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Solch ein Einsatz der Blockchain-Technologie müsste entsprechend den Technischen Richtlinien und Schutzprofilen des Bundesamts für Sicherheit in der Informationstechnik (BSI) ausgestaltet werden. Mit der Kommunikation von personenbezogenen Daten aus intelligenten Messsystemen über eine Public Key Infrastructure (PKI) gemäß § 28 MsbG wird bereits heute ein komplexes kryptographisches System, das digitale Zertifikate ausstellen, verteilen und prüfen kann, im Smart Metering eingesetzt. Eine Authentifizierung von Akteuren könnte allerdings perspektivisch auch über kryptographische Hash-Funktionen einer Blockchain-Anwendung erfolgen.

Hierauf aufbauend können unter anderem Einsatzmöglichkeiten der Blockchain-Technologie im Bereich dezentraler Erzeugung, bei Mieterstrom-Modellen und Prosumer-Anbindung, Energiehandel, Smart Grid-Management, der Anlagenbewertung und vor allem der Elektromobilität entwickelt werden. All dies muss allerdings im konkreten Einzelfall und unter dem Vorbehalt der derzeitigen Skalierbarkeit von Blockchain-Modellen und der tatsächlichen Sinnhaftigkeit des Einsatzes eines komplexen Krypto-Systems betrachtet und geprüft werden.

Durch den Einsatz eines Blockchain-Verfahrens zur Erkennung der Fahrzeuge und zur Kommunikation sowie Abrechnung der bezogenen Strommenge kann die Abwicklungsgeschwindigkeit deutlich erhöht werden. Darüber hinaus bleibt der Kunde jederzeit Herr über seine Mobilitätsdaten. Teilnehmern wird zusätzlich ermöglicht, ihre privaten Ladestationen anderen E-Autofahrern zur Verfügung zu stellen. Bezahlung und Abrechnung erfolgt dann selbständig über Blockchain-basierte Smart Contracts.

III. Fazit

Die Ladesäulenverordnung stellt – neben dem erwähnten Förderprogramm des Bundes – einen weiteren wichtigen Baustein zum Aufbau der dringend erforderlichen, öffentlich zugänglichen Ladeinfrastruktur dar. Um Elektrofahrzeuge effizient in das intelligente Stromnetz der Zukunft zu integrieren und ihre technischen Flexibilitäten verwertbar zu machen – perspektivisch vielleicht sogar einen Markt für Flexibilitäten zu schaffen – ist ein ausgewogener Ansatz erforderlich, der nicht nur die Anforderungen der Nutzer, sondern auch die Rahmenbedingungen der sich im Umbruch befindlichen Verteilnetze berücksichtigt. Für die Rechtswissenschaft stellen sich hierbei, insbesondere unter Berücksichtigung der neuesten Technologien wie der Blockchain, Fragen, die in höchstem Maße komplex und konvergent sind.

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Contracts, Warranty and Product Liability in the Chinese Automotive Industry

With more Chinese vehicle manufacturers („OEM") implementing globalized procurement strategies and exploring non-traditional supplier relationships with European suppliers, the already wide range of automotive supply chain-related issues in China is growing significantly in complexity. Based on our experience in helping European supplier clients with the various contractual issues presented at all levels of the supply chain – whether involving purchase orders, single (or dual) source supply contracts or compensation methods for the supplier's investment required by OEMs, product liability and warranty disputes (in particular, if they caused a recall or a field action), tooling and R&D development agreements etc., we summarize some key take-aways of the latest legal developments in China regarding suppliers' negotiation[1] of the purchase terms and conditions with Chinese OEMs or suppliers of a higher Tier level.

1. Defining the contractual relationship between OEM and supplier

The Chinese OEM purchase terms or contracts for auto components (used for the assembly of the vehicles) are referred to as „parts subcontracting agreement", „general terms and conditions (‚GTC')", „master purchase or supply contract", or „commercial contract" etc. The detailed analysis of these OEM contracts is not possible without an understanding of the Chinese Contract Law[2] („CCL") and its requirements for the legal relationship between an OEM and a supplier. Thus we need to provide a brief overview of the CCL as follows:

The CCL consists of two sections. In Section I („General Provisions") from Chapter 1 to 8, some fundamental principles and statutory requirements on contract formation, validity, performance, termination and breach of contract as well as liabilities resulting from breaches of contract are specified which are applicable to all types of contractual relationships.

