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From the Secretary
EIFI MINUTES

FINAL DOCUMENT

Legal Position EIFI

- Considering that:

- Auto EIFI Legal Commission's purpose is to support its members who shall be driven by competitive aspirations and to promote profession interests solely through legitimate means;

- Auto EIFI Legal Commission's activities and its members participation shall be conducted at all times in compliance with applicable law;

- Auto EIFI Legal Commission's shall not be a forum/place for anti-competitive practices.

- The goal of this document is:

Automotive fastenings suppliers have some specificities, and for this reason, EIFI has decided to highlight some "bad practices" and see if and how laws and regulations of different European countries can be useful for us.

Some of these specificities - not presented in an order of importance - are:

- Number of different parts for one car (quantity);
- Number of assemblies per car – highest in car industry;
- Part price (low value) in comparison with all types of consequences (logistic non conformities, potential damages);
- Longer Life cycle of parts in comparison with other parts in automotive;
- Carry over of fastenings parts increase regularly in automotive;
- Standardization is so important that Fastening Industries are not always able to know where parts are used;
- Non conformities sometimes are due to interfaces with other parts, our companies are considered liable when they should not;
- Way to install our parts can be different – automatic or manual – this may generate non conformities;
- Way to handle our small parts in a way that may generate non conformities;
- Not aware of the full "context" in case our companies are making specific developments that generate additional risks;

- Traceability lost by customer generates potential "unlimited" damages (sorting, recalls…etc) in comparison with real number of parts non conforming;
- Insurance issues – missing of possibilities to be covered for some situations requested by customers;
- Logistic – packaging, consignment stock, volumes fluctuation…- complexity requested by customers not focused for fastening parts;
- Misalignment between Code of Conducts and Legal Documents proposed BP;
- Intellectual Property – customers have the will to get for free IP - to have also a second source and also at the same time - to try to impose additional producer;
- Keep the tooling for an indefinite time.

PRACTICES

1. Price reduction (technical/commercial)

Business in Fastening Industries is frequently done with "package" of several different components and so individual negotiation between Supplier and Customer on price reduction for package deals can be in breach of frame contract (Package).

Legal arguments :

- A fair price-reduction-arrangement for package-deals in frame contracts can only be achieved if either the OEM has no right to terminate part of the frame contract for individual products during the term of the contract, or if the Supplier has the extraordinary right to terminate the whole frame contract in case the OEM removes individual products from the package.

2. Duration / Termination

A) Termination by Customer: it is so easy for Customer to "find" defects due to Supplier's type of parts (interfaces are numerous… etc).

Legal arguments :

- Since termination of a part of the frame contract, due to design change, is a valid cause for termination for Customer, then replacement parts or equal volume should be added in order to keep base volume of the Agreement intact.

- If parts of the frame contract are terminated and business volume decreases, commercial and technical productivity should be re-negotiated and adopted to new business volume.

- Competitiveness on technical, quality and logistics offered by Supplier: this clause has to be based on tangible and objective criteria measurable and comparable by both Parties, otherwise the clause is not valid.

- Equal rights for both Parties to terminate the contract, or to renegotiate the clauses:
  Since the successful exploitation of the Agreement is based upon the principles of mutual benefit, upon the occurrence of events (not contemplated and/or foreseen by the Parties and neither attributable to the Parties themselves) that alter substantially the equilibrium of the Agreement and/or affect the possibility to obtain the purpose of the Agreement, then a Party should have the right to make a written request for revision to the Agreement. The Parties shall then consult each other and use all reasonable best efforts to revise and/or amend the Agreement in a mutual satisfactory manner and in order to ensure that neither Party suffer excessive prejudice.

B) Termination by Supplier :

Legal arguments :

- If the Customer has agreed on minimum volume, timing, percentage of business then in case of breach by Customer to comply with them, Supplier has the right to terminate the contract prior the termination date (see point above "equal rights for both Parties to terminate the contract, or to renegotiate the clauses").

- This problem can be solved also by agreeing with Customer on graduated prices for fixed quantities and time frames which also allow for a retrospective billing by the supplier.

- In case the Customer has not agreed on specific obligations, then we can consider on a legal standpoint that the agreement is not valid due to absence of cause, therefore, it is also possible not to execute the contract by Supplier.

- Here a problem might be the existence of a so called "Severability clause" [*The "Severability clause" states that the terms of the contract are independent of each another. In the event any clause of the agreement is found to be in violation of any applicable law, only this clause is invalid while the remaining clauses remain in full force and effect.*] which stipulates the interpretation of the contract according to its economic purpose and thus could force the Supplier to adjust the contract. Therefore we recommend to always clearly define all stipulations of the contract.

