Now We're Talking: Revisiting the Canadian Approach to No Oral Modification Clauses

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"No oral modification" (NOM) clauses state that variations of contracts must be written. At the core of the debate surrounding these clauses is whether the law can support a decision by parties to forfeit their rights to modify the agreement as they choose, even when doing so binds them to an agreement that does not reflect their most recent shared intentions. Canada is not insulated from this debate. Historically, courts opposed enforcing NOM clauses, citing inconsistency with freedom of contract principles. However, leading Canadian decisions are inconsistently applied. This uncertainty means NOM clauses will continue to be challenged. Courts can look to UK and Australian jurisprudence for guidance.

This paper examines whether common law Canadian courts should give effect to NOM clauses, considering British and Australian approaches. The author argues that, where a NOM clause is present, a subsequent oral variation clearly intended to modify the substance of the agreement should be enforceable. However, NOM clauses still serve an evidentiary role, signaling parties' intentions.

The author first explains NOM clauses. Next, he discusses their treatment in Canadian jurisprudence, paying particular attention to analogies between NOM clauses, exclusion clauses and "entire agreement" clauses. He then compares the UK approach, which favours the enforcement of NOM clauses on the grounds of freedom of contract to Australian jurisprudence, which favours the enforceability of subsequent oral amendments in the face of NOM clauses. He cautions Canadian courts against applying the UK approach, arguing that the enforcement of subsequent oral amendments is more consistent with the rationale for, and objectives of, freedom of contract than the strict enforcement of NOM clauses. The author then applies the principles of contractual interpretation developed by Canadian courts to conclude that NOM clauses, despite being unenforceable on their own terms, may nevertheless make it more challenging for a party to demonstrate a subsequent intention to amend an agreement. Further, as incoherence in Canadian jurisprudence stems from analogies to exclusion clauses and "entire agreement" clauses, the author distinguishes this approach in favour of treating NOM clauses as sui generis.

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Introduction

Written contracts, particularly between commercial parties, often include a clause stating that any variation of the agreement must be made in writing. These clauses are commonly referred to as "no oral modification" (NOM) clauses.[1] Despite their ubiquity, the enforceability of such clauses has long been the subject of debate.[2] At the core of this debate is a disagreement over whether the law can support a decision by the parties to forfeit their rights to modify an agreement in whichever way they choose, even where such a concession may later bind them to terms that no longer reflect their most recent shared intention. Historically, courts across the common law world have opposed the enforcement of NOM clauses on their own terms, though some variations in treatment between jurisdictions have emerged.[3]

1. See *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*, [2016] EWCA Civ 396 at para 113, Beatson LJ [*Globe Motors*]; *Rock Advertising Limited v MWB Business Exchange Centres Limited*, [2018] UKSC 24 at para 9, Lord Sumption JSC [*Rock Advertising* 2018]; *Archibald v Action Management Services Inc*, 2015 NSCA 103 at para 22, Hamilton JA [*Archibald*]. They may also be known as "no oral variation" or "no oral amendment" clauses.

2. See Robert A Hillman, "Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of No Oral Modification Clauses" (1988) 21:3 Cornell Intl LJ 449 at 450–51.

3. See Paul S Davies, "Varying Contracts in the Supreme Court" (2018) 77:3 Cambridge LJ 464 at 465; James C Fisher, "Contract Variation in the Common Law: A Critical Response to *Rock Advertising v MWB Business Exchange*" (2018) 47:3 Comm L World Rev 196 at 198. The traditionally dominant approach is articulated by Cardozo J in *Beatty Guggenheim Exploration*

A greater number of judges and academics have expressed their support for the enforcement of NOM clauses in recent years.[4] Most notably, the Supreme Court of the United Kingdom in *Rock Advertising Limited v MWB Business Exchange Centres Limited* allowed a NOM clause to be enforced on its own terms.[5] This decision caused a dramatic shift in the direction of English law and prompted considerable scholarly discussion in the wider common law world.[6] Only two years earlier in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*, the Court of Appeal of England and Wales held that NOM clauses are inconsistent with the principles of freedom of contract and therefore unenforceable in the face of a subsequent oral amendment.[7] This approach still has weight in Australia, where courts have consistently found NOM clauses ineffective against subsequent oral modifications.

