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The indemnity of distributors in Swiss law after the judgement of 22 May 2008 of the Federal Court.

Dr. André Thouvenin, Attorney at law, Zurich



1 The agency agreement is governed by the Swiss Code of Obligations.

- ¹ The Swiss Code of Obligations (hereinafter "CO") from 30 March 1911 provides for the various agreement types in Articles 184 – 551. This also includes the agency agreement, which has been provided for by law since 1953 (Art. 418a et seq. CO).

2 The entitlement to a compensation for customers.

- ² Article 418u CO defines the requirements, under which an agent is entitled to compensation for customers:

"If the agent, through his activity, has substantially increased the principal's clientele, and if, even after termination of the agency relationship, the principal or his successor in title benefits substantially from the business relations with the acquired clientele, the agents or his heirs have an inalienable right to an adequate compensation to the extent that such compensation is not inequitable.

This claim shall not exceed the net earnings one year derived from this contractual relationship, computed on the average of the last five years, or if the relationship has not existed so long, then on the average of the total of such period.

No claim exists if the agency relationship was terminated for a reason for which the agent was responsible."



3 Distribution agreements are not provided for by law.

- 3 Sales agreements, through which a supplier grants a distributor – generally in another country – the right to purchase from said party all or certain goods that it manufactures and to resell them to certain customers

or in a certain territory for its account, are not provided for in Swiss law. With such distribution agreements, we are referring to exclusive representation agreements or exclusive distribution agreements.

In such distribution agreements, the parties provide for their reciprocal rights and duties such as prices, payment terms, delivery dates, etc. as well as minimum amounts, which the distributor must accept, the duty of a distributor to maintain a storehouse, advertise, etc.

4 Problems in the event of differences among the parties.

- 4 If problems arise between the parties during the collaboration that are not provided for in the agreement the question arises as to which legal provisions are to be applied.
- 5 The courts refer to such agreements, which are not provided for by law, as agreements *sui generis* or composite agreements. This is because individual activities or rules normally occur with one contract type governed by law and others with another contract type such as a purchase contract, rental contract or agency contract.
- 6 The question arises in this respect as to whether the rules valid for the statutory contract type are to be applied analogously to the issues disputed by the parties in order to resolve the issues disputed in manner that a judge deems adequate.
- 7 Questions of this kind have arisen for years with regard to the exclusive distribution agreement and also e.g. with regard to franchise contracts.



5 The Federal Supreme Court has already applied various individual provisions of agency law analogously for such distribution agreements.

- 8 The Federal Supreme Court already applied individual provisions of Agency Law analogously for the exclusive distribution agreement such as Art. 418q CO relating to orderly termination and Art. 418r CO relating to termination without notice¹.

6 However, the Federal Supreme Court dismissed such analogous application of 418u CO in 1962.

- 9 Thus far, however, the Federal Supreme Court has dismissed the analogous application of the provision from Art. 418u CO to exclusive distribution agreements². In the case it ruled on in 1962, it states that the exclusive distributor is an independent businessperson who operates his business at his discretion. The customers of the exclusive distributor do not become the customers of the principle, which is the prerequisite for an entitlement to compensation for customers.
- 10 The Federal Supreme Court furthermore refrained from extending the additional compensation to the agent, introduced as an exception, to other agreements. Nonetheless, the court did not provide for a decision in the event that the supplier had additional controlling rights granted, the exclusive distributor had been integrated in the distribution organisation and/or would have had to report to the supplier or transfer said customers to the same.

¹ BGE 88 II 30

² BGE 88 II 169; PRAXIS 51 (1962) 127



- 11 Since this time, the question has been discussed and argued in various articles, as to on what grounds or under which prerequisites analogous application of Art. 418u CO should be permitted.

7 The distribution of goods has changed considerably.

- 12 Over the past decades, the distribution of goods has changed considerably: Suppliers place great emphasis on their brands and want to influence the distribution of their products to a much greater degree than in the past.
- 13 Even if the suppliers are dealing with foreign markets not through their own subsidiaries, own employees or agents, they want to stipulate how their products should be marketed. This is associated with increasingly extensive provisions in distribution agreements.

8 The supplier imposes extensive duties on the exclusive distributor.

- 14 Today, a distributor is instructed in great detail and manifold as to how he is to conduct activities, how he is to market the products of the supplier. In addition, the distributor often has to report in detail and on a regular basis on the activities undertaken in the market in order to sell the products of the supplier, which customers prefer which products, etc. In some cases, the distributor even has to grant access to its books and records, forward a copy of every customer order to the supplier or at least disclose the customer addresses in another form, no later than the end of the contract.



