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NEWSLETTER N°2

Digital Law

ENFORCEABILITY OF LIMITATION OF LIABILITY CLAUSES AGAINST THIRD PARTIES

Cour de cassation, Commercial Chamber, July 3, 2024, No. 21-14.947

On July 3rd, 2024, the Commercial Chamber of the French Judicial Supreme Court handed down a landmark ruling on the enforceability of limitation of liability clauses against third parties to a contract. Prior to this ruling, French case law generally held that a third party to a contract could invoke, based on tort liability, a contractual breach causing them damage without having to prove a tortious or quasi-tortious fault distinct from this breach.

This approach was problematic, as it allowed third parties to benefit from a more favorable position than the contracting parties themselves, since the third party's compensation for damages was not contractually limited. In order to preserve the “economic balance of the contract” to which the contracting parties had committed themselves, the French Judicial Supreme Court, ruled in the present case that, the limitation of liability clause agreed by the contracting parties is also enforceable against third parties. Consequently, the contractual party was held liable in tort to a third party based on a breach of contract.

This decision aims to limit the risk of a party to a contract being held liable to a third party beyond the limits stipulated in the contract, on condition that the limitation of liability clause provided in the contract is applicable, for example in the absence of any gross negligence or intentional misconduct. With this ruling, the Court provides a welcome clarification, enhances the foreseeability of the parties and the legal certainty of their contractual relationships. However, as the decision was handed down in an insurance context, and the third party in question was an insurance company subrogated to the rights of a party to the contract, the question arises as to whether it could be generalized to other sectors.

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LIMITATION OF META'S ABILITY TO PROCESS DATA FOR ADVERTISING TARGETING PURPOSES

CJEU, 4 October 2024, Case C-446/21, Schrems v. Meta

On October 4, 2024, the Court of Justice of the European Union (CJEU) handed down a ruling reiterating the obligation for Meta, when collecting personal data on and off the Facebook social network, with the principle of data minimisation and the prohibition of processing sensitive personal data in the absence of the data subject's consent.

Meta collects data on the activities of its users both on its own services, such as Facebook, Instagram and WhatsApp, and through third-party websites and applications connected to Facebook, on which “social plug-ins” are “embedded” to record the personal data of their visitors, such as the URL of the page visited, the time of visit and the visitor's IP address. This data is processed by Meta for the purpose of targeted advertising on Facebook.

In the present case, Maximilien Schrems, known for his role in the CJEU's invalidation of the Safe Harbor in 2015 and the Privacy shield in 2020, received advertisements on Facebook related to his sexual and political orientation after he visited political party pages aimed at a homosexual audience that contained Meta’s plug-ins. However, he had never indicated his sexual orientation on his Facebook profile.

I Subsequently, Maximilien Schrems filed a complaint against Meta, accusing it of having processed sensitive data without his consent. Meta, on the other hand, argued that it was entitled to process such data, as Maximilien Schrems had spoken publicly about his homosexuality in videos and podcasts accessible online, which constituted proof of his consent to the processing of such personal data.

The Court held that Meta’s collection of its users' personal data, both on and off Facebook social network, without limitation as to the data retention period, the categories of data processed, and the purposes of the processing, infringes the data minimisation principle, according to which only personal data that is adequate, relevant and limited to the purposes of the processing, shall be processed. In addition, the Court ruled that a user's public declaration at a panel discussion of their sexual orientation did not constitute explicit consent allowing Meta to process other data relating to their sexual orientation obtained from partner websites and apps for the purpose of sending personalized advertising to that user. This decision is a reminder that data minimisation, one of the five founding principles governing the implementation of data processing, must not be neglected, even when the processing is used for advertising purposes. Advertisers and other players in the online advertising sector will need to take into account this reminder, at a time when they are seeking to obtain as much data as possible on Internet users, in order to target them as accurately as possible.

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A VIDEO GAME PUBLISHER CANNOT PROHIBIT THE USE OF CHEATING SOFTWARE ON THE BASIS OF THE SOFTWARE'S COPYRIGHT.

CJEU, 17 October 2024, Case C-159/23, Sony v. Datel

On October 17, 2024, the Court of Justice of the European Union issued a preliminary ruling on the scope of copyright protection for computer programs in the case of cheating software.

In this case, Sony filed a complaint in Germany against Datel, a company marketing software enabling PSP console users to “cheat” in Sony's multiplayer games, arguing that this software infringed its right to authorize the modification of its games. The particularity of this cheating software is that it does not reproduce or change the source code or the object code. Instead, it works with the game by temporarily modifying certain data stored in the console's RAM and used while the game is running, thus influencing its progress.

In response to the question of whether changing the variables of a video game constituted an unauthorized adaptation of the game, the Court held that copyright protection for software was not applicable in this case, because it only applies to the source code or object code of the program, i.e. the very structure of the software, which in this case was not impacted by the use of the cheat software.
Cheat software publishers should not, however, rejoice too quickly over this decision, as video game publishers have other means to try to prevent cheat software from being marketed: beforehand, they can incorporate technical protection measures into their games to prevent cheating software from operating, and/or include a prohibition on players using cheating software in their games' general terms and conditions of use; afterwards, they can take action on the grounds of unfair competition against publishers of such cheating software.

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