Courts in Canadian common law jurisdictions have not developed a unified approach to the enforceability of NOM clauses. *Shelanu Inc v Print Three Franchising Corp*, a 2003 decision of the Court of Appeal for Ontario, is often cited as the leading case on the enforceability of NOM clauses.[8] Yet *Shelanu* has

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Co (1919), 122 NE 378 at 381, 225 NY 380 (NY Ct App 1919):

> 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 [. . .].

4. See *Rock Advertising* 2018, *supra* note 1. See also Jonathan Morgan, "Contracting for Self-Denial: On Enforcing 'No Oral Modification' Clauses" (2017) 76:3 Cambridge LJ 589; Ewan McKendrick, "The Legal Effect of an Anti-Oral Variation Clause" (2017) 32:10 J Intl Banking L & Reg 439.

5. See *supra* note 1.

6. See e.g. Richard Calnan, "Contractual Variation Clauses" (2018) 33:8 Butterworths J of Intl Banking and Financial L 487; Marcus Roberts, "No Oral Modification Clauses in New Zealand – Now What Do We Do?" (2019) 28:3 NZULR 475; Luke Tattersall, "No Oral Modification Clauses: Contractual Freedom under English and New York Law" (2019) 6:1 J Intl & Comp L 117; George Pasas, "No Oral Modification Clauses: An Australian Response to *MWB Business Exchange Centres v Rock Advertising* [2018] 2 WLR 1603" (2019) 45:1 UWA L Rev 141.

7. See *supra* note 1.

8. 226 DLR (4th) 577, 64 OR (3d) 533, Weiler JA [*Shelanu*]. See *Archibald*, *supra* note 1 at para 23. See also *Paramount Painting v Dunn*, 2019 ONSC 7307 at para 37, Gordon J [*Paramount*]; *Honey Bee (Hong Kong) Limited v VitaSound Audio Inc*, 2018 ONSC 5787 at para 43, Lococo J, aff'd 2020 ONCA 629 [*Honey Bee*].

not been interpreted consistently, and its articulation of a strong argument against effective NOM clauses in *obiter dicta* has not prevented their enforcement in subsequent decisions. It is therefore likely that the validity of NOM clauses will continue to be challenged, and considering recent developments in the United Kingdom, Canadian courts may look elsewhere in the common law world for a renewed approach.

This paper aims to address the question of whether common law Canadian courts should give effect to NOM clauses, taking into consideration the approaches developed in British and Australian jurisprudence. I take the position that, where a NOM clause is present, a subsequent oral variation of the agreement that is clearly intended to modify its substance should nevertheless be enforceable, regardless of whether the parties had turned their minds to the existence of the NOM clause.[9] The clause should therefore not be enforceable on its own terms. However, unenforceability would not prevent the presence of the NOM clause from shaping the context in which the later amendment was formed. NOM clauses may therefore serve an evidentiary role as a signal of the parties' intentions, though the degree to which they influence a finding that a subsequent amendment has been made will vary based on factual circumstances. Further, NOM clauses should be treated as *sui generis*, rather than as a species of exclusion clause. This framework is consistent with established principles in Canadian contract law as well as the weight of persuasive authority from Australia and the Court of Appeal of England and Wales.

To advance this position, I will first offer a comprehensive definition of the NOM clause. Second, I will provide an overview of the treatment of NOM clauses in Canadian jurisprudence. Third, I will review British and Australian jurisprudence addressing NOM clauses. Finally, I will discuss the key issues raised by the jurisprudence and propose an approach that is able to reliably give effect to the intention of the parties while remaining consistent with broader principles of Canadian contract law.