- Possibility for Supplier to negotiate a clause that will allow the Supplier to terminate LTA upon prior written notice.

3. Productivity for carry over and long – life cycle parts

Long Term Agreements (LTA) are often incorporating a clause of productivity (e.g. the Supplier is assumed to improve production process over time and thus generate a more efficient operation that the Customer expects to benefit from). In terms of complicated and/or new parts this is a fair expectation. However in terms of standardized parts and long life cycle parts this expectation is less fair as no significant productivity gains are reachable.

Legal arguments :

- Productivity clauses are generally based on piece costs. As raw material is a commodity representing over 30% of product value, it is an unfair practice to incorporate elements that the fastener industry cannot influence. Productivity clauses should be based on value add.

- Ability to supply after end of series production (EOP):

This might be a problem if the EOP has not been clearly defined in the contract and price adjustments are not allowed with regard to those of the series production. Then, upon conclusion of the contract, the Supplier cannot foresee how long and at which prices he has to be able to supply. As after EOP the production costs for smaller order quantities for the spare part demand are higher and there might be other parameters which might influence the profit of the supplier after EOP, we recommend to always negotiate the spare part prices individually after EOP in order to prevent the Supplier from a delivery of spare parts at the price of the series production. It is for example possible to agree upon a maximum price for spare parts upon conclusion of the contract (e.g. "After EOP the price of the spare parts is not allowed to exceed 200 % percent of the product price at the end of series production.")

4. Competitiveness

Legal arguments :

- Competitiveness on technical, quality, logistics offered by Supplier: this clause has to be based on tangible and objective criteria measurable and comparable by both parties, otherwise the clause is not valid.

- The comparability must not apply to the product price alone. Only a verifiable objective economic advantage for the Customer when buying a competitor's product may affect the frame contract.

5. Costs breakdown (requested in Long Term Agreement)

Legal arguments :

- Costs breakdown can be considered as disclosure of Supplier's Know How and so it is an argument to refuse during negotiation.

- Disclosure of this type of information could be also in violation of Competition Law/Antitrust Law, for this reason it is an argument to refuse.

- If a costs breakdown is to be conducted, it should be covered by confidentiality agreement in order to avoid any potential violation of Competition Law/Antitrust Law and also protect Supplier's know-how.

6. Debit Notes

Customers include right for debit notes in contracts or execute debit notes ever without contracts.

Legal arguments:

- Debit notes are not valid if they are not prior explicitly agreed by Parties. It is a reason to refuse them if not prior agreed.
  This is an example of a bad practice, to change unilaterally conditions and then apply debit notes.

  As a result:
1. If prior agreed by the Parties → this is valid → no way to refuse.
2. If not prior agreed, a debit note by Customer is not valid, therefore we can stop deliveries of the parts.

- In case, Debit Notes are issued by a customer that concerned several parts, even if we have agreed on these debit Notes, this customer is also in breach. The customer is not executing agreement properly because he has the right to do Debit Note only for invoices regarding parts that maybe are defective. Suppliers have the legal possibility to inform customers that they can stop deliveries.

- The contract should exclude the netting of receivables without mutual agreement. According to the contract contentious receivables are not allowed to be set off.

- Debit notes are generally issued if a customer initiates a claim of non-conformity. Debit notes might be related to incurred costs for sorting operations, line stops, quality control etc. Prior any such

action is initiated it should be authorized by the supplier . If an action is initiated without authorization of the supplier a debit should not be accepted as an explicit agreement is lacking.

- Other topics related, many OEM's charge an administrative fee when issuing a quality claim or conduct a sorting operation without notifying and without Supplier approval. In many cases do the Customer use debit notes to execute this fee. If such fees are not stipulated in the agreement, then Supplier should be able to reject such costs.
  If such costs are agreed, Supplier should (according to equality principle) be able to issue an invoice for costs incurred for fault-tracing when Customer has issued a false claim.

7. Internet Portals

Click on button "OK" means acceptance of Terms and Conditions.

Legal arguments:

- In order to be valid, or at least to have legal arguments, if Supplier wants to express its refusal, it shall expressly inform Customer of its refusal of such terms by Registered Letter with Acknowledgement Receipt, otherwise these Terms and Conditions will apply.

- Terms and conditions should be agreed between authorized representatives to be valid. Freedom of contract should be applied and agreed terms and conditions should be valid.

