

NO ORAL MODIFICATION CLAUSES: CONTRACTUAL FREEDOM UNDER ENGLISH AND NEW YORK LAW

Luke Tattersall*

Abstract: This article considers the law pertaining to no oral modification clauses under both English and New York law, examining how the clauses have been treated under the respective legal systems and the way in which this has evolved over time. This article analyses the normative foundations of no oral modification clauses and considers the arguments both for and against, balancing contractual freedom, party autonomy and the flexibility of contractual formation. The article concludes by examining how the two legal systems have reached a position which in practice is similar in many respects, albeit noting that this outcome was achieved through starkly different routes.

Keywords: *no oral modification clauses; contractual freedom; comparative law; English law; New York law; commercial law; the law of private obligations*

I. Introduction

The law of contracts is premised upon the foundational principle that parties are free to contract as they wish within the boundaries of the public policy of each particular jurisdiction. However, interesting issues of principle arise when one considers the extent to which parties are permitted to limit their own contractual freedoms within the confines of a commercial relationship.

These questions underwent analysis in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*¹ in which the UK Supreme Court considered the law regarding, what are commonly referred to as, no oral modification (NOM) clauses, which operate to prohibit amendments being made to contracts unless executed in a particular form.² In light of recent developments, this article seeks to examine the evolution of the law regarding NOM clauses under both English and New York law as the two bodies of jurisprudence have closely influenced one another's developments. The two legal systems have reached positions which in practice are similar to one another, yet each has done so by different means. The following will explore the normative arguments in support of both the English and New York law positions for restricting a party's ability to amend their private legal affairs.

* Barrister, Essex Court Chambers, London, United Kingdom.

1 [2019] AC 119.

2 A common example of a NOM clause regularly found in practice would be, for instance, "The terms of this Agreement may not be waived or changed, except by written endorsement issued to form a part hereof and signed by the Company".

It is argued that the Supreme Court's recent restatement of the law in this area is to be welcomed as it provides for a doctrinally coherent and commercially sensible basis, whilst offering both certainty and flexibility to those seeking to amend their contractual arrangements.

II. The English Law Position

Under English law, a contract may be varied by subsequent agreement³ whether written, orally or by conduct.⁴ Previously, an important distinction existed in English law between rescission on the one hand and variation on the other. This dichotomy was because, unlike rescission, variation of a contract could not take place by oral or written agreement in circumstances where the contract contained an express clause stating that the variation had to be evidenced in a particular form and endorsed or signed by the parties, ie, a NOM clause.⁵

However, from April 2016, the position has undergone significant alteration. The Court of Appeal in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*⁶ had cause to consider a contractual clause which stipulated that any amendments to the contract must be in writing and signed by both parties, thereby prohibiting variations made orally or by conduct. On the issue of whether such a clause was enforceable, the court examined two conflicting authorities, namely *United Bank v Asif*⁷ and *World Online Telecom Ltd v I-Way Ltd*.⁸ The former authority set out the orthodox position that contractual terms are binding and that all variations other than those adhering to the stipulated form are prohibited, whereas the latter authority permitted oral modifications irrespective of the inclusion of such a clause.

Having considered these contrasting positions, the Court of Appeal concluded that they were not bound by either decision and were instead entitled to determine the issue for themselves,⁹ yet ultimately ruled in favour of the *World Online* approach,¹⁰ which is to say that they found NOM clauses to be unenforceable. The court held that a contract containing a no moral modification clause *could* be varied by oral agreement or by conduct, with Beatson LJ explaining the position as follows:

³ A unilateral notification by one party to another, in the absence of agreement, cannot constitute a variation of a contract (*Cowey v Liberian Operations Ltd* [1966] 2 Lloyd's Rep 45, 49–50).

⁴ Variation takes place where the parties to a contract effect a change through modifying its terms by mutual agreement (*Robinson v Page* (1826) 3 Russ 114, 38 ER 519, 519–521; and *Royal Exchange Assurance v Hope* [1928] Ch 179, 191). In respect of land and statutory provisions, the restrictions permitting only written modification of the agreements remain intact.

⁵ *Robinson v Page* (n.4), 521; *Goss v Lord Nugent* (1833) 5 B & Ad 58, 110 ER 713, 715–717 and *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38, 44–45.

⁶ [2017] 1 All ER (Comm) 601.

⁷ (Court of Appeal, 11 February 2000).

⁸ [2002] EWCA Civ 413.

⁹ Applying *Young v Bristol Aeroplane Co Ltd* [1944] KB 718.

¹⁰ *World Online Telecom Ltd v I-Way Ltd* (n.8), [113].

The parties have freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth or by conduct. The consequence in this context is that in principle the fact that the parties' contract contains a [NOM] clause ... does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct.¹¹

In support of this position, the court cited with approval the remarks of Gloster LJ,¹² Stuart-Smith J¹³ and Steel J,¹⁴ stating that this demonstrated "recognition by these experienced judges that in principle an oral variation can be effective notwithstanding such a clause".¹⁵ The court then turned to consider the underlying principles upon which the reasoning in *World Online* rests. Moore-Brick LJ sought to establish the basis for the court's decision as follows:

The governing principle, in my view, is that of party autonomy. 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 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. If there is an analogy with the position of Parliament, it is in the principle that Parliament cannot bind its successors.

As a matter of principle, however, I do not think that they can effectively tie their hands so as to remove from themselves the power to vary the contract informally, if only because they can agree to dispense with the restriction itself. Nor do I think this need be a matter of concern, given that nothing can be done without the agreement of both parties and if the parties are in agreement, there is no reason why that agreement should not be effective.¹⁶

On the basis of the court's remarks, those in business could be forgiven for thinking that NOM clauses, despite having been carefully drafted, are not worth the paper they were written upon. However, with regard to this, the Court of Appeal disagreed, instead explaining that:

11 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* (n.6), [100]. The term "new contract" suggests the formation of a collateral contract, whereas what was in fact meant was a modification of the original contract.

12 *Energy Venture Partners Ltd v Malabu Oil & Gas Ltd* [2013] EWHC 2118 (Comm), [271]–[274].

