



Distribution Newsletter Switzerland

Goodwill indemnity for distributors remains an exception under Swiss law

In a landmark decision of 2008, the Swiss Federal Supreme Court had ruled for the first time that, under certain circumstances, exclusive distributors have a mandatory claim for goodwill indemnity upon termination of the distribution agreement. This had been the first case in which a Swiss court had accepted to apply by analogy the agency law provision regarding goodwill indemnity to distributors, and to award such indemnity to a distributor.

In a recently published decision of 8 October 2019, the Supreme Court confirmed the principles of its case law established in 2008. The Supreme Court however denied a goodwill indemnity to the distributor in the case before it, thereby upholding the decision of the lower court. This new decision once again confirms that a goodwill indemnity for distributors is and remains an exception under Swiss law.

1 Background: The landmark decision of 22 May 2008

In its decision of 2008, the Supreme Court held that the agency law provision regarding goodwill indemnity is to be applied by analogy to distributors if the distributor has been strongly integrated in the supplier's distribution system and, due to his limited economic freedom, the distributor's position is similar to that of an agent. If the distributor fulfils this condition and qualifies as a "quasi-agent", he has a mandatory claim for goodwill indemnity provided the following conditions are met:

- the distributor, through his marketing activities, has either established or significantly increased the supplier's customer base;
- the customers acquired by the distributor will likely remain loyal to the products and, therefore, the supplier will substantially benefit from the customer base established or increased by the distributor in the future; and,

- a goodwill compensation is neither inequitable nor has the distributor terminated the agreement without cause or caused the supplier's termination through his conduct.

In the case of 2008, the Supreme Court affirmed the distributor's position as a "quasi-agent" because the distributor had contractual obligations to

- disclose the names of his customers to the supplier as well as information on his turnover and accounting records,
- submit sales and market reports,
- purchase minimum quantities of products and retain minimum quantities in stock, and
- allocate a minimum amount to marketing activities each year.

On the other hand, the supplier was entitled to unilaterally change the prices and terms of supply, to cease producing the products, and to approve new points of sale.

Because the distributor in the 2008 case not only qualified as a "quasi-agent" but also met the other conditions for a goodwill indemnity, the Supreme Court awarded such indemnity for the first time.

2 Supreme Court confirms its case law and elaborates on the requirements of the customers loyalty to the products

In a recent decision of 8 October 2019, the Supreme Court confirmed that an exclusive distributor may be entitled to goodwill indemnity if his economic situation in the relationship had been similar to that of an agent. The Supreme Court explicitly referred to its decision of 22 May 2008, making clear that a distributor's analogous right to goodwill indemnity depends on the particular circumstances of the case, and will be approved only in exceptional cases.



Although the Supreme Court in its decision referred to exclusive distributors, it did not deal with the question whether or not a non-exclusive distributor may also be entitled to a goodwill indemnity. This remains an undecided issue. Given that the criteria examined by the Supreme Court did not relate to the question of exclusivity or non-exclusivity, it has to be assumed that a non-exclusive distributor could also assert a claim for goodwill indemnity, provided he fulfils the restrictive requirements for such a claim.

The main part of the new decision did not deal with the analogous application of the agency law provision on goodwill indemnity to distributors, but rather focussed on the condition of the customers' loyalty to the products and the benefits that the supplier can reap from the customer base established by the distributor. These considerations are applicable not only to the termination of distribution agreements, but also largely to the termination of agency contracts.

In particular, the Supreme Court confirmed that the burden of proving the customers' loyalty to the products and, accordingly, the supplier's substantial benefit after termination, lies with the distributor. The distributor must prove with preponderance of evidence that the customers acquired by him will remain loyal to the product and, accordingly, the supplier substantially benefits from the customer base established or increased by the distributor. In the case before it, the Supreme Court denied that this requirement was met. This because the sales of the new distributor had

slumped by 90 percent in the first 6 months after taking over distribution of the products, and only after half a year did the sales of the new distributor recover to a level of around 50 percent of the sales of the previous distributor.

Because the actual sales figures did not allow the conclusion that the customers remain loyal to the products, the Supreme Court refrained from examining the other conditions for a goodwill indemnity, including the distributor's strong integration into the supplier's distribution system and his position as a "quasi-agent". The lower court had denied such strong integration and similarity to an agent, once again showing that a goodwill indemnity for distributors under Swiss law remains the big exception.

3 Key takeaways

The new decision confirms that while distributors may be entitled to a goodwill indemnity in certain circumstances, such indemnity remains an exception for distributors. Accordingly, Swiss law remains a preferable choice for suppliers in international distribution. To further minimize the risks of a mandatory claim for goodwill indemnity in a situation where the distributor qualifies as a "quasi-agent", the supplier may include reasonable criteria for calculating the goodwill indemnity in the agreement.

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