CONTRACTING OUT OF CONTRACTUAL FREEDOM: NO-ORAL MODIFICATION CLAUSES AND EFFECTING PARTY INTENTION

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Table of Contents

Introduction

This dissertation is concerned with determining what effect, if any, should be given to a no-oral modification clause (NOM-clause) in New Zealand. Such a clause states that only variations to the contract which are agreed in writing will be binding between the parties. Difficult cases arise where, despite the clause, a variation is agreed informally, either orally or by conduct. If one party then regrets the variation and asserts the NOM-clause precluded it, courts can be faced with a difficult question: which agreement should prevail, the written contract containing the clause, or the informal variation?

New Zealand law lacks a clear position on this issue. The prevailing view in the common law world was formerly that a variation is effective despite a NOM-clause. However, in 2018, the United Kingdom Supreme Court gave judgment on this issue in *Rock Advertising v MWB*.[1] Now, in the United Kingdom, an informal variation to a contract containing a NOM-clause is unenforceable. Consideration of what approach to adopt in New Zealand is therefore timely.

Chapter 1 will introduce the concept of a no-oral modification clause, and outline the leading cases in England, Australia and Canada. What few New Zealand cases do address NOM-clauses will also be detailed, as well as relevant aspects of the New Zealand legal context. Chapter 2 will explain and analyse the three distinct approaches that have emerged in English case law, to determine whether any stand out as preferable for New Zealand to adopt. Chapter 3 will expand on problems with the English approaches, and argue that a flexible approach is required to give effect to the intentions of the parties in all cases. Chapter 4 will discuss the form such an approach should take, benefiting from New Zealand's existing approach to "entire agreement" clauses under the Contract and Commercial Law Act 2017.[2] The conclusion which will be reached is that NOM-clauses should be controlled by a similar statutory provision, to be inserted into that Act.

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[1] *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2018] 2 WLR 1603 at [12].
[2] Contract and Commercial Law Act 2017, s 50.

This dissertation does not address the extent to which equitable doctrines such as promissory estoppel and part-performance could allay issues with the effectiveness of NOM-clauses at common law. NOM-clauses are very common in commercial agreements, so the common law should, and can, provide a sufficient answer to issues which arise in relation to them. Equity is uncertain in nature, and its function should be as a back-stop, rather than as a primary tool to address a ubiquitous clause.

Chapter 1 - The Problem with NOM-Clauses, the Judicial Background and New Zealand

Introduction

This chapter will introduce the concept of a NOM-clause, and explain the basic problem with its operation. Then, an outline of the positions on NOM-clauses of other common law jurisdictions will be provided, followed by discussion of the few New Zealand cases to concern this issue. Finally, some relevant particularities of the New Zealand context will be noted.

The Concept of a No-Oral Modification Clause

A NOM-clause seeks to protect the original terms of a written contract from being vulnerable to subsequent informal variation. It does this by purporting to mandate that, in order to be effective, any subsequent variation to the original agreement must be concluded in writing. It thus imposes a formality requirement on future modification.

The below depicts a typical wording of a NOM-clause:

> "All variations to this contract must be agreed, set out in writing and signed on behalf of both parties before they take effect."

A NOM-clause necessarily limits efficiency when circumstances call for a modification to the existing terms. Despite this, there are several commercial motivators for the inclusion of a NOM-clause.

Firstly, attempts to undermine the written agreement through informal communications will be discouraged.[3] Changing circumstances often entail variation, but one party may nonetheless wish the agreement to persist. It is advantageous to that party to include a NOM-clause and discourage

[3] *Rock Advertising v MWB* (UKSC), above n 1, at [12].

persuasive verbal attempts to vary. Even a party who would remain adamant benefits by avoiding such attempts.

Secondly, a NOM-clause avoids dispute over precise terms of contended oral variations.[4] The content of a written agreement is easily proved. An oral agreement, by contrast, suffers from difficulty in ascertaining what exactly was said. The content is subject to a "very high probability of error", and fact finders may accept "fabricated or wish-born oral agreements".[5] A NOM-clause avoids this uncertainty and potential unfairness.

Thirdly, requiring formality better allows organisations to maintain control over their agents in respect of authority to agree to variations.[6] Written record allows management to monitor what agents agree to, and thereby to discipline employees who overstep authority. Further, the very fact that a variation must be concluded in writing is likely to give an agent pause; variations are more likely to be considered and even checked with management. The risk of disadvantageous variation is thus alleviated.

It is unsurprising, then, that NOM-clauses are commonly included in standard form commercial contracts, and reasonably described as "boilerplate".[7]

The Problem

On its terms, a NOM-clause is a simple concept. No variation that does not comply with the formality requirement will be valid and enforceable between the parties. This may appear perfectly logical, and in terms of enforceability, not materially distinguishable from any other

[4] *Rock Advertising v MWB* (UKSC), above n 1, at [12].
[5] Charles T McCormick "The Parol Evidence Rule as a Procedural Device for Control of the Jury" (1932) 41 Yale LJ 365 at 367.
[6] *Rock Advertising v MWB* (UKSC), above n 1, at [12].
[7] Stuart Pemble "Do Clauses Prohibiting the Oral Variation of Written Contracts Work?" (2016) EG 87 at 87. See also Mark Anderson *A-Z Guide to Boilerplate and Commercial Clauses* (Butterworths, Oxford, 1998) at 13.

contractual term. Despite this, determining the effect of a NOM-clause where an informal variation is nonetheless established has been a matter of considerable controversy in the courts.

The essential problem is that freedom of contract and the autonomy of contractual parties to both make and unmake promises can be said to conflict with the operation of a NOM-clause. As Cardozo J famously put it in *Beatty v Guggenheim Exploration Co*: [8]

> "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."

The genesis of the issue is the fact that general contract law does not place any formality requirement on a valid contract.[9] Just as a written contract binds its parties, so too does an agreement extant only in verbal communications. At general law, therefore, nothing stops parties to a written contract varying it informally. A NOM-clause purports to override this general law. The problem is, effectively, whether it succeeds. If the written agreement has been varied orally, which is binding - the variation, or the original contract containing the NOM-clause?

There are two situations in which the parties' freedom to vary informally can crystallise in this context. The first, and less controversial, is where the parties have informally dispensed with the NOM-clause itself in their variation agreement. The second is where they have not, and the NOM-clause is said to have been implicitly waived by the mere existence of an informal variation.

The first situation represents a stronger case for enforceability as against a NOM-clause. Less intention must be inferred in order to achieve the result of enforceability, as it is not necessary to imply the waiver of the NOM-clause. The second situation, conversely, does require this implication.

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[8] *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 at 387.

[9] *Rock Advertising v MWB* (UKSC), above n 1, at [7]. See also *Laws of New Zealand* (online looseleaf ed, LexisNexis) at [162].

On its wording, however, the NOM-clause prevails just as easily in each situation. Whether or not the variation is expressly directed to the clause itself, such a variation is caught by the clause, as a modification to the original contract. If the variation has not been concluded in writing, it is invalid.

Cases representing the first situation are unlikely to occur. Where the parties contemplate the NOM-clause, it is virtually certain that they will comply with it - and simply withdraw the clause in writing. This would be a brief and simple document. Thus, such parties would not encounter the conceptual difficulty that arises when an informal variation combats a NOM-clause.

The difficult cases will likely represent the second situation, where parties make an otherwise-valid informal variation contrary to a NOM-clause, at a time when both are completely ignorant of its existence. The essential question this dissertation seeks to answer is which agreement should prevail in such a case - the original written contract, or the subsequent informal variation.

It would make for an exceptional outcome if a commercially desirable clause, freely agreed to, recorded in writing, and relied on, was deemed ineffective. However, it would also make for an exceptional outcome if an informal contract, validly formed, was of no effect by operation of a solitary clause in the parties' past agreement. These two propositions, taken together, indicate the fundamental issue concerning NOM-clauses.

The Judicial Background

There is relatively little case law on NOM-clauses, especially in New Zealand, and much of it is in obiter. This section will set out the important cases in England, Australia and Canada. It will then outline what New Zealand cases do exist.

The English Cases

The most important English cases are the decisions of the England and Wales Court of Appeal (EWCA) and the United Kingdom Supreme Court (UKSC) in *MWB v Rock Advertising*[10] and its appeal *Rock Advertising v MWB*.[11] For succinctness, these cases will be referred to as '*MWB* (EWCA)' and '*MWB* (UKSC)', respectively. In the EWCA, it was decided that a NOM-clause does not affect a subsequent informal variation.[12] However, the UKSC reversed this; it was held that NOM-clauses are fully effective at precluding the enforceability of informal variations.[13]

Of particular significance to the EWCA was the obiter judgment given by Beatson LJ in *Globe Motors v TRW Lucas Varity*.[14] While the NOM-clause issue in that case was obiter the EWCA nonetheless presented a full analysis. All three judges opined that a NOM-clause is not effective to invalidate an informal variation. This was adopted in full in *MWB* (EWCA).

The prior English authority was thoroughly examined by the EWCA in *Globe Motors*. The starting point was a pair of inconsistent EWCA decisions, both appeals from summary judgments. In *United Bank Ltd v Asif*, the Court held that in the case of a contract containing a NOM-clause, no oral variation could be of any legal effect.[15] Two years later, in *World Online Telecom v I-Way*, the Court held that, despite *United Bank*, the issue of the enforceability of a NOM-clause in the face of a subsequent oral variation was sufficiently unclear that a summary judgment was not appropriate.[16]

In *Spring Finance v HS Real Company* Judge Mackie recognised these contradictory authorities.[17] He reasoned in obiter that a subsequent oral variation could indeed be effective

[10] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] QB 604.
[11] *Rock Advertising v MWB* (UKSC), above n 1.
[12] At [36].
[13] At [17].
[14] *Globe Motors Inc and ors v TRW Lucas Varity Electric Steering Ltd and anor* [2016] EWCA Civ 396, [2017] 1 All ER (Comm) 601.
[15] *United Bank Ltd v Asif and anor* (11 February 2000, unreported).
[16] *World Online Telecom v I-Way* [2002] EWCA Civ 413.
[17] *Spring Finance v HS Real Company LLC* [2011] EWHC 57 (Comm), [2011] All ER (D) 159 (Jan).

despite a NOM-clause.[18] Subsequently, in the High Court decision in *Globe Motors*, he repeated this view.[19]

In *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd*, again in obiter, Gloster LJ did not decide the point, but indicated her preference for the unenforceability of NOM-clauses.[20]

In *Virulite LLC v Virulite Distribution*, Stuart-Smith J stated his view of the authorities as being that, despite a NOM-clause, an informal variation can be effective.[21] However, as noted by Beatson LJ, Stuart-Smith J came to this view without the benefit of argument by the parties, as the point had been conceded.[22]

The congruence of these authorities renders unsurprising the conclusion in *Globe Motors*, and the adoption of that conclusion in *MWB* (EWCA). It suggests the opposite of the decision in *MWB* (UKSC). The reasoning given in these judgments will be expounded and analysed in the Chapter 2.

The Australian Cases

In *Liebe v Molloy*, the High Court of Australia held that a clause stating that variations to a construction contract must be done in writing did not prevent an informal variation binding the parties.[23]

This position has since prevailed in Australia. It was upheld in *Commonwealth v Crothall Hospital Services*,[24] and again in *GEC Marconi Systems v BHP*.[25] The Australian position therefore aligns with the decision in *MWB* (EWCA).

