CONTRACTING FOR SELF-DENIAL: ON ENFORCING “NO ORAL MODIFICATION” CLAUSES

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ABSTRACT. “No oral modification” (NOM) clauses should be enforced in English law. Parties should be permitted to impose formality requirements upon themselves. Entire agreement clauses are (rightly) enforced and this provides a compelling parallel. The reasoning of two Court of Appeal decisions holding NOM clauses unenforceable is critically analysed. The extent to which NOM clauses should be defeasible by estoppel and unfair terms legislation is considered.

KEYWORDS: contract, formalities, no oral modification clauses, entire agreement clauses.

I. INTRODUCTION

“No oral modification” (NOM) clauses should be enforceable, contrary to the current weight of English authority. Were the argument accepted, then for a contract containing a term such as “No variation of this Agreement shall be valid or effective unless made by one or more instruments in writing signed by the parties to this Agreement”, any purported variation, other than one in signed writing, would be ineffective to modify the contract’s terms.

This article begins by setting out the basic case for upholding such “NOM” clauses. Respect for party autonomy favours their enforcement (and thus invalidation of subsequent informal contract variations). Yet a dilemma exists that logic alone cannot resolve. Appealing to the will of the parties gets us only so far with this particular problem – even less far than it usually does. For at which point in time and in what format is the parties’ shifting expression of intention to prevail?

The dilemma is the ancient one facing a member of Odysseus’s crew who, having tied his captain to the mast of the ship before sailing past the Sirens’ island, realised that Odysseus now urgently wished to be untied.1 Should the loyal sailor obey Odysseus’s initial command not to

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1 Perhaps through a combination of lip-reading and body-language sensitivity, for the sailors’ ears were stopped with beeswax against the Sirens’ songs.
untie him, or his later-expressed wish to be released? Just as Odysseus had excellent reason for wishing to limit his later freedom of action (and called on his crew to enforce the restraint against him), so contracting parties may sensibly wish to limit their later freedom and insert a term requiring the court to enforce that restraint.

The contract lawyer’s dilemma should be resolved in Homeric fashion – contracting parties should be empowered to give up their freedom to make informal variations of their contract, and the courts should enforce their abjuration. While the imposition of formality requirements by law is always controversial (i.e. reasonable lawyers disagree over its wisdom), the controversy subsides when contracting parties decide to tie their own hands. Also, it would be inconsistent not to enforce NOM clauses given the enforcement of party-endorsed formality rules in other areas of the law of contract – in particular of “entire agreement clauses” giving exclusive force to contractual documents.

These arguments suggest that the Court of Appeal erred in failing to enforce NOM clauses in *Globe Motors Inc. v TRW LucasVarity Electric Steering Ltd.* and *MWB Business Exchange Centres Ltd. v Rock Advertising Ltd.* The Supreme Court should overrule those decisions at the earliest opportunity. If the Court of Appeal’s liberal (not to say abolitionist) stance towards the consideration doctrine in *MWB v Rock Advertising* finds favour in the Supreme Court, it will be even more desirable to uphold the NOM clause. As the law liberalises its rules on modification of contracts, parties should be empowered to substitute restrictions of their own. We finally consider the limits within which NOM clauses ought to be defeasible, should the main argument about their enforcement be accepted.

II. Why “NOM” Clauses Should be Enforced: Formality and Party Choice

Various sensible commercial reasons might justify the inclusion of a NOM clause. Parties choosing to do so must be taken to accept that, on balance, the positive benefits of enforcing only formally expressed contract modifications outweigh the (undoubted) costs. This informed choice should be respected, and the NOM clause enforced. The fact that English law does not usually require formalities for contract modification is beside the point. That may well be the sensible rule for most contracts. But if some parties wish to depart from contract law’s default position and make

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2 A considerably harder question – not addressed here – is whether parties could contract for an entirely unmodifiable contract, i.e. contracting out of the power to vary altogether and not merely requiring variations to be in writing.


modification more onerous, they have sufficiently demonstrated the unsuitability of the law’s general approach for their particular situation.

A. Statutory Formality Rules

It is notorious that formality requirements have costs as well as benefits, wherever they appear in the law. As well as protection against fraud (given the difficulty of forging documents and signatures), eponymous in the Statute of Frauds 1677, other functions may readily be suggested. Lon Fuller’s classic analysis indentified formality’s “evidential”, “cautionary” and “channelling” functions.\(^5\) Respectively, written agreements provide clear evidence of a contract having been made (and its terms). Secondly, the need to sign, seal or fulfil some other formal step can serve as “an excellent device for inducing the circumspective frame of mind”, and thereby caution against rash agreements. Thirdly, the availability of a formal “channel” offers ready means for parties to signal their intention to be legally bound (i.e. by going to the trouble of heading down the formal route): “[a formality requirement] offers channels for the legally effective expression of intention.” Fuller’s analysis does not exhaust the possibilities.\(^6\) One well-known reason for the universal employment of written contracts by business organisations is the maintenance of internal control and corporate standardisation: an individual sales representative or customer services adviser is deprived of power to agree terms differing from the standard terms of business.

Of course, these benefits are not incontrovertible. Some unwritten agreements are nonetheless exceptionally well evidenced; sophisticated parties have no need of paternalistic “cautioning” (which can only work by deliberately making it harder to enter into contracts, which increases transaction costs);\(^7\) furthermore, in commerce it is correctly and weightily presumed that businesses always intend their agreements to be legally enforceable, so a “channel for the legally effective expression of intention” appears redundant;\(^8\) and sometimes it might be commercially advantageous to permit sales persons to vary terms for a valued customer without obtaining prior clearance from senior management or the firm’s legal advisers. Nor, pace Fuller, do formality rules inevitably promote all its beneficial functions simultaneously.\(^9\)

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\(^5\) L.L. Fuller, “Consideration and Form” (1941) 41 Columbia L.R. 799.


\(^7\) See e.g. Actionstrength Ltd. v International Glass Engineering [2003] UKHL 17; [2003] 2 A.C. 541, at [6], per Lord Bingham of Cornhill.

\(^8\) See e.g. Edwards v Skyeways Ltd. [1964] 1 W.L.R. 349. Fuller recognised this, noting that the “channelling” function “has no place where men’s activities are already divided into definite, clear-cut business categories”.

Against these uncertain benefits for a formality regime must be placed its significant and undeniable costs. Formalities defeat party intention. They invalidate contracts (or, with NOM clauses, contract variations) that would otherwise be enforceable because the parties’ intention to contract could be proven according to the usual rules, albeit that they were informally expressed. This intention-defeating function of formality rules is their whole point, not an incidental and avoidable side-effect. So when a formality requirement is imposed, a judgment needs to be made on whether its intention-defeating cost is one worth paying.

