

No Oral Modification (NOM) Clauses *Food for Thought*



Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other.

– per Cardozo J in *Beatty v Guggenheim Exploration Co* [1919] 225 NY 380

WHAT ARE NOM CLAUSES?

NOM clauses are generally standard, boilerplate clauses which state that all variations to the contract must be agreed, set out in writing and signed by all parties.

A typical NOM clause may look like this:

“This agreement may not be released, discharged, supplemented, interpreted, amended, varied or modified except by an instrument in writing signed by the authorized representatives of all the parties to this agreement.”

Such clauses are regularly inserted into contracts for various legitimate commercial reasons¹:

- to avoid vexatious arguments that the agreement has been varied orally or by the conduct of the contracting parties – such arguments may be raised to fend off summary judgment;
- to avoid disputes about the exact terms of the variation; and
- to enable companies to keep track of whether their employees have agreed to variations with or without authorization.

NOM clauses and entire agreement clauses may seem similar, but are actually distinct. A NOM clause nullifies **subsequent** modifications of the contract, whereas an entire agreement clause nullifies **prior** collateral agreements.

ARE NOM CLAUSES LEGALLY EFFECTIVE?

The recent Singapore Court of Appeal decision of *Charles Lim Teng Siang and anor v Hong Choon Hau*

and anor [2021] SGCA 43 (“**Charles Lim**”) has provided some much-needed clarification on this “vexed question of law”².

The appellants had entered into a Sale and Purchase Agreement (“SPA”) to sell shares to the respondents. The date of completion passed but the share transaction was never completed. For more than 3.5 years, the appellants did not serve any notice to complete. They eventually commenced a suit claiming damages for breach of the SPA. The respondents’ main defence was that the SPA was rescinded by mutual agreement. However, the SPA contained a NOM clause which prohibited any “variation, supplement, deletion or replacement of or from” the agreement unless made in writing and signed by or on behalf of both parties.



On the legal effect of a NOM clause, the Court of Appeal stated that:

- a NOM clause merely raises a **rebuttable presumption** that in the absence of an agreement in writing, there would be no variation³;
- it is for the party alleging oral variation to rebut the presumption. To do so, he must adduce **more cogent and compelling evidence** to prove an oral

variation – this is because of the inherent improbability that parties would make an oral modification given the existence of the NOM clause⁴; and

- if the oral variation can be proved on a balance of probabilities, the NOM clause will **cease to have legal effect** because that would be the collective decision of both parties to the contract⁵.

These statements are technically not legally binding as precedent, given that the NOM clause in *Charles Lim* did not apply and the Court of Appeal did not need to decide on the legal effect of the NOM clause⁶.

However, until the Court of Appeal next makes a decision on this issue, its statements in *Charles Lim* are nevertheless likely to be persuasive for future cases.

There are other noteworthy implications following *Charles Lim*.

First, the approach in Singapore has diverged from the approach in the UK, as adopted by the UK Supreme Court in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] 4 All ER 21 (“**Rock Advertising**”). Two approaches were espoused there:

- the Sumption approach, *i.e.* that a NOM clause will be given full effect – any subsequent modification to the contract is deemed invalid unless it complies with the formalities stated in the NOM clause (this was the approach adopted by the majority)⁷; and
- the Briggs approach, *i.e.* that a NOM clause is effective, but parties may orally agree to depart from the NOM clause. Such agreement can be express or implied but should not be lightly inferred⁸.

The Singapore Court of Appeal in *Charles Lim* expressed reservations about both approaches. This difference in position should be borne in mind when dealing with contracts which may be governed by either jurisdiction.

Second, the Singapore Court will likely adopt a strict interpretation of NOM clauses. In *Charles Lim*, the NOM clause was not engaged because it only provided for four specific forms of modification – “*variation, supplement, deletion or replacement*”. Rescission of the SPA did not fall within the meaning of any of these terms⁹.

Third, notwithstanding a NOM clause, a party may be estopped from enforcing the NOM clause if the other party had acted in reliance on the oral modification to his detriment¹⁰. In *Charles Lim*, the Court of Appeal stated that even if the oral rescission was deemed invalid as a result of the NOM clause, the appellants would have been estopped from enforcing the SPA¹¹.

¹ *Charles Lim* at [36]; *Rock Advertising* at [12], [14].

² *Charles Lim* at [2].

³ *Charles Lim* at [38].

⁴ *Charles Lim* at [56].

⁵ *Charles Lim* at [58].

⁶ *Charles Lim* at [35].

COMMENTS AND PRACTICAL SUGGESTIONS

- In light of the Singapore Court of Appeal's decision in *Charles Lim*, **existing contracts which contain NOM clauses** may need to be relooked.
- If a NOM clause is to be included in the contract, and the intention is for the NOM clause to apply to a cancellation or rescission of the contract, this should be **expressly provided** for.
- Given that the Court will require more cogent evidence of an oral variation, **evidence-gathering will become critical**. Relevant evidence may take the form of testimony from independent witnesses, contemporaneous documents such as parties' correspondence or meeting notes, and/or evidence of parties' objective conduct in performing the contract as orally varied.
- Entire agreement clauses and NOM clauses have posed significant hurdles for parties who sought to prove oral agreements, particularly when applied together with the doctrine of contractual estoppel. It remains to be seen whether the approach by the Singapore Court of Appeal in *Charles Lim* signals that the doctrine of contractual estoppel may be subject to greater scrutiny in future.
- In the final analysis, **a more cautious approach** when dealing with modifications to the contract may be to ensure that they are documented in writing and signed by all parties, whether or not there is a NOM clause. The amending agreement should make clear, among other things, which clauses need amendment, whether other clauses of the original agreement remain in effect, and the date from which the amendments are to take effect.

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⁷ *Rock Advertising* at [10], [15].

⁸ *Rock Advertising* at [24], [27], [30].

⁹ *Charles Lim* at [29]-[34].

¹⁰ *Charles Lim* at [39].

¹¹ *Charles Lim* at [85]-[86].