13 *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB), [55].

14 *I-Way Ltd v World Online Telecom Ltd* [2004] EWHC 244 (Comm).

15 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* (n.6), [104]–[106].

16 *Ibid.*, [119]–[120].

It does not follow that clauses like [this] have no value at all. In many cases parties intending to rely on informal communications and/or recourse of conduct to modify their obligations under a formally agreed contract will encounter difficulties in showing that both parties intended that what was said or done should alter their legal relations; and there may also be problems about authority. Those difficulties may be significantly greater if they have agreed to a provision requiring form variation.¹⁷

The Court of Appeal's reasoning suggests that they envisage that NOM clauses will act as evidence of the parties' intent when in litigation parties seek to contest one another's readings of whether, and by what means, the agreement was modified. However, it is doubtful in practice that NOM clauses would function this way, as if the law permits oral variations, thereby rendering NOM clauses ineffective, the fact that it was present at the time may be an indication that the parties had agreed that variations should be made in writing. However, variations made orally or by conduct would remain permissible in law. Therefore, evidentially the inclusion of a clause does not take one very far. The evidence will instead manifest itself as actions in reliance upon the modification, namely preparatory works, emails and memos which discuss, infer or imply a modification, or testament of phone calls and minutes of meetings. The Court of Appeal therefore were perhaps overly optimistic with regard to the remaining utility of NOM clauses following their ruling.

The Court of Appeal handed down its judgment in April 2016, following which the authority was swiftly applied by a series of subsequent courts. The Court of Appeal in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*,¹⁸ heard in June 2016, examined the Court of Appeal's judgment in *Globe Motors* in detail, with Kitchin LJ lending his support, holding that:

The relevant principles, the material policy considerations, the earlier authorities and the issue of precedent were considered in depth and with the benefit of very full argument in *Globe Motors* and for my part I consider it would require a powerful reason for this court now to come to a conclusion or adopt an approach which is different from that of all members of the court in that case. ... I respectfully agree with Beatson LJ that the decision of this court in *World Online Telecom* was correct and should be followed for the reasons he gave. To my mind the most powerful consideration is that of party autonomy.¹⁹

Similarly, Furst J sitting in the High Court in August 2016 was of the view that "any doubts as to the status of the decision in *Globe Motors* have been dispelled by the

¹⁷ *Ibid.*, [117].

¹⁸ [2017] QB 604.

¹⁹ *Ibid.*, [34].

subsequent decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553²⁰. Similar endorsements were given in *Connect Plus (M25) Ltd v Highways England Co Ltd* by O’Farrell J.²¹

One would therefore be forgiven for thinking that in mid-2018 the English law position as to NOM clauses was on a stable footing, having been scrutinised heavily by the upper courts. However, this was not the case. The parties in *Rock* were granted permission to appeal the Court of Appeal’s judgment to the Supreme Court where the court composed of Lady Hale, Lord Wilson, Lord Lloyd-Jones, Lord Briggs and Lord Sumption heard argument on whether NOM clauses should be enforceable. Despite a line of consistent authorities, all of which supported the principle that NOM clauses should be nullified, permitting variation of contracts both orally and by conduct in circumstances where contracts contain a clause to the contrary, the Supreme Court nevertheless felt it prudent to embark upon a different course, overturning all of the previous Court of Appeal and High Court rulings cited above.

The NOM clause in question was an archetypal example, commonly found in standard form contracts across a wide range of industries, it read “All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect”. Lord Sumption, who gave the leading judgment, spent time setting out the reasons commonly given, and which were cited by the Court of Appeal²² and High Court,²³ for treating NOM clauses as being ineffective. These were that: (1) a variation of an existing contract is itself a contract; (2) that because the common law imposes no requirements of form on the making of contracts, the parties may agree informally to dispense with an existing clause which imposes requirements of form; and (3) that the parties must be taken to have intended to do this by the mere act of agreeing a variation informally when the principal agreement required writing.²⁴

Just as Kitchin LJ in the Court of Appeal,²⁵ Lord Sumption cited from the well-known dicta of the former US Supreme Court Justice, Cardozo J (as he then was) in *Beatty v Guggenheim Exploration Co*,²⁶ where, when commenting upon the state of NOM clauses under New York law, he said:

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,

20 *ZVI Construction Co LLC v University of Notre Dame (USA) in England* [2016] Bus LR 1311, [74].

21 [2018] EWHC 140 (TCC), [169].

22 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (CA) (n.18), [19]ff; *Globe Motors v TRW Ltd* (n.6), [97]ff.

23 *ZVI Construction Co LLC v University of Notre Dame (USA) in England* (n.20), [73]ff; *Connect Plus (M25) Ltd v Highways England Co Ltd* (n.21), [166]ff.

24 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (SC) (n.1), [7].

25 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (CA) (n.18), [34] (Kitchin LJ).

26 *Beatty v Guggenheim Exploration Co* 225 NY 380, 387–338 (1919).

may itself be waived. ‘Every such agreement is ended by the new one which contradicts it’ (*Westchester F Ins Co v Earle* 33 Mich 143, 153). 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 ...

However, despite the force of Cardozo J’s words, the Supreme Court was unconvinced by this line of reasoning and instead chose to reverse the Court of Appeal and High Court rulings. The court’s rationale for doing so was underpinned by a principled analysis of party autonomy *vis-à-vis* agreeing to contractual terms. Whilst Kitchin LJ in *Rock* (CA) felt that the principal reason for not holding parties to NOM clauses, and permitting them to make changes orally, was party autonomy, the Supreme Court understood that such a stance is in fact an erosion of contractual autonomy and in practice only serves to “override the parties’ intentions”. The Supreme Court went so far as to describe the Court of Appeal’s basis of autonomy as a “fallacy”, stating that “the real offence against party autonomy is the suggestion that [parties] cannot bind themselves as to the form of any variation, even if that is what they have agreed”.²⁷

Lord Sumption explained that “party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows”, pointing out that all contracts seek to limit party autonomy to some extent by binding the parties to a certain course of action.²⁸ The distinction, which advocates in opposition of NOM clauses raise, is that contracts ordinarily seek to bind parties by reference to their unilateral acts, but only rarely seek to impose bilateral limitations on party autonomy in the event of agreement. However, the distinction between bilateral and unilateral expressions of contractual autonomy fails to take proponents of oral modifications very far. This is because the same reasoning applies in circumstances where the parties have signed up to a set of agreed contractual provisions, those provisions should be honoured and enforced with the effect that any subsequent modifications which fail to meet the required form will fail to have the intended effect. This is not to extinguish party autonomy, as the parties remain free to formalise their modifications in the manner and form which they had originally envisaged if they truly intended for those modifications to take effect. The Supreme Court highlighted that there are many instances in which statutes demand that particular forms of agreement, for example, contracts for the sale of land, are made and varied in writing. The court was of the opinion that there was no reason why parties should be prohibited from being able to include such requirements by exercising their contractual autonomy.