However absolute a formality rule might seem, courts usually succumb to the temptation to create exceptions to it. Carol Rose identifies an unbreakable cycle whereby crystalline rules are muddied by qualifications. The frequent end result may be “uncertain certainty”, as F.A. Mann put it in another context. Joseph Perillo argues that the typically “highly creative” judicial approach brings the law into disrepute, when the (supposedly exceptional) meritorious case is distinguishable from the “ordinary” case only by “tortuous logic devoid of common sense or policy content”. To the extent that formality rules attempt to provide clarity (e.g. by precluding allegations of oral warranties or modifications), to overlay them with qualifications detracts from that clarity. If the exceptions are wide-ranging enough, or complex enough, much of the point of having the formality requirement in the first place is lost.

The problem has on rare occasions been recognised by the courts. The Statute of Frauds has for centuries been reviled, or even mocked. Yet Lord Kenyon C.J. (unusually thinking it “very beneficial”): “lament[ed] extremely that exceptions were ever introduced in construing the Statute of Frauds; ... if the Courts had at first abided by the strict letter of the Act it would have prevented a multitude of suits that have since been brought.” Much more frequently though, courts “do justice” by recognising merits-based exceptions, despite non-compliance with statutory formality rules.

For a legislator, formality requirements therefore pose an intractable problem. In practice it is probably unknowable whether, for the great run of parties to be affected by a formality provision, the benefits outlined

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10 N.B. the “usual rules” firmly exclude evidence of what the parties actually (“subjectively”) thought they meant, e.g. Sherrington v Berwin Leighton Paisner [2006] EWCA Civ 1319, at [5]–[6], per Lloyd L.J. Formality rules merely carry further the orthodox requirement for external objective evidence of intention.


15 Chater v Beckett (1797) 7 Term Rep. 201, 204.

16 See Perillo, “The Statute of Frauds”, p. 74, on the courts’ “ingenious and creative, but often erratic and undependable, means of escaping an exaggerated statutory penalty” (i.e. voidness under the Statute of Frauds).
above outweigh the cost of defeating party intentions. (That such statutory rules tend to become peppered with judicial exceptions only adds to the indeterminacy of the legislator’s task.) To be clear, this is not an argument for repeal of all statutory form rules.\textsuperscript{17} They certainly could, on balance, do more good than harm. But we do not know and have no practical way of knowing. Not surprisingly, the introduction, reform and repeal of statutory formality requirements often divides legal opinion at the highest levels.\textsuperscript{18} The great likelihood is that the optimal solution varies from situation to situation, and from party to party. That poses an insoluble difficulty for the legislature, which must lay down general rules. Even provisions that strike a delicate balance are by no means assured of success.\textsuperscript{19}

\textbf{B. Self-Imposed Formalities}

Yet these difficulties fall away when the parties agree to impose formality requirements upon themselves.\textsuperscript{20} A NOM clause is but one example. If contracting parties have judged that, on balance, such a formality best serves their interests, how is the court justified in ignoring their assessment? NOM clauses are (it appears) widely used in practice. For courts to hold such clauses ineffective implies that many commercial parties, and their legal advisers, do not understand their own business and their own interests. It would ignore – or dismiss – professional opinion.

In \textit{Boilerplate: Practical Clauses}, Richard Christou explains NOM clauses’ use and rationale.\textsuperscript{21} On the “procedural” aspect of contract variation he writes that it is “important that any such changes are made in a disciplined way, that proper consideration as to whether they should be made is given by duly authorised persons and that a proper record of all variations is kept. Variations should not be made informally, or as it were by accident”.\textsuperscript{22}

Christou lists boilerplate NOM clauses offering “proper safeguards against inadvertent changes”.\textsuperscript{23} A further advantage of requiring reduction to writing is the “planning” or “clarifying” effect: it requires the variation to be spelled out in detail, flushing out any hidden disagreements to be

\textsuperscript{17} Well-known survivals include Statute of Frauds 1677, s. 4 (guarantees); Wills Act 1837; Law of Property Act 1925, s. 53 (creation of interests etc in land); Law of Property (Miscellaneous Provisions) Act 1989, s. 2 (contracts for sale of land).

\textsuperscript{18} The repeal of the Statute of Frauds 1677, s. 4 was recommended by a majority of the Law Reform Committee in 1937 (Cmd. 5449), but subsequently its retention in amended form was recommended by the Committee’s 1953 Report (Cmd. 8809) and implemented by Law Reform (Enforcement of Contracts) Act 1954.

\textsuperscript{19} See e.g. for criticism of s. 2–202, Uniform Commercial Code (US), R.A. Hillman, “How to Create a Commercial Calamity” (2007) 68 Ohio St.L.J. 335.


\textsuperscript{22} Ibid., at para. 10–072.

\textsuperscript{23} Ibid., at paras. 10–077 to 10–079.
It is clearly desirable that variations to a detailed written contract (which is where NOM clauses are found) should be specified with similar precision. Thus there are many functional advantages that a NOM clause could bring to a commercial relationship.

One possible reason for the demand in practice is as a party-agreed substitute for the doctrine of consideration. This is not the place for detailed analysis of the well-known developments. Suffice it to say that through promissory estoppel, and “practical benefit consideration”, the common law rules against “gratuitous modification” have been relaxed by the courts over recent decades. Interestingly, historical attempts to reform or abolish consideration have envisaged formalities as the alternative badge of enforceability. This appealed to the Court of King’s Bench under Lord Mansfield C.J. In *Pillans v Van Mierop*, Lord Mansfield held that consideration was not required for promises in writing (in commercial cases, at least). Wilmot J. explained the rationale in detail: he said that writing had been requisite (in Roman law) “in order to put people upon attention and reflection, and to prevent obscurity and uncertainty … Therefore it was intended as a guard against rash inconsiderate declarations”.

Notwithstanding the commercial utility of the *Pillans* decision, its reasoning did not accurately reflect English law (which treats deeds, and not (all) writing, as a separate category of contracts) and it was overruled. Yet in 1937, the Law Revision Committee echoed Lord Mansfield, calling for the enforcement of seriously intended written promises, even when they lacked consideration. Its Report has not been implemented. Perhaps many lawyers agreed with Hamson’s contemporaneous objection that informal writing may be as casual as conversation – and that few laymen take as much care when signing a letter as sealing a deed. Still, the point remains that would-be reformers have not usually gone so far as to demand the outright abolition of the doctrine of consideration. Some other restriction on legally binding promises has been felt necessary. Writing has been suggested as the alternative. And if the common law is now moving away

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25 N.B. that *MWB Business Exchange Centres Ltd.* [2016] EWCA Civ 553; [2017] Q.B. 604 was another bold relaxation of consideration (as well as holding NOM clauses unenforceable).
26 *Pillans v Van Mierop* (1765) 3 Burrow 1663.
27 Ibid., at p. 1670.
28 *Rann v Hughes* (1778) 4 Bro. P.C. 27.
29 Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration) (Cmd. 5449) (1937), at [29]–[30].
31 The L.R.C. of 1937 (Cmd. 5449) seemed keen to do this in principle, but decided (at [27]) that “abolition root and branch … would almost certainly abolish suspicion and hostility”. Notably, one of the “inconvenient” sub-doctrines to be “pruned away” was the “existing duty” rule for modifications, at [33]–[36].
from consideration as a requirement for enforceable modifications, the NOM clause could be a response to this permissive attitude.

