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NO-ORAL-VARIATION CLAUSES AND OUR POWERS TO VARY CONTRACTS

Charles Lim Teng Siang v Hong Choon Hau

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In *Charles Lim v Hong Choon Hau* [2021] SGCA 43, the Singapore Court of Appeal delivered an important judgment on no-oral-variation clauses, and their legal effect. This note analyses the reasoning of the Court, addressing also some implications the case might have on future developments.

Oral contracts are commonplace. As a "general rule"[1] the common law does not impose formality requirements on our powers to create contracts with one another.[2]

So too for our powers to vary—or synonymously, to modify—the contracts we have entered into. Contracting parties can agree to vary their terms orally, and no obstacle at general law prevents their doing so. But what if parties stipulate a term purporting to do just that? Does it have legal effect—can contracting parties, at time of formation, fetter *ex ante* their powers to subsequently agree a variation of terms?

These drafting attempts have been referred to interchangeably as anti-oral-variation or no-oral-modification clauses in the cases: NOM clauses for short here. As Moore-Bick LJ observed, there might well be "practical benefits in being able to restrict the manner or form in which an agreement can be varied", but the key question has always been "whether there is a principled basis on which that can be achieved".[3]

While "legitimate commercial reasons"[4] favour giving them legal effect, "conceptual problems" have stood in the way.[5] The issue has spawned copious commentary.[6] In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd,* the UK

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1 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24 at para 15 [*MWB* (UKSC)].

2 Though statutory exceptions exist. In England, *The Statute of Frauds 1677*, s 4 (guarantees); *Law of Property (Miscellaneous Provision) Act 1989*, s 2 (contracts for the sale of land); *Law of Property Act 1925*, s 53 (creation of interests etc in land) etc. *Cf* the power to make a will: *Wills Act 1837*, s 9. In Singapore, see *Civil Law Act 1909*, s 6 and s 7.

3 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at para 120.

4 *MWB* (UKSC), *supra* note 1 at para 12 (Lord Sumption).

5 *Ibid* at paras 13 (Lord Sumption), 25 (Lord Briggs).

6 A mere sampling: Jonathan Morgan, "Contracting for Self-Denial: On Enforcing 'No Oral Modification' Clauses" [2017] 76 CLJ 589 [Morgan]; Ewan McKendrick, "The Legal Effect of an Anti-oral Variation

Supreme Court recognised that these questions raise "truly fundamental issues in the law of contract".[7] There, the UKSC had to decide "whether a contractual term prescribing that an agreement may not be amended save in writing signed on behalf of the parties is legally effective".[8] Momentously, they held 'yes', overruling the Court of Appeal of England and Wales.

In Singapore the Court of Appeal has, in *Charles Lim v Hong Choon Hau,*[9] recently handed down an important judgment on this very issue. It is a fully reasoned decision signalling that they will very likely depart from the UKSC, opting instead to chart their own path. In a nutshell, the bulk of their reasoning suggests that they would rather confine NOM clauses to having a purely "evidential" effect, denying them any "real [legal] effect" on our powers to agree a contractual variation.[10]

I. Facts and Result

Charles Lim involved a contract for the sale of shares. Simplified to its essentials, Lim and Hong entered into an agreement to sell shares, the sale to take place on 17th October 2014.[11] The sale however was never executed. Three-and-a-half years later in May 2018, when the share price had "substantially plummeted",[12] Lim, the seller, insisted that the contract be completed. Hong, the buyer, refused. The seller sued him, claiming damages for breach of contract.

In response, the buyer argued that in a phone call on about 31st October 2014, the contract had already been "orally rescinded"[13] by agreement. The trial judge found as a fact that this had occurred,[14] a finding upheld by the SGCA.[15] But the buyer's case faced a potential stumbling block—clause 8.1, a NOM clause included as "boilerplate" by their lawyers, to which neither party had paid "sufficient attention":[16]

Clause" [2017] 32 JIBLR 439; Janet O'Sullivan, "Unconsidered Modifications" [2017] 133 LQR 191; Janet O'Sullivan, "Party-Agreed Formalities for Contractual Variation – A Rock of Sense in the Supreme Court" [2019] 135 LQR 1; Paul S Davies, "Varying Contracts in the Supreme Court" [2018] 77 CLJ 464; William Day, "Variation and Waiver" in W Day and S Worthington, eds, *Challenging Private Law* (Oxford: Hart Publishing, 2020) at ch 3; JW Carter, John Eldridge, & Elizabeth Peden, "Agreed Writing Requirements for Contract Variation" [2020] 36 JCL 107; Andrew Burrows, "Anti-Oral Variation Clauses: Rock-Solid or Rocky?" in PS Davies and M Raczynska, eds, *The Contents of Commercial Contracts: Terms Affecting Freedoms* (Oxford: Hart Publishing, 2020) [Burrows]; D Foxton, "The Boilerplate and the Bespoke: Should Differences in Quality of Consent Influence the Construction and Application of Commercial Contracts?" in Mitchell and Watterson, eds, *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Oxford: Hart Publishing, 2020) at 274-277.

