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Rock Solid?
The Legal Effect of No Oral Modification Clauses in New Zealand in light of *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*

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Abstract

No oral modification (NOM) clauses are a "near ubiquitous" part of many commercial contracts. These clauses purportedly prevent the parties from varying their contract unless they comply with self-imposed formality requirements – usually that any variation must be in writing and signed. This paper analyses the legal effect of NOM clauses, in light of the United Kingdom Supreme Court's decision in Rock Advertising Ltd v MWB Business Centres Exchange Ltd*. It argues that New Zealand should not follow the decision, primarily in order to uphold contract law's central consideration of party autonomy. While parties may enter agreements that temporarily restrict the freedoms that they respectively have, their shared contractual freedom to alter those agreements using a method recognised by the general law is inalienable. The NOM clause cannot override the later contractual bargain. Subsidiary issues related to the practical consequences of the different views are also analysed.*

Keywords

No-oral variation clause—oral variation—No-oral modification clause—form requirements— Rock Advertising Ltd v MWB Business Centres Exchange Ltd*—contractual freedom—party autonomy—New Zealand*

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I Introduction

Two parties enter a rental contract. MWB agrees to provide Rock with office space in central London at a rate of £4,000 per month.[1] Rock's business encounters difficulties. It falls behind in payments to MWB. Consequently, a representative of Rock phones a representative of MWB. The two agree to a variation of the contract, whereby Rock may continue to occupy the premises provided it meets a revised payment schedule. Consideration aside,[2] it is clear that this variation is enforceable. The parties have expressed a clear intention to alter the terms of the contract. There is no general rule of common law requiring variations to take a particular form.[3] Even if the contract was originally entirely expressed in writing, it may be varied orally.[4] Writing provides *evidence* as to the intentions of the parties, but it is ultimately the expressed intentions themselves, however expressed, that matter. Therefore, MWB can no longer demand the original rental amount.

Take the same facts with one amendment. The original agreement includes a clause stating: "All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect".[5] Notwithstanding this clause, the parties agree to vary the contract in a phone call between them. They express a clear intention to alter their bargain. Shortly afterwards, MWB reneges on the arrangement and demands the original sum. Does the additional clause change the outcome?

This was the question before the United Kingdom Supreme Court in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, handed down in May this year.[6] The issue was described as "truly fundamental" in the law of contract.[7] In a significant decision reversing a unanimous Court of Appeal,[8] and the weight of previous common law

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1 The payment schedule was marginally more complex than this – as were the facts of the case – but all material features of the scenario here are taken from *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2018] 2 WLR 1603.

2 There *was* a consideration issue as regards the practical benefit consideration doctrine, but it was ultimately left unaddressed by the United Kingdom Supreme Court because it was obiter.

3 Jeremy Finn, Stephen Todd and Matthew Barber *Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2017) at 773.

4 *Williams v Moss' Empire Ltd* [1915] 3 KB 242 approved by *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38 (CA).

5 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [2].

6 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1.

7 At [1].

8 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] QB 604.

authority,[9] the Court held that, if such a clause was included in the original agreement between the parties, any attempted oral variation would be ineffective. In other words, an otherwise contractually binding variation, like the one in the previous paragraph, is overridden because it does not comply with the party-imposed formality. These clauses are known as No Oral Modification (NOM) clauses. Technically they are "variation only in writing" clauses, as, in their customary form, variation both orally and by conduct is purportedly rendered ineffective. As is outlined in greater detail later, though, the Court was willing to recognise an exception if the party arguing for variation had acted in reliance on the agreement.[10]

It has been said that the judgment in *Rock Advertising* "casts a long shadow over the dialogue" on NOM clauses in New Zealand, where this is not yet clear appellate court authority on the issue.[11] In *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd*, a 2014 New Zealand Supreme Court decision, both the majority and minority expressed the view that NOM clauses do not have legal effect.[12] However, the view was limited to one sentence in each judgment, with no explanation provided nor authority cited. *Savvy Vineyards* has not been referred to in subsequent High Court judgments concerning NOM clauses.[13] Instead, while reaching the same legal conclusion, the High Court has utilised English authority.[14] For example, Associate Judge Osborne cited five English cases in reaching his decision in *Beneficial Finance Ltd v Brown*,[15] but made no reference to *Savvy*

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9 As noted by Lord Briggs in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [25]. This is discussed extensively later in the paper.

10 At [16].

11 Will Shaw and Simon Connell "*Rock Advertising v MWB* in the UK Supreme Court: 'no oral variation' clauses can be enforceable" [2018] NZLJ 198 at 200. There are two New Zealand Court of Appeal cases concerning NOM clauses which are not mentioned in the text. Both of these cases are difficult to take law from, as while it was found that oral variation had not occurred, the reasons do not clearly show whether this was because it was considered that the NOM clause was operative or because it was extremely evidentially persuasive. See *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218 (CA); and *Stevens v ASB Bank* [2012] NZCA 611. These cases have also not been followed by recent High Court decisions.

12 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 at [62] per McGrath J and at [112] per William Young J.

13 See *Air New Zealand Ltd v Newfoundland Site 2 (Hotel) Ltd* [2017] NZHC 1131; *Beneficial Finance Ltd v Brown* [2017] NZHC 964; and *Conqueror International Ltd v Mach's Gladiator Ltd* [2018] NZHC 265.

14 *Air New Zealand Ltd v Newfoundland Site 2 (Hotel) Ltd*, above n 13, at [33]; *Beneficial Finance Ltd v Brown*, above n 13, at [69]–[77]; and *Conqueror International Ltd v Mach's Gladiator Ltd*, above n 13, at [43].

15 *Beneficial Finance Ltd v Brown*, above n 13, at [69]–[77].

Vineyards. Given the lack of a reasoned higher court judgment and a proven reliance upon now-overruled English authority, it is unclear which approach to NOM clauses the High Court will now take. The decision in *Rock Advertising* is likely to be, at the very least, influential.[16]

This paper therefore addresses how the New Zealand courts *should* deal with NOM clauses when the issue next arises. Much of the analysis is also transferrable to other jurisdictions should the issue arise again. The position stated by the New Zealand Supreme Court in *Savvy Vineyards* is correct, but requires further explanation, particularly in light of the judgment in *Rock Advertising*. The first part of the paper deals with the conceptual questions related to NOM clauses. It is argued that it is conceptually impossible to give legal effect to NOM clauses as a matter of the common law: The United Kingdom Supreme Court was wrong. Secondly, the paper turns to an assessment of the practical benefits advanced by NOM clause proponents. It is explained that these advantages are largely overstated, particularly when the estoppel exception is examined. The New Zealand courts should also therefore not feel pressured to give legal effect to NOM clauses as to do so may even increase uncertainty.

II Conceptual Coherence and the Common Law

Lord Sumption in *Rock Advertising* dismissively stated that "the reasons advanced in the case law for disregarding [NOM clauses] are entirely conceptual".[17] While it is not quite true that such opponents focus "entirely" on conceptual issues,[18] there *are* highly persuasive arguments advanced by opponents that fall within this category of objections. Moreover, his Lordship evidently attempted to resolve these conceptual issues, implicitly accepting that some degree of conceptual coherence is important within the common law.

This section explains why the arguments advanced by proponents of the common law recognising the operative nature of NOM clauses are insufficient to surmount significant conceptual barriers. There are, in reality, two distinct conceptual issues regarding NOM

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16 Bell Gully suggests it will be "of at least persuasive authority in future New Zealand cases": see Bell Gully "A win for contractual certainty – UK Supreme Court finds 'no oral variation' clauses enforceable" (21 May 2018) <www.bellgully.com>. Fortune Manning suggests that "the courts in New Zealand [will] now be less likely to find a lawful variation" as a result: Fortune Manning "Certainty on Non Oral Modification Clauses" (31 May 2018) <www.fortunemanning.co.nz>. Chapman Tripp goes so far as to state that it is likely to be adopted: see Chapman Tripp "Some clarity on 'no oral modification' clauses" (29 May 2018) <www.chapmantripp.com>.

17 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [13].

18 As section III of this paper explains.

clauses that require resolution. Both will be considered below. First – is it *possible* for parties to orally contract to modify a NOM clause? If this is answered affirmatively, the second question arises – what is the nature of the behaviour required before the court should hold that parties have expressed the requisite intention?

A Is Oral Variation Ever *Permitted?*

1 Background

The preliminary question is whether there are *any* circumstances in which the parties can orally remove or modify a NOM clause. This was the genesis of the disagreement between the majority and separate view in *Rock Advertising*: Both held that there was no effective oral variation in the case at hand but differed as to the generality of their statements. The difference in view can be analysed through the extreme scenario where there is a manifest mutual intention to vary. That is, imagine that the parties to a contract containing a NOM clause expressly agree – orally – that they should repeal the clause itself. But, by some misfortune, they do not have any instrument with which to record their agreement in writing, and therefore fail to satisfy the self-imposed formality requirement. Perhaps, in order to ensure there is clear evidence of their agreement, they improvise with a video recording.

