Variation of Commercial Contracts

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Abstract
Parties who have entered into a commercial contract may find that subsequent economic, commercial or other developments call for corresponding changes in the terms of the agreement. As part of contract planning, variation clauses are invariably incorporated in written commercial contracts to enable such changes to be made and to promote certainty. A common variation clause is the “No Oral Modification” clause which typically requires agreement, writing and signature by the parties before the variation can take effect. Where the requirements are not met, the question is whether the subsequent oral variation is legally effective. This has given rise to conflicting decisions across jurisdictions which have significant commercial ramifications. This paper will examine the legal uncertainty surrounding the effect of no oral variation clauses and suggest some pointers to businesses in the event that they encounter such uncertainty in the course of cross-border transactions.

Introduction
A commercial contract may be varied in accordance with an express variation clause. In the absence of such a clause, parties may agree verbally or in writing to a variation. As the variation of an existing contract is itself a contract, the subsequent variation is subject to the ordinary rules governing contract formation namely, the terms of the arrangement must be certain, there must be mutual agreement, consideration and the intention to create legal relations. For example, if the buyer is seeking to change the delivery date stipulated in the contract to an earlier date, the seller must agree and the buyer must provide fresh consideration which could take the form of an extra payment in exchange for the seller’s promise to deliver at an earlier date. In the absence of consideration, the variation must be effected by deed. As for the intention to create legal relations, such an intention to enforce the new agreement is generally presumed in the case of commercial agreements. Parties may also allege they have attempted to vary the agreement by conduct. The party asserting such variation has to prove that the contractual obligations were performed differently from those stipulated under the original bargain and that the pattern of conduct is consistent only with the alleged variation.

A no oral variation clause, however, does not prevent the parties from making a subsequent agreement to do away with the agreed procedures for variation or from making a new contract to replace the existing one.

Express variation: The “no oral modification” clause
Known variously as “variation in writing”, “no oral modification (“NOM clause)” or “no oral variation” clauses, they are commonly incorporated in business contracts. They give certainty and prevent future disputes as to whether or not an informal exchange between the parties has effectively varied the original contract. A NOM clause typically requires all variations to be agreed, set out in writing and signed by the parties or their representatives before they are valid. For certain kinds of contracts such as the sale or other disposition of land and guarantees, Legislation prescribes that they must be evidenced in writing. The same requirement applies to any modification of these contracts.

Three legitimate commercial reasons are advanced for incorporating an express NOM clause: 1) it prevents attempts to undermine a written contract by informal means, (2) it prevents disputes about whether a variation was intended and the exact terms of the alteration (for evidentiary purposes) and (3) a formal record makes it easier for corporations to monitor restrictions based on internal rules on the making of variation agreements. 1

The effect of NOM clauses in the various jurisdictions will be discussed below.

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1 Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24 per Lord Sumption at [12]
England

The position has been inconsistent until the Supreme Court’s recent decision that NOM clauses are legally binding and that non-compliant oral variations are unenforceable. The case of Rock Advertising Ltd v MWB Business Exchange Centres Ltd is of huge commercial interest. In that case, MWB which operated serviced offices, entered into a licence agreement with Rock allowing it to occupy office space for a fixed term of 12 months. Clause 7.6 provided inter alia that “…………….All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect”. Rock fell into significant licence fee arrears, and its director proposed, in a telephone call, a revised schedule of payments to the credit controller employed by MWB. Under this proposal, certain arrears would be deferred and the accumulated arrears would be spread over the remaining term of the licence. A dispute arose as to whether the credit controller had orally accepted Rock’s proposal to vary the Licence to reflect the revised payment schedule. When Rock failed to pay the arrears, MWB locked Rock out of the premises, terminated the Licence and sued for the arrears. Rock counterclaimed for damages for wrongful exclusion from the premises. Two issues arose: (1) whether the oral variation was valid, having regard to the NOM clause and (2) whether it was supported by consideration. This paper deals only with the first issue. The answer to the first issue in the negative makes it unnecessary to consider the second issue.

The Judge at first instance found that the parties had orally agreed to the variation in the form of the revised schedule of payments but held in favour of MWB on the ground that the oral variation did not satisfy the written requirements in Clause 7.6 and was therefore unenforceable. On appeal, the Court of Appeal reversed the earlier judgment and held that MWB was bound by the oral variation which also amounted to an agreement to dispense with Clause 7.6. MWB appealed, inviting the Supreme Court to reconsider the legal effect of the NOM clause in the contract. The Supreme Court unanimously allowed the appeal and held that the oral variation of the licence fee payment schedule was ineffective for want of writing and signature as required under Clause 7.6.

Lord Sumption gave the leading judgment while Lord Briggs gave a concurring judgment, albeit on different and rather narrower grounds. Lord Sumption held that the starting point is the parties’ intention and the rule applied by the Court of Appeal in the present case was to override the parties’ intentions. As a matter of principle, parties can bind themselves as to the form which the variation must take. However, party autonomy operates up to the point the contract is made but thereafter only to the extent allowed by the contract. Therefore, if the contract allowed only written amendments, the parties had already agreed that any oral modification would be invalid. There were no policy reasons to override the parties’ intention not to be bound by oral variations.