Judge Richard Posner has linked the enforceability of NOM clauses with the decline of consideration in US law.\(^\text{32}\) As he notes, the Uniform Commercial Code, s. 2–209(1) abolished the common law requirement of consideration for contract modifications. Instead the Code looks to duress and bad faith to protect against opportunistic attempts at modification. But in a further departure from common law, s. 2–209(2) permits parties to exclude oral modifications. Judge Posner rationalises this provision as “reinforcement” of duress, and “a substitute for the cautionary and evidentiary function” of the consideration doctrine. However, Judge Frank Easterbrook denied (in dissent) that the permissive reform on NOM clauses was concerned mainly with opportunism: “A person who has his contracting partner over a barrel, and therefore is able to obtain a concession, can get the concession in writing. The writing will be the least of his worries.” Instead, although it could have some utility against the “careless opportunist”, the “principal function [of a NOM clause] is to make it easier for businesses to protect their agreement against casual subsequent remarks and manufactured assertions of alteration”.\(^\text{33}\) Whatever the rationale for the inclusion of NOM clauses in contracts, the American reforms’ inclusion in adjacent subsections of the Uniform Commercial Code shows a connection between the relaxation of consideration and the enforcement of NOM clauses.

In short, given the widespread use of NOM clauses in commercial drafting and the perfectly sensible explanations for that popularity, they should be given effect. There is no inconsistency with the common law’s general absence of formality requirements. The courts usually try to avoid “astonishing the Temple and surprising St Mary Axe”.\(^\text{34}\) Yet refusing to enforce NOM clauses is a flagrant disappointment of reasonable commercial expectations. It is also out of line with international contract law instruments such as Unidroit.\(^\text{35}\) No sufficiently strong reason exists to justify it. On the contrary, since commercial parties are taken to mean what they say and are held to it, there can be no basis for suggesting that they cannot really have intended to prohibit informal modifications. Moreover, analogous areas of law suggest that NOM clauses should be enforced.

**III. ANALOGOUS PARTY-AGREED FORMALITIES**

This section establishes that entire agreement clauses are rightly enforced according to their plain meaning. By contrast, making the outcome of negotiations conditional on a signed contract is not watertight; yet even here the starting point is to permit parties to impose formality requirements upon
themselves. Taken together, the law in these two areas indicates that prohibitions on informal modification should also be enforceable.

A. Entire Agreement Clauses

1. Enforcement and Rationale

It is extremely common for commercial contracts to contain a clause such as the following: “This Agreement sets out the entire agreement and understanding between the parties, and supersedes all proposals and prior agreements, arrangements and understandings between the parties, relating to its subject matter.”

Such “entire agreement” clauses (here “EACs”) are routinely enforced by the courts. An EAC prevents either party from raising anything “outside the four corners” of the document as forming part of the contract between them. This deprives (for example) a collateral warranty of the contractual effect that it would otherwise have enjoyed. Although one case has upheld a collateral contract in such circumstances, Gray J.’s decision has been extrajudicially criticised by Lewison L.J. as one that “undermines the general purpose of an entire agreement clause”, a criticism endorsed by Gloster L.J. The dubious exception proves the rule.

Why are EACs so commonly used? In a much-cited passage, Lightman J. said:

The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search.

David McLauchlan criticises these remarks (or their popularity) for promising the enforcement of EACs on “the most extreme scenario”. Such opportunistic attempts to raise collateral terms are no doubt deplorable. But an EAC’s virtue is less clear, suggests Professor McLauchlan, when parties have extensively discussed (and settled) a matter which is later omitted from the written agreement.

However, Lightman J.’s concerns about strategic behaviour do not exhaust the rationales for EACs. Catherine Mitchell suggests a number

36 Dubai Islamic Bank v PSI Energy Holding Co. [2013] EWHC 3781 (Comm), at [32], per Flaux J.
37 Ryanair Ltd. v SR Technics Ireland Ltd. [2007] EWHC 3089 (QB).
39 Mileform Ltd. v Interserve Security Ltd. [2013] EWHC 3386 (QB), at [104]-[105].
40 Inntrepreneur v East Crown Ltd. [2000] 2 Lloyd’s Rep. 611, at [7].
42 For another example of opportunism, however, see text to nn.48–49 below.
of other plausible explanations. The aim of an EAC is to simplify the task before the court. There can be no real controversy about a contract’s content when it includes an enforceable EAC. This compares favourably with the difficulty in trying to piece together the implicit (or oral) dimension of a bargain that has only partly been reduced to writing. “A court’s conclusions on the social context of a commercial agreement may be impressionistic at best”. It is no doubt difficult (costly in time and money) to embody an agreement exhaustively and exclusively in a document. But parties may decide that the “up front” drafting expense is justified by costs saved at the “back end”, should there be a dispute. An EAC is a formal device, but “formalism” is not necessarily a term of abuse. Formal approaches are rationally designed to remove discretionary power from decision-makers.

EACs also deliberately revive the “parol evidence rule”. Both that rule, and its resurrection, are controversial. Much the better view of the common law “rule” is that it is no more than a sensible presumption that a contractual document forms the exclusive source of the parties’ rights and duties; that presumption will be rebutted by proof that the parties intended collateral material to form part of their contract. It follows that (in the absence of an EAC) difficult evidential disputes may cloud the question of the contractual document’s exclusive force.

A major perceived advantage is that EACs “provide a degree of certainty” on that question: the parties’ express stipulation that the document is to form the entirety of the contract “dispense[s] with any need to search for an implied or inferred intention to integrate the bargain” (such implied intention being the basis for the parol evidence “rule”). In other words, parties who prefer a crisp rule of exclusivity will expressly provide for it in their contracts. Such parties might share Lord Hobhouse’s belief that the parol evidence rule provided vital commercial certainty (and lament the laxity with which the “rule” has now been watered down). If the common law has (for perfectly understandable reasons) replaced strict rule with rebuttable presumption, it is equally understandable that some parties may try to contract out of the new law, and to reinstate the old approach with all its rigours. Obviously there are costs in doing so (an EAC will defeat “real intentions” regarding collateral terms). But equally, there are costs (evidential difficulties) in the absence of a clear parol evidence rule.

It is hard to say categorically which approach must be superior. The common law has to have a rule one way or another. It has settled on a flexible (defeasible-presumption) approach. But one size does not fit all. Should parties who prefer formalism not be permitted to contract into a strict parol evidence regime? As Longmore L.J. says, “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”.47 (The context for that dictum was a contract for the sale of land. It is “highly undesirable to have any scope for argument whether the written terms of a contract for sale of land do, in fact, constitute the entire contract”,”48 for the statutory requirement that such contracts be in signed writing is “not intended to be a charter for those wishing to disown apparent contracts for the sale of property to go behind the document and search for statements made in pre-contract negotiations, then to claim that they were intended to be terms of the contract and thus bring the whole contractual edifice crashing to the ground”.49 An EAC wisely precludes such chicanery.)