The majority judgment was delivered by Lord Sumption, with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed. They held that where a NOM clause is included in the contract, *any* purported variation that fails to satisfy its requirements is rendered ineffective.[19] If the parties decide they now wish to be able to informally vary the contract, they must first remove the NOM clause whilst following the prescribed formalities. Lord Briggs wrote separately to convey his belief that it was "conceptually impossible" to hold that the parties could wholly prevent themselves from orally varying their contract at any point.[20] His Lordship considered that an intention to modify the NOM clause orally would rarely be found, but that the possibility of such an intention prevented the imposition of a black-and-white rule as to legal effect.[21] The following explains why Lord Briggs was correct to hold that there must be some circumstances in which parties can orally modify the contract despite the NOM clause. The limits that his Lordship places upon these circumstances are critiqued in part B.

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19 That is, the parties may still raise an argument for enforcement based upon estoppel.

20 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [26].

21 At [24].

2 Parties' Intentions

The fundamental aim of contract law is to give effect to the objective mutual intention of the parties.[22] This is not disputed by either side of the NOM clause debate. Nevertheless, the judges assess the intention of the parties at two different times – T1 and T2. At T1, when the original contract is formed, the parties agree that they shall not vary their contract except in writing. At T2 the parties agree to vary the contract, such that it would ordinarily be legally enforceable. But it is not in writing. Refusing to enforce the variation seemingly satisfies the mutual intention of the parties at T1, when they agreed that variations must be in writing. On the other hand, enforcing the variation satisfies the mutual intention of the parties at T2, when they entered into what would otherwise be a legally binding contractual variation. To which mutual intention should the law of contract give effect?

(a) The case *for* variation

The case for giving effect to the subsequent variation despite the NOM clause is rather straightforward. Variation of a contract may be considered a contract itself.[23] There are no formal requirements for simple contracts. So, while the original contract might note that all variations should be in writing, the parties may then vary that clause informally. Provided the variation satisfies the usual four elements – "agreement, certainty, consideration and intention to create legal relations"[24] – it ought to be contractually binding. Of course, the channel through which an alleged variation was made may make it more or less difficult to prove a legally binding variation. But if from all the evidence the court considers that the parties have entered a binding variation, it should give effect to it. A sovereign legislature may impose formal requirements but the parties themselves cannot. They cannot restrict the continuing, inalienable autonomy they share to contract and to vary that contract. As Corbin's fundamental principles of contract state:[25]

> Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties. No contract, whether oral or written can be varied, contradicted or discharged by an antecedent agreement. Today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today.

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22 HG Beale (ed) *Chitty on Contracts* (32nd ed, Sweet & Maxwell, London, 2015) at [1–025].

23 This is not the only way to think about a variation, but it is how it was analysed in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [7].

24 Stephen A Smith *Aityah's Introduction to the Law of Contract* (6th ed, Clarendon Press, Oxford, 2005) at 93.

25 Arthur Corbin "The Parol Evidence Rule" (1944) 53 Yale LJ 603 at 607.

Simply put, doctrinally, it is not possible for earlier intentions to prevail. Parties possess, and never cease to possess, freedom of contract, which means they always have the ability to mutually restructure their affairs.

There is also a further intuitive reason as to why this later set of intentions should be prioritised: Today is more important than yesterday. Parties who agree to vary their contract today express their present intention. While for some reason they have failed to record it in writing, the courts have, through their ordinary evidentiary processes, found that this intention exists. Parties expressing this view today are better informed than they were yesterday. They may have discovered in the intervening period that the clause is inconvenient (recall that this is an express variation of the clause). Perhaps it did not reflect the fluidity of their commercial relationship. The outcome affects them today, rather than yesterday. Within a system that generally accepts promises are of equal effect regardless of the channel through which they are made, the more recent choice should be upheld.

(b) The case *against* variation

Those arguing that NOM clauses should remain operative in spite of an oral agreement to vary the contract also summon arguments of party autonomy. By including a NOM clause, the parties expressed their desire for a more formalistic arrangement than the default regime. This, from their perspective, better suited their needs. Freedom to contract should be upheld unless there is a public policy reason against it. None here exists. Because of this earlier freedom to contract, the parties do not have the capacity to enter into a contract at T2 other than in accordance with the self-imposed form requirements of T1. Party autonomy is important, but it only "operates up to the point where the contract is made … thereafter only to the extent that the contract allows".[26] That is to say that, when parties contract, they surrender a component of their freedom. For instance, by entering a trade-tie with another business, a party forgoes their opportunity to enter other supply arrangements. The other business agrees to supply their products at a given price. As Morgan has argued, "the law of contract is about permitting parties to bind themselves as to future conduct: that is, the law enlarges contractual autonomy precisely by limiting freedom later on".[27]

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26 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [11].

27 Jonathan Morgan "Contracting for self-denial: On enforcing 'no oral modification' clauses" (2017) 76 CLJ 589 at 607.

But this argument fails to grapple with the fact that, by the ordinary rules of contract, an effective variation only requires agreement between all contracting parties. While Lord Sumption was correct to state that party autonomy is inherently restricted when a contract is entered at T1, the restriction is only upon the autonomy of each party to act *unilaterally*. The trade-tie restricts one party's capacity to unilaterally enter other business relationships. Rather than disappearing, this autonomy is handed across to the other party, who may choose to release them from their obligations. However, the shared party autonomy to mutually vary or discharge the contract at T2 is always preserved. There is nowhere else for it to go. The parties are simply free to alter what it is that the contract allows. It is this shared party autonomy which is restricted by the courts when NOM clauses are given legal effect. This is entirely unprecedented. Yet proponents do not outline any limits upon the parties' ability to restrict their future actions that they think ought to be imposed. For example, if autonomy at T1 is absolute, as they argue, then the courts ought to give legal effect to a contract between parties that said variation is never permitted. There is no middle ground, for the parties can either place shared restrictions upon themselves or they cannot. The better view is that they cannot place shared restrictions, as shared autonomy is inalienable. On this basis already, a NOM clause should not be legally effective in the face of a later agreement to informally vary it.

It is also worth briefly rejecting the other autonomy arguments made by NOM clause proponents. First, it is incorrect to state that refusing to give legal effect to a NOM clause requires wholly "violat[ing] [the parties'] autonomy to include a NOM clause at the outset".[28] The clause is there until it is varied. Admittedly it is at the point where the clause would be a "useful" term of the contract that variation occurs, so in practical terms it might seem that it never existed – but it did. This is analogous to a situation where the price of goods is included in a written contract, but before any orders are made the parties begin orally renegotiating the price. If variation is found to have occurred, it does not follow that the original price was never part of the contract. This freedom of contract argument is expressed more eloquently by Underhill LJ:[29]

> The principle of freedom of contract entitles parties to agree whatever terms they choose, subject to certain limits imposed by public policy … The parties are therefore free to include terms regulating the manner in which the contract can be

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28 At 607.

29 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2017] 1 All ER (Comm) 601 at [119].

> varied, but just as they can create obligations at will, so also can they discharge or vary them, at any rate where to do so would not affect the rights of third parties.

And perhaps more satisfyingly, even if the NOM clause can be orally altered, its inclusion in the original contract is evidence that at some point in their relationship the parties wished to self-impose form requirements. As is explained in greater detail further on in this paper, a party arguing that a later agreement was not intended to be legally binding can use this aspect of the original bargain as evidence. A party arguing that the price of goods is still what was expressed in the original written contract can persuasively argue that agreement has not been reached or was not intended to be legally binding by noting that the parties have previously formalised contractual relations. This will likely succeed unless there is other clear evidence favouring variation. It would be even more likely to succeed where that clause also barred oral variation.

The courts are not, therefore, prohibiting parties from including NOM clauses, nor depriving such clauses of all effect. A degree of party autonomy to colour the contractual relationship by utilising a NOM clause in T1 is upheld even when NOM clauses are not given legal effect, but only to the extent that it is consistent with upholding inalienable shared party autonomy. By contrast, otherwise legitimate expressions of party autonomy at T2 – and further along the plane of time, as many variations may be agreed – may be entirely overridden by a legally effective NOM clause. On this basis alone, the conceptual argument defending NOM clauses fails. Nonetheless, there are a number of other lines of argument pursued in relation to this discussion that are examined below.

3 Analogy to statutory form requirements

Legislatures have superimposed a plethora of statutory form requirements upon the common law, which apply to both the formation and variation of contracts. The most infamous of these is the Statute of Frauds 1677 – eponymously aimed at protecting against fraud – which subsists in reduced form in the United Kingdom today.[30] New Zealand follows a categorical approach, where certain classes of contracts (usually involving high value assets or people in vulnerable situations) must be evidenced in writing.

