Charles Lim

1. The facts of the dispute in the recent Singapore Court of Appeal decision of *Charles Lim Teng Siang v Hong Choon Hau* [2021] SGCA 43 ("*Charles Lim*") are straightforward. The Appellants claimed that the Respondents had failed to complete under an agreement for the sale and purchase of the Appellants' shares (the "SPA"). The Respondents' primary defence was an alleged telephone call between the 1st Appellant and the 1st Respondent, where the Respondents claimed that the SPA had been rescinded by oral agreement. At first instance, the High Court accepted, amongst other things, the Respondents' evidence that the SPA had been rescinded with this telephone call.[1]

2. On appeal, the Appellants argued that the SPA could not be orally rescinded by virtue of a "no oral modification" ("NOM") clause in the SPA. Whilst the Court of Appeal found that the specific act of rescission had not been included within that clause (and so the point became moot), the Court of Appeal proceeded to provide its *obiter* observations of what it considered the legal effect of a NOM clause should be, by focusing on what it called the "three schools of thought" on this subject.[2]

3. A significant part of the Court of Appeal's analysis concerned the "Sumption approach" as set out in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 ("*Rock Advertising*"). The Court of Appeal criticised the Sumption approach as "*overly concerned*" with contractual certainty, and considered that the reasons favouring the Sumption approach were insufficient to displace principles of party autonomy.[3] The Court of

[1] *Charles Lim*, [18]
[2] *Ibid*, [35]
[3] *Ibid*, [50]

Appeal expressed its preference for the "Comfort Management" approach, which it thought preserved party autonomy in respect of parties' future conduct.

4. It is respectfully suggested that the Sumption approach is the preferred approach and that the issue of the Court of Appeal's perceived conflict between certainty and party autonomy in the Sumption approach to a NOM clause is overstated. This advice adopts a hybrid Singapore and English law approach in its analysis and aims to explain how the Sumption approach is conceptually and practically the sounder approach, compared against the other two approaches.

The push for certainty

5. The desire for certainty has driven the development of contract law which now overwhelmingly favours a textual analysis of contracts,[4] and certainty is said to be "*a traditional strength and major selling point of English commercial law*".[5]

6. However, despite all that is said about the advantages of a precedent-based legal system, any form of litigation introduces uncertainty. Businesses go to great lengths to avoid litigation risk, firstly by minimising the likelihood of disputes arising, and secondly by frequently utilising alternative dispute resolution mechanisms that yield the least amount of control to third party adjudicators.

7. The quest to avoid the unpredictable outcomes of litigation can be seen in the rise of substantial in-house legal teams in companies. As of 2019, there were an estimated 31,000 registered in-house solicitors – arguably the legal "risk spotters" of companies – in England

[4] See paragraphs 14 to 16 below.
[5] Lord Bingham in *The Golden Victory* [2007] UKHL 1 at [1].

and Wales. This figure has almost tripled over the last 20 years.[6] The global Legal Operations Unit of Shell, one of the largest companies in the world whose standard form contracts are routinely used in the oil and gas industry,[7] is experimenting with visual contracts which make "*for shorter, clearer agreements*", in hopes that that will help Shell "*get back to the original purpose of having a contract: a meeting of the minds*". [8]

8. When disputes inevitably occur, parties increasingly turn to alternative methods of dispute resolution. In England and Wales, close to 1.3 million cases were commenced in the civil courts in 2020, with only 45,200 cases which were not settled or withdrawn ultimately going to trial.[9] Demand for mediation is rising year on year in Singapore.[10] According to the American Judges Association, as many as 97 percent of civil cases that are filed are resolved other than by a trial.[11] While some of these cases are dismissed or are resolved through other means, the vast majority of cases settle.

"the Parties"

9. A further reality is that commercial contracts are not merely entered into by the parties found in the preamble of a contract. A contract may be negotiated and then performed by any number of employees within a company, each applying their specialist knowledge to issues within a contract.

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[6] The rise and rise of the in-house lawyer, June 2021, The Law Society UK: https://www.lawsociety.org.uk/en/topics/in-house/the-rise-and-rise-of-the-in-house-lawyer/

[7] For example, the SHELLTIME charterparty forms.

