No Oral Modification clauses to the test: how relevant are they in the COVID-19 shock and beyond?

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INTRODUCTION

The focus of this article will be on the function, use and judicial recognition of No Oral Modification clauses (NOM clauses).[3] These terms usually form part of entire agreement clauses to be found in numerous commercial contracts. A No Oral Modification clause is a contractual term prescribing that an agreement may not be amended save in writing signed by or on behalf of the parties.[4] An entire agreement clause prevents statements or representations that are not set out in a written agreement from having contractual force.[5] According to Chitty,[6] the practice of entire agreement clauses probably originated in the United States.

No oral variation clauses, among other clauses, such as force majeure clauses, are more relevant than ever. Due to the COVID-19 pandemic challenging timeframes and the ability of the parties to perform their contracts, businesses have experienced time pressure, cash flow difficulties, lack of revenue, restrictions in their operation, and as anticipated, the immediate

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[3] Hereafter referred to as NOM clause for brevity. The terms *no oral variation clause, anti-oral variation clause and no oral modification clause* will be used interchangeably.

[4] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24.

[5] The purpose of the clause is to 'denude what would otherwise constitute a collateral warranty of legal effect': *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 7 WLUK 841.

[6] Hugh Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2020) para 13-117. See Uniform Commercial Code para 2-203. See also Edwin Peel, *Treitel on The law of Contract* (15th edn, Sweet & Maxwell 2020) para 4-016.

effect is on compliance with their contracts. Commercial contracts are thus affected. Experienced businessmen will explore ways to modify their duties to ensure they perform on the basis of what is doable, eg limit the amount of obligations, agree on more extended timelines for performance or limit imminent or longer-term performance of obligations. In a nutshell, this means that commercial practitioners will seek to somehow amend their contract.

More notably, because of the pandemic and the hardship it brings forward, parties involved may try to invoke a contractually available force majeure clause. However, the latter may need to be read with the NOM clauses, which, as we shall see, are almost as important as red-hand rule clauses.
The original questions that this article will pose and then answer are the following:

1. How popular are NOM clauses in commercial contracts? The methodology that we will follow will look at real life commercial contracts of the following two types: commercial leases and shipping contracts.
2. Are NOM clauses prevalent?
3. How are English courts upholding NOM clauses? The role of *Rock Advertising* will be of particular consideration.[7] What is the importance of the recent English judicial development when compared with the quantitative results of the appearance of NOM clauses in commercial leases and standard shipping contracts?

1. SCOPE AND METHODOLOGY OF THE RESEARCH

The aim of this article is to examine NOM clauses both from a pragmatic and a judicial point of view. The first objective of this research is to trace their popularity and the second is to see how the law supports their use. Common law frameworks are almost synonymous with freedom of contract and they afford parties with greater flexibility to tailor-make their agreements. For this reason, we will look at English case law, real-life US commercial contract examples (as another common law system), and standard contracts with English and US governing law options. It is only recently that English law paved an unambiguous way towards full enforcement of NOM clauses, with the Supreme Court solidifying their legal effectiveness. Prior case law was ambivalent on the enforceability of NOM clauses. The

[7] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24.

landmark Supreme Court judgment in *MWB v Rock Advertising*[8] arose out of a licence agreement to occupy premises, and therefore it is useful to study the significance of the judgment against the real backdrop of a pool of commercial lease agreements. For the collection of our data, we focused on other common law systems as well. A great number of lease agreements deposited to the US Security and Exchange Commission (SEC) was thoroughly reviewed. SEC describes its functions as follows: 'The federal securities laws we oversee are based on a simple and straightforward concept: everyone should be treated fairly and have access to certain facts about investments and those who sell them. To achieve this, we require public companies, fund and asset managers, investment professionals, and other market participants to regularly disclose significant financial and other information so investors have the timely, accurate, and complete information they need to make confident and informed decisions about when or where to invest.'[9]

The filing of commercial lease agreements as material contracts with SEC provides us with a bank of commercial lease contracts from another common law jurisdiction. By looking at US contracts, we also widen the international common law purview of the research into commercial trends of NOM clauses in contracts. We have chosen commercial leases as a representative type of commercial contract, primarily because a similar contract was at stake in the UK Supreme Court authority on NOM clauses.

Model shipping contracts is the second area we will look at, for two reasons. Firstly, shipping is a significant part of international trade, which has also been largely hit by COVID-19, with much discussion devoted to the doctrine of frustration and its difficult evidentiary threshold as well as force majeure clauses (again with strict prerequisites to be met). Secondly, model contracts, such as BIMCO's contracts are extremely advanced in capturing and incorporating modern contract law trends, so as to suit commercial needs, and also be commercially enforceable.

At the same time, the article considers common law, European and international schemes,[10] and a German case to demonstrate how flexible, strenuous and similar the consideration of NOM clauses is. We make these important expansions, not only because the judges

[8] Ibid.

[9] <https://www.sec.gov/about/what-we-do>.

[10] We will specifically look at UNIDROIT, PECL, DCFR, CISG and the Rotterdam Rules.

themselves initiated a look at other commercial law texts, but also because commercial contracts, depending on various factors (eg governing law, subject matter, clauses, dispute resolution method etc) might be influenced by regulatory texts, standard terms and principles. It is particularly relevant to consider double-written form (NOM) clauses, and a German commercial lease judgment will be particularly analysed, in order to additionally offer the civil law perspective.

FINDINGS

i.COMMERCIAL LEASES

In the commercial lease contract realm, our research question was whether many lease agreements available in EDGAR's[11] database contain a NOM clause.
We have researched over 50 commercial leases, and only three did not contain a NOM clause.[12]
However, even the ones without a NOM clause usually had an equally powerful clause disallowing the tolerance of a breach to be construed as a variation of the contract.
For example, a lease agreement of the sample[13] contained a term entitled Tolerance, which read: 'Any tolerance on the part of the Landlord in relation to the terms and conditions of the Lease, whatever the frequency or duration, may not, under any circumstances, be considered as amending or deleting said terms or conditions, nor as generating any right whatsoever, the Landlord being able to end said tolerance at any time.'

[11] EDGAR is the Electronic Data Gathering, Analysis, and Retrieval system which performs automated collection, validation, indexing, acceptance, and forwarding of submissions by companies and others who are required by law to file forms with the US Securities and Exchange Commission (SEC). See more at <https://www.sec.gov/edgar/searchedgar/aboutedgar.htm>.

[12] For example, Exhibit 10.20, <https://www.sec.gov/Archives/edgar/data/0001644675/000156459018014514/mime-ex1020_630.htm>.

[13] Exhibit 4.19, <https://www.sec.gov/Archives/edgar/data/1500866/000119312512188966/d304617dex419.htm>.

In another lease, more specifically an office lease,[14] we see this NOM clause:
'All understandings and agreements previously made between the parties are superseded by this Lease, and neither party is relying upon any warranty, statement or representation not contained in this Lease. This Lease may be modified only by a written agreement signed by Landlord and Tenant.'

We also see a similar, equally powerful term in the Remedies clause:

'B. The subsequent acceptance of Rent hereunder by Landlord shall not be deemed to be a waiver of any preceding breach by Tenant of any term, covenant or condition of this Lease, other than the failure of Tenant to pay the particular Rent so accepted, regardless of Landlord's knowledge of such preceding breach at the time of acceptance of such Rent. No waiver by Landlord of any breach hereof shall be effective unless such waiver is in writing and signed by Landlord.'

This office lease was further strengthened through a No Waiver clause:
'**22. No Waiver.**
Either party's failure to declare a Default immediately upon its occurrence, or delay in taking action for a default shall not constitute a waiver of the default, nor shall it constitute an estoppel.'

In a deposited office lease agreement,[15] we find both a NOM and a No Waiver clause, which respectively read:

'This Lease may not be altered, changed or amended, except by an instrument in writing executed by all parties hereto. Further, the terms and provisions of this Lease shall not be construed against or in favor of a party hereto merely because such party is the "Landlord" or the "Tenant" hereunder or such party or its counsel is the draftsman of this Lease.'

[14] Exhibit 10.5,

<https://www.sec.gov/Archives/edgar/data/1408356/000119312512416770/d229977dex105.htm>.

[15] <https://www.sec.gov/Archives/edgar/data/1318742/000095014407001914/g05791exv4w46.htm>.

And

'**No Waiver of Rights:** No failure or delay of Landlord or Tenant to exercise any right or power given them herein or to insist upon strict compliance by the other party of any obligation imposed on it herein and no custom or practice of either party hereto at variance with any term hereof shall constitute a waiver or a modification of the terms hereof by Landlord or any right to demand strict compliance with the terms hereof. No waiver of any right of Landlord or Tenant or any default by the other party on one occasion shall operate as a waiver of any of Landlord's other rights or of any subsequent default. No express waiver shall affect any condition, covenant, rule, or regulation other than the one specified in such waiver and then only for the time and in the manner specified in such waiver. No person has or shall have any authority to waive any provision of this Lease unless such waiver is expressly made in writing and signed by an authorized officer of Landlord.'

