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Abstract: The United Nations Convention on contracts for International Sale of Goods, 1980 (CISG) applies to international sales contracts. According to provisions of CISG, the aggrieved buyer or seller may recover damages if there is breach of contract or obligations under articles 74-77 of CISG. Article 74 of CISG allows recovering all losses caused by the breach. In respect of recovery of attorney’s fees as a part of damages by the successful party, there are dividing decisions. The analysis of case law leads to the conclusion that CISG deals with substantive rules, claiming legal costs is a procedural matter, hence, this has to be determined by procedural law of the state.

Key words: UNCISG, CLOUT Case, damages, foreseeable, attorney’s fees, award.

1. Introduction:

A contact creates rights and obligations between the parties. The breach of contract may result in claiming of damages by the injured party. The United Nations Convention on contracts for International Sale of Goods, 1980 (CISG), provides different remedies to the aggrieved parties, including the remedy of claiming damages under articles 74-77 of CISG.

Articles 45 (1)(b) and 61 (1)(b) of CISG provide that the aggrieved buyer and the seller, respectively, may recover damages as provided in articles 74 to 77 if the other party fails to perform as required by the contract or the Convention. The purpose of awarding damages is to place the aggrieved party in the same economic position it would have been in had the breach not occurred and had the contract been performed. The extent of the available damages is governed by Article 74-77 CISG.

According to article 74 of CISG, damages for breach of contract by one party consist of a sum equal to the loss suffered by the other party as a consequence of the breach. Article 74 represents the general Convention rule on damages, as it protects against all (foreseeable) loss caused by the breach, including direct loss suffered by a buyer who will not or cannot avoid. But article 74 is most significant regarding indirect (consequential) loss, including lost profits and other purely economic loss, as well as physical damage to property.

Possible forms of damages as a result of breach of contract are non-performance damages, incidental damages, and consequential damages. The compensability of incidental losses is not explicitly mentioned in Article 74. In view of the principle of full compensation, however, it is beyond question. It is not possible to enumerate the types of losses because there are many situations in which incidental or consequential financial loss result to the aggrieved party, one such situation is attorney’s fees as legal costs.

A party may incur legal costs for the enforcement of obligations under the contract or Convention. However, article 74 of CISG does not address the payment of attorney’s fees and costs incurred by an aggrieved party in connection with seeking relief for the breach of contract from a third party, such as court or arbitral tribunal ("litigation expenses"). On this issue, courts and commentators have differed over whether such expenses may be recoverable under the Convention.

The paper seeks to examine the scope of claiming attorney’s fees as a part of damages under CISG. In this context, reference is made to provisions of damages under CISG and decided case law. The decisions in regard to award of attorney’s fees as damages are split. Based on article 74, a number of courts have awarded successful claimants their litigation expenses and some courts denied the same stating that litigation expenses is a procedural matter governed by the law of the state, CISG deals with substantive sales rules and not with procedural matters.

2. Recovery of Attorney’s fees as a part of damages:

A large majority of legal systems follow the principle that the winning party is either fully, or at least partially, reimbursed for costs incurred from
the proceedings.\textsuperscript{8} In countries of loser-pays jurisdictions, the losing party would pay regardless of a breach and the prevailing party would be under no obligation to establish foreseeability as required by Article 74 of CISG.\textsuperscript{9}

According to Finnish Code in Finland a party losing the dispute will be held liable for the legal fees of both parties to the proceedings. This is also known as “loser pays” rule. According German Sales law pre-litigation attorney expenses would be characterized as substantive damages and also recognized the rule of “loser-pays”.\textsuperscript{10}

\textbf{2.1. Interpretation of article 74 of CISG:}

Article 74 of the CISG states 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. The damages under CISG can be collected are restricted in three ways, which are as follows:\textsuperscript{11} First: The loss must be foreseeable at the time of the conclusion of the contract; Second: The losses must be proved with a reasonable certainty and are not merely speculative; and Third: The losses were not caused by the plaintiff’s failure to mitigate.