The argument for disregarding NOM clauses is that the parties cannot agree not to vary a contract orally because such an agreement would be destroyed automatically upon the oral variation. Lord Sumption pointed out that parties who agree orally to a variation do not necessarily intend to dispense with the NOM clause. The natural inference from a failure to observe a NOM clause is that the parties overlooked it and not that they intended to dispense with it. The approach of the Court of Appeal was to override the parties’ intention to bind themselves on the form that future variations should take.

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2 United Bank Ltd v Asif (CA, unreported, 11 Feb 2000 stated that a NOM clause is effective) and World Online Telecom Ltd v I-Way Ltd [2002] EWCA Civ 413 (CA recognised that contract containing anti-oral variation clause can be varied by oral agreement or by conduct); Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396 stated, obiter, that an oral variation could be valid notwithstanding the NOM clause

3 [2018] UKSC 24

4 A later Court of Appeal in Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396 expressed, obiter, a view on NOM clauses in the context of alleged oral variations. It focused on the general principle of party autonomy which allows parties to vary the contract as they pleased (even the NOM Clause can be changed like other contract clauses) with the result that the oral agreement to vary the contract also amounted to an agreement to dispense with the NOM clause. Thus, the oral variation of the contract was effective, notwithstanding the NOM clause. This view was overruled by the UK Supreme Court in the Rock Advertising case
Lord Briggs agreed that the NOM clause deprived the oral modification of any binding force but gave different reasons for his decision. He stated that the two critical questions in the present case were (1) whether the parties can agree to remove a NOM clause orally and (2) whether, if so, such an agreement will be implied where they orally agree upon a variation of the contract (in non-compliance with the NOM clause) without referring to it at all. The oral variation agreement said nothing about the NOM clause, which by necessary implication, remained intact. Lord Briggs said the parties could have effectively removed the NOM clause by oral agreement (in answer to 1), but such an agreement could not be implied. It has to be expressly addressed by the parties in order for it to take effect. Lord Briggs agreed with Lord Sumption’s proposition that parties who orally agree to the variation do not thereby impliedly agree to dispense with the NOM clause, unless such an implication is necessary. In this context, necessity is a strict test. For example, where the oral variation called for an immediately different performance before any written record of the variation could be made and signed, then necessity may lead to the implication of an agreed waiver of the NOM clause but the same facts would be equally likely to give rise to an estoppel. In Lord Briggs’s view, the more cautious recognition that a NOM clause continues to bind until the parties have expressly or by strictly necessary implication agreed to dispense with it, would give the parties most of the commercial benefits of certainty and avoid abusive litigation about the alleged oral variation. It would certainly do so in the present case.  

Singapore

The Singapore High Court noted in its recent decision in Benlen v Authentic Builder that a NOM clause does not preclude the possibility of there being an oral variation. At best, it raises a rebuttal presumption that in the absence of writing, there had been no variation. The Court cited a textbook and the English Court of Appeal cases of Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd and MWB Business Exchange Centres Ltd v Rock Advertising Ltd. The obiter dicta in the first case and the decision in the second case on NOM clauses were subsequently overturned by the UK Supreme Court. Following these developments in the UK, the Singapore Court is likely to reconsider the issue when the opportunity arises. In the meantime, parties should, in the interests of certainty, conform strictly to the NOM clause by making written amendments to the original contract.

Canada

The leading case appears to be Shelanu Inc v Print Three Franchising Corp where the Ontario Court of Appeal held that a novariation clause did not prevent parties from entering into a new oral agreement. However, as the subsequent oral contract was a new contract that terminated the original one, the anti-oral variation clause was not breached. In so deciding, the Court was side-stepping the issue of whether the original contract could be varied by the subsequent oral agreement.

New Zealand

It appears that the position is not settled. There are cases that indicate that NOM clauses will be effective: Air NZ Ltd v Nippon Credit Bank Ltd and similarly in Stevens v ASB Bank Ltd in the context of a banking relationship. On the other hand, it may be surmised from Beneficial Finance Ltd v Brown that an oral variation can be valid notwithstanding a non-oral variation clause.

5 Note 3 at [30], [31]
6 [2018] SGHC 61
8 [2016] EWCA Civ 396 at [95]–[113] per Beatson LJ
9 [2016] EWCA Civ 553 at [34] per Kitchin LJ.
10 (2003) 172 O.A.C. 78 (CA)
11 [1997] 1 NZLR 218 (CA)
12 [2012] NZCA 611
13 [2017] NZHC 964
Australia

The position is in marked contrast to the current English position. In the Federal Court case of *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*, Finn J held that notwithstanding the writing requirement, it was open to the parties by express oral agreement or by contract implied from conduct to modify the contractual rights and obligations laid down in the original contract. Alternatively, one party may so induce or encourage the other’s assumption on which it relies that the relevant formal requirements need not be complied with, as to be estopped from later setting up those requirements. Although English decisions are not binding in Australia, it remains to be seen whether or not Australian courts will follow the UK Supreme Court’s significant decision on NOM clauses.

