On Wednesday 16 May 2018 the Supreme Court handed down its much anticipated judgment in Rock Advertising Limited v MWB Business Exchange Centres Limited [1] (Rock Advertising). The issue before the Court was whether a contractual term prescribing that an agreement may not be amended save in writing signed on behalf of the parties (commonly called a “No Oral Modification” or “NOM” clause) is legally effective.

NOM clauses are standard provisions in many commercial contracts across the energy sector. For example, in Energy Venture Partners Ltd v Malabu Oil & Gas Ltd [2], a case involving an alleged oral variation of an exclusivity agreement related to the sale of an ownership interest in an oil prospecting licence for an offshore Nigerian oil field, the Court did “incline to the view that there can be an oral variation …. notwithstanding a clause requiring written modifications, where the evidence on the balance of probabilities establishes such variation was indeed concluded.”

It is in the context of that line of reasoning (which supports the view that an oral agreement to vary a contract is effective even where there is a NOM clause) that the matter came before the Supreme Court in Rock Advertising. The Supreme Court has now decided that NOM clauses are effective to prevent oral variations of a contract, thereby giving primacy to contractual certainty.

**Facts of Rock Advertising**

The defendant in Rock Advertising, MWB, was a company operating serviced offices in Central London. In August 2011, the claimant, Rock, entered into a contractual licence agreement with the defendant to occupy office space for a fixed term on the basis of a schedule of agreed licence fee payments. The agreement contained the following NOM clause in clause 7.6:

“This Licence sets out all of the terms as agreed between MWB and Licensee. No other representations or terms shall apply or form part of this Licence. All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.”

By February 2012, Rock had accumulated licence fee arrears of more than £12,000. Rock’s director proposed, orally, to a credit controller employed by MWB, a revised payment schedule under which part of certain payments would be deferred and the accumulated arrears would be spread over the remaining licence term. A dispute arose between the parties as to whether the revised payment schedule had been orally agreed to by MWB.

The Court of Appeal had found that an oral agreement was reached, and that the agreement as to the revised payment schedule amounted to an agreement to dispense with clause 7.6 such that MWB were bound by the variation. MWB appealed to the Supreme Court, who unanimously decided that the NOM clause in clause 7.6 was legally effective.
Judgment of the Supreme Court

Lord Sumption, with whom the other judges (except for Lord Briggs) agreed, said that "the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation". He considered that not to give effect to such a provision would override the parties' intentions.

Lord Briggs gave a concurring judgment on the basis of different reasons, which led him to conclude that a NOM clause "continues to bind until the parties have expressly (or by strictly necessary implication) agreed to do away with it". While Lord Briggs' approach might leave open the possibility of oral variations to NOM clauses in limited circumstances, any such argument would be extremely difficult given the view of the majority of the Court.

English contract law does not normally obstruct the legitimate intentions of commercial parties (except for overriding policy reasons - not applicable to NOM clauses). The majority of the Court identified three commercial reasons for including NOM clauses:

1. to prevent attempts to undermine written agreements by informal means;
2. to avoid disputes not just about whether a variation was intended but also about its exact terms; and
3. to make it easier for corporations to police their own internal rules and policies restricting the authority to agree variations.

Those legitimate reasons for the inclusion of a NOM clause served to justify giving effect to those clauses despite a subsequent oral agreement (bearing in mind the parties' freedom to contract as they see fit), which was apparently intended to effect a variation. Lord Sumption also rejected the suggestion that parties who agree an oral variation in spite of a NOM clause must have intended to dispense with the clause, recognising that it was far more likely that they had simply overlooked it, and that, if they were aware of it, they were knowingly risking invalidity. For those reasons (amongst others) the Supreme Court found that the oral variation in the Rock Advertising case was not effective because it lacked the writing and signatures required by clause 7.6 of the licence agreement.

Commercial implications

The decision in Rock Advertising should be welcomed by contracting parties who turn to English law as the governing law of their contracts because of the certainty that it provides. A clause that is commonly included in many types of commercial agreement in the energy sector will be upheld and given effect by the courts. In an environment where negotiations during the term of a contract may often be conducted by agents, or personnel on the ground, not all of whom will be aware of the full consequences of oral agreements they are purporting to reach, that certainty has significant value, particularly from a risk management perspective. The decision should also prevent protracted disputes about the existence and terms of any alleged oral variation to a contract containing a NOM clause.

It is important to note that the Supreme Court in Rock Advertising explicitly recognised that estoppel remains as a "safeguard against injustice" such that whilst the contract itself may not be varied by oral agreement, a party will still be able to argue that, for example, an unequivocal representation has been made, on which it has relied to its detriment, such that it was entitled to act as if the contract had been varied. However, Lord Sumption indicated that there are limits on the doctrine of estoppel in these circumstances and cautioned against allowing that line of argument to be of such broad effect that it destroyed "the whole advantage of certainty for which the parties had stipulated".

From a practical perspective energy sector businesses who provide for English law as the governing law of their contracts should seek to ensure that all of their employees and agents are aware that informal and oral variations of contracts containing these clauses will not be enforceable, that the defence of estoppel (commonly regarded as a defence of last resort) may well be difficult to sustain, and that they should be careful to follow the strict provisions of any NOM clause.

[1] [2018] UKSC 24
[2] [2013] EWHC 2118 (Comm)