The common law position that contracts may be made formally or informally between two parties with no restrictions as to the manner in which the formation

²⁷ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (SC) (n.1), [11].

²⁸ *Ibid.*

takes place has been hailed as a blessing of the common law, providing much needed flexibility to those in commerce. However, the Supreme Court were astute to point out that NOM clauses are now common place in contracts throughout the world, which they took to suggest that commerce had reached the point where the common law's flexibility had become a "mixed blessing [to] businessmen and is not always welcome".²⁹ There are numerous reasons why this is so. First, NOM clauses prevent attempts to undermine written agreements by informal means for which there is self-evidently significant scope for abuse.³⁰ Second, modifications made orally create scope for misunderstandings which in turn will give rise to disputes not only as to whether the variation was intended but as to the precise terms, manner, scope and language of the amendments; and third, by insisting upon a level of formality in the way in which contracts are modified it grants businesses a degree of control with which to police amendments to contracts in circumstances where there may be large teams, often based in different jurisdictions, all working under a single agreement.

For these reasons, the Supreme Court was minded to conclude that the rationale for the introduction and enforcement of NOM clauses is underpinned by "legitimate commercial reasons" and that "the law of contract does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy", of which none arose.³¹ In supporting the argument that international commerce is in favour of the validity of NOM clauses, the Supreme Court drew examples from the Vienna Convention on Contracts for the International Sale of Goods (1980) and the UNIDROIT Principles of International Commercial Contracts, both of which insist upon permitting contractual freedom whilst upholding the parties' contractual agreement as to the manner and form of subsequent amendments. The court felt that for reasons of commercial efficacy and business common sense that it was time to bring English law in line with these "widely used codes" of international practice.

In taking the point further, useful analogies can be drawn between NOM clauses and entire agreement clauses, both of which have become standard form terms in commercial contracts. In *Inntrepreneur Pub Co Ltd v East Crown Ltd*,³² Lightman J explained that "the purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through

²⁹ *Ibid.*, [12].

³⁰ NOM clauses guard against what Klein J termed "loose talk" which could otherwise be relied upon, see *UK Learning Academy Ltd v Secretary of State for Education* [2018] EWHC 2915 (Comm), [73].

³¹ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (SC) (n.1), [12]. Further, for the courts to hold that NOM clauses are invalid would be to imply that commercial parties, and their legal advisers, did not understand or intend for an express term to have effect, this is antithetical to the commercial reality in which business contracts are drafted. It would also serve to defeat what are the legitimate expectations of the parties when acting upon the agreement.

³² [2000] 2 Lloyd's Rep 611, [7].

the undergrowth and finding in the course of negotiations some (chance) remark of statement ... on which to found a claim” and he added that “the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurance made in the course of the negotiations...shall have no contractual force, save insofar as they are reflected and given effect in [the contract].”³³

Obvious similarities are present between the rationale for entire agreement clauses and NOM clauses. It is imperative that those in business are able to rely upon the carefully drafted and often hard-fought compromises of a detailed contract and not to be dragged into frivolous litigation or arbitration over misunderstandings, or worse, spurious accusations of modifications which were not contained within the final contract for good reason.³⁴ Without the protection of such clauses, businesses would be open to having their contractual agreements changed on a whim, irrespectively of the fact that they had exercised their contractual autonomy by expressly including clauses which cater for this very event.³⁵ To rule that such clauses are not worth the paper they are written upon would place the English law of contracts on a commercially unsound footing and would give pause to the significant number of commercial parties who choose English law as their go-to governing law.

Lon Fuller emphasised that the rules of contractual formation are often accompanied by positive side effects. In particular by requiring parties to record their agreement in writing, clear evidence is created that a contract *has* been made, along with particularising the relevant terms. A corollary of this is that by complying with formalities, parties signal their express intention to form binding legal relations, as opposed to intending something more amorphous or colloquial — for example, an intention that in the future a course of action should be considered. Similarly, by requiring parties to fulfil formal steps such as signing or sealing a contract, it serves as a mechanism for, what Fuller referred to as, “inducing the circumsperspective frame of mind” which protects against making hasty decisions which parties may be more prone to do orally than when following a formal process.³⁶ A further benefit is that by requiring parties to draft any amendments in writing, the modifications will need to be expressed in detail, thereby shining a light on any potential areas of contention which exist between the parties but which

33 See further, *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] 1 WLR 753.

34 Lord Briggs, who agreed with the outcome but dissented partially on the reasoning, felt that there was also a “powerful analogy with the way in which the law treats negotiations subject to contract”, namely that “no binding obligations thereby ensure unless or until [the parties] have made a formal written contract”; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (SC) (n.1), [29].

35 See Longmore LJ in *North Eastern Properties Ltd v Coleman* [2010] 1 WLR 2715, [82], where he said “if the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said”. The same logic applies to the application of NOM clauses.

36 See L Fuller, “Consideration and Form” (1941) 41 *Columbia Law Review* 799, 800.

had thus far gone undiscovered or had failed to be resolved.³⁷ A proposition made orally can often appear attractively simplistic, but how that modification operates relative to the other contractual provisions and the instrument as a whole has the potential to raise problems requiring attention.