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[18] At [53].
[19] *Globe Motors Inc and another v TRW Lucasvarity Electric Steering Ltd* [2012] EWHC 3134 (QB).
[20] *Energy Venture Partners Ltd v Malabu Oil & Gas Ltd* [2013] EWHC 2118 (Comm) at [273].
[21] *Virulite LLC v Virulite Distribution* [2014] EWHC 336 (QB) at [55].
[22] *Globe Motors*, above n 14, at [106].
[23] *Liebe v Molloy* (1906) 4 CLR 347 at 353-355.

The Canadian Cases

The Ontario Court of Appeal considered the issue in *Shelanu v Print Three Franchising*.[26] That case concerned an "entire agreement" clause rather than a NOM-clause, but it was submitted that the clause nonetheless operated to exclude the oral variation.[27] Rejecting that submission, Weiler JA stated in obiter that even a NOM-clause could not have that effect.[28]

In support, Weiler JA cited *Colautti Construction v City of Ottawa*.[29] There, it was held that an in-writing variation requirement did not prevent the parties modifying their agreement informally.[30] Therefore, the Canadian approach also aligns with *MWB* (EWCA).

The New Zealand Cases

The earliest New Zealand authorities are the cases of *Air NZ v Nippon Credit Bank*[31] and *Stevens v ASB*.[32] In *Air NZ*, a contention that a contract containing a NOM-clause was informally varied was brushed aside by Gault J in the Court of Appeal.[33] This case was cited with approval, albeit in obiter, by Associate Judge Doogue in *Stevens v ASB*.[34] In neither of these cases was the NOM-clause central to argument.

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[24] *Commonwealth v Crothall Hospital Services (Aust) Ltd* (1981) 54 FLR 439 at 447.
[25] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50, (2003) 128 FCR 1 at [215].
[26] *Shelanu Inc v Print Three Franchising Corpn* (2003) 226 DLR (4th) 577.
[27] At [42].
[28] At [54].
[29] *Colautti Construction Ltd v City of Ottawa* (1984) 9 DLR (4th) 265.
[30] At [28]-[30].
[31] *Air NZ Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218 (CA).
[32] *Stevens v ASB Bank Ltd* [2012] NZCA 611.
[33] At 227.
[34] At [29].

These cases do not suffice to depict the New Zealand position. In *Beneficial Finance v Brown*, the High Court provided New Zealand's most thorough judicial consideration of NOM-clauses.[35] Associate Judge Osborne considered the "developing English approach" as "likely to be applied" in New Zealand.[36] As this case preceded the decision in *MWB* (UKSC), this reference is to the approach in *MWB* (EWCA), that NOM-clauses are ineffective. *Air NZ* and *Stevens v ASB* went uncited. Also uncited was an obiter comment by the Supreme Court in *Savvy Vineyards v Kakara Estate*, which also suggested that an informal variation would be enforceable despite a NOM-clause.[37]

The apparently inconsistent authorities could arguably be reconciled by reference to *Energy Venture Partners*, where Gloster LJ stated that a banking relationship may constitute such an overpowering factual indicator that no binding oral variation could be found in fact.[38] As both *Air NZ* and *ASB v Stephens* concerned banking relations, the ease with which the informal variation argument was dispensed with may be seen as a conclusion of fact rather than law. This would suggest that New Zealand's approach is likely to represent that in *MWB* (EWCA).

However, the UKSC's decision casts significant doubt on this.[39] While not binding, a decision of the highest English court is strongly persuasive authority in New Zealand.

The New Zealand Context

New Zealand courts are bound neither by *MWB* (UKSC) nor by a clear line of domestic authority. This leaves room for the courts to consider all existing approaches, and also to adopt a unique approach if that is preferable.

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[35] *Beneficial Finance Ltd v Brown* [2017] NZHC 964.
[36] At [74].
[37] *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281. at [112].
[38] *Energy Venture Partners*, above n 20, at [274].
[39] Will Shaw and Simon Connell "*Rock Advertising v MWB* in the UK Supreme Court: "no oral variation" clauses can be enforceable" [2018] NZLJ 198 at 200.

Significantly, New Zealand law differs from English law on the treatment of "entire agreement" clauses. In England, such clauses are generally effective. [40] In New Zealand, however, effectiveness depends on a court's satisfaction that it would be "fair and reasonable" between the parties. [41] The specifics of "entire agreement" clauses, and of this approach, will be detailed in Chapter 4. It is sufficient for now to note that the two clauses are closely related, and thus that New Zealand's approach to one is significant to the question of how to approach the other.

The Erosion of Consideration as a Requirement for Contract Variation

Under the traditional consideration rule, no variation was enforceable unless the promisee gives new consideration in excess of their existing duty under the contract.[42] This provided a control on variations, as many variations were unenforceable for want of such consideration. [43] Thus, the risk of being bound to a disadvantageous variation was limited.

However, the modern position seems to be that new consideration of the promisee is no longer required. In England, the development of the "practical benefit" doctrine - that the practical benefit of ensuring performance of an existing obligation can suffice to constitute good consideration[44] - has been said to "hopelessly" compromise the doctrine of consideration.[45] Arguably, any variation will confer some form of "practical benefit" onto the promisor; if not, why would the promisor agree? Indeed, in *MWB* (EWCA) the Court found valid consideration on the "practical benefit" understanding, despite the promisee promising no more than its existing obligation.[46]

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[40] *Rock Advertising v MWB* (UKSC), above n 1, at [14]; Jonathan Morgan "Contracting for Self-Denial" (2017) 76(3) CLJ 589 at 596.
[41] Contract and Commercial Law Act 2017, s 50.
[42] *Stilk v Myrick* [1809] EWHC KB J58.
[43] See for example *Stilk v Myrick*, above n 42; *Foakes v Beer* [1884] UKHL 1; In *re Selectmove Ltd* [1993] EWCA Civ 8.
[44] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1989] EWCA Civ 5.
[45] Brian Coote "Consideration and Benefit in Fact and Law" (1990) 3 JCL 23 at 28-29.
[46] At [48]. The UKSC declined to consider the consideration issue, see *Rock Advertising v MWB* (UKSC), above n 1, at [18] and [20].

New Zealand courts have addressed this concern, and it appears that rather than adopt "practical benefit"-style consideration, the position may be to do away with consideration for variations altogether.[47] Roberts cites two Court of Appeal judgments for this proposition; *Antons Trawling v Smith*[48] and *Teat v Willcocks*.[49]

Whatever the formulation, the result is likely the same; new consideration is not required for variation agreements. Thus, a protection against wanton variation no longer exists. This has been emphasised by Morgan, who posits that a reason for the ubiquity of NOM-clauses is as a "party-agreed substitute" for consideration.[50] He notes that historical attempts to abolish consideration have "envisaged formalities as the alternative badge of enforceability".[51] For instance, *Pillans v Van Mierop* held that consideration was not required for commercial variations in writing, as a formality requirement puts people "upon attention and reflection", and is a "guard against rash inconsiderate declarations".[52]

In assessing the effect of NOM-clauses in New Zealand, the erosion of consideration is important because it may be that variations are now too easy to establish. Thus, there may be more merit to the effectiveness of a NOM-clause as a means to control variations.

Conclusion

This dissertation aims to recommend the best approach for New Zealand to adopt. The following chapters will analyse the existing approaches in England, and consider whether an approach in line with that toward "entire agreement" clauses is preferable.

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[47] Marcus Roberts "*Teat v Willcocks*: Consideration and Variation Contracts Revisited" 20 NZBLQ 79 at 85.
[48] *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 (CA).
[49] *Teat v Willcocks* [2013] NZCA 162, [2014] 3 NZLR 129.
[50] Morgan, above n 40, at 594.
[51] At 594.
[52] *Pillans v Van Mierop* (1765) 3 Burrow 1663 at 1670.

Chapter 2 - Judicial Approaches to NOM-Clauses

Introduction

This chapter will outline the three approaches to the effect of NOM-clauses where an informal variation has nonetheless been agreed. These approaches are those that have been judicially applied in England. The objective is to provide each approach's strongest case on the reasoning given, and also to critique that reasoning. It will be shown that each approach has theoretical flaws, and therefore that none is so compelling as to render it correct.

The approaches range from endorsing the full enforceability of NOM-clauses through to declining to give them any force at all. One approach falls between these extremes, which generally enforces NOM-clauses, but not in all situations. The totality of the range of approaches is indicative of the complexity of the issue.

The "No-Effectiveness" Approach

Overview

Under this approach, an informal variation will bind parties despite a NOM-clause in their original agreement. Parties have the freedom to enter contracts without formality, and the NOM-clause cannot preclude this. This approach was applied in *MWB* (EWCA). [53]

The rationale for this approach could be that NOM-clauses are unenforceable terms of no effect. However, this view is probably incorrect. It is extraordinary for contract law to simply ignore terms of an otherwise-valid agreement. In some instances, such as penalty clauses and terms in restraint of trade, courts will deem contractual clauses unenforceable, as recognised by Beatson

[53] *MWB v Rock Advertising* (EWCA), above n 10, at [36].

LJ in *Globe Motors*.[54] However, this is the exception from the norm, and if the intention of the EWCA in *Globe Motors* and *MWB* (EWCA) was to deem NOM-clauses invalid, we would expect a clear statement saying so.

Instead, it seems that the rationale for the EWCA's enforcement of the informal variation is that such a variation will necessarily involve a withdrawal, either explicit or implicit, of the NOM-clause. This is evidenced by Kitchin LJ's citation of Cardozo J's dictum in *Beatty*.[55] Set out above, this statement clearly depends on implied withdrawal. If the clause was simply unenforceable from the outset, then its constraints would not need to come "back through the window".[56] Throughout, the Court expresses a primary concern for party autonomy - which is respected under the withdrawal rationale, but denied under the unenforceable rationale.

The characterisation of this approach as dependent on explicit or implicit variation of the NOM-clause is also consistent with the interpretation of the EWCA decision in both of the UKSC judgments.[57]

The withdrawal rationale makes it necessary to consider the two scenarios in which an informal variation can be put against a NOM-clause, as outlined in Chapter 1.

The first is where the parties have informally agreed to dispense with their NOM-clause in the course of the variation agreement. This is a comfortable fit with the withdrawal rationale; the clause has been withdrawn, and therefore the variation is binding. However, such a situation must be rare; parties who are aware of the NOM-clause will surely comply with it.[58]

It must be noted that the informal variation of a NOM-clause is nonetheless non-compliant. However, the same contractual freedom which allowed the NOM-clause in the first place allows

[54] At [99]. On penalty clauses in New Zealand, see Burrows, Finn and Todd *The Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 853-859. On terms in restraint of trade, see *Blackler v New Zealand Rugby Football League* [1968] NZLR 547 (CA).
[55] *Beatty*, above n 8, at 388.
[56] At 388.
[57] *Rock Advertising v MWB* (UKSC), above n 1, at [5], [7], [24] and [27].
[58] *Rock Advertising v MWB* (UKSC), above n 1, at [24].

its retraction. In the words of Cardozo J, "you may put it out by the door, it is back through the window".[59]

The second scenario is where the parties agree to an informal variation without acknowledging the NOM-clause. This fits less comfortably with the withdrawal rational, because the withdrawal is not explicit. Instead, the approach draws an inference in all cases that the parties have impliedly withdrawn the NOM-clause, based on the mere existence of the non-compliant variation.

The "No-Effectiveness" approach can be summarised as follows; a NOM-clause will not invalidate an informal variation, because whether explicit or implicit, any such variation will necessarily involve a withdrawal by the parties of the NOM-clause. Thus, giving effect to party autonomy requires enforcing the variation.