Article 74 states that damages may be awarded for “breach of contract” that causes loss, without any qualification as to the seriousness of the breach or the loss.\textsuperscript{12} Article 74 sets out the Convention’s general formula for the calculation of damages. The formula is applicable if a party to the sales contract breaches its obligations under the contract or the Convention. The first sentence of article 74 provides for the recovery of all losses, including loss of profits, suffered by the aggrieved party as a result of the other party’s breach. The second sentence limits recovery to those losses that the breaching party foresaw or could have foreseen at the time the contract was concluded. The formula applies to the claims of both aggrieved sellers and buyers.\textsuperscript{13} The Convention determines the grounds for recovery of damages, but domestic procedural law may apply to the assessment of evidence of loss.\textsuperscript{14}

With regard to recovery of attorney’s fees as a part of damages, some commentators are of the opinion that attorney’s fees are governed by article 74 and thus should be interpreted under the CISG exclusively. Conversely, others are of the opinion that the CISG does not govern awards of attorney’s fees and therefore the award should be granted under domestic procedural laws.\textsuperscript{15} Decisions are split as to whether attorney’s fees for litigation may be awarded as damages under article 74.\textsuperscript{16}

Article 74’s principle of full compensation, however, supports the view that litigation expenses should be recoverable as damages. This is because the failure to do so would leave the aggrieved party less than whole.\textsuperscript{17} A number of courts and arbitral tribunals have considered whether an aggrieved party may recover the costs of a lawyer hired to collect a debt arising from a sales contract. Several decisions awarded damages to compensate for legal fees for extra-judicial acts such as the sending of collection letters.\textsuperscript{18} In short applying the interpretive approach to article 74 would allow an aggrieved party to recover legal expenses in connection with extrajudicial attempts to assert rights under the Convention before avoidance of the contract. However, the same approach would not allow a party to recover legal expenses associated with litigation.\textsuperscript{19}

The above study reveals that there are some decisions, which allowed pre-litigation cost but denied the litigation cost itself. The court made a distinction between pre-litigation lawyer costs, which are recoverable as damages under CISG Article 74, and attorney’s fees for conduction the litigation itself.\textsuperscript{20}

\textbf{2.2. Attorney’s fees was allowed as a part of damages:}

Several decisions have awarded damages under article 74 to compensate for incidental damages arising from the breach.\textsuperscript{21} The arguments for inclusion of attorney’s fees under CISG are; the plain meaning of Article 74; the principle of full compensation; the principle of foreseeability; the duty to mitigate; the general principle of reasonableness; and the reading of the preamble that is the endeavor to promote uniformity.\textsuperscript{22} In following cases there are decisions awarding pre-litigation costs as damages and in some cases attorney’s fees awarded as a part of damages under article 74 of CISG.

\textit{In CLOUT case No. 130}\textsuperscript{23} the court held that legal costs incurred in actions to enforce claims under two different contracts were allowed. The court stated that, in principle, legal costs could be recovered as damages.

\textit{In Wolfram R. Seidel GmbH v. Crotton S.A.}\textsuperscript{24} the court in Spain awarded to the buyer, under the heading of consequential damages, the costs of lawyer’s fees in relation to extra-judicial claims addressed to the plaintiff outside Spain. The court also granted to the buyer the payment of legal fees as well as lost profits under Article 74 CISG.

Article 74 encompasses compensation for the cost of a reasonable pursuit of one’s legal rights.\textsuperscript{25} The court held that the seller was entitled to attorneys’ fees and that the word “loss” in Article 74 encompasses the cost of pursuing one’s
right. In another case, it was held that the litigation expenses incurred on enforcing contractual rights are incidental damages that must be recoverable under article 74 in order to make aggrieved parties whole.

In CLOUT case No. 130, the tribunal concluded that a supplemental interpretation of the arbitration clause by reference to both article 74 and local procedural law authorized the award of attorney’s fees before a tribunal consisting of lawyers. In CLOUT case No. 254 the court allowed reasonable pre-litigation costs of lawyer in seller's country compensable and pre-litigation costs of lawyer in buyer's country to be awarded as part of costs. Similarly, in CLOUT Case No. 327, recovery of debt collection costs allowed.

A number of courts and arbitral tribunals have considered whether an aggrieved party may recover the cost of a lawyer hired to collect a debt arising from a sales contract. Several decisions award damages to compensate for legal fees for extra-judicial acts such as the sending of collection letters. A party who is represented by a lawyer has a right to expenses.

In Perry v. Baptist Health the appellate court held that the trial court was correct in its conclusion that upon the threshold determination that the Appellee was the prevailing party in the case, it had discretion to award reasonable attorney’s fees based upon expenses incurred even during its prosecution of unsuccessful arguments and endeavors within the case.

In CLOUT Abstract No. 930 the Swiss court held that reasonable costs for the recovery of the debt by the creditor are considered to be accessory costs, which can be claimed according to Article 74 of CISG. This includes costs for debt collection proceedings, costs for the assignment of an agency for the collection of foreign debts or extrajudicial lawyer’s fees, as long as those expenses are made in direct relation to the recovery of the debt.

In Eyroflam S.A. v. P.C.C. Rotterdam B.V. held that Eyroflam had a right to have extrajudicial collection costs compensated. Similarly, in Watermelon case reasonable legal costs allowed by the court.

