a matter of procedure?*

Judging by the tenor of his latest contribution, it hasn't been easy for Professor Schlechtriem to abandon his original position, i.e., that the "matter" of attorneys' fees is rightly regarded as a matter "*governed, but not settled*" by the Convention, and it may be that he (if he "had his druthers") would (still) *prefer to use the CISG* to the "settle" that matter. In any event, Professor Schlechtriem has now (lamentingly) acknowledged the quixotic

16. See Lookofsky & Flechtner, *supra* note 7, at 96-100.

17. Schlechtriem, *supra* note 15, at 76.

18. See Harry M. Flechtner, *Moving through tradition towards universalism under the U.N. Sales Convention (CISG): Notice of lack of conformity (Article 39) and burden of proof in the Bundesgerichtshof opinion of 30 June 2004*, in LIBER MEMORIALIS PETAR SARCEVIC: UNIVERSALISM, TRADITION AND THE INDIVIDUAL 457 (Tomljenovic, Erauw & Volken eds. 2006).

19. See Article 11 of the Convention.

20. See Lookofsky & Flechtner, *supra* note 7, at 96-98.

21. *Id.*

nature of such a quest.²² Better than most, he can read the writing on the American judicial wall: the American decision-makers have *made* their decision, which will almost surely remain *final*, whatever (any) academics might advise American judges to think.

Less lamenting (though perhaps more pugnacious) is the latest (2006) “Advisory Opinion” rendered by the CISG Advisory Council (of which Professor Schlechtriem is a most distinguished member), including the following “black letter” proposition: **“Under Article 74, the aggrieved party cannot recover expenses associated with litigation of the breach.”**²³ It is, of course, hardly surprising that the (unanimous) Advisory Council Opinion is clear and unequivocal: attorneys’ fees *cannot* be recovered as damages under the CISG. What one might wonder about is why the Council (unanimously) stamps Judge Posner’s (and our) substance-procedure distinction as “*outdated and unproductive*”²⁴ (which certainly sounds worse than *façon de parler!*). The Council is, of course, entitled to its opinion on the substance-procedure issue, but we note that the “Opinion” on this particular point remains a conclusory assertion with virtually no documentation, except for a somewhat curious invitation to “*see*” a scholarly article on the substance-procedure distinction as it relates to a completely different (*conflict of laws*) context.²⁵

Since we have explained and documented *our own* position (both individually and collectively) on the attorney fee issue itself, we have little more to say on that particular score.²⁶ We do, however, take this opportunity to comment on the Advisory Council Opinion “approach.” In our view, that approach suffers from two problems. First, it distorts our own use of the substance-procedure distinction in determining the scope of the Convention. Second, it appears to be based on a misunderstanding of the role and authority of the Advisory Council itself.

On the first point, the Advisory Council Opinion states:

Some courts and commentators believe that the recovery of litigation expenses is a procedural matter outside the scope of the Convention’s substantive damages provisions

22. See Schlechtriem, *supra* note 15, at 76.

23. CISG Advisory Council Opinion No. 6, *Calculation of Damages under CISG Article 74*, heading 5 (2006).

24. *Id.* ¶ 5.2.

25. *Id.* n.89 (inviting readers of the Council’s Opinion to “See Carruthers, *The Substance and Procedure Distinction in Conflict of Laws: A Continuing Debate in Relation to Damages*, 53 INT’L & COMP. L.Q. 691 (2004).”).

26. See the discussions cited in notes 5 & 7 *supra*.

[citing, *inter alia*, our *Viva Zapata* piece]. . . . The issue of whether litigation expenses should be considered as damages for purposes of Article 74 cannot be resolved through a substance/procedure distinction. Whether a matter is considered substantive or procedural may vary from jurisdiction to jurisdiction and may depend on the circumstances of a particular case. Relying upon such a distinction in this context is outdated and unproductive.²⁷