Thus a number of reasons justify the wide usage of EACs. Documentary exclusivity simplifies the evidential inquiry, promotes certainty and hampers certain forms of opportunism. When the common law equivalent (the parol evidence “rule”) has shrivelled into a presumptive starting point, some contracting parties have reacted by stipulating expressly for a stricter approach (believing this better suited to their commercial relationship). The courts have not hesitated to enforce such EACs. The simple basis for enforcement is (as with any other contract term) party autonomy – freedom of contract.50

All of this supports the enforcement of “NOM” clauses too. In each species of clause, the parties expressly stipulate that informal agreements should be unenforceable (whether made collaterally at the outset, or concerning subsequent variation). This consciously departs from the common law. Ordinarily, just as the parol evidence “rule” is actually just a rebuttable presumption, there is no common law requirement for modifications to be in signed writing. But that provides no good reason to ignore the parties’ determination that a stricter requirement better suits their situation. There are perfectly rational arguments to justify such a choice. The common law rules are defensible, and (no doubt) often appropriate. It would be overreach, however, to believe that they embody the only defensible approach to every contractual relationship.

50 EACs have mostly avoided analysis as a “contractual estoppel” (which does not appear to be a true “estoppel” at all): see K.C.F. Loi, “Contractual Estoppel and Non-Reliance Clauses” [2015] L.M.C.L.Q. 346, at 359.
2. Criticism of Entire Agreement Clauses

The law on EACs is clear. The courts simply enforce them, thereby "denud[ing] what would otherwise constitute a collateral warranty of legal effect". However, this clear law has attracted fierce criticism. This falls under two broad headings. First, the elevation of contractual documents into the exhaustive source of obligations ("documentary fundamentalism") is criticised as an unacceptable divergence from the reality of contracting practice. Secondly, it is said to be "illogical" to give exclusive status to a document containing a NOM clause when the common law has correctly refused to take the same approach, by downgrading the parol evidence rule.

Professor McMeel accepts that one of the strengths of English commercial law is the careful attention paid to contractual documents. But he argues that respect for written contracts has been carried to damaging excess. His critique (which goes beyond EACs) is that:

[Those] engaged in negotiating and drafting commercial contracts have had increasing resort to a suite of standard clauses – entire agreement, non-reliance and no representation clauses – which are intended to protect the integrity of the written instrument and, as far as possible, insulate it from [challenge]. . . . [F]rom 1980 to 2005, the judges, while sympathetic to the parties’ efforts, realistically accepted that the document could never be entirely shielded from events in the real world. Only [since 2006] have the judges preferred the virtual reality of the boilerplate clauses to the more complicated reality of commercial negotiations.

He is not alone in criticising the disjunction between the tightly defined realm of the contractual documents and the messy reality of commercial relationships. Stewart Macaulay has influentially argued that contract law is of limited relevance to commercial practice. In particular, Professor Macaulay contrasts the parties’ “real deal” with the mere “paper deal” in the written contract. By excessive focus on the “paper deal”, the implicit, relational dimensions of the “real deal” are entirely neglected. The solution should be to locate contracts squarely within their broader commercial context. To advocates of such a contextual approach, an EAC must “appear horribly old-fashioned”.

51 Inntrepreneur [2000] 2 Lloyd’s Rep. 611, at [7].
58 Mitchell, “Entire Agreement Clauses”.
A narrower, sharper thrust against EACs’ unreality is made by Professor McLauchlan. He argues that EACs make a factual claim (that the document embodies the whole contract); but that where the parties did not in fact intend such “integration”, all evidence considered, the EAC’s statement of fact is proved false.59

Both charges of “unreality” can be countered. First, there is sociological evidence that in some sectors of commerce at least, actors expect that contracts will be negotiated, performed and enforced in a strict and formal way.60 In Hugh Collins’ aphorism, there are cases “where the context tells the judge not to look at the context”.61 Sometimes commercial practice still, then, approves “old-fashioned” formalism. In such cases the courts should retain their accustomed formal approach. That would mean enforcing EAC (and NOM) clauses to their letter.

There is no self-contradiction in the empirical evidence. Commercial expectations sometimes reflect traditional English contract formalism. On other occasions, a flexible, co-operative approach prevails in practice. How is contract law to cater for these different expectations? One possibility might be to tailor the law to particular parties’ (or perhaps particular commercial sectors’) values and norms. Obviously however, the practical difficulties for the courts would be immense.62 Yet for the common law to plump unswervingly either for strict formalism, or (after a radical transformation) for flexible “relationalism”, would thwart the expectations of many contracting parties, whichever way the choice is made.

This concern drives Professor McMeel’s critique. He accepts that sophisticated commercial parties might genuinely wish to have a purely documentary contract. But he worries that “endemic” EAC (and related) clauses do not reflect the expectations of smaller, less sophisticated commercial parties (on whom such clauses might be imposed by larger organisations’ standard terms). In short, he suggests, “The bond dealer must not be allowed to reconfigure commercial contract law for the wider commercial community, car dealers and all”.63

Party choice offers a way through the dilemma.64 To the extent that the common law is formalist, it should nevertheless welcome parties who

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63 McMeel, “Documentary Fundamentalism”, p. 207.
64 Mitchell, “Entire Agreement Clauses”. 
contract for a quite different approach. For instance, as is notorious, English law generally avoids imposing duties of good faith on negotiating or contracting parties. But when the parties expressly assume duties of good faith through a contractual term, the court should (notwithstanding the common law’s stance) take them at their word and give effect to it. Conversely, to the extent that the common law adopts more relaxed rules, parties that opt for strict formalism should have that choice respected too. As already suggested, EACs may be a considered formalist reaction to the relaxation of the parol evidence “rule”. As Dr. Mitchell concludes: “The courts’ job . . . is to offer the kind of support that the parties have signalled that they want, whether contextual or formal. An EAC may be an important signal of the latter.”

There remains Professor McMeel’s objection that parties might not truly have intended that the written contract be their entire agreement when the EAC is buried in (“virtual reality”) “boilerplate” standard clauses, as is increasingly often the case. However, this very ubiquity of the EAC in drafting practice “reflects the general commercial understanding that a negotiated document is executed with the object of crystallising the bargain”. Moore-Bick L.J. has been “unable to accept” the suggestion that an EAC’s “significance is diminished” because it is contained in boilerplate rather than being individually negotiated. This leads into a wider debate still – whether a party is necessarily bound by all the terms in a contract that it has signed, irrespective of whether it has read them (even when the proposing party knows there are terms to which it may well not have consented). Despite distinguished commentators’ suggestions that the “objective mistake about terms” principle should apply with undiminished force to signed documents, a signature remains conclusive evidence of assent in English law. The signature is such a commercially convenient device for obtaining (and signifying) binding agreement that its power is taken to great (perhaps unrealistic) lengths. Even in cases where the signing party actually did not read the contract, they are deemed to assent to all its terms. English law prefers formalist convenience over messy reality here too.

This suggests the answer to Professor McLauchlan’s argument that an EAC should be challengeable as a “false statement of fact” when the parties did not in fact intend the document to exhaust their mutual obligations (for

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65 Ibid.
66 Ibid.
67 “Entire Agreement”.
70 Ibid.
example when the EAC was “part of the boilerplate that neither party noticed and the actual position may be that an undertaking not included in the written agreement was given and was intended to be legally binding”).