8. Intellectual Property (IP)

Suppliers' IP are under free license. In Customer agreements it is frequent to find clauses that say: *"If a purchase order is not issued, Purchaser, at its option, may acquire from Seller at Seller's actual cost, exclusive title to all or any portion of the technical information, data and intellectual property related to work Seller performed for the program pursuant to this Sourcing Nomination Letter together with whatever licenses are required under Seller's background intellectual property rights to use that information and data on a royalty free basis."*

Legal arguments :

- Supplier shall refuse such kind of clauses (also considering the necessity to protect its know-how) or shall grant to Customer licenses to its own IP under payment of royalties.

- Supplier should always take care to agree only upon stipulations according to which he alone can decide who is allowed to use his IP and to which extent and purpose.

Under some domestic laws (e.g. the Italian law), it is forbidden that Intellectual Property rights are granted to Customers on a royalty free basis (for example art. 6 of Italian Law No. 192 of 18 July 1998 on Industrial Subcontracting provides that "*it is null and void any agreement with which a sub-supplier transfers and assigns intellectual and industrial property rights in favour of a customer without adequate consideration*").

- IPR developed by Supplier and covered by legal protection (such as trade mark, patent etc) is a non-negotiable asset. A party claiming free access to an existing IPR is acting in bad

  faith.

- Innovations occurring during a mutual project developed between Supplier and Customer should be either co-owned (based on what each party brought to the table) unless an agreement regulating ownership of IPR's intervened prior the mutual development work was initiated.

- Legal practice would be:

1) Intellectual Property rights should be separately negotiated prior to undertaking any joint development work;
2) when product development is carried out by Supplier but is financed by Customer, any IP which may arise during the work carried out belong to Customer;
3) when product development is jointly undertaken but is not financed by Customer, any IP which may arise belong to both Parties and should be divided equally, or in accordance with a contract drawn up prior to work being carried out;
4) Intellectual property rights that belong to Supplier prior to any work being carried out and/or developed separately during the course of the work are the property of Supplier.

9. Warranty

Customer often asks Supplier that all developments must comply with Customer implicit requirements during all lifetime (e.g. "*Warranties 100 000 Km and ...years*").

Fastener is produced by Supplier based upon a specification received from the Customer. Supplier is responsible to ensure that the products supplied are conforming to the specifications required by the Customer. After delivery to the Customer, Supplier is not aware of the use of fastener, the potential wear and tear caused by the use of the fastener in the application conceived by the Customer and of the use in the final product (i.e. vehicle), as these are activities that are not under Supplier's control. For this reason Supplier's responsibility should not be invoked.

Legal arguments :

- The parties should agree upon on maximum guarantee for which insurance coverage is available. Warranty periods have to be exactly defined. For example a maximum warranty period can be stipulated (e.g. "36 months from registration of the vehicle and at most 48 months from delivery to the Customer").

- As a Supplier we have to warrant that our product fulfills Customer's specifications. Misuse or a bad design of the final application is not a valid base for claiming Supplier's warranty, unless Supplier was also involved in the designing of the final application.

- The Suppliers have not under control the environment in which the product will be placed and since such environment will evolve, Supplier is not aware of its constraints (specially: stocks conditions, assembly, incorporation into a subset or a set, interaction between elements, stress during the vehicle working).

- Any Customer request for a contractual warranty could be ruled by the following principles, representing the usual practices of the sector:

A. Customer validated the product design into its end-use environment.

B. Customer has defined the functional characteristics by the mean of testing and target values to be reached.

C. Customer has validated on the whole quality file in reference, that is the base of fastening companies' obligations in Automotive.

D. Customer has to inform Supplier of any modification and/evolution occurring during the product life cycle and that may possibly modify its assembly and using conditions.

10. Applicable law

All products supplied and their developments are expected to comply with local/national Customer law and local specific requirements (even if Supplier does not know where the products will be used).

It is a problem to ensure broad compliance. It is difficult to get and know all regulations all over the world mainly because Supplier does not know where the products will be used by Customer.

Legal arguments :

- Supplier should ask Customer to provide the list of applicable regulations.

- Supplier has to comply to law and regulations but limited to what is under its control (place of production).

11. Claim Management

Actual cost vs. reference market

Legal arguments:

- In case of a damage event, Supplier should not allow Customer, or even Customer's clients, to determine the amount of the claimed damage. Therefore the contract should always stipulate that in case of a damage event, all measures and expenditures have to be agreed with Supplier in advance (if necessary also by engaging the liability insurance companies of the parties).

12. Terms of payment in EU-Directive

According to the EU-Directive for delayed payments (2011/7/EU), payment terms of more than thirty (30) days in general terms and conditions are generally invalid. Payment terms of more than sixty (60) days in individual contracts have only limited validity.