Update on Claims for Compensation for Clientele by Distributors under Swiss Law

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1. Background

Under Swiss commercial agency law, a commercial agent may claim compensation for clientele (goodwill) upon the termination of the agency agreement by the principal. Such claim requires the agent's activities have resulted in a substantial expansion of the principal's clientele and considerable benefits accrue to the principal or its legal successor from the past business relationship. The latter considerable benefits include, for instance, lasting loyal clients acquired by the former agent (Article 418u Swiss Code of Obligations ("**CO**")). Parties to an agency agreement may not waive such a potential claim in advance.

More than 15 years ago, the Swiss Federal Supreme Court held that the above rule applies by analogy to exclusive distribution agreements (BGE 134 III 497) provided that the exclusive distributor effectively faces limited autonomy, and is *de facto* in a situation comparable to that of a commercial agent. This may be the case where the distributor is closely integrated into the supplier's sales and distribution organization, and, thus, enjoys only very limited commercial autonomy.

The decision marked a shift from previous case law and came with many unanswered questions. Practitioners feared that courts and arbitral tribunals will apply the above judgment to a large number of distribution agreements, and that this will lead to numerous claims for compensation for clientele and related disputes upon termination of distribution agreements. Some authors expressed concerns that the ruling would make it less attractive for parties to an international distribution agreement to choose Swiss law as the governing law.

Against this background, we analyzed the Swiss published court decisions and arbitral awards rendered since this landmark decision.

2. Findings

Ever since the Federal Supreme Court's decision BGE 134 III 497 in 2008, it is frequently the case that former distributors purport to be entitled to a compensation for clientele upon the termination of the distribution agreement. The fact that there are only very few published court decisions and arbitration awards since 2008 on the issue is remarkable. Importantly, none of these few decisions effectively upheld the exclusive distributor's claim for compensation for clientele. This suggests that at least some of the concerns expressed following the landmark ruling of 2008 proved unjustified.

Courts and arbitral tribunals generally applied the test established by the Federal Supreme Court when assessing whether a distributor's situation was similar to that of an agent (i.e., limited commercial autonomy), which would in turn justify the analogous application of Article 418u CO.

In addition, the few published judgements confirm that a successful claim for compensation for clientele requires the distributor to demonstrate that:

- the distributor – through its marketing activities – has either **established or significantly increased the principal's customer base**. In practice this requires an analysis of, *inter alia*, the strength of the product's brand, the number of customers and/or key customers which will likely continue to buy the product, turnover (incl. potential future product turnover), and a comparison with competitors in the sector to determine whether the increase in the principal's customer base has been significant.
- after the termination or expiration of the distribution relationship, the **principal substantially benefits from the customer base** established or increased by the distributor, as the customers

acquired by the distributor are likely to generate recurring business in the future without additional efforts of the principal.

- after having taken all relevant circumstances into account, the **compensation for clientele must not be inequitable**. For example, if the distributor was able to reap significant benefits during the distribution relationship, this may militate against an additional compensation.

The rulings in the meantime clarified that Article 418u does not apply by analogy to non-exclusive distribution agreements. Whether Article 418u CO applies by analogy to other types of agreements, such as franchise agreements, has not yet been decided.

3. Relevant Issues for International Distribution Agreements

3.1 Mandatory Nature of Article 418u CO

In BGE 134 III 497, the Federal Supreme Court held that the application of Article 418u CO is mandatory, even if applied by analogy to exclusive distribution agreements. For example, in a published arbitral award (ICC No. 23803/FS of 11 July 2019), the sole arbitrator found that the following contractual clause in an international exclusive distribution agreement does not constitute a valid advance waiver of any claims for compensation for clientele pursuant to Article 418u CO: "*22.8 The parties hereto hereby expressly waive any claim for compensation (including compensation for damages suffered due to termination or for clients and goodwill) upon termination of this Agreement […].*".

3.2 Questions Concerning the Parties' Choice of Law

The established mandatory nature of Article 418u CO in the context of exclusive distribution agreements raises the question whether parties to a Swiss governed agreement may exclude the application of Article 418u CO in the form of a partial negative choice of law. Thus far, there is no case law on this matter in Switzerland.

Further, Swiss courts have not yet decided whether provisions on mandatory compensation of agents and/or distributors under foreign laws (for instance, national legal provisions implemented under the EU Commercial Agents Directive) constitute overriding mandatory provisions which Swiss courts or Swiss seated arbitral tribunals must apply irrespective of the parties' choice of Swiss law as the governing law. The majority of Swiss scholars disapproves of such an understanding.

In an (unpublished) arbitration award by an arbitral tribunal seated in Switzerland, a sole arbitrator came to the same conclusion. A decision rendered by the Paris Cour d'Appel of 23 November 2021 (RG19/15670), following an enforcement action of the award in France, provides for the relevant contents of the arbitral award. The dispute concerned a Swiss law governed agency contract according to which an agent had to distribute products in France. After the termination of the contract by the supplier, the agent claimed compensation under French law with reference to the (allegedly) internationally mandatory nature of such compensation right in light of the *Ingmar* decision of the Court of Justice of the European Union dated 9 November 2000 (C-381/98). The sole arbitrator found that the relevant provisions of French law do not constitute overriding mandatory provisions that need to be considered by an arbitral tribunal seated in Switzerland despite the parties' choice of Swiss law as the governing law.

4. Executive Summary

In certain situations, Swiss law allows exclusive distributors to claim compensation for clientele. Parties to an exclusive distribution agreement may not waive said (potential) right in advance. While many cases evolving around such claims are being settled, it is noteworthy that none of the (few) published court and arbitration decisions since 2008 effectively granted an exclusive distributor's claim for compensation for clientele.

If the parties agree on Swiss law to govern their exclusive distribution agreement, Swiss courts or Swiss-seated arbitral tribunals will likely accept and comply with such choice of law and not apply foreign law provisions on compensation for clientele instead.

[*For a more detailed analysis of the topic, please refer to the authors' (German language) article: Philipp Groz/Alisa Zehner, Zur Kundschaftsentschädigung beim Alleinvertriebsvertrag, Fünfzehn Jahre nach BGE 134 III 497, Aktuelle Juristische Praxis (AJP)/Pratique Juridique Actuelle (PJA), 2024 p. 398 et seqq.)*]