7 *MWB* (UKSC), *supra* note 1 at para 2.

8 *Ibid* at para 12.

9 [2021] SGCA 43 [*Charles Lim*].

10 *Ibid* at paras 50, 58.

11 A simplification for clarity's sake. Other parties were involved but material communications were between Lim and Hong.

12 *Charles Lim, supra* note 9 at para 85.

13 *Ibid* at paras 1, 12, 18.

14 *Ibid* at paras 18, 62.

15 *Ibid* at paras 63, 70, 82.

16 *Ibid* at para 1.

> Variation of Terms
>
> 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[17]

Hence the main issue on appeal—was their oral agreement to set aside the contract "invalid because it was in contravention of clause 8.1"?[18] The court held that it was not.

As a matter of construction, clause 8.1's scope did not extend to 'rescission'—a distinct concept from variation or modification.[19] The contract was effectively rescinded on 31st October 2014. There was nothing left to enforce. This was sufficient to dispose of the appeal.

II. A 'Wider' Approach?

However, as the "legal effect" of a NOM clause had been fully argued by counsel, and a five-judge-quorum exceptionally convened specifically to decide the issue, the SGCA set out their thinking in seriously considered *obiter dicta*,[20] proceeding to identify what they thought were flaws in the UKSC's reasoning in *MWB*.

The majority judgment in *MWB* was delivered by Lord Sumption (with Lady Hale and Lords Wilson and Lloyd-Jones agreeing), while Lord Briggs gave a concurring judgment on different grounds.

Lord Sumption's "strict approach" favouring "rigorous enforcement"[21] of NOM clauses came across most poorly. His reasoning was accused variously of conflating "collective autonomy" with "individual autonomy",[22] being "overly concerned with contractual certainty",[23] and confusing "evidential difficulties in proving an oral variation" with "contractual principles" and the "conceptual challenges" posed by NOM clauses.[24]

Lord Briggs' qualified middle approach came off better. For Lord Sumption, a NOM clause constrains the procedure for its own removal. For Lord Briggs it does not, extending only to all other terms (the contract's "substance"[25]). Hence the clause itself can be removed by oral agreement, express or necessarily implied. Importantly however, to intend to remove the clause, the parties must have had it in mind. But the SGCA thought this requirement "suffer[ed]" from the "drawback" of

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17 *Ibid* at para 26.
18 *Ibid* at para 20.
19 *Ibid* at paras 29-34. Compare, though not cited by the court, *Morris v Baron & Co* [1918] AC 1 (HL) at paras 25-26 (Lord Dunedin): "The difference between variation and rescission is a real one…".
20 *Charles Lim, supra* note 9 at para 35.
21 *Ibid* at para 37.
22 *Ibid* at para 43.
23 *Ibid* at para 50.
24 *Ibid* at paras 37, 50, 58.
25 *MWB* (UKSC)*, supra* note 1 at paras 24-25, 27, 29.

being still too narrow, "with the result that a NOM clause will practically never be done away with".[26]

Instead, the SGCA preferred a "wider test"[27] to imply removal of a NOM clause—there should be no need for parties to have addressed their minds to the NOM clause at the relevant time. Surprisingly, to support this conclusion they employed a fiction, resorting to hypothetical or presumed agreement:

> The test should be whether at the point when parties agreed on the oral variation, they would necessarily have agreed to depart from the NOM clause had they addressed their mind[s] to the question, regardless of whether they had actually considered the question or not.[28]

Though the case was not mentioned, their thinking here resembles, and may have been influenced by, their reasoning on implied terms in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd.*[29] Namely, that implied terms are based on "parties' *presumed* intentions…rather [than] their objectively ascertained *actual* intentions",[30] and so can only "fill… 'true' gaps"—where "parties did not contemplate the issue at all and so left a gap"[31]—based on a "conjoined"[32] business efficacy[33] and officious bystander[34] test. Drawing this parallel is tempting, but it may not be apt, and should be cautioned against.

Significantly, the SGCA's 'wider' approach, which they dubbed the "*Comfort Management* approach",[35] was said to be "adopted"[36] from the EWCA in *MWB v Rock Advertising*. Central to that reasoning is Cardozo J's "celebrated *dictum*" in *Alfred Beatty v Guggenheim Exploration Co,*[37] which was endorsed both by the EWCA in *MWB*[38] and the SGCA in *Charles Lim*:[39]

> Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived… What is excluded by one act, is restored by another. You may put it out by the door, it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again.[40]