Section II („Specific Provisions") of the CCL from Chapter 9 to 23 then sets forth the detailed rights and obligations of 15 types of special contracts, whose provisions prevail over the general provisions in Section I. Although the CCL upholds the „party autonomy" as a fundamental principle and gives parties the liberty to decide rights and obligations on their own, the Specific Provisions in Section II of the

* We would like to thank Dr. Christian Kessel, Head of the International Automotive Sector Group of Bird & Bird for initiating this article and providing helpful comments to earlier drafts. More about the authors on page III.

1 As we exclusively represent suppliers, this article largely reflects the suppliers ‚positions in such negotiations.

2 Chinese Contract Law was promulgated on 15 March 1999 by National People's Congress and came into effect on 1 October 1999.

CCL are still relevant and shall be taken into consideration where the contract is silent or when conflicts arise.

For each type of special contract listed in Section II, the key rights and obligations defined therein are essential for the assessment of the performance and/or breach of the contract, which will result in the parties' statutory responsibility for risk, liability and remedies as provided in Section II correspondingly.

Therefore, it is necessary to define the contractual relationship between OEMs and suppliers based on the facts of different scenarios prior to any analysis of the rights and obligations, which may fall under different types of contracts.

1.1 Technology or Product Development Contract

1.1.1 Technology Cooperation and Related Disputes

The complex auto parts, modules or systems are often designed and developed jointly by both Chinese OEMs and the Tier 1 European suppliers. OEMs usually need to initially define the interface drawings and rough specifications of the parts to be developed. Suppliers will then contribute the more detailed development based on both their experiences with other customers and their accumulative technical know-how of the European market. The suppliers will eventually produce prototype samples for testing and the tooling designed for serial production. After the prototypes samples are confirmed upon the OEM's various testing and approval procedures, the suppliers will start the serial production to deliver the components made from the special tooling paid by the OEM. Thus, the initial technical development process and the final serial production process are often tightly connected with each other and are deemed mutually conditional as prerequisites for each other to secure the overall cooperation.

For the technical innovation of the European supplier, the Chinese OEM may either enter into a stand-alone product development contract with the Tier 1 supplier to specify how to compensate such know-how or may incorporate the technical development provisions as part of the preconditions for the supply in the purchase contract.

In practice, the cost of any technical contribution for the product development is often allocated to the production cost and added to the product unit price. In cases where the suppliers have provided their technical contributions in the development phase, but the cooperation with the OEMs stops before the parties enter into serial production, disputes may arise on the payment of any technical development work if the parties failed to clearly agree in their contract on a pro rata value for each product or the calculation method of the technical contribution of the supplier.

We can categorize the possible legal relationships into three scenarios based on Chinese courts' rulings.[3]

(i) Traditionally the Chinese parts supplier had only limited know-how innovation potential and therefore did not contribute much know-how to Chinese OEMs. Therefore, Chinese courts have a tendency to assume that the product development process does not involve much technology innovation from the supplier, and it is the OEM who masters all know-how. According to such understanding, the product development work of the supplier is just the preparation phase before its serial production. The whole cooperation between OEM and supplier was therefore simply seen as a Contract for Work by Chinese courts. Consequently, the compensation for the supplier's technical innovation would be very limited under the Contract for Work provisions in Chapter 15 of the CCL (to be elaborated hereunder in section 1.3 of this paper).

(ii) Since Chinese OEMs increasingly rely on European suppliers' capability of technical innovation in addition to production management, the product development process may be separated from the serial production phase and may be governed by a technology development contract (for details, see below). Upon the outcome of the prototype testing the subsequent serial production process shall constitute a separate agreement, i.e. a Contract for Work.

(iii) If European suppliers contribute significant innovation and technology which is developed and owned independently, and such technology will not be transferred to OEMs the legal relationship may be categorized as a Technology Contract under which the technology is protected for the supplier who charges a license fee based on the unit price of the product if the OEMs engages a third party for serial production to lower the production cost. In such case, Chinese courts[4] tend to assume that the serial production is the industrial application of the deliverables under the Technology Contract.