Ultimately, there is a far simpler and more practical reason which underpins why NOM clauses should be upheld. Lord Sumption explained pithily that “it is not difficult to record a variation in writing”.³⁸ If the parties had truly reached a bilateral agreement by which they wished to modify their contract, they were at liberty to record that variation in writing and sign it. It is a bizarre train of thought from which one would consider that a failure to adhere to a simple limitation means that the parties intended to dispense with it, as opposed to that they did not in fact intend to modify their contractual position at all.³⁹ Similarly, Lord Briggs explained that if the parties are finding the NOM clause a hindrance, they are free to remove it by a single modification made in writing, after which modifications can be made orally or by conduct at will.⁴⁰ The simplicity with which mutually agreed amendments can be made only serves to buttress the argument that NOM clauses should be valid for reasons of commercial common sense.

Whilst it is contended that NOM clauses should be valid, there will nevertheless remain cases in which the parties agreed to amend their contracts orally and where reliance on the clause has the potential to cause injustice.⁴¹ The Supreme Court felt that in instances where the parties had agreed to amend the contract but had failed to record the amendment in the stipulated form that the doctrine of estoppel should provide a “safeguard against injustice”.⁴² However, Lord Sumption was keen to point out that he did not think that the scope for the use of estoppel should be so broad as to “destroy the whole advantage of certainty” which the parties intended when they incorporated a NOM clause originally. Lord Sumption refused to expand upon the application of estoppel *vis-à-vis* NOM clauses; however, it raises interesting questions of whether all forms of estoppel (promissory, convention, acquiescence, etc.) would be suitable to strike the balance between contractual

37 See JM Perillo, “The Statute of Frauds in the Light of the Function and Dysfunctions of Form” (1974) 43 *Fordham Law Review* 39, 56–58.

38 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (SC) (n.1), [15].

39 In the United States, Judge Easterbrook considered that the “principal function of [NOM clauses] is to make it easier for businesses to protect their agreement against casual subsequent remarks and manufactured assertions of alteration”, see *Wisconsin Knife Works v National Metal Crafters* 781 F 2d 1280, 1285–1286 (1986).

40 Alternatively, where a degree of flexibility is needed to conduct business orally, an NOM clause could be drafted to include a provision permitting nominated individuals to agree oral variations or that oral variations made by nominated persons are valid if subsequently confirmed in writing within a certain period; see R Binns, “Rock v MWB: Legal Certainty of Hindrance Of Commercial Endeavours?” (2019) *European Intellectual Property Review* 119, 122.

41 It should be noted that modifications to contracts which contains NOM clauses can be saved as collateral contracts if the modifications satisfy the formation of a new, separate contract, ie, amounting to an offer, acceptance and consideration.

42 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (SC) (n.1), [16].

certainty and policing injustice in circumstances where what would otherwise be a *bona fide* oral modification is misused by one party to an agreement.⁴³ Jonathan Morgan contends that the scope for estoppel should be limited, suggesting that it should only apply in circumstances where one party had given assurances that the NOM clause would not be relied upon in relation to the modification.⁴⁴ The basis for this proposition is that the certainty granted by NOM clauses should not be eroded by the application of equitable remedies. However, it is submitted that Morgan puts the point too high. To allow estoppel to intervene only in such a limited set of circumstances would be unrealistic and would leave an unknown number of deserving cases without redress in which a party had acted dishonestly and in bad faith to induce reliance upon an amendment confident in the fact that it would not be applied due to the inclusion of a NOM clause.⁴⁵ Similarly, Morgan's reading would mean that estoppel could only apply in cases where the parties had expressly, and bilaterally, addressed their minds to the presence of a NOM clause. It is likely that the number of cases in which this occurs, yet where the parties elect not to take the simple step of codifying their amendment in the proper form, will be rare. It is argued by critics that parties might consider contracting out of estoppel by including reference to it in their NOM clauses,⁴⁶ although how amenable the courts will be to having their equitable jurisdiction ousted by the parties in this manner remains to be seen. However, in returning to the court's decision, whilst the search for an equilibrium between certainty and justice will need to be resolved in time, the Supreme Court's ruling that NOM clauses have contractual force, with estoppel providing for protection when needed, is undoubtedly a welcomed direction for English law to take.

By charting this path, the Supreme Court has set English law in the direction of a doctrinally coherent basis which sits more comfortably within the current framework of English contract law premised upon the foundation principle of autonomy which underlies the common law of private obligations. As Lord Toulson remarked, parties are "free to contract on whatever terms they choose and the court's role is to enforce them".⁴⁷ Against this backdrop, the previous rulings on NOM clauses sat uncomfortably. Whilst there are qualifications to the rule, these operate

43 It is difficult to imagine that all forms of estoppel would provide the correct balance. Estoppel by acquiescence, for example, which takes effect where one party has remained silent in failing to correct the other party on its legally misunderstood rights would likely be too broad so as to frustrate the purpose of NOM clauses. This is something which the courts will have to grapple with in the coming years as litigants test the boundaries of the newly effective clauses.

44 J Morgan, "Contracting for Self-Denial: On Enforcing 'No Oral Modification' Clauses" (2017) *Cambridge Law Journal* 589, 612.

45 A more favourable, and commercially sensible, view can be seen adopted by David Snyder who submits that NOM clauses should be enforceable except in circumstances where the party's language or conduct "induced the other party to change its position reasonably, materially, and in good faith", see D Snyder, "The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver and Estoppel" (1999) *Wisconsin Law Review* 607.

46 Binns (n.40) p.122; Morgan (n.44) p.612.

47 *Prime Sight Ltd v Lavarello* [2014] AC 436, [47].

only under the grounds of public policy, for example with respect to fraud, illegality, mistake or misrepresentation. In the absence of such contentions, commercial parties operate on the assumption that under English law their terms as read will be enforced in a commercially sensible manner. The law seeks to uphold parties' intentions as recorded in writing at the time the contract was formed, permitting only minimal and well-justified interventions to the contrary. The Supreme Court's ruling succeeds in satisfying these legitimate expectations.