[8] In Practice: How Shell maximizes the value of its legal operations function, August 2021, Reuters: https://www.reuters.com/legal/legalindustry/practice-how-shell-maximizes-value-its-legal-operations-function-2021-08-10/

[9] Civil courts - Courts data: https://data.justice.gov.uk/courts/civil-courts/

[10] Singapore Mediation Centre saw record number of cases and disputed sums in 2017, January 2018, Straits Times: https://www.straitstimes.com/singapore/singapore-mediation-centre-saw-record-number-of-cases-and-disputed-sums-in-2017/

[11] Court Review: The Journal of the American Judges Association, 42:3-4 (2006), pp. 34-39: https://amjudges.org/courtrv/cr42-3and4/CR42-3BarkaiKentMartin.pdf

10. This reality is rightly recognised by the Supreme Court in *Rock Advertising.*[12] The employees performing the contract may change during the term of the contract, but what remains is the legal fiction of separate legal personalities, where the corporations remain the only parties bound by the contract.[13] These "parties" would, in the most ideal situation, have expected its employees to subsequently follow the terms of the contract to the letter.

Principles of contract interpretation

11. It is in the above practical context that a bright line provided by the Sumption approach would be likely to have an immediate and clarifying effect on commercial practice, which, it is argued, justifies "*a pressing need to modernise the common law*" (contrary to the opinion of Lord Briggs in *Rock Advertising*[14]).

12. Conversely, this author does not favour the Briggs approach on the basis that such an approach introduces unnecessary uncertainty, or the "Comfort Management" approach, which appears as an attempt to circumvent the clear intent of the parties to the contract.[15] These approaches, while intended to respect party autonomy, in fact restrict the parties' freedom to contract and leave parties with little capacity to protect their contractual fates.

13. Importantly, these commercial realities have also guided the modern development of principles of contract interpretation, fundamentally based upon the principle of freedom of contract and consequently, of minimal judicial interference.

[12] *Rock Advertising*, [12]
[13] The difficulties with individuals purporting to orally amend contracts entered into by multiple individuals can also be seen in the facts of *Charles Lim*.
[14] *Rock Advertising*, [32]
[15] Putting aside for a moment the debates around agency and authority.

14. In England and Wales, the overarching principle of contract interpretation requires a court to give effect to the natural and ordinary meaning of the words in a contract, considered in its documentary, factual and commercial context.[16] The "reasonable person" is to read a contract with the background information reasonably available to the parties when the contract was formed.[17]

15. Similarly, under Singapore law, the court is required first to look at the text of the contract and the relevant context in which the contract was entered into (*CIFG Special Assets Capital I Ltd v Ong Puay Koon* [2017] SGCA 70 ("*CIFG*") at [19]). As to what constitutes "relevant context", the court in *CIFG* provided that this would include the contract and the commercial documents entered into as part of the transaction forming the subject matter of the contract.

16. The emphasis in the English and Singapore law context is therefore on a textual interpretation of contracts, dependent on the circumstances at the time at which the contract was entered.[18]

17. The Sumption approach applies these rules of contract interpretation by confirming that a NOM clause plainly provides that the parties had intended that their contract could not be validly amended before express formalities are complied with.

[16] *Arnold v Britton* [2015] UKSC 36 at [17].

[17] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.

[18] Whilst there is some debate in the Singapore law context on the admissibility of extrinsic evidence on subsequent conduct, the general rule remains that where there is a written contract no other evidence should be admitted to vary its terms (Section 94 of the Evidence Act 1997).

18. The Briggs approach similarly adheres to these basic principles, but is effectively made redundant for the reasons explained by the Court of Appeal in *Charles Lim*;[19] if the NOM clause could be modified only where there is clear evidence that the parties had put their mind to the existence and intention of the NOM clause, it would be highly unusual for the parties to have ignored the formality requirements in the NOM clause by then proceeding to enter into an oral agreement. In other words, this approach is commercially unrealistic.

19. Conceptually, the "Comfort Management" approach is the most problematic. Having overlooked the basic principles of contract construction by focusing squarely on an examination of the principle of party autonomy,[20] such an approach would have to be justified by reference to the law on implied terms.

20. Both the Singapore and English courts endorse a highly restrictive approach to the implication of terms. Considering the Singapore Court of Appeal's judgment in *Sembcorp Marine Ltd v PPL Holdings* [2013] SGCA 43 ("*Sembcorp*") at [101] and the UK Supreme Court's judgement in *Marks and Spencer v BNP Paribas* [2015] UKSC 72 ("*Marks and Spencer*") at [18] together, a term should be implied only if (amongst other things) it would be necessary to give business efficacy to the contract, be so obvious that the parties would have responded "Oh, of course!" had the proposed term been put to them at time of the contract and finally, not contradict any express term of the contract.

21. The very existence of a NOM clause rebuts these three conditions. The contract would not suffer from a "*lack of commercial or practical coherence*" without the implication of the

[19] *Charles Lim*, [52]
[20] *Ibid,* [2]

"Contract Management" approach into the contract;[21] parties need only comply with the formalities required under the NOM clause to unbind themselves from earlier terms of the contract.[22]

22. Further, the author postulates that if the parties had been asked at the time of contracting if the NOM clause should apply only insofar as the parties had not subsequently orally amended the terms of the contract, the parties' likely reaction would have been "Oh, of course *not*!". Whether or not the "Comfort Management" approach would at least assist to increase the evidential burden of a party claiming that the contract had been orally amended is therefore irrelevant.