1.1.2 Qualification of Technology Development Contract

Technology development contracts are one type of Technology Contracts which likely apply if European suppliers contribute know-how to OEMs in general. In order to determine whether or not there is a technology development contract, the following criteria specified in the Rules on Technology Contract Certifications (to register the technology development contract for tax deduction or refund purposes) may assist:

- There is a clear and specific objective of scientific research and technology development;
- The subject matter is not yet mastered by the parties by the time they enter into the contract; and
- The research and development work as well as its expected outcome is innovative.

Conversely, it is also specified that a contract is not a technology development contract where the work required is to only alter size, specification, orders, or use similar technical methods to realize the adjustment of the product, manufacturing techniques and/or material ingredients („Adjustment Development").

Technology adjustments are rather seen as part of a normal serial production engagement, such as under scenario (i) of 1.1.1 above. Legally, the underlying contract would likely be seen as a Contract for Work unless additional elements of higher value development are present.

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3 (2014) Min Shen Zi No.903, *the Supreme People's Court of China, Xinglong Parts Company v.s. First Automobile Works (FAW);*
(2015) Dan Shang Chu Zi No. 547, People's Court in Danyang, Jiangsu Province, Gangqi Car Parts Company v.s. Dongfeng Auto Group.

4 *(2008) Zhe Min Gao Zhong No. 143, High Court Zhejiang Province, Shanghai Sundun Car Parts Company v.s. Bodao Technology Group.*

1.1.3 Rights under Technology Development Contracts

Unless otherwise provided for in the respective agreement, statutory rights and obligations under a technology development contract according to Chapter 18 of the CCL include:

(1) For the commissioned development work, the right to register the innovation and invention as patent shall belong to the supplier; for the joint development work, the right is jointly owned by the OEM and supplier;

(2) Both parties shall have the right to use and transfer technical trade secrets developed, and the OEM shall not restrict the supplier's right to use such know-how in the development work for other customers;

(3) The OEM who breaches the contract resulting in the delay, suspension or failure of the project, is liable for the damages incurred by the supplier;

(4) The price or remuneration for the technology developed by the supplier shall be determined by the development cost, level of advancement of the know-how, the value for industrial applications, etc;

(5) If the OEM alters the agreed specification requirements, extra costs resulting from such alterations shall be borne by the OEM;

(6) If the intended technology of the project cannot be realised due to a major defect or in violation of the scientific rules, the supplier shall have the right to terminate the contract.

Based on Article 19 of the Interpretation of Some Issues Concerning the Application of Law in the Trial of Technology Contract Disputes issued by the Supreme People's Court in 2004, („Judicial Interpretation on Technology Contracts"), it shall be deemed as commissioned development of suppliers if OEMs only provide funds, equipment or materials to suppliers or undertake assistance work.

1.2 Purchase and Sale Contract

Even though the supply contracts between OEM and suppliers are often named and drafted as purchase and sales contracts, the Chinese courts differ in their views and do not apply the statutory rights and obligations for the purchase and sale of goods under Chapter 9 in Section II of the CCL unless the other chapters are silent on specific issues. This is in line with Article 174 of Chapter 9.

A purchase contract is defined in Chapter 9 of the CCL as a contract under which the seller delivers and transfers the ownership of goods to the buyer, and the buyer pays the price to obtain the ownership of goods. Therefore, when a genuine purchase and sale contract is terminated and the supplier claims any loss, the buyer usually is not obliged to pay for the production cost upon the return of such goods, because the supplier can still sell the standard goods to other buyers.

In the automotive industry, serial components for vehicles are usually customized and manufactured for only one OEM for one particular vehicle type. If the contract is terminated, therefore costs of finished but unsold goods or investments into equipment and the like cannot be recovered by selling these goods to third parties. In such scenario, as illustrated in 1.1.1 Chinese courts assume that the key obligation of the supplier is to perform either technical development work or to produce parts as outsourced work from OEM to satisfy the OEM's special requirements instead of just selling and delivering standard goods. Therefore, in such cases unsold goods or frustrated investments become recoverable positions if the OEM is obliged to compensate the supplier in case of terminations.

However, in the automotive industry there are also universal standard auto parts that are interchangeable among different vehicles. Such standard parts are much less complex, fulfil general requirements of different OEMs without drawings or technical specifications from OEMs and are usually made from the tooling owned by the supplier itself. In such cases, the underlying contract between the supplier and the customer (OEM) will likely be deemed as a purchase and sale contract under Chapter 9 of the CCL.

