TWENTY ESSEX

Singaporean and English law diverge on fundamental contract law issue: Singapore Court of Appeal rejects reasoning in *Rock Advertising*

David Lewis QC and Daniel Bovensiepen

Charles Lim Teng Siang v Hong Choon Hau [2021] SGCA 43

In May 2018 we authored a bulletin ("our May 2018 bulletin") about the radical decision of the English Supreme Court in *Rock Advertising v MWB Business Exchange Centres Limited* [2019] AC 119 ("Rock Advertising") in respect of the effect of "no oral modification" clauses ("NOM clauses").

The Supreme Court in *Rock Advertising* had overturned the Court of Appeal and rejected the reasoning in a string of previous cases. Since, the decision has been applied in England repeatedly, as well as being cited in four Court of Appeal cases[1]. But the long-running controversy as to the common law effect of NOM clauses on orally agreed variation rolls on.

In the very recent case of *Charles Lim Teng Siang v Hong Choon Hau* [2021] SGCA 43 ("Lim"), Singapore's apex Court has, in a notable unanimous decision by an enlarged five-member panel, disagreed with the majority view (led by Lord Sumption) in *Rock Advertising*. In doing so, the Singapore Court of Appeal expressly relied upon adverse commentary on the *Rock Advertising* decision, including our May 2018 bulletin (see at [42] and [47]).

As we observed in our May 2018 bulletin, *Rock Advertising* was out of line with the law in other jurisdictions, and the decision in Lim demonstrates that such divergence will persist[2]. Given the prevalence of NOM clauses in many kinds of commercial contracts, the differences in the law between various common law jurisdictions should be of significant interest to commercial parties and their lawyers, including when choosing English law or some other law, such as Singaporean law, to govern their contracts.

The divergence may not just be between different jurisdictions. It could impact a single commercial relationship. Lord Burrows JSC, dissenting in the high-profile *Enka v Chubb* [2020] 1 WLR 4117, pointed out that New York law appeared to treat NOM clauses differently, with the result that, if the law of an arbitration agreement was English law, whereas the main contract was governed by New York law, an oral variation might be effective to vary the main contract, but not the arbitration agreement (see [238]).

The facts of *Lim*

The appellants agreed to sell and the

1. *NHS Commissioning Board v Dr Manjul Vasant* [2020] 1 All ER (Comm) 799; *Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd* [2020] 2 All ER (Comm) 97; *Kabab-Ji SAL v Kout Food Group* [2020] 1 Lloyd's Rep 269 ("Kabab-Ji"); and *James v Hertsmere BC* [2020] 1 WLR 3606 ("James").

2. The Singapore Court of Appeal also drew attention to contrary Australian authority, as well as a 2020 decision of the Malaysian High Court, *Ng Sau Foong v Rhombus Food & Lifestyle Sdn Bhd & another* [2020] 8 MLJ 155 ("Ng Sau Foong"), in which Ong J essentially preferred the minority judgment of Lord Briggs JSC in *Rock Advertising*.

respondents to buy shares in a publicly listed company for US$10.5 million. A formal share purchase agreement ("the SPA") was executed with a completion date of 17 October 2014. Clause 8.1 of the SPA ("the NOM Clause") provided:

"*No variation, supplement, deletion or replacement of any term of the SPA shall be effective unless made in writing and signed by or on behalf of each party.*"

The share transaction was never completed. Eventually, but not until May 2018, the appellants demanded compliance with the SPA. The trial judge found that the SPA had been rescinded by oral agreement during a telephone call on 31 October 2014, and this decision on the facts was upheld on appeal.

The legal issue was whether this purported rescission was rendered ineffective by the NOM Clause. Steven Chong JCA, giving the judgment of the Singapore Court of Appeal, identified two key questions:

1. Did the NOM clause in the SPA apply to an oral rescission?
2. Does a NOM clause prevent oral variation, if an oral variation is proved?

A menu of differing NOM clauses

As with most common wordings, the NOM Clause sought to restrict variations to the terms from being made unless in writing. But a NOM clause could of course go further, depending upon its wording. Sufficiently clear wording could probably be effective to restrict entry into new contracts[3], or prevent informal extensions to the duration of a contract[4], by requiring later contracts or extensions to be in writing and signed.

In our May 2018 bulletin we observed that, applying Lord Sumption's reasoning, a NOM clause purporting to prevent contractual variations *completely* might also be effective as a matter of English law. Steven Chong JCA agreed with us (see at [47]) and considered that an unjustifiable restriction on party autonomy.

In *Lim* the Court was in no doubt that the wording of the NOM Clause was not apt to restrict rescission of the SPA, as distinct from variations to it. The Court was influenced (at [30-31]) by the existence in the United States Uniform Commercial Code of a NOM clause explicitly excluding oral rescission. Strictly speaking, therefore, the question of what effect the NOM clause had on oral variations did not arise.

A vote for Lord Sumption or Lord Briggs? Re-open the NOM-inations

Nevertheless, given the importance of the issue, the Court went on to consider the effect of NOM clauses. Although these views were stated to be provisional, they reflect the unanimous opinion of five Justices. The reasoning in *Lim* will surely be followed in Singapore in the future.