However, English law tolerates such factually false declarations. The impregnable “agreement” by signature is one example – and indeed an “important principle of English law which underpins the whole of commercial life”. Further, there is direct authority that contracting parties may agree a factual basis for their contract which departs from reality; they will not be able to depart from the agreed basis (to assert the truth!) later on:

Parties are ordinarily free to contract on whatever terms they choose and the court’s role is to enforce them. … [T]here is nothing inherently contrary to public policy in parties agreeing to contract on the basis that certain facts are to be treated as established for the purposes of their transaction, although they know the facts to be otherwise.

Given this clear judicial acceptance of binding counter-factual statements (often, although quite inaccurately, referred to as “contractual estoppel”), Professor McLauchlan’s objection to the fictitious nature of the EAC appears unpersuasive.

The paternalist will object that even if such make-believe is tolerable between “sophisticated commercial parties”, using contractual language “retrospectively to alter the character and effect of what has gone before” is questionable in dealings with “the man in the street”. But English law sees itself as addressed primarily “the big fish” – the generality of contract law is tailored to sophisticated commercial parties, with specific protection – for example unfair terms legislation or unconscionability – for vulnerable contractors. The characteristic stance is a highly permissive one, subject to such statutory (or other) regulation. Janet O’Sullivan has suggested that it be applied to NOM clauses too.

Yet another objection to EACs is that it is “illogical” to enforce these while accepting that at common law, the parol evidence “rule” can never be absolute (because the “rule’s” basic proposition – that the parties intended the document to be the sole source of mutual obligations – is always liable to be contradicted by their actual intentions to the contrary). With respect, non sequitur. It is correct that the parol evidence “rule” cannot be absolute because the party “intentions” that it embodies are only inferred; such hypothetical “intentions” are necessarily vulnerable to

contradiction by evidence of actual, differing intentions. However, when an EAC is present the parties’ own agreement supplies direct evidence of their intention that the document be an exhaustive record. There can be no question of “party intentions” being used to rebut the EAC – for it already expresses their intentions. Since English law holds that parties agree to all signed written terms, there is no room for an EAC to be contradicted by “party intention”. We could also note that all the difficulties in applying the parol evidence “rule”, well described by Professor McLauchlan, would beset EACs too, if he were correct that “logic” required assimilation of treatment. Commercial certainty, as well as freedom of contract, requires that EACs instead be enforced as they stand.

To conclude, while there are some significant arguments against EACs, to accept the criticism would require a radical transformation of English commercial law whereby signed documents would no longer be treated as definitive of the terms (and indeed existence) of a contract. Whatever the gain in theoretical purity from such a move, we suggest that its disruptive effects make it unwise to contemplate. For good practical reasons, English law should maintain its acceptance of the signature rule, of signed standard terms (“boilerplate”), and of EACs. This is not “documentary fundamentalism” – an irrational judicial fetish for writing that inevitably defeats true intentions. As even such stern critics as Gerard McMeel accept, sophisticated parties frequently expect such a formal approach. In cases where they do not (and in cases involving small businesses, and consumers), there is the possibility for challenge using the unfair terms legislation.

B. “Subject to Written Contract” Clauses

Parties may designate negotiations “subject to written contract”, i.e. state expressly that a binding contract will come into being only when a written agreement is signed. There is no question that in principle such a requirement is enforceable. Even parties who begin performance of the (contemplated, but unsigned) agreement may find that no contract has been formed by that conduct, and that recovery on a non-contractual basis is also refused.

That this is the starting point (although not the inevitable end point) is assumed by *RTS Flexible Systems Ltd. v Molkerei Alois Müller GmbH & Co. K.G.* Lord Clarke began the Supreme Court’s judgment by observing: “The moral of the story to is to agree first and to start work later.”

78 Cf. Section V(C) below.
81 Ibid., at para. [1].
some who ignore that moral may still recover. The court could find a contract (despite the absence of signed writing) if convinced that both parties’ conduct showed a firm intention to “to enter into contractual relations on particular terms notwithstanding their earlier understanding or agreement”, or “Put another way, they [were] waiving the ‘subject to (written) contract’ term or understanding”.82 The Supreme Court drew the “clear inference” that RTS and Müller had by their conduct “in effect agreed to waive the ‘subject to contract’ provision” – thus “the necessity for a formal written agreement . . . had been overtaken by events”.83 So the morality tale is downgraded to the role of a presumptive starting point only.

Where does this leave “subject to written contract” clauses? Clearly in a case where the alleged contract remained wholly unperformed, the clause would preclude the finding of contract. But as Steyn L.J. observed, the fact that an alleged contract has been fully or partly performed “will often make it unrealistic to argue” that no contract has not come into being.84 The Supreme Court adopted that insight when in found that the “subject to written contract” clause had been “overtaken” in RTS. Paul Davies argues that it “must be right” that the parties’ initial requirement for written formation “cannot be irrevocably binding upon them”; Professor Davies accepts that “difficult questions” remain about whether and when they have agreed to waive the requirement, and the precise terms of any contract that they are held (by their conduct) to have agreed.85

It is perhaps inevitable that “subject to written contract” clauses cannot definitively preclude the formation of a contract by conduct. Courts are understandably reluctant to conclude that there was no agreement when the parties have acted in a way that is consistent only with the alleged contract’s existence (the “subject to written contract” clause aside). Not only would the “no contract” conclusion be at odds with the other evidence, its implications would be troublesome. Trying to deal with a dispute that is contractual in all essential features by deploying non-contractual doctrines such as unjust enrichment does not always lead to happy results.86 A “non-contractual” route might also be an attempt to have it both ways – by insisting that there is no contract but then employing a remarkably “analogous” doctrine, such as quantum meruit. Rattee J. held in Regalian v L.D.D.C. that just as “subject to contract” precludes an action for breach of contract it also precludes a claim for restitution of benefits conferred (or wasted expenditure):

82 Ibid., at para. [55].
83 Ibid., at paras. [86]–[87].
86 Ibid.
[Where parties] both enter negotiations expressly (whether by use of the words "subject to contract" or otherwise) on terms that each party is free to withdraw from the negotiations at any time, ... [e]ach party to such negotiations must be taken to know (as in my judgment Regalian did in the present case) that pending the conclusion of a binding contract any cost incurred by him in preparation for the intended contract will be incurred at his own risk, in the sense that he will have no recompense for those costs if no contract results.87

In a case like RTS v Müller, if we rule out any non-contractual remedies as being unsatisfactory or impermissible or both, the stark choice is between finding that a full contract was formed by conduct or simply letting the losses lie where they fall. Where (as in RTS) things have gone a lot further than the preliminary work done in Regalian, the court will strain to avoid the conclusion that there were no obligations existing nor remedies available. In short, given the drastic consequences of granting no remedy at all (and the drawbacks of the viae mediae), a “subject to written contract” clause will sometimes become overtaken by events, after a significant degree of performance. However, as the Supreme Court emphasised, a strong case is needed to compel the conclusion that the clause has been waived. The Court presented its decision as an exceptional one; normally the parties’ self-imposed requirement of signed writing would govern.