I. The NOM Clause and its Application

Before beginning an analysis of the treatment of NOM clauses, it is important to outline a working definition of the term. The key feature of the

9. It is outside the scope of this paper to discuss related issues concerning adequacy of consideration for an amendment. I will therefore assume that a valid oral amendment is supported by consideration in a manner that conforms with established legal principles.

NOM clause is that it establishes a formality requirement that precludes the parties from agreeing to any subsequent amendment that does not comply.[10] A NOM clause will typically resemble the following: "No variation of this Agreement shall be valid or effective unless made by one or more instruments in writing signed by the parties to this Agreement."[11] The parties may wish to set out formality requirements that are more or less rigorous than those found in the sample clause above. For instance, they may require that an amendment receive the signature of persons holding specified positions within their respective organizations, or may require a more detailed procedure for amendment. As will be discussed in Section IV.B of this paper, the nature of the formality requirements will provide some context in which the intention of the parties can be understood. Yet despite these potential variations, such clauses provide essentially the same function and therefore raise the same basic concerns. As such, it is necessary to consider them all through the same analytical framework.

The NOM clause must be distinguished from the so-called "entire agreement" clause. The purpose of the entire agreement clause is to limit the agreement between the parties to what has been set down in writing, to the exclusion of any representations made prior to the execution of the contract.[12] As such, the clause will usually contain a phrase similar in effect to: "This contract contains the entire agreement between the parties."[13]

Though they differ significantly in purpose, the NOM clause and the entire agreement clause bear some resemblance to one another and, due to this similarity, they have attracted comparisons and occasionally been given the

10. Throughout this paper, I focus on the enforceability of an "oral" amendment in the face of a NOM clause. I do this because, for a NOM clause to achieve its purpose, it must at the very least purport to reduce amendments to writing and therefore preclude oral variations. Further, much of the relevant case law and literature focuses on alleged oral variations. It is nevertheless important to note that certain written communications, such as emails, text messages, or unsigned writings, can also contradict the terms of a NOM clause, depending on how that clause is worded.

11. Morgan, *supra* note 4 at 589.

12. See *Soboczynski v Beauchamp*, 2015 ONCA 282 at paras 43–47, Epstein JA [*Soboczynski*]. See also MH Ogilvie, "Entire Agreement Clauses: Neither Riddle nor Enigma" (2008) 87:3 Can Bar Rev 625 at 626, 642.

13. *Soboczynski*, *supra* note 12 at para 10.

same treatment by courts.[14] This tendency to see the clauses as categorically indistinguishable, or even closely analogous, is misguided. The key difference between the clauses lies in the fact that the NOM clause is employed to limit the parties' exercise of their future rights, while the entire agreement clause operates as a clarification of what has already been agreed.[15] The NOM clause is controversial because it purports to override the parties' later express intention, while the entire agreement clause is widely accepted because it represents the parties' current desire to override any previous understanding, thereby supporting the terms as they have been expressed in the contract in a manner akin to the parol evidence rule.[16] Due to these critical differences, it is not necessary to consider the treatment of entire agreement clauses in this paper, except where they must be distinguished from NOM clauses.

II. The Treatment of NOM Clauses in Canadian Law

Shelanu is widely regarded as the leading Canadian decision addressing the treatment of NOM clauses.[17] The case concerned a dispute between Print Three Franchising Corporation (Print Three), a franchisor of print shops, and Shelanu Inc., a franchisee owned by Brian and Mary Deslauriers. The Deslauriers also owned a second corporation, BCD Print Inc. (BCD), which operated a separate Print Three franchise. Shelanu initially controlled two Print Three franchises, though due to declining revenues, Shelanu surrendered one of these by oral agreement with Print Three. This oral agreement was never questioned by either party despite the presence of a NOM clause in the corresponding, terminated franchise agreement. In the following years, BCD relocated its business and used the new location strictly as a production facility in support of Shelanu's remaining franchise operation. All agreements relating

14. See *Shelanu*, *supra* note 8 at paras 31–32. See also *Rock Advertising* 2018, *supra* note 1 at para 14.

15. See *Rock Advertising* 2018, *supra* note 1 at para 28, Lord Briggs JSC; Roberts, *supra* note 6 at 14; Calnan, *supra* note 6 at 489.

