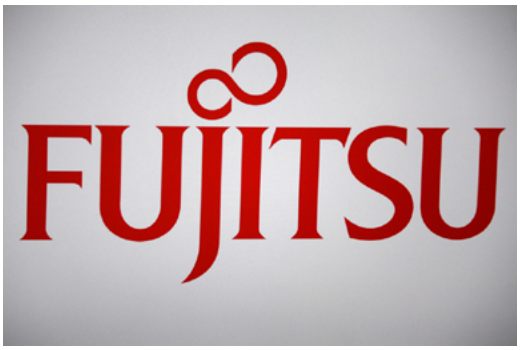
Fujitsu's problems with partnering agreements – it ain't all it seems

Speed read

Partnering agreements are often not all they seem at first sight. In our article, Fujitsu's own goal on limitation of liability – spooky stuff,[1] we talked about the court saying Fujitsu could not recover under a partnering agreement with IBM because IBM failed to feed it work envisaged by the partnering agreement. The limitation of liability clause for loss of profit precluded that.[2]



Key also was that this so-called "*partnering agreement*" wasn't as between actual partners, and IBM had the upper hand. We often see contracts called "*partnering agreements*" which are one-sided as here. That's fine, so long as suppliers enter them with eyes wide open, recognising that some nice language and concepts don't always translate into equal treatment as between equals (i.e. as between partners).

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The Detail

The background is set out in our first article.[3] IBM (initially PWC) and Fujitsu had entered into a partnering agreement in relation to a big contract with a UK Government agency. Fujitsu was IBM's subcontractor under that agreement.[4]

Under the partnering agreement, there was a "*Committed Workshare*" regime aimed at Fujitsu being sub-contracted to do infrastructure support, operations management and maintenance. The partnering agreement contained, as such agreements often do, nice vision and partnering principles.

Fujitsu argued that such partnering arrangements created additional fiduciary duties and/or similar good faith duties, of the sort that are often seen as between partners. They also argued there was fiduciary duty not precluded by the limitation of liability. It is well established there can be such contractually based duties but they can't be inconsistent with the contract.

The court understandably bowled these arguments over, based on the wording of the partnering agreement. For starters, as these so called partnering agreements often say, the contract expressly said that IBM and Fujitsu were not partners in a legal sense. Plus, any fiduciary duty flows from the contract and therefore is caught by the limitation of liability in the contract.

And so the Judge set out why she wasn't prepared to move away from what she expected to be the parties' decision at the time, as follows:

> 85. ....I am not persuaded that the exclusion of liability for loss of profits is in any way commercially unreasonable or inconsistent with business sense. This is a case where a court should be very slow to intervene with its own view of commerciality...
>
> 86. The workshare arrangements under the Sub-Contract may have been a very important part of the agreement and the Sub-Contract may have been a significant one in terms of prospect and length. But there may have been very good commercial reasons for deciding

to exclude liability on both sides from a loss of profits claim for breach of the workshare arrangements as well as for breach of the other significant arrangements in the Sub-Contract.

87. There was self-evidently (looking at the express terms of the Sub-Contract) goodwill and co-operation between these two large commercial entities at the time that the Sub-Contract was entered into (and amended in 2008). Commercial parties are entitled to and do rely on commercial "mores"; they can choose to rely on trust and to prefer not to expose themselves or each other to litigation in due course - for sound commercial and professional reasons.

88. Here, each party chose consciously to release the other from potentially very significant liabilities in the event of a breach of contract (or any other breach), subject to certain agreed exceptions.

Many would debate whether parties actually think that way when agreeing partnering agreements but of course the party with the stronger hand may push for this outcome in the drafting. And in the end, clear words trump all.

The key takeaway is not to be seduced by high level visions, governance principles and words like "partnering" to think that strong enforceable rights are always created. Go into partnering agreements and the like with eyes wide open, recognising also the choice that, as the Judge points out, the parties may choose to create non-binding obligations, rather than those that are legally binding.

1. http://www.wigleylaw.com/assets/Uploads/Fujitsus-own-goal-on-limitation-of-liability-spooky-stuff.pdf

2. Save as to a claim based on an account for profit.

3. http://www.wigleylaw.com/assets/Uploads/Fujitsus-own-goal-on-limitation-of-liability-spooky-stuff.pdf

4. http://www.wigleylaw.com/assets/Uploads/Back-to-backing-sub-contracts.pdf

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