

**Case 631: CISG 25; 54; 64 (1) (a); 72; 74; 75; 77; 78**

Australia: Supreme Court of Queensland 10680 of 1996

Downs Investments Pty Ltd. (ACN 010 729 567) (in voluntary liquidation) (formerly known as Wanless Metal Industries Pty Ltd.) v. Perwaja Steel SDN BHD

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<<http://cisgw3.law.pace.edu/cases/001117a2.html>>

Abstract prepared by Marianne Rose

The case dealt with a number of issues: whether a failure to establish a timely letter of credit constituted a fundamental breach of contract; whether the seller was entitled to avoid the contract and recover from the buyer the losses claimed on the grounds of the buyer's repudiation and/or non-compliance with an essential term of the contract; and whether the seller had taken reasonable steps to mitigate damages. The applicability of the CISG was not in dispute.

Downs Investment, an Australian company (the seller), entered into a contract with the Malaysian company Perwaja Steel (the buyer), for the purchase and shipment of scrap steel to be shipped from Australia to Malaysia. According to the contract, an irrevocable letter of credit from the buyer in favour of the seller was required prior to shipment. Shortly before having to provide the letter of credit, the structure and management of the buyer changed. Under this new management structure, the buyer was obliged to obtain permission from an executive committee before it could provide a letter of credit. The buyer failed to provide a letter of credit upon the seller's request, as the executive committee could not communicate any instructions within a short time. Upon receipt of this communication from the buyer, the seller replied purporting to accept the buyer's repudiation of its contractual obligations and terminated the contract.

The case was heard in the Supreme Court of Queensland. The court held that the legislation relevant to determine the dispute was the *Sale of Goods (Vienna Convention) Act 1986* (Qld), because the parties to the contract had agreed that the law applying in Brisbane would define their contractual obligations, and that Act required the application of the CISG.

Pursuant to article 64 CISG, the court determined that the seller could declare the contract avoided if the buyer failed to perform any of its obligations that amounted to a fundamental breach of the contract. The court then applied the definition of "fundamental breach" as defined in article 25 CISG. In the court's view, the refusal to establish a timely letter of credit was clearly a fundamental breach within the meaning of article 25 and article 64 (1) (a) of the Convention.

The court also considered the application of article 72 CISG and concluded that, if prior to the performance of the contract, it was clear that one of the parties would commit a fundamental breach, the other party might declare the contract avoided. If time allowed, the seller was required to give reasonable notice to the buyer to permit him to provide adequate assurance of his performance.

The court found that the failure to establish a letter of credit in the circumstances of the case was a failure by the buyer to meet its "obligation to pay the price" of the goods in the meaning of article 54 CISG, which in fact states that the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made. The change of management structure in the buyer, which required executive management committee approval for a letter of credit, and the refusal of the committee was held to be no excuse at law.

Once established that the buyer's breach of contract caused significant loss to the seller, the court looked at articles 74 and 75 CISG to determine the relevant damages. The court accepted that the sub-charter of the original ship as soon as possible was a reasonable step (in the sense of article 77 CISG) to minimise the damage incurred by the seller in having a large vessel standing by at the seller's expense and not being used for the purpose of shipping its scrap steel to the buyer. The court also expressed that the resale of the scrap to another buyer within two months of the seller's acceptance of the buyer's repudiation of the contract clearly satisfied the requirements of article 75 CISG, as it was done within a reasonable time. In the court's view, the seller promptly took all steps reasonably necessary to mitigate the damages it suffered as a consequence of the buyer's repudiation.

Therefore, the court gave judgment for the seller, including interests (article 78 CISG).