KIRKLAND & ELLIS

Kirkland Alert

Does a Variation Clause Amount to a "No Oral Modification" Clause?

11 April 2022

In an application for summary judgment by a bank on its counterclaim under a facility agreement, the High Court considered whether a variation clause precluded oral modifications to a facility agreement.

Various arguments were put forward by both sides to support their respective positions as to why the terms of the Facility Agreement had or had not been amended. This *Alert* considers the argument relating to whether the variations clause permitted oral modifications.

Clause 20.1 of the Facility Agreement provided:

> *"any term of the Finance Documents may be amended or waived with the agreement of the Borrower and Lender in writing."*

The bank submitted the alleged variations were not legally binding. Specifically, in relation to clause 20.1 of the Facility Agreement, the bank argued that the clause meant that amendments to the Facility Agreement must be in writing, otherwise the words *"in writing"* have no meaning. The borrower submitted that an equally plausible construction of clause 20.1 of the Facility Agreement was that amendments or waivers are permitted with agreement.

The court found that this matter was not one suitable for summary judgment on the basis that the language in clause 20.1 is ambiguous. The judge found it was unclear as to: (i) whether the words *"in writing"* required the amendment to be effected in a written document; or (ii) whether it was sufficient for it to be evidenced in writing, i.e., whether it was sufficient for an oral modification to be evidenced in writing.

As this was a summary judgment application, the court did not reach a conclusion on which construction was to be preferred. The court noted that, in accordance with the principles of construction, it would need to weigh the natural meaning of the relevant language against the factual context and commercial common sense. These were matters that the court could not resolve on a summary judgment application.

While the court reached no conclusion on whether oral modifications, evidenced in writing, would be permitted under clause 20.1 of the Facility Agreement, it is noteworthy that the court did not find the language clear enough to have expressly excluded such modifications such that the matter could be dealt with at summary judgment stage.

If parties wish to exclude the possibility of oral modifications (even if evidenced in writing), this case highlights the importance of making that expressly clear in the relevant clause.

Case: *Integral Petroleum SA v Bank GPB International SA* [2022] EWHC 659 (Comm)

Authors

Richard Boynton

Partner / London

Stuart Doxford

Partner / London

Harkiran Hothi

Partner / London

Related Services

Practices

- Litigation
- International Arbitration