Our research has shown that in most cases the NOM clause was part of an entire agreement clause.

In contract EX-10.1(B),[16] which was a lease agreement, we notice an excellent combination of an all-inclusive clause comprising an entire agreement clause, a no-waiver clause and a NOM clause:

'**21. ENTIRE AGREEMENT - NO WAIVER**

This Lease contains the entire agreement of the parties hereto and no representations, inducements, promises or agreements, oral or otherwise, between the parties not embodied herein, shall be of any force or effect. The failure of either party to insist in any instance on strict performance of any covenant or condition hereof, or to exercise any option herein contained, shall not be construed as a waiver of such covenant, condition or option in any other instance. This Lease cannot be changed or terminated orally but only by an agreement in writing signed by both parties hereto.'

This contract also had a force majeure clause:

[16] Contract Ex-10.1 (B),

<https://www.sec.gov/Archives/edgar/data/79282/000119312513087664/d441942dex101b.htm>.

‘**36. FORCE MAJEURE**

Whenever a period of time is prescribed for the taking of an action by Landlord or Tenant (other than the payment of Rent), the period of time for the performance of such action shall be extended by the number of days that the performance is actually delayed due to strikes, acts of God, shortages of labor or materials, war, terrorist acts, civil disturbances and other causes beyond the reasonable control of the performing party (‘Force Majeure’).’

Similarly, under an entire agreement clause of another lease contract, we see a NOM clause:[17]

‘Entire Agreement. This Lease, together with any exhibits attached hereto, contains the entire agreement and understanding between the parties. There are no oral understandings, terms, or conditions, and neither party has relied upon any representation, express or implied, not contained in this Lease. All prior understandings, terms, or conditions are deemed merged in this Lease. This Lease cannot be changed or supplemented orally, but may be modified or amended only by a written instrument executed by the parties. Any disputes regarding the interpretation of any portion of this Lease shall not be presumptively construed against the drafting party.’

A straightforward and clear NOM clause, again included in an entire agreement clause of another lease agreement is the following:[18]

‘**Entire Agreement**. It is understood and acknowledged that there are no oral agreements between the parties hereto affecting this Lease and this Lease constitutes the parties’ entire agreement with respect to the leasing of the Premises and supersedes and cancels any and all previous negotiations, arrangements, brochures, agreements and understandings, if any, between the parties hereto or displayed by Landlord to Tenant with respect to the subject matter thereof, and none thereof shall be used to interpret or construe this Lease. None of the terms, covenants, conditions or provisions of this Lease can be modified, deleted or added to except in writing signed by the parties hereto.’

[17] Exhibit 10.38, <https://www.sec.gov/Archives/edgar/data/1043509/000119312509069485/dex1038.htm>.

[18] Exhibit 10.1, <https://www.sec.gov/Archives/edgar/data/1476963/000155335019000414/htbx_ex10z1.htm>.

A clear designation as to what the agreement is and when a modification will be binding on the parties is seen in the following eloquent term of yet another lease:[19]

'**Prior Agreement; Amendments**. This Lease with its incorporated Exhibits, Addenda and attachments constitutes and is intended by the parties to be a final, complete and exclusive statement of their entire agreement with respect to the subject matter of this Lease. This Lease supersedes any and all prior and contemporaneous agreements and understandings of any kind relating to the subject matter of this Lease. There are no other agreements, understandings, representations, warranties, or statements, either oral or in written form, concerning the subject matter of this Lease. No alteration, modification, amendment or interpretation of this Lease shall be binding on the parties unless contained in a writing which is signed by both parties.'

In another lease,[20] we detect an interesting clause, entitled 'No oral agreements':

'**No Oral Agreements.** This Lease covers in full each and every agreement of every kind or nature whatsoever between the parties hereto concerning this Lease, and all preliminary negotiations and agreements of whatsoever kind or nature are merged herein, and there are no oral agreements. Tenant acknowledges that no representations or warranties of any kind or nature not specifically set forth herein have been made by Landlord or its agents or representatives.'

In the annex (EXHIBIT E), we come across an estoppel certificate containing the following provision, which reads as an entire agreement clause: 'The Lease constitutes the entire agreement between landlord under the Lease ("Landlord") and Tenant with respect to the Demised Premises and the Lease has not been modified, changed, altered or amended in any respect except as set forth above.'

[19] Exhibit 10.04,

<https://www.sec.gov/Archives/edgar/data/1223862/000119312512257405/d325183dex1004.htm>.

[20] Exhibit 4.22, <https://www.sec.gov/Archives/edgar/data/1540159/000121716012000029/f332scottlease.htm>.

Although a NOM clause in its usual phrasing does not appear in this agreement, the combination of the above clauses leads to an interpretation of the contract that does not allow oral agreements, and hence modifications of its content.

It was positive that a NOM clause stands independently,[21] ie not in the context of an entire agreement clause in one lease of our sample. As we will see below both clauses appear separately:

'(h) **Amendments; Binding Effect**. This Lease may not be amended except by instrument in writing signed by Landlord and Tenant. No provision of this Lease shall be deemed to have been waived by Landlord unless such waiver is in writing signed by Landlord, and no custom or practice which may evolve between the parties in the administration of the terms hereof shall waive or diminish the right of Landlord to insist upon the performance by Tenant in strict accordance with the terms hereof.'

'(l)**Entire Agreement**. This Lease constitutes the entire agreement between Landlord and Tenant regarding the subject matter hereof and supersedes all oral statements and prior writings relating thereto. Except for those set forth in this Lease, no representations, warranties, or agreements have been made by Landlord or Tenant to the other with respect to this Lease or the obligations of Landlord or Tenant in connection therewith. The normal rule of construction that any ambiguities be resolved against the drafting party shall not apply to the interpretation of this Lease or any exhibits or amendments hereto.'

A further good example of a combination of entire agreement, antioral, and no waiver clauses is found in the Miscellaneous of the following Masterlease governed by the law of the state of New York:[22]

'g) Each lease, together with this agreement and any related agreements, (i) constitutes the final and entire agreement between the parties superseding all conflicting terms or provisions of any prior proposals, approval letters, term sheets or other agreements or understandings

[21] Exhibit 10.8, <https://www.sec.gov/Archives/edgar/data/1312928/000119312510262521/dex108.htm>.

[22] Exhibit 10.1, <https://www.sec.gov/Archives/edgar/data/1568669/000101968715004506/ex1001.htm>.

between the parties, (ii) may not be contradicted by evidence of (y) any prior written or oral agreements or understandings, or (z) any contemporaneous or subsequent oral agreements or understandings between the parties; and (iii) may not be amended, nor may any rights thereunder be waived, except by an instrument in writing signed by the party charged with such amendment or waiver.'

A very powerful NOM clause is the following:[23]

'**13.9** ***Entire Agreement; Amendments.*** This Agreement constitutes the entire agreement between Lessor and Lessee respecting its subject matter, and supersedes any and all oral or written agreements. Any agreement, understanding or representation respecting the CREZ Assets, or any other matter referenced herein not expressly set forth in this Agreement or a subsequent writing signed by both Parties is null and void. For avoidance of doubt, the Amended and Restated Lease is hereby replaced in its entirety by this Agreement. This Agreement shall not be modified or amended except in a writing signed by both Parties. No purported modifications or amendments, including without limitation any oral agreement (even if supported by new consideration), course of conduct or absence of a response to a unilateral communication, shall be binding on either Party.'

The commercial leases that we researched in Edgar's database show contracts expertly drafted, evidencing clear and unambiguous NOM clauses and further enhanced against possible defences of waiver, estoppel and potential oral agreements.

ii. BIMCO CONTRACTS[24]

Shipping is another sector affected by the COVID-19 pandemic, and to respond to the current needs of commerce, BIMCO has developed a new force majeure clause which is ready for review.[25] BIMCO[26] has around 1900 member companies across 120 countries, works with

[23] Exhibit 10-13,

<https://www.sec.gov/Archives/edgar/data/1506401/000119312514457952/d724324dex1013.htm>.

[24] Baltic and International Maritime Council.

[25] <https://www.bimco.org/news/contracts-and-clauses/20201211-new-bimco-force-majeure-clause-ready-for-review>.

[26] <https://www.bimco.org/about-us-and-our-members>.

industry experts to produce modern contracts tailored to specific trades and activities and its contracts are recognised around the world and widely used. It is BIMCO's widespread and pioneering role in standard contracts in shipping and the constant revision of its clauses, that made the research of its contracts indispensable as a snapshot of modern shipping contract trends. Checking whether NOM clauses appear in numerous contracts is important in our research.

Similarly to the great majority of US commercial leases using NOM clauses, it is important that several standard modern BIMCO shipping contracts with English governing law clauses also come with a NOM clause. Indeed, a good number of BIMCO standard contracts have entire agreement clauses with NOM clauses. Some pertinent examples and representative provisions are the following: a NOM clause is found in BARGEHIRE 2021,[27] which is a standard bareboat charterparty, ie a lease agreement specifically designed for unmanned barges:

'32. Entire agreement
(e) This Charter Party may not be modified except by written agreement between the parties.'