9 The Federal Supreme Court recently had to examine such a case and granted the entitlement to compensation for customers.

¹⁵ The decision of the Federal Supreme Court being presented to you herein (published in the official corpus of the Federal Supreme Court: BGE 134 III 497) is based on a case with such extensive duties imposed on two exclusive distributors, who had established the market for the scent of the supplier over a period of approximately 10 years in the Czech Republic and Slovenia. In examining the decree of the High court of the Canton of Geneva, the Federal Supreme Court ruled that the court of lower instance wrongly denied the claim of the exclusive distributors and therefore granted the entitlement to compensation for customers.

10 The extensive restrictions on the exclusive distributors were decisive.

¹⁶ Several provisions in the exclusive distribution agreement existed in order to determine the entitlement to compensation for customers which are mostly considered standard provisions in exclusive distribution agreements nowadays.

¹⁷ Based on these contract provisions the two exclusive distributors were restricted in their freedom as entrepreneurs in various regards.

¹⁸ The exclusive distributors had to

- present new sale locations to the supplier for approval;
- purchase annually a minimal amount of products;
- accept unilateral amendments as to price and supply conditions.



19 In addition,

- the supply of specific products could be suspended with immediate effect;
- at least 10% of the annual turnover had to be invested into advertisements;
- the exclusive distributors had to maintain a specific amount of products on stock;
- they had to present various reports and lists as to their turnover as well as to the competitors' business on a monthly basis; and
- they had to disclose their accounts and records.

20 Based on these contract provisions the Federal Supreme Court concluded that the exclusive distributors enjoyed merely limited autonomy despite their formal independence.

21 Furthermore, the exclusive distributors were obliged to periodically disclose to the supplier the names and addresses of their customers. The Federal Court held that this, in essence, constituted an obligation to transfer the customer base to the supplier upon termination of the exclusive distribution agreement.

11 The Federal Supreme Court of Germany applies similar criteria.

22 As such, the Federal Supreme Court draws on similar criteria as the practice of the German courts requires for the analogous application of § 89b of the German Commercial Code. The German Federal Supreme Court requires, for analogous application, that the exclusive distributors are integrated in the supplier's distribution system and fulfil extensive commercial tasks that can be compared with the tasks of a commercial representative.



12 The Swiss Federal Supreme Court referred to "Realkundschaft" (real clientele).

- ²³ Contrary to the practice of the German courts, the Swiss Federal Supreme Court – at least in this case – does not, however, require that the exclusive distributor would have to be obliged in an agreement to disclose customers to the supplier. In this respect, it found it adequate that the exclusive distributors had expanded the market for a product of daily use – in this case, a scent – in both contract territories.
- ²⁴ From the facts of the case, it was also established that the exclusive distributors did not canvass customers which were personally bound to them but bound to the brand of the scents. The Federal Court called such group of customers *Realkundschaft* and held that, in connection with such group of costumers, the requirements set out under Art. 418u CO are fulfilled in most cases.

13 The court of lower instance must calculate the compensation.

- ²⁵ The Cantonal High court of Geneva rejected the claim of the exclusive distributors to the entitlement of a compensation for customers. As a result, it also did not calculate such compensation.
- ²⁶ The Federal Supreme Court therefore returned the dispute to the Cantonal High court of Geneva so that this calculation is made up for according to the principles that apply to agents.

14 How is the amount of compensation for customers calculated?

- ²⁷ The calculation – or rather: estimate – of compensation of an agent for customers is not uncomplicated per se. It becomes more complicated with the analogous application to the exclusive distribution agreement.



28 Why?

- 29 The amount of compensation for customers is calculated based on the principles established in connection with Art. 418u CO. In other words, only if and when the requirements set out in the Article mentioned are fulfilled, an exclusive distributor, integrated into the supplier's organisation to the extent mentioned above, is entitled to a compensation for customers. The impact of the supplier's brand on the exclusive distributor's customer base does not per se exclude a compensation for customers, such impact is however to be taken adequately into account when calculating the amount of compensation for customers.
- 30 With the analogous application of Art. 418u CO, the "equivalent" or at least comparable circumstances of the exclusive distributor integrated into the supplier's organisation as an agent must be accounted for. In this respect, it is necessary to exclude aspects that are not comparable.
- 31 Ideally, in calculating a compensation of an exclusive distributor for customers, one draws on the standard rate of commission for an agent. By nature, considerable problems arise as it is difficult to define a "standard" rate of commission. An exception exists in cases in which the supplier has made arrangements with an agent for the distribution of its products in individual territories and for which a commission is offered.
- 32 In commentaries and articles relating to this issue, in which a "standard" commission cannot be determined, rates from 5% to 10% of the turnover are identified or it is recommended that one-third of the profit margin of an exclusive distributor is used as a basis for the calculation of the entitlement.