Counsel in an earlier decision of the Court of Appeal of England and Wales made an analogical argument to the ability of Parliament to "stipulate for formality despite the

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30 Statute of Frauds 1677 (GB) 29 Cha II c 3, s 4.

potential injustices and hard cases that can result".[31] They argued that, as "contract is based on consent", "how much more should the parties themselves, by consent, be able to adopt such a regime".[32] Morgan considered this argument "both cogent and compelling" as "there should be *greater* confidence in the appropriateness of a party-chosen NOM clause than of a statutory formality rule".[33] The majority in *Rock Advertising* then adopted the analogy, holding that:[34]

> There are many cases in which a particular form of agreement is prescribed by statute: contracts for the sale of land, certain regulated consumer contracts, and so on. There is no principled reason why the parties should not adopt the same principle by agreement.

However, it is contended that this analogy is "misconceived"[35] or even "spurious".[36] The voluminous case law related to the consequences of non-compliance with formal requirements imposed by statute has no bearing on "legal effect to be given to self-imposed, not externally imposed, formal requirements".[37] In cases related to statutorily imposed form restrictions, "the court will be concerned with the law which Parliament has made for everyone".[38] However, in cases involving NOM clauses, "the parties have made their own law by contracting and can in principle unmake or remake it".[39] Externally imposed law could be either by statute or by doctrines of the common law, such as consideration or the rule prohibiting penalties. These restrictions are unlike obligations undertaken by the parties, because such obligations are effective only by force of logically prior rules of general law. There is a clear hierarchy.

The analogy weakens further when it is considered that "the consequences of non-compliance with statutory requirements fall to be determined under the shadow of the legislative purpose of the particular statutes in which they may be found".[40] Non-

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31 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*, above n 29, at [97].

32 At [97].

33 Morgan, above n 27, at 606.

34 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [11].

35 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*, above n 29, at [99].

36 James Fisher "Contract variation in the common law: A critical response to *Rock Advertising v MWB Business Exchange*" (2018) 47 Common Law World Review 196 at 200.

37 *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50, (2003) 128 FCR 1 at [216].

38 *World Online Telecom Ltd v I-Way Ltd* [2002] EWCA Civ 413 at [10] per Sedley LJ.

39 At [10].

40 Fisher, above n 36, at 200.

compliance may produce various effects.[41] In the New Zealand context, contracts which do not meet a writing requirement may be deemed void,[42] invalid[43] or unenforceable.[44] Therefore, in addition to doctrinal opposition, statutorily imposed form requirements fail as a meaningful analogy as the practical consequences of inconsistency vary significantly. Accepting the premise does not lead naturally to the conclusion.

When this analogy was raised in the Court of Appeal, Underhill LJ suggested that, "if there is an analogy with the position of Parliament, it is in the principle that Parliament cannot bind its successors".[45]

4 Authority

In *Rock Advertising* Lord Sumption asserted that if it is indeed "conceptually impossible for the parties to agree not to vary their contract by word of mouth", other jurisdictions must have only given effect to NOM clauses through "an overriding rule of law (presumably statutory) requiring writing as a condition of formal validity".[46] But, his Lordship continued, "other legal systems have squared this particular circle".[47] Now to say that some legal systems have managed to overcome this conceptual difficulty does not mean it is based on sound principle: pragmatism may have won the day. But, perhaps even more significantly, it does not appear that analogous legal systems have found it possible to give effect to NOM clauses without a statutory rule. In the words of Lord Briggs' judgment, giving effect to NOM clauses "involve[s] a clean break with

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41 See in the United Kingdom context Beale, above n 22, at [5–004].

42 These include some contracts of employment and collective agreements, assignments of copyright, residential building contracts worth over a prescribed amount, certain types of insurance contracts, and bills of exchange: Employment Relations Act 2000, s 65 and 54; Copyright Act 1994, s 114; Building Act 2004, s 362F; Life Insurance Act 1908, ss 43 and 44; Marine Insurance Act 1908, ss 23–26; and Bills of Exchange Act 1908, ss 3 and 84.

43 Agreements for the compromise or settlement of claims by minors and contracts to contract out of the default liability regime for the carriage of goods must be writing in order to be valid: Contract and Commercial Law Act 2017, ss 104 and 250–252.

44 See for example ss 24–27 of the Property Law Act 2007 which requires a contract for the disposition of land to be in writing, or for its terms to be evidenced in writing, before it can be enforced. Other contracts that are unenforceable unless writing requirements are met include real estate commission agreements, certain contracts arising from unsolicited approaches, and consumer credit contracts. See respectively Real Estate Agents Act 2008, s 128; Fair Trading Act 1986, ss 36K, 36L and 36N; and Credit Contracts and Consumer Finance Act 2003, s 32.

45 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*, above n 29, at [119].

46 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [14].

47 At [14].

something approaching an international law consensus, unsupported by any societal or other considerations peculiar to England and Wales".[48]

The doctrine against enforcing NOM clauses has been referred to as "American" in origin,[49] so it is best to start there. Perhaps the preeminent enunciation of the principle is from *Beatty v Guggenheim Exploration Co*, a case featuring oral changes to an employment agreement containing a NOM clause. Cardozo J wrote:[50]

> Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived … What is excluded by one act, is restored by another. You may put it out by the door, it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again.

Despite this being a 1919 judgment that is only binding in the State of New York, the common law rule expressed therein persists across the United States unless a statute has overridden it.[51] Wagner-von Papp identifies Alabama, Indiana, Iowa, Kansas, Massachusetts, Michigan, Mississippi, Rhode Island, Texas, and Wisconsin as retaining the rule.[52] Another vivid statement came from the 1957 Pennsylvania Supreme Court decision in *Wagner v Graziano Construction Co*,[53] which is still law in Pennsylvania today, too.[54] There, Musmanno J stated:[55]

> The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof … The hand that pens a writing may not gag the mouth of the assenting parties.

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48 At [32].

49 *World Online Telecom Ltd v I-Way Ltd*, above n 38, at [11].

50 *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 at 387–388.

51 As *Beatty v Guggenheim Exploration Co*, above n 50, was. Today § 15–301 (1) of the New York General Obligations Law states "A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent."

52 See further discussion on United States law in Florian Wagner-von Papp "European Contract Law: Are No Oral Modification Clauses Not Worth the Paper They Are Written On?" (2010) 63 Current Legal Problems 511.

53 *Wagner v Graziano Construction Co* 136 A 2d 82 (Pa 1957).

54 See *United Environmental Group Inc v GKK McKnight LP* 176 A 3d 946 (Pa 2017).

55 *Wagner v Graziano Construction Co*, above n 53, at 83–84.

Additionally, despite self-described "aversion to [*any*] oral modifications of written agreements", even the Delaware courts have continued to hold against the enforceability of NOM clauses.[56] Their method of dealing with the "cognitive dissonance" that the potential oral variation of NOM clauses create is through "upping that level of proof [required for variation] from a mere preponderance to clear and convincing evidence".[57] It is clear, therefore, that across the United States the courts have accepted that, as a matter of the common law, there are at least some situations where a NOM clause can be overridden informally.

Of course much of the United States common law on this issue has stopped evolving, as statutory provisions such as the New York General Obligations Law or Californian Civil Code now govern the situation.[58] The most significant legislative amendment is contained in § 2-209(2) of the Uniform Commercial Code, which permits parties to exclude oral modifications in sales of goods contracts.[59] The relevant section has been adopted in all States.[60] However, while these legislative developments demonstrate that NOM clauses are viewed in the United States as positive tools that can "uphold commercial certainty", the fact that such changes have occurred through the legislature shows that country has not "squared that particular circle".

The issue has not been directly considered by the Supreme Court of Canada. However, the Nova Scotia Court of Appeal recently recognised that the "leading case in Canada on 'no oral amendment clauses'… is *Shelanu Inc v Print Three Franchising Corp*",[61] a judgment from the Ontario Court of Appeal.[62] *Shelanu* concerned an alleged oral amendment to a franchise agreement despite an exclusion clause in the written contract which provided that there could be no waiver or amendment unless it was signed by all

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56 *Continental Ins Co v Rutledge & Co* 750 A 2d 1219 (Del Ch 2000) at 1230.

57 *Eureka VIII LLC v Niagara Falls Holdings LLC* 889 A 2d 95 (Del Ch 2006) at 109.

58 Californian Civil Code, § 1698(c) states: "Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration".

59 Uniform Commercial Code, § 2–209(2) states: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party."

60 See RK Rasmussen "The Uneasy Case Against the Uniform Commercial Code" (2002) 64 Louisiana Law Review 1097. Louisiana has "adopted" art 2 of the Universal Commercial Code by revising the Louisiana Civil Code of sales to parallel it, whilst the other States have adopted it in full.

61 *Archibald v Action Management Services Inc* 2015 NSCA 103, [2015] NSJ No 485 at [23].