1.3 Contract for Work

As distinguished above, in the legal relationship of a Contract for Work under Chapter 15 of the CCL, the supplier will bear the key obligation to perform certain work with their own equipment, tools, skills and labour under instructions from the OEM. They are therefore deemed to be subcontractors of the OEMs.

Chapter 15 of the CCL also specifies that the supplier shall complete the main part of the work itself. It means that unless agreed by the customer, the supplier shall not assign the main part of the work to a third party. In practice, OEMs usually select those suppliers with qualified supply experience and sufficient production capacity to manufacture customized parts, and respective qualifications is a prerequisite for an OEM to conclude a contract with a specific supplier. For instance, most OEMs require the tier 1 supplier to pass the ISO/TS16949 quality system certification to guarantee the quality of customized parts; only approved suppliers can undertake the main part of the production work. By contrast, for sale and purchase contracts there is no statutory limitation on who is allowed to manufacture the goods or how they may be manufactured.

OEMs may terminate Contracts for Work at any time, but shall compensate the supplier for any losses incurred due to the termination. Ideally, suppliers would not have to rely on this relatively vague statutory right and have detailed stipulations in the respective contract about what shall be compensated for.

As the production processes under Contract for Work are usually labour intensive, the CCL, unless otherwise agreed by the parties, grants the suppliers a statutory lien over the finished products so that the supplier (and indirectly its workers) is secured in case the OEM fails to pay for the work.

Another key feature different from a sales and purchase contract is that the OEM under a Contract for Work has the statutory obligation to provide assistance to the supplier where required, such as to confirm drawings and specifications in time.

Considering the complexity of the legal relationship between suppliers and OEMs, clear rules for the compensation for technical development, tooling, serial production and extra investment costs in case of a termination should be clearly agreed upon, instead of relying on the allocation of these costs to the unit price. While it is generally challen-

ging to negotiate such clauses into agreements with OEM European suppliers have more leverage on contracts in China due to their advanced experience and product know-how compared to Chinese suppliers. Robust engagements in contract negotiations may therefore lead to reasonable modifications to the general terms of conditions offered by OEMs.

2. General Terms and Conditions of Purchase of OEMs

OEMs usually provide their own General Terms and Conditions of Purchase („GTC") which are often strongly in their favour. Such GTC may bring substantial legal risk for the suppliers. Therefore, in view of the extensive use of GTC, it is crucial to understand whether the OEM's GTC shall be construed as standard terms and can be invalidated or not. In this respect, provisions on definition and the invalidity of standard terms in Section I of the CCL provide general principles.

2.1 Definition of Standard Terms

Article 39(2) of the CCL defines standard terms as „contract provisions which were prepared in advance by a party for repeated use, and which are not negotiated with the other party in the course of concluding the contract." From this statutory definition the following basic criteria for standard terms are derived:

a) drafted in advance by one party;

b) to be concluded in high numbers repeatedly;

c) not negotiated by the other party.

The GTC in general satisfy the first two criteria mentioned above as they are prepared in advance for repeated use. However, Chinese courts usually do not see that the GTC meet the third criterion in any B2B contracts.[5]

In general, in B2B relationships the courts are inclined to assume that the supplier which received the GTC as a commercial entity specialised in its business shall have sufficient professional knowledge and experience to undertake any legal risks in the GTC provided by the OEMs. Suppliers are assumed to have equal bargaining power to review and negotiate the GTC to protect their own interest. Therefore, it is very unlikely that the GTC between OEMs and suppliers are considered standard terms.

Considering the market realities in the Chinese automotive industry, the leading European Tier 1 suppliers have a longer business history than most Chinese OEMs and are more specialised and advanced in the technology development and production of specific auto components than Chinese OEMs. As mentioned, Chinese OEMs often rely on the Tier 1 suppliers' technology. In such cases the suppliers are deemed to have sufficient knowledge and experience and – at least – equal bargaining power to be able to negotiate favourable terms of the GTC.

Chinese OEMs are often open for negotiation vis à vis European Tier 1 suppliers which thus have more bargaining power than most Chinse suppliers against the OEMs in general. The European suppliers may either revise key terms of the GTC or reach supplementary agreements that prevail over the GTC as originally drafted.

