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No Variation Clauses: Worth the Paper They're Written On?

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In *Globe Motors v TRW Lucas Varity Electric Steering*,[1] the English Court of Appeal has considered the effect of 'no variation' clauses that stipulate the formalities required for any subsequent amendment to the parties' contract. The court concluded that such clauses cannot have their stated effect of restraining parties' freedom to agree an amendment otherwise, for example by conduct or oral agreement. Instead, the existence of a 'no variation' clause will be a factor the court takes into account when assessing whether the parties intended to vary their contract. Following *Globe Motors*, parties will need to continue to take care to avoid unintentionally agreeing an amendment to their contract and should not assume that a 'no variation' clause will protect them.

Standard clauses – no variation except in writing

Strictly speaking, the Court of Appeal did not need to decide the 'no variation' clause arguments in *Globe Motors*: the Court decided the appeal on a prior issue of contractual interpretation. Nevertheless, the Court acknowledged that the effect of 'no variation' clauses was a "*question of general importance*" and all three judges specifically addressed the issue.

The contract in dispute included a typical example of such a clause, stating that the agreement:

> *"…can only be amended by a written document which (i) specifically refers to the provision of this Agreement to be amended and (ii) is signed by both Parties."*

The Appellant argued that this clause should be given effect, and that it prevented the parties from having amending the contract in any other way, in this case by conduct. It was submitted that this approach would promote certainty and avoid false or frivolous claims of an oral variation.

Such 'no variation' or 'anti-oral variation' clauses are standard boilerplate provisions in many English law contracts. The 2002 ISDA Master Agreement, to take just one example, states that any amendment "*will only be effective if in writing… and executed by each of the parties or confirmed by an exchange of telexes*".

The historical position – inconsistent authorities

Do these clauses work? Given their pervasiveness in practice, it may be surprising that English law did not previously have a clear answer. Scant authority existed, and the existing authority was inconsistent. On the one hand, the Court of Appeal had determined that it was "*incontestably right*" that a clause requiring all variations to be in signed writing meant "*that no oral variation of the written terms could have any legal*

[1] *Globe Motors, Inc & Ors v TRW Lucas Varity Electric Steering Ltd & Anor* [2016] EWCA Civ 396 ("*Globe Motors*").

effect'.[2] On the other hand – conflictingly – the Court of Appeal had held in a separate case that a similar clause might not preclude a variation because "*the parties have made their own law by contracting, and can in principle unmake or remake it*."[3]

The position in other jurisdictions also varies. For example, under the United States Uniform Commercial Code, a clause which excludes modification except by signed writing is effective to prevent an amendment of the contractual terms by other means. However, an "*attempted*" oral modification can still operate as a "*waiver*" that prevents a party from relying on the strict terms of the written contract where to do so "*would be unjust in view of a material change of position*".[4]

The decision – freedom to vary

In resolving these conflicting authorities, there is a tension between the terms of the contract the parties have executed and the freedom of those same parties to contract thereafter. On the one hand, the law will look to give effect to parties' agreements and promote certainty in their dealings. But, on the other, parties should be free to reach agreements in any way that the law permits – and if they are free to amend any other term by oral agreement, why not one which says that oral agreements are not valid?

Ultimately, the Court resolved this tension in favour of freedom of contract:

> *"The general principle of the English law of contract is that… the parties have freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.*
>
> *The consequence in this context is that in principle the fact that the parties' contract contains a clause [requiring variations to be in writing] does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct."*

The Court expressed some hesitation. Lord Justice Underhill, in particular, acknowledged that it seemed "*entirely legitimate*" for parties to insist that subsequent variations should be agreed in writing as "*a protection against the raising of subsequent ill-founded allegations that its terms have been varied by oral agreement or by conduct*". But, as a matter of principle, parties' freedom to contract cannot be extinguished by an earlier contract. They cannot tie their hands by removing their freedom to vary the contract informally, if only because they can agree to dispense with the contractual restriction itself.

The Court thus refused to enforce a contractual term that all variations must be in signed writing. But the presence of a 'no variation' clause will remain relevant to the question of whether a contract has been validly amended. A party wishing to argue that a variation has been agreed will still need to prove that both parties intended to alter their legal relations. As noted by Lord Justice Underhill, the difficulties of proving this "*may be significantly greater if they have agreed to a provision requiring formal variation*". In the face of a 'no variation' clause, the court is likely to require "*strong evidence*" that the parties in fact intended what was subsequently said or done to amend their contract.

A more certain future?

In the strict sense, English law still lacks a binding authority on this issue. As already noted, the Court of Appeal did not need to decide this question in order to resolve the appeal. As such, the Court's observations on this issue were '*obiter'* and so are not binding precedent. Nevertheless, the three distinguished judges heard full argument, gave considered opinions and reached consensus. Hence, *Globe Motors* is likely to be followed by courts and arbitral tribunals applying English law in the future.

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2 *United Bank Ltd v Asif & Ors* (unreported, 11 February 2000).

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

4 UCC § 2-209.

A commercial approach?

This decision places the commercial reality of the parties' conduct over legal formality. In one sense, this comes at a cost of legal certainty: the parties cannot merely look to their written contract. In another sense, though, the parties have the certainty that any variations to their contract will be respected, whatever the contract itself says.

If parties do not wish to vary their contract, they should continue to exercise caution regardless of any 'no waiver' clause. In particular, in the context of any discussions around, or conduct that may be construed as, amending an existing contract, the parties should: (i) expressly reserve their rights; (ii) make clear that any conduct inconsistent with the written contract is not intended to waive or amend the parties' contractual rights and obligations; and (iii) make any amendment discussions expressly "subject to contract" until final agreement is reached. Equally, if parties do wish to agree a variation, they would be wise to check any contractual formalities and to leave no room for argument as to whether a legally binding agreement was in fact reached.

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