62 *Shelanu Inc v Print Three Franchising Corp* [2003] OJ No 1919 (Ont CA).

the parties.[63] Comments with respect to NOM clauses were obiter as the Court had found the clause did not apply to the specific method of variation utilised. Nonetheless, the Court firstly affirmed the view expressed by Perillo in *Corbin on Contracts* that "[t]wo contractors cannot by mutual agreement limit their power to control their legal relations by future mutual agreement".[64] Furthermore, they explained why this is correct as a matter of principle. The parties have amended the written agreement "by their subsequent course of conduct" such that the written agreement "no longer represents the intentions of the parties".[65] To enforce the NOM clause would be "contrary to the classical theory of contract interpretation which emphasises that courts should ascertain and give effect to the intention of the parties".[66] *Shelanu* has been followed twice in the British Columbia Supreme Court on this point,[67] and has not received any negative treatment.[68]

The position is well-settled in Australia and Singapore, too. The Singapore Court of Appeal has observed that the effect of a NOM clause is "at best to raise a rebuttable presumption that, in the absence of writing, there has been no variation".[69] Similarly, the Federal Court of Australia, while denying the effect of NOM clauses, stated that they may still have "significant evidentiary effect".[70] The 2017 Australian edition of Cheshire and Fifoot confirms NOM clauses do not have legal effect, stating that "a term can never be drafted in such a way as to prevent informal contract variation".[71]

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63 At [42].

64 At [50] citing JM Perillo (ed) *Corbin on Contracts* (Western Publishing, St Paul Manitoba, 1993) at [1295].

65 At [54].

66 At [55] citing R Sullivan "Contract Interpretation in Practice and Theory" (2000) 13 SCLR (2d) 369.

67 See *Craigdarloch Holdings Ltd v Syscon Justice Systems Canada Ltd* 2010 BCSC 1186, [2010] BCJ No 1651 at [131]; and *Premier Marketing Solutions Inc v NII Northern International Inc* 2012 BCSC 1478, [2012] BCJ No 2060 at [9]–[12].

68 Or at least, none was encountered within cases available on Westlaw and Lexis databases.

69 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] SGCA 19, [2018] 1 SLR 979 at [90].

70 *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*, above n 37, at [221]. See also *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* [2009] FCA 1220, (2009) 261 ALR 501; and *Liebe v Molloy* (1906) 4 CLR 347 at 353–355 (note that this is the highest authority in Australia showing that NOM clauses do not have legal effect, but the Court analysed the issue differently to more recent judgments); and RD Turnbull "MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2018] UKSC 24; [2018] 2 WLR 1603" (2018) 92 ALJ 434 at 434.

71 NC Seddon and RA Bigwood (eds) *Cheshire & Fifoot Law of Contract 11th Australian Edition* (LexisNexis, Chatswood, 2017) at 213.

Instead of drawing upon this wide body of common law, Lord Sumption's two touchstones were international regimes: the UNIDROIT Principles of International Commercial Contracts and the Vienna Convention on Contracts for the International Sale of Goods (CISG).[72] His Lordship reasoned that, "these widely used codes suggest there is no conceptual inconsistency".[73] But, as Turnbull has noted, the adoption of these principles is statutory.[74] If Lord Sumption had wanted, Wagner-von Papp has previously outlined the various European jurisdictions that give effect to NOM clauses through their respective Civil Codes.[75] But these, likewise, would only demonstrate that it is possible to achieve this change through statutory reform: a proposition no one denies. It is put most straightforwardly by Fisher:[76]

> Critics do not claim that NOM clauses *cannot* be made impervious to subsequent informal variation as a matter of positive law, only that such a rule is unsupported by doctrine—the law's underlying and organising logic that 'furnishes a standard for that law' from a position 'outside of and above the law as it exists at any given time' and makes the law more than an arbitrary aggregate of discrete posited rules.

This is the view that was also reflected strongly in English authority prior to *Rock Advertising*. Lord Sumption justified the choice to depart from other common law jurisdictions as "[t]he English cases are more recent, and more equivocal".[77] Additionally, there was "a substantial body of recent academic writing in support of a rule which would give effect to NOM clauses according to their terms".[78] Again, neither of these claims are correct.

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72 International Institute for the Unification of Private Law (UNIDROIT) *Principles of International Commercial Contracts* (4th ed, 2016); and United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 3 (opened for signature 11 April 1980, entered into force 1 January 1988).

73 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [13].

74 Turnbull, above n 70, at 435.

75 See Wagner-von Papp, above n 52. See also Ole Lando and Hugh Beale (eds) *Principles of European Contract Law* (Kluwer Law International, The Hague, 2000) at 154–157.

76 Fisher, above n 36, at 198–199.

77 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [9].

78 At [9].

We can deal first with the academic writing. Lord Sumption cited three articles.[79] Yet, of the three scholars cited, only one – Morgan – explicitly agrees with the majority that NOM clauses ought to be given absolute effect.[80] Meanwhile, McKendrick accepted that when the "contracting parties have expressly addressed their minds to the anti-oral variation clause and have agreed to delete it", albeit orally, "it can nevertheless be argued that effect should nonetheless be given to any subsequently agreed oral variation".[81] He did not address which conclusion should be preferred: He was rather more concerned with the (distinctly more likely) situation where the parties have not turned their minds to the anti-oral variation clause – which was also the focus of Lord Briggs' separate view. Similarly, O'Sullivan outlined some "strong commercial arguments" and some "strong counter-arguments of principle" regarding giving legal effect to NOM clauses.[82] She suggested that it "might" be preferable to treat them as valid as a matter of common law, subject to various statutory regimes to protect the unwitting.[83] However, she later stated that, "[a]t the very least, the presence of such a clause means that particularly strong evidence should be required to give effect to a non-compliant variation".[84] This is hardly compelling evidence of a substantial body of academic writing in favour of the changes that Lord Sumption delivered.

And what of the "more recent, and more equivocal" English cases? It appears that the more recent the English case, the less equivocal.[85] Admittedly, the Court of Appeal, in a judgment written by Sedley LJ, favoured giving legal effect to NOM clauses in a 2000 case, *United Bank Ltd v Asif*.[86] But just two years later, Sedley LJ had changed his mind. He was part of a unanimous Court of Appeal in *World Online Telecom Ltd v I-Way Ltd* that held that such a clause was not enforceable.[87] Unfortunately, the Court of Appeal in *World Online Telecom* did not recognise that there was earlier Court of Appeal authority on the matter, so did not deal with the inconsistency between this finding and their earlier

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79 At [9]. The articles cited are Morgan, above n 27; Ewen McKendrick "The legal effect of an Anti-oral Variation Clause" (2017) 32 JIBLR 439; and Janet O'Sullivan "Unconsidered Modifications" (2017) 133 LQR 191.

80 Morgan, above n 27.

81 McKendrick, above n 79, at 445.

82 O'Sullivan, above n 79, at 196.

83 At 196.

84 At 197.

85 See also Liron Shmilovits "Amending a contract contrary to its own provisions" [2016] LMCLQ 363. Shmilovits writes strongly in favour of giving legal effect to NOM clauses but accepts at 364 that "there appears to be unanimity: restrictions on variation are ineffective".

86 *United Bank Ltd v Asif* (11 February 2000) Unreported (CA) at [17]–[18].

87 *World Online Telecom Ltd v I-Way Ltd*, above n 38, at [6]–[12].

judgment in *Asif*. Later courts were left to decide which to follow. Nonetheless, the courts were unanimous in holding NOM clauses were not legally effective: English authority has (until the Supreme Court decision in *Rock Advertising*) since been *un*equivocal. Cases from the High Court such as *Spring Finance Ltd v HS Real Company LLC*,[88] *McKay v Centurion Credit Resources LLC*,[89] *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd*[90] and *Virulite LLC v Virulite Distribution Ltd*[91] followed or expressed a preference for *World Online Telecom*.[92] The Court of Appeal reiterated its *World Online Telecom* view in *Westbrook Resources Ltd v Globe Metallurgical Inc*,[93] albeit without referencing either previous Court of Appeal case. Therefore, while differing views were expressed across these cases as to the potential evidentiary value of NOM clauses, all Judges conveyed the view that the clause could not be wholly determinative of the outcome. None supported the view expressed in *Asif*.

In 2016 the issue again reached the Court of Appeal in *Globe Motors Inc v TRW Lucas Variety Electric Steer*.[94] This time, the Court recognised that it had provided inconsistent authority between *Asif* and *World Online*.[95] After examining the principles, policy, authority and precedent, the Court unanimously held that NOM clauses should not be given effect. Underhill LJ did acknowledge that he felt "some hesitation" in reaching the decision, but this was based only on how he viewed the practical outcome.[96] His firm view was there was no "doctrinally satisfactory way" of giving legal effect to NOM clauses.[97] Likewise, Moore-Bick LJ recognised the "force of the suggestion that there might well be practical benefits" from giving legal effect to NOM clauses, but "[did] not think that there [was] a principled basis on which that [could] be achieved".[98] And of course, the Court of Appeal in *Rock Advertising* then expressed the same view.[99]

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88 *Spring Finance Ltd v HS Real Company LLC* [2011] EWHC 57 (Comm) at [53].

89 *McKay v Centurion Credit Resources LLC* [2011] EWHC 3198 (QB) at [56].

90 *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm) at [273].