DISMANTLECON, BIMCO's standard Dismantling, Removal and Marine Services Agreement issued in 2019 also contains a NOM clause.[28]

BIMCO Bunker Terms 2018 is a standard contract for the purchase and supply of marine fuels to ships. This also has an anti-oral variation clause.[29]

REPAIRCON is a standard contract for ship repairs issued in 2018, and it contains both a No Waiver clause and an entire agreement clause with a NOM clause.[30]

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[27] <https://www.bimco.org/contracts-and-clauses/bimco-contracts/bargehire-2021#>.

[28] <https://www.bimco.org/contracts-and-clauses/bimco-contracts/dismantlecon#>.

[29] <https://www.bimco.org/contracts-and-clauses/bimco-contracts/bimco-bunker-terms-2018>.

[30] 'No waiver: No failure or delay by a Party to exercise any right or remedy provided under this Contract or by law shall constitute a waiver of that or any other right or remedy nor shall it prevent or restrict the further exercise of that or any other right or remedy.

SUPPLYTIME 2017, which is a time charterparty for offshore support vessels, has a NOM clause that recites as follows:[31]

'This Charter Party, including all Annexes referenced herein and attached hereto, is the entire agreement of the Parties, which supersedes all previous written or oral understandings and which may not be modified except by a written amendment signed by both Parties.'

BARECON 2017, is one of BIMCO's new generation contracts; it is a bareboat charter party, ie a lease agreement, whereby the charterer obtains possession and full control of the ship along with the legal and financial responsibility for it. [32] BARECON is among the several BIMCO contracts with NOM clauses, as we see below:

'36. Entire Agreement This Charter Party is the entire agreement of the parties, which supersedes all previous written or oral understandings and which may not be modified except by a written amendment signed by both parties.'

Interestingly the governing law clause of this contract allows the choice between English and Singapore law, as is the case with SUPPLYTIME above.

Furthermore, SUPERMAN, the Standard Agreement for the Supervision of Vessel Construction, whose latest edition was issued in 2016 has an entire agreement clause with a NOM clause.[33]

(d) Entire Agreement

This Contract constitutes the entire agreement between the Parties and no promise, undertaking, representation, warranty or statement by either party prior to the date of this Contract shall affect the Contract nor shall any modification of this Contract be of any effect unless in writing signed by or on behalf of the Parties.'

[31] <https://www.bimco.org/contracts-and-clauses/bimco-contracts/supplytime-2017#>.

[32] <https://www.bimco.org/contracts-and-clauses/bimco-contracts/~/link.aspx?_id=94EF77222A824D20BC9C7E0AE2F0702A&_z=z#>.

[33] https://www.bimco.org/search-result?term=SUPERMAN>.

Moreover, SERVICECON (2014) is a standard service contract whereby a shipper undertakes to transport a minimum number of containers over an agreed given period. Its entire contract clause comes with a NOM. [34]

GUARDCON,[35] BIMCO's standard agreement for the hire of the services of private maritime security guards on ships, whose latest edition was issued in 2012, also contains a NOM clause.

RECYCLECON[36] is BIMCO's standard contract for the sale of vessels for green recycling. It was issued in 2012 and has the following NOM clause:

'Any modification of this Contract shall not be of any effect unless in writing signed by both the Sellers and the Buyers.'

LAYUPMAN,[37] issued in 2011, is a standard contract for the laying up of ships, and also contains a similar NOM clause.

CREWMAN[38] (with its versions CREWMAN A and B) last issued in 2009 is BIMCO's standard crew management agreement and, as the above contracts, it also has a NOM clause. In a similar vein, NEWBUILDCON, issued in 2007, is the industry's only international standard shipbuilding contract designed for use in any jurisdiction and for any type of ship.[39] It contains a NOM as part of its entire agreement clause.

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[34] '12. Entire Contract: This Contract constitutes the entire agreement between the parties and no promise, undertaking, representation, warranty or statement by either party prior to the date stated in Box 2 shall affect this Contract. Any modification of this Contract shall not be of any effect unless in writing signed by or on behalf of the parties.'

[35] <https://www.bimco.org/contracts-and-clauses/bimco-contracts/guardcon>.

[36] <https://www.bimco.org/contracts-and-clauses/bimco-contracts/recyclecon#>.

[37] <https://www.bimco.org/contracts-and-clauses/bimco-contracts/layupman>.

[38] <https://www.bimco.org/search-result?term=CREWMAN%20A>.

[39] The latest edition of NEWBUILDCON was issued in 2007.

BIMCO's standard container lease agreement, BOXLEASE (2006),[40] contains a no oral variation clause as part of its entire agreement clause:[41]

'This Agreement constitutes the entire agreement between the Parties and no promise, undertaking, representation, warranty or statement by either party prior to the date of this Agreement stated in Box 2 shall affect the Agreement. Any modification of this Agreement shall not be of any effect unless in writing signed by or on behalf of the Parties.'

Lastly, CRUISEVOY is BIMCO's standard cruise voyage charterparty, issued in 1998, and contains the following elaborate NOM clause:[42] 'This Charter Party may not be changed orally nor may any provision or right be waived, modified, enlarged, amended or varied in any manner nor may it be abrogated or discharged except in each case by a written instrument signed by the party to be charged therewith.'

It is worth reflecting on the years of revision of these contracts and their suggested governing law clauses, which are in their majority pointing to English law-London arbitration, the US maritime law/ law of the State of New York and Singapore/Singapore law in terms of suggested governing law and dispute resolution routes. The standard inclusion of UK and US law among their suggested governing law clauses validates the choice of our methodology. It is also worth noticing the diverse subject matters, and clear entire agreement clauses of the researched BIMCO contracts, which include equally straightforward NOM clauses. Indeed, collectively the aforementioned BIMCO contracts have revisions/editions made from 1998 to 2021.

Since English law is among the governing law options offered in the above contracts, it is important to see whether the inclusion of NOM clauses is followed by their enforceability under English law. It is now time to investigate the judicial approach of English law to NOM clauses, to test the alignment of common law and practice and assess the solidity of NOM clauses.

[40] <https://www.bimco.org/contracts-and-clauses/bimco-contracts/boxlease>.

[41] Lines 600-605 of BOXLEASE.

[42] CRUISEVOY 1998, Lines 481-484.

THE JUDICIAL TREATMENT OF NO ORAL VARIATION CLAUSES BEFORE *ROCK ADVERTISING v MWB*[43]

Surprisingly, until *MWB v Rock Advertising,*[44] English case law was ambivalent with regard to no oral variation clauses,[45] with two Court of Appeal conflicting judgments, namely *United Bank Ltd v Asif*[46] and *World Online Telecom Ltd v I-Way Ltd.*[47] Then *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*[48] emerged with *obiter dicta* about anti-oral modification clauses.

In *Globe Motors*, it was mentioned *obiter* that the fact that the contract contained a clause requiring any amendment to be in writing and be signed by both parties did not in principle preclude parties from later making a new contract amending the original one by an oral agreement, or by conduct.[49]

In *United Arab v Asif,*[50]whereas the deed of guarantee prescribed that 'no variation … shall be valid or effective unless made by one or more instruments in writing signed by the parties …', Lord Justice Sedley found that the judge at first instance was 'incontestably right in concluding that no oral variation of the written terms could have any legal effect' and refused leave to appeal for a summary judgment. The Court of Appeal endorsed his view.

Furthermore, in *World Online Telecom,* the contract contained the following clause:

'… no addition, amendment or modification of this Agreement shall be effective unless it is in writing and signed by and on behalf of both parties.'

The variation relied on by I-Way was purely oral and/or by conduct. However, it was found that the topic of superseding a no oral variation clause in a written agreement was as a matter

[43] [2018] UKSC 24, para 9. See also the Court of Appeal judgment [2016] EWCA Civ 553, para 18.

[44] Ibid.

[45] See Treitel above, para 4-016.

[46] (11 February 2000, unreported).

[47] [2002] EWCA Civ 413

[48] [2016] EWCA Civ 396.

[49] [2016] EWCA Civ 396, paras 101-107.

[50] (CA, unreported, 11 February 2000). We read about this in [2018] UKSC 24, para 9.

of law, not settled.[51] For the purpose of understanding the tension of important principles, it is useful to remember the following statements made in passing, despite the different outcome of the judgment: 'In a case like the present the parties have made their own law by contracting, and can in principle unmake or remake it.'[52] and also that 'a consensual oral variation, after all, is also an exercise of freedom of contract.'[53]
As we shall see below, such considerations stand at the core of the debate of whether anti-oral modification clauses embody or restrict party autonomy.

Reverting to *Globe Motors*, Lord Justice Moore-Bick stated the following, which is noteworthy:
'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 of the kind to which Beatson LJ refers. The parties are therefore free to include terms regulating the manner in which the contract can be varied, but just as they can create obligations at will, so also can they discharge or vary them, at any rate where to do so would not affect the rights of third parties. If there is an analogy with the position of Parliament, it is in the principle that Parliament cannot bind its successors.'[54]

[51] *World Online Telecom Ltd v I-Way* [2002] EWCA Civ 413, para 12. This is also discussed in [2018] UKSC 24, para 9.