If the supplier does not negotiate the GTC it is not an indication these GTC are not negotiable, but rather that the supplier chooses not to negotiate.

2.2 Incorportation of GTC

The CCL does not set forth specific additional requirements for the incorporation of GTC other than general rules how to conclude the contracts based on offer and acceptance. It is silent on the question whether GTC that are in a separate document have to be provided to the other party or whether it is sufficient if the other party can take reasonable notice of them (e.g. by downloading them from an online supplier portal).

Article 39 of CCL however requires the party using standard terms to define the rights and obligations of the parties according to the principle of fairness and to call the other party's attention in a reasonable manner to any provisions excluding or limiting its liability and to explain such provisions upon request of the other party.

Therefore in practice, in practice, the GTC are usually either attached to the agreement as an annex, or incorporated into the main body directly. Whether a court would rule that GTC have been validly agreed by a pure reference to an online supplier portal where they are made available for download is difficult to predict. The courts might be inclined to conclude that the GTC are incorporated into the contract if only referred to but not sent to the supplier, as the supplier is deemed to have a duty of prudence when signing any document which refers to the GTC.

2.3 Invalidation of Standard Terms

The GTC are qualified as standard terms, if the inequality of bargaining power allows one party to force its standard terms on the other party on a ‚take-it-or-leave-it' basis. Since terms are concluded in the absence of negotiation with the other party, there is a real risk that the party which provides GTC will abuse its advantage and impose unfair terms on the other party with insufficient knowledge and experience.

Article 40 in Section I of CCL specifies that where a standard term exempts the liability of one party or increases the liability of the other party, or excludes the primary rights of the other party, such term shall be null and void. The CCL provides the statutory remedy to invalidate unfair terms and applies instead statutory rights and obligations pursuant to the principle of equality and fairness.

In order to encourage and facilitate trade, the courts tend to set high thresholds for the invalidity of standard terms in B2B relationships and require that:

a) one party has exploited its advantageous position or the other party's inexperience and

b) there is evident unfairness in the terms of the contract.

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5 *(2015) Min Yi Zhong Zi No. 295, Supreme Court, Ping'an Bank Chongqing Branch vs Chongqing Dashun Mining Co., Ltd and others; (2013) Min Ti Zi No. 215, Supreme Court, Jiangsu Gangzheng Thin Board Tech Co., Ltd vs. Inner Mongolia BaoGang Stock Holing Co., Ltd;*
(2016) Min Su Shen No. 612, Jiangsu High Court, Shanghai Fengling Cleaning & Technology Co. Ltd vs. Suzhou Shang'ou Supermarket Co. Ltd.

Therefore, unless there is evident unfairness, the courts will most likely deem the GTC of OEMs to be valid. So far there are not any court decisions for the automotive industry that the GTC of the Chinese OEMs were invalidated as standard terms.

Therefore, we suggest the suppliers take a conservative approach when seeking the invalidation of standard terms.

3. Quality Warranty and Product Liability

3.1 Governing Rules

Provisions about product liability are scattered in a number of different laws and regulations. For the automotive industry the following are relevant:

1. Chinese Contract Law (CCL)
2. Tort Liability Law („Tort Law") of 26 December 2009, in force since 1 July 2010
3. Product Quality Law („PQL") of 8 July 2000, in force since 1 September 2000
4. Consumer Rights Protection Law of 25 October 2013, in force since 15 March 2014
5. Provisions on the Liability for the Repair, Replacement and Return of Household Automotive Products („3R Regulation") of 29 December, 2012 in force since 1 October 2013
6. Regulation on the Administration of Recall of Defective Auto Products („Recall Regulation") of 22 October, 2012 in force since 1 January 2013.

3.2 Contractual Quality Warranty and Liability under CCL

With respect of the contractual quality warranty undertaken by the suppliers towards OEMs, the supplier shall warrant that all products supplied shall be defect-free i.e. in line with the quality requirement as agreed. If the product is found not to conform to the quality requirement as agreed or the applicable national standards published by the China Administration of Quality Supervision Inspection and Quarantine („AQSIQ") for all safety-related parts within the contractual warranty period or agreed defect notification period, then the supplier is responsible for the respective defect as a warranty issue.

