



Distribution Newsletter Switzerland

Developments in the Law of Exclusive Distribution

Until now no compensation for customers upon termination of an exclusive distribution agreement

In line with a decision of the Swiss Federal Supreme Court ("SFSC") rendered back in 1962¹ we used to advise our clients that an exclusive distributor is denied, analogous to the agency law as set forth in Art. 418u Swiss Code of Obligations ("CO"), a compensation for customers upon termination of the exclusive distribution agreement. As the SFSC did not render any decision in similar cases thereafter² we also advised our clients that an analogous application of other provisions of the agency law, e.g. of its termination provision, would most likely be denied as well.

As time goes by

In its new decision rendered on May 22, 2008 (BGE 134 III 497)³ the SFSC had to deal with a complaint of two exclusive distributors, which prayed, amongst others, for a compensation for customers upon termination of their long-time exclusive distribution agreement with a Geneva based supplier. The long-time exclusive distribution agreement entitled the exclusive distributors to distribute scents in the Czech Republic and in Slovakia. Contrary to the courts of the lower instances, the SFSC held that an analogous application of Art. 418u CO is justified given the particulars of the case at hand and remanded the case to the lower courts for calculation of the amount of compensation for customers.

¹ BGE 88 II 169, PRAXIS 51 (1962) 127

² At least no such decisions were published in the official gazette of the SFSC

³ The decision was rendered in French, a slightly shortened version however will be published in German in PRAXIS in 2009

Which are the determining factors for the entitlement of a compensation for customers?

Determining for the entitlement of a compensation for customers were several provisions in the exclusive distribution agreement which are mostly considered as standard provisions in exclusive distribution agreements nowadays.

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

The exclusive distributors had to

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

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.

Based on these contract provisions the SFSC concluded that the exclusive distributors enjoyed merely limited autonomy despite their formal independence.

Furthermore, the exclusive distributors were obliged to periodically disclose to the supplier the names and



addresses of their customers. The SFSC held that this, in essence, constituted an obligation to transfer the customer base to the supplier upon termination of the exclusive distribution agreement.

From the facts to the case it was also established that the exclusive distributors did not canvass costumers which were personally bound to them but bound to the brand of the scents. The SFSC 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.

How is the amount of compensation for customers calculated?

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 mentioned Article 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.

Summary

Subject to an integration of the exclusive distributors into the supplier's organisation to the extent set out above there is a chance or risk - as the case may be - that a compensation for customers upon termination of the exclusive distribution agreement becomes due. Such compensation becomes due even if the parties have waived the applicability of Art. 418u CO as latter is coercive (*ius cogens*) and because coercive provisions can not be waived even if applied merely analogous.

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