91 *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB), [2015] 1 All ER (Comm) 204 at [55].

92 *World Online Telecom Ltd v I-Way Ltd*, above n 38.

93 *Westbrook Resources Ltd v Globe Metallurgical Inc* [2009] EWCA Civ 310, [2009] 2 All ER (Comm) 1060 at [13].

94 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*, above n 29.

95 At [96].

96 At [116].

97 At [116].

98 At [120].

99 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*, above n 8.

Within the wide body of case law outlined above, most of the cases heard oral argument from both sides. Often such argument was before judges who expressed a view that they would give legal effect to NOM clauses if they were able to. It is not that they did not look for a conceptually sound way of giving legal effect to NOM clauses, but simply that they found that there was no such method available. This adds weight to the conclusion that the conceptual justification provided by Lord Sumption is not sound.

5 Analogy to entire agreement clauses

Immediately after having asserted that the experience of other jurisdictions shows that there is no conceptual inconsistency in enforcing NOM clauses (an assertion shown to be false), Lord Sumption stated that the "same point may be made in a purely English context by reference to the treatment of entire agreement clauses, which give rise to very similar issues".[100] Entire agreement clauses (EACs) are perhaps the most regularly used "boilerplate" provisions.[101] Generally, such clauses provide that the written contract "set[s] out the entire agreement between the parties and supersede[s] all proposals and prior agreements, arrangements and understandings between the parties".[102] It may state that the written document "contains all the terms of the contract and that no warranties or promises are given other than those expressed therein".[103] If effective, the parties are prevented from raising anything "outside the four corners" of the document as forming part of the contract between them.[104] This section explains why the analogy between EACs and NOM clauses is misguided.

Lord Sumption's starting point was that EACs are "routinely applied" by the English courts,[105] a starting point which of itself is arguably incorrect,[106] and which even if correct perhaps should be regretted as a position at law.[107] More important than litigating EACs, however, is to recognise that they fail to provide a compelling analogy to NOM clauses. Lord Sumption reasoned that NOM clauses must be conceptually consistent like

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100 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [14].

101 Robert Edel "Boilerplate Clauses: Waiver, Variation and Entire Agreement" (presented to AMPLA Conference, 2007) at 197.

102 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [14].

103 See David McLauchlan "The Entire Agreement: Conclusive or a Question of Weight?" (2012) 128 LQR 521 at 521.

104 *Dubai Islamic Bank v PSI Energy Holding Co* [2013] EWHC 3781 (Comm) at [31].

105 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [14].

106 See McLauchlan, above n 103. The courts may still find the existence of a collateral contract (at 521–526) or may use contractual estoppel (at 536–539). And, less controversially, rectification is available to enforce a term not contained in the writing (at 533–536).

107 See McLauchlan, above n 103.

EACs, because "[b]oth are intended to achieve contractual certainty about the terms agreed".[108] No reasoning beyond this was provided. His Lordship is correct when he states that they pursue the same purpose – but it is never explained how a shared purpose means they are both conceptually consistent. The courts could create a new doctrine that holds that it is always impossible to vary a contract. This would help to achieve "contractual certainty", as parties would know they are bound in eternity by any contract they enter. However, we could all agree that this new doctrine would not be part of a conceptually coherent common law.

To recall, the analogy to EACs is directed against the argument that the common law ought to give effect to the parties' presently expressed mutual intention, over their original intention. What is somehow completely overlooked, then, is that EACs and NOM clauses affect the agreement at different times. EACs can be thought of as existing at T1 and thus overriding any prior intentions – those from T0 – or perhaps concurrent intentions at T1. But this does not explain why T1 should also override T2. EACs "do not purport to bind the parties as to their future conduct. They leave the scope and the procedure for subsequent variation entirely unaffected".[109] The idea that EACs should be binding over earlier expressed intentions may even strengthen the argument that later intentions are paramount.

New Zealand has also pursued a different approach from this English common law position through legislative intervention. Through what was then s 4 of the Contractual Remedies Act 1979,[110] the New Zealand Parliament legislated to preclude EACs from having conclusive effect. This legislation was viewed as necessary to ensure that the promisor would "not be able to shelter behind a lie",[111] by stating all the terms of the contract are in the written document when, in reality, the parties have made other promises that are not expressed in writing. The New Zealand courts have therefore been expressly empowered by Parliament to establish whether an EAC represents the true position between the parties. By contrast, concerns have been raised about the propensity of the English courts to give legal effect to EACs, therefore "abdicat[ing] responsibility for determining whether or not the contract before them was procured by false statements

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108 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [14].

109 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [28] per Lord Briggs.

110 Now Contract and Commercial Law Act 2017, s 50.

111 (23 May 1979) 422 NZPD 76.

during the negotiation process".[112] This has been described as "documentary fundamentalism".[113] While conceptual coherence within this framework of "documentary fundamentalism" might even call for legally effective NOM clauses, there is no such argument in New Zealand due to the aforementioned legislative intervention.

B What Behaviour Should be Required?

It is clear from the above discussion that the reasons to regard NOM clauses as conclusive in *Rock Advertising* are not sufficiently compelling. However, at this point it has only been established that it should be possible as a matter of New Zealand law to give effect to an oral variation despite the existence of a NOM clause – in some circumstances. We now turn to considering the nature of the behaviour that the common law should require of parties before variation is effective. In practical terms, the matter of implied oral variation is substantially more important than that of express oral variation. It would be highly unusual for the parties to expressly agree to vary the NOM clause and not immediately, in the interests of certainty, reduce this agreement to writing. Or, as Lord Briggs explained in *Rock Advertising*, "leaving aside emergencies", once the parties remember the NOM clause, "they would almost certainly remove it by a simple written variation, or indeed make the whole of the substantive variation itself in writing".[114]

1 How to override a NOM clause

In his separate opinion, Lord Briggs took a restrictive approach to the non-compliant expressions of intention that could override a NOM clause. In his Lordship's view, the clause should be binding until the parties have "expressly (or by strictly necessary implication) agreed to do away with it".[115] An intention to orally modify a NOM clause should not "lightly be inferred".[116] For example, the parties "discussing and even reaching a consensus about a variation of the substance of their obligations purely orally, without express reference to the NOM clause", would not be sufficient.[117] This view had not before been taken in the case law. It is, however, similar to the view expressed by McKendrick in his article on the Court of Appeal's *Rock Advertising* judgment.[118] McKendrick contended that if the parties have not addressed their minds to the NOM

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112 Gerard McMeel "Documentary fundamentalism in the Senior Courts: the myth of contractual estoppel" [2011] LMCLQ 185 at 186.

113 At 186.

114 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [24].

115 At [31].

116 At [27].

117 At [27].

118 McKendrick, above n 79.

clause, but have entered an oral agreement that would otherwise be a substantive variation to the contract, "they have not exercised their contractual freedom … They have simply acted inconsistently with their own agreement".[119] Therefore, the NOM clause should remain operative.

With respect to McKendrick, it is unclear how varying a substantive term of a contract amounts to anything other than an exercise of contractual freedom. Rather, it seems contractual freedom is considerably undermined if the present intention of parties to vary a substantive term of their contract is overridden by earlier action that they do not recall – which is the likely scenario if they have not addressed their minds to the NOM clause. If the parties genuinely do not remember the clause, it should be accorded less, rather than more, weight. As noted earlier, the NOM clause is likely to have been a part of the "boilerplate" of the contract.[120] By contrast, the putative oral variation is likely (particularly when litigated) to be an important term of the contract, such as the fee to be paid for certain services,[121] the rental price,[122] or the date by which delivery must occur.[123] Moreover, even if the two terms are accepted as of equal importance to the operation of the contract, holding that a "forgotten" NOM clause should govern the situation grants it an almost constitutional character. There is no common law rule that parties must remember specific terms of their contract in order to override them. Prioritising a NOM clause that was absent from the parties' minds "divorces the test for valid modification from ordinary offer and acceptance analysis, leaving it unprincipled and isolated from wider contract theory".[124] The "necessary implication" of two people with authority to bind the parties agreeing to a substantive change that is intended to be effective immediately is precisely that they have overridden the formalities contained within the contract – "whether they were conscious of them or not".[125]

2 Evidentiary value

None of this is to suggest that a NOM clause is entirely irrelevant for a court faced with a putative oral variation. The clause may still have "considerable practical utility" for the

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119 At 445.

120 Edel, above n 101, at 197; and Mark Anderson and Victor Warner *A–Z Guide to Boilerplate and Commercial Clauses* (4th ed, Bloomsbury Professional, London, 2017) at 50.