3.2.1 Non-conformity of Standards and Defects

(i) Standards

A defect is any negative deviation from an applicable standard. Such standards may be statutory or individually agreed. The key of any dispute about defects is that the required standard is clear and unambiguous. Typically these are expressed in various technical specifications such as size, material, function, performance or other types of quality-related requirements.

For safety-related auto parts, the quality requirements contractually agreed shall be above the applicable national standards published by the AQSIQ which are mandatory for both OEM and suppliers under PQL. For non-safety-related parts, the AQSIQ may also publish applicable national standards, but they are not mandatory and rather „recommended" standards only.

OEMs tend to define quality standards for the warranty as ambiguous and wide as possible to enable a wide range of potential claims. Suppliers naturally will try to specify requirements clearly and narrowly and avoid simple back-to-back warranties. For example, under Article 26 of PQL and Article 23 of the Consumer Protection Law products supplied to consumers shall have the function to be expected in light of the intended use. OEMs often require the suppliers to warrant that the parts are suitable for the intended use.

If the parties have not agreed on the applicable standards and requirements Chapter 4 of the CCL provides for an escalation of statutory standards: 1) applicable national standard or industry standard; 2) customary standard or 3) the specific standard complying with the purpose of the contract.

(ii) Defect

Defects of auto parts may be caused by different reasons under the different contractual relationship scenarios illustrated in section 1 above.

a) Design Defect

If the defect of the parts concerned is in the design, then in scenario (i) under 1.1.1 above, the supplier shall bear no contractual liability under a Contract for Work, because it is the obligation of the OEM to provide drawings and specification requirements of the products for suppliers to follow. As long as the supplier has used the materials, toolings and processes in conformity with the OEM instructions the supplier has complied with its contractual obligations.

For Contracts for Work however, the suppliers have the duty to inform OEMs in time if drawings or specifications of the OEMs are incorrect or otherwise create problems. For design defects in scenarios (ii) and (iii) under 1.1.1, the suppliers are liable for breach of contract if the technology developed is not in line with the specification agreed or other national standards.

b) Material Or Manufacturing Defects

If a defect is in the materials or manufacturing processes, then the suppliers which undertake the serial production will be responsible under the Contract for Work. Under Chapter 15 of the CCL for Contracts for Work, if the outcome of the work performed by the suppliers is not complying with the quality requirements agreed, the supplier shall be liable for repairing or remaking the products, reducing the prices or compensating the loss, etc.

c) Safety-related Defect

If the product is found not to conform with safety-related standards or may cause unreasonable danger to the human body or vehicle, such safety-related defect caused by the supplier will lead to the OEM's obligation to immediately recall the vehicle under the Recall Regulations. The OEM will claim related costs from the supplier under the contractual product warranty. The supplier can protect itself from overreaching claims by defining „safety-related defect" clearly in the contract. Often in practice such defects fall in a grey area between safety and non-safety related defects, and OEMs take a conservative approach and proceed with a recall anyway, and then claim related costs from their supplier. If the „defect" is contractually specified as non-safety related the OEM cannot claim recall costs accordingly.

3.2.2 Inspection of Incoming Goods and Defect Notification

If a defect is found during the incoming goods inspection at the OEM, the OEM shall notify the supplier of such defect immediately (Article 158 CCL). If the OEM fails to give such defect notice within the quality warranty period, the quality of the product is deemed to comply with the contract. If no warranty period is specified in the contract with OEM, the defect notification period shall be within a reasonable period of no more than two years.

For automotive products, the statutory minimum warranty period under the 3R Regulations for key parts and systems e.g. the engine, transmission, steering and braking system etc., apply. Therefore, OEMs usually impose such applicable warranty periods in the contract with suppliers. OEMs may often require suppliers to provide the contractual warranty for longer periods or more mileage than required in the 3R-Regulations (see below at 3.3.2), for instance 5 years or 150.000 km. In this case the starting date of supplier's contractual warranty shall be agreed to be the date of delivery of the parts instead of the invoice date issued to the consumers as required by 3R Regulations.

3.2.3 Non-fault warranty liability and remedies

As regards its defective performance, in general, the supplier will be liable for breach of contract on a non-fault basis, which in theory can be contracted out.