The RTS approach does not eviscerate “subject to written contract” clauses. These still preclude contractual liability in several situations (and often, as suggested, non-contractual liability too). While the (alleged) contract remains wholly executory, the absence of signed writing will be fatal to any claim that there was a contract. Nor can it be said that any signs of performance whatever (or preparation for it) will compel the inference that a contract had been formed. Such conduct may be explicable as that taken in the confident expectation that a contract will formally be concluded – but, as Ratee J. explained in Regalian, nevertheless with the (imputed) knowledge that costs incurred or benefits conferred remained at the party’s own risk. Here too, the “subject to contract” clause achieves its purpose. Even when the (imprecise) dividing line is crossed and the court infers that the parties’ conduct waived the “subject to written contract” requirement (as in RTS v Müller), arguably this does not defeat the purpose of the clause.88

If the point of “subject to contract” is to make clear that “each party is free to withdraw from the negotiations at any time”, there is less sense in extending such “freedom to withdraw” from a contract which has not just been “negotiated” but substantially (or completely) performed on one or both sides. It would have taken the effect of the clause

88 Cf. J.H. Langbein, “Substantial Compliance with the Wills Act” (1975) 88 Harvard L.R. 489, 515–26 (analysis of the formalities’ intended purposes, and whether these would be defeated by finding “substantial compliance”).
beyond its likely commercial rationale had it precluded liability in RTS v Müller.

These reasons do not apply with equal force when we return to NOM clauses. The effect of holding an informal modification unenforceable is less drastic than finding that there was no contract (i.e. enforcing a “subject to contract” clause). The contract originally concluded between the parties will continue to govern. So courts might feel more comfortable with giving effect to a NOM clause. The purpose of NOM clauses is precisely to invalidate informal modifications, for the various possible reasons explored above (compare the “freedom in negotiations” rationale for “subject to contract”). Potentially, reliance on informal modifications might in rare cases generate an estoppel so that the NOM clause would be unenforceable. Otherwise, parties’ conduct following an informal modification should be irrelevant, if the whole point of the NOM clause is not to be undermined.

IV. TWO RECENT DECISIONS

In the Globe Motors case, the Court of Appeal gave its considered (albeit obiter) opinions on the NOM-enforceability question that had been fully argued before it. Their Lordships’ reasoning was approved in MWB v Rock Advertising, where a NOM clause’s unenforceability formed part of the ratio. We respectfully submit that these decisions fell into error.

All three judges in Globe Motors separately gave reasons why NOM clauses do not prevent subsequent unwritten variations. Beatson L.J. observed that statutory exceptions aside, the common law allows contracting irrespective of form, whether “in a document, by word of mouth, or by conduct”. From this, his Lordship held, it followed that a NOM clause cannot prevent subsequent non-written modifications. Beatson L.J. rejected as “misconceived” counsel’s argument that contracting parties should be able to impose formality requirements on themselves just as Parliament can (and does). However, we have suggested that counsel’s argument was both cogent and compelling. There should be greater confidence in the appropriateness of a party-chosen NOM clause than of a statutory formality rule. It is clear that in principle (leaving aside illegality, duress or fraud) parties are able to contract out of many common law “doctrines” – for example stipulating for liquidated damages on a basis quite different from common law quantification; including force majeure clauses to extend the range of frustrating circumstances; and so forth. NOM clauses should not be added to the controversial and shrinking list of those which the
common law simply will not enforce, such as overtly penal sums payable on breach,\textsuperscript{93} or terms providing for third-party enforcement.\textsuperscript{94} While Moore-Bick L.J. acknowledged the “practical benefits” of NOM clauses, he held there was no “principled basis” for holding that parties had “effectively tie[d] 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”.\textsuperscript{95} In \textit{MWB v Rock Advertising}, Kitchin L.J. (with the agreement of Arden and McCombe L.J.J.) agreed with \textit{Globe Motors} and with Beatson L.J.’s reasoning. Kitchin L.J. continued that “the most powerful consideration is that of party autonomy, as Moore-Bick L.J. explained it”.\textsuperscript{96} Kitchin L.J. thought this “echoed” a judgment of Cardozo J.:

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.\textsuperscript{97}

This provides powerful rhetorical criticism of NOMs. Cardozo J.’s eloquence is – as always – formidable. Nonetheless, it is open to question.\textsuperscript{98} Much of the reasoning seems to address cases where parties stipulate for entirely unmodifiable contracts. There are reasons to permit them to “contract again” in such a situation. But what if the restriction self-imposed encompasses only the \textit{form} of the modification? Is it so obvious that “The prohibition of oral waiver, may itself be [orally] waived”? To find such waiver whenever there is an informal variation would render meaningless a clause that parties have, for good reason, included in their initial contract. Appeals to “party autonomy” get us only so far. In order to respect the autonomy of parties to make non-written variations the court would have to violate their autonomy to include a NOM clause at the outset. We conversely suggest that to respect that initial autonomy, NOM clauses should be enforced against the parties subsequently. The entire business of 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. Having swallowed the camel the judges should not cavil at the gnat.

\textsuperscript{93} Although these are now allowed (if “proportionate”) when there is a “legitimate interest” in discouraging breach: \textit{Cavendish Square Holding B.V. v Makdessi} [2015] UKSC 67; [2016] A.C. 1172.

\textsuperscript{94} Compare now Contracts (Rights of Third Parties) Act 1999, s. 1(1)(a).

\textsuperscript{95} \textit{Globe Motors Inc.} [2016] EWCA Civ 396; [2017] 1 All E.R. (Comm) 601, at [120].

\textsuperscript{96} \textit{MWB Business Exchange Centres Ltd.} [2016] EWCA Civ 553; [2017] Q.B. 604, at [34].

\textsuperscript{97} \textit{Alfred C. Beatty v Guggenheim Exploration Co.}, 225 N.Y. 380, 387–388 (1919).

\textsuperscript{98} For modern US law, cf. text to note 32 above.
Underhill L.J., the third judge in *Globe Motors*, concurred only with “some hesitation”. His Lordship placed greater emphasis on the “entirely legitimate” desire of commercial contractors to preclude the raising of subsequent ill-founded allegations that [the contract’s] terms have been varied by oral agreement or by conduct: even though ill-founded, such allegations may make the obligations under the contract more difficult to enforce, most obviously by making it more difficult to obtain summary judgment. However, Underhill L.J. thought the counter-arguments for “flexibility” were “also strong”. Ultimately he could not “see a doctrinally satisfactory way of achieving [entrenchment]” for NOM clauses. With respect however, it is not entirely clear why it would be doctrinally unsatisfactory, let alone impossible, simply to take NOM clauses at their word and invalidate subsequent non-written variations.