121 As in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd*, above n 90.

122 As in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, itself.

123 As in *Air New Zealand Ltd v Nippon Credit Bank Ltd*, above n 11.

124 Fisher, above n 36, at 200.

125 Richard Calnan "Contractual variation clauses" (2018) 33 JIBFL 487 at 489.

party arguing against variation.[126] Moore-Bick LJ suggested that it is "likely to raise in an acute form the question whether parties who are said to have varied the contract otherwise than in the prescribed manner really intended to do so".[127] It indicates "that the parties contemplated that their dealings would be formalised in writing".[128] In *Conqueror International Ltd v Mach's Gladiator Ltd*, Gendall J described the existence of a NOM clause as an "important feature of the factual matrix" as it set out the original intentions of the parties.[129] Because the "clear intention of the parties … was expressed in the no oral variation clause", the party arguing for variation was required to present "strong compelling evidence [to] displace this".[130] In the absence of this, Gendall J had "no hesitation" in finding that the alleged oral variation had not occurred.[131]

However, the evidentiary significance that a NOM clause may hold is not to be construed as affecting the burden or standard of proof upon the party arguing for variation.[132] This would, just like Lord Briggs' test above, "divorce the test for valid modification from ordinary offer and acceptance analysis".[133] The better view is that the evidentiary significance is fact-dependent: the clause is a piece of relevant evidence which must be given "its due weight".[134] Sometimes, this will be quite a lot. Fisher argues that "[o]nly exceptionally will the reasonable person in the position of the promisee be ignorant of the NOM clause contained in the original contract".[135] Therefore, in almost all cases "the only reasonable interpretation to be drawn from an oral renegotiation that does not expressly waive the NOM clause is that the renegotiation was *subject to* confirmation in writing".[136] And certain circumstances may further diminish the likelihood that a reasonable promisee is ignorant of the clause. For example, in *Virulite*, Stewart-Smith J noted that "the fact that a clause was specifically negotiated or was insisted on by one party or the other (for a particular reason or no reason at all) may be a relevant factor".[137] But because it is the changing intentions of the parties that matter, the parties may later

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126 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*, above n 29, at [120].

127 At [120].

128 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd*, above n 12, at [41]. See also Anderson and Warner, above n 120, at 47–48.

129 *Conqueror International Ltd v Mach's Gladiator Ltd*, above n 13, at [42].

130 At [46].

131 At [65].

132 Cf *Delaware*: see *Continental Ins Co v Rutledge & Co*, above n 56, at 1230.

133 Fisher, above n 36, at 200.

134 *Virulite LLC v Virulite Distribution Ltd*, above n 91, at [60].

135 Fisher, above n 36, at 200.

136 At 200.

137 *Virulite LLC v Virulite Distribution Ltd*, above n 91, at [60].

show that they are not "wedded" to it.[138] Thus, in *Virulite*, another relevant circumstance was the "clear evidence of two occasions where the parties had chosen not to record express agreements in compliance with the [NOM clause]".[139]

Overall, it is vital to recognise that NOM clauses are terms contained in a contract just like any other. The principles which the courts deploy in order to determine their legal effect should not be any different to those which are utilised for other terms. Their effect should therefore depends on the facts of the case.

III Practical Considerations

In choosing which path to follow with regard to NOM clauses, practical considerations should be largely secondary to the conceptual coherence arguments made above. This is borne out in *Rock Advertising*. While it was earlier noted that Lord Sumption was critical of the emphasis that writing on this issue has placed on conceptual problems, his Lordship was equally unwilling to give effect to the practical benefits without first explaining why he considered he had overcome the conceptual barriers. Likewise, the basis for Lord Briggs' separate view demonstrates that his Lordship was only willing to give effect to NOM clauses should he consider them conceptually coherent.

However, it is likely that there is a dose of realism sitting behind these attempts to find conceptual coherence. The courts – particularly in the area of commercial contract law – may be inclined to take a particular position if they believe that it can provide general practical benefit. Indeed, Fisher has suggested that Lord Briggs' extremely narrow formulation of the situations where NOM clauses could be orally varied largely arose from a desire "to square contract logic with the perceived need for commercial certainty".[140] Likewise, Shaw and Connell have argued that Lord Briggs' view may be followed in New Zealand as "a kind of pragmatic halfway house between the more extreme positions taken by Lord Sumption and his opponents".[141]

This section of the paper therefore addresses whether there truly are benefits from giving legal effect to NOM clauses such that the New Zealand courts might, on re-examining the law, be tempted to take an approach that is inclined towards their effectiveness. In order to effectively compare the possible outcomes, it begins by establishing the "safety

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138 At [69].

139 At [67].

140 Fisher, above n 36, at 200.

141 Shaw and Connell, above n 11, at 200.

device" which the New Zealand courts would be likely to fashion for parties who have genuinely forgotten about the clause and subsequently relied upon the variation. Then a number of the practical benefits outlined by NOM clause proponents are explored. These include arguments that giving legal effect to NOM clauses will lead to a reduction in unnecessary litigation, greater protection for rash parties, and better safeguards for corporations who must place contractual authority in the hands of agents. It is suggested that these benefits are, on the whole, exaggerated. This is because it is either possible to access alternative mechanisms which already provide the same functions, or the desired outcome is one that should not be prioritised by the law of contract. Finally, some potential costs of giving legal effect to NOM clauses are outlined.

A The Exception: Estoppel

Suppose A and B conclude a contract containing a NOM clause. Notwithstanding the clause, they later orally agree to vary the contract. B performs the agreement according to the modification. When B has completed work, A – who has observed B's performance without making any objections – seeks to invoke the NOM clause, arguing that B has performed contrary to the valid terms of the contract.

Few advocates of NOM clauses would argue that A should succeed: It would be an injustice. Lord Sumption was conscious of this, noting that "in England, the safeguard against injustice lies in the various doctrines of estoppel".[142] However, as estoppel did not arise on the facts, it was "not the place to explore the circumstances in which a person can be stopped from relying on a contractual provision laying down conditions for the formal validity of a variation".[143] His Lordship did point out that "the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the [NOM] clause".[144] Therefore, at the least, there "would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality", amounting to "something more" than the informal promise itself.[145] Similarly, both the CISG and the UNIDROIT Principles provide exceptions only where the party asserting the validity of the variation has relied on the conduct.[146] In the United States, most courts have interpreted the

142 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [16].

143 At [16].

144 At [16].

145 At [16].

146 See art 29(2) of the United Nations Convention on Contracts for the International Sale of Goods, above n 72, which provides: "However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct"; and art 2.1.18 of the

exceptions in the Uniform Commercial Code to require reliance.[147] Alternatively, in some states a "clear and unequivocal" waiver may suffice even in the absence of reliance.[148]

Estoppel is well-established as both a defence and a cause of action in New Zealand.[149] Recent case law emphasises four requirements for a successful claim. These are the creation or encouragement of a belief or expectation, reliance on that belief or expectation, detriment as a result of that reliance, and that it would be unconscionable for the party against whom the estoppel is alleged to go back on his or her word.[150] In the context of the above example, utilising estoppel as a cause of action would mean that B might be able to obtain relief if they had relied on a (otherwise contractually binding) promise that A orally made but then failed to perform.

It is highly likely that, if New Zealand were to give legal effect to NOM clauses, many variations currently accepted as valid through ordinary contract principles would instead be given effect through promissory estoppel or estoppel by convention.[151] The New Zealand courts seek to give effect to a clearly proven actual mutual intention of the parties, as demonstrated by the judgment of the New Zealand Supreme Court in *Vector Gas*.[152] There, a majority of the Supreme Court were willing to invoke estoppel by convention so that the intention of the parties would be upheld, even though estoppel was not even pleaded.[153] Likewise, Finn, Todd and Barber have remarked that recent cases suggest that estoppel may sometimes be invoked to "hold a party to a promise *even though* that promise was not contractual, for example, because there was no consideration for it".[154] There would seemingly be an even stronger case for this where all the ordinary features of a legally binding contractual promise are fulfilled. The clearly expressed

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Principles of International Commercial Contracts, above n 72, which states "a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct".

147 Wagner-von Papp, above n 52, at 569.

148 At 569 citing *Cloud Corp v Hasbro* 314 F 3d 289 (7th Cir 2002) at 279–280.

149 *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA) at 86 per Holland J: "Any suggestion that estoppel is available only as a shield has disappeared".

150 See for example *Mitchell v Trustees Executors Ltd* [2011] NZCA 519 at [47]; and *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44].

151 Although note that there have been "frequent dicta in the New Zealand courts supporting the view that all types of estoppel are species of one broad genus" so the specific formulation is less important: Finn, Todd and Barber, above n 3, at 142.

152 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

153 At [47], [48], [85], [93], [97] and [144].

154 Finn, Todd and Barber, above n 3, at 27.

mutual intention of the parties will place a "very great deal of pressure on the courts to give effect to that agreement".[155] Moreover, the courts would likely provide estoppel as a backstop to prevent a party from using a NOM clause as an instrument of fraud. It would otherwise be easy for a party to orally agree to a variation (notwithstanding the presence of a NOM clause), wait for the other party to perform, and then enforce the contract under the original terms. A failure to invoke estoppel would amount to the court sanctioning this fraudulent behaviour.

