NOM Clause: Rescission, Estoppel and Legal Effect

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It is commonplace for contracts to include a term where parties agree not to *vary*, *supplement*, *delete* or *replace* terms in the contract unless the modification is in writing. This is commonly referred to as a no oral modification clause ("NOM Clause"). The effect of a NOM Clause differs between jurisdictions and in a recent decision, *Charles Lim Teng Siang v Hong Choon Hau* [2021] SGCA 43 ("*Lim v Hong*"), the Singapore Court of Appeal ("SGCA") took the opportunity to express its provisional views on what is the legal effect of a NOM Clause. Even though provisional, it was a strong affirmation, this time by a court of five judges, of its view previously expressed in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*").

Facts

Pursuant to a written agreement, the appellants were to sell shares to the respondents by October 2014 but this event never materialised. The appellants brought an action in September 2018 to claim damages against the respondents for wrongful failure to complete the share transaction.

Represented by QWP, the respondents successfully disputed the claim on the basis of a mutual agreement reached over a telephone call in October 2014 to rescind the written agreement. While the defence of equitable estoppel was also ventilated, in view of the finding that the written agreement had been rescinded, no ruling on this point was necessary.

On appeal, in its bid to overturn the trial judge's decision, the appellants argued that a NOM Clause in the written agreement would defeat the respondent's oral rescission defence.

The SGCA dismissed the appeal on the basis that the written agreement was orally rescinded. The decision is interesting on a few fronts.

Rescission

The appellants' counsel argued that oral rescission of a written agreement is tantamount to "replacing" or "deleting" the clauses in the agreement which the NOM Clause prohibited.

However, the SGCA rejected these arguments and stated clearly that rescission does not fall into the meaning of either of those two words, or the words "variation" or "supplement". While this was dispositive of the appeal, the SGCA went on to make an observation about the doctrine of estoppel as an exception to a NOM Clause and to offer its provisional views on the legal effect of a NOM Clause.

Estoppel

The SGCA stated that even if the NOM Clause invalidated oral rescission of the written agreement, there was enough to establish that the appellants would be estopped from enforcing the written agreement.

The SGCA made clear that the doctrine of estoppel operates as an exception to the enforcement of a NOM Clause. This means that if the parties performed the written contract in a modified manner and detrimental reliance on the modification is shown, then a party will be prevented from arguing for a strict enforcement of the terms of the NOM Clause and performance to only be in accordance with the written (unmodified) contract.

Legal effect

Of significant interest is the SGCA's expression of its view on the legal effect of a NOM Clause.

In *Comfort Management*, the SGCA (in April 2018) endorsed in *obiter* that a NOM Clause has the effect of raising "a rebuttable presumption that in the absence of an agreement in writing, there would be no variation". This accords a NOM Clause with an evidential function. This adopted the approach of the English Court of Appeal in *MWB Business Exchange Centres Limited v Rock Advertising Limited* [2016] 3 WLR 1519. However, the English CA's approach was reversed on appeal by the UKSC (in May 2018), holding that a NOM Clause will be given full effect such that any subsequent modification to the contract must comply with the NOM Clause (typically requiring modifications to be in writing), failing which such modifications will be treated as invalid.

The SGCA found that the UKSC's approach untenable as it assumes that the parties' intentions should be fixed at the point when the contract was entered into; thereby overlooking the power and autonomy that the parties collectively retain to vary their agreement.

The two approaches are driven by different priorities - Singapore's approach prioritise parties' autonomy while UK's approach prioritises commercial certainty.

In our view, the better and conceptually correct approach should be what the SGCA endorsed. There should not be any reason why the law of contract should preclude parties from orally modifying a term in a contract if it can be proven that they collectively agreed to the modification.

Conclusion

One should not leave this article with the impression that a NOM Clause serves no purpose. A NOM clause adds certainty to the contractual terms, can prevent misunderstandings arising from oral discussions and in the process, avoids disputes.

However, following *Lim v Hong*, it is clear that a NOM Clause will not be enforced at all costs. A NOM Clause does not apply to rescission (unless oral rescission is expressly prohibited), and estoppel is an exception to the enforcement of a NOM Clause. Furthermore, it seems mostly likely that if the question of the legal effect of a NOM Clause should come before a Singapore court for determination, it will be treated as serving an evidential function (i.e. creating a rebuttable presumption) and not more. The party seeking to rely on an oral agreement to vary or rescind an agreement containing a NOM Clause will have the burden of proving the oral agreement on the balance of probabilities. Parties should be aware that informal discussions regarding the terms of an agreement may result a variation of an agreement despite the existence of a NOM Clause.

The team from QWP was led by Mr Christopher Woo, who was ably assisted by Mr Joel Ng and Mr Sujesh Anandan.

If you have any queries on how these developments may affect your business or would like to obtain advice, please do not hesitate to get in touch with us.

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