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26 *Charles Lim, supra* note 9 at para 52.
27 *Ibid* at para 54.
28 *Ibid*.
29 [2013] SGCA 43 [*Sembcorp Marine*]. *Cf Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72.
30 *Sembcorp Marine, ibid* at para 96 [emphasis in original].
31 *Ibid* at para 94.
32 *Ibid* at para 98.
33 *The Moorcock* (1889) 14 PD 64 (Bowen LJ).
34 *Southern Foundries (1926) Ltd v Shirlaw* [1939] 2 KB 206 (MacKinnon LJ).
35 Following *obiter dicta* in their previous judgment in *Comfort Management Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 (CA) at para 90 [*Comfort Management*]. See also *Charles Lim, supra* note 9 at paras 38, 61.
36 *Charles Lim, ibid* at para 38.
37 (1919) 225 NY 380 [*Alfred Beatty*].
38 [2016] EWCA Civ 553 at paras 34 (Kitchin LJ), 66-67 (McCombe and Arden LJJ agreeing).
39 *Charles Lim, supra* note 9 at para 44.
40 *Alfred Beatty, supra* note 37 at 387-388.

And so, held the SGCA, "an initial limitation imposed by a NOM clause can be unwound by the same parties at a later date".[41] "[T]he court should give effect to party autonomy as the paramount consideration, and uphold the parties' oral agreement to depart from a NOM clause, express or implied, if the same can be proved".[42]

III. Some Background

Before further commentary on selected aspects of the SGCA's reasoning in *Charles Lim*, it will help to first contextualise their pronouncements with some background.

Before *MWB,* the position in English law was uncertain, with inconsistent authorities on the issue. Could a NOM clause fetter the parties' powers to agree a variation orally, thereby invalidating any such attempt? One case suggested 'yes'[43], while another—*World Online Telecom*—suggested 'no'[44]. Both were appeals from decisions about summary judgment.

It was only in *Globe Motors*[45] that the EWCA, with the benefit of full argument, unanimously decided to follow the 'no' line in *World Online Telecom.*[46] Moore-Bick LJ said that:

> As a matter of principle… I do not think that they can effectively tie their hands so as to remove from themselves the power to vary the contract informally…[47]

He also recognised that:

> The governing principle, in my view, is that of party autonomy. The principle of freedom of contract entitles parties to agree whatever terms they choose, subject to certain limits imposed by public policy of the kind to which Beatson LJ refers. The parties are therefore free to include terms regulating the manner in which the contract can be varied, but just as they can create obligations at will, so also can they discharge or vary them…[48]

This set the backdrop to *MWB v Rock Advertising*. The trial judge there had ruled in MWB's favour because of a NOM clause. MWB could claim arrears on a licence of office premises in London from Rock as originally agreed, despite a phone conversation between Rock's director and an MWB employee agreeing to accept less than

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41 *Charles Lim, supra* note 9 at para 45.

42 *Ibid* at para 49.

43 *United Bank Ltd v Asif* (unreported, 11 February 2000, EWCA).

44 *I-Way Ltd v World Online Telecom UK Ltd* [2002] EWCA Civ 413 [*World Online Telecom*].

45 *Globe Motors Inc & Ors v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 [*Globe Motors*].

46 *Ibid* at para 100 (Beatson LJ): "in principle the fact that the parties' contract contains a clause such as Article 6.3 does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct" and paras 116-121 (Underhill and Moore-Bick LLJ agreeing).

47 *Ibid* at para 120.

48 *Ibid* at para 119.

originally owed.[49] The EWCA overruled the trial judge. That phone conversation was upheld as a valid oral variation, NOM clause notwithstanding. Paying tribute to Beatson LJ's extensive judgment in *Globe Motors,* and following also *World Online Telecom,* Kitchin LJ said:

> To my mind the most powerful consideration is that of party autonomy, as Moore-Bick LJ explained it. Indeed that explanation seems to me to echo the words of Cardozo J nearly 100 years ago…[50]

IV. 'Party autonomy'

As mentioned, the SGCA's preferred 'wider' approach was adopted from the EWCA in *MWB*. Understandably, the theme 'party autonomy' featured prominently in their reasoning. But its usefulness may be questioned.

In *Charles Lim* the issue was characterised as a "vexed question of law which requires an examination of the principle of party autonomy in contract law, its ramifications, and its limit".[51] And in criticising Lord Sumption's judgment, they said:

> … the parties to any contract are ultimately the master[s] of their own contract and if they decide to orally agree to do away with or depart from a NOM clause, the court should uphold their autonomy to do so.[52]

The connection between 'party autonomy' and 'freedom of contract'—amply evident from Moore-Bick LJ's reasoning as extracted above—can now be stressed. Moore-Bick LJ and later Kitchin LJ appear to have been using the two labels interchangeably. 'Freedom of contract' was not at all mentioned in *Charles Lim*. But it is a familiar, and an equally if not more helpful, way of framing and understanding the puzzle at a more general level. As articulated in *World Online Telecom:*

> In a case like the present the parties have made their own law by contracting, and can in principle unmake or remake it. Among other things, far from fettering their freedom of contract, Mr Nasir can legitimately say that a preclusive clause like clause 21.1 gives effect to that freedom… One reason may be that the principle itself is neither simple nor unitary. A consensual oral variation, after all, is also an exercise of freedom of contract.[53]

What seems to have gone insufficiently recognised in *Charles Lim* is that 'party autonomy' is under-determinative. It can go both ways,[54] depending on whether one

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[49] By deferring and hence backloading Rock's licence fees payments under a revised schedule.