[52] *World Online Telecom Ltd v I-Way* [2002] EWCA Civ 413, para 10.

[53] Ibid.

[54] *Globe Motors v TRW* [2016] EWCA Civ 396, para 119 of the judgment. Moore-Bick LJ continued in para 120 of the case underlining:

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

Given the above case law dichotomy, it was about time that *Rock Advertising* came to settle the matter of enforceability of NOM clauses.

ROCK ADVERTISING v MWB

MWB Business Exchange Centres Ltd operated serviced offices in central London. On 12 August 2011, Rock Advertising Ltd entered into a contractual licence with MWB to occupy office space.

The contract contained an entire agreement clause, which also contained a No Oral Modification clause:

THE ENTIRE AGREEMENT CLAUSE

'This Licence sets out all of the terms as agreed between MWB and Licensee. No other representations or terms shall apply or form part of this Licence.
All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.'

However, performance was not as per the contract, with Rock Advertising accumulating hefty license fee arrears. Its director proposed – and supposedly had accepted – a revised schedule of rent payments to the credit controller employed by MWB.

The effect of the revised schedule was to defer part of the February and March payments, and to spread the accumulated arrears over the remainder of the licence term.[55]
This revised schedule was worth slightly less to MWB than the original terms, because of the cost to them of the interest deferral.[56]

As per the facts of the case, there was then a telephone discussion between Mr Idehen (for Rock Advertising) and Ms Evans (for MWB) in which, according to Mr Idehen, Ms Evans

[55] [2018] UKSC 24, para 3.

[56] [2018] UKSC 24, para 3.

agreed to vary the licence agreement in accordance with the revised schedule. Nevertheless, Miss Evans later denied this. She claimed to have treated the revised schedule as a mere proposal in a continuing negotiation, which ceased to have any currency once it was rejected by the director of MWB.

On 30 March 2012, MWB locked Rock Advertising out of the premises on account of its failure to pay the arrears, terminated the licence and then sued for the arrears. Rock Advertising counterclaimed damages for wrongful eviction from the premises. The outcome of the counterclaim, and therefore of the claim, depended on whether the variation agreement was effective in law.

There were two key legal issues here – both of which may have important repercussions in the context of commercial and thus maritime law (as a branch of it), given the popularity of NOM clauses that we have proved in a great number of commercial contracts above. In this article, we are focusing mainly on this particular issue:

Was the oral agreement (if any) binding in the light of the 'No Oral Modification' clause?

As Lord Sumption rightly observed, NOM clauses are common in commercial contracts. and previous case law was ambiguous[57] on whether NOMs were effective. It is therefore critical to assess the line of reasoning, illustrate important points on the variation of contracts and demonstrate the precedent that is set, with emphasis on the very fine details on which future disputes may reach a different outcome.

[57] As per Lord Sumption JSC, [2018] UKSC 24, para 9, 'the English cases are more recent, and more equivocal.' The case law that was revisited in *Rock Advertising* namely was *United Arab v Asif* (unreported) 11 February 2000 in favour of the legal effect on NOMs; *World Online Telecom ltd v I-Way Ltd* [2002] EWCA Civ 413, para 12, where Sedley LJ stated that 'the law on the topic is not settled'; Gloster LJ inclined to the view that such clauses are ineffective in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm); we saw the same view in *obiter dicta* in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2017] 1 All ER (Comm) 601. See also Florian Wagner-von Papp, 'Are No Oral Modification Clauses Not Worth the Paper They Are Written On?' (2010) 63 (1) Current Legal Problems 511, at 537.

Hence, the purpose of this article is to discuss the juridical basis of the reasoning and identify the alignment of law and practice, finishing with a corroboration of findings and suggestions. We will also look at the much more recent *Kabab-Ji*[58] case, which explained *Rock Advertising* and its dicta.

We know that *Rock Advertising v MWB*[59] is a ground-breaking decision[60] if only because Lord Sumption told us so:

'Modern litigation rarely raises truly fundamental issues in the law of contract. This appeal is exceptional. It raises two of them. The first is whether a contractual term prescribing that an agreement may not be amended save in writing signed on behalf of the parties (commonly called a "No Oral Modification" clause) is legally effective.'[61]

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[58] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6.

[59] The judicial trajectory of the *MWB v Rock Advertising* has the following important elements. The Central London County Court judge found in favour of MWB, holding that the modification of the contract was invalid because it lacked in another significant respect: the oral agreement was in conflict with the 'no oral modification' clause, as it was neither documented in writing nor signed on behalf of both parties: it could therefore have no effect.

The Court of Appeal overturned this decision. And held that the oral agreement to revise the schedule of payments meant that the parties had waived the requirements of the NOM clause. Parties should be free to make and unmake their contracts, as to hold otherwise would be to restrict party autonomy.

The Supreme Court overturned the Court of Appeal judgment concerning the effect of the NOM clause, but left the consideration question open.

[60] The Supreme Court judgment has also attracted the attention of legal scholars: see, for example, Paul S Davies, 'Varying contracts in the Supreme Court' (2018) 77(3) CLJ 464-467; Leslie Dodd, 'No oral modification clauses: solid as a rock' (2019) 4 Juridical Review Jur 342-349; Robert Harris, 'Modifications, wrangles and bypassing' (2018) LMCLQ 441-450 and others.

[61] [2018] UKSC 24, para 1. The second issue is whether an agreement, whose sole effect is to vary a contract to pay money by substituting an obligation to pay less money or the same money later, is supported by consideration.

In light of this judgment, this article will study and analyse the development of commercial law affecting the balancing freedom of contract and commercial certainty, using the example of standard international commercial contracts and a recent international convention in order to take the judgment one step further. More specific policy directions when it comes to contracts used in commerce and shipping are identified and considered in context.
It will be demonstrated that these observations are particularly relevant for commercial and thus, maritime contracts, where entire agreement clauses and NOM clauses are frequently included, as was demonstrated before with the researched and enlisted above BIMCO standard contracts.

The article will focus on the question of the variation of the contract and its form, as this is a burning issue for commercial lawyers and businessmen especially in periods of hardship.

PARTY AUTONOMY, NOM CLAUSES AND THEIR ADVANTAGES

Kitchin LJ gave the lead judgment in *MWB v Rock Advertising*[62] reiterating that party autonomy awards parties with the flexibility to change their mind and override clauses of their contracts. His Lordship endorsed[63] the words of Cardozo J nearly 100 years ago in the New York Court of Appeals in *Alfred C Beatty v Guggenheim Exploration Company and others*.[64] In a judgment with which Hiscock Ch J, Chase, Collin and Crane JJ concurred (Cuddeback and Hogan JJ dissenting), Cardozo J said this (at pages 387 to 388):

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

[62] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd (Rev 1)* [2016] EWCA Civ 553.

[63] [2016] EWCA Civ 553, para 34.

[64] (1919) 225 NY 380.

Lord Sumption at the Supreme Court started by recognising that 'at common law there are no formal requirements for the validity of a simple contract'.[65]
His Lordship also remarked that the law was not exactly solid as to whether NOM clauses are always effective. Lord Sumption weighed up a rising number of academic views advocating that effect should be given to such clauses strictly according to their terms.[66]
It was clearly stated that the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation; in this, Lord Sumption disagreed with Kitchin LJ, who had found that if the oral variation of the schedule of payments was held not to be valid, that would mean that the courts obstructed party autonomy.

In stark contrast with what had been held at the Court of Appeal, at the Supreme Court this was held to be a fallacy:

'Party autonomy does operate, but only up to the point when the contract is made: thereafter it operates only to the extent that the contract allows.'[67]
Lord Sumption stressed that it is in the very nature of contracts to somehow restrict party autonomy in that they aim to bind parties in certain ways and to some course of action, which naturally restricts freedom of contract.[68]
On the contrary, his Lordship asserted that what undermines party autonomy 'is the suggestion that the parties cannot bind themselves as to the form of any variation, even if that is what they have agreed.'[69]

[65] [2018] UKSC 24, para 7.

[66] These were cited in para 9 of the judgment and were the following: Jonathan Morgan, 'Contracting for self-denial: on enforcing "No oral modification" clauses' (2017) 76 CLJ 589; E McKendrick, 'The legal effect of an Anti-oral Variation Clause' (2017) 32 Journal of International Banking Law and Regulation 439; Janet O'Sullivan, 'Unconsidered Modifications' (2017) 133 LQR 191.

[67] [2018] UKSC 24, para 11.

[68] [2018] UKSC 24, para 11.

[69] [2018] UKSC 24, para 11.