An Evidential Role

However, a NOM-clause does affect the subsequent dealings of the parties.[60] The EWCA in *Globe Motors* and in *MWB* (EWCA) held that the existence of a NOM-clause will be a factor in determining whether the parties agreed to a binding variation.[61] In *Beneficial Finance*, the High Court endorsed this position.[62] Thus, despite failing against an established informal variation, NOM-clauses are likely to "increase the difficulties" of proving one occurred.[63]

At one time, it appeared possible that the evidential standard in NOM-clause cases could be adjusted, to increase the onus on the party alleging the variation.[64] In *Spring Finance* and again

[59] *Beatty*, above n 8, at 388.
[60] Ewan McKendrick "The legal effect of an anti-oral variation clause" (2017) 32(10) JIBLR 439 at 441.
[61] *Globe Motors*, above n 14, at [104]; *MWB v Rock Advertising* (EWCA), above n 10, at [28].
[62] *Beneficial Finance*, above n 14, at [77].
[63] McKendrick, above n 14, at 441.
[64] McKendrick, above n 14, at 441.

in *World Online Telecom*, Judge Mackie stated that the court would require "strong evidence" of an informal variation where a NOM-clause is present.[65]

This notion has received some academic support, as arguably it strikes a balance between giving effect to agreed terms, and allowing parties to vary informally. It would not offend freedom of contract, but would still protect parties from "spurious" and unfounded claims.[66]

However, this appears to have been stamped out by the courts. In *Virulite*, Stuart-Smith LJ expressed his preference for the approach stated by Gloster LJ in *Energy Venture Partners*; the NOM-clause has an evidential function, but the standard of proof remains the balance of probabilities.[67] Subsequently, in *Globe Motors* Beatson LJ agreed, and in *MWB* (EWCA) this position was applied in the result.[68]

Beneficial Finance also noted the dicta of Judge Mackie, but followed *Virulite* and *Energy Venture Partners* to conclude that the standard was the balance of probabilities.[69]

Reasoning to Support this Approach

In applying this approach, the EWCA adopted its dictum in *Globe Motors*. This brings the reasoning of the Court in that case into sharp focus.

While acknowledging commercial benefits of a NOM-clause, Beatson LJ reasoned that it could not overpower freedom of contract.[70] As above, parties have the freedom to make or unmake any agreement in writing or informally. A subsequent informal variation should thus have effect despite a NOM-clause.

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[65] *Spring Finance,* above n 17, at [53]; *World Online Telecom,* above n 16, at [33].
[66] Liron Shmilovits "Amending a Contract Contrary to its own Provisions" [2016] LMCLQ 363 at 366.
[67] *Virulite*, above n 21, at [60]; *Energy Venture Partners,* above n 20, at [273]-[274].
[68] *Globe Motors,* above n 14, at [109]; *MWB v Rock Advertising,* above n 10, at [28] and [34].
[69] *Beneficial Finance,* above n 35, at [77].
[70] *Globe Motors,* above n 14, at [97] and [100].

It was stressed to the Court that the broad principle of contractual freedom has been limited in other situations. Chiefly, counsel cited the in-writing requirement for dispositions of land under the Land Registration Act.[71] It was asserted that, if the legislature can impose a formality requirement on private actors, then it must be open to such actors to adopt such a requirement by agreement.[72]

Beatson LJ was not persuaded by this analogy, calling it "misconceived".[73] Freedom of contract is an underlying principle, applying unless specifically excluded by an overriding rule. The statutory in-writing requirement is one such instance, but it cannot be taken to suggest that, generally, freedom of contract should be defeasible. Rather, the need for statutory intervention indicates the broad scope of the rule.

Exceptions can also be found at common law. Beatson LJ noted that both penalty clauses and restraint of trade covenants are not enforceable, contrary to freedom of contract.[74] As counsel could point to no common law principle limiting the freedom of parties to make variations informally where a NOM-clause is present, Beatson LJ upheld the general freedom.[75]

Underhill and Moore-Bick LJJ agreed.[76] Like Beatson LJ, both acknowledged commercial motivations for a NOM-clause. However, neither thought that a principled or doctrinally sound method for achieving its ends could exist in the face of freedom of contract. Moore-Bick LJ summarised: [77]

[71] Land Registration Act 2002 (UK), s 25. A similar provision applies in New Zealand; see Property Law Act 2007, s 24.
[72] *Globe Motors*, above n 14, at [97].
[73] At [99].
[74] At [99].
[75] At [100].
[76] At [116] and [118-120].
[77] At [119].

> "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".

Moore-Bick LJ analogised with the supremacy of Parliament.[78] A sovereign legislature cannot bind its successors. If statutes conflict, the latter implicitly repeals the former.[79] The same arguably applies to contracting parties; their latter agreement implicitly repeals the NOM-clause.

However, this analogy is unconvincing. For one, private actors are materially distinguishable from the state which must represent constituents. More significantly, as Shmilovits argues, a NOM-clause only binds as to form. Parliament is similarly restrained in the passing of legislation, but this is not repugnant to its supremacy.[80]

However, this position has attracted academic support. The editors of *Chitty on Contracts* noted that "the better view would appear to be that it is possible for parties to waive compliance" with the clause, and for them to do so informally.[81] The position has been commended for its clarity.[82] While some are critical of the results reached, the approach's theoretical soundness is acknowledged.[83]

Declining to enforce NOM-clauses allows for the advantages of the common law's formality indifference to be utilised. Agreements can be made quickly, and without necessity for lawyers and legally drafted documents.[84] A NOM-clause can be said to "ignore reality", as variation is often required urgently in the commercial world, so giving effect to the informal variation instead reflects reality.[85] Indeed, for the law to disregard a variation that the parties themselves have treated as effective due to a formality defect would so flagrantly ignore reality as to be

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[78] At [119].
[79] *Kutner v Phillips* [1891] 2 QB 267 at 272; cited in *Ngaronoa v The Attorney General of New Zealand* [2017] NZCA 351, [2017] 3 NZLR 643 at [12].
[80] Shmilovits, above n 66, at 365.
[81] Hugh Beal (ed), *Chitty on Contracts* (32nd ed, Sweet and Maxwell, London, 2017), Vol 1 at [22-045].
[82] Paul S Davies "Varying Contracts" (2016) 75(3) CLJ 455 at 455.
[83] Shmilovits, above n 66, at 364.
[84] *Rock Advertising v MWB* (UKSC), above n 1, at [12].
[85] Pemble, above n 7, at 87.

"pedantic" and "harsh".[86] In short, there is a good reason that the common law does not require formality, and to enforce a NOM-clause is to frustrate that policy.

However, the EWCA did not make the distinction between the two scenarios described above: where the informal variation addresses the NOM-clause, and where it is silent to the NOM-clause. As the latter scenario requires inferring implied withdrawal, the EWCA's approach is weaker for this failure. The approach is expressed as affording primacy to party autonomy, but presuming party intention as to a fundamental term (the withdrawal of the NOM-clause) without acknowledgement or explanation flouts any actual intention of the parties. Chapter 3 will expand on this shortcoming.

The "Fully Effective" Approach

Overview

The NOM-clause is fully effective, and therefore any informal variation fails to bind the parties. It does not matter whether the variation addressed and withdrew the NOM-clause, or not. Regardless, this would constitute a variation of the original document, and would thus fail.

The essential rationale is that failure to enforce a NOM-clause is to "override the parties' intentions" and thus to defy party autonomy.[87]

Reasoning to Support this Approach

[86] Shmilovits, above n 66, at 365.
[87] *Rock Advertising v* MWB (UKSC) above n 1, at [11].

This approach was applied by the majority in *MWB* (UKSC). The judgment was given by Lord Sumption, and Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed. Lord Briggs gave a minority judgment on alternate reasoning; his approach will be detailed in the following section.

Lord Sumption noted the considerable commercial benefits of NOM-clauses.[88] These are discussed above, in Chapter 1.

The primary reason given for this approach was that it gives effect to a mutually-agreed clause, and as such, respects the parties' freedom of contract. This is surprising, given that the EWCA appealed to the same principle to reach the opposite result. Lord Sumption, however, deemed fallacious the EWCA's view that party autonomy supports the "No-Effectiveness" approach.[89]

In support, Lord Sumption stated that nearly all contracts bind parties to their terms, and therefore "restrict their autonomy".[90] It is through enforcement of these agreed terms that party autonomy is respected. As Morgan has commented:[91]

> "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."

Thus while enforcement of a NOM-clause does restrict the parties' later contractual freedom, such restriction was agreed in exercise of their autonomy, and must be respected.

Academics have also noted the issue with the EWCA's appeal to party autonomy to decline enforceability of the NOM-clause. O'Sullivan and Shmilovits have both pointed out a paradoxical issue with the premise.[92] As both note, the same contractual freedom that is usually used to justify the enforceability of a clause, is used by the EWCA to deny enforceability.

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[88] At [12].
[89] At [11].
[90] At [11].
[91] Morgan, above n 40, at 607.
[92] Shmilovits, above n 66, at 364; Janet O'Sullivan "Unconsidered Modifications" (2017) 133 LQR 191 at 196.

Further, in a NOM-clause case, that contractual freedom is used to deny enforceability "in favour of the very thing which the parties expressly agreed to prohibit" (an informal variation).[93]

Therefore, while Lord Sumption agreed that freedom of contract is the governing principle, he totally disagreed with the EWCA on how it should be respected. Rather than mandate that informal variation must be available, he thought that a NOM-clause must be enforceable, and therefore that the variation must fail.

Despite academic backing, there is a conceptual flaw with Lord Sumption's reasoning. Essentially, he makes a trite law analogy to justify his opinion on a nuanced issue. His point is that freedom of contract means that parties can mutually limit their autonomy, and that the best way to give effect to this is to enforce such agreed limits. This is uncontroversial, but only when limited autonomy is understood in a unilateral sense. Once contractual freedom is utilised, neither party may individually (unilaterally) act outside of the agreed confines of each party's post-contractual autonomy.

This can be seen in a simple example. If Party X contracts with Party Y to the effect that Party Y will pay Party X $100 in return for 10 widgets, then party autonomy has been limited. Of all the actions that Party X can take, it can no longer decline to provide widgets. Similarly, Party Y cannot refuse to pay. The contractual freedom to enter the agreement is then respected by enforcement of both obligations; contractual autonomy is enlarged by limitation of later autonomy.

This analysis breaks down in the NOM-clause situation. According to Lord Sumption, party autonomy is limited to the extent that the parties cannot vary informally. However, necessarily, such variation would not be a unilateral overstep of agreed limited autonomy, but a bilateral one. This makes a significant difference.

In the example above, it would always remain open to the parties to bilaterally step outside their contractual bounds. If it were mutually decided that the supply was no longer desirable, both

[93] Shmilovits, above n 66, at 364-365.

could renege on their respective promises. This would be a simple exercise of contractual freedom to unmake agreements.[94] In this way, limited party autonomy can only exist unilaterally - the autonomy of one party is only limited by the contract so long as the counterparty demands it. Lord Briggs alluded to this in his minority judgment, stating that parties may bind themselves as to future autonomy, but only so long as at least one party desires this.[95]

In the NOM-clause scenario, both parties act outside their limited autonomy to agree to an informal variation. Whether this bilateral action should suffice to override the NOM-clause, Lord Sumption's reasoning is flawed. His analogy is improper, because the contractual terms he stressed as vital to enforce in the interest of contractual freedom are only ever unilaterally binding. The policy does not necessarily apply to bilateral action in the NOM-clause context.