Underhill L.J. suggested (presumably with relief) that the court’s approach did not entirely deprive NOM clauses of value: for their inclusion would add “significantly” to the (anyway substantial) difficulties that a party has in trying to convince the court that a formal written agreement has been modified by “informal communications and/or a course of conduct”. That may be so. But it downgrades the NOM clause into merely one piece of material evidence weighing against informal modification. (Since the matter would have to be fully investigated there can be no possibility for the summary dismissal of an argument that the contract had been modified – an important reason for using a NOM clause according to Underhill L.J. himself.) Further, Underhill L.J.’s point is hard to reconcile with weighty first instance authority holding that a NOM clause does not formally reverse the burden of proof. The courts have accordingly disapproved any NOM-created requirement for “strong evidence” of a modification, or a “very high evidential burden”, as potentially productive of confusion. Perhaps the burden of proof rarely determines the outcome of civil litigation in practice. If so, the question of its formal reversal is a barren one. Anyway, Underhill L.J.’s attempt to salvage NOM clauses’ value is questionable when other courts have firmly repudiated their elevation to decisive status for rebutting alleged oral modifications.

Gloster J. suggested in one case that in the context of certain formal commercial relationships (such as banking), “the factual matrix of the contract and other circumstances may well preclude the raising of an alleged oral

100 Ibid., at para. [117].
102 e.g. *Virulite L.L.C. v Virulite Distribution Ltd.* [2014] EWHC 366 (QB); [2015] 1 All E.R. (Comm) 204, at [55]–[60].
103 Ibid., at para. [60], per Stuart-Smith J.
variation to defeat [a NOM] clause".  

This dictum could have had far-reaching implications. It is precisely in such commercial cases that NOM clauses ought to be strictly enforced. However, Stuart-Smith J. has held that Gloster J. did not mean to insulate entire categories of contracts from informal modification: it is ultimately a matter for the evidence in each case whether the parties have overridden the NOM clause. In the current state of the law therefore, a NOM clause’s only effect (however commercial the “matrix” and however sophisticated the parties) is as one piece of relevant evidence tending to rebut the contention that a contract has been varied orally or by conduct. This does not go far enough to achieve the clause’s commercial goals.

The point to which the learned Lords Justices devoted most of their judgments in MWB v Rock Advertising was the absence of consideration (on the traditional analysis) for MWB’s promise to accept a lower monthly rent from its licensee, Rock. There is no space here to analyse the court’s innovative approach to “practical benefit” consideration (which was invoked to uphold the modification). But there is much to say on the other side. And if gratuitous modifications are to be upheld on “freedom of contract” grounds (the mere fact of agreement being enough to render it binding), it is curious that the Court of Appeal failed to use the same argument to enforce the NOM clause. Especially when, as Janet O’Sullivan suggests, it was inserted in the original contract “precisely . . . to avoid allegations of unconsidered, informal variations (and thus avoid, inter alia, difficult arguments about consideration)”.

Perhaps some would praise the consistency of the Court of Appeal’s approach to the two controversial issues before it in MWB. On both consideration and the NOM clause the court favoured the approach which facilitated contract variation. But the appearance of consistency is false. As argued above, if the common law is to relax its own rules “policing” the variation of contracts it is even more important to permit parties to substitute their own controls. Just as “entire agreement clauses” have refurbished the dilapidated parol evidence “rule” so parties might wish to reinstate the rules in Foakes v Beer and Stilk v Myrick. And just as courts have enforced “entire agreement clauses” so they should now enforce NOM clauses too. The Supreme Court has given the landlords permission to appeal in MWB. Their Lordships should uphold the NOM clause. Indeed,
should the Supreme Court be minded to uphold the extension of “practical benefit” (and even overrule *Foakes v Beer*, a course not open to the Court of Appeal), thereby liberalising the rules on contractual variation, it is even more important that an agreed NOM clause should be respected – and enforced.

V. DEFEASIBILITY

A. Absolute or Qualified Enforcement?

If English law is now to change direction and enforce NOM clauses, should such enforcement be absolute? A further dilemma arises. There may be good reasons to give effect to an informal modification, especially when relied upon. On the other hand, admitting exceptions complicates the legal position and may deprive NOM clauses of much of their value. As Underhill L.J. feared in *Globe Motors*, it will become difficult to enforce the original (NOM-protected) agreement by summary judgment if the defendant can allege relied-upon informal modifications (which will require factual investigation).


English law would stand out if it refused to admit any ameliorating doctrines. But distinctiveness is not necessarily a bad thing. Quite the reverse, if international commercial parties would prefer strict enforcement of NOM clauses. Judges have praised the documentary certainty of English law in contrast with “laxer systems”. The widespread “ambivalence” towards NOM clauses has been criticised by Robert Hillman. He suggests that rather than maintain an unstable balance, it might be better if on this question for lawyers to “abandon compromise, which inevitably generates confusion. Instead, they should swallow hard and then decide simply to enforce NOM clauses or to abolish them. Either approach would be certain, simple, and would thus promote uniform interpretation”.

Hillman prefers “abolition” (on the ground that this accords with protecting reliance, with the parties’ most recent intentions, and with the old common law “which hardly wreaked havoc on commercial transactions in [the

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113 Hillman, “Article 29(2)”, p. 463.
USJ]).\textsuperscript{114} We have argued above for the opposite, equally clear and simple, approach. But against Hillman’s advocacy of unequivocal choice, many would suggest that compromise means the best of both worlds – and is anyway inevitable.\textsuperscript{115} David Snyder argues that NOM clauses should be enforceable except where “the party’s language or conduct induced the other party to change its position reasonably, materially, and in good faith”. Snyder warns that “Those who hope for something more certain than what is offered here are deluded by the illusion of certainty”.\textsuperscript{116} The history of supposed bright-line, impregnable NOM rules in the courts is given as support.

Hillman’s absolutism is attractive for a system aspiring to clear and certain rules of commercial law. But perhaps the best that can realistically be hoped for is enforcement subject to narrow and well-defined exceptions. Namely estoppel and challenges through the unfair terms legislation.

B. Informal Modifications and Estoppel

English law protects reasonable action in reliance upon promises, through the estoppel doctrine(s). Proprietary estoppel is often employed to give (some) effect to agreements about real property ownership where they are unenforceable for non-compliance with statutory formalities. Evidence of the parties’ conduct may lead a court to conclude that a contract existed where otherwise it might not, because of problems about certainty, or formation (e.g. the “battle of forms”), or even because the parties themselves required signed writing as a condition of obligation. Actions speak louder than words. A partly (or indeed fully) performed agreement will rarely be found not to have existed. In line with this powerful (if tacit) current of contract jurisprudence, there would be strong inclination to enforce a relied-upon oral modification, despite the presence of a NOM clause. As noted above, this solution is the dominant one internationally.