In his judgment, Lord Sumption highlighted the advantages of NOM clauses.[70]

1. they prevent efforts, including abusive attempts, to challenge written contracts by informal means;[71]
2. they discourage ambiguities and therefore prevent disputes not just about whether a variation was intended but also about its exact terms;[72]
3. they facilitate corporations with policing their own internal rules restricting the authority to agree contractual amendments.[73]

There are also civil code examples to support the effectiveness of NOM clauses and this was emphasised by Lord Sumption, with important comments about the nuanced take on this matter by civil law legal systems.

More specifically, the examples of the wider use of NOM clauses were coupled with support in that direction from civil law-inspired examples and included the Vienna Convention on the International Sale of Goods.[74]

Article 11 provides that a contract of sale 'need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.'

Nonetheless, article 29(2) provides that:

'A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.'

[70] [2018] UKSC 24, para 12. Lord Sumption noted that NOM clauses simply prove that businessmen and lawyers are not always entirely happy about the complete flexibility of common law and wish to curtail it with such clauses for greater predictability and certainty.

[71] [2018] UKSC 24, para 12.

[72] [2018] UKSC 24, para 12.

[73] [2018] UKSC 24, para 12.

[74] United Nations Convention on Contracts for the International Sale of Goods. Hereafter referred to as the Vienna Convention or CISG. The UK is not a signatory.

As we shall see below, the reference to the written formality described in the second sentence was made by Lord Sumption, with an opportunity to compare civil and English law and their respective doctrines/principles. His Lordship assured that the exception to the effectiveness of NOM clauses in these civil law systems is explained by good faith, whereas in English law injustice can be prevented through the doctrine of estoppel.[75]

However, in this respect we would like to draw attention to the fact that the second exception (ie that a party may be precluded by his conduct, if the other party has relied on this conduct) was not that emphasised at that stage. In *Rock Advertising,* this could have been relevant: MWB's conduct (for example, the acceptance of the first payment that allegedly took place after the revised schedule was orally agreed without rejection or warning that more fees were due as per the original agreement) could potentially be the type of conduct that the second sentence of 29(2) of the Vienna Convention describes.[76] Lord Sumption did not take that

[75] [2018] UKSC 24, para 16: 'It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause.'

[76] See [2016] EWCA Civ 553, para 6, where it is stated: 'Moreover, on that same day it paid £3,500 to MWB, this being the first instalment due in accordance with the revised payment schedule. In the alternative, Rock argued that by reason of its payment and MWB's acceptance of the £3,500, MWB was estopped from disavowing the variation to which it had orally agreed.' More detail can be gleaned from the article coauthored by one of the counsels of the case: Clifford Darton, Sally Anne Blackmore & Samantha Dawkins, 'Rock: Clarity on Contracts?: An Exceptional Appeal; A Purist's Outcome. Lessons from *MWB Business Exchange Centres Ltd v Rock Advertising Ltd'* which provides about Mr Idehen: *'He said that he would make an immediate payment of*

point, although, in our opinion, in theory, it could be validly argued or substantiated perhaps with additional wording or conduct.

The example of the Vienna Convention was brought in order to draw the parallelism of how a NOM clause is recognised by an international Convention. However, we submit that this demonstrates that the very recognition of the exception to the rule, can weaken the argument, simply by illustrating in which circumstances party autonomy as expressed in the NOM clause may be displaced by subsequent conduct (an oral variation, payment and acceptance or silence) and respective reliance.

In other words, Article 29(2) has a much more modest yet flexible approach towards party autonomy by virtue of its second sentence, meaning that we should not only focus on the first part of the article. This is the difference of the philosophy of civil law: the law is codified in order to have a prophylactic effect and interfere with party autonomy where there is reliance of third parties to a certain behaviour, and hence a need for their legal protection. On the contrary, common law gives episodic solutions to legal problems. Similarly, the examples of no-waiver clauses in the US and BIMCO[77] contracts show that with such clauses alongside the NOM clause, the discussion of estoppel would not be called for. It is in this sense not random that we looked at US commercial leases in EDGAR's database and BIMCO contracts.

ROCK ADVERTISING AND OTHER INTERNATIONAL TRADE AND SHIPPING TEXTS: IDENTIFYING CONNECTIONS

£3,500 as a goodwill gesture if the revised schedule was accepted and, following his conversation with Ms Evans, did indeed make such a payment, as evidenced by emails, something not lost upon HH Judge Moloney QC, who tried the case in March 2014.' (New Law Journal, Commercial Legal Update, pp 9-10, available at <https://www.newlawjournal.co.uk/docs/default-source/article_files/009_nlj_7797_specialist_commercial_blackmore.pdf?sfvrsn=2dd2ebd_2>).

[77] See for example REPAIRCON, which just before the Entire Agreement contains the following No-waiver clause: '**No Waiver**. No failure or forbearance of either of the Parties to exercise any of their rights or remedies under this Contract shall constitute a waiver thereof or prevent the Parties from subsequently exercising any such rights or remedies in full.'

Another example that was used by the Supreme Court in *MWB v Rock Advertising*[78] is Article 1.2 of the UNIDROIT Principles of International Commercial Contracts, 4th edn (2016):
This provides that 'nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form.'
Yet Article 2.1.18 specifies:
'A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.'
Lord Sumption also cited with approval from the judgment of Longmore LJ in *North Eastern Properties Ltd v Coleman:*[79]
'If the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said.'[80]

Since the English courts looked outside the UK jurisdiction for the wider legal view on NOM clauses and contractual form, we thought it is pertinent to add a few more details from the European soft law side on this matter. The approach of the Draft Common Frame of Reference (DCFR) and the Principles of European Contract Law (PECL) to NOM clauses[81] is relevant.

More specifically, the DCFR[82] specifies:

'**II. 4:105: Modification in certain form only**

[78] [2018] UKSC 24, paras 13 and 16.

[79] [2010] 1 WLR 2715.

[80] [2018] UKSC 24, para 14.

[81] Nils Jansen, Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) 285-288.

[82] For more on NOMs under the DCFR see Florian Wagner-von Papp, 'Are No Oral Modification Clauses Not Worth the Paper They Are Written On?' (2010) 63 (1) Current Legal Problems 511.

(1) A term in a contract requiring any agreement to modify its terms, or to terminate the relationship resulting from it, to be in a certain form establishes only a presumption that any such agreement is not intended to be legally binding unless it is in that form.
(2) A party may by statements or conduct be precluded from asserting such a term to the extent that the other party has reasonably relied on such statements or conduct.'

The PECL are similar, except that they only provide for the writing form of the modifications, as opposed to a 'certain', yet not identified, form in the DCFR. The PECL provision appears below:

Article 2:106: Written Modification Only

(1) A clause in a written contract requiring any modification or ending by agreement to be made in writing establishes only a presumption that an agreement to modify or end the contract is not intended to be legally binding unless it is in writing.

(2) A party may by its statements or conduct be precluded from asserting such a clause to the extent that the other party has reasonably relied on them.
There are academic views that understand the above model rules (PECL, DCFR) as offering a presumption only as to the effectiveness of the NOM clause.[83]

If we go back to *Rock Advertising*, although the matter of the effectiveness or validity of a no oral variation clause in English law seemed to be finally clarified, it was at the same time indicated that there is a small window for the exception:
'At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself.'[84]

Arguably, the above statement about 'something more that would be required' is a bit vague: what would be an example? Unfortunately, the judgment did not elaborate on this, as the facts

[83] See Wagner-von Papp above, para 581; see above, *Commentaries on European Contract Laws*, 288.

[84] On point (ii) see *Actionstrength Ltd v International Glass Engineering In.Gl.En SpA* [2003] 2 AC 541, paras 9 (Lord Bingham) and 51 (Lord Walker).

did not require it. This is not surprising though, as already the focus on the certainty of NOM clauses and their enforceability resolves the issue emanating from previous inconsistent holdings. Let us not forget that cases are fact sensitive.
The lower courts had decided that the minimal steps taken by *Rock Advertising* could not substantiate estoppel,[85] hence the issue did not need to be further discussed before the Supreme Court. This means that although this judgment makes a critical contribution to the clarification of a contract law principle, ie upholding the effectiveness of NOM clauses against informal contractual amendments, practice could potentially lead to disputes where the principle has to succumb to facts that could corroborate estoppel. With estoppel understandably not being of focus due to the facts in this judgment, we will monitor cases where *Rock Advertising* and its principles on NOM clauses are further explained.

One needs to remember that, in an interpretation process, English courts weigh and assess the interaction of more than one relevant principles, and their role is to strike a balance.[86] There are levels of observations that can be drawn, and one thing seems emphatic. A case like *Rock Advertising* which enforces a term of a written agreement, that variations need to be evidenced in writing, defends the principle of contractual certainty, because there was a clear and unambiguous term as to the form and effectiveness of future contract variations. The desirability for a further elaboration on the exceptions does not defeat this observation, as it is only natural that the court has to adjudicate on the questions referred to it. It is important to see how subsequent UK judgments have understood and how future decisions will test the robustness of the principle against estoppel defences raised by complex facts of commercial legal disputes.

