Thompson & Knight Impact
ATTORNEYS AND COUNSELORS

Client Alert *June 14, 2018*

ENGLISH CONTRACT LAW UPDATE: ORAL CONTRACTS UNDER ENGLISH LAW – NOT WORTH THE PAPER THEY'RE WRITTEN ON?

The recent UK Supreme Court decision in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 addresses the question of whether an oral agreement can amend an existing written contract containing a provision that any amendments should be in writing. In this Client Alert, we examine this case in detail and review the English common law rules on enforceability of oral contracts more generally.

Oral Contracts Under English Law

The English common law does not stipulate documentary formalities for the validity of a contract. There are some statutory exceptions to this, most notably contracts for the transfer of interests in land or real property. But in general, an oral agreement can and will be enforced if it can satisfy the core principles applicable to any contract, namely, that:

- there must have been an offer of terms by one party and an acceptance by the other;
- there must be "consideration" flowing between the parties (*i.e.*, a benefit to the party providing the promise and a burden on the party in receipt);
- there must be an intention to create legal relations; and
- the contract terms must be sufficiently certain.

It is probably the final two requirements that pose the most significant hurdle to a party arguing for the existence of an oral contract. In situations other than simple trades, the lack of any written document may militate against the notion that the parties intended to create a legal relationship. Also, ascertaining the detailed terms of that agreement may present a material evidential burden.

Case Law on Oral Contracts

The courts have frequently enforced oral contracts where these requirements are met, however. The creation of the UK's National Lottery resulted in a spate of contractual actions (which went both ways depending on the facts) to determine whether unwritten ticket purchasing syndicates between friends or colleagues constituted enforceable contracts. Indeed, such was the flow of litigation that the UK Lottery organizer now provides a written model template for use by syndicates in an attempt to limit the number of these disputes.

Another recent High Court case was *Blue v Ashley* [2017] EWHC 1298, which involved Mike Ashley, the high profile boss of UK retailer Sports Direct. Not averse to undertaking alcohol-fueled "negotiations" in his local bar, Ashley allegedly promised a finance advisor during one such session that he would pay him £15 million if Sports Direct's share price rose to £8. It duly did after a year, and Blue sued for payment. Judge Leggatt in the High Court came to the view that, even if Ashley had uttered the

words, there was no enforceable contract – drunken statements made in a bar did not reach the hurdle required to establish an intention to create legal relations under English law.

No Oral Modification Clauses – *Rock Advertising v MWB*

Commercial contracts very commonly include a provision whereby no amendment may be made to the contract's terms other than in writing. These are frequently referred to as No Oral Modification or "NOM" clauses. In the oil and gas sector, the Association of Petroleum Negotiators ("AIPN") produces a large number of model forms, including joint venture, asset transfer, and commodity sale agreements. All of these fully termed models include an NOM clause, either as a self-standing term or as part of the entire agreement provision.

Whilst the potential validity of a contract created orally under English law is clear, an intriguing question arises as to whether a written contract can be amended orally, particularly when it contains an NOM clause. In *Rock Advertising v MWB*, the UK courts recently had to tackle this very question.

Rock Advertising occupied office space under a license agreement with MWB and fell behind with its monthly rental payments. Rock Advertising's managing director telephoned one of MWB's credit controllers and allegedly reached an oral agreement that the annual rental payment profile be deferred to make it easier for Rock Advertising to handle the arrears and keep up with future payments. MWB subsequently did not accept that a formal agreement had been reached in that telephone conversation and terminated the license. It excluded Rock Advertising from the premises and sued for the arrears. Rock Advertising counterclaimed for damages caused by the wrongful termination and exclusion.

The case reached the Supreme Court following decisions at first instance and the Court of Appeal. All courts accepted that MWB's credit controller did have ostensible authority to bind MWB contractually. The key point in the case turned on whether the purported oral amendment agreement was effective, given that Clause 7.6 of the license agreement required all variations to be in writing and executed by both parties.

The first instance High Court Judge upheld the effectiveness of the NOM clause. This decision was overturned by the Court of Appeal, however, on the conceptual basis that if a contract can be created orally under English common law, then so can a contract be amended orally. This applied equally to a contract that on its express terms required written amendment. Such was the significance of the legal question at stake, and the divergent views in prior case law, that leave was granted to appeal to the UK's final court of adjudication.

The Supreme Court overturned the Court of Appeal's decision. In his judgment, Lord Sumption made clear that the proper English common law rule should be that once an NOM provision is agreed upon in writing, it subsequently must be complied with to effect a contract variation. Whilst acknowledging that English common law allows parties significant autonomy in how a contract is formed, "*Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows.*" Lord Briggs agreed with this decision but took a different slant on the

conceptual issue. In his view, there were two questions: (i) in principle, could English law allow an oral agreement to expressly amend a written NOM clause?; and (ii) where there is a purported oral variation of terms that makes no reference to an existing NOM clause, is there also an implied amendment of the NOM clause? In the opinion of Lord Briggs, the conceptual possibility of amending an NOM clause orally could remain intact, though he conceded that the factual likelihood of this situation occurring was slim (perhaps in emergency circumstances). In this case (as in many prior actions), the oral variation that was sought to be enforced had said nothing about the NOM clause, and the courts should not take it that the NOM clause was therefore amended by implication. Accordingly, the purported oral variation failed. Lord Briggs analogized this to a completed contract negotiation expressly made subject to contract – no terms could be enforced prior to the execution of the final written agreement.

Conclusion – Learnings for Oil and Gas Companies

The Supreme Court's decision in *Rock Advertising v MWB* follows a line of other English law cases in recent years in steadfastly enforcing the terms of a written agreement between commercial parties. If your agreement contains an NOM clause (which is likely if it is based on an AIPN model form), it will be enforced, and a purported oral amendment will, in most conceivable circumstances, be invalid. In any event, using NOM clauses in contracts provides a significant safeguard in preventing disputes over whether unintended contract amendments have inadvertently come into effect following informal communications. Commercial parties should nonetheless take steps to ensure their commercial staff are aware of the requirement for a final written document when discussing any contract changes with a counterparty.

If you have additional questions, please do not hesitate to contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

CONTACTS:

Andrew B. Derman
+1.214.969.1307
Andrew.Derman@tklaw.com

Peter Sloan
+44.20.7952.1733
Peter.Sloan@tklaw.com

Anthony Golding
+44.20.7952.1732
Anthony.Golding@tklaw.com