

Dispute Resolution

Drafting Cautionary: Be Very Specific with "No Oral Modification" Clause

Introduction

A "no oral modification" clause ("**NOM clause**") is a boilerplate clause included in an agreement to require any variations of an agreement to be in writing. The Singapore Court of Appeal recently held in *Charles Lim Teng Siang v Hong Choon Hau* [2021] SGCA 43 ("**Lim v Hong**") that a NOM clause which stated that any variation, supplement, deletion, or replacement of a term must be in writing did not preclude an oral rescission of the contract. This decision illustrates the importance of ensuring that NOM clauses are properly drafted such that oral rescission and termination are captured in the plain language of the clause if that is intended.

In *obiter*, the Court of Appeal further expounded on the legal effect of an NOM clause at some length, raising the possibility that despite the presence of an NOM clause, the court may still uphold oral modification or rescission in some circumstances.

We examine the Singapore Court of Appeal's decision and its implications below.

Factual Background

By way of background, the appellants and respondents had executed a sale and purchase agreement ("**SPA**") in which the appellants agreed to sell their shares in a company to the respondents. The SPA contained an NOM clause which stated that "No variation, supplement, deletion or replacement of or from this Agreement or any of its terms shall be effective unless made in writing and signed by or on behalf of each Party".

Completion failed to take place on 17 October 2014 as scheduled. In May 2018, the appellants sent a letter demanding compliance with the SPA, and later commenced proceedings upon the respondents' refusal to do so.

At first instance, the respondents alleged that a telephone conversation had taken place on 31 October 2014 between the first appellant ("**Lim**") and the first respondent ("**Hong**"), in which they had mutually agreed to rescind the SPA. The High Court Judge found in favour of the respondents, accepting that the SPA had been rescinded. On appeal, the appellants pleaded that any such rescission was invalid by reason of the NOM clause.

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It fell to the Court of Appeal to consider two issues:

1. Did the NOM clause apply to an oral rescission?
2. If it did, what legal effect did it have on an oral rescission?

Decision of Court of Appeal

In answer to the first question, the Court of Appeal found that it was patently clear that the NOM clause did not apply to rescission. The plain language of the clause expressly stipulated four particular forms of modification which had to be made in writing – variation, supplement, deletion, and replacement. Rescission clearly did not fall within the meaning of those four terms.

Since the NOM clause did not apply to rescission, it was not necessary to examine the legal effect of the NOM clause on oral rescission. Nonetheless the Court of Appeal noted the following in *obiter*:

- The Court preferred the approach it had endorsed in *obiter* 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 ("**Comfort Management approach**").
 - The party alleging oral variation would need to rebut the presumption that there was no oral variation, which would require more cogent evidence. The more inherently improbable a fact is, the more cogent the evidence that is needed to prove that fact.
 - It should not be strictly required for the parties to have specifically addressed their minds to dispense with the NOM clause.
- This was in contrast with Lord Sumption's approach ("**Sumption approach**") in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] 4 All ER 21 ("**Rock Advertising UKSC**"), which stated that a NOM clause would be given full effect such that any subsequent modification would be deemed invalid unless the stipulated formalities were complied with.
 - The Court of Appeal noted that the autonomy of an *individual* party might be bound by the terms of the contract. However the parties as a *collective* retained the power and autonomy to vary any aspect of their own agreement so long as they had jointly agreed to do so.
 - Any difficulties in establishing the existence of the oral agreement should be resolved by the proper application of evidential principles, not by the law of contract.

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- Similarly, the Court expressed reservations regarding the approach developed by Lord Briggs ("**Briggs approach**") in *Rock Advertising UKSC*. The Briggs approach was similar to the Sumption approach, save that where parties had orally agreed to depart from the NOM clause, such agreement would be valid.
 - The Court noted that such situations would be unlikely to arise. If parties had been cognisant of the formality requirements, they would be more likely to simply comply with them by setting out the modification in writing.

Ultimately, the Court found in favour of the respondents as (a) the phrasing of this particular NOM clause did not apply to oral rescission, and (b) on the facts, there had in fact been an oral rescission.

Concluding Words

Lim v Hong illustrates the importance of ensuring that NOM clauses are properly drafted such that the desired types of contractual modifications, including rescission and termination if so intended, are captured in the plain language of the clause.

As a second safeguard, contracting parties should be advised on the potential gaps in the efficacy of NOM clauses, and avoid regarding them as a failsafe that automatically excludes any oral modification of the contract. Although the Court's preference of the *Comfort Management* approach was stated in *obiter*, *Lim v Hong* marks the second time that the Court of Appeal has expressed support for the view that NOM clauses merely create a rebuttable presumption against oral modification.

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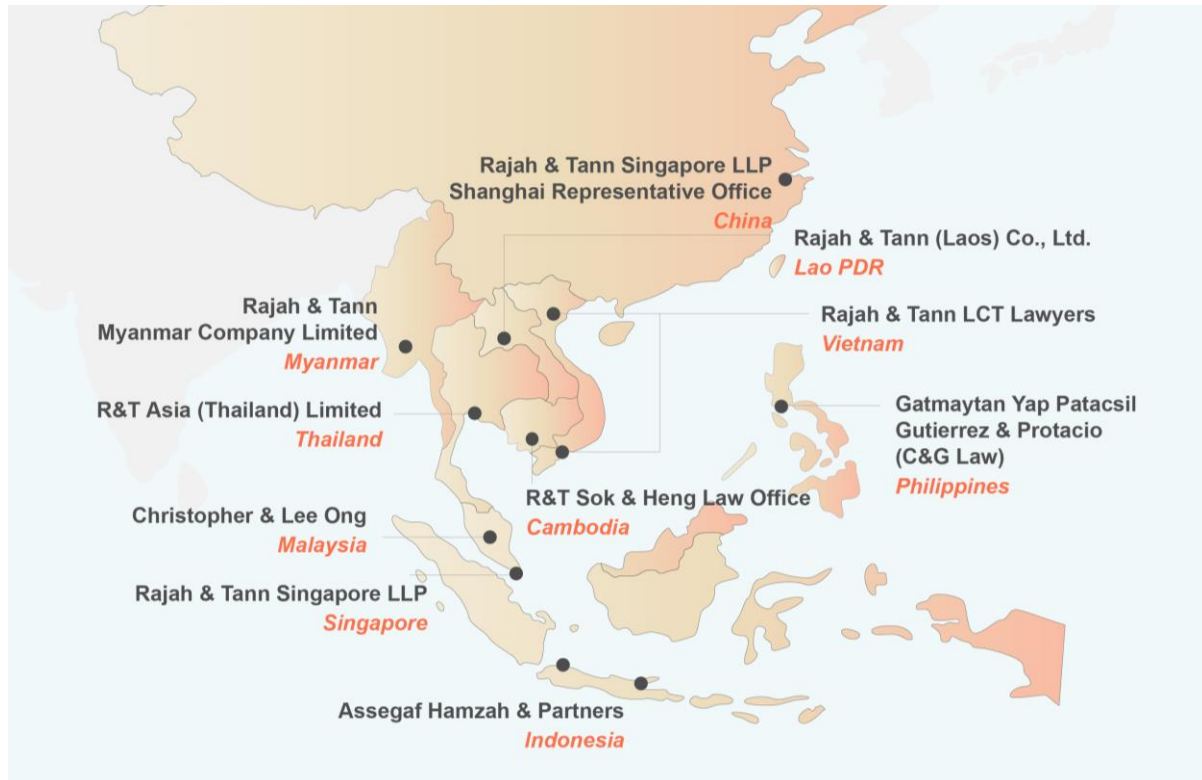
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