One may wonder how this is consistent with our thesis that English law now credits NOM clauses with certainty, if we are not crystal clear about estoppel. We have the rule, the test for the exception, just not a Supreme Court example for a successful estoppel in a NOM clause

[85] See also John Cartwright, *Formation and Variation of Contract* (2nd edn, Sweet & Maxwell 2018) Chapter 10.

[86] See Hugh Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2019) para 13-043: 'Given that the courts are concerned with the application of "principles" rather than "rules", it is not surprising to find that these principles can at times conflict and the result is a perceived degree of uncertainty or tension in the case-law.'

context at the same time. A question that naturally arises is when the line is crossed, so that estoppel can be triggered and defeat a NOM clause.

The case *Active Media Services Inc v Burmester, Duncker & Joly GmbH & Co Kg & Ors*[87] is relevant in this regard. [88]

So far, we have also noted how the Supreme Court in *Rock Advertising* opened itself up to legal provisions of freedom of contract and form in other jurisdictions and instruments.

Furthermore, *Rock Advertising* was mentioned in a shipping case, namely *Nautica Marine v Trafigura*.[89] Parties were in negotiations for the chartering of a vessel for the carriage of crude

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[87] [2021] EWHC 232 (Comm).

[88] In A*ctive Media Services Inc v Burmester, Duncker & Joly GmbH & Co Kg & Ors*, a dispute arose concerning the financing, completion and delivery of an animated film. Clause 11.2 of the Completion Guarantee contained a NOM clause. Justice Calver explained in paras 339 and 340:

'The unequivocal conduct in this case was not something such as a one-off telephone call, as in Rock Advertising (which, as was common ground before the Supreme Court, was not clear enough to create any estoppel). I find as a matter of fact that it consisted of an extensive course of conduct, over many months, whereby Active by Mr. Quinn, as well as acting through Mr. Sears and Mr. Jason Moring, endorsed (a) the extension of the Delivery Date; (b) the consequent postponement of the release of the Film into 2018; (c) the purported acceptance of the bonded delivery materials by DDI on 21 September 2017; (d) fundraising from Telefilm on the footing that the CGA was discharged; (f) exploitation of the Film in 2018 through DDI; (g) changes to the waterfall; and (h) payments out of the Collection Account.'(para 339).

'Active accordingly itself indicated through its agents (by words and conduct over many months) that it considered the Film to be completed and delivered, or at least that it would not suggest that there had not been completion and delivery of the Film under the Completion Guarantee, and that it would therefore treat the Guarantor Defendants as being discharged from liability under the Completion Guarantee. Active led the Guarantor Defendants to believe that it would instead join in the exploitation of the Film in 2018 with the benefit of third party funding. That amply satisfies the "something more" required by Lord Sumption in Rock Advertising.' (para 340).

[89] *Nautica Marine Ltd v Trafigura Trading LLC* [2020] EWHC 1986 (Comm).

oil. The issues for the court were whether a contract was concluded and, if so, what the terms of the contract were.[90]

In para 77, Justice Foxton stated:
'It must be a rare case in which something short of the parties proceeding to perform the agreement which they had negotiated *subject to* an unsatisfied pre-condition would be sufficient to constitute an implicit agreement to waive or remove that pre-condition.'

The *Nautica* case confirms the high threshold courts expect for the successful defence of estoppel that holds parties legally bound by an oral modification despite a NOM clause.

In the modern era, it is relevant to ask whether an email exchange pursuant to an oral variation or further referring to it and containing the email signature of the parties would satisfy the written requirement of the NOM clause. This is a question of facts and interpretation.[91] *Rock Advertising* does not elaborate further on the specific respect of what would adequately constitute evidence of the unequivocal informal promise.[92] The parties would need to show something more other than the informal promise itself, as per the wording of *Rock Advertising* and *Kabab-Ji.* According to *Rock Advertising,* the subsequent conduct of the parties did not suffice to activate estoppel as per the test. This is why it is additionally helpful that contracts specify whether a double-written NOM clause is needed and what exactly satisfies the writing requirement.

[90] [2020] EWHC 1986 (Comm), para 2.

[91] The case *Williams v Simm [2021] EWHC 121 (Ch)* is noteworthy. The requirements of the NOM clause had not been satisfied as the email discussions did not amount to an offer and acceptance and did not include all the contractual terms. Additionally, in the words of His Honour Judge Cawson QC, in para 86.3: 'In the present case LSC's rights had been reserved by the additional wording at the end of the email dated 21 October 2019 referred to in paragraph 36 above. Such wording does, as I see it, negative any suggestion that the electronic signature of Mr Morley in the email dated 21 October 2019 had authenticating intent.'

[92] [2018] UKSC 24, para 16.

BIMCO contracts explain what writing includes.[93] As we have covered the use of NOM clauses in commercial leases and standard shipping contracts, and as a shipping case has cited *Rock Advertising,* this expansion towards the area of so-called 'dry' maritime law, makes a look at the Rotterdam Rules[94] relevant. Although, the Rotterdam Rules have not yet come into force, they are a modern international maritime plus carriage convention and address the ever-increasing presence and hence importance of electronic communication and records in international shipping and trade practice.[95] Volume contracts with derogations[96] from the otherwise mandatory umbrella of the Rotterdam Rules are permissible if certain requirements are satisfied in writing. Thus, in the Rotterdam Rules, like in *Rock Advertising*, derogations remind us of variations, [97] and the necessary specifics of the agreement in writing form remind us of the specific limitations imposed by the NOM clause for its effectiveness to be upheld by courts.[98]

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[93] See for example TOWCON 2021, Clause 37(b) 'For the purposes of this Agreement, "in writing" shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, fax, e-mail, registered or recorded mail, or by personal service.' Another example is BIMCO's BOXCHANGE Standard Container Interchange Agreement which provides:

16. Notices

1. (a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Agreement shall be in writing.

2. (b) For the purposes of this Agreement, "in writing" shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, cable, telex, fax, e-mail, registered or recorded mail, or by personal service.

[94] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.

[95] Ibid.

[96] As per article 80(1), (2) and (5) of the Rotterdam Rules, volume contracts allow derogations from the mandatory application of the Rotterdam Rules subject to the terms contained in the above article.

[97] Therefore, we indeed have similarities with those of a variation of an initial agreement.

[98] We should also note that Article 3 of the Rotterdam Rules heralds that electronic communications can be used for the purposes of complying with the writing requirement, corroborating our remarks about email exchanges with the opportunity of *MWB v Rock Advertising* and the need for more clarity on what satisfies the writing requirement, if the contract is silent.

Since the Supreme Court established the principle that NOM clauses are enforceable, we also need to see whether and how subsequent cases have explained the principle. We now shift our attention to the Court of Appeal case of *Kabab-Ji v Kout Food*:[99] this is a commercial case with important arbitration dimensions which applied the principle of *Rock Advertising*.

EFFECTIVENESS OF NOM CLAUSES AFTER *ROCK ADVERTISING: KABAB-JI v KOUT FOOD*[100]

In *Kabab-Ji SAL (Lebanon) v Kout Food Group*, the dispute arose out of a Franchise Development Agreement (FDA) entered into between Kabab-Ji and AHFC. The latter then became a subsidiary of Kout Food Group (KFG). The FDA agreement contained inter alia:

a. A good faith provision:

'Article 2: Good Faith and Fair Dealing

In carrying out their obligations under the Agreement, the Parties shall act in accordance with good faith and fair dealing. The provisions of the Agreement, as well as any statements made by the Parties in connection therewith, shall be interpreted in good faith.

b. an Arbitration clause (Article 14);[101]

c. a clause requiring any waiver to be in writing and signed by the affected party (Article 17);

[99] [2020] EWCA Civ 6.

[100] Ibid.

[101] Article 14.3 reads: 'The arbitrator(s) shall apply the provisions contained in the Agreement. The arbitrator(s) shall also apply principles of law generally recognised in international transactions. The arbitrator(s) may have to take into consideration some mandatory provisions of some countries i.e. provisions that appear later on to have an influence on the Agreement. Under no circumstances shall the arbitrator(s) apply any rule(s) that contradict(s) the strict wording of the Agreement.'

Article 14.5 provided: 'The arbitration shall be conducted in the English language, in Paris, France.'

d. an Entire Agreement Clause;'[102]

Finally, and most importantly, the FDA had a NOM clause providing as follows:

'The Agreement may only be amended or modified by a written document executed by duly authorised representatives of both Parties.'

The first difference in the content of this clause compared to that of *Rock Advertising* is that only writing is required without a need for the signature of the parties or their representatives. The issues under consideration involved determining whether the respondent had become a party to the main FDA agreement and/or the arbitration agreement contained therein notwithstanding the presence of NOM provisions in the main contract.[103]
At first instance, it was already found that the above nexus of provisions constitutes a strict context, ie a strict interpretation and strict limits to the obligations of the parties.[104]
It is critical that *Kabab-Ji,* like *Rock Advertising* also found the estoppel defence unsuccessful. Sir Michael Burton found on the alleged modification, ie the third party acting as if it is a licensee, that as per *Rock*, something more would be required, at least 'some words or conduct unequivocally representing that the transfer of rights and obligations to it was valid notwithstanding its informality'. It was explicitly held by Sir Michael Burton that conduct is not enough and therefore the second step was to identify whether there was evidence of consent in writing under the light of good faith, as the FDA required.
It needs to be reminded here that otherwise the party would have been deemed to have taken 'minimal steps', as in *Rock Advertising*.[105]

[102] '... No interpretation, change, termination or waiver of any provision hereof, and no consent or approval hereunder, shall be binding upon the other party or effective unless in writing signed by LICENSEE and by an authorized representative of LICENSOR or its designee.'