2.3. Attorney’s fee was allowed partly as a part of damages:

In Dawson v. Temps Plus, Inc., the trial court awarded the plaintiff approximately $62,000 in damages and $20,000 in attorney’s fees for the breach of a covenant not to compete. Upon appeal, the court reversed the trial court’s award of damages and held that the breach had caused only nominal damages to the Plaintiff-Appellee, therefore, the court reversed and remanded the attorney’s fees award for reconsideration in light of appellate court finding of only nominal damages.

In Granjas Aquanova S.A. de C.V. v. House Mfg. Co., Acquanova contended that attorneys’ fee are a foreseeable loss specifically recoverable under Article 74. The District Judge granted in part attorney’s fee and denied in part and its motion for prejudgment interest is denied. The court applied Arkansas law, according to Ark.Code.Ann. §16-22-308 a court may award reasonable fees to the successful party in a breach of contract case. The Arkanas Supreme Court after considering the factors such as the time and labor requirements of the case and the novelty and difficulty of the legal issues, it is clear that Aquanova is entitled to $423, 954.45 in Attorney’s fee.

2.4. Attorney’s fees was not allowed as a part of damages:

There are some decisions in which the claim for attorney’s fees was not allowed as a part of damages under article 74 on the grounds 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.

There is a strong argument that Article 74 of the Convention should not be construed to permit such recover (recovery of attorney’s fees). Article 74 requires that the damages be based on a breach of contract. A consequence of this is that a defendant, in a country where a loser-pays rule is inapplicable, would be unable to recover attorneys’ fees as damages after successfully having defended himself because no breach of was established.

In Kropp v. Ziebarth, the trial court awarded the attorney’s fees to the defendant buyers. The Montana Statute at issue in the case permitted the prevailing party to recover reasonable attorney’s fees. The Eight circuit Court reversed the award.

In CLOUT case No. 410 it was held that the aggrieved party had failed to mitigate these expenses as required by article 77 when it hired a lawyer in buyer’s location rather than a lawyer in seller’s location to send collection letters. The arbitrators denied recovery of the amount of the claimant’s attorney’s fees on the grounds that the fees incurred were unforeseeable. In San Lucio, S.r.l. et al. v. Import & Storage Services, LLC,
U.S. District Court held that each party is responsible for the payment of its own legal fees.

In Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., the District court awarded Zapata compensatory contractual damages for the cost of unpaid tins delivered to Lenell, as well as $550,000 in attorney fees. Judge Shadur held that Zapata’s recovery of its attorney’s fees as foreseeable consequential damages and the award of the fees is governed by the CISG instead of domestic procedural rules.

On appeal the Seventh Circuit reversed the District court’s decision and held that legal fees were neither clearly included, nor clearly excluded, from Article 74. The losses do not include attorney’s fees incurred in the litigation of a suit for breach of contract. The decision of Judge Posner in Zapata case based on following three reasons:

a. Award for attorney’s fees are not part of substantive law, but are procedural rules to be determined by the local forum;

b. Awards of Attorney’s fees as consequential damages were not contemplated in the four-corners of the CISG or in the general principles on which the convention was based; and

c. Interpreting the CISG to include attorney’s fees in damage awards cause abnormalities in its application.

Judge Posner also found that the award of attorney’s fees to be part of domestic procedural law, not a matter of substantive treaty law. The court further observed that awarding attorney’s fees as damages is in conflict with the majority of world’s legal systems. There are no principles that can be drawn out of the provisions of the Convention for determining whether the loss includes attorney’s fees; so by the terms of the convention itself the matter must be left to domestic law.

There are two main reasons why some commentators support Judge Posner’s final decision in Zapata. First, they suggest that the CISG does not govern the award of attorney’s fees. Therefore, there is no need to consult the gap-filling measures under Article 7(2) to interpret its application. Second, and most notably, is the belief that procedural rules are general in their application and should apply to both domestic and international cases.

2.5. Criticism against the Zapata case:

According to David B. Dixon, there are the five reasons why the Zapata case was determined incorrectly:

1. The court has disregarded the international character of the CISG and ignored international case law and rules of treaty interpretation;

2. The plain language of Article 74 contemplates the inclusion of attorney’s fees in the calculation of loss;

3. Judge Posner ignored the CISG’s general principle of “full compensation” for contract damages;

4. Judge Posner’s distinction between substantive and procedural law was inappropriate;

5. Judge Posner’s suggestion that awarding attorney’s fees would cause “abnormalities” was irrelevant to the case he was addressing and even if it was relevant, it could easily be disposed of under existing rules of interpretation.