23. There is unfortunately little indication of what the Court of Appeal in *Charles Lim* thought of the "Comfort Management" approach in the context of these well-established rules of contract interpretation.[23]

24. It is presumed that the counterargument would be that the interpretation of a NOM clause that is allegedly amended orally would have to be interpreted together with that oral amendment, which returns the debate to the futility of the Briggs approach. In the case where the purported oral amendment does not amend the NOM clause directly, this author argues that the principles of contract interpretation are authoritative and require the clear words of the NOM clause to be interpreted "as is", which would logically override the attempt to vary other terms of the contract orally.

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[21] *Marks and Spencer*, [21]

[22] See also *Rock Advertising* at [25].

[23] Even though two of the five judges in *Charles Lim* sat on the three-judge panel in *Sembcorp*, and all three judges in *CIFG* presided over the *Charles Lim* appeal.

25. For the reasons explained above, it is difficult to identify a compelling basis on which a NOM clause should only give rise to a "*rebuttable presumption*" of law that in the absence of an agreement in writing, there would be no variation.[24]

An alternative interpretation – the condition precedent

26. Given the above, the author believes that the Sumption approach not only aligns most closely with the commercial reality of contractual relationships, but that it can be interpreted coherently with the current body of case law, namely that the Sumption approach is analogous to the approach consistently taken by the courts in interpreting condition precedents, where performance of all or part of a contract only becomes necessary when the condition precedent is satisfied.[25]

27. This can be demonstrated by the courts' application of variation clauses commonly found in construction contracts. Construction contracts frequently provide that work that is not specifically defined but contemplated in a contract (the "Variations") must first be approved by the employer in writing. The purpose of these provisions is generally to control costs in a construction project.

28. In such contracts, the courts have little difficulty in finding that a requirement for a written Variations order can constitute a condition precedent to payment for extra work, even if the employer had in fact orally ordered the work to be done.

[24] *Charles Lim*, [38]
[25] *Total Gas Marketing Ltd v Arco British Ltd* [1998] UKHL 22

29. For example, in *Hersent Offshore S.A. v Burmah Oil Tankers Ltd* [1978] 2 Lloyd's Rep. 565, the employer was found not liable to pay for extra work orally instructed on the basis that notice of intention to claim the extra payment in accordance with the agreed procedure had not been given by the contractor to the employer for over a year.

30. Whilst it is noted that the Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] SGCA 19 ("*Comfort Management*") had opined that the absence of formal compliance with the contractual Variations procedure is "*not necessarily fatal to a claim for variation works*", the court primarily relied on a passage in the *Law and Practice of Construction Contracts* (4th ed.) in making this observation, which in fact concluded that a written Variations order was a condition precedent to payment for extra work, but that the employer could be estopped by his conduct from denying liability to pay notwithstanding the non-compliance.[26]

31. Despite the judgment in *Comfort Management*, later in the year the High Court held in *Wei Siang Design Construction v Euro Assets Holding* [2018] SGHC 182 that although the relevant Variations procedure did not require instructions to be given in writing, the wording of the clause meant that the contractor was prevented from pursuing a claim on it in failing to obtain written instructions from the employer thereafter. In this case, the court had also gone further to find that the contractor was in breach of contract by having carried out the procedurally non-compliant Variations.[27]

[26] *Comfort Management*, [89] – [90]
[27] At [297]. The strict approach to the interpretation of Variations clauses is also adopted in Malaysia without great judicial or academic concern (*Construction Law in Malaysia,* 2012, page 306).

32. The distinction here is therefore that, when the court determines that a Variations clause is in effect a condition precedent-type clause, there can be no rebuttable presumption that arises at law to facilitate a different interpretation of the Variations clause. The only other recourse would be in equity (which the author suggests is the correct approach in the next section).

33. By extension, there is no conceptual difference between Variations made following an agreed procedure and variations of a contract required to be made in compliance with a NOM clause. Without such formalities, the foregoing would simply be attempts to amend the contract. As such, there is no compelling reason why Variations clauses should be afforded greater clarity at law than a NOM clause, and it is hoped that the condition precedent approach may also put to rest the courts' struggle with the theoretic difficulties[28] in giving literal effect to a NOM clause.