Lord Sumption also relied on the enforceability of NOM-clauses under extant civil codes to support enforceability in England.[96] Having characterised opposition to NOM-clause enforceability as "entirely conceptual", Lord Sumption pointed to such rules as evidence that this conceptual issue can be surmounted.[97]

The United States Uniform Commercial Code provides another example of an enforceable NOM-clause.[98] This is particularly relevant to the current discourse, because it reversed the above-stated dictum of Cardozo J.[99]

It is unclear how useful this point is. No one doubts that a statutory rule that NOM-clauses are effective would render them so.[100] The real question is whether such a rule is desirable given the notion of contractual freedom. Lord Sumption's point "fails to engage meaningfully" with this

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[94] *Beatty,* above n 8, at 387.
[95] *Rock Advertising v MWB* (SC), above n 1, at [22].
[96] United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 3 (opened for signature 11 April 1980, entered into force 1 January 1988); UNIDROIT *Principles of International Commercial Contracts*, (4th ed, 2016).
[97] At [13].
[98] United States Uniform Commercial Code (US), s2-209(2).
[99] McKendrick, above n 60, at 444.
[100] James C Fisher "Contract variation in the common law: A critical response to *Rock Advertising v MWB Business Exchange*" (2018) 47(3) CLWR 196 at 198.

conceptual challenge.[101] The civil codes referred to are evidence that such legislation may be merited, but do not themselves assist in resolving the conceptual problem.

The final major aspect of Lord Sumption's reasoning was an analogy between NOM-clauses and "entire agreement" clauses (EACs). An EAC generally provides that the whole of the parties' agreement is contained within the written contract itself, and therefore that no prior proposals and representations form part of the contract.[102]

Lord Sumption considered the clauses to "give rise to very similar issues".[103] Both essentially state that the whole of the agreement exists in writing, and that no informal representation can modify the substance of that written agreement. The similarity between EACs and NOM-clauses will be explored in Chapter 4.

Lord Sumption briefly canvassed English law on EACs. He concluded that, unless a collateral informal agreement can operate as an independent contract (meaning it must be supported by consideration), contended informal representations fail.[104] Because EACs are generally enforceable, Lord Sumption suggested that NOM-clauses should be too, considering their functional similarity.

Lord Briggs disputed this analogy.[105] While EACs serve a similar purpose, the "conceptual difficulty" of NOM-clauses does not affect EACs.[106] EACs simply disregard past discussions and reduce material correspondence to that recorded in the contract. NOM-clauses, on the other hand, "purport to bind the parties as to their future conduct"; as they exclude future variation.[107] It is the inability to bind future selves that, according to the EWCA, renders NOM-clauses

[101] Fisher, above n 100, at 198.
[102] *Rock Advertising v MWB* (UKSC), above n 1, at [14]. See also Catherine Mitchell "Entire Agreement Clauses: Contracting Out of Contextualism" (2006) 22 JCL 222 at 222.
[103] At [14].
[104] At [14].
[105] At [28].
[106] At [28].
[107] At [28].

ineffective. Because no such inability applies regarding EACs, Lord Sumption's analogy probably fails. Subsequent academic discussion has supported this critique.[108]

In closing, Lord Sumption acknowledged that injustices may result where a variation is concluded in good faith, only for one party to later rely on the NOM-clause to preclude enforceability.[109] The strictness of the "Fully-Effective" approach does not lend itself favourably to such a situation. However, Lord Sumption was not dissuaded, saying that a "safeguard against injustice" is achieved by estoppel.[110] He did not address the extent to which estoppel could apply, except to state that it could not be "so broad" as to always negate a NOM-clause, and that it could not apply on the facts of *MWB* (UKSC), as Rock did not rely to its detriment.[111] This dissertation does not comment on the adequacy of estoppel to address this concern.

The "Conditional on Direct Address" Approach

Overview

A NOM-clause will be effective against informal variation of the contract, so long as the variation itself does not address the NOM-clause. This approach was applied by Lord Briggs, in the minority, in *MWB* (UKSC).

As outlined in Chapter 1, there are two situations where a NOM-clause can be engaged against an informal variation: where the parties withdraw the NOM-clause itself in their variation, and where they simply agree a variation without reference to the NOM-clause.

The "Conditional on Direct Address" approach only substantially differs from the "Fully Effective" approach in the first situation. Like any contractual term, a NOM-clause can be

[108] Robert Harris "MWB: Modification, Wrangles and Bypassing" [2018] LMCLQ (forthcoming).
[109] At [16].
[110] At [16].
[111] At [16].

withdrawn. However, withdrawal would constitute a variation of the original agreement, and thus, under the "Fully Effective" approach, would need to be in writing.

For Lord Briggs however, a NOM-clause can be informally waived. Subsequently, any variation to the substance of the contract would be effective - the NOM-clause would no longer govern the parties. Thus, in the first situation, variation is effective.

However, this approach also enforces the variation in rare instances of the second situation. If the withdrawal of the NOM-clause must be necessarily implied in the informal agreement, then the variation prevails over the NOM-clause. However, this is a "strict test", and will be met only where performance of the variation was urgently required, before it could be recorded in writing.[112] Lord Briggs acknowledged that such situations are "equally likely" to give rise to estoppel.[113]

Reasoning to Support this Approach

Like Lord Sumption, Lord Briggs recognised the commercial benefits of a NOM-clause.[114] Both seem to have considered, accordingly, that the law should enforce NOM-clauses if it can.[115]

However, from this premise Lord Briggs deviated substantially from Lord Sumption. Lord Sumption was comfortable disregarding the "conceptual impossibility" that persuaded the EWCA, but Lord Briggs rejected this.[116] He deemed it conceptually impossible for: [117]

> "... parties to a contract to impose upon themselves [a NOM-clause], but not to be free, by unanimous further agreement, to vary or abandon it by any method, whether writing, spoken words or conduct, permitted by the general law".

[112] *Rock Advertising v MWB* (UKSC), above n 1, at [30].
[113] At [30].
[114] At [21].
[115] At [21].
[116] At [25].
[117] At [26].

Therefore, this approach is conceptually aligned to the "No-Effectiveness" approach. Like the EWCA, Lord Briggs considered the "conceptual impossibility" to be determinative. However, in terms of result, the approach is much more likely to accord with the "Fully Effective" approach. That both reached the same outcome in *MWB* (UKSC) demonstrates this. What tethers the two is Lord Briggs's reluctance to find party intention to withdraw the NOM-clause.

Under the "No-Effectiveness" approach, the NOM-clause fails against any informal variation. The "Conditional on Direct Address" approach is fundamentally opposed to this. While Lord Briggs agreed with the EWCA that, due to the "conceptual impossibility", parties can always waive a NOM-clause informally, he stated that:[118]

> "But such an agreed departure will not lightly be inferred, where the parties merely conduct themselves in a non-compliant manner, for example by discussing and evening reaching consensus about a variation of the substance of their obligations purely orally, without express reference to the NOM-clause".

This renders the approach likely to result in the same outcomes as the "Fully Effective" approach. In order to refer to the NOM-clause, the parties must contemplate it. In all but rare scenarios of extreme urgency, contemplation of the NOM-clause will lead the parties to simply comply by varying formally. Lord Briggs himself acknowledged that the outcome on any likely fact-set will correspond with the "Fully Effective" approach.[119]

Regardless, Harris prefers this approach to the "Fully Effective" approach.[120] Allowing parties the benefit of a NOM-clause unless it is specifically withdrawn, regardless of formality, balances the freedom to contract both originally and subsequently. Only a clear intention to withdraw the NOM-clause will do, as opposed to the wide inference of the "No-Effectiveness" approach.

Further, this fundamental issue with the "Conditional on Direct Address" approach – its near-

[118] At [27].
[119] At [24].
[120] Harris, above n 108, (forthcoming).

certain alignment with the inflexible "Fully Effective" approach – is arguably alleviated in two respects. Firstly, it provides a pragmatic outcome in hypothetical cases of more onerous NOM-clause variants.[121] Secondly, Lord Briggs's limited allowance of withdrawal by necessary implication allows parties who vary without reference to the NOM-clause to enforce their variation in certain circumstances.[122]

Harris posits more onerous variants of NOM-clauses.[123] One states that variation must be in writing, and signed on the top of a mountain. Another states that variation must be approved by 95% of shareholders. These clauses would not necessarily be repugnant to public policy.[124] On Lord Sumption's reasoning, even withdrawal of the clause itself would have to conform with these constraints. On the other hand, the "Conditional on Direct Address" approach would allow the constraint, but would also allow non-complying withdrawal. This sensibility leads Harris to endorse the approach.[125]

The allowance for withdrawal by necessary implication also strengthens this approach. Dismissing Lord Sumption's analogy with EACs, Lord Briggs relied instead on an analogy with negotiations which parties declare are "subject to contract".[126] This umbrella is effective in England at preventing representations made in negotiation from forming part of the agreement.[127] Harris praises this analogy as against the EAC analogy, as the "subject to contract" umbrella denies enforceability of future, rather than past, informal representations and agreements.[128]

The "subject to contract" umbrella is effective unless the parties agree to dispense with it.[129]

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[121] Harris.
[122] Harris, above n 108, (forthcoming).
[123] Harris.
[124] Harris.
[125] Harris.
[126] At [29].
[127] At [29].
[128] Harris.
[129] *Rock Advertising v MWB* (UKSC), above n 1, at [29].

Such agreement will not be implied, unless it is "necessary".[130] Given the aptness of the analogy, it makes sense to allow this for NOM-clauses too. Lord Briggs explains that, where performance is urgently required, a NOM-clause can be implicitly withdrawn.[131]

Conceptual coherence aside, the allowance for necessary implication makes this approach better equipped to avoid injustice than the "Fully Effective" approach. Reliance on estoppel is unsatisfactory because its scope is unclear, except that it must not be so broad as to rob the NOM-clause of effect.[132] There would need to be a clear representation that the informal variation is valid, and "something more" invoking equity's stalwart concept of unconscionability.[133] As Peel notes, "something more" is uncertain, as it is "difficult to see what might suffice".[134]

Necessary implication is more suitable than reliance on equity. It is likely that, to establish "something more", a representation that the NOM-clause would not be invoked against the informal variation would be required.[135] This requires contemplation of the NOM-clause at the relevant time, which would surely compel formal variation. This potentially renders estoppel worthless. By allowing strictly necessary implied withdrawal of the NOM-clause, the approach provides some scope for a just outcome where the "Fully Effective" approach would bluntly enforce the NOM-clause. For this reason, Harris deems it correct.[136]

Despite this flexibility, it is unclear why adherence to party autonomy mandates implication. Lord Briggs developed his approach bearing party autonomy in mind; he rejected the "Fully Effective" approach because parties have "autonomy to agree to release themselves" from the NOM-clause.[137] His rejection of the "No-Effectiveness" approach also depends on party

[130] At [29], citing *Cohen v Nessdale Ltd* [1982] 2 All ER 97.
[131] At [30].
[132] At [16].
[133] At [16], citing *Actionstrength Ltd v International Glass Engineering in Gl En SpA* [2003] UKHL 17 for the phrase "something more".
[134] E Peel (ed), *Treitel on the Law of Contract* (14th ed, Sweet & Maxwell, London, 2015) at [5-027].
[135] Harris, above n 108, (forthcoming).
[136] Harris.
[137] At [25].

autonomy: while parties can vary the NOM-clause informally,[138] such departure "will not lightly be inferred".[139] The parties must clearly demonstrate the intention to withdraw by directing the variation to the NOM-clause.

This suggests that contemplation of the NOM-clause is crucial to effectiveness of the variation. This sits uneasily with the necessary implication exception. Lord Briggs stated that mere ignorance of the NOM-clause will not suffice,[140] but the approach allows for variation in ignorance where urgency requires immediate performance.[141] As above, this has been applauded.[142]

The approach thus asserts that 'parties ignorant of a NOM-clause cannot vary informally, unless the variation is urgent'. It is unclear why urgency is the touchstone that negates Lord Briggs's focus on party intention. If writing were required (as under the "Fully Effective" approach), then, due to the time required to draft, urgency would sensibly make a difference. However, Lord Briggs allows for informal variation that directly addresses the NOM-clause. Parties aware of it could so vary in practically no time. Lord Briggs's emphasis on party autonomy thus does not support the necessary implication exception, compromising the theoretical integrity of this approach.