[50] [2016] EWCA Civ 553 at para 34 [*MWB* (EWCA)].

[51] *Charles Lim, supra* note 9 at para 2.

[52] *Ibid* at para 40.

[53] *World Online Telecom, supra* note 44 at para 10 (Sedley LJ).

[54] In their terms, 'collective autonomy': *Charles Lim, supra* note 9 at paras 43, 46, 47, 51. At para 41, the court attempts to unpack 'party autonomy' in terms of three 'consequences'. But, respectfully, this does not seem very helpful. Certainly not in disambiguating the relevant powers at stake. One can, for

focuses on our powers to contract with each other at time of formation, or our powers to agree a variation at a later time. Yes, one might say that autonomous persons can always agree to release themselves from prior bonds if they later change their minds. But one might equally say that autonomous persons must be able to make credible commitments, effectively binding their future selves.[55]

Like 'freedom of contract', 'autonomy' is 'neither simple nor unitary'. Appeals to 'autonomy' cannot resolve the problem in either direction. Of course, neither does 'freedom of contract', but the point here is that re-packaging the issue in 'autonomy' terms does not take us much further. It gives only a false appearance of clarity.

In fact it may prove counter-productive, muddying the waters by unnecessarily complicating a difficult issue with yet another tricky concept. For example, in "expressing… reservations" about Lord Sumption's judgment, the SGCA accused him of "conflat[ing] the parties' individual autonomy with the parties' collective autonomy".[56] Respectfully, this seems an uncharitable reading. 'Party autonomy' is broad enough to encompass two sets of separate powers, invoked at different times: (i) our powers to form contracts with each other, as distinct from (ii) our powers to agree to vary our formed contracts. When Lord Sumption said that "[p]arty autonomy operates up to the point when the contract is made, but *thereafter only to the extent that the contract allows*…",[57] he seems simply to have been saying that—through a NOM clause given legal effect—the former set of powers can 'trump' the latter, fettering their exercise.

An agreement is the doing of *both* parties.[58] It is unlikely that Lord Sumption was unaware of the basic point that, just as with contract formation, contract variation requires an agreement. And that just as with formation, this is established through 'offers' and 'acceptances', and the like—so "nothing can be done without the agreement of both parties."[59] One party's 'offer' to vary does nothing until 'accepted' by the other.[60]

The SGCA was of course completely correct to emphasise that these powers are in an important sense "jointly"[61] or "collectively"[62] exercised.[63] But this follows

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example, simply substitute every mention of 'contract' with 'variation', so it reads: "… no one is forced to enter into any [variation], whether written or oral… once a [variation] is entered into, it attracts certain consequences…."

55 *Cf MWB* (UKSC), *supra* note 1 at para 11 (Lord Sumption).

56 *Charles Lim, supra* note 9 at para 43 [emphasis removed].

57 *MWB* (UKSC), *supra* note 1 at para 11 [emphasis added].

58 See *eg* Timothy Liau, "Privity: Rights, Standing, and the Road Not Taken" [2021] 41 (3) OJLS 803 at 829 [Liau, "Privity"]; Robert Stevens, "Binding our Future Selves" in PS Davies and M Raczynska, eds, *The Contents of Commercial Contracts: Terms Affecting Freedoms* (Oxford: Hart Publishing, 2020) at 18.

59 *Globe Motors, supra* note 45 at para 120 (Moore-Bick LJ).

60 Compare, to similar effect, *Alliance Concrete v Sato Kogyo* [2014] SGCA 35 at para 105: "ACS was trying its level best to foist upon SK a *variation* of the Contracts in relation to the price *which SK steadfastly resisted throughout*" (Phang JA) [emphasis in original]

61 *Charles Lim, supra* note 9 at paras 42-43.

62 *Ibid* at paras 42-46, 51, 55, 58.

63 If one wishes to be pedantic, 'powers to contract' and 'powers to vary' are more general categories, in convenient shorthand, and can be decomposed into two further sequential powers. The power to 'offer' by its exercise creates in the offeree a power to 'accept': see *eg* Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" [1913] 23 Yale LJ 16 at 49-51. This however does

simply from the logic of agreement and its essential role in both contract formation and variation. There is, in my view, no real need for 'collective autonomy' as some novel term of art, or to coin a "collective party autonomy principle".[64]

A related clarification may be apt here. As the SGCA rightly pointed out, it is of course an incorrect proposition that "the *parties' intention* should be fixed at the time when the contract was entered into".[65] People change their minds all the time. This should however not be confused with the correct proposition that, unless validly varied, the *terms* of a contract are fixed at the time it is formed. That is why, as the SGCA later (correctly) asserted, "[c]ontractual interpretation seeks to ascertain the objective intentions of parties *as reflected by the express words of the agreement*".[66] Even if mutually coincident, parties' intentions are insufficient for an agreement. What is in their minds is irrelevant so long as not 'reflected'—*ie* objectively manifested—in agreement.[67]

V. No 'Legal Effect', Only 'Evidential'?

The SGCA endorsed Lord Briggs' qualification on the basis that it "upholds the parties' collective autonomy to depart from NOM clauses".[68] But, wanting a 'wider test', they expanded it through a fiction based on hypothetical or presumed agreement: it can be 'necessarily implied' that parties intended to remove a NOM clause, even if parties had no knowledge of the NOM clause (as on the facts of *Charles Lim*).