[103] See [2020] EWCA Civ 6, para 1.

[104] The Court of Appeal cited para 16 of Lord Sumption's speech in *Rock Advertising.*

[105] It is now time to examine what steps were minimal under *Kabab-Ji*, thus not allowing the estoppel to materialise. Under *Kabab-Ji,* the following did not suffice for the second requirement of the *Rock Advertising* estoppel test to be held as met*:*

The *Kabab-Ji* discussion of *Rock Advertising* is a proof of the commercial law dimensions of the latter, and notably in the field of arbitration. [106]

More specifically,[107] Lord Justice Flaux refused to accept that interpreting the provisions of the contract in good faith would justify an interpretation that goes beyond what has been agreed or purports to rewrite the Agreement. Good faith was a specific term of the FDA, and a provision of CISG, that *Rock Advertising* looked at for harmonisation purposes. It is therefore an important principle of a contract's interpretation that may also contain a NOM clause.

In para 73, Flaux LJ commented on the understanding of the exception to the enforceability of NOM clauses under Article 2.1.18 of UNIDROIT, which derives from good faith and abuse of rights concepts, whereas in English law it comes from estoppel. Although, in *Rock Advertising*, there was nothing more to be said, in *Kabab-Ji*, good faith was not an abstract extracontractual principle, but a formal provision of the agreement.

(i) a letter of the Chief executive officer of Z (AHFC) and of K, on K note paper to the claimant (ii) an email dated June 3 2006, sent by the Claimant to Mr Zeine at Z, enclosing a copy of minutes of a meeting on the Claimant's headed note paper dated May 29, 2006;(iii) a letter dated June 6, 2006 from Mr Zeine, on K headed note paper to the Claimant and (iv) an email dated 7 November 2006, from the Claimant to Mr Zeine, attaching a draft unsigned MOU between the Claimant and K for his comments.

Males LJ who gave permission to appeal in *Kabab-Ji*, went on to highlight that the first instance judge had erred in law in accepting some room for argument that although the requirement for written consent under the NOM clause might need to be interpreted in good faith, did not specify what this entails in practice.

[106] The dispute also revolved around the law of the arbitration agreement, which in a rather rushed fashion was decided to be English law, which was the governing law of the FDA. It was concluded that English law is the governing law of the arbitration agreement and direct references were made to the English Arbitration Act '96 in stark contrast with section 2(1) which provides that: 'The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.' See paras 62-70 of the Court of Appeal judgment.

[107] In para 65.

Flaux LJ concurred with Lord Sumption JSC that there is 'little difference' [108] between the UNIDROIT approach and estoppel. However, his Lordship's words on whether the UNIDROIT principles suggest a broader test are ambiguous, as we can see below:
'Even if, contrary to that conclusion, the UNIDROIT principles are enunciating some broader test for preclusion than that laid down by Lord Sumption JSC, those principles cannot be used to override the No Oral Modification clauses in the FDA.'[109]

Therefore, his Lordship is not really following the potentially more generous UNIDROIT test, as under it, the *Kabab-Ji* combination of a good faith provision, the NOM clause, conduct to the contrary would suffice for the NOM clause to be obviated. The *Rock Advertising* test said that, whereas in UNIDROIT there is a good faith, in English law, where there is no implied duty of good faith, we reach a comparable result through estoppel. In *Kabab-Ji* we had a good faith provision in the agreement itself. So, what if we have a contract, where the court finds English law to apply and good faith is also a term of the contract? In our view, this enriches the test, whereas *Kabab-Ji* read it more restrictively.

When the contract introduces good faith, we have a different, more inclusive test. If in *Rock Advertising*, in a dispute about a contract with a clear NOM clause and no good faith clause, the court looked at other legal systems/texts and considered good faith, then *a fortiori*, in *Kabab-Ji*, a good faith provision in the contract would make the good faith consideration imperative.

Good faith is not a rule, it is a principle. And since, the judges initiated the process of construction of the contract and its clauses, including the NOM clause, then clearly the strict wording is under scrutiny.[110] The contract and the circumstances of the exchanges are to be

[108] Para 75.

[109] Para 76 of the Court of Appeal judgment.

[110] Lord Sumption in *Rock Advertising* enhances the trend of literalism, defined as giving effect to the language in contractual interpretation of commercial and shipping contracts. The inclusion of specific clauses is associated with a particular contractual intention, which has been expressed in writing; See Lord Sumption's speech entitled 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' page 9 available at <https://www.supremecourt.uk/docs/speech-170508.pdf>. His Lordship had a chance to appraise the most

examined as a whole. Hypothetically speaking, if the *Kabab-Ji* case was to be decided by arbitrators, the good faith or other a-national principles could be at stake anyway in order to determine the contractual intention. The reason is that arbitrators compared to judges may follow various approaches in order to determine the law that will apply to the dispute. What transpired from these paragraphs of *Kabab-Ji*, is that they seem to take an even narrower interpretation of the *Rock Advertising* test.

Estoppel in *Kabab-Ji* was yet again unsuccessful, which is another similarity with *Rock Advertising.*[111]

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important English authorities on contractual construction and interpretation in a speech about the Supreme Court and interpretation of contracts: 'The first and main point to make is that the language of the parties' agreement, read as a whole, is the only direct evidence of their intentions which is admissible.' He added 'It is I think time to reassert the primacy of language in the interpretation of contracts.' It was also clarified that:
'The parties are the masters of their own agreement, and anything which marginalises the role of words in the process of construction is a direct assault on their autonomy.'
See also *Arnold v Britton* [2015] UKSC 36; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14 (Lord Hoffmann); *Wood v Capita* [2017] UKSC 24, para 10 (Lord Hodge). On principles of contractual interpretation, see Lewison, *The Interpretation of Contracts* (6th edn, Sweet and Maxwell 2015), First Supplement 2019, para 1-01. On an exhaustive and detailed study of the rules of construction and interpretation see Eleni Magklasi, *Decoding the Law Of Incorporation Of Charterparty Arbitration Clauses Into Bills Of Lading And Identifying Its Dimensions: delineating the sui generis status of arbitration clauses*, PhD thesis submitted to the University of Southampton,
<https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.773264>.

[111] Para 58 of the *Kabab-Ji* Court of Appeal judgment: 'Mr Diwan QC submitted that the appellant's entire case before the arbitrators had been conduct based. There were no documents other than conduct based documents, none of which would satisfy the requirements of the No Oral Modification clauses or of the estoppel required to override those clauses, as the judge correctly found. He described as a "phantom submission" the submission on behalf of the appellant that there were or might be any more documents not referred to by the judge which would have a bearing on the legal requirements of the FDA or satisfy Lord Sumption's test for estoppel. Whilst there

In para 77,[112] Flaux LJ pointed out that as a matter of English law the good faith provision cannot rewrite the contract, because this is not allowed by the strict *Rock Advertising* test. *Rock Advertising,* and followingly *Kabab-Ji*, acknowledge that there should be reasons why parties say things they say in contracts. These observations prioritise the interpretational approach of honouring the limitations that parties themselves impose through their words in their deals: when the contract wording is clear, there is no reason why the court will interfere.

Rock Advertising's recognition of NOM clauses and the case law that follows it constitute an advanced – and pivotal – juridical development of direct benefit to commercial practitioners and their contracts, but also to the body of case law on commercial interpretation. The wording of the parties becomes the compass that is primarily followed by the courts, again to the assurance of businessmen who wish to conduct business deals as they see fit. This consolidates the positive rulings in *Arnold v Britton* and *Wood v Capita* and epitomises the invaluable contribution of the Supreme Court to the refinement and application of common law doctrines on contractual interpretation. English law follows a much straight-forward

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had been invoices from the appellant in relation to the royalty payments paid by KFG which were not before the Court, the royalty payments had been reimbursed by AHFC. As I pointed out in the course of argument, this would make the invoices equivocal, in the sense that KFG could have been paying them as agent for its subsidiary AHFC, which was the point the judge made at the beginning of [47] of his judgment. Mr Diwan QC submitted that if his submissions as to the construction of the double lock and the limited override of No Oral Modification clauses permitted by *Rock Advertising* were correct, there was no basis for reopening the judge's factual assessment of the documents before him.'