Conclusion

Each approach primarily appeals to party autonomy to determine the effect of a NOM-clause. The "No-Effectiveness" approach presumes that parties who agree to an informal variation intend to withdraw the NOM-clause, and thus enforces the variation. The "Fully Effective" approach instead effects the explicit intention in the contract - to remain bound by the NOM-clause. The "Conditional on Direct Address" approach aims to strike a compromise, enforcing

[138] At [26].
[139] At [27].
[140] At [30].
[141] At [30].
[142] Harris, above n 108, (forthcoming).

the variation only where intent to withdraw is clear, but declining to draw that inference in the majority of cases.

Theoretical criticism can be levelled at each approach. None is so compelling as to be clearly desirable in New Zealand. The next chapter will demonstrate practical shortcomings, focusing especially on the inability of any rigid approach to achieve its stated goal, to respect party autonomy.

Chapter 3 - The Intention of the Parties

Introduction

This chapter will analyse the outcomes generated by each approach when applied to variable fact scenarios. The fundamental issue is which agreement to enforce between a written agreement containing a NOM-clause and an informal variation agreed despite the NOM-clause. This issue can manifest in many scenarios, as a NOM-clause is a boilerplate term.

Each approach ostensibly gives effect to party autonomy, which contract law does by determining the objective intention of the parties.[143] However, no approach succeeds in doing so in all contractual relationships. Rather, to achieve this end, a fact-sensitive approach that takes into account the parties' actual relationship is required.

This analysis is informed by reference to relational contract theory. Unlike the rigid judicial approaches, a key tenet of this theory is that contract law should not be "unitary and mandatory", applying to all contracting contexts in the same way.[144] Instead, flexibility is required to effect party intention in differing contexts.[145]

The Objective Intention of the Parties

Smith v Hughes

[143] See for example George Leggatt "Making Sense of Contracts: The Rational Choice Theory" (2015) 131 LQR 454 at 475.
[144] Robert E Scott "The Promise and Peril of Relational Contract Theory" in Jean Braucher, John Kidwell and William C Whitford (eds) *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Hart, Oxford, 2013) 105 at 121.
[145] Stewart Macaulay "The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" (2003) 66(1) MLR 44 at 64.

In a seminal judgment in *Smith v Hughes*, Blackburn J emphasised the importance of objectivity, rather than subjectivity, in determining what the intention of the parties is. That case concerned an oral contract for the sale of oats, which the purchaser required to feed horses. The seller provided a sample (of new oats), and the contract was concluded when the buyer approved. However, unbeknownst to the seller, the buyer's horses required old oats. When the seller delivered new oats, the buyer refused to pay.

The Court found that the substance of the deal did not depend on the buyer's subjective understanding. Rather, it depended on what an objective reasonable person would believe the deal was. As Blackburn J put it:[146]

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

Because the buyer had approved of the sample of new oats, a reasonable person would understand that the contract was on those terms. Thus, the buyer breached the contract.

There are two schools of thought concerning the meaning of objectivity in this context. The "detached objectivity" theory insists that the subjective intention and knowledge of the parties is irrelevant to their objective intention; instead, only outward appearances discernible to a "fly on the wall" are relevant to ascertaining objective intention.[147] On the other hand, the "promisee objectivity" theory asks what a reasonable person in the position of the promisee would understand the contract to be, taking into account what the promisee subjectively knows.[148] This account is consistent with Blackburn J's dictum.

This chapter will apply objectivity according to the latter theory. As discussed below, the objective intention of the parties in the factual contexts discussed depends significantly on their

[146] *Smith v Hughes* (1871) LR 6 QB 597 at 607.
[147] DW McLaughlan "Objectivity in Contract" (2005) 24 Univ Qld Law J 479 at 484.
[148] At 484.

subjective qualities, such as degree of commercial sophistication and whether they were subjectively aware of the NOM-clause. Thus, in order to effect party intention, the reasonable person must be placed in the shoes of the parties in order to take account of these factors.

Application to the NOM-Clause Context

The question is which agreement should prevail - a NOM-clause or an informal variation. It is not simply whether to enforce an agreement, but which agreement to give effect to at the necessary expense of the other.[149]

Smith v Hughes shows that "an objective test for determining whether binding, enforceable obligations are created" is required.[150] Thus, recourse should be had to the reasonable person to determine whether the parties intended the informal variation to create binding obligations. This question must turn on the objective intention of the parties at the time the variation was agreed. The factual context is crucial to this. The objective intentions of the parties thus cannot be effected by rigid approaches.

The Factual Scenarios this Chapter Will Consider

This chapter will apply the three judicial approaches to three classes of relationship in which an informal variation has occurred despite a NOM-clause. The first is a relationship of two natural persons. The second is a relationship between two organisations, where the informal variation has been agreed by agents. The third is supplier-consumer relationship, where the supplier is an organisation.

[149] David V Snyder "The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver, and Estoppel" (1999) 2 Wis L Rev 607 at 640; *GEC Marconi*, above n 25, at [220].
[150] Martin Hevia "Separate Persons Acting Together - Sketching a Theory of Contract Law" (2009) 22 Can JL & Jur 291 at 306.

In all examples, the informal variation has been clearly established in fact; this means that the evidential effect afforded to a NOM-clause under the "No-Effectiveness" approach is irrelevant.[151]

None of the variations directly address the NOM-clause. It is unlikely that parties aware of their NOM-clause at the time the variation is agreed would fail to simply comply with it.[152] As these examples are intended to demonstrate practical failings of the judicial approaches, it makes sense to test the hard case of ignorant parties, which will be much more common.

Relatedly, there is no suggestion of a requirement for urgent performance of the type hypothesised by Lord Briggs in allowing for necessary implication that the parties intended to waive the NOM-clause in rare circumstances.[153]

Outcomes Reached by the Approaches

Despite the differences between the relationships, the approaches respectively reach the same result in each. This is essential to the focus of this chapter; the approaches are rigid.

Applying the "No-Effectiveness" approach would result in the enforceability of the variation, because the parties are taken to have intended to withdraw the NOM-clause by the existence of the variation.

Both the "Fully Effective" and the "Conditional on Direct Address" approaches would give effect to the NOM-clause and disavow the variation. The parties expressed a clear intention not to be bound to any informal variation, and thus cannot be said to intend such a variation to bind them.

[151] *Globe Motors*, above n 14, at [104]; *MWB v Rock Advertising* (EWCA), above n 10, at [28].
[152] *Rock Advertising v MWB* (UKSC), above n 1, at [24].
[153] At [30].

For clarity, the following table displays the agreement each approach enforces.

	"No-Effectiveness"	**"Fully Effective"**	**"Conditional on Direct Address"**
Natural Persons	Variation	NOM-Clause	NOM-Clause
Organisations	Variation	NOM-Clause	NOM-Clause
Supplier-Consumer	Variation	NOM-Clause	NOM-Clause

Relationship Between Natural Persons

Natural persons who are commercial actors may include a NOM-clause in their contract. If that contract lasts sufficiently long, forgetting the clause is certainly possible. An informal variation may be agreed that one party subsequently regrets. Recollection of the NOM-clause would provide a strong argument against the enforceability of the variation.

A reasonable person would consider that the parties clearly intended to vary their agreement. If an agreement to vary exists, then intention to vary does too. The parties' intention to be bound by their NOM-clause has therefore lapsed. Snyder notes that "the later agreement probably reflects what the parties want better than their earlier agreement does."[154] Just as Parliament is deemed to intend repeal where it legislates contrary to a past statute,[155] effect should be given to the last in time. A reasonable person would therefore effect party intention by enforcing the variation.

This is the result reached by applying the "No-Effectiveness" approach. The main objection to this approach is that it is problematic to infer that, in all cases, parties intend to withdraw the NOM-clause. As McKendrick states, the mere existence of a non-complying agreement does not indicate that the parties have "exercised their contractual freedom" to revoke the NOM-clause.[156]

[154] Snyder, above n 149, at 640.
[155] *Ngaronoa*, above n 79, at [12].
[156] McKendrick, above n 60, at 445.

However, this criticism does not apply to the natural persons case. Their reasons for including the NOM-clause would presumably be those referred to in Chapter 1 - that it prevents unfounded claims of informal variation, and that it prevents disputes over precise terms.[157] Where a variation is clearly agreed in fact, these reasons are not operative. There is no reason for the parties to intend continued enforceability of the NOM-clause.

The case of organisations is different. A third reason to include a NOM-clause continues to operate: that it helps to control employees.[158] Discussed below, this supports criticism of the blanket inference, as there is a reason for the parties to continue to intend the NOM-clause's operation. Because this does not affect natural persons, the intention to withdraw the NOM-clause can be confidently discerned.

Thus, both the "Fully Effective" and the "Conditional on Direct Address" approaches fail to effect the objective intentions of the parties here. These approaches deny the parties the contractual freedom to enter into the variation, when their intention to do so is clear. As Shmilovits puts it, it is "pedantic" and "harsh" for the law to enforce an agreement that no longer represents the parties' mutual intention.[159]

Relational contract theory propounds a distinction between the "real deal" and the "paper deal". The essential point is that the "paper deal" is often ineffective at capturing every aspect of the "real deal" between the parties.[160] Excessive focus on the "paper deal" can mean that "implicit, relational dimensions of the 'real deal' are entirely neglected".[161] This analysis has led courts to give effect to actual expectations of parties where their "paper deal" is silent to them, or even where it is inconsistent with them.[162]

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[157] *Rock Advertising v MWB* (UKSC), above n 1, at [12].
[158] At [12].
[159] Shmilovits, above n 66, at 365.
[160] Macaulay, above n 145, at 44.
[161] Morgan, above n 40, at 599.
[162] Macaulay, above n 145, at 44.

This distinction is normally raised in the context of a "paper deal" which fails to accurately capture the intentions of the parties at the time they agreed to it; those intentions comprise the "real deal", which is given effect to instead. This does not fit the NOM-clause context perfectly, as a NOM-clause is not ambiguous or flawed.

Nevertheless, the essence of the distinction supports the broader proposition that a written contract is not always the overriding source of the parties' intention, where a contrary intention is apparent elsewhere. In the NOM-clause context, the informal variation competes with the "paper deal" to achieve recognition as the source of party intention. Faced with a choice between a prior "paper deal", and a current "real deal" in the form of an informal variation, the reasonable person would uphold the "real deal".

Critics of this relational view often note that practical difficulties in determining the "real deal" are substantial.[163] That must be correct, but it is not applicable to this context. The variation provides unequivocal evidence of the "real deal".

Thus, in the simple example of natural persons who agree to an informal variation despite a NOM-clause, the objective intention of the parties is to be bound by the variation. However, the addition of details to these facts could change the reasonable person's view of party intention. For example, if the parties were of unequal commercial sophistication, the weaker party may insist on a NOM-clause. Oral negotiations can be aggressive, and the weaker party may wish to avoid accidentally agreeing informally to a variation demand from the stronger party.

In such a case, a reasonable person may consider that, at the time of variation, the intention of the parties remained to be bound by the NOM-clause. The NOM-clause continues to perform a function, meaning it cannot be dismissed as a mere "paper deal". Of course, mere subjective intention cannot change the reasonable person's view. Contract law effects either the intention of

[163] See J Gava and J Greene "Do We Need a Hybrid Law of Contract? Why Hugh Collins Is Wrong and Why It Matters" (2004) 63(3) CLJ 605.

both parties, or the intention of just one, so long as that party reasonably believed the counterparty accepted that intention.[164]

Thus, so long as such an intention can be objectively shown, for example by express negotiation of the NOM-clause, or even communication by the weaker party of their reason to include it, then the objective intention of the parties may not be the enforceability of the variation. The blanket inference that both parties intended to waive the NOM-clause would not be justified.