Steven Chong JCA identified three schools of thought (at [38]):

1. The Lord Sumption approach in *Rock Advertising* giving full and strict effect to a NOM clause in preventing oral variations.
2. The Lord Briggs approach in *Rock Advertising*[5] which permits parties to orally agree a specific departure from the NOM clause, either expressly or by necessary implication.
3. The approach previously endorsed by the Singapore Court of Appeal *obiter* in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("Comfort Management"), that a NOM clause only raises a rebuttable presumption that in the absence of an agreement in writing there will be no variation. *Comfort Management* adopted the approach of the English Court of Appeal in *Rock Advertising* (which was subsequently overturned by the Supreme Court).

The Singapore Court of Appeal had more sympathy for the Lord Briggs approach, but ultimately rejected the view of both Lord Sumption and Lord Briggs.

In respect of Lord Sumption's judgment, the Court referred to subsequent commentary, including our May 2018 bulletin, and disagreed with the fundamental premise of Lord Sumption's view as to what party autonomy entails in this context. In its view, if parties orally agree to disregard a NOM clause, their autonomy to do so should be upheld.

Whilst the Singapore Court of Appeal agreed with some of the remarks of Lord Briggs in relation to party autonomy, it still considered his approach too narrow (at [52]). The Court did not agree Lord Brigg's strict requirement that the parties must have specifically addressed their minds to dispensing with the NOM clause. Steven Chong JCA pointed out that in a case where the parties distinctly had the requirements of the NOM clause in mind, it would be very unlikely that they would only agree an oral variation, rather than simply complying with the requirements of the NOM clause. The Court further considered that Lord Briggs' analogy with negotiations 'subject to contract' was inapposite (at [55]).

Taking comfort in the third way

The Singapore Court of Appeal

3. As assumed in *Rotam Agrochemical Company Limited v Gat Microencapsulation GMBH* [2018] EWHC 2765 (Comm), by Mr Justice Butcher at [137] (obiter).
4. Cf. *James* (see fn. 1 above).
5. Largely followed in Malaysia by Ong J in Ng Sau Foong (see fn. 2 above).

therefore preferred the third school of thought listed above, broadly the same approach taken earlier in *Comfort Management*.

The test identified by the Singapore Court of Appeal (at [54]) for when an oral variation could circumvent a NOM clause was:

"*... whether at the point when the parties agreed on the oral variation, they would necessarily have agreed to depart from the NOM clause had they addressed their mind to the question, regardless of whether they had actually considered the question or not.*"

In stating this test, the Singapore Court of Appeal was still giving some effect to NOM clauses, citing (at [36]) Lord Sumption's observations in *Rock Advertising* about the important commercial function of such clauses, and emphasising (at [56]) that "*rather compelling evidence*" will still be required before the court will find and give effect to an oral variation in the face of a NOM clause. The Court drew an analogy with the inherent difficulty in proving civil fraud: the standard of proof remains the civil standard, but in practice more cogent evidence is required to rebut the presumption that an oral variation was intended, given the NOM clause. Accordingly, in the Court's view, the NOM Clause served an important evidential function (but no more).

Estoppel – the great escape?

The Singapore Court of Appeal observed that under all three schools of thought the doctrine of equitable estoppel may ameliorate the effect of a NOM clause (at [39] and [84]), if the other party acted in reliance on the agreed oral modification to its detriment.

Lord Sumption had appeared to limit the scope for any estoppel to mitigate his strict enforcement of NOM clauses, by requiring at the very least (1) some words or conduct unequivocally representing that the variation was valid notwithstanding its informality, and (2) something more for this purpose than the informal promise itself.

By contrast, in *Kabab-Ji* (see fn. 1 above) Lord Justice Flaux (at [74] to [75]) indicated[6] that the English law of estoppel in this context is broadly equivalent to the proviso in the UNIDROIT Principles of International Commercial Contracts 2016 Article 2.1.18 that "*... a party may be precluded by its conduct from asserting [a NOM clause] to the extent that the other party has reasonably acted in reliance on that conduct.*" Lord Justice Flaux cited an illustration from the Comment on the UNIDROIT Principles, from which example we find it hard to discern any words or conduct unequivocally representing that the variation was valid *notwithstanding its informality*[7].

On the facts of *Lim*, the Court held briefly (*obiter*) that even had the NOM Clause been effective, Mr Lim would have been estopped from enforcing the SPA, where the respondents had relied on the variation in not completing earlier. This probably involved a wider view of the application of the doctrine of estoppel than that envisaged by Lord Sumption, as is consistent with the Court's prior rejection of his approach, and aligns more with that of Lord Justice Flaux in *Kabab-Ji*.

In our view, the true ambit of the estoppel exception to NOM clauses as a matter of English law is still fertile ground for development, in a case which properly tests that on its facts. It remains to be seen whether the common law in different jurisdictions will diverge in this respect as well.

6. In part relying upon a passing reference to the UNIDROIT Principles by Lord Sumption.
7. The Scottish Court of Session (Outer House) in *Serco Ltd v Forth Health Ltd* [2020] CSOH 48 [42-44] seems to have agreed that Lord Sumption's requirements were not a necessary condition for an estoppel preventing reliance on a NOM clause.

David Lewis QC

David is a specialist advocate who practises in a wide range of general commercial and private international law disputes, with a particular emphasis on energy and natural resources, civil fraud and the conflict of laws.

Read his online bio ›

Daniel Bovensiepen

Daniel's practice covers a broad range of international commercial work, with a particular emphasis on shipping, commodities, energy and natural resources, and related international disputes. He has extensive experience, including in the Supreme Court and Court of Appeal, and before a wide variety of arbitral bodies.

Read his online bio ›