16. See Roberts, *supra* note 6 at 14; Calnan, *supra* note 6 at 489.

17. See *supra* note 8. Cited as leading authority in *Archibald*, *supra* note 1 at para 23. See also *Honey Bee*, *supra* note 8; *Paramount*, *supra* note 8.

to these changes were made orally. Two years later, the parties reached an oral agreement to terminate the BCD franchise and effectively merge its production operation with the Shelanu franchise. However, Print Three subsequently disregarded this oral agreement and continued to treat Shelanu and BCD as separate franchises, thereby depriving the Deslauriers of certain sales-based royalty rebates that they would have received had the BCD franchise been surrendered.[18] In support of its position, Print Three relied on the NOM clause in the BCD franchise agreement, which stipulated that any "waiver, amendment, or change" of the terms had to be made in writing and signed by the parties.[19]

Several contract and franchise law issues were raised at trial and on appeal, including whether the oral agreement to terminate the BCD franchise agreement was enforceable notwithstanding the NOM clause. The trial judge, Nordheimer J, held that the oral agreement was enforceable.[20] The Court of Appeal upheld Nordheimer J's decision to enforce the oral agreement.

Justice Weiler, writing for the Court, reached this conclusion by first treating the NOM clause, along with an entire agreement clause also found in the franchise agreement, as exclusion clauses. However, she noted that these were unconventional exclusion clauses in that they did not concern the usual subject matter of such clauses, being the limitation of liability for damages related to breach of contract or a tort related to the contract.[21] She nevertheless maintained that the clauses at issue should be treated as exclusion clauses on the grounds that precedent supports the treatment of entire agreement clauses as exclusion clauses.[22] It is critical to note that Weiler JA did not distinguish between the NOM clause and the entire agreement clause at this stage of the analysis.

Justice Weiler consequently analyzed the NOM clause at issue under a synthesis of the tests for the enforceability of exclusion clauses offered by Dickson CJ and Wilson J in *Hunter Engineering Co v Syncrude Canada Ltd*, then the leading case concerning the enforceability of such clauses.[23] In Weiler JA's formulation of this test, if the clause covered the alleged occurrence

18. See *Shelanu*, *supra* note 8 at para 21.

19. *Ibid* at para 28.

20. See *ibid* at paras 25–26.

21. See *ibid* at para 31.

22. See *ibid*.

23. See *ibid* at para 32, citing [1989] 1 SCR 426, 57 DLR (4th) 321 [*Hunter Engineering*].

or breach, then it was enforceable unless enforceability was unconscionable or unless the clause was unfair, unreasonable, or otherwise contrary to public policy.[24] Justice Weiler found that the NOM clause did not apply to the oral agreement on the grounds that the termination of the agreement did not constitute a "waiver, amendment, or change", as these words signified a continuing relationship and therefore did not extend to an agreement to end the relationship.[25]

Although the inapplicability of the NOM clause could have ended the analysis, Weiler JA continued to the second stage of the test, ultimately stating that she would have exercised her discretion not to enforce the clause even if it applied.[26] She reached this conclusion on multiple grounds. First, she stated that where the parties have, by their subsequent course of conduct, amended the written agreement so that it no longer represents their intention, the court will refuse to enforce the written agreement, even in the face of a clause requiring changes to the agreement to be in writing.[27] In this case, Nordheimer J at trial had inferred from the parties' course of conduct, including the numerous oral agreements made prior to the BCD termination, that they did not intend to continue to be bound by the exclusion clauses in the agreement. Second, she cited Professor Ruth Sullivan and Professor Stephen Waddams for the proposition that evidence of the true intention of the parties should prevail over the written agreement in any question of interpretation, as the objective of contractual interpretation is to give effect to the intention of the parties.[28] Since Print Three had conceded the existence of the oral agreement to terminate the BCD franchise on appeal, it would have been contrary to this proposition to allow the NOM clause to take precedence. Third, she drew attention to the values of equity, fairness, and justice, which underlie contractual interpretation and would be violated by enforcing the NOM clause.[29] Finally, Weiler JA stated that the franchise agreement was a contract of adhesion, which

24. See *Shelanu*, *supra* note 8 at para 35, citing *Guarantee Co of North America v Gordon Capital Corp*, [1999] 3 SCR 423 at para 52, 178 DLR (4th) 1, Iacobucci and Bastarache JJ.