Yet caution is required. Full acceptance of this suggestion would mean that many, perhaps most, informal modifications would be enforced by way of estoppel. As Easterbrook J. has observed in this context: “Any [modification] that is more than a condonation of an existing default will induce some reliance.”\textsuperscript{117} Courts are aware that estoppel can go too far in circumventing formality rules. Thus limits have been suggested. In the Actionstrength case the House of Lords held that reliance upon an oral promise to guarantee a debt did not estop a plea that the guarantee was unenforceable because not contained in writing, as required by statute.\textsuperscript{118}
As Lord Hoffmann said, to raise such an estoppel “would be to repeal the statute” since “[i]t is in the nature of a contract of guarantee that the party seeking to enforce it will always have performed first”, by advancing credit.\textsuperscript{119} The exception would come close to swallowing the rule in the NOM situation too. There were obiter suggestions in \textit{Actionstrength} that an express promise by the guarantor not to rely on the absence of writing might estop it from raising the Statute of Frauds defence when sued on its oral guarantee.\textsuperscript{120} Similarly, estoppel could be established by an undertaking (when informally varying a contract) that a NOM clause would not be invoked to defeat the variation. Otherwise, by analogy with \textit{Actionstrength}, estoppels based upon relied-upon informal variations should fail.

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, \textit{whether by contract, estoppel, or otherwise}, unless made by instruments in writing signed by the parties to this Agreement, \textit{and action in reliance on any such informal variation shall not estop either party from resiling from it}”.

This should be effective to exclude estoppel, for all the reasons advanced here for the enforcement of NOM clauses. In addition, it is rather difficult to see that when parties have agreed to the inclusion of such a clause in their initial agreement it could be “reasonable” to rely on subsequent informal modifications.

\textit{C. Unfair Terms Legislation}

The impact of legislation in both consumer and business situations remains to be considered. It would be strongly arguable that any business attempting to rely on a NOM clause to evade an oral modification promised to a consumer would be unable to do so; the NOM clause would very likely “cause a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer” and thus be unenforceable (\textit{Consumer Rights Act 2015}, s. 62).

The position with \textit{business–business} contracts is not so clear. Section 3 of the Unfair Contract Terms Act 1977 would apply when a NOM clause was contained in “standard terms of business”. The party whose standard terms they were would not be able to rely on the NOM clause “to render a contractual performance substantially different from that which was reasonably expected of him” (s. 3(2)(b)(i)), unless it could demonstrate that the clause was “reasonable”. Section 3(2)(b)(i) is notoriously difficult to interpret. Its circularity is exposed by the present situation. Does “what

\textsuperscript{119} Ibid., at para. [26].

\textsuperscript{120} Ibid., at para. [9], per Lord Bingham, at paras. [52]–[54], per Lord Walker.
was reasonably expected” here include what was promised by the informal modification? If so, s. 3(2)(b)(i) would obviously bite on the NOM clause. But does this not beg the question – assuming that the NOM clause was absent or unenforceable (for the purpose of defining what was “reasonably expected”) when that is the very issue at stake?

Some indirect light is shed by AXA Sun Life Services plc. v Campbell Martin Ltd. where Stanley Burnton L.J. held that an entire agreement clause could fall within s. 3(2)(b)(i), a provision he deemed “not entirely clear”.121 His Lordship’s rationale was that where collateral warranties and representations affected the performance that was “reasonably expected”, an EAC (by depriving them of effect) could enable a “substantially different” contract performance.

An alternative approach would look to wider extrinsic evidence. It has been suggested that NOM clauses are questionable in industries where “parties transact business informally and flexibly, orally adjust their agreement as circumstances change, and rarely rely on their written contract”.122 In such a context there would be a strongly arguable case that informal variations would affect the “performance ... reasonably expected”, thus triggering s. 3(2)(b)(i) for any NOM clause. However, actual evidence of industry practice and expectations would be required. Not every business context assumes such flexible attitudes – Professor Hillman contrasts those where “parties rely heavily on written terms or if parties invest significant resources drafting their initial contract, including the NOM clause, frequently consult the written terms in carrying out their agreement, and fail to establish a practice of oral adjustment”.123 It is not clear that an informal variation could affect the “reasonably expected” performance in such an industry. (Indeed, although again conscious of the danger of circularity, one could observe that the initial inclusion of a NOM clause would point in favour of such formality, given that parties should be permitted to choose the framing for their agreement).124 Still, if there was demonstrably incongruity between a NOM clause and the industry in question (or evidence of particular parties’ relationship and expectations), it could fall subject to s. 3 (2)(b)(i).

That would require the application of the “reasonableness test” under s. 11 of the 1977 Act. For all the reasons adduced in this article, it is submitted that it would usually be reasonable to include a NOM clause between sophisticated commercial parties. However in cases involving significant power imbalance, especially where the weaker party would (consistently with industry norms) expect flexibility and informality to

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123 Ibid.
124 See Mitchell, “Entire Agreement Clauses” and corresponding text.
govern the contract (so that s. 3(2)(b)(i) was applicable), unreasonableness might be a tenable decision.

The result is that while NOM clauses would be highly vulnerable to challenge when used against consumers, they should usually withstand review under the Unfair Contract Terms Act 1977. That conclusion will satisfy nobody. Businesses attempting to enforce an informal modification will have high hurdles to surmount when praying in aid the 1977 Act. Yet those relying on NOM clauses will also have cause for dissatisfaction. Despite the tentative suggestions above, the precise application of s. 3(2)(b)(i) remains untested and unclear. Given the degree of discretion that it accords to first instance judges, the reasonableness test is notoriously unpredictable too. And even if these provisions are given restraint – used if not never then “hardy ever” – their existence nevertheless creates uncertainty disproportionate to the rarity of success. Many would agree with Christopher Clarke J. that “It is obviously advantageous that commercial parties of equal bargaining power should be able to agree what responsibility they are taking (or not taking) towards each other without having to satisfy some reasonableness test”. The courts should take these words to heart. But Parliament in its sovereign wisdom has imposed s. 3 of the 1977 Act even between well-matched commercial parties, and the courts cannot ignore that provision, however inconvenient the results.

VI. CONCLUSION

The basis of the law of contract is to confer the freedom to curb subsequent freedom of action; certain conduct henceforth becomes a breach of contract. Contracting parties should also be free to give up their freedom to make informal variations by including a “NOM” clause. The common law does not generally require formalities for contractual variation (or indeed formation). But there are sensible commercial reasons to require modifications to be in signed writing, and courts should respect the choice of parties who agree to impose such formality on themselves. They can hardly make their intentions clearer than by inserting an express NOM clause. It violates a commercially important aspect of freedom of contract if such clauses are (as the Court of Appeal has recently held) unenforceable.

For parties who do not intend their relationship to be governed by contractual documents, the remedy is simple. They should not include NOM clauses (or EAC clauses, or similar provisions) in their contracts. Should


126 *C.L. Union Eagle Ltd. v Golden Achievement Ltd.* [1997] A.C. 514, 519, per Lord Hoffmann (equitable relief from forfeiture).

they agree to such clauses, their complaint that the documentary approach is “unreal” and inappropriate should receive little sympathy. Parties should be empowered to indicate the appropriate degree of formal/contextual framing for their contracts. They cannot expect to be rescued by the courts if they signal their choice incorrectly – with the exception of consumers and (possibly) less sophisticated commercial parties, who might defeat a NOM clause by relying on the unfair terms legislation. Big commercial players should be held to their word. Invalidating informal variations when a NOM clause is present beneficially extends freedom of contract.