The remainder of this practical analysis therefore proceeds on the assumption that, if the New Zealand courts were to give legal effect to NOM clauses, they would also invoke estoppel where the parties have agreed to what would otherwise be a contractually binding variation and one of the parties has acted in reliance upon it. When considering the practical effects, the comparison is between this and the conceptually correct approach argued for above – giving evidentiary weight to the NOM clause dependent upon all the circumstances of the case.

B Commercial Certainty

NOM clauses are said to "promote certainty" and assist commerce in a range of respects outlined below.[156] There is "admittedly unsystematic" empirical evidence that they are "frequently used in business relationships", which means that the decision in *Rock Advertising* may have a significant impact upon these parties.[157]

These clauses are claimed to help parties "avoid false or frivolous claims of an oral agreement".[158] A party that breaches the (initial) terms of a contract might argue that those terms have been varied, even if there are no legitimate grounds for so arguing. This is a particular risk where the parties are able to rely on oral representations. It is easier to manufacture evidence of these than to generate the necessary documentary evidence where variations are required to be in writing. Therefore, parties that wish to avoid falling victim to opportunistic behaviour should be entitled to exclude oral variation at the outset. Alternatively, there are parties who make genuine, yet incorrect, allegations of oral variation. There is always a risk of misunderstandings within a contractual relationship. Aware of these risks, parties rationally assessing the situation at the beginning of a contractual relationship ought to be entitled to take steps to prevent

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155 Calnan, above n 125, at 489.

156 O'Sullivan, above n 79, at 196.

157 Wagner-von Papp, above n 52, at 544.

158 O'Sullivan, above n 79, at 196.

potential litigation arising from such misunderstandings. This is of mutual benefit to the parties. Disputes that do arise are less costly, as they can primarily be resolved by reference to the documentary evidence.[159]

It is also argued that NOM clauses may perform "cautionary" and "channelling" functions.[160] Requiring some formal steps can "serve as an excellent device for inducing the circumspective frame of mind and thereby caution against rash agreements".[161] This acts as a safeguard for parties "to protect themselves from an inadvertent or unwise oral adjustment",[162] particularly if they aware that they are prone to making promises they later regret. It is more likely "changes are made in a disciplined way".[163] The reduction of the agreement to writing ensures that the variation is spelled out in the appropriate detail, thereby flushing out hidden disagreements that would otherwise be saved for later.[164]

There are a number of lines of response that show that these benefits are vastly overstated. In the first instance, the courts can easily recognise, as explained above, that the inclusion of a NOM clause may be a useful piece of evidence for a party faced with an alleged oral variation. A mere assertion that variation has occurred, without more, is likely to be outweighed by the combination of the assertion offered by the party arguing against oral variation and the original NOM clause which offers evidence about the nature of the parties' relationship and intentions. It is unlikely, therefore, that a successful "fraudulent" assertion is based solely on oral evidence. The more likely scenario is that any claim is based on a course of conduct pursued by the parties after the putative oral variation. Estoppel will then be argued, oral evidence will be used to establish precisely what the party relied on and litigation will occur. Moreover, much of the litigation of NOM clauses is tied up in other litigation, such as the true construction of the original terms of the contract. Or, where variation does occur in writing, evidence about what the parties said to each other is still important in determining what the written terms mean.

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159 Wagner-von Papp, above n 52, at 544.

160 See LL Fuller "Consideration and Form" (1941) 41 Columbia Law Review 799 at 800 for an explanation of these. See also Morgan, above n 27, at 591; and Wagner-von Papp, above n 52, at 550–552.

161 Morgan, above n 27, at 591.

162 Robert Hillman "Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of No Oral Modification Clauses" (1988) 21 Cornell Intl LJ 449 at 450.

163 R Christou *Boilerplate – Practical Clauses* (7th ed, Sweet & Maxwell, London, 2015) at [10–072].

164 Joseph Perillo "The Statute of Frauds in the Light of the Functions and Dysfunctions of Form" (1974) 43 Fordham L Rev 39 at 56–58.

Giving effect to NOM clauses does not significantly alter the amount of litigation or the evidence before the court.

Second, it is still quite open to the parties, in the absence of a NOM clause, to insist that contractually binding variations are only made in writing. All parties must agree to a variation before it is effective. If *either* party continues to insist (and acts consistently with this representation) that, for example, they do not intend to be legally bound *until* the variation is expressed in writing, the courts will give effect to this. A NOM clause makes little difference to commercial parties that implement strict rules to formally vary contracts. For example, regardless of whether a bank includes a NOM clause, the other party is likely to be precluded from raising an oral variation because of the formal nature of the relationship. The bank's employees will clearly communicate that there is no intention to be bound by statements until they are reduced to writing. Even if they forget on one occasion, it would still not be reasonable for the counterparty to think that a conversation gave rise to a contractually binding variation. Parties who genuinely wish to pursue these evidentiary, cautionary and channelling functions of NOM clauses can easily do so by being upfront with the counterparty about their expectations.

Proponents of NOM clauses might respond that for some parties this level of self-regulation is impossible. For example, a "rash" commercial party will simply forget to be careful when answering phone calls or having a conversation over lunch, compared to when they are carefully negotiating a written contract. The NOM clause is necessary to protect them. The first response to this is simply that these supposedly commercial parties should be aware enough of their own shortcomings that they can alter their behaviour according to experience. Warping contract law to suit their needs – as against the trust that their counterparty places on their seriously intended promise – should not rank on our list of priorities. Secondly, if a "reminder" is required, this can still be achieved through including a NOM clause in the contract: If parties do always check the contract before variation, they will see that there is at least an expectation that they vary it in writing.

However, it is unclear how *giving legal effect* to this clause enhances these purposes. NOM clauses have been described as "near ubiquitous" in the United Kingdom,[165] but it was not until May this year that they were given legal effect.[166] It is distinctly unlikely

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165 Simon James and Matthew Scully "No oral modification clauses upheld" (17 May 2018) Clifford Chance <www.cliffordchance.com>.

166 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1.

that before May parties included NOM clauses, remembered that they had done so, but then simply brushed them aside when it came to varying their contracts because they knew that the courts would only place evidentiary weight upon them. The rather more likely scenario is that those who remembered the existence of a NOM clause abided by it; while those who forgot about the NOM clause may or may not have abided by it, depending on the nature of their contractual relationship. Giving legal effect to the clause does not change the calculus: parties are not suddenly more likely to remember that it exists, because the detriment to forgetting is already significant enough that they had adequate incentive to remember. Moreover, parties who now forget the existence of the NOM clause and orally vary their contract are likely to rely upon this promise immediately, meaning that the action is really just shifted from contract to estoppel. So-called "rashness" is no defence to an estoppel claim when the other party *relies on* the oral variation.

When considering the effect on commerce generally, Hillman makes the point that "we simply do not know whether business would benefit more from facilitating or deterring oral modifications of written agreements when the parties originally intended to bar such adjustments".[167] An accurate assessment of this requires "comparing the frequency and costs of parties mistakenly thinking a NOM clause benefits them with the frequency and benefits of parties correctly including a NOM clause".[168] I would add that, in order to properly assess any benefit, we would also need to assess whether different behaviour is elicited by comparable parties that do and do not include NOM clauses. This is difficult. But I would also suggest that if we accept the argument from NOM clause proponents that parties know subjectively what is best for them, then this surely means that parties who choose to vary their contracts orally at a later time are doing so because they believe it is in their best interests. We ought to give effect to the contractual relationship that actually develops, as opposed to what the parties might have predicted when they first entered into a contract. And objectively, it is surely "more commercially efficacious that contracting parties should be able to informally agree a variation to any term in their contract to meet their future business needs".[169] This better accommodates "the subsequent fast-pace commercial realities of business".[170] If the parties consider that writing their agreement down is not worth the benefits of writing that they must have

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167 Hillman, above n 162, at 452.

168 At 452.

169 Lee Mason "The Utility and Futility of 'No Oral Variation' Clauses: When Commercial Certainty Meets Party Autonomy" (2016) 37 Business Law Review 134 at 135.

170 At 135.

understood by including a NOM clause, then the court ought to uphold this recent subjective assessment. We must remember that it is expensive to spend time agreeing to every variation in writing, and given that most contracts are successfully performed without litigation, we should encourage parties to find the level of fluidity that best suits their needs. This may not be the level of "commercial certainty" that law firms writing in favour of the decision desire, but it is a level of commercial *efficiency* that better fulfils the needs of businesspeople.

C Regulating Agency Relationships

In addition to the general certainty arguments made above, specific mention is often made of the benefits that NOM clauses might provide larger commercial entities.[171] In large organisations, employees and agents often perform the contract. The doctrine of ostensible authority means that the representations of agents will be binding upon their principal even where they have acted outside the scope of their authority. It is suggested that a further benefit of legally effective NOM clauses is that they could assist principals by restricting the ability of agents to enter binding agreements.[172] The employee who answers the phone and agrees to altered credit terms[173] – contrary to the wishes of the principal – does not bind the business. This reduces the significant costs of monitoring agents and the damage from variations that slip through the cracks.