Under the CCL any improper performance or non-performance constitutes a breach of contract. The legal consequences are regulated by statutory laws in a somewhat rudimentary way: In principle, the buyer is entitled to claim (compensation for) repair, replacement, return the product or reduce the price (Art. 155, 111 and 113 CCL). The parties are expected to contractually agree on more specific rules. If the parties fail to do so, the consequences of the breach of contract are very much at the discretion of the courts. Therefore, it is advisable to provide detailed warranty provisions in a contract.

In China, warranty claims for the delivery of defective products can be agreed to comprise liquidated damages for breach of contract. The amount of the liquidated damages or the method of its calculation can be contractually agreed. Pursuant to Article 113 of the CCL loss caused by the breach of contract shall be equivalent to the actual loss suffered by the other party, i.e. the OEM, including the foreseeable benefits receivable after the performance of the contract. If the actual losses are much lower that the agreed liquidated damages (30 % based on an judicial interpretation[6] or the discretion of the court[7]), the supplier will have the right to request the court to lower and adjust the compensation for damages based on actual loss, performance and fault of each party under the principle of fairness and goodwill.

Suppliers would also try to agree on a suitable limitation of liability which will be upheld by the court as contractual arrangement, except for 1) liability for personal injury to the other party; and 2) property damage to the other party as a result of intent or gross negligence.

If the defective auto parts cause bodily injury or damages to other assets of an end-user of a vehicle the end-user then has the right to choose recourse against the OEM directly who will try to recover the related losses from the supplier. If the OEM proves that the defective part is an independent aftermarket product purchased by the end-user directly from the supplier, the supplier will then bear the relevant warranty towards the end-user directly.

To avoid disputes, it shall be specified clearly what is the procedure for handling claims when settling field claims. Suppliers shall negotiate for not being liable for goodwill payments by any OEM to a consumer.

3.3 Statutory Warranty and Liability for Safety Issues

Chinese Tort Law lays out general tort liabilities between wrongdoers and victims in relation to product defects. The PQL sets forth mandatory administrative requirements for the product quality for OEMs and suppliers as well as grants administrative power to the competent government authorities. The 3R Regulations and Recall Regulations are both drafted under the Tort Law and PQL by AQSIQ.

3.3.1 Defects causing unreasonable dangers

(i) Defects pursuant to the PQL are those that cause unreasonable dangers for human safety or safety of the vehicles. If there are national or industry standards for ensuring human safety or vehicle safety nonconformity with these standards constitute a defect.

(ii) The 3R Regulations have their own definition of a defect.

Firstly, if the defect causes an unreasonable danger, it constitutes a „serious safety performance failure", which means that there is a product quality problem which endangers the human body or assets safety. As a result the consumer cannot safely use the household automotive product.

Secondly, if the defect does not cause an unreasonable danger, it is defined as a „product quality issue", which means that the normal use of a household automotive product is affected, or the quality of a household automotive product does not comply with the quality status prescribed by national technical standards or explicitly stated by the OEM.

(iii) The Recall Regulations define a defect as non-compliance with state standards or industrial standards regarding protection of personal or property safety or any other unreasonable risks to personal or property safety which exist generally in the same lot, model or type of auto products for design, manufacturing, labelling and other reasons.

(iv) There is no legal definition of „unreasonable danger" mentioned in (i)-(iii) to assess the defect. It is also not clear who shall bear the burden of proof of the existence of such danger and defect. Courts[8] may within their discretion take into account the following factors when assessing the danger:

- what is the reasonable use or purpose of the product when it is manufactured?

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6 *Based on Judicial Interpretation on Purchase and Sales of Goods Contract published by Supreme Court on 5 October 2012.*

7 *(2007) Min Er Zhong Zi No. 139, Supreme Court, Huangtai Brewery Group in Gansu Province vs. Huangtai Trading Co. Ltd in Beijing.*

8 *(2013) Er Yi Chang Zhong Min San ZHong No. 0034,Yi Chang Intermedia Cour, Fu Xian Huan vs. Shandong Yuheng Robber Co. Ltd*
(2014) Yi Zhong Min Zhong Zi No. 04929, Beijing No.1 Intermedia Court, Beijing Construction Installation Co.Ltd vs. Beijing Meiya Pipe Co. Ltd
(2015) Luo Min Chu Zi No. 1484, Mi Luo Intermedia Court, Zhou Qi Ying vs. Snow Beer Co. Ltd.

