NO ORAL MODIFICATION CLAUSES UPHELD

The Supreme Court has decided that the commercial desirability of no oral variation (or modification) clauses in contracts overrides any conceptual difficulty in their application. If parties include such a clause in their contract, then the contract can only be varied in writing – though the Court left open the possibility that if the parties act on an oral variation, they might be estopped from later denying the variation's validity.

Key issues

- Decades of uncertainty have been ended by the upholding of no oral variation clauses
- The pragmatism of English law trumps any doctrinaire objections
- But do remember that the clause is there

No oral variation (or modification) clauses are near ubiquitous in commercial contracts. They provide that the written contract in question may only be varied in writing, and, in particular, that it may not be varied orally. The commercial advantages of these clauses are (at least) threefold. First, they prevent a party from seeking to undermine the written agreement by contending that it has been varied orally, thereby removing the certainty that the written agreement provided. Secondly, by insisting on the parties writing down any variation, they reduce the greater scope for the misunderstanding that can occur in oral agreements. Thirdly, they allow companies to control better by whom and how contracts can be amended.

Despite the consistent commercial usage of no oral variation clauses, the consensus view has, traditionally, been that they are conceptually impossible and thus unenforceable. English law does not impose formal requirements for the making of a contract (with limited statutory exceptions); the parties can always make a new contract orally; and if they make a new contract that varies an old contract, the new contract is valid.

In *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, the Supreme Court decided that commercial needs easily outweighed conceptual concerns. If the parties to a commercial contract wish to restrict the manner in which they can amend their contract, there is no policy reason for the law to prevent their doing so. The choice is between upholding the parties' first, written, contract, containing the no oral variation clause, or the parties' second, oral, contract. In the Supreme Court's judgment, the former won comfortably. Some statutes impose formal requirements for contracts; there is no reason why the parties themselves should not do so.

The Court pointed out that its conclusion is not unprecedented. For example, the Vienna Convention on Contracts for the International Sale of Goods (which is not binding in the UK) and UNIDROIT's Principles of International Commercial Contracts both expressly allow no oral variation clauses. Entire

agreement clauses are also similar, and they have long been upheld in English law.

The one escape route allowed by the Supreme Court is estoppel. If the parties agree an oral variation and then act on that variation, it may be that they would not be permitted to go back on the oral variation. The Court did not go into this in any detail – it wasn't relevant on the facts of the *Rock Advertising* case – but did stress that estoppel could not be allowed to spread its wings so widely as to destroy the effect of a no oral variation clause. There had to be some words or conduct representing that the oral variation was valid, and this would require more than the oral agreement itself.

Conclusion

The Supreme Court's decision in *Rock Advertising* confirms that English contract law is pragmatic rather than doctrinaire. If commercial parties (consumer law is different) want to agree something that does not raise issues of public policy, the role of the English courts and of English law is to find ways to uphold those wishes, not to undermine them.

But parties to a contract with a no oral variation clause need to remember that the clause is there. If they want to change the contract, they must take the time and trouble to write their changes down. Estoppel is a complex doctrine, and is not generally a sound basis for future action.

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