It is enough if they *would* have so intended, *had* they known. What to make of this? One might quibble here with the perceived need to resort to such a convoluted fiction, which, conceptually, creates an odd half-way house. It is puzzling because the SGCA also endorsed Cardozo J's 'celebrated dictum' and the approach of the EWCA in *MWB*, from which their 'wider' approach was 'adopted'. In *ZVI Construction Co v University of Notre Dame* it was confirmed that, on the EWCA's approach, it is irrelevant to ask if parties had thought about the NOM clause when agreeing a variation.[69]

There is an inconsistency here which ought to be ironed out. The two approaches assume diametrically opposed starting points about the 'legal effect' of a NOM clause, so one cannot concurrently embrace both. To illustrate this, suppose a different scenario, *Charles Lim-2*:

> X and Y enter into a contract containing a NOM clause. Two weeks later, instead of orally rescinding the contract altogether, they attempt to vary its terms orally

not detract from the basic point: an agreement is the doing of *both* parties, thus a 'bilateral'—or if you prefer, a 'joint' or 'collective'—matter.

64 *Charles Lim, supra* note 9 at para 55.

65 *Ibid* at para 40 [emphasis added].

66 *Ibid* at para 60 [emphasis added].

67 See *eg,* Liau, "Privity", *supra* note 58 at 807-08, 829.

68 *Charles Lim, supra* note 9 at para 51.

69 [2016] EWHC 1924 at para 80. Examining the reasoning of Kitchin LJ in *MWB* (EWCA), *supra* note 50, and that of Beatson LJ in *Globe Motors, supra* note 45, upon which it relied. The very same conclusion is reached by Burrows, *supra* note 6 at 42.

> (perhaps to adjust the price downwards). At all times X and Y are completely unaware of the clause's existence.

Consider first Lords Sumption's and Briggs' view. Under both views this attempt at oral variation must fail; it is 'invalid' (probably 'void').[70] Why? Because their common starting point is that NOM clauses can be given 'legal effect'—they fetter the parties' legal powers to agree variations by setting a formality hurdle—hence non-compliant attempts are 'invalid'.

Lord Briggs' qualification will moreover not apply in *Charles Lim-2*. To repeat, unlike Lord Sumption, for Lord Briggs a NOM clause cannot constrain the procedure for its own removal. So, distinguishing the NOM clause from other contractual terms (its 'substance'[71]) becomes absolutely essential. An oral agreement to vary the contract's terms (its 'substance') could potentially still be valid, if but only if it simultaneously removes the NOM clause. Hence Lord Briggs' natural insistence upon the strict requirement that the parties must have had the clause in mind, intending to remove it, whether expressly or by necessary implication. This requirement is not met in *Charles Lim-2*.

Contrast now the 'wider' approach of the EWCA in *MWB*. Lack of awareness of the NOM clause in *Charles Lim-2* will not prevent a valid oral variation of the contract's terms. The EWCA upheld the phone conversation between Rock's director and an MWB employee as a valid oral variation, despite a NOM clause of which they "were probably entirely unaware".[72]

This demonstrates a completely opposite starting point assumed by the supposedly 'wider' view. Under this view, the clause has no 'legal effect'—it cannot even fetter the parties' powers of variation to begin with. If X and Y agree an oral variation, it is valid. That is why the clause, and the parties' awareness of its existence, is irrelevant. This approach is conceptually cleaner and more straightforward. To arrive at the desired result the adaptation suggested in *Charles Lim* is unnecessary. There is no need to fastidiously distinguish NOM clauses from other terms, then go on fretting about whether the clause was simultaneously removed by the parties' actual agreement, much less a fictitious presumed agreement.

To sum up, if NOM clauses are given 'legal effect', oral variations are *prima facie* 'invalid'. No 'legal effect', no *prima facie* 'invalidity'. These are two inconsistent positions a legal system can take; one cannot have one's cake and eat it.

What then is the position under Singaporean law? As it stands there is some unclarity, as the reasoning in *Charles Lim* could be said to point in inconsistent directions. But it is submitted that the large bulk of it leans towards giving NOM clauses no 'legal effect'. The judge in *Comfort Management* said that:

> [A] term of a contract which states that the contract can only be varied in writing will not prevent there being an oral variation; instead, the effect of such a term is

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70 *MWB* (UKSC), *supra* note 1 at para 15: "What the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid." See also para 17.