III. The Position under New York Law

Having set out in detail the formation and current position of how English law approaches NOM clauses, it is illuminating to consider this relative to the position under New York law, as, after all, the Court of Appeal⁴⁸ and Supreme Court⁴⁹ relied heavily upon the principles and dictum expounded by Cardozo J when sitting in the New York Court of Appeals.⁵⁰ One will see that, on inspection, the law in New York regarding NOM clauses is similarly full of twists and turns as both the legislature and the courts have had to grapple with striking the right balance between contractual freedom and the level of formality necessary for modification. Whilst New York law reached its current position by means of a different route to that of English law, in practice there is much similarity between the substantive final positions of the two, albeit communicated through the guise of different language.

In brief, the current position under New York law can be summarised as follows. There exists a statute which *prima facie* makes NOM clauses enforceable. However, the courts have sought to create a number of carveouts by which variations can be made orally or by conduct, in circumstances where there has been (1) partial performance; (2) estoppel; or (3) where the modification has been fully executed. As a result, the position is that in cases where the evidence is sufficient to establish one of the above, a contract *can* be varied orally or by conduct. The means by which New York law reached this position provides insight into the application, scope and limitations of NOM clauses and gives pause to consider what is the most commercially sensible approach when dealing with the competing interests of flexibility and certainty.

A. *The starting point*

The starting point for the position under New York law can be found in the infamous, and oft cited, passage from Cardozo J in *Beatty v Guggenheim Exploration Co*,⁵¹

48 *MWB Business Exchange v Rock Advertising Ltd* (CA) (n.18).

49 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (SC) (n.1).

50 See <https://nycourts.gov/courts/structure.shtml>, for a diagram detailing the New York court structure (last visited April 2019).

51 225 NY 380 (1919).

which whilst quoted above from the English courts, for the purposes of refreshment establishes the following:

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. Every such agreement is ended by the new one which contradicts it. 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.

It can be seen when examining the development of New York law concerning NOM clauses that in reality the current position of New York law is not so far removed from Cardozo J's remarks made in 1919, and it can be said that the law is seen to be achieving the same outcome but by a more roundabout route, which reflects the tug of war between the legislature and the courts.

B. The General Obligations Law

Following Cardozo J's ruling, his judgment gained traction and the position in New York for some time became that irrespectively of a NOM clause contained in the parties' agreement, modifications could take place orally or by conduct. However, for reasons which are no doubt obvious, and which provided the catalyst for the UK Supreme Court's stance in *Rock*, those in commerce became frustrated that their carefully drafted clauses aimed at providing protection against modifications were seen by the courts as having no force. This precipitated the New York legislature in 1941 to pass the General Obligations Law (GOB), of which §15-301(1) reads:

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.

The provision remains in force to this day and has widely been viewed as rolling back the common law's stance established in *Beatty* with respect to the application of NOM clauses.⁵² The effect of the statute is that parties can now rely upon NOM clauses contained in their agreements and that all other variations (ie, those made orally and by conduct) will be deemed unenforceable.

However, whilst this was plainly the intention of the legislature, the reality under New York law is that the courts responded by developing a number of

⁵² See *Israel v Chabra* 12 NY 3d 158 (2009).

significant exceptions to the application of §15-301, with the result that in practice, the current position is not significantly different from prior to the statute's enactment. §15-301(1) has been consistently raised in almost all decisions concerning the modification of contracts containing NOM clauses for the past 50 years. If one seeks to modify a contract under New York law which contains such a clause, they can expect to be required to engage with §15-301(1) and the relevant jurisprudence carving out what are now seen as exceptions to the rule. Albeit one would not be criticised for thinking that §15-301 is in fact the exception to the rule that modifications made orally or by conduct will be deemed enforceable, such is the scope of the common law exceptions.⁵³

C. *The exceptions to §15-301*

When considering the exceptions to §15-301, one can see how the courts have striven to chart a position which gives credence to the GOB whilst retaining the position that variations made orally or by conduct are enforceable irrespective of the existence of such a clause. To achieve this, the courts have created three exceptions which in practice act as carveouts in respect to §15-301(1). The exceptions are that variations made orally or by conduct will be held to be effective where

- (1) there was partial performance of the variation;
- (2) where the party should be estopped from going back on an agreed variation;
and
- (3) where the variation has been executed.

The case which first established these exceptions to the GOB was *Rose v Spa Realty Association*,⁵⁴ heard by the New York Court of Appeals. The case concerned a claimant whose principal business was as a land developer. The claimant entered into a written agreement to purchase land from the defendant and the contract contained a term stating that it could not be modified other than by written agreement. Prior to the construction of the properties, the parties modified their agreement orally so that the number of buildings to be constructed on the first parcel of land was to be reduced from 150 to 96. The court held that the disputed modification was supported by evidence, namely that following the alleged modification the claimant applied for approval to build less units than had originally been stipulated in the contract, which was explainable only with reference to the parties' oral modification. The variation was upheld despite the application of §15-301(1). The court spent time

⁵³ Jonathan Morgan notes that statutory rules which impose contractual formalities "tend to become peppered with judicial exceptions" and that if the exceptions are wide ranging or complex enough "much of the point of having the formality requirement ... is lost"; see J Morgan, "Contracting for Self-denial" (n.44) pp.592–593.

⁵⁴ 42 NY 2d 338 (1977).

elaborating upon the ways in which a modification can be enforced despite the existence of the statutory provision.

(i) Partial performance

The first exception is that of partial performance, the rationale behind this carve-out is that by requiring partial performance, the scope for frivolous claims in which an unsupported allegation that the contract was modified is reduced. Evidence is needed to support the assertion in the form of an act. The court summarised its view on this exception in the following way:

Where there is partial performance of the oral modification sought to be enforced, the likelihood that false claims would go undetected is similarly diminished. Here, too, the court may consider not only past oral exchanges, but also the conduct of the parties. But only if the partial performance be unequivocally referable to the oral modification is the requirement of writing under §15-301 avoided.⁵⁵

However, the court did not wish to grant *carte blanche* scope to parties seeking to raise this exception, and therefore two further requirements were introduced which caveat the exception. The first is cited above and was reiterated when the court said “partial performance alone is not enough; the performance must be unequivocally referable to the oral agreement to modify”.⁵⁶ The second was explained by the court as follows: “Key is that [the] conduct was not otherwise compatible with the written agreement”.⁵⁷

Therefore, partial performance may be invoked to defeat an NOM clause in circumstances where a party can demonstrate performance and that such conduct is unequivocally relatable to the purported modification and is not otherwise compatible with the written agreement. By requiring these conditions, the court delineated a course in which only real, rather than fanciful or fictitious, modifications will be permitted despite the existence of a NOM clause and the statute, whilst frivolous assertions that an oral modification had been made, but without sufficient evidence in support, will rightly be excluded in line with the parties’ original intent.