This passage seems to suggest that we (Flechtner and Lookofsky) rely on the substantive-procedural distinction as a test—in fact as *the sole and exclusive test*—for determining whether the recovery of attorney fees is covered by the Convention. But that is hardly a reasonable reading of our analysis. In fact, we have used the distinction between substance and procedure not as a legal “test” for the Convention’s scope, but as *one of the tools available to determine whether the CISG drafters intended to deal with attorney’s fees in the CISG*.²⁸ In other words, we have not invoked the substance-procedure distinction as a (formalistic) “test” to determine whether the recovery of attorneys’ fees (matter) lies within the scope of the CISG; but rather as a tool for determining and then expressing the apparent *intent of the drafters* (an intent discovered without even referring to the substance-procedure distinction) *not to have the Convention govern the issue*,²⁹ and as an *explanation for why* courts (and, presumably, the drafters of the text of the CISG) simply *assumed* that the matter was beyond the scope of the Convention—i.e., because *they* thought of it as a matter of procedure rather than as a matter of substantive sales rules of the type provided in the Convention.

This method of using the substance-procedure distinction (as a tool to discern the CISG drafters’ intent) is, we think, clearly justified, as the *drafters themselves employed the same distinction* to determine the proper scope of the Convention in another context: a proposal to add language to the Convention

27. CISG Advisory Council Opinion No. 6, *supra* note 22, ¶¶ 5.1 & 5.2 (footnotes omitted).

28. Indeed, in Professor’s Flechtner’s discussion of the attorneys’ fees question in the *Northwestern Journal of International Law & Business*, the substance-procedure distinction is not even mentioned until the seventh paragraph (out of 10 devoted to the question). See Flechtner, *supra* note 5, at 150-54. The distinction is not brought up until *after* he argues that the drafters of the Convention did not intend Article 74 to cover attorney fees, as demonstrated by the fact that this vital question is never even mentioned in the *travaux préparatoires*, that awarding attorneys’ fees under Article 74 yields absurd results (an argument on which the Advisory Council Opinion itself relies—see Council Opinion No. 6, *supra* note 22, ¶ 5.4.), and that the overwhelming practice in decided CISG cases is, apparently, to treat the matter as a question governed by the domestic law of the forum rather than by the Convention. Flechtner, *supra* note 5, at 147-48, 151-53. *Accord* Lookofsky & Flechtner, *supra* note 7, at 97-98.

29. The Advisory Council Opinion itself, of course, concludes that attorneys’ fees are *not intended to be governed* by the CISG.

that would have expressly allocated the burden of proof concerning conformity of delivered goods was rejected because “it was considered inappropriate for the Convention, which relates to the international sale of goods, to deal with matters of evidence or procedure.”³⁰

This last fact leads to our second criticism of the Advisory Council Opinion: since the Convention drafters themselves employed the substance-procedure distinction in determining the proper scope of the CISG, where does the Council come by the authority to declare that distinction is not a proper tool of analysis because it is “outdated and unproductive”? The Advisory Council is, quite obviously, not an “international legislature”; unlike those who drafted the Convention and utilized the substance-procedure distinction, the Council is comprised merely of self-appointed representatives of the CISG scholarly community. It is certainly a distinguished group of scholars, but organizing themselves into a (private) body gives their opinions no more inherent authority concerning the meaning of the CISG than the opinions of other scholars: Advisory Council opinions have authority only insofar as they present a *convincing* analysis, and where those opinions depart from the intention of those who have actual law-making authority—as clearly is the case with regard to the substance-procedure distinction—the Council’s opinions have no authority whatsoever. The Advisory Council is welcome to think (and opine) that the substance procedure distinction is “outdated and unproductive,” but the Council has not been authorized to excise the distinction from scholarly Convention analysis when the drafters in fact themselves used that distinction to explain what they thought was the proper scope of the CISG.

Consider an analogous situation: Article 4(a) of the Convention excludes from the scope of the CISG questions of “validity of the contract or of any of its provisions, or of any usage.” The distinction between validity and non-validity issues has also proven a difficult and elusive one that might also be regarded as “outdated and unproductive.” It would, nevertheless, be absurd to think the Advisory Council (or any other private group or party) has the authority to declare—as it has with regard to the substance-procedure distinction—that questions concerning the scope of the Convention therefore “cannot be resolved” by reference to the validity/non-validity distinction. It is equally absurd to think that an Advisory Council Opinion can render the

30. UNCITRAL, Report of the Committee of the Whole relating to the draft Convention on the International Sales of Goods, 1977, ¶¶ 177-178, *reprinted in* JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS 330 (1989).

substance-procedure distinction irrelevant. Whether members of the Advisory Council like it or not, the distinction between substance and procedure, remains—must remain—one of the tools that informed analysts employ in determining the proper scope of the Convention: the drafters—those who in fact were appointed to fashion the treaty and whose product defined what the sovereign Contracting States agreed to—used the distinction for this purpose, as evidenced by both the nature of the Convention and its *travaux préparatoires*.