71 *MWB* (UKSC), *supra* note 1 at paras 24-25, 27, 29 (Lord Briggs).

72 *MWB* (UKSC), *supra* note 1 at para 24 (Lord Briggs). Unsurprisingly, the UKSC reversed the EWCA on appeal.

> at best to raise a rebuttable presumption that, in the absence of writing, there has been no variation.[73]

Additionally, a paragraph after citing Cardozo J's dictum in *Alfred Beatty v Guggenheim Exploration Co*, the SGCA declared:

> It seems to us there is no legitimate reason to suggest that NOM clauses are *sui generis* and are somehow insulated from the parties' power and capacity to vary the terms of their bargain. This would constitute an unprincipled limitation on the parties' collective autonomy.[74]

If one is indeed serious about the NOM clause having no 'legal effect', but only an 'evidential' effect, as the SGCA was very keen to repeatedly stress,[75] asking if X and Y would have hypothetically removed a clause with no recognised legal effect seems an unnecessary artifice.

VI. Consideration

At this juncture it may be interesting to contrast the opposite scenario. Rather than making it harder to vary a contract through a NOM clause, can parties agree to make it easier to vary a contract? Perhaps by dispensing with one of the otherwise 'essential elements'[76] for variation, through a 'no-need-for-consideration clause'?

In the famous coda of *Gay Choon Ing v Loh Sze Ti Terence Peter* it was considered whether consideration might be abolished.[77] This was raised again in yet another significant recent case, *Ma Hong Jin v SCP Holdings Pte Ltd*.[78] Although the SGCA ultimately declined to abolish the need for consideration in variations, the court decided that it was only a 'default' requirement.[79]

On this point Singaporean law has diverged yet again from English law. Lord Briggs in *MWB* observed that:

> While statute may, in the public interest, require certain formalities for the making of certain types of contract, the common law leaves the parties to choose their own, so long as the essential elements of offer, acceptance and consideration are

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73 *Comfort Management, supra* note 35 at para 90. Compare Beatson LJ in *Globe Motors, supra* note 45 at para 100, concluding that the clause "does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct".

74 *Charles Lim, supra* note 9 at para 46. If one were insistent on being critical, the confusion in this passage is that it does not adequately distinguish between (i) our powers to form contracts with each other, versus (ii) our powers to agree to vary our formed contracts, and (iii) 'party autonomy', which as pointed out above is broad enough to encompass the two distinct sets of separate powers.

75 *Charles Lim, supra* note 9 at paras 50, 58.

76 *MWB* (UKSC), *supra* note 1 at para 22 (Lord Briggs).

77 [2009] SGCA 3.

78 [2020] SGCA 106 [*Ma Hong Jin*].

79 *Ibid* at paras 36-37, 57-66.

> observed. These matters are as applicable to the variation of an existing contract as they are to the making of a contract in the first place.[80]

An issue that arose in *Ma Hong Jin* is whether parties could, by a contractual term, dispense with the requirement of consideration for a variation (answer: 'yes'),[81] and whether, on the facts of the case, a term in the contract had this effect (answer: 'no' as a matter of construction).

The SGCA construed the term as a NOM clause*,* providing a further clue on its 'legal effect' in Singapore:

> 9.3 No amendment or variation of this Agreement shall be effective unless so amended or varied in writing and signed by each of the Parties.

The court interpreted the clause as "prescrib[ing] signed writing as a minimum threshold for legally valid variation to occur. In other words, it provides for a necessary… condition for validity of a subsequent variation of the contract".[82] Could one read this as giving NOM clauses 'legal effect', as the UKSC in *MWB* did, and so *prima facie* invalidating oral variations? If so, it will have to be reconciled with *Charles Lim*.

VII. Estoppel

Finally, *Charles Lim*'s reasoning on estoppel also merits some discussion. Estoppels can prevent the assertion of legal rights or operate as a rule of evidence, precluding reliance on evidence to establish the truth of facts which a party is estopped from asserting.[83] Since NOM clauses were decisively given 'legal effect' by the UKSC in *MWB,* this created a unique conundrum. A "safeguard against injustice"[84] was thought necessary. One of the outstanding questions in English law remains the room for, and scope of "various doctrines of estoppel"[85] to prevent one party from asserting or pleading the NOM clause—and hence the invalidity of an orally agreed variation.

There are clashing concerns here which may be simply irreconcilable. The first is the thought that estoppel can play a role as "safety net where detriment is shown" given "the tension" between "facilitating certainty and avoiding a trap for those who forget the clause and have varied the agreement orally".[86] The second is the directly

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80 *MWB* (UKSC), *supra* note 1 at para 22 (Lord Briggs).

81 *Ma Hong Jin, supra* note 77 at paras 36, 66. And prior to that in obiter *Benlen Pte v Authentic Builder Pte Ltd* [2018] SGHC 61.