The United States

The common law rule has traditionally denied effect to NOM clauses. As Cardozo J observed in *Beatty v Guggenheim Exploration Co*: “Whenever two men contract, no limitation self-imposed can destroy their power to contract again”. In contrast, the United States Uniform Commercial Code, while not requiring a contract or modification to be in any signed written record, nevertheless gives legal effect to a writing requirement for modification.

International Codes

Many legal codes around the world recognise NOM clauses as effective. The Vienna Convention on the International Sale of Goods (1980) and the UNIDROIT Principles of International Commercial Contracts (2016) give effect to NOM clauses but recognise that a party may enforce oral variations by way of estoppel.

Variation by conduct

If a NOM clause is held to be binding, the party acting on the subsequent oral agreement faces the risk of not being able to enforce it. The other party may seek to rely on the NOM clause to defeat a variation on which the other party has relied. As a “safeguard against injustice”, the party who has relied on the oral agreement to its detriment may be able to invoke the doctrine of estoppel. However, as Lord Sumption pointed out in the *Rock Advertising* case, the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty under a NOM clause. The party relying on estoppel must minimally show (1) some words or conduct unequivocally representing that the variation was valid notwithstanding its informality and (2) for this purpose, the representation must be something more than the informal promise itself. In this regard, the Courts below rightly held that the minimal steps taken by Rock were not enough to support any estoppel defences.

On the other hand, in *Globe Motors*, a non-contracting party (Porto) became a party to the original Agreement through variation by conduct. The Judge found that the Agreement was in fact varied or waived by the parties’ conduct because in their dealings under the Agreement over a long period they operated as if Porto was a party. It was overwhelmingly clear on the facts and material deployed by Globe that TRW Lucas treated Porto as a contracting party. Referring to the “open,
obvious and consistent" dealings over a long period, there was no other explanation but that the parties intended to add Porto as a party to the Agreement.

The Vienna Convention on the International Sale of Goods (1980)\textsuperscript{24} and the UNIDROIT model code\textsuperscript{25} in giving effect to NOM clauses, also address this issue and preclude a party by his conduct from relying on such a clause to the extent that the other party has relied on that conduct. Similarly, the United States Uniform Commercial Code provides that an attempt at modification or rescission that does not satisfy the writing requirements can operate as a waiver.\textsuperscript{26}

**Conclusion**

The enforceability of NOM clauses is inconsistent across jurisdictions. Jurisdictions as well as international codes that recognise the binding effect of NOM clauses give commercial certainty to the terms of agreement. Contractual certainty is definitely welcomed by business parties. By prescribing a formal process for variation, it minimises informal or unintended modifications.

In view of the conflicting decisions on NOM clauses and their likely impact in relation to cross-border transactions, this paper will offer some pointers that will pre-empt a subsequent oral agreement from being held unenforceable.

First, contracting parties should be mindful as to the formalities required when attempting to modify a contract. The best practical course is to comply with the form laid down in the NOM clause. Second, the contract should state that any alleged variation that does not comply with the variation clause will be ineffective and the party seeking to enforce a non-compliant variation will fully indemnify the other party against all losses suffered and any other consequences.

Third, the contract should specify the persons authorised to execute a contract variation on behalf of the business entity. Authority should be limited to variations documented in writing and signed by the authorised persons. Any unauthorised variation will be ineffective.

Fourth, parties should bear in mind that even in jurisdictions that recognise an oral variation to a written agreement, notwithstanding the NOM clause, whether the alleged variation becomes operative turns on the intention of the parties. The burden of proof rests on the party alleging the variation and the standard of proof is the balance of probabilities.

Fifth, a party that has acted in reliance on a non-compliant oral variation may have limited recourse to equitable remedies. The doctrine of estoppel may, in appropriate circumstances, be invoked to circumvent a NOM clause. Alternatively, compliance with a NOM clause may be waived. The Vienna Convention on the International Sale of Goods, the US Uniform Commercial Code and the UNIDROIT model law also address this issue.

Sixth, non-compliance with a NOM clause may become irrelevant if an oral variation amounts to an entirely new agreement which supersedes the existing contract and terminates it. Whether the oral variation has this effect is a question of construction, depending on the intentions of the parties and the circumstances. Strong evidence is needed before the court can find that the oral variation has this effect.

At the end of the day, it is always best to reduce into writing variations made orally or by conduct to avoid future disputes about the existence and legal effect of such variation and the exact terms of the modification.

\textsuperscript{24}Article 29(2)

\textsuperscript{25}Article 2.1.18 of the UNIDROIT Principles of International Commercial Contracts, 4th ed (2016)

\textsuperscript{26}Section 2-209(4)