(ii) Estoppel

The second exception which the court saw fit to carve out from §15-301 applies in instances where a party has induced some form of reliance as a result of the purported variation. In such circumstances, the party should be able to rely upon the variation as a matter of equity. The court explained their reasoning as follows:

⁵⁵ *Ibid.*, 344.

⁵⁶ *Ibid.*, 345.

⁵⁷ *Ibid.*, 346.

There is, however, another qualification to the mandates of §15-301. Analytically distinct from the doctrine of partial performance, there is the principle of equitable estoppel. Once a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute to bar proof of that oral modification.⁵⁸

With respect to the requirements that have to be met, the court ruled that “comparable to the requirement that partial performance be unequivocally referable to the oral modification, so, too, conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written”.⁵⁹ In *Core Services Group v Team Housing*,⁶⁰ the court held that a party asserting estoppel must demonstrate that their reliance upon the other party's conduct was reasonable (citing *Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*⁶¹ in support as authority).

Whilst the courts were clear that to establish estoppel to defeat §15-301 there must be reliance, they did not expand on what was meant by “significant and substantial” reliance. This grants first instance judges broad discretion to find that the test for estoppel has not been satisfied. Astutely, the court held that the conduct which forms the basis of the estoppel must be incompatible with the conduct expected under the contract. Were this not the case it would open the door to spurious claims based upon little more than the fulfilment of the parties' original agreement.

(iii) Executory contract

The third exception finds force in a technical reading of the statute, the court explained that §15-301 nullifies only “executory” oral modification and that accordingly “once executed, the oral modification may be proved”.⁶² That is to say that if one purports that the parties have modified their contract orally and suggests that the modification has been fully satisfied then the oral modification can be relied upon irrespective of the statute and the NOM clause found in the parties' agreement. For example, had the parties been engaged in the construction of a building and had agreed to modify their original contract in order to add an additional floor to the project, had the parties proceeded to complete building works on the additional floor in full then under New York law this would be sufficient to found an exception against the enforcement of a NOM clause contained in their agreement.

In explaining the rationale behind this exception, the court suggested that “when the oral agreement to modify has in fact been acted upon to completion,

⁵⁸ *Ibid.*, 344.

⁵⁹ *Ibid.*

⁶⁰ NY Slip Op 31634 (U) (2016).

⁶¹ 93 NY 2d 229 (1999).

⁶² *Rose v Spa Realty Association* (n.54), 343.

the same need to protect the integrity of the written agreement from false claims of modification does not arise".⁶³ However, the court was clear that anything less than a fully executed oral modification will not suffice, as the act — whilst indicating a potential modification of the contract — would fall within the purview of the statute with the effect that the NOM clause would be deemed effective.

A more astute way of reading the three exceptions is to envisage them as forming a spectrum of enactment, in which there are varying degrees where a party has moved forward on the basis of a variation said to have been made to their contract. The spectrum starts with estoppel, in which there does not have to have been actual performance of the variation *per se*, but merely reliance upon it. To return to the analogy of a contract for construction, making arrangements to secure funding for the financing of the materials needed for the variation would suffice, rather the purchase or use for construction of those materials. Next on the spectrum is partial performance in which a party had begun to act upon the basis of the purported variation, but had not fulfilled their modified obligations entirely. And at the end of the spectrum rests executed modifications, in which the party has relied upon the purported modification and carried out their part in full.

By separating out the varying degrees of enactment, the court has been able to create three separate and distinct, yet inextricably related, exceptions to the rule set down by the New York legislature in §15-301. The spectrum of exceptions covers a large manner of eventualities whilst limiting the scope for spurious claims in which a party purports that a modification has been made yet has no evidence of reliance or performance with which to prove it. This does however raise the difficulty in circumstances where party A and B agree orally to amend a contract and that amendment takes the form of party A either having to perform some act in a year's time or being released from an obligation of having to perform an act in a year's time. In both instances, it is plausible that there will be cases in which there will have been no reliance to the extent needed to found estoppel and no partial performance due to the obligation being due to be performed far in the future. Regrettably, it appears that these cases will fall within a narrow bracket in which contracting parties will have to accept the arguable injustice with which they find themselves and be bound by the terms of the NOM clause found in the agreement. Otherwise, the New York courts have sought to flex the limits of the common law by creating a wide-ranging and extensive set of carveouts to §15-301 which seek to strike a balance between contractual freedom and justice.

Going forward, there can be little doubt that the courts have succeeded in neutering §15-301 of its original force and intent. The court's judgment in *Rose* has formed the basis for parties to raise exceptions to §15-301(1) in almost all subsequent cases.

⁶³ *Ibid.*, 343.

D. A bump in the road

In 2009, the Court of Appeals handed down judgment in the case of *Israel v Chabra*⁶⁴ in which the court spent time considering §15-301 in detail.⁶⁵ The justices came down strongly in favour of the view that the legislative provision was enacted for good reasons and accordingly that where parties had included a NOM clause in their contract, it should be upheld. The court expressed its view on the importance of §15-301 by stating:

This legislative history reveals that, in drafting General Obligation Law §15-301(1), the Legislature did not intend to interfere with the ability of parties to craft specific contract terms governing their rights; if parties decided to include a “no oral modification” clause in their agreement, the statute is intended to facilitate its enforcement. Section 15-301(1) places this type of clause on the same footing as any other term in a contract.⁶⁶

The references made to the history of s.15-301 explains how the catalyst for the passing of the statute had been the court’s judgment in *Betty* and that the provision had been introduced to provide greater certainty to contracting parties that their agreements would be upheld. However, despite the resurgence in favour of the validity of NOM clauses in *Israel*, the Court of Appeals stopped short of abrogating the exceptions set down in *Rose* in 1977.