25. *Shelanu*, *supra* note 8 at para 44.

26. See *ibid* at paras 59–60.

27. See *ibid* at para 54, citing *Colautti Construction Ltd v Ottawa (City)*, [1984] 46 OR (2d) 236, 9 DLR (4th) 265 (CA), Cory JA.

28. See *ibid* at 55–56, citing Ruth Sullivan, "Contract Interpretation in Practice and Theory" (2000) 13 SCLR (2d) 369 at 378; SM Waddams, *The Law of Contracts*, 3rd ed (Toronto: Canada Law Book, 1993) at paras 328–29.

29. See *Shelanu*, *supra* note 8 at para 57.

necessarily implied an inequality in bargaining power and therefore presented another reason to deny enforcement of an exclusion clause.[30]

It is also notable that, in her analysis of the entire agreement clause, Weiler JA cited *Corbin on Contracts* for the proposition that an express provision in a written contract forbidding oral variation of the terms of a contract or its discharge is "generally unsuccessful with respect to subsequent agreements".[31] Specifically, she quoted the following excerpt: "Two contractors cannot by mutual agreement limit their power to control their legal relations by future mutual agreement. Nor can they in this manner prescribe new rules of evidence and procedure in the proof of facts and events."[32]

In *Archibald v Action Management Services Inc*, the Nova Scotia Court of Appeal considered whether a NOM clause could preclude a subsequent oral variation. At issue was whether an oral agreement to terminate a lease was enforceable notwithstanding a clause in the lease providing that no term could be waived unless it was in writing and signed by the landlord.[33] Following *Shelanu*, Hamilton JA held that the NOM clause did not cover an oral agreement to terminate the written contract. Importantly, she affirmed language in *Shelanu* indicating that parties will generally be unsuccessful in attempting to forbid oral variation through use of a NOM clause.[34] She also applied the two-part test from *Shelanu* to determine whether the clause, which she characterized as a type of exclusion clause,[35] was enforceable, describing the second part of the test as a simple question of whether the applicable clause should be enforced.

The enforceability analysis in *Archibald* is unusual because it overlooks the fact that the test for the enforceability of exclusion clauses changed in the years following *Shelanu*. In *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, the Supreme Court of Canada articulated this revised test. *Tercon* requires that, if the exclusion clause applies to the circumstances at issue, the court must consider whether it was unconscionable when made.[36] If not, the court is asked whether it should decline to enforce the clause because of

30. See *ibid* at para 58.

31. *Ibid* at para 50, citing Joseph Perillo, *Corbin on Contracts*, revised ed (St Paul, MN: West, 1993).

32. *Ibid*.

33. See *Archibald*, *supra* note 1 at paras 19–21.

34. See *ibid* at paras 25–26.

35. See *ibid* at paras 22–23, 25–26.

36. See 2010 SCC 4 at paras 122–23, Binnie J, dissenting [*Tercon*].

an overriding issue of public policy.[37] It lies on the party seeking to avoid enforcement of the clause to demonstrate that matters of public policy outweigh the "very strong public interest" in the enforcement of contracts.[38] Given that Hamilton JA recognized the NOM clause as an exclusion clause, it would presumably follow that she could have applied this test to determine its enforceability.[39]