This demonstrates the need for a flexible approach. Even in the simple context of natural persons, a rule that the variation always prevails would not capture the objective intentions of the parties.

Relationship Between Organisations

This situation is materially distinct from the first because organisations are not like natural persons. As legal persons, they can contract, but they can only do so through their agents. In the NOM-clause case, an informal variation agreed through agency raises different considerations as to the intention of the parties. As natural persons, agents themselves exhibit a clear intention to vary. However, the intention which matters is that of the organisation, which is a different concern. This section will explain how, in the organisations case, the parties may objectively intend the NOM-clause to remain operative at the time of variation.

Intention of the Organisation as Distinct from that of the Agent

The seniority of the agents who agree to the variation is a substantial factor as to the objective intention of an organisation. If the agents are directors, then the above discussion regarding natural persons likely applies, because directors are said to comprise the "directing mind" of the

[164] McLaughlan, above n 147, at 488.

organisation, by virtue of seniority.[165] A reasonable person would thus regard the organisation's intention as being to execute a binding variation.

The case will be different where at least one of the agents is a relatively low-level employee. To the agents themselves, the intention is to vary, as above. However, the party whose objective intention matters is the principal - the organisation as a whole.

The case of *Daventry District Council v Daventry & District Housing* illustrates this distinction.[166] There, two agents of the Council acted with contrary intentions: the chief negotiator acted with the intent that the Council would not pay for a deficit in a pension scheme, whilst the Council's lawyers erroneously believed the Council was to pay for it. Eventually, a contract was entered on the terms that the Council would pay the sum. While this represented the intention of the lawyers, it certainly did not represent the intention of the Council. The contract was accordingly rectified by the Court on the ground of common mistake - neither party intended the agreement which resulted.

This case demonstrates the general difficulty with simply attributing an agent's mental state onto their organisation. The reasonable person's assessment is therefore more general in scope than simply to effect the intentions of agents.

Actual and Ostensible Authority

An organisation can only be bound to an agreement made by its agent where the agent's action was within their authority.[167] This authority can either be "actual", meaning that the terms of the agent's relationship with their principal allow the agent to agree to contracts,[168] or "ostensible", meaning that a third party would reasonably assume that the agent has that authority, based on

[165] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713.
[166] *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333.
[167] Derek French, Stephen Mayson and Christopher Ryan *Mayson, French & Ryan on Company Law* (33rd ed, Oxford University Press, Oxford, 2016) at [19.5.1].
[168] At [19.5.2.1], citing *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 502-503.

words or conduct of the principal.[169] So long as either actual or ostensible authority is found, a principal will be bound.

These rules can have harsh consequences for organisations; agency can cause organisations to contract contrary to their self-interest, or to commit legal wrongs.[170] It is thus logical that organisations look to limit the likelihood of such outcomes.

The NOM-clause is one such method. Although it does not limit the agent's authority - as the agent could always contract in writing - a NOM-clause can reduce the agent's aptitude or volition to agree to informal variations. An in-writing requirement can give an agent pause when faced with a proposed variation.[171] It is likely to cause the agent to consider the variation more thoroughly, or even to check with a superior. This commercial benefit could lead a reasonable person to conclude that, despite the intention of the agent, the intention of the organisation was for the NOM-clause to persist.

The facts of *MWB* make for a useful illustration. At the time the variation was agreed, Miss Evans (MWB's agent) was talking to Mr Idehen (Rock's managing director) on the phone while on a bus.[172] Ignorant of the NOM-clause, Miss Evans made the variation hastily, and did not check with management. MWB's intention was arguably that the NOM-clause would invalidate the variation.

Inadequacy of Agency Rules to Deal with the NOM-Clause

It may appear that the presence of a NOM-clause would be sufficient to preclude the counterparty's reliance on the agent's ostensible authority to vary informally. This would allow

[169] At [19.5.3], citing *Armagas Ltd v Mundogas SA* [1986] AC 717 at 777.
[170] Sarah Worthington "Corporate Attribution and Agency: Back to Basics" (2017) 133 LQR 118 at 135-136.
[171] *Globe Motors*, above n 14, at [97]; *MWB v Rock Advertising* (EWCA), above n 10, at [22]; *Rock Advertising v MWB* (UKSC), above n 1, at [12].
[172] O'Sullivan, above n 92, at 196.

parties to achieve the aim of the NOM-clause without invalidating a subsequent variation; the variation would not be established for want of authority.

However, it is dubious whether ostensible authority is a sufficiently nuanced instrument to distinguish between general authority to bind, and a formality limitation on that authority. For instance, in the case of an agent whose ostensible authority primarily derives from their position and the usual authority that position carries, the agent has "implied authority to do whatever is normally incidental in the ordinary course" of that position.[173] This common law rule has been codified in s 18(1)(c)(ii) of the Companies Act 1993, which states that the authority an agent in a position "customarily" holds cannot be denied by the principal.[174]

It is likely that an agent whose position customarily carries the power to agree to contracts has ostensible authority to do so, and that a formality requirement would be incidental to this power. Thus, in *MWB*, the first instance finding that Miss Evans, a credit controller, had "at least ostensible authority" to vary was not appealed by MWB.[175]

The inability of agency law to provide for this issue, and the merit of altering the relevant rules in order to allow it to, are matters outside the scope of this dissertation. Instead, contract law, by giving effect to the objective intention of the parties, can afford parties this benefit.

A Contractual Approach: The Objective Intention of the Parties

For organisations, therefore, a benefit conferred by the NOM-clause remains relevant at the time of variation. This is unlike the basic natural persons scenario, where the relevance of the NOM-clause ceases.

[173] Peter Watts (ed) and FMB Reynolds *Bowstead and Reynolds on Agency* (20th ed, Sweet & Maxwell, London, 2014) at [3-028].
[174] Companies Act 1993, s 18(1)(b)(ii).
[175] At [8].

Bolstering this proposition, consideration is no longer required to enter into a binding variation in New Zealand,[176] as detailed in Chapter 1. Under the orthodox approach, consideration served as a check on propensity for hastily-agreed variation, because the promisee had to offer valid consideration in order for the variation to be binding. In this context, an organisation would be protected from effects of an overenthusiastic agent by the reasonable likelihood that, in accepting an orally proposed variation, the agent would not offer valid consideration. As Morgan speculates, the ubiquity of NOM-clauses may be due to their suitability as a "party-agreed replacement" for this protection.[177] At the time of variation, therefore, organisations continue to rely on NOM-clauses.

As above, the "No-Effectiveness" approach draws a blanket inference that the parties intended to withdraw the NOM-clause. However, in the organisation scenario, a contrary intention can be inferred; the NOM-clause remains operative, and thus the organisation does not intend its withdrawal. As Lord Briggs stated, intention to withdraw should "not lightly be inferred".[178]

Of course, subjective intention to remain bound by the NOM-clause is insufficient for the reasonable person to consider that the deal between the parties embodied this. Rather, that intention must be objectively apparent. If a reasonable person in the position of the counterparty would understand that intention to exist, then this will be satisfied.

Various factors will determine this question. Where there is an imbalance in sophistication or bargaining power between the parties, it is less likely that a reasonable counterparty would understand that the NOM-clause was to remain effective. The same is true where the NOM-clause is standard form and was not addressed in negotiation. McMeel has expressed the concern that enforcement of standard terms may not reflect the expectations of smaller and less sophisticated actors, in the same way that such enforcement does not reflect the expectations of a consumer.[179] An objective intention must contemplate this.

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[176] Roberts, above n 47, at 85; *Antons Trawling*, above n 48; *Teat v Willcocks*, above n 49.
[177] Morgan, above n 40, at 594.
[178] At [27].
[179] G McMeel "Documentary Fundamentalism in the Senior Courts: The Myth of Contractual Estoppel" [2011] LMCLQ 185 at 207.

However, if the counterparty is equally sophisticated, then the objective intention may be the ineffectiveness of the variation. Similar applies if the clause is negotiated, putting a reasonable counterparty on notice. Just as the buyer in *Smith v Hughes* could not reasonably claim the contract was for old oats, the counterparty cannot reasonably assert ineffectiveness of the NOM-clause.

These variable circumstances necessitate a flexible test, unlike the rigid judicial approaches. Such a test would give effect to the objective intention of the parties in all situations, which rigid approaches cannot do.

Relational Contract Theory

This situation raises a key aspect of relational contract theory. Effecting party intention is not as simple as ignoring the "paper deal" and focusing instead on "real" aspects. Rather, as Mitchell puts it, the law must be "sympathetic to the operation of formal contracts and relational norms as *integrated* phenomena".[180] Sometimes the "real" deal and relational norms are vital, while in other situations the contract itself is key. According to Gava, relational contract theory would only apply "real" aspects at the expense of the paper deal, where the contract is not relevant to the parties' bargain.[181]

This is not the case concerning organisations. The NOM-clause remains relevant throughout, and thus the organisation still depends on the contract. Gava, summarising Collins, states that it is:[182]

> "... normally the business relationship that is the most important aspect of transacting, but in particular circumstances either the deal or the legally enforceable contract can assume first rank importance".

[180] Catherine Mitchell "Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal" (2009) 29(4) OJLS 675 at 677 (emphasis original).
[181] John Gava "Taking Stewart Macaulay and Hugh Collins Seriously" (2016) 33 JCL 108 at 110.
[182] At 112, summarising Hugh Collins *Regulating Contracts* (Oxford University Press, Oxford, 1999) at 127-148.

Here, despite the "real" actions of the agents, the NOM-clause retains priority to the organisation. Macaulay gives the example of terms that protect corporations from salesmen making concessions to customers as an instance where the contract retains prevalence over the relational expectations.[183] This is similar to the effect of a NOM-clause for an organisation, lending credence to the effectiveness of the clause.

Relationship Between Supplier and Consumer

General Concerns with Supplier-Consumer Contracts

Freedom of contract does not comfortably fit the context of supplier-consumer relationships. That theory depends on the notion that parties "negotiate equally to agree to terms that accord with their interests".[184] This, in turn, depends on the "false assumption" that the consumer is in a position of equal bargaining power with the supplier.[185]

This is patently false, even "nonsensical".[186] Instead, consumers endure an "inequality of bargaining power".[187] Of particular relevance is the problem with prevalent standard form contracts employed by suppliers. Although most consumer contracts concern discrete transactions, rendering variation unlikely, such contracts can continue for meaningful periods of time. For instance, informal variations may arise in telecommunications supply contracts or

[183] Stewart Macaulay "Non-Contractual Relations in Business: A Preliminary Study" in Braucher, Kidwell and Whitford (eds) *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Hart, Oxford, 2013) 1 at 16.
[184] Alexandra Sims "Unfair Contract Terms: A New Dawn in Australia and New Zealand?" (2013) 39(3) Monash U L Rev 739 at 742.
[185] Kate Tokeley "Introduction" in Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) 1 at 21.
[186] Tokeley, above n 185, at 21.
[187] Tokeley, above n 185, at 21.

consumer credit contracts. A NOM-clause is boilerplate language,[188] and likely to feature in many such contracts.

