

**Case 993: CISG 72; 73; 78**

Denmark: Højesteret (Danish Supreme Court)

17 October 2007

Zweirad Technik v. C. Reinhardt A/S

Original in Danish

Published in Danish: Ugeskrift for Retsvæsen 2008 p. 181 et seq.;

<http://cisgnordic.net/index.php/cases/danishcases/34-danishcaselaw/100-2007-oct-17-sc>

Abstract prepared by Joseph Lookofsky, National Correspondent

A Danish seller imported Japanese motorcycles and then resold large numbers of them to a German buyer for resale to its customers in Germany. In practice, the buyer ordered quantities based on forecasts of anticipated sales in Germany and the seller then ordered corresponding quantities from its Japanese supplier (i.e. the manufacturer). The parties' practice permitted minor adjustments of the orders in question, e.g. if certain colours and/or quantities were unavailable.

In the fall of 1999, the buyer ordered some 1,600 motorcycles to be delivered in instalments. The price for each instalment was payable in Yen upon delivery, whereas the total price was made subject to a bank guarantee. Later, due to exchange rate fluctuations between the Euro and the Yen, the buyer requested that the seller ask the manufacturer for a price reduction. When the manufacturer refused, the buyer nonetheless placed additional orders for 2,000 motorcycles. In December 1999, however, the buyer cancelled its orders. When the seller protested, the parties agreed that the buyer would accept delivery of half the ordered quantity subject to a given discount by the seller and with the seller to attempt to secure an additional discount from the manufacturer. Not satisfied with the seller's efforts to obtain the additional discount, the buyer refused to take delivery of a given instalment and also cancelled the bank guarantee. Claiming that such a conduct constituted a fundamental breach, the seller avoided the contract, advising the buyer that it would resell the motorcycles concerned in Denmark.

In the litigation which ensued the buyer contested that the seller had rightly avoided the contract and that the seller was entitled to damages equal to the difference between the contract price and the price secured under cover transactions (which took the seller nearly 5 years to complete). The buyer also argued that the seller had not taken reasonable measures to mitigate, as the motorcycles in question were resold only in Denmark, where prices were allegedly lower than in Germany (an allegation the seller disputed). Finally, the parties disagreed on how interest, if payable, should be calculated.

In the first instance, the Danish Maritime & Commercial Court (*Sø- og Handelsretten*) decided in favour of the seller, holding that the seller had rightfully avoided under article 72 CISG and that the cover sales were made in a reasonable manner and within a reasonable time. On this basis, the Maritime & Commercial Court awarded the seller DKK 3.9 million in damages, corresponding to the difference between the contract price and the cover price. Referring to article 78 the Court also awarded the seller interest calculated from the date of resale (cover).

Reviewing this decision on appeal, and citing article 73 CISG, the Supreme Court (*Højesteret*) unanimously affirmed that the seller had been entitled to avoid. As regards damages a majority (3 of 5 judges) voted to reduce the High Court's award of damages by approximately 50 per cent, holding that the seller failed to re-sell the motorcycles at a sufficiently high price or within a reasonable period of time. Basing this reduction on a "discretionary calculation", the majority voted to award damages in the amount of 2 million DKK. Without referring to article 78 CISG, the majority held that the seller was entitled (only) to interest calculated as of the commencement of the action. A minority of 2 Supreme Court judges, while not commenting on article 78, saw no reason to criticize the cover sales by the seller or the damages originally awarded by the Maritime and Commercial Court.