

Can You Rely on NOM Clauses?



by Steven SY Tee and Joyce Ong Kar Yee



“No oral modification” clauses (**NOM clauses**), otherwise known as anti-oral variation clauses, are a common sight in commercial contracts. They generally provide that agreed variations to the contract must be set out in writing and signed by all the parties. Their intent is to provide contractual certainty and avoid vexatious arguments about whether a variation was intended and its exact terms. Parties are also concerned with avoiding any contractual changes being made without proper consideration or prior approval or authorisation.

A typical example of a NOM clause would be as follows:

“No variation of this agreement shall be effective unless in writing and signed by or on behalf of each of the parties.”

Decision in *Rock Advertising*

The effectiveness of NOM clauses has long been questioned on the basis that freedom of contract requires that parties are able to make and unmake contracts as they see fit. This is encapsulated in Cardozo J’s notable judgment in *Beatty*.¹

“Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived.”

However, the understanding that NOM clauses may in practice be of limited effect appears to

have been reversed in England by the ground-breaking UK Supreme Court decision in *Rock Advertising*.² In that case, the Supreme Court upheld the effectiveness of a NOM clause and ruled that a purported oral variation of the contract was invalidated by it.

In reaching this conclusion, Lord Sumption (with the support of the majority) highlighted that although parties have the freedom to make contracts, such autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. He noted that nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. His Lordship, however, recognised that strict enforcement of the NOM clauses could give rise to injustice where oral agreements have been acted upon by the parties who then find themselves unable to enforce the agreement due to a NOM clause. Nonetheless, he observed that the potential

¹ *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380

² *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24



safeguard against such injustice, in England at least, lies in the various doctrines of estoppel.

However, the clean break approach adopted by the majority in *Rock Advertising* was not shared by Lord Briggs. Although his Lordship agreed that a NOM clause is effective, he opined that there should be an exception where the parties agree to do away with it orally or by strictly necessary implication. He did not accept that a legal rule permitting parties to bind themselves as to the process of reaching future agreement truly gives effect to freedom of contract as it allows a present freedom to sacrifice an impending freedom.

Position in Malaysia

While UK cases are not binding in

Malaysia, they have persuasive value. It came as no surprise that the High Court in *Ng Sau Foong*³ deliberated on the decision in *Rock Advertising* before ultimately holding that a contract variation in that case was valid notwithstanding a NOM clause.

Ong Chee Kwan J in *Ng Sau Foong* adopted Lord Briggs' approach except that there was no need for any implication that the parties agreed to depart from a NOM clause to satisfy a "strictly necessary" threshold. He reasoned that firstly, parties could be unaware of the NOM clause having not consciously negotiated it but was inserted by diligent lawyers. Secondly, it is the interest of businessmen to expect the courts to uphold a mutually agreed agreement even if it was done orally, given that the parties would have reduced their agreement into writing or waived the requirements of a NOM clause if it had been brought to their attention. Lastly, certainty and expediency should not prevail over the principle of party autonomy, citing Cardozo J. In any event, estoppel

would have applied to the facts in that case as there was an unequivocal representation which was relied upon.

Alternative approach

Interestingly, the apex court of Singapore in *Charles Lim*⁴ recently expressed reservations about the two approaches in *Rock Advertising*. Instead of applying *Rock Advertising*, the Singapore Court of Appeal preferred the view that a NOM clause merely raises a rebuttable presumption that in the absence of any agreement in writing, there would be no variation. This approach would then require the party alleging oral variation to rebut the presumption, and to do so, such party would need to adduce more cogent evidence to prove the oral variation. Once the burden of proof is discharged, the NOM clause will not apply since that reflects the collective decision of the contracting parties.

The Singapore Court of Appeal also highlighted that estoppel is likely to be established in most cases where a party is able to prove an oral variation. The parties' objective conduct in performing the contract as orally varied will often be evidence of the existence of an oral variation. Such performance could also be then used to establish detrimental reliance on the oral variation and in so doing, satisfy the

³ *Ng Sau Foong v Rhombus Food & Lifestyle Sdn Bhd & Anor* [2020] 8 MLJ 155

⁴ *Charles Lim Teng Siang & Anor v Hong Choon Hau & Anor* [2021] SGCA 43

requirements for obtaining relief under the doctrine of equitable estoppel.

What about entire agreement clauses?

The Supreme Court in *Rock Advertising*⁵ also made reference to the fact that a similar treatment is made to entire agreement clauses which are often paired together with NOM clauses. Both are intended to achieve contractual certainty in relation to the terms agreed. A NOM clause nullifies *subsequent* variations of the contract by giving effect to an *earlier* manifestation of the parties' intentions as to formality. In contrast, an entire agreement clause seeks to exclude reliance on negotiations or representations made *prior* to the execution of the contract to support a claim for the existence of a collateral contract, by giving effect to the *latest* expression of the parties' intentions.

A typical example of an entire agreement clause is as follows:

"This agreement constitutes the entire undertaking between the parties in respect of the subject matter hereof and supersedes all previous agreements and undertakings in respect of the subject matter hereof."

In *Rock Advertising*, the Supreme Court reiterated that entire agreement clauses are to be strictly applied, which has also been the view taken by the Malaysian courts. This can be observed in the High Court decisions of *HTJ Development*⁶ and *THHE Fabricators*.⁷ The High Court in *THHE Fabricators* cited *Rock Advertising* and held that an entire agreement clause precludes any collateral contract unless it is capable of operating as an independent

agreement and is supported by its own consideration. Citing Longmore LJ in *North Eastern Properties*:⁸

"If the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said."

Takeaway

Care should be taken to comply with all formalities, especially those specified in "boilerplate" provisions such as NOM clauses, that contracting parties sign up to. Accordingly, parties will need to consider such provisions carefully and the kind of formalities they will require. For instance, where parties want the flexibility to effect a variation quickly, consideration should be given as to what constitutes "written" or "in writing". It may be that a simple email exchange would suffice and if no, this should be expressly provided for in the contract.

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⁵ Lord Sumption in *Rock Advertising* found support for his strict application of NOM clauses in an analogy with entire agreement clauses, concluding that if an alleged collateral contract is not independent, but relied on as modifying the effect of the contract containing the entire agreement provision, that clause can prevent the collateral contract from operating.

⁶ *HTJ Development Sdn Bhd v Teoh Chin Kee & Anor* [2018] MLJU 1753

⁷ *THHE Fabricators Sdn Bhd v Zen End Resources Sdn Bhd* [2018] MLJU 2151

⁸ *North Eastern Properties Ltd v Coleman* [2010] 1 WLR 2715