No detailed discussion of the exceptions discussed above was entered into in *Israel*, and as a result, the courts of New York have proceeded on the basis that *Rose* remains good law with the effect that the exceptions can still be relied upon. This position is likely correct on the basis that the court in *Israel* explicitly stated that “nothing in the history of the [General Obligations Law] suggests that the Legislature sought to abrogate other common-law rules related to the interpretation of contracts”,⁶⁷ to which the exceptions formulated by the court in *Rose* would undoubtedly be classified. The importance of *Israel*, however, cannot be overstated, as all subsequent cases concerning NOM clauses post 2009 have invariably cited *Israel* as authority for the argument that such clauses should be upheld on the basis that the judgment represents an unequivocal endorsement of the legislative goals sought to be achieved by §15-301.

⁶⁴ *Israel v Chabra* (n.52).

⁶⁵ The Court of Appeals was asked to consider a different point to the one addressed by this article, namely in circumstances where the second of two conflicting provisions in a guaranty requires that any modification be made in writing and signed by the parties, does §15-301 of the New York General Obligation Laws prevent the common law rules of contractual interpretation being used to determine which clause governs. However, the court chose to consider the application of §15-301 more broadly.

⁶⁶ *Israel v Chabra* (n.52), 167.

⁶⁷ *Ibid.*, 167.

E. *The exceptions post Israel*

On this basis, it therefore falls to consider the post-2009 authorities to determine whether the application of the exceptions set out in *Rose* have been affected by the pronouncements in favour of NOM clauses in *Israel* or whether in practice the exceptions have been eroded. A small number of examples will suffice as it swiftly becomes evident that New York's lower courts have not lost their appetite for the flexibility which the common law grants litigants seeking to avoid the effects of NOM clauses.

*Zysman v Medreal*⁶⁸ offers a prime example. The case was heard only two months after *Israel* and concerned a mortgage note with a provision barring oral modifications of its terms. The court cited both §15-301 and *Israel* in support that “where a contract contains a ‘no oral modification clause’ that clause will be enforceable”.⁶⁹ However, somewhat paradoxically, the court went on to caveat that statement by explaining that “nevertheless, an oral modification will be enforced where, inter alia, there is part performance that is actually performed and “unequivocally referable” to the alleged modification (see *Rose v Spa Realty Association*, *supra* see generally, *Sudit v Schapiro* 57 AD 3d 968; *L & W Supply Corp v ADF Drywall Inc* 55 AD 3d 1026)”.⁷⁰ The citation to *Rose* leaves no doubt that the exceptions continue to apply. The court proceeded to consider whether the contract was executory in nature and also whether consideration had been given for the purported oral variation, demonstrating that each of the exceptions continue to persist, despite *Israel* at the time being hot off the press.

The orthodox position concerning NOM clauses re-established its foundations in *Baraliu v Vinya Capital LP*⁷¹ which concerned whether an employment contract had been modified by way of an oral agreement. The court characterised the application of §15-301 *vis-à-vis* the exceptions as a form of equilibrium in which:

The party seeking to avoid the effect of [§15-301] ... can only do so by showing either partial performance or equitable estoppel Partial performance will allow avoidance of the Statute only if the performance is ‘unequivocally referable’ to the new contract Equitable estoppel applies if one party to the written contract has induced another’s significant and substantial reliance upon an oral modification, and if the conduct relied upon is not otherwise compatible with the agreement as written.

The key aspect of New York law is that, for either partial performance or equitable estoppel to apply and show an effective oral modification to the written contract, the conduct relied upon by the plaintiff to prove the

68 NY Slip OP 31186 (U) (2009).

69 *Ibid.*

70 *Ibid.*

71 *Baraliu v Vinya Capital LP* 765 F Supp 2d 289 (2011).

modification must be ‘not otherwise compatible with the agreement as written...’⁷²

An interesting example can be seen in *Nassau Beekman LLC v Ann/Nassau Realty LLC*⁷³ where the court considered whether an oral variation of a sale agreement was effective despite a NOM clause. As is expected, §15-301 was cited with approval as was *Rose*. However, interestingly, the court suggested that when seeking to rely upon the exceptions, if the performance undertaken by the plaintiff is also explainable as *preparatory steps* taken with a view towards consummation of an agreement in the future, then that performance is not “unequivocally referable” to the new contract.⁷⁴ This *dictum* originated in *Nassau* and was not drawn from precedent. Therefore, it could be argued that the court increased the threshold required in order to establish the exception. On the other hand, the court may have only intended for it to be an example of an instance in which partial performance was not unequivocally referable to the variation, as oppose to providing a gloss on establishing the exceptions. In any event, such *dictum* is to be welcomed as it provides further guidance to those seeking to substantiate their case that an oral variation is effective irrespective of a NOM clause and §15-301, as frequently parties are left wondering whether the facts of their case meet the somewhat opaque criterion for establishing the relevant exceptions.

To close, an admirably concise summary of the position of New York law after the back and forth between the courts and the legislature in *Beatty*, *Rose* and *Israel* can be found in *Gun Hill Road Service Station Inc v ExxonMobil Oil Corp.*⁷⁵ The court was tasked with examining an NOM clause, to which Judge Castel explained:

This provision is enforceable under NY Gen Oblig Law §15-301(1), which, abrogating the common law rule in New York, “places this type of clause on the same footing as any other term in a contract.” *Israel v Chabra* 12 NY 3d 158, 163, 167 (2009).

Under New York law, “[p]artial performance of an oral agreement to modify a written contract, if unequivocally referable to the modification, avoids the statutory requirement of a writing.” *Rose*, 42 NY 2d at 341.⁷⁶

It is clear, therefore, that the New York courts have once again been able to chart the path of least resistance, allowing §15-301, *Rose* and *Israel* to coexist in a complicated, albeit harmonious legal landscape in which NOM clauses are

⁷² *Ibid.*, 297–298.