The problem with applying contractual freedom to standard forms in this context has been recognised by the Law Commission, which has said that standard terms drawn up by stronger parties are "a long way from the assumptions that seem to underlie freedom of contract".[189] The consumer is realistically unable to negotiate standard terms,[190] and thus is unlikely to bother to read them.[191] Even if they do, the terms are "technical" and "complex",[192] and considerable time or even legal advice is probably required to understand them.[193] Thus, enforcing standard terms against a consumer on a contractual freedom basis is problematic. Even where a consumer is aware of a NOM-clause, it is likely that they would consider an informal variation to nonetheless supersede it. Thus, effecting party intention cannot be achieved by deeming the consumer's intention on the basis of standard terms.

Inadequacy of Consumer Protection Legislation to Deal with NOM-Clauses

New Zealand has legislated to protect consumers from standard form terms with the "Unfair Contract Terms Law",[194] comprising s 26A and ss 46H to 46M of the Fair Trading Act 1986.[195] The courts may declare certain terms unfair, rendering subsequent inclusion in consumer contracts unlawful.[196] To be unfair, a term must (a) cause a significant imbalance in parties'

[188] Pemble, above n 7, at 85.
[189] Law Commission *"Unfair" Contracts: A Discussion Paper* (NZLC PP11, 1990) at 6.
[190] Tokeley, above n 185, at 21; Chris Willett "Transparency and Fairness in Australian and UK Regulation of Standard Terms" (2013) UWAL Rev 72 at 75.
[191] Sims, above n 184, at 749; Lisa Bernstein and Hagay Volvovsky "Not What You Wanted To Know: The Real Deal And The Paper Deal In Consumer Contracts - Comment On The Work Of Florencia Marotta-Wurgler" (2015) 12 Jerusalem Rev Legal Stud 128 at 130.
[192] Tokeley, above n 185, at 21.
[193] Sims, above n 184, at 750.
[194] Alexandra Sims "Unfair Contract Terms" in Kate Tokeley (ed) *Consumer Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) 207 at 209.
[195] Fair Trading Act 1986, s 26A and ss 46H to 46M.
[196] Section 26A.

rights and obligations, (b) not be reasonably necessary to protect legitimate interests of the supplier, and (c) cause detriment to the consumer if applied.[197]

It is doubtful whether a NOM-clause would satisfy this test. Sims provides examples of unfair terms, and each confers a unilateral benefit or disbenefit.[198] Being inherently bilateral, a NOM-clause does not fit with these examples. However, it is certainly arguable that the effect of a NOM-clause will invariably be unilateral - protection of the supplier.

Given the discussion concerning organisations, above, it is also arguable that NOM-clauses are reasonably necessary to protect the supplier's legitimate interests.

Significantly, unfair term applications can only be made by the Commerce Commission,[199] so these provisions will not assist an individual consumer seeking effectiveness of an informal variation.

The Objective Intentions of the Parties

If the supplier is a natural person, then the objective intention of the parties should be assessed as in the basic natural persons case. The NOM-clause's relevance has most likely ceased, and thus the parties intended to vary.

A supplier who is an organisation presents a more difficult question, because a NOM-clause remains valuable to an organisation despite a variation. However, almost invariably in the consumer context for the reasons explored above, that intention of the organisation will not be objectively apparent. It is not reasonable to expect a consumer to understand this, as they are likely unaware of the NOM-clause's existence altogether. A consumer is likely instead to regard a variation concluded with a representative as operative. That is the "real" deal. An imbalance in

[197] Section 46L.
[198] Sims, above n 184. at 743-744.
[199] Fair Trading Act, s 46H(1).

sophistication or bargaining power renders an objective intention to remain bound by the NOM-clause untenable.

Conclusion

A New Common Law Approach?

Effecting the intention of the parties requires more nuance than the application of rigid rules which draw default inferences without regard for the parties' actual relationship. In most scenarios involving natural persons, the parties intend the variation to be binding. Conversely, relationships involving organisations may demand the conclusion that the NOM-clause was intended to remain effective, if such an intention was objectively apparent in the circumstances.

Thus, the "No-Effectiveness" approach, by always enforcing the variation, will often fail to effect party intention. The "Fully Effective" and "Conditional on Direct Address" approaches will always enforce the NOM-clause where the parties, or their agents, were ignorant of it at the time of variation. This also fails to implement party intention in many cases, because the intention of an organisation is not simply referable to that of its agent.

An approach that gives effect to party autonomy in all cases must be flexible and fact-sensitive. Such an approach could be instituted by the courts in New Zealand. Determining which agreement to enforce would depend on whether either party intended the NOM-clause to remain relevant at the time of the variation. Subjective intention is not sufficient. Instead, the courts must look to particularities of relationships: whether the parties were equally sophisticated or not, and whether the NOM-clause was negotiated or referred to will be crucial indicators of the objective reasonableness of this continued intention.

However, such an approach is a stark departure from English approaches, which deem party intention in all cases. There is also no support for such an approach in the wider common law

world; Australia and Canada both utilise the "No-Effectiveness" approach. While not binding, this will be persuasive to New Zealand courts. Therefore, it is conceded that a fact-sensitive approach is probably unlikely to be applied.

A "Fair and Reasonable" Statutory Rule

Even if such an approach were likely to be adopted, it is preferable to handle this issue with legislative intervention. A statutory rule that a NOM-clause only prevails against an informal variation where it is "fair and reasonable" would come to the same, or sufficiently similar, outcomes as a fact-sensitive party intention analysis does. As stated in Chapter 1, such a rule already exists in relation to EACs,[200] which are similar devices to NOM-clauses. The case law on that rule broadly concerns the same matters as discussed in this chapter in relation to objective intentions.

The strongest argument against a flexible approach is that it adversely affects certainty of outcome. Instituting such an approach in statute rather than common law alleviates this in two respects. Firstly, a statute can set out the crucial determinants to the effectiveness of a NOM-clause, allowing parties a reasonable degree of predictability. Secondly and relatedly, the existing case law on EACs would allow parties to analogise with their own relationship in order to determine likely results.

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[200] Contract and Commercial Law Act 2017, s 50.

Chapter 4 - A Flexible Alternative

Introduction

This chapter will recommend that a flexible, fact-sensitive approach to NOM-clauses be adopted by statute in New Zealand. This approach would take the form of an amendment to the Contract and Commercial Law Act 2017 (CCLA), being the addition of a bespoke section addressing NOM-clauses.

In arriving at the wording of the section, this chapter will draw on the statutory treatment of EACs. It will be recalled that an EAC deems the contractual document to be the whole of the parties' agreement, at the expense of prior representations. In the context of pre-contractual misrepresentation, EACs are only enforceable if that is "fair and reasonable" in the circumstances.[201] A similar approach to NOM-clauses would allow courts to implement party intention as outlined in the preceding chapter. In addition, as EACs and NOM-clauses are similar devices, adoption of a corresponding approach would enhance the consistency and coherence of contract law in New Zealand.

However, although EACs and NOM-clauses are broadly similar, the comparison is not flawless – as Lord Briggs recognised, only NOM-clauses purport to bind the parties as to future conduct.[202] The approaches should correspond, but this difference means they should not be identical. This will be clarified below.

Approaching EACs and NOM-Clauses Consistently

[201] Contract and Commercial Law Act 2017, s 50(2). The wording of this section is substantially reproduced from s 4 of the Contractual Remedies Act 1979. Many of the sources discussed in this chapter refer to that section, but are nonetheless applicable to s 50.
[202] *Rock Advertising v MWB* (UKSC) above n 1, at [28].

In *MWB* (UKSC), Lord Sumption made an analogy between EACs and NOM-clauses to say that, because EACs are effective in England, NOM-clauses should be too.[203] He stated that they "give rise to very similar issues",[204] as both state that the entirety of the contract is that recorded in the relevant document, at the expense of informal representations or agreements which are not recorded. Both clauses are intended to prioritise written formulation of intention, in contrast with the common law's lack of a formality requirement.[205]

A key reason for an EAC is to prevent a counterparty "threshing through the undergrowth" of pre-contractual dialogue to find a chance remark or statement upon which to assert that the terms of the agreement are different from those recorded.[206] Conversely, a NOM-clause prevents a counterparty from enforcing an informal variation subsequent to the contract. As Lord Briggs recognised, this is reason to dispute Lord Sumption's analogy, as the "conceptual difficulty" of parties purporting to bind their future selves does not arise.[207]

The conceptual difficulty distinction is merited. It renders improper the assertion that parties can bind their future selves with a NOM-clause because an EAC is effective. In other words, the analogy with EACs is no answer to the conceptual problem which so troubled the EWCA.

However, this does not mean that the law cannot, or should not, take a similar approach to both clauses. The reasons that parties deploy them are similar. More significantly, the sorts of cases where enforcing a NOM-clause would produce an unjust outcome are likely to be similar to the sorts of cases where enforcing an EAC would be undesirable.

Enforcement of a NOM-clause in a situation of unequal sophistication means that a weaker party cannot rely on a variation that it reasonably expected to rely on. Analogously, operation of EACs results in inability to enforce a pre-contractual representation, despite reliance on it in entering

[203] At [14].
[204] At [14].
[205] Morgan, above n 40, at 598.
[206] *Inntrepreneur Pub Co Ltd v East Crown Ltd* [2000] 2 Lloyd's Rep 611, at [7].
[207] At [28].

the agreement. Just as with NOM-clauses, the most egregious cases would involve representees who would not negotiate, read or understand the EAC.

In England, EACs are generally enforceable.[208] In New Zealand, however, s 50 of the CCLA enforces the clause in some situations while setting it aside in others.[209]. This suggests that, in the interest of coherence within New Zealand contract law, NOM-clauses should be controlled by a similar provision to s 50.

New Zealand's Approach to EACs

Section 50 states that, in the context of an alleged pre-contractual misrepresentation, an EAC will only be conclusive to deny the claim if the court considers it "fair and reasonable" in the circumstances.[210] A non-exhaustive list of factors is provided: the subject matter and value of the transaction, the respective bargaining strengths of the parties, and whether the parties were advised by lawyers.[211]

A Two-Stage Test?

On the literal wording of the section, the court cannot inquire into the merits of the plaintiff's claim until it has first disregarded the EAC.[212] This carries the uncomfortable implication that the particularities of the representation are irrelevant to the assessment of the fairness and reasonableness of the EAC excluding it. However, courts have not applied the section in this

[208] *Rock Advertising v MWB* (UKSC), above n 1, at [14]; Morgan, above n 40, at 596.
[209] Contract and Commercial Law Act 2017, s 50.
[210] Section 50(2).
[211] Section 50(3).
[212] Burrows, Finn and Todd, above n 54, at 248.

way.[213] Instead, the courts will look to the circumstances upon which the claim is based as a part of the inquiry into fairness and reasonableness.

This is undoubtedly merited in terms of case-by-case justice, but the concern has been raised that such an approach effectively dismisses considerations of "convenience and certainty" which the EAC is partially intended to provide.[214] In looking behind the EAC, the court is required to hear detailed fact submissions - an expense that the EAC is designed to avoid. This dissertation does not express a view on the appropriateness of the courts' approach to s 50, but does below consider whether the literal meaning of the equivalent NOM-clause section should also suggest a two-stage test.