82 *Ma Hong Jin, ibid* at para 40. I have truncated the quote for readability, but this does not change its meaning. The full quote reads: "In other words, it provides for a necessary, but not necessarily sufficient, condition for validity of a subsequent variation of the contract".

83 Leaving aside controversial cases where estoppel can somehow create new rights: *eg,* proprietary estoppel: *Crabb v Arun DC* [1979] Ch 179 (CA)*, Thorner v Major* [2009] UKHL 18; *Guest v Guest* [2020] EWCA Civ 387 (appeal to UKSC pending). Or promissory estoppel as a 'sword' in Australia: *Walton Stores v Maher Stores* [1988] HCA 7.

84 *MWB* (UKSC), *supra* note 1 at para 16.

85 *Ibid*.

86 *Globe Waters, supra* note 45 at 98 (Beatson LJ).

opposed thought that too wide a role would result in the 'exception' swallowing up the general rule's value, so that it needs to be confined within manageable, predictable bounds.[87] Thus "the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause".[88] Lord Sumption emphasised that:

> [A]t the very least, (i) there would have to be 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.[89]

Still, uncertainty prevails. The nature of the 'exception' may render it impossible to retain the chief practical advantage of a rule favouring NOM clauses—certainty about the existence of a variation and its terms. Estoppel "is notoriously fact-specific. It is anything but a certain doctrine".[90] Another aggravating problem is that it is not at all clear precisely what kind(s) of estoppel Lord Sumption had in mind. He deliberately left it open. A particularly difficult question today concerns the significance of the italicised words above: must the representor explicitly refer to the validity of their oral agreement, or the NOM clause? For example, 'I know we put in a NOM clause, but it's okay—I won't rely on it' or 'don't worry about the legal details of validity for now, let's just proceed first'. These could occur in an 'urgent' case calling for 'immediate' implementation.[91] If explicit reference is indeed necessary, then estoppel cannot apply in situations where parties are unaware of the NOM clause, as on the facts of *MWB,* or indeed *Charles Lim.*

It is important to stress here that worries about this kind of estoppel and its operation arise only if and only because the UKSC decided to give NOM clauses 'legal effect', invalidating oral variations as a starting point. One is then forced to consider as a second-order question the bounds of the 'exception': when, as a 'safety net' or 'safeguard' for the other party, one party can be estopped from asserting the NOM clause and its legal effect (invalidity of a later oral variation).

By contrast, the dynamic is really quite different on a 'wider' view, where as a starting point, NOM clauses are denied 'legal effect'. What is there to estop one from asserting then? [92] This point seems to have gone unnoticed in *Charles Lim.* Notably, the SGCA thought estoppel an 'exception'[93] even to their preferred 'wider' approach:

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87 See *eg,* Morgan, *supra* note 6 at 610: "…admitting exceptions complicates the legal position and may deprive NOM clauses of much of their value".

88 *MWB* (UKSC), *supra* note 1 at para 16. The same point has been made by Morgan, *ibid* and Burrows, *supra* note 6 at 43-45.

89 *MWB* (UKSC), *ibid* at 16.

90 Burrows, *supra* note 6 at 44, referring to promissory estoppel.

91 *MWB* (UKSC), *supra* note 1 at paras 30-31 (Lord Briggs). Compare *Charles Lim, supra* note 9 at para 54.

92 The only possibility left as I see it, though not mentioned or considered by the court in *Charles Lim*, is estoppel operating as a rule of evidence. On which see *eg* the well-known list in *Discount and Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598 at 602-3 (Jordan CJ): "There are various types of estoppel… In all these cases, estoppel is a rule of evidence which, in the given circumstances, prevents a person, as a matter of law, from denying or asserting, as the case may be, the existence of some fact, irrespectively of whether it really exists".

93 *Charles Lim, supra* note 9 at paras 39, 84.

> [T]he doctrine of equitable estoppel is recognised as an exception such that a party may be estopped *from enforcing a NOM clause* if the other party had acted in reliance on the oral modification to his detriment.[94]

Moreover, the SGCA in further *dicta* suggested a much laxer, generalised approach towards establishing estoppels in future:

> … estoppel may likely be established in most cases where the parties are able to prove such oral variation… It would typically be established by the parties' objective conduct in performing the contract as orally varied. For this reason, in most circumstances where an oral variation (which would in itself constitute a clear and unequivocal representation) is proved, the parties should be able to establish detrimental reliance on the variation (the act of performing the obligations of the oral variation), and thereby satisfy the doctrine of equitable estoppel.[95]

The fact that not all estoppels are equitable aside[96]—in fact Lord Sumption's citation of *Actionstrength* appears to concern a case involving estoppel by convention, a common law estoppel[97]—the different kinds of estoppel potentially at play in *Charles Lim*, and their different subject-matter, were inadequately distinguished. It might thus be helpful to clarify here: estopped from what, exactly?