Neither *Shelanu* nor *Archibald* involved circumstances in which a NOM clause was found to have applied. However, Canadian trial courts have considered the enforceability of directly applicable NOM clauses. One such case, *Paramount Painting v Dunn*,[40] a decision of the Ontario Superior Court of Justice, showed a strong disinclination to enforce a NOM clause on the basis of Weiler JA's statement of the law in *Shelanu*. In *Paramount*, Gordon J held that the NOM clause at issue was ineffective against the oral agreement to amend, as the latter "reflected the intention of the parties".[41] Notably, he cited *Shelanu* for the proposition that: "Despite the provisions [in the contract at issue] requiring changes to be in writing and signed by both parties, the law is clear such does not prevent a subsequent oral agreement."[42] Likewise, in *Premier Marketing Solutions Inc v NII Northern International Inc*, a decision of the Supreme Court of British Columbia, Bauman CJ treated *Shelanu* as authority against the enforceability of NOM clauses in the face of subsequent oral amendments generally.[43] In *Jack Ganz Consulting Ltd v Recipe Unlimited Corporation*, a 2020 decision of the Ontario Superior Court of Justice, Nishikawa J wrote that: "[T]he courts have repeatedly held that parties can, by their conduct, demonstrate that they do not intend to be bound by [NOM] clauses. In these situations, courts have enforced the terms of the parties' subsequent verbal agreement", citing *Shelanu* in support of this statement.[44]

However, not all jurists have interpreted Weiler JA's conclusions in *Shelanu* as a general prohibition on the enforceability of NOM clauses. In *Honey Bee (Hong Kong) Limited v VitaSound Audio Inc*, a decision of

37. See *ibid* at para 123.

38. *Ibid*.

39. See *Canadian Premier Life Insurance Co v Sears Canada Inc*, 2010 ONSC 3834 at para 87 (in which Pepall J noted that *Tercon* may have changed the applicability of the clauses at issue in *Shelanu*). See also *2190322 Ontario Ltd v Ajilon Consulting*, 2014 ONSC 21 at para 60, Himel J.

40. See *supra* note 8.

41. *Ibid* at para 37.

42. *Ibid*.

43. 2012 BCSC 1478 at paras 9–12, Bauman CJ [*Premier Marketing*].

44. 2020 ONSC 5307 at para 86, Nishikawa J [*Jack Ganz*].

the Ontario Superior Court of Justice, Lococo J followed the test set out in *Shelanu* and found that a NOM clause was enforceable.[45] The case concerned a dispute over an investment agreement that had been signed in the context of an ongoing commercial relationship between the parties. This agreement contained a NOM clause and an entire agreement clause.[46] Honey Bee (Hong Kong) Limited (Honey Bee) sued for damages arising from an alleged breach of the investment agreement by VitaSound Audio Inc. (VitaSound). VitaSound claimed that agents of Honey Bee had agreed to an oral amendment of the investment agreement pursuant to which Honey Bee would have supplied VitaSound with certain products in lieu of an investment in VitaSound's shares. Honey Bee denied this.

Justice Lococo held that the evidence did not support a finding of a later oral variation.[47] However, he continued his analysis of the NOM clause despite the absence of any oral agreement, ultimately holding that the clause was enforceable.[48] Distinguishing the facts before him from those of *Shelanu*, he held that there were no reasons of fairness, unconscionability, or policy that would warrant the exercise of discretion to decline enforcement of the clause.[49] On this point, he noted that the parties were "sophisticated business persons with access to professional advice".[50] Justice Lococo's enforceability analysis was based on the test for enforceability of an exclusion clause set out in *Hunter Engineering*, as applied in *Shelanu*.[51]

Another notable component of the analysis in *Honey Bee* was the treatment of contractual interpretation. Following *Sattva Capital Corp v Creston Moly Corp*,[52] the leading Canadian case concerning contractual interpretation, Lococo J considered the objective intentions of the parties within the context of the factual matrix in which they emerged.[53] In conducting this analysis, he took the entire business relationship, including the parties' other agreements, into account. However, Honey Bee's conduct still did not appear to be that of a party consenting to enter an oral agreement to modify the contract. He noted that there was no "meeting of the minds" between

45. See *Honey Bee*, *supra* note 8.
46. See *ibid* at para 20.
47. See *ibid* at para 38.
48. See *ibid* at para 46.
49. See