SWISS SUPREME COURT EXTENDS INDEMNITY TO THE TERMINATION OF NON-AGENCY RELATIONSHIPS[1]

In a decision of 22 May 2008 (4A 61/2008: http://www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm, search term "4A 61/2008") the Swiss Supreme Court has recognized that, under Swiss substantive law, exclusive distributors may in principle be entitled to compensation for the value of clientele they generate upon the termination of a distribution contract by the supplier.

The prevalence in international arbitration of Swiss law, and in particular distribution contracts subject to Swiss law, makes this development worthy of notice. Indeed, Swiss law has heretofore often been selected for application to distribution contracts subject to arbitration, often Swiss, precisely to escape wider mandatory indemnity provisions in a number of EU Member States, in particular Belgium and Germany.

Two distributors sought indemnities for the termination of their contracts of exclusive distribution respectively in the Czech Republic and Slovakia with a Swiss supplier of certain branded goods. These contracts were subject to Swiss law, and the Geneva courts had jurisdiction. The termination took place before the Czech Republic and Slovakia entered the EU, and therefore pre-dated the transposition into national law there of Council Directive 86/653 of 18 December 1986 on commercial agents (the "**Community Directive**").

It had long been settled under Swiss law that only agents proper were entitled to an indemnity for the loss of future commissions under Swiss law. This is expressly provided for in Article 418 u CO, and, in a 1962 case that had never been overturned (ATF 88 II 169) and was widely considered to be firm law, the Swiss Supreme Court had held that this provision could not be extended by analogy to entities similarly situated with agents. In that case the Supreme Court reasoned that, unlike agents, distributors are not required by operation of Swiss law to transfer the clientele they have developed to the supplier, and, moreover, this provision in favour of agents had an exceptional character which could not be extended to other legal relationships for fear of overwhelming the entire contractual system of Swiss law.

Article 418 u CO provides for an indemnity for an agent where the following three cumulative conditions are fulfilled: the agent has significantly (*wesentlich, sensiblement, considerevolemente*) increased the supplier's clientele, from which the latter derives an effective benefit, and the awarding of an indemnity would not be inequitable

It was largely academic opinion which led the Supreme Court to reverse itself in this recent decision, although the Court recognized that there existed no obviously dominant opinion in the legal literature.

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The Supreme Court stated that an indemnity may be available to an exclusive distributor providing first that it is similarly situated with an agent, and secondly, that the three conditions of Article 418 u CO are satisfied. It said that these were matters to be assessed in the individual case.

In this case the Supreme Court accepted that the exclusive distributors were so situated in that that they lacked independence from the supplier, which reserved for itself the right to approve new sales points, while the distributors were obligated to buy minimum quantities, to accept unilateral changes to sales conditions and the cessation of any product line, to maintain certain stocks of product, and to provide monthly sales information to the supplier.

As for the three conditions of Article 418 u CO, the Supreme Court held that they were satisfied on the particular facts. On the instant facts, the goods were branded goods. The Supreme Court treated cases of branded goods as presumptively fulfilling the conditions for an indemnity. The new clientele would tend to be loyal to the brand, and not the individual distributor, and the Supreme Court held that this case was unexceptional in this regard.

The Supreme Court did not itself fix the indemnity in the instant case, but sent the matter below for determination. At all events, the principles under Swiss law are substantially similar to those under the Community Directive, capping the amount at an average value of one year's commissions.

Brief Commentary: Since the requirement of being situated substantially similarly to an agent was treated by the Supreme Court as being dependent upon the supplier, it is may now be argued that that the analogy to agents as concerns indemnity entitlements can also apply to other legal relationships, such as mandate and employment contracts.

It is significant that the Supreme Court applied Article 418 u CO on the basis that Swiss law was the *lex contractus*, and not as a mandatory norm. This may be contrasted to the Community Directive, where, as seen in the *Ingmar GB Ltd* v. *Eaton Leonard Technologies Inc.* (C-381/98, [2000] ECR I-9305) the indemnity provisions are mandatory norms in the private international law sense, applicable "where the situation was closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State […]" (*cas. cit.* at para. 25).

The distribution in this Swiss decision took place in the Czech Republic and Slovakia, and not in Switzerland itself. It is remarkable that it was the parties' choice of Swiss substantive law which was the basis for its applicability. The Supreme Court seems therefore to be saying "in for a penny, in for a pound". This may not be entirely unjustified in the case of agents where such a position preserves a balance struck under Swiss contract law. Agents are by operation of law required to transfer the clientele to their principal. So the coherence of the Swiss contractual system arguably requires that they be guaranteed this indemnity in return. The situation is surely different where the transfer operates, as with exclusive distributors, not by operation of law, but by virtue of economic circumstances.

It may be though that Article 418 u CO applies on the separate and further basis of its being a mandatory norm. If so, distributors in Switzerland could claim the indemnity even where the *lex contractus* is not Swiss law, or any law providing for such an indemnity. But this is no longer certain.