Equity as a safety net

34. Whilst the Sumption approach may appear unduly harsh, it is proposed that equity remains ready to offer protection against unconscionability and to mitigate "*the rigours of strict law*".[29] Indeed, one would be hard-pressed to find a case where an oral variation argument is made without an accompanying argument of estoppel.[30]

35. In the cases on Variations, where the courts have found that the justice of a dispute so requires, they have readily considered whether a contractor should be compensated for work

[28] Or as described in *Rock Advertising* at [13], "*The reasons advanced in the case law for disregarding them* [NOM clauses] *are entirely conceptual.*".

[29] Lord Denning in *Crabb v Arun District Council* [1976] Ch 179, 187.

[30] In addition to *Charles Lim* and *Rock Advertising*, Staughton J had earlier on in *The Cape Hatteras* [1982] 1 Lloyd's Rep. 518 (a case on Variation clauses) that "*each side has an argument as to estoppel, as it not uncommon in these days*" (page 524).

done on the application of concepts of *quantum meruit*,[31] or have decided that it would be a fraud on the part of the employer to refuse to pay.[32] Equitable remedies are flexible, and it is argued, therefore best placed to undergo any expansion to meet the needs of justice.

36. Whilst equitable doctrines fall outside the ambit of this advice, if a pleading in equity fails, that is indication that no prejudice has been caused to the complainant, and that there are perhaps few compelling reasons for the parties to be held to anything else but the bargain that they have agreed to. It is, after all, "*not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice*."[33]

On a "no modifications whatsoever" ("NMW") clause

37. For completeness, the criticism of the Singapore Court of Appeal that the Sumption approach may be extended such that the courts would be forced to enforce a clause which prohibits any amendment to a contract is, respectfully, overstated.[34]

38. In the author's view, there is no necessary expansion of the recognition of a NOM clause into a broader, irrevocable waiver of the parties' right to contract. It remains open to the courts to interpret a NMW clause as ineffective in limiting the parties' right to enter into fresh agreements on the same subject matter, on the principle that clear words are necessary

[31] *Gilbert & Partners v Knight* [1968] 2 All E.R. 248, where it is suggested by this author that Harman LJ's decision *not* to find that there had been a new contract for works to entitle the contractor to their quantum meruit was very much guided by his views on the fairness of the matter: "*It is perhaps rather a hard case on the plaintiffs, but if it is a case of hardship to them or hardship to her, it is they who should suffer because it is they after all who are professionals and she is not.*" (page 251)

[32] *Hill v South Staffs Railway* (1874) L.R. 18 Eq. 154. *Keating on Construction Contracts*, 11th ed. at [4-079] also suggests that this result could also be achieved with principles of unjust enrichment.

[33] *Arnold v Britton*, [20]

[34] *Charles Lim*, [47]

before a court will hold that a contract has taken away rights and remedies which a party would otherwise have had at general law,[35] or to rely on the "*unruly horse*" of public policy to prevent a NMW clause from taking effect.[36]

Conclusion

What is the purpose of the law?

39. The author's support for the Sumption approach is ultimately rooted in the view that, fundamentally, the law should reflect the values of a society.[37] In this case, there is no better evidence of the value placed on society's desire to uphold its freedom to pursue contractual certainty, where NOM clauses are practically as a matter of course incorporated by parties to a written contract.[38]

40. Thus far, industries have been able to react quickly if they disagree with a court's interpretation of certain contract clauses; see for example the BIMCO BARECON 2017, where the insurance provisions were specifically amended to clarify that a shipowner's insurer was entitled to pursue claims against the charterers or other third parties, in response to the judgment in the *Ocean Victory* in the same year.[39]

41. If the "Comfort Management" approach becomes binding under Singapore law, there would be little that could be done by individuals or corporations to override the effects of this

[35] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689
[36] Taming the unruly horse: The treatment of public policy in the courts, 2019: www.supremecourt.gov.sg/Data/Editor/Documents/Public%20Policy%20Lecture%20-%2019Feb2019.pdf
[37] Law as a system of values, October 2013, Sir Rabinder Singh: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/singh-law-as-system-of-values20131031.pdf/
[38] See also *Rock Advertising*, [12].
[39] [2017] UKSC 35. See also a reaction to this judgment at Co-insurance clauses as complete codes - the surprising effects of the UK Supreme Court decision in The Ocean Victory, October 2017, Ince: https://www.incegd.com/en/news-insights/co-insurance-clauses-complete-codes-surprising-effects-uk-supreme-court-decision/.

approach. Any attempts to incorporate the NOM clause in Singapore law contracts would be rendered effectively redundant, and any attempt to rebut the presumption by drafting words to that effect would lead to a vicious cycle promoting uncertainty in contract interpretation. This would be the frustrating result of the judiciary's circumvention of the clearly intended effect of NOM clauses without any suggestion from the legislature – the very concern raised by the Court of Appeal in *Charles Lim* on the perceived threat of the Sumption approach.[40]

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[40] *Charles Lim*, [49]