- what is the reasonable expectation of a common consumer with average common sense towards the safety of a product ?
- due to the limitation of knowledge or techniques, can the product be made safer or replaced by other substitute?

3.3.2 Warranty and Liability under the 3R Regulations

The 3R Regulations provide specific rules about the minimum warranty period and what liability on a non-fault basis OEMs shall bear towards consumers for repair, replacement or return („3R") of the vehicles. Such 3R Warranty is usually reflected in the supply contract or a separate quality agreement as the minimum standard the supplier must comply with.

(i) Repair

The warranty period is three years or 60,000 km in mileage (whichever occurs first) starting from the issuance date of the VAT invoice for the purchase of the vehicle.

Any defective vehicle within the repair warranty period shall be repaired free of charge including hourly manpower charges and cost of repair material, which the supplier may be required to cover who is accountable for the defect. In addition, if the repair work takes more than 5 days, the OEM shall provide a spare car or compensate the transportation cost for consumers.

(ii) Replacement

If any quality issue occurs within 60 days or 3000km whichever occurs first, for the key parts in the engine and transmission of the vehicle, the consumer can require the replacement of the whole engine or transmission.

(iii) Return

In the following situations, the consumers are entitled to return the vehicles and the OEMs shall refund the purchase price to the consumers:

- Failure in the steering system, brake system, car body cracking or fuel leakage within 60 days or 3000 km (whichever occurs first) after the issuance of the purchase invoice;
- Failure of the main parts of the steering system, brake system, suspension system, front/rear axle or body of the car within the Guarantee Period;
- Serious defects could not be remedied or new serious defects have occurred after the second repair within the warranty period
- Failure of engine, transmission or main parts thereof after the second replacement within the Guarantee Period.

(iv) No liability for „Wear and Tear"

The liability for repair, however, does not apply to „easy to wear and tear" parts, such as oil, fuel and air filters, wiper blades, tyres or brake pads that shall be replaced more often and regularly under normal condition. Each OEM is required to provide the list of „easy to wear and tear" parts. These parts do not fall under the 3R repair warranty period of the whole vehicle, but shall follow other specific technical standards which are shorter warranty periods for each type of parts. Consumers can require the OEMs to undertake the product liability by replacing the „easy to wear and tear" parts free of charge within the quality warranty period.

3.4 Notification Requirements

Under the CCL, PQL and the Law on the Protection of Consumer Rights and Interests, the manufacturer or the seller is obliged to notify consumers of the defects immediately in the products to avoid increasing or expanding the loss of the consumers. If the manufacturer or the seller fails to perform such obligation, the consumer concerned can claim damages.

Particularly under the Auto Products Recall Regulation, when a car manufacturer becomes aware of any possible defects in one of its products, it shall immediately organize an investigation and analysis and report the results of such investigation and analysis to the competent government authorities with a view to production stoppages or products recalls if the respective requirements are met.

RA Professor Dr. Rolf-Dieter Mönning und RAin Dr. Elena Mönning, Aachen*

Europäische Restrukturierungsrichtlinie: Entschuldung versus Gläubigerbefriedigung

I. Stand des Verfahrens

1. Entschließung des Europäischen Parlamentes

Zu dem EU-Vorschlag für eine Richtlinie über „Präventive Restrukturierungsrahmen, die zweite Chance und Maßnahmen zur Steigerung der Effizienz von Restrukturierungs-, Insolvenz- und Entschuldungsverfahren" liegt seit dem 22.9.2017 der Entwurf eines Berichtes des Rechtsausschusses des Europäischen Parlaments vor, der von der deutschen Abgeordneten Prof. Dr. Angelika Niebler (CSU) in ihrer Eigenschaft als Berichterstatterin verfasst wurde. Die Vorstellungen des Rechtsausschusses weichen in einer Reihe von Punkten substantiell vom Vorschlag der EU-Kommission vom 22.11.2016 über die Ausgestaltung eines präventiven Restrukturierungsverfahrens ab. Der Bericht des Rechtsausschusses wurde vom EU-Parlament als Entschließung übernommen und war Gegenstand der ersten Lesung des Richtlinienvorschlages gemäß Art. 294 Abs. 3, Art. 53 und Art. 114 des Vertrags über die Arbeitsweise der Europäischen Union. Der Standpunkt des Parlaments bzw. die

* Auf Seite III erfahren Sie mehr über die Autoren.