

3 July 2018

Banking and Finance Update

We commented on whether it is possible to verbally amend a "no oral modification" (NOM) clause in September 2016 (*Non-variable variation - never say never*), contrasting the position under English and South African law. A recent decision of the Supreme Court in England supports the position that these clauses should, in most circumstances, be upheld and, in doing so, provides a far greater degree of contractual certainty.

The NOM clause is a commonly seen boilerplate provision in South African and English law governed agreements and is inserted to provide certainty between parties by prescribing that any amendment to the agreement between them must be in writing.

Until last month the English courts, largely based on the English Court of Appeal judgment in *Globe Motors, Inc & Ors v TRW Lucas Varity Electric Steering Ltd & Anor* [2016] EWCA Civ 396 (20 April 2016) suggested that these clauses were not enforceable where there was sound evidence of an amendment being agreed orally. The decision was based on the protection of parties' contractual freedom - that is, they should be able to contract how and when they wish.

In contrast, the position in South Africa was established many years ago in the matter of *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A). This judgment asserts that under a South African law governed agreement, contracting parties can limit their future contractual freedom by prescribing that any variation is only valid if done in the form stipulated (typically in writing). The Shifren principle, which favours certainty over contractual freedom, does not apply where there are public policy considerations to the contrary and has been confirmed and applied consistently by South African courts.

In the recent case of *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 (16 May 2018) the English Supreme Court enforced an NOM clause and, in effect, disregarded the previous authority of *Globe Motors*. The facts of the *Rock* matter revolved around whether a telephone conversation regarding amendments to a schedule of fees to a license agreement would be binding on the parties concerned.

The court held that the variation was invalid as it had not been "in writing and signed by both

parties”, as required by the agreement. The court concluded that “party autonomy operates up to the point when the contract is made but thereafter only to the extent that a contract allows”. The main judgment was given by Lord Sumption who found that there is no overriding public policy reason to consider NOM clauses unenforceable and that they are generally used for legitimate commercial reasons. He also found that there is no inconsistency between the general principle that contracts may be made informally and a specific agreement between the parties to a contract that it may only be varied in writing. With reference to earlier judgments that found against the enforceability of NOM clauses, where their enforcement would allow or facilitate an abuse, he suggested that the various doctrines of estoppel offered adequate safeguards.

The decision of *Rock* favours certainty and provides confidence to parties who choose to use NOM clauses. Helpfully, it also aligns the position under English and South African law more closely.

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Also published in Without Prejudice August 2018.

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