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

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- 1 The agency agreement is governed by the Swiss Code of Obligations.**
- 2 The entitlement to a compensation for customers.**
- 3 Distribution agreements are not provided for by law.**
- 4 Problems in the event of differences among the parties.**
- 5 The Federal Supreme Court has already applied various individual provisions of agency law analogously for such distribution agreements.**
- 6 However, the Federal Supreme Court dismissed such analogous application of 418u CO in 1962.**
- 7 The distribution of goods has changed considerably.**
- 8 The supplier imposes extensive duties on the exclusive distributor.**
- 9 The Federal Supreme Court recently had to examine such a case and granted the entitlement to compensation for customers.**
- 10 The extensive restrictions on the exclusive distributors were decisive.**
- 11 The Federal Supreme Court of Germany applies similar criteria.**
- 12 The Swiss Federal Supreme Court referred to "Realkundschaft" (real clientele).**

13 The court of lower instance must calculate the compensation.

14 How is the amount of compensation for customers calculated?

15 Can the entitlement be excluded?

16 Should the compensation be provided for in an agreement?

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.
