Very often a contract contains a clause which states it may only be amended in writing. Such clauses are known as "No Oral Modification" or NOM clauses.

The intention of the clause is straightforward but, until recently, the position has been that a later oral agreement to amend the contract is, in effect, also an agreement to dispense with the NOM clause.

In a short unanimous judgment handed down on 16 May 2018, the Supreme Court in Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] has concluded that a contract which states it may only be amended in writing, cannot be amended unless the amendment is in writing.

This Supreme Court decision has significant commercial ramifications for all contracts which are governed by English law.

Background

- In August 2011, Rock and MWB entered into a 12 month licence for Rock to occupy serviced offices in the West End of London (the Licence).
- The Contract included a NOM clause at 7.6 as follows:

  "This Licence sets out all of the terms as agreed between MWB and Licensee. No other representations or terms shall apply or form part of this Licence. All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect." [emphasis added]
Fees were due under the Licence - by February 2012, Rock had fallen into significant arrears on these payments. Rock proposed a revised schedule of payments, which was then discussed in a phone call between the two parties.

Relations between Rock and MWB deteriorated. This culminated in MWB terminating the licence and these resultant proceedings with MWB claiming for arrears and Rock counterclaiming for wrongful exclusion from the offices.

The Dispute

The dispute centred on the effect of clause 7.6 of the Licence.

Rock contended that in the course of the telephone discussion about the proposed revised schedule of fee payments, the parties had agreed to vary the terms of the Licence to reflect that schedule. Rock's case depended therefore on the validity of the oral variation.

MWB argued that the telephone discussion did not result in an oral variation for various reasons, including a lack of consideration and that, in any event, any such oral variation would be invalidated by the NOM provision at clause 7.6 of the Licence. For the purposes of this article, we focus purely on the NOM clause issue (which was ultimately determinative in any event).

At first instance, the court held in favour of MWB concluding that, although there was an oral agreement as put forward by Rock, the variation was ineffective as it did not satisfy the provisions of clause 7.6 which required that any variation be set out in writing and signed on behalf of both parties.

Considerations and decision of the Court of Appeal

Rock appealed and the Court of Appeal hearing took place in early March 2016. Significantly, this was shortly after a differently constituted Court of Appeal had considered the same issue obiter in Globe Motors Inc & others v TRW Lucas Varity Electric Steering Ltd & another [2016], reported on in our article: Varying contract terms despite no variation clause. Although the decision in Globe Motors primarily turned on a different issue, the uncertainty in relation to the legal effect of NOM clauses (following two competing Court of Appeal decisions) led the court to express a view in any event.

The Court of Appeal in Globe Motors focused on the governing principle of party
autonomy which allows parties to agree to vary their relationship as they pleased.

When Rock Advertising reached the Court of Appeal, in terms of the issue relating to the NOM clause, the Court of Appeal considered it would require a powerful reason for them to depart from the approach of the Court of Appeal in Globe Motors. The Court of Appeal therefore overturned the first instance decision and allowed Rock's appeal, concluding that the oral agreement to revise the schedule of payments also amounted to an agreement to dispense with clause 7.6 (the NOM clause) itself.

**Supreme Court**

MWB successfully appealed with the Supreme Court overturning the Court of Appeal's decision and restoring the first instance ruling, finding the oral variation was invalid as it was not in writing and signed by both parties, as required by clause 7.6 of the Licence.

Lord Sumption delivered the leading judgment, concluding that "party autonomy operates up to the point when the contract is made but thereafter only to the extent that a contract allows ....".

In other words, parties are free to bind their future relationship by agreement and, since the contract only permitted written amendments, the parties had already agreed an oral amendment would be invalid. This would include an amendment to clause 7.6 itself.

Lord Briggs agreed with the finding that the NOM clause in clause 7.6 deprived the oral agreement of any binding force as a contractual variation but had different reasons for his decision in that he considered the fact that the NOM clause had not been mentioned at all at the time of the oral agreement to be pivotal. In his view, an oral agreement by the parties to remove the NOM clause would be effective but that such an agreement could not be implied; rather it must be explicitly addressed by the parties in order to take effect.

**Widespread contractual implications**

The decision of the Supreme Court gives certainty to the effect of a NOM clause, which will be binding. No doubt some will consider the ruling to be an attack on the autonomy of the parties to agree whatever/whenever/however, but the emphasis here was on the parties' freedom to agree the terms of the contract in the first instance.

As Lord Sumption described, there may be occasions when a party will be estopped from relying on a NOM clause (which sets out conditions for the validity of a variation), but this
is a separate distinct issue and would require in his view:

"At the very least, (i) … some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself."

The doctrines of estoppel therefore provide "the safeguard against injustice" that might potentially arise from the binding nature of a NOM clause in the original contract.

From a commercial perspective, contractual certainty is welcome. Check your concluded contracts if you are considering changing the terms of an agreement - if there is a NOM clause requiring variations to be in writing, then ensure you comply with those requirements.

Going forward, you can decide whether or not to include a NOM clause in contracts with confidence - include them or not, but keep in mind that once agreed, they will be binding.