As will be recalled, in *Charles Lim* the court held that the contract had been effectively orally rescinded by agreement two weeks after its formation. Hence all original contractual rights were extinguished retrospectively and there would be nothing left to enforce,[98] so nothing to be estopped or prevented from enforcing. It was strictly unnecessary to decide the estoppel issue.

However, in *Charles Lim* the buyer had pleaded alternatively that the seller was "estopped *from relying on [his] legal rights under the sale-and-purchase-agreement"*,[99] preventing him from enforcing any secondary rights to damages for an alleged breach of that contract. This, it should be observed, is really quite different from the estoppel envisaged by the SGCA when pronouncing estoppel an 'exception' to their wider approach—that "a party may be estopped *from enforcing a NOM clause*".[100] Respectfully, things seem to have blurred when the SGCA then proceeded to hold in *dicta* that "even if the oral rescission is deemed to be invalid by operation of the NOM clause, the [seller] would, in any event, have been estopped

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94 *Ibid* at para 39 [emphasis added].

95 *Ibid* at para 57.

96 More well-known common law estoppels include estoppel by representation: *eg Avon CC v Howlett* [1983] 1 WLR 605 (CA); and estoppel by convention *eg Amalgamated Investment and Property Co Ltd v Texas Commerce Int Bank Ltd* [1982] QB 84 (CA); *The Vistafjord* [1988] 2 Lloyd's Rep 343 (CA); *Actionstrength Ltd v International Glass Engineering SpA* [2003] UKHL 17 [*Actionstrength*]; *Prime Sight Ltd v Lavarello* [2013] UKPC 22.

97 *Actionstrength, ibid*.

98 The consideration on each side here being the mutual abandonment of each party's respective rights to performance or rights to damages, as the case may be: *Scarf v Jardine* (1882) 7 App Cas 345 at 351; *Raggow v Scougall & Co* (1915) 31 TLR 564.

99 *Charles Lim, supra* note 9 at para 15 [emphasis added].

100 *Ibid* at para 39.

from enforcing the sale-and-purchase-agreement".[101] Two different estoppels were potentially at play here. 'Deeming' hid this fact.

The court then reasoned that "the oral agreement to rescind the [contract] in itself constituted a clear and unequivocal representation by the [seller] that [he] would not enforce the [contract]",[102] which the buyer had relied upon in not completing the sale. As the share price had "substantially plummeted" since then, this "caused [the buyer] detriment… such that it would now be inequitable for the [sellers] to enforce the [contract]".[103]

Will an oral agreement to vary the contract, rather than rescind it, also *eo ipso* constitute a clear and unequivocal representation "not to enforce the original contract", thereby estopping either party from enforcing its terms?

There is almost a sense of overkill here. On the 'wider' approach a NOM clause has no 'legal effect'. There is one less obstacle to an informal variation of the contract, so one less potential 'trap' to 'safeguard' against. Once varied, new terms supersede and replace the old terms of the original contract. Must one really add that, on such facts, a loose brand of estoppel could apply? Simply to emphasise that the original contract—which no longer exists—can no longer be enforced?

It remains to be seen how far the courts will take this line of reasoning.

VIII. Conclusion

Charles Lim tackled fiendishly difficult questions head-on, answering some, but perhaps raising even more. It will certainly not be the last word on the matter. The SGCA's 'provisional'[104] views were seriously considered and will likely prompt further litigation.

A position similar to the 'wider' approach taken by the SGCA in *Charles Lim* has been defended most strongly by Professor Burrows, and it would be obviously inappropriate to rehash his arguments here.[105] Perhaps surprisingly this was not cited to, or by, the court. Should the SGCA decide to travel further down this path, it might wish to consider those arguments, alongside the cases following *MWB v Rock*.[106]

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[101] *Ibid* at para 85 [emphasis added].

[102] *Ibid*.

[103] *Ibid*.

[104] *Ibid* at para 61. Interested readers may wish to know that this case has now also been noted in: Sng, "No Oral Modification Clauses: the Story from Singapore" [2021] 137 LQR 568; Tan & Wong, "No Oral Modification Clauses in the Singapore Court of Appeal" [2021] LMCLQ 585; Lee, "Varying Contracts – Consideration, Form and Reality" [2021] MLR (Early View); Lau, "No Oral Modification Clauses: Autonomy, Certainty or Presumption?" [2021] 80 CLJ 443.

[105] Burrows, *supra* note 6. Now Lord Burrows. This article was written just prior to his becoming a justice of the Supreme Court of the UK.

[106] *Eg Mayer Cars and Trucks Ltd v Jaguar Land Rover Ltd* [2021] EWHC 2984 (Comm) at paras 39-42 (nothing to support plead of estoppel); *Kebab-JI SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 at paras 55-69 (NOM invalidated 'novation by addition', no estoppel as no qualifying representation found); *Gama Aviation (UK) Ltd v MWWMMWM Ltd* [2021] EWHC 2229 (Comm) at paras 16-19, 31 (reasoning could be extended to preclude informal novations).