Application of s 50

Section 50 bestows a wide discretion in determining the enforceability of an EAC, but the decided cases display a respectable degree of consistency in application. Decisions are often "informed substantially by the distinction between commercial and non-commercial" agreements.[215] This makes sense, considering two of the express considerations in the section address potential inequalities in sophistication between parties.[216]

In the leading case,[217] *Brownlie v Shotover Mining*, the Court of Appeal focused on the facts that the contract was commercial and between commercial parties, that the transactional value was high meaning that it was reasonable to expect careful scrutiny of the terms, that the bargaining strengths of the parties were not significantly imbalanced, and that both parties were represented by solicitors.[218] In addition, the court accepted that the EAC had been expressly discussed in

[213] Burrows, Finn and Todd, above n 54, at 248; DW McLauchlan "Merger and Acknowledgement Clauses under the Contractual Remedies Act 1979" (1988) 18 VUWLR 311 at 317 and 324; Matthew Barber "Entire Agreement (and Acknowledgement) Clauses, Misrepresentation and the Fair Trading Act (2011) 17 NZBLQ 393 at 398.
[214] McLauchlan, above n 213, at 324.
[215] Barber, above n 213, at 397.
[216] Section 50(3).
[217] Burrows, Finn and Todd, above n 54, at 248.
[218] *Brownlie v Shotover Mining Ltd* (1992) CA181/87 at 32.

negotiations.[219] This all led to the conclusion that the EAC should be conclusive between the parties. McKay J stated:[220]

> "It would be a matter of concern if commercial people acting in good faith could not achieve certainty by excluding liability for prior statements".

Subsequent cases have also treated the characterisation of the relationship as commercial as a formidable factor in favour of enforcement. In *PAE v Brosnahan*, the Court of Appeal applied *Brownlie* to declare an EAC between commercial parties conclusive.[221] In *Hall v Warwick Todd*, the same rationale was applied to a contract between natural persons in a personal capacity, who had substantial commercial experience.[222]

It has also been ruled that an EAC being in a standard form renders it less likely to be conclusive,[223] whereas the EAC being specific to the transaction points the other way.[224]

These considerations of commercial sophistication and specific contemplation of the EAC are all relevant to the first stage of the literal statutory test. However, as above, courts have also looked at the context in which the contended representation arose to determine whether the EAC is "fair and reasonable".

Most notably, courts have looked to the "egregiousness of the representation" in order to determine whether to enforce the EAC.[225] In *Brownlie*, despite the factors above, the Court refused to apply the EAC against the plaintiff because the representation concerned was fraudulently made.[226] It was therefore not "fair and reasonable" for the EAC to prevail.

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[219] At 32-33.
[220] At 33.
[221] *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611, (2010) 9 NZBLC 102,862 at [23].
[222] *Hall v Warwick Todd* (2000) 9 TCLR 448 at [114].
[223] *Snodgrass v Hammington* CA254/93, 22 December 1995 at 26.
[224] *Herbison v Papakura Video Ltd* [1987] 2 NZLR 527 (HC) at 541.
[225] Barber, above n 213, at 399.
[226] At 33-34.

Section 50 can therefore be summarised as usually enforcing EACs between commercial actors of similar bargaining strength. However, the section is a balancing test and factors such as specific negotiation of the EAC can lead to its effectiveness despite unequal bargaining strength in particular cases. Further, despite these considerations, the conclusiveness of the EAC may nonetheless be decided by reference to the context of the contended representation.

A Corresponding Statutory Approach to NOM-Clauses

O'Sullivan, one of three academics relied upon by Lord Sumption in *MWB* (UKSC) to support the effectiveness of NOM-clauses, states in the same piece that a preferable approach may be to scrutinise NOM-clauses for fairness and reasonableness under a protective statutory regime.[227] Such an approach:[228]

> "... would acknowledge nuanced but important differences between, for example, consumers and commercial actors, as well as between a freely negotiated clauses and one tucked into standard form boilerplate".

This aligns closely with the operation of s 50 in relation to EACs. This section will assess how such a section would deal with various cases like those posited in Chapter 3.

Application of a "Fair and Reasonable" Test to NOM-Clauses

The general effectiveness of an EAC between commercial parties would also apply to a NOM-clause between such parties. This would allow organisations to rely on NOM-clauses to moderate conduct of their agents, so long as the counterparty could reasonably have been expected to understand the effect of the clause. As Lord Sumption stressed in *MWB* (UKSC),

[227] O'Sullivan, above n 92, at 196.
[228] At 196.

parties should be free to insist upon formality despite the common law's flexibility.[229] There are clear benefits to doing so, and "the common law does not normally obstruct the legitimate intentions of businessmen".[230]

On the other hand, a "fair and reasonable" test would decline to enforce a NOM-clause in situations where, due to sophistication imbalance, it is not reasonable to expect the counterparty to understand its effect. To unsophisticated parties, a NOM-clause would pale in comparison to a modification agreed in person and in the present.

A Two-Stage Test?

In the EAC context, the two-stage test makes a degree of sense. If there are no concerns as to the comprehension of the EAC at the time of the agreement, then it can be presumed that the parties both knew that past representations would be rendered irrelevant. Thus, the particularities of those representations should not bear on the conclusiveness of the EAC, because the parties consciously agreed to exclude them.

However, a two-stage test to deal with NOM-clauses would be inappropriate. As Lord Briggs pointed out, NOM-clauses, unlike EACs, bind the parties as to future conduct.[231] Thus, the court's satisfaction that both parties understood the NOM-clause in entering the contract is not sufficient to overrule a later variation.

The interim between agreements could be long. It is possible that parties, or their agents, forget the NOM-clause exists. It is thus necessary that the particularities of the contended informal variation be considered as a part of the decision whether to enforce the NOM-clause.

In *Brownlie*, the fraudulent nature of the representation led the Court to disregard the commercial

[229] At [12].
[230] At [12].
[231] At [28].

nature of the transaction. Because the EAC was agreed subsequent to the representation, the representee at least had the opportunity to insist that the representation be written in the contract. Despite that, the Court set the EAC aside.

The NOM-clause equivalent to a fraudulent representation could be a situation where a party is aware of the NOM-clause but nonetheless proposes an informal variation, with the intention to invoke the clause to invalidate the variation upon receipt of the benefit of the counterparty's performance. Justice would demand the ineffectiveness of the NOM-clause. Unlike the EAC situation, the counterparty has no opportunity to decline to agree to the NOM-clause in time to avoid this. It is emblematic of Lord Briggs's critique of the analogy - that only the NOM-clause binds parties as to future conduct.

Thus, given the decision in *Brownlie*, the NOM-clause test must allow courts to consider the circumstances in which the variation is made.

The future effect of NOM-clauses gives rise to another issue with a two-stage test. As ruled in *Hall v Warrick Todd*, commercially experienced natural persons will be unlikely to successfully argue that their EAC be set aside. This is because the EAC expresses their clear intention that past representations are excluded.

The corresponding scenario in a NOM-clause context should be different. If two commercially experienced natural persons agree to an informal variation despite a NOM-clause, simply assessing the adequacy of the agreement to include a NOM-clause is insufficient. As outlined in Chapter 3, the intention of such natural persons is clearly to revoke the NOM-clause. The test, therefore, must allow the court to assess party intention subsequent to the original agreement.

It is therefore suggested that the "fair and reasonable" test controlling NOM-clauses be drafted more widely than s 50, allowing courts to take into account the circumstances of the variation as well as of the original agreement to the NOM-clause.

Recommended Drafting of a "Fair and Reasonable" Test for NOM-Clauses

The wording of the proposed section would therefore incorporate the substantive wording of s 50, without ostensibly requiring courts to follow a two-stage test. The suggested wording is:

> **Clause purporting to invalidate any variation that does not comply with stated formality requirements**
>
> (1) This section applies if a contract contains a provision purporting to invalidate any subsequent variation of that contract that does not comply with stated formality requirements.
>
> (2) A provision such as that described in subsection (1) is unenforceable unless the court is satisfied that it is fair and reasonable that the provision should be conclusive between the parties, having regard to the matters specified in subsection (3).
>
> (3) The matters are all the circumstances of the case, including the circumstances at the time of contract formation and at the time of the purported variation, including —
>
> (a) the subject matter and value of the transaction; and
>
> (b) the respective bargaining strengths of the parties; and
>
> (c) whether any party was represented or advised by a lawyer at the time of the negotiations or at any other relevant time.

Such a section would achieve satisfactory outcomes in all types of contractual relationship, having regard to the objective intentions of the parties. It is sufficiently flexible to avoid unjust enforcement of a NOM-clause, while remaining capable of allowing organisations to deploy NOM-clauses to alleviate problems with agency and generally provide for commercial certainty.

Drawbacks of the Flexible Approach

An approach that requires the courts to exercise discretion is always prone to criticism. Discretion to decide whether the NOM-clause is "fair and reasonable" allows courts to do justice in all cases, but generates two main drawbacks.

Firstly, judicial efficiency is hindered. When a case about an informal variation despite a NOM-clause reaches a court, a full hearing will be required. This costs both the court and the parties time and money. Under the rigid approaches outlined in Chapter 2, the outcome is more easily determinable. Under the "No-Effectiveness" approach, the informal variation simply binds the parties, although a hearing would likely be required to prove the variation occurred. Conversely, under the "Fully Effective" approach, the NOM-clause precludes effectiveness of the variation. The "Conditional on Direct Address" approach does require more of the courts, as evidence as to whether the variation expressly waived the NOM-clause, or whether necessary implication by virtue of urgency is tenable, is required. Nonetheless, this will require substantially less than the statutory test. It is likely that summary judgments are issuable under all three approaches.

Despite this, the need for flexibility outweighs the desire for judicial efficiency. While parties are spared expense when a summary judgment suffices, the losing party may have lost considerably more by operation of a rigid test that may have failed to effect objective intention - whether that be the intention to rely on the NOM-clause, or the intention to vary. As Chapter 3 demonstrates, the effectiveness of a NOM-clause must rightly depend on the context.

Secondly, a discretionary test can be criticised as insufficiently certain for commercial actors. A rigid rule allows parties to know which agreement is effective, and to organise their affairs accordingly. Because a flexible test depends on discretion, such a response is arguably not available.

Despite the flexibility which is inherent in the test, it will result in fairly predictable outcomes. The statutory wording tells parties the aspects of a contractual relationship that the test depends on. Under s 50, it is reasonably certain that a commercial relationship will result in an enforceable EAC, unless some weighty factor displaces that. As Barber comments, s 50 "strikes an effective balance between predictability of result and the courts' sensitivity to contracting in unfair circumstances".[232]

[232] Barber, above n 213, at 411.

The same is likely to hold true for the NOM-clause test. Parties will be able to organise their affairs in accordance with the result that they can predict, with a fair degree of accuracy. Further, parties will be able to refer to case law on s 50 as instructive for the likely operation of the NOM-clause section.

Conclusion

Therefore, it is recommended that New Zealand legislates to approach NOM-clauses according to the fairness and reasonableness of their effectiveness against an informal variation in the relevant circumstances. Such a provision would be consistent with s 50 of the CCLA, which controls EACs. EACs and NOM-clauses are in operation similar devices, and thus the end of a coherent system of law is advanced by like treatment.

More importantly, such an approach would afford NOM-clauses the flexibility that is required given the range of relationships in which they may be employed, as outlined in Chapter 3. Drawbacks of a flexible approach do not outweigh this vital attribute.

Conclusion

To address the NOM-clause issue in a way that satisfactorily gives effect to the intention of the parties in all potential cases requires flexibility. The English judicial approaches are all rigid, and rely on deeming party intention rather than sensitivity to the facts of particular cases. Contract law should not resort to such blunt methods in its aim to respect party autonomy.

New Zealand should adopt a flexible and fact-sensitive approach. In the absence of any settled position, it is open to the courts to implement this. However, a preferable method would be statutory intervention. Aligning the New Zealand approach to NOM-clauses with that to EACs contributes to coherency and consistency within the law, because the two clauses are similar in rationale and effect. Further, a "fair and reasonable" test like that proposed allows for the flexibility that is required to effect party intention in all cases.

Despite its flexibility, the test would remain reasonably predictable. A party considering disputing an informal variation on a NOM-clause basis could refer to the statute, and the case law on s 50, and know with reasonable accuracy the likelihood of success. Thus, drawbacks to the "fair and reasonable" test would not outweigh its benefit: effecting party intention.

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