In the case of attorneys' fees the drafters, we believe, followed the distinction between substance and procedure—albeit probably unconsciously: they appear to have *assumed* that the Convention does not deal with the attorney fees issue (more precisely, it never occurred to them it might deal with the issue) because *they* (would have) thought of it as a “matter” of *procedure*. There is, as we have noted elsewhere, *nothing* at all in the *travaux préparatoires* to suggest that the drafters ever contemplated the *wild* notion that Article 74 (or any other CISG rule) “governed” the recovery of attorney fees—this despite the issue’s great importance not only in the U.S., but also in loser-pays jurisdictions.³¹ So now, in 2007, it seems to us absurd “counsel” that we should hide our eyes and ignore a distinction that the drafters themselves invoked, merely because *some* academics (now) find that distinction hard to use, “outdated” or “unproductive.”

Of course we are taking an *intent*-oriented approach to interpretation. A pure “textualist” might argue that the drafters’ intent was irrelevant, and that the “plain meaning” of Article 74 encompasses attorneys fees because it covers all “losses” caused by a breach. We frankly have little regard for this view of language and interpretation. What, for example, is the “plain meaning” of the second sentence of Article 13, which provides that under the Convention a contract of sale “*may be proved by any means. . .*” Since the plain dictionary meaning of “any” is (of course) “any,” the “plain meaning” of the sentence is that courts applying the Convention must let the proponent of a contract prove its existence with (e.g.) hearsay evidence, by evidence that domestic rules of evidence would block as prejudicial or violative of public policy, by Ouija boards, by reading sheep entrails—in short by “any” means. Obviously, *that* “plain meaning” is completely absurd, and the reason it is

31. In these jurisdictions domestic rules on recovery of attorneys fees (which presumably would also be pre-empted if the CISG governs the matter) sometimes feature artificial schedules of recoverable fees or reference to considerations (such as the amount in controversy) that are not relevant to the “actual foreseeable loss” approach that would be mandated under Article 74. See Flechtner, *supra* note 5, at 152-53.

absurd is because it ignores the intent behind the provision (which is to prevent the indirect imposition of formality requirements through rules limiting the kind of evidence needed to establish existence of a contract³²), and because it fails to acknowledge that the *Convention was in general not intended to address procedural matters* (such as evidentiary rules).

SUMMING UP

We firmly maintain our original position that the recovery of the costs of attorneys employed in litigating a claim under the Convention is a matter beyond the scope of the CISG, governed instead by the domestic law of the forum as a procedural question. Now that all but the most obstinate internationalists appear to have accepted the outcome of Judge Posner's opinion in *Zapata* (which creates a judge-made fact that the CISG *does not pre-empt* the "American rule"³³), the attack has turned to Judge Posner's *ratio*, especially to his use of the substance-procedure distinction (or, rather, the somewhat distorted picture of that use that is attributed to both him and *us*). Because we think those attacking critics fail to understand the real "ratio" underlying the *Zapata* precedent—the simple but well-founded premise that the CISG *does not govern the "matter"* of attorneys' fees—we have (briefly) re-entered the fray. Time will tell whether our own "Advisory Opinion" might ultimately persuade others to see the issue in the light that we (continue to) do.

32. See Peter Schlechtriem, *Article 11* ¶ 13, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (Peter Schlechtriem & Ingeborg Schwenzer eds.) (2d (English) ed. 2005).

33. At least not in the 7th Circuit (*compare* Schlechtriem, *supra* note 15, at 76), and given the *highly persuasive* nature of Judge Posner's precedent, it will almost surely also be followed elsewhere. See generally Joseph Lookofsky, *Digesting CISG Case Law: How Much Regard Should We Have*, 8 VINDOBONA J. INT'L COMM. L. & ARB. 181 (2004), also at <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky9.html>.