There are two bodies of law that U.S. judges should consult before passing judgment on treaty interpretation. The first one is the U.S. Constitution’s Supremacy Clause and second one is rules of treaty interpretation of international law embodied in the Vienna Convention on Law of Treaties, as well as decisions of ICJ. This protocol has not been followed in Zapata case.

2.6. Opinion of legal scholars:

Professor Honnnold has suggested, when noting “labels that the state law bears should be irrelevant” under international law, that the problem with Judge Posner’s argument is that the domestic label of “procedural law” distorts the application of article 7(1), which calls for the uniform application of the CISG.

Professor Orlandi argues that when parties from different countries with different legal heritages turn to the courts for equal enforcement of their contractual rights pursuant to the uniform rules of the CISG, “abstract distinction between substantive and procedural laws become redundant, if not harmful…”

According to Professor Felemegas the plain language of article 74 arguably contemplates the inclusion of attorney’s fees in the calculation of loss. The nature of article 74 is inclusive, not exclusive. There are many different categories of loss recoverable as damages, none of which is specifically mentioned in the text of article 74. The compensation of costs of litigation (court’s and
lawyer’s fees) is governed exclusively by the relevant lex fori. 55

According to Harry M. Flechtner, the likely explanation for why the drafter never contemplated that attorney fees might be covered by article 74 is that they thought of the recovery of attorney costs as a procedural matter beyond the scope of the substantive sales rules of the Convention; after all the matter is, in domestic law, generally treated as an aspect of procedure.56

The question to be considered if a party successfully sues for breach under the convention, can it recover the attorney fees incurred during the litigation as damages under article 74?57 Whether the matter is covered under domestic procedural law or CISG damages. According to Harry M. Flechtner & Professor Joseph Lookofsky, leaving the recovery of attorney fees to domestic law is the correct approach: it not only honors the likely intention of the Convention’s drafters, but it also makes the most sense from a policy standpoint.58

3. Limiting damages under CISG:

The CISG limits the scope of recovery of damages under articles 74-77. It is based on the idea that the recovery of damages cannot be unlimited.59

The damages recoverable under Sections 74, 75 & 76 are reduced, if it is established that the aggrieved party failed to mitigate losses. 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. A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss resulting from the breach.60

4. Burden of proof in cases of claiming damages:

None of the damage formulas in article 74, 75 and 76 expressly allocates the burden of proof.61 The burden of proof with regard to the foreseeability lies with the aggrieved party.62

The Convention recognizes the general principle that the party who invokes a right bears the burden of establishing that right, and that this principle exclude application of domestic law with respect to burden of proof.63

5. Conclusion:

The research concludes that there are conflicting decisions on award of attorney’s fees as a part of damages under Article 74. There are several arbitral tribunals have awarded recovery of attorney’s fees for the arbitration proceedings citing article 74.64

The recovery of compensation for the costs of attorneys employed in litigating claims under the Convention should be treated as a question beyond the scope of the Convention, to be handled pursuant to applicable to domestic law.65 This appears to be exactly the approach adopted to date in virtually all cases.66 In the case of attorney’s fees the drafters 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 because they thought of it as a “matter” of procedure.67

It is very clear from the decided cases and scholarly opinions that the award of attorney’s fees as a part of damages under Article 74 of CISG is not a proper interpretation. The claiming of attorney’s fees is a part of damages by the successful party to the case is a procedural matter governed by law of the state and not by CISG. The provisions of CISG deal with substantive law, therefore, attorney’s fees is not a subject governed by CISG.

6. References:

[7] Ibid.
[10] Ibid.
[13] Ibid.
[15] Harry M. Flechtner (Winter 2002), Recovering Attorney’s Fees as damages under the U.N. Sales

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[24] UNCITRAL texts (CLOUT) Abstract no. 796, Germany 14 January 1994 Appellate Court Düsseldorf (Shoes case)

[25] Oberlandgericht (Appellate Court) case No. 17 U 146/93, 14 Jan. 1994 (F.R.G.) for details see pace.edu/cases.


[34] Switzerland 23 May 2006 Higher Cantonal Court Valais (Suits case) for details see: http://cisgw3.law.pace.edu/cases/060523s1.html.


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[38] 337 Ark.247, 987 S.W. 2d 722 (1999).


[41] Ibid 15.


[43] 601 F.2d 1348 (8th Cir. 1979).


[48] Ibid.


[51] Ibid.


[54] John Felemegnas (2003), An Interpretation of Article 74 CISG by the U.S. Court of Appeals, 15 Pace Int’l L. Rev. 91.

[55] Ibid 5.


[57] Ibid 2.

[58] Ibid 59.


[60] Article 77


[64] Ibid 50.

[65] Ibid 59, page 581.


[67] Ibid 40.