[112] Para 77 of the judgment:

'Similarly, the principle of good faith and fair dealing, whether in Article 2 of the FDA or Article 1.7 of the UNIDROIT principles, cannot be used to override the clear wording of the No Oral Modification clauses to a greater extent than identified by Lord Sumption JSC. The first sentence of Article 2 is focusing on good faith and fair dealing in the performance by the parties of their obligations under the FDA. It cannot be used to make someone a party to the FDA who would not otherwise be a party as a matter of English law, assuming that there was no estoppel precluding reliance on the Oral Modification clauses.'

approach, which is more automated, without adding filters of good faith, as seen in other instruments. This is why *Rock Advertising* and *Kabab-Ji* elaborate on the refinement of the legal enforceability of NOM clauses in principle and less, on the exception through estoppel.

Let us now see a German case involving a NOM clause in order to introduce another perspective alongside that of the common law.

DOES CIVIL LAW ALLOW AN ORAL MODIFICATION OF A SO-CALLED DOUBLE-WRITTEN FORM CLAUSE? A GERMAN CASE

A case of the German Federal Court of Justice[113] concerned the type of clause specifying that 'any modification of the contract requires written form and also a modification of this – in writing requirement – requires written form', a so-called double-written form clause.[114]
It was ruled that:
'A so-called "double-written" clause contained in a contract for the rental of commercial premises cannot preclude an oral or implied amendment of the terms of the contract in the event of a formal agreement on the basis of the primacy of the individual agreement in accordance with Paragraph 305b of the BGB.'[115]

After having entered into a lease, the original contracting parties changed the purpose of the use agreed in the contract and, in doing so, neither the contractual nor the statutory written form of Paragraphs 126 and 127 of the BGB was complied with.[116]

In para 17 (aa) of the judgment we read:

[113] Bundesgerichtshof (Federal Court of Justice) Order of 25.1.2017, XII ZR 69/16.

[114] See reference to German Law, in Wagner-von Papp above, at 533.

[115] See the German Civil Code (BGB), § 305b:

'Precedence of individually negotiated terms': 'Individually negotiated terms take precedence over standard business terms.'

[116] Para 9 of the translated judgment. This and all references are to paragraphs/pages of the English translation of the judgment.

'The Senate has already decided on a simple written form clause in a form contract. It does not matter whether the parties intended to amend the general terms and conditions or whether they were aware of the conflict with the general terms and conditions. It is also irrelevant whether the individual agreement was concluded expressly or implicitly. Individual contractual agreements take precedence over general terms and conditions, irrespective of the form in which they were concluded, and therefore even if they are based on oral statements. This is true even if it is determined by an AGB form clause that oral agreements are ineffective (Senate judgment BGHZ 164, 133 = NJW 2006, 138 et seq with further references)'.[117]

[117] Para 17 (aa) of the translated judgment. Before we draw our conclusions, however, about the key question of this article, we need to remember that this case was peculiar in that, as we read in para 16b) of the case (and this refers to the paragraph of the English translation of the judgment):

'The question of the validity of a double written form clause in a commercial premises rental contract may, however, be left open in the present case. The clause is in any event ineffective because of the primacy of the individual agreement under Section 305b of the Civil Code'.

The following extracts from the translated in English judgment are also important:

Para 18 BB) 'There are no significant differences in this respect between simple and double-written terms. The primacy of the individual agreement must be maintained in the case of both, even if it is accepted that the user has an interest in not removing the written form of a long-term lease by means of subsequent verbal agreements and, therefore, that such a clause is regarded, exceptionally, as valid. The meaning and purpose of Paragraph 305(b) of the BGB, according to which contractual agreements entered into by the parties for the individual case may not be crossed, eroded or wholly or partially nullified by different general terms and conditions. The provision is based on the consideration that general terms and conditions, as general guidelines for a large number of contracts, are pre-formulated in abstract terms and are therefore from the outset designed to be supplemented by the individual agreement of the parties. They can and should apply only in so far as the individual agreement concluded by the parties leaves room for that purpose. If the parties agree otherwise, even if only orally, this takes precedence (see Senate judgment BGHZ 164, 133 = NJW 2006, 138, 139).';

19 'The interest of the user of the clause, or even of both parties, in not jeopardising the long-term relationship between the parties by means of subsequent verbal agreements must resign from what the parties subsequently

As we saw, the German court reached a different outcome compared to English law as enshrined in *Rock Advertising* and *Kabab-Ji*. But, in the language of the court, a factor that was left open, was whether the double-written form clause would have been ultimately valid, as the result was determined by the supremacy of individually negotiated terms over general clauses.

Under English law, it was that very issue, namely that of the validity that was directly tackled: the parties are using clear language through a NOM clause and therefore their variations will only be effective and legally enforceable if they comply with the NOM clause. The only exception is estoppel, whereby something more would be required other than the informal promise itself. Unlike what transpired from the German judgment, English law lets parties make their deals as they see fit, allowing these clauses to be entered into and be made subject to the test of contractual interpretation. There is no implication of a good faith principle, or a case of the relevant FDA or licence agreement raising an issue of not individually negotiated terms. The English cases identified the issue of variation, or (novation/assignment in *Kabab-Ji*), not that of a hierarchy of clauses. Since *Rock Advertising*, if the parties wish to vary their agreement, they can do so in accordance with the terms that this prescribes. Essentially, commercial certainty prevails over flexibility under English law, with the specific written agreement dispensing the uncertainty of proving informal promises.
This is in line with shipping and popular contracts that we have reviewed, and which contain entire agreement, NOM and/or no waiver clauses. More notably, at the beginning of the article, we reviewed over 50 US contracts of which 47 contained a NOM clause as part of entire agreement clauses; the same is true for at least 15 BIMCO editions of standard contracts issued from 1998 until 2021. Thus, commercial parties can by virtue of the precedent created by the Supreme Court decision in *MWB v Rock Advertising* be optimistic about the merit and enforceability of NOM clauses, and why not, expand the inclusion of such clauses in more contracts. Following *Rock Advertising*, the commercial intention of

agreed. It is also irrelevant – unlike in the case of an individually agreed double-form clause – whether the parties took account of the contrary clause in their oral agreement and deliberately wanted to overrule it (see the Senate judgment in BGHZ 164, 133 = NJW 2006, 138, 139 with further references).'

minimising litigation and increasing legal certainty through anti-oral variation clauses meets its true validity.

CONCLUSION

The COVID-19 pandemic is negatively affecting smooth performance of commercial contracts, and businessmen need to know where they stand. In some situations, parties immediately think that their contract is frustrated. However, frustration is hard to satisfy. Now, in other cases, with contracts including a force majeure clause, businessmen may to their surprise, see pandemics not covered by the wording of that clause, or simply realise that the factual matrix is insufficient for its application. The reality check is therefore telling us that force majeure clauses may be imperfect creatures of contract, certainly when compared with NOM clauses, whose brevity, straight-forward meaning and impact are beyond doubt, post *Rock Advertising* more than before. With business having to survive, commercial practitioners may start phone discussions to negotiate adjustments, ie variations in contractual performance. Parties may however see that there is simply no easy way to amend a contract due to an overwhelming adversity; or that the contract can be varied, or anyway terminated subject to written formalities. This is why NOM clauses should not be ignored. In fact, our quantitative research has shown that the contractual device of NOM clauses is much more popular than one may have once thought. And not only are NOM clauses multitudinous in commercial leases in the US, but also in several BIMCO shipping contracts. The UK and US elements of the research have been designated by cases, theory and practice.

'Pacta sunt servanda' remains a sacrosanct principle, as we saw in English law. We also studied how English cases discuss good faith, which otherwise is not per se a doctrine of English law, and find parallelisms with estoppel. Estoppel raises a difficult evidentiary threshold for NOM clauses to be defeated. This does not seem to be a problem in the US leases that we reviewed, because of the frequent no waiver clauses. We therefore need to advise that contracts governed by English law include specific clauses about variations, and also set out definitions about types of communication that satisfy that an agreement is 'in writing'.

NOM clauses are de facto strict, resulting in the preservation of the contract (perhaps more than force majeure clauses), because they look at written variations of any one or more terms;

force majeure clauses additionally depend on the foreseeability of events and also the parties' reactions in relation to the events covered, and these are harsh prerequisites for their success. The research of over 50 US commercial leases when compared with the estoppel arguments raised in the UK judgments, shows that the US contracts are much more proactively drafted, by frequently including no waiver or estoppel clauses in addition to entire agreements and NOM clauses, making agreements change-proof, and in line with the parol evidence rule.

The importance of upholding the validity and effectiveness of NOM clauses as a deterrent to oral variations in our view should be clustered among the leading English law principles about the interpretation of commercial contracts.[118]

We would like to conclude with the observation that party autonomy is not randomly an alternative term for the principle of freedom of contract in English law. It is not just an abstract concept; it is evidenced and thus illustrated by the parties' words, and, most importantly, it is applied by courts. This means that there is a valid need for commercial lawyers, and their pedantic insistence on exhaustive contract drafting against all odds. It is not just a professional obsession!

[118] See also Richard Christou, *Drafting Commercial Agreements* (6th edn, Sweet & Maxwell 2016) para 1.18 stating that the status of contract variations under decision in *MWB v Rock Advertising* (at the Court of Appeal, as it was then) concerned the interpretation of commercial contracts.