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IT services dispute: the Supreme Court considers the non-liability clause

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In IT service contracts, it is common to find non-liability clauses protecting companies that provide software and professional IT system implementation or integration services.

Issue In Dispute

Is such a contractual non-liability clause valid under Quebec civil law where a fundamental obligation is breached?

In *6362222 Canada inc. v. Prelco inc.,* recently rendered, the Supreme Court of Canada ruled that the non-liability clause in question was freely negotiated between the parties and resulted from compromises made by both sides. It therefore had to be respected.

The respondent “Prelco” mandated the appellant “Créatech” to supply software and provide services to implement an integrated management system, the purpose of which was to manage and track all operational services information found in a large number of databases. Further to the many recurring problems during the system implementation, Prelco decided to end its contractual relationship with Créatech and hired another company to render the system operational. Prelco then claimed damages from Créatech, while Créatech filed a counterclaim for the unpaid balance for the project from Prelco. This began a long legal battle, which ended in the Supreme Court.

In its decision, the Supreme Court treated various arguments which, according to Prelco, would have precluded the application of the non-liability clause. The Court dismissed these arguments.

Reaffirmation Of The Primacy Of Freedom Of Contract

The Supreme Court of Canada held that the Civil Code is set out in such a way as to provide for parties’ freedom to contract and to strike a balance between the notion of public order and the principle of freedom of contract.

In considering the applicable legal principles, the judges noted however that the principle of respect

for the contractual will of the parties does have exceptions, for example in cases of gross negligence or intentional fault, where economic forces are unbalanced (such as a contract between a merchant and a consumer), where adhesion contracts and other types of contracts, such as nominate contracts mentioned in the Civil Code are involved, or where exclusions cover liability for body or moral injury.

Conclusion

From this decision, it appears beneficial for IT service providers or other service providers to choose to be governed by the Quebec regime in contracts where the parties negotiate a clause limiting or excluding liability.