⁷³ 105 AD 3d 33 (2013).

⁷⁴ *Ibid.*, 30–40.

⁷⁵ (United States District Court, SDNY, 1 February 2013).

⁷⁶ *Ibid.*, 9.

enforceable but only in a limited set of circumstances where partial performance, estoppel or complete execution has not taken place. Whilst only a handful of examples have been examined in depth above, one can find countless authorities in which the New York courts have applied this balance successfully to NOM clauses spanning the full range of commercial disputes following the ruling in *Israel*.⁷⁷

F. Bringing the strands together

Whilst efforts were made by the New York legislature to undo what had been done by Cardozo J with a view to providing legal certainty, on reflection, it has been largely unsuccessful. The exceptions established in *Rose* are wide ranging and, most importantly, continue unencumbered post the Court of Appeals' judgment in *Israel*. The end result is that the current position under New York law is not far removed from the position in 1919.

In practice, if parties wish to rely upon a purported variation, they will need to supplement their claim with evidence to substantiate their actions. Such evidence would undoubtedly manifest itself in one of the ways set out in *Rose*. Parties will seek to establish the modification by demonstrating partial or full performance of what was agreed or that they relied upon the modification and subsequently acted upon it, ie, providing the court with evidence of conduct or documents which point to the modifications having been agreed. Therefore, what are termed as exceptions are in fact simply manifestations of the ways in which parties to a contract would go about evidencing a purported variation. This would have been the case prior to §15-301 under the original common law position, the only difference being that the evidence would not have been shoehorned through the language of "exceptions" to a rule. If a party alleging that a contract containing a NOM clause has been modified cannot produce evidence establishing reliance or performance, then it is highly unlikely that the disputed variation would have been upheld in any event.

The only distinction which exists between the current position under New York law and how clauses were treated when *Beatty* was law is that *Beatty* covered a slightly wider purview. If two contracting parties had agreed to modify a contract but later one reneged upon the modification, but there existed a chain of correspondence between the parties in which they discussed the modification but one party had failed to rely upon it or had failed to implement it, then under *Beatty*

⁷⁷ See by way of further example: (1) *Eujoy Realty Corp v Van Wagner Communications LLC* 22 NY 3d 413 (2013); (2) *Stafftopia Inc v Prometheus Global Media* NY Slip Op 32608 (U) (2016); (3) *Academy Orthotic v Healthfirst Inc* NY Slip Op 31410 (U) (2016); (4) *Obsessive Compulsive Cosmetics v Sephora USA Inc* NY Slip Op 51295 (U) (2016); (5) *18 Associates LLC v Court Street Pizza* NY Slip Op 51222 (U) (2017); (6) *RSSM CPA v Bell* NY Slip Op 30020 (U) (2017); (7) *Franpearl LLC v Orenstein* NY Slip Op 50429 9U) (2018); (8) *Abramowitz v Lefkowitz* NY Slip Op 02589 (2018); and (9) *Microbank v Inspired MD Inc* No 16 CV 3860 LTS (2018).

such a modification could still have been found to be effective as NOM clauses had been rid of all contractual force. However, under the current regime, this scenario falls within a narrow set of circumstances where the aggrieved party would not find redress, as they had failed to take action upon the basis of the modification and thus their claim would fail to satisfy the exceptions. However, the number of cases in which the modification is of such magnitude that the parties are willing to litigate the matter and where there has been no reliance or performance are likely to be rare. It is more likely that any modification of such importance that it warranted litigating would have been acted upon to the other party's detriment. Therefore, the current position under New York law offers in practice almost precisely the same level of protection and flexibility found in *Beatty*. For these reasons, it can be said that, despite attempts by the Court of Appeals in *Israel*, the common law has succeeded in emasculating §15-301 of its intended effects. Parties under New York law continue to enjoy strong prospects of success that modifications made orally or by conduct, subject to the circumstances of the case, will be upheld.

IV. Conclusion

As it stands, the laws of England and New York are not vastly different to one another in their practical application to NOM clauses, albeit that they arrived at this position via eminently different courses. English law underwent a period of turbulence in which the lower appellate courts struggled to strike the right balance between contractual certainty and the flexibility to serve justice when needed. Only in 2018, when the Supreme Court — by way of Lord Sumption — was granted the opportunity to redress the balance was a commercially sensible and doctrinally coherent position reached. In contrast, New York law, although having a shorter lineage, saw to lead the way with respect to NOM clauses. Cardozo J's *dicta* played a formative role in the development of both jurisdictions' approaches to this area of contracts. However, in New York, the legislature was sensitive to the problems raised by the Supreme Court in *Rock*, albeit almost 80 years earlier, and sought to confront them by overriding the decision in *Beatty* and passing a law which championed NOM clauses. However, as is so often the case, legislation proved to be too heavy handed for what is ultimately a nuanced problem of private obligations in striking a balance between two meritorious but competing interests. The courts of New York stepped in to qualify the statute, permitting oral modification of contracts irrespective of NOM clauses in a wide array of circumstances, permitting the statute to bar only the most frivolous claims which fail to be supported by evidence.

English law took heed of this and we now find ourselves in the position where in both England and New York, NOM clauses operate under the general rule that they will be enforceable subject to the equitable remedy of estoppel, providing an

exception to the rule in circumstances where adherence would result in injustice. The key distinction, of course, is that the exceptions under New York law are exceptionally broad, to the point where the rule that NOM clauses are enforceable has in fact become the exception. In contrast, Lord Sumption envisaged proceeding on the basis that only occasionally, when it was truly warranted, would the courts exercise their discretion to permit estoppel to intervene. The Supreme Court did not wish to create a wholly analogous situation to that in New York in which the common law has all but eroded the contractual autonomy and binding agreements of parties. On balance, it is considered that the English law position set down in *Rock* is to be viewed as preferable. However, time is needed to examine whether the Supreme Court's intentions will find form in the decisions of the lower courts or whether estoppel will become merely the new language in English law to permit oral modification of contracts irrespective of the recorded intentions of the parties.