- ³³ Another solution is seen in drawing on the percentage of the exclusive distributor's margin allocated to the storage, debtor risk of the exclusive distributor and similar risks, which the agent is not required to cover, deducting this from the margin and calculating the compensation based on the remaining margin. A correct approach that is dogmatic per se exists in this respect. However, the parties will hardly be able to reach a consensus in a dispute and the exclusive distributor will in most cases hardly be able to demonstrate the accuracy of the percentages it brings forward.

15 Can the entitlement be excluded?

- ³⁴ Another issue is the question as to whether an exclusive distributor has mandatory entitlement to such compensation or whether the entitlement to compensation for customers can be excluded in an agreement. In my opinion, the entitlement cannot be explicitly excluded.
- ³⁵ If reasons exist in support of the analogous application of Agency Law and as a result e.g., as discussed herein, including from 418u CO, it is not comprehensible as to why subsequent exclusion of this provision, formulated as a compulsory measure, from an agreement should be permissible.

16 Should the compensation be provided for in an agreement?

- ³⁶ Individual suppliers will consider providing for the compensation of an exclusive distributor in an agreement. This is, however, precarious. If the compensation for the exclusive distributor is set too low in an agreement then said party – as with an agent in the case of an agency agreement – shall still have an entitlement to a greater compensation that a judge finds to be adequate. This is due to the fact that the exclusive distributor, as mentioned, is not able to forego its entitlement in advance as with the agent.



- 37 Attempts by companies to divide a commission, to which an agent is entitled in an agency agreement, into a component for the activity of the agent – such as 6% – and a component – such as 1% – to settle the subsequent entitlement of compensation for customers, was a frequent occurrence in the past.
- 38 I intentionally refer to such agreements as "attempts" because they are condemned to fail from the beginning. They apparently serve to undermine the entitlement of an agent to the compensation for customers.
- 39 Why?
- 40 The compensation for customers depends on various prerequisites as prescribed by law. They must be in place at the time the agreement is terminated. If this is not the case, the agent has no entitlement to the compensation for customers.
- 41 The entitlement to the compensation of customers arises, as shown above, only if the clientele has been significantly expanded, if the supplier gains advantages as a result – said party therefore continues to benefit from these customers and does not, e.g., stop producing some of or all products distributed by the agent or stop distributing in the contract territory.
- 42 The entitlement is forfeited if the agent terminates itself without this being attributed to the supplier or if the termination of the agreement is attributed to the agent.
- 43 The compensation for customers always depends on various prerequisites; it is therefore not always due in every case. Why should a profit-oriented company make payments to an agent for years or even decades that are specifically set forth in an agreement in the form of an additional (partial) commission if the possibility exists that the agent is not even entitled to this upon the termination of the agreement?
- 44 Raising this question means answering it with no. A contract provision relating to compensation for customers "settled" in advance in the form of



shares of commission suggests that the supplier is unconscionably attempting to avoid having to pay the compensation owed. In short: this represents a provision in violation of the law and is therefore invalid.

- ⁴⁵ The same applies in the case of an exclusive distributor integrated in a supplier's distribution system.

17 Summary.

1. In the case of an exclusive distribution agreement, entitlement to compensation may also exist corresponding to the compensation for customers from an agency agreement according to Art. 418u CO.
2. The prerequisite for this is – in addition to the prerequisites according to Art. 418u CO – that the exclusive distributor was integrated, similar to an agent, extensively in the supplier's distribution system and the supplier is able to benefit from the customers after the termination of the agreement.
3. I believe this entitlement is mandatory, that is, the parties cannot exclude said entitlement from an agreement.
4. An exact calculation of the entitlement is very difficult as the basis for the calculation cannot be the full margin of the exclusive distributor, but rather only a percentage, which corresponds to a standard provision resulting out of an agency relationship or only a portion of the margin, which corresponds to the actual distribution activities.
