Singapore Court of Appeal Rules That "No Oral Modification" Clause Does Not Apply to Rescission

The Singapore Court of Appeal has held that a "no oral modification" clause ("**NOM clause**") which prohibits the oral variation, supplement, deletion or replacement of any term of the agreement did not apply to the oral rescission of that agreement: *Charles Lim Teng Siang & Anor v Hong Choon Hau & Anor* [2021] SGCA 43.

Our Comments

The interpretation and legal effect of a boilerplate clause, namely a NOM clause, takes centre stage in the case of *Charles Lim Teng Siang & Anor v Hong Choon Hau & Anor*.

While the observations made by the Court of Appeal in this case were merely provisional as a decision was not necessary on the question of the legal effect of a NOM clause, it is nonetheless interesting to note that the Court of Appeal has for the second time now expressed a preference for the view that a NOM clause should not override the party autonomy principle in contract law i.e., where parties' oral agreement to depart from a NOM clause can be proven, the court should give effect to the more recent intention of the parties even if made orally, and even if contrary to their earlier written agreement.

The Court of Appeal had, in the earlier case of *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979, endorsed in *obiter* the position that a NOM clause merely creates a rebuttable presumption that absent an agreement in writing on the variation, there is no variation of the original agreement. The Court of Appeal in this case maintained its preference for this approach in the treatment of NOM clauses.

The decision is also a timely reminder to contracting parties not to overlook boilerplate clauses which are often viewed as "standard" and unimportant.

This update takes a look at the Court of Appeal's decision.

Background

The first and second appellants entered into an agreement ("**SPA**") to sell shares in a company ("**Company**") to the first and second respondents. The SPA contained a NOM clause which provided that "[n]o variation, supplement, deletion or replacement of or from [the SPA] or any of its terms shall be effective unless made in writing and signed by or on behalf of each [party to the SPA]" ("**Clause 8.1**").

The sale was not completed and the appellants initiated court proceedings against the respondents. The appellants claimed, among other things, that the respondents wrongfully failed to complete the sale and sought damages for breach of the SPA. The respondents' key defence was that the SPA had been orally rescinded by mutual agreement in a telephone conversation between the first appellant and the first respondent. The first appellant denied that the telephone conversation took place.

The High Court accepted the respondents' evidence, and held, that the SPA had been orally rescinded by mutual agreement through the telephone call between the first appellant and the first respondent.

On appeal to the Court of Appeal, the appellants raised a new argument, contending that the alleged oral rescission, even if proved, was invalid because it contravened Clause 8.1; and that, in any event, there had been no mutual agreement to rescind the SPA.

The respondents' position on appeal was that Clause 8.1 did not apply to rescission; the evidence supported the mutual agreement to rescind the SPA, or alternatively, the appellants were estopped from enforcing the SPA.

The Court of Appeal's Decision

Ruling in favour of the respondents, the Court of Appeal held that, on its plain language, Clause 8.1 clearly did not apply to rescission of the SPA, and that the evidence supported an oral agreement to mutually rescind the SPA. It also observed that, even if the oral rescission was deemed invalid by the operation of Clause 8.1, the appellants would, in any case, have been estopped from enforcing the SPA.

Clause 8.1 did not apply to an oral rescission

The Court of Appeal held that, as a matter of construction, oral rescission of the SPA did not fall within the ambit of Clause 8.1.

The Court of Appeal noted that the clause expressly stipulated four particular forms of modifications which must be made in writing — namely, variation, supplement, deletion and replacement — which had as their common denominator the notion that the SPA would remain valid and in force. It pointed out that rescission clearly did not fall within the meaning of any of those four terms.

The Court of Appeal further added that if parties intended for a NOM clause to exclude oral rescission, this could be explicitly provided for. The Court of Appeal cited section 2-209 of the Uniform Commercial Code (US) where the term "rescission" was subsequently added to an earlier version of the statute (which merely dealt with oral modification) to also preclude oral rescission of contract. The later addition makes clear that rescission is to be treated separately from modification.

Legal effect of Clause 8.1 on oral rescission

Although Clause 8.1 was not engaged, the Court of Appeal, with a *coram* of five judges, made several interesting observations on the legal effect of such a NOM clause.

It acknowledged several legitimate commercial reasons why parties may choose to include a NOM clause in their agreement: (a) to prevent attempts to undermine written agreements by informal means, such as by raising an alleged defence of oral modification in order to prevent summary judgment; (b) to ensure the certainty of the terms and existence of any modification, since oral discussions are difficult to prove and may also easily give rise to misunderstandings; and (c) such formality makes it easier for corporations to police internal rules which restrict their employees' authority to agree to variations.

However, the Court of Appeal took the view that those reasons do not offer a legitimate basis to prevent parties from orally varying an agreement where such an oral variation can be proved.

The Court of Appeal noted that there were at that time at least three schools of thought on the legal effect of a NOM clause, and considered each of these approaches before stating that it preferred the approach endorsed in *obiter* in the earlier Court of Appeal decision in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979, namely, that a NOM clause merely raises a rebuttable presumption that, in the absence of an agreement in writing, there would be no variation. Once the burden of proof is discharged, the NOM will cease to have legal effect to make way for the collective decision of the contracting parties to vary any aspect of their own previous agreement.

Without expressing a conclusive view on the matter (as it was not necessary to do so in this case), the Court of Appeal provisionally noted that it should not be strictly required for the parties to have specifically addressed their minds to dispense with the NOM clause when agreeing to the oral variation, in order for the court to infer that the parties had agreed to depart from a NOM clause. Rather, to cross the "rebuttable presumption" threshold, the Court of Appeal was of the view that the test should be whether, at the point when 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.

On the facts, the Court of Appeal largely agreed with the High Court's reasons for finding that the SPA had been orally rescinded by mutual agreement.

While it was not necessary for the Court of Appeal to address the estoppel issue, having found that the SPA was orally rescinded and the NOM clause did not apply to oral rescissions, the Court of Appeal nonetheless observed that, even if the oral rescission was deemed to be invalid by operation of the NOM clause, the appellants would, in any event, have been estopped from enforcing the SPA given that:

- the oral agreement to rescind the SPA in itself constituted a clear and unequivocal representation by the appellants that they would not enforce it;
- the respondents relied on this representation and decided not to complete the SPA; and
- this caused detriment, since the Company's share price had substantially plummeted from the price on the contractual completion date, such that it would now be inequitable for the appellants to enforce the SPA.

In the circumstances, the Court of Appeal dismissed the appeal.

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