Between a Rock and a hard place: *Singapore Courts decline to follow English precedent on 'No Oral Modification' clauses*

5 July 2021

By: James Carter | John Goulios | Charles Allin | Matthew Shaw | George Bonomini

In April 2021, the Singapore Court of Appeal handed down its judgement in *Charles Lim Teng Siang v Hong Choon Hau*,[1] in which it considered the vexed question of whether "no oral modification" (NOM) clauses in contracts, which prevent the contract being amended other than in writing, should be strictly applied. The Singapore Court of Appeal decided that they should not be, taking the opposite view the English Supreme Court took in 2018 in the landmark decision of *Rock Advertising v MWB Business Exchange Centres Limited*,[2] which held that they should be.

Rock Advertising

The decision of the Supreme Court in *Rock Advertising* put to rest the ongoing debate in English contract law as to whether NOM clauses had legal effect and should be strictly applied.

English law previously treated NOM clauses with a degree of flexibility, allowing contracts containing them to be varied orally where the evidence on the balance of probabilities established that the parties had concluded the variation.

Rock Advertising changed all that. The facts were relatively simple: Rock Advertising leased office space from the appellants, MWB. Representatives of the two parties agreed orally during a telephone conversation that they would change the schedule for making rent payments. However, the contract between the parties contained a NOM clause, which set out that no variations could be made orally, but had to be made in writing.

At first instance the court decided that the oral variation was of no effect, as it did not comply with the requirements of the NOM clause. The Court of Appeal reversed this decision and ruled that the variation was legally binding. Upon appeal to the Supreme Court, the majority sided with Lord Sumption's leading judgment that NOM clauses were not only legally effective, but any variations to a contract containing a NOM clause had to comply with its terms, unless a party could establish an estoppel preventing reliance upon the clause.

Our previous note on the judgment in *Rock Advertising* and its effect on contract law and commercial relationships is available here.

Summary of the position in Singapore law following the Singapore Court of Appeal Judgment

The facts of *Lim v Hong* also were relatively straightforward: Lim and his mother (Tay) entered into a Share Purchase Agreement (SPA) with Hong and Tan but the SPA was left unperformed for several years following its execution. Lim then

(belatedly) brought an action to enforce the SPA. Hong defended Lim's claim on the basis of a telephone call in which Hong said that Lim had orally agreed to rescind the SPA. Lim denied this, but, in the alternative, Lim relied on a NOM clause, which stated that no variation, supplement, deletion or replacement of any term of the SPA would be effective, unless made in writing and signed by the parties.

At first instance, the Singapore High Court accepted that the parties had orally agreed to rescind the SPA.[3] The Court of Appeal framed the issues in dispute as follows: (1) whether the NOM clause (as a matter of construction) covered an alleged oral agreement to rescind the SPA, as distinct from an agreement to vary, supplement, delete or replace any of its terms; and (2) if it did, what was the effect of the NOM clause on the parties' oral agreement.

As a matter of construction, the Singapore Court of Appeal found that the NOM clause did *not* extend to oral agreements to rescind. Strictly speaking, that would have been sufficient to determine the outcome of the dispute. *Obiter*, however, the Singapore Court of Appeal (which, unusually, was convened as a panel of five Justices of Appeal) went on to consider and restate the law on NOM clauses generally. It decided not to adopt the majority view in *Rock Advertising*, which held parties to the letter of their NOM clauses in almost all circumstances (absent estoppel). It also rejected the minority view in *Rock Advertising*, *i.e.*, that oral amendments would be upheld provided that the parties had expressly (or by necessary implication) agreed to depart from the NOM clause. This too was viewed as too strict. Instead, the Singapore Court of Appeal reaffirmed the approach taken in the earlier Singapore decision in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd*,[4] holding that parties may amend a contract by agreement despite the presence of an NOM clause, and that an NOM clause creates merely a rebuttable presumption that there is no variation unless the variation is made in writing. This was viewed as more consistent with generally accepted notions of parties' contractual autonomy than the approach in *Rock Advertising*, which prioritised autonomy at the time of initial contract formation over any subsequent oral agreement to amend.

Conclusion and commercial implications

The ruling in *Rock Advertising* was broadly welcomed as providing contractual certainty on the application and effectiveness NOM clauses. Having chosen to continue on a different path, the Singapore courts have signalled that they continue to prefer the more flexible position on NOM clauses that predated *Rock Advertising*, emphasising freedom of contract throughout the lifetime of an agreement over contractual certainty fixed at the date of execution.

This divergence of approach will be particularly relevant to parties operating in or across both jurisdictions, or under multiple contracts where some adopt English law and some Singapore law as their governing law. Major organisations which rely on a number of individuals to negotiate large numbers of contracts, not all of whom will be aware of the full consequences of oral agreements they are purporting to reach, may value the certainty conferred by NOM clauses and therefore opt for their contracts to be governed by English law (which will strictly enforce them).

Following the *Lim v Hong*, parties that use Singapore law as the governing law for their contractual agreements must be cautious that such contracts could relatively easily be varied orally, even if the contract contains a NOM clause, provided there is clear evidence that an oral agreement was in fact reached. Those individuals that are able to vary contracts on behalf of the contracting parties (such as directors) would be wise to ensure that any conversations regarding the contract and its performance are therefore expressly stated not to be intended to vary the contract, and that records of such conversations are maintained to the extent possible. That said, there will be situations in which the flexibility conferred by the Singapore position will be valuable – for example, where it is envisaged that contracts will need to be very frequently varied or should be amenable to informal and swift alteration, to (for example) account for factors such as market conditions or time-sensitivity. Nonetheless, those individuals that are able to vary contracts on behalf of the contracting parties must take care to not inadvertently vary their contracts.

---

[1] [2021] SGCA 43 (*Lim v Hong*).
[2] [2019] AC 119 (*Rock Advertising*).
[3] *Lim Teng Siang Charles v Hong Choon Hau* [2020] SGHC 182.
[4] [2018] 1 SLR 979.

AUTHORS

James Carter
Partner
London | T: +44 (0)20 7349 0296 [UK Switchboard]
james.carter@dlapiper.com

John Goulios
Partner
Singapore | T: +65 6512 9595
Melbourne | T: +61 3 9274 5000
john.goulios@dlapiper.com

Charles Allin
Partner
London | T: +44 (0)20 7349 0296 [UK Switchboard]
charles.allin@dlapiper.com

Matthew Shaw
Of Counsel
Singapore | T: +65 6512 9595
matthew.c.shaw@dlapiper.com