# No oral modifications – worth the paper they're written on?

Commercial contracts will often contain provisions relating to variations and amendments. Typically such provisions require all variations to be in writing and signed by both parties to be effective. But are such clauses as watertight as they appear and are there circumstances in which variations which do not comply with these clauses bind the parties?

## What do these clauses look like?

These clauses will typically say something like "*No variation of this agreement shall be effective unless it is in writing and signed by the parties*".

## What is the point of them?

The purpose of these clauses is contractual certainty. By making amendments to a contract subject to such formality, the parties (and indeed any third party) should be in no doubt as to what, if any, changes to the contractual arrangements exist.

## So less formal changes are simply ineffective, right?

Sadly the law is not quite so straightforward. The Supreme Court had to consider this question last year in the case of *Rock Advertising Limited v MWB Business Exchange Centres Limited* (2018). In this case it was held that, as a general rule, the requirements of no oral modification clauses should be enforced. To decide otherwise

would make such clauses meaningless and it would run contrary to the obvious argument that parties, having agreed to the inclusion of such a clause, should not be allowed to circumvent it. However, the circumstances of a case may allow a workaround to the effect of such clauses. For example, it might be the case that, on the facts, the parties had agreed a separate agreement rather than a variation of an existing agreement. Alternatively, the parties may have conducted themselves in such a way that it would be unfair to treat the informal variation as unenforceable, such as informal arrangements as to payment.

## But does this mean that variation clauses are not worth the paper they're written on?

Not exactly. While the Supreme Court identified circumstances where the effect of such clauses could be circumvented, it should not be assumed that parties can easily argue a basis for getting around them. The ability to prove that an informal arrangement operates as a separate contract that is independent of the primary contract may not be possible on the facts. The ingredients required to create a contract (including consideration and the requisite intention) may not be there. Unconscionable conduct is similarly notoriously difficult to prove.

## Conclusions

While no oral variation clauses can be circumvented, they are certainly not meaningless. As said at the outset, they are a powerful tool in promoting certainty. Variations to a contract cannot be unilateral (unless there is a specific contractual clause allowing this). For less formal arrangements to bind the parties, there needs to be an acceptance to the change by all, whether that be by words, conduct or a combination of the two. Parties concerned to ensure that they do not inadvertently vary agreements by conduct should consider the following:

- If you have discussions regarding potential variations, record what was discussed (and agreed or not agreed as the case may be) in writing and send it to the other party.
- Ensure that meetings in which variations are discussed (or documents recording discussions) are marked 'subject to contract'.
- Make it clear that if a variation is to be made, it is to be recorded in writing.

Such clauses are very much worth the paper they're written on, provided that parties remember that they are not bulletproof.

## How we can help

From developers, investors and contractors to high net worth individuals, our construction lawyers provide a wealth of expertise and ensure construction contracts are well drafted and watertight. We can also assist with construction disputes. To find out more, please contact our construction team.

Nitej Davda

Partner