Against this argument sits the importance of the reliance interests of the counterparty that interacts with the agent. As a common part of the boilerplate of a contract, NOM clauses frequently sit "somewhere alongside something about the singular including the plural, the male including the female, and notices being deemed valid if delivered by first class post".[174] Time and time again it has been noted that they are likely to be forgotten. In ordinary human interactions we would place more reliance on what someone has told us they are going to do than what the written version of a contract that was probably never read in its entirety states.

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171 See for example Wagner-von Papp, above n 52, at 552; RB Ahdieh "The Strategy of Boilerplate" (2006) 104 Michigan Law Review 1033 at 1040; McKendrick, above n 79, at 442. Making it "easier for corporations to police internal rules restricting the authority" to vary contracts was also noted by Lord Sumption as one of the three reasons that companies include such clauses: *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [12].

172 Wagner-von Papp, above n 52, at 544; and O'Sullivan, above n 79, at 196.

173 As Ms Evans did in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, above n 1, at [3].

174 Email from Paul Stanley to Obligations Discussion Group regarding the United Kingdom Supreme Court judgment in *MWB v Rock Advertising* (16 May 2018).

And importantly, the doctrine of ostensible authority is based on this idea that people ought to be able to rely on representations from those held out as agents. Representations made by the agent are no less significant than representations made by the principal. Inconvenience caused by incorrect statements does not cause less of an erosion of the trust involved in commerce because it came from an agent instead of a principal. Parties with the capacity to engage agents should internalise the risks involved – contract law should not aim to insure them against these risks. They should develop clear internal policies that discourage their agents from entering these unwise contractual variations. Otherwise, the law of contract is facilitating a safety net for businesses using agents to conduct their business which may well come at the expense of smaller, less commercially savvy parties.

D Costs

While the estoppel exception was established above for the purpose of comparison, it is vital to note that its boundaries are not settled. It would require significant litigation for parties to have a proper understanding of the scope of estoppel. For this reason, Calnan believes that, "[r]ather than creating welcome certainty, the decision of the Supreme Court in the *Rock Advertising* case may well encourage litigation".[175] Moreover, if the courts did not apply the estoppel doctrine liberally, even parties that have acted upon an oral variation in circumstances where the NOM clause was long forgotten may fail to receive a remedy. This means that the risk of being a victim of fraudulent behaviour is simply shifted onto parties that believe that variations have occurred.

There are also questions as to the logical conclusion of the Supreme Court's reasoning with regard to the ability of parties to mutually bind themselves. As raised above, a logical extension of the rule entitling parties to restrict their future mutual freedom is allowing parties to contract to prohibit any variation whatsoever. What would the courts do when confronted with this? They might, of course, opt out of dealing with the principle by deciding that such a large restriction upon later contractual freedom is void on grounds of public policy.[176] But restrictions that fall between this and the NOM clause in *Rock Advertising* are also possible. For example, Morgan has advocated that the courts

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175 Calnan, above n 125, 489.

176 Although, as argued by Albert Schwartz and Robert E Scott in "Contract Theory and the Limits of Contract Law" (2003) 113 Yale LJ 541, there are arguments favouring giving effect to such a clause as long as the parties carefully considered the benefits to them.

should give effect to clauses which make a contract immune to variation through estoppel and waiver. He argues:[177]

> Should estoppel be given any wider scope, drafters could respond with clauses designed to prevent not only 'oral modification' but variation through estoppel too – e.g. "No variation of this Agreement shall be valid or effective, *whether by contract, estoppel, or otherwise*, unless made in writing signed by the parties to this Agreement, *and action in reliance on any such informal variation shall not estop either party from resiling from it*.

No doubt these questions will soon reach the English courts, as lawyers encourage their clients to pursue commercial certainty by including such a clause and a wronged party seeks to invalidate it. It does not seem that South Africa and the United States – who have had legally effective NOM clauses for decades[178] – have seen a noteworthy reduction in litigation. These issues about specific NOM clauses remain contentious. In fact, there is current litigation in both jurisdictions regarding the degree to which emails may satisfy a NOM clause which must be in "writing and signed".[179] Litigation will always occur.

On the other hand, it can perhaps be accepted that the litigation outlined in these preceding two paragraphs is of a transient nature. Eventually, these issues may be resolved and any increase in litigation argued above might be outweighed by the fact that there will be fewer arguable cases that could come before the courts. That is, some parties *may* have claimed before without having any evidence of having relied on a promise to their detriment, even in spite of the difficulty they would have experienced in overcoming the evidentiary weight that is appropriately ascribed to a NOM clause. For example, they may have had corroborating documentary evidence of the oral variation that justified bringing the issue to the attention of the courts. These parties' claims will permanently be avoided, leading to a reduction in litigation around potential variation. Yet to argue that this is a benefit misses the point. It is, in fact, a cost to justice. While litigation efficiency

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177 Morgan, above n 27, at 612.

178 For South Africa see *SA Sentrale Ko-op Graan Maatskappy Bpk v Shiften* 1964 (4) SA 760 (A), affirmed in South Africa's new constitutional era in *SA Brisley v Drostky* 2002 (4) SA 1 (SCA). These cases have not been used in this piece as they are only available in Afrikaans.

179 See for example Yeukai Mupangavanhu "Electronic Signatures and Non-Variation Clauses in the Modern Digital World: The Case of South Africa" (2016) 133 SALJ 853; Stephanie Holmes "*Stevens v Publicis*: the Rise of "No E-mail Modification" Clauses?" (2010) 6 Washington Journal of Law, Technology and Arts 67; and Annie P Kubic "The Impact of Electronic Communications on Contract Modifications" (19 July 2017) American Bar Association <www.americanbar.org>.

is important, providing the correct outcome to the parties should be paramount. In situations where these clauses are given legal effect and override later intentions, despite the parties clearly conducting their relationship in a way that is inconsistent with the clause, it is unjust for that original clause to govern. It may also lead to an erosion of trust between the parties, as they generally expect what would otherwise be contractually binding promises to be enforced by the courts. Parties should not be required to experience tangible detriment to have the serious promises they have entered with another party enforced. This is the entire purpose of the law of contract. As Calnan says:[180]

> … an element of chaos is inherent in the way in which English law deals with contracts. The question is whether the parties have objectively reached an agreement. That may be messy, but life is messy. What should be important is the legal substance of the transaction, not its form.

Agreement is what the courts seek to uphold, even if it is sometimes hard to find. By giving legal effect to NOM clauses, the courts would fail to do their duty.

IV Conclusion

The decision of the United Kingdom Supreme Court in *Rock Advertising* was surprising. The Court made a significant departure from precedent – from England and Wales, and the common law world – in favour of a rule that is said to uphold "commercial certainty". In order to reach this result, the judgments made a number of assertions that fall down when properly considered. The analogies to legislative intervention and EACs provided were false, while considerations of party autonomy in fact fall in favour of giving effect to present intentions over past ones. Respecting party autonomy means accepting that the parties will always retain their freedom to contract in any way that the general law also allows. As has been accepted by all involved in the NOM clause debate, it is only once these conceptual barriers have been cleared that the courts can give legal effect to NOM clauses. The analysis in this paper has shown that this is not possible.

Fortunately, as this paper has also explained, not much is lost in a practical sense by refusing to give legal effect to NOM clauses. The much-touted gains to commercial certainty are unlikely to be achieved in England and Wales. Most disputes that arose before the *Rock Advertising* decision could be argued as estoppel instead. Other disputes will also arise relating to the construction of the NOM clauses that lawyers draft. While

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180 Calnan, above n 125, at 489.

businesses who use long chains of agents to perform their contracts may obtain a large benefit, this comes at the expense of counterparties relying upon the genuine promises of these agents. Meanwhile, it is still possible for businesses in jurisdictions that choose not to give legal effect to NOM clauses to conduct their contractual relationships utilising formal requirements, and therefore obtain their evidentiary, cautionary and channelling functions. They can even include a NOM clause as an extra piece of evidence as to their intentions. It is just that, should the parties genuinely wish to pursue these functions, they must also incur the corresponding costs of informing their counterparty that this is their intention, rather than conducting an informal relationship and then later falling back on a seemingly forgotten NOM clause.

New Zealand should therefore continue with the approach it has taken on some occasions in the past – the dominant approach at common law – and refuse to give NOM clauses legal effect. This view is also strengthened by a legal framework which strives to give effect to the actual mutual intention of the parties, as seen through legislative intervention which prohibits operative EACs and a Supreme Court which is willing to recognise estoppel by convention. Parties should be able to informally vary a contract despite the existence of a self-imposed clause precluding variation other than in line with certain formalities. Such a clause may still carry some evidentiary weight, but is only one part of the factual matrix that the courts will consider when determining whether an effective informal variation has occurred. Ultimately, the courts should look to the intentions of the parties at the time of the purported variation. While parties may enter agreements that temporarily restrict the freedoms they respectively have, their shared contractual freedom to alter those agreements in any way recognised by the general law is inalienable. Upholding the later promise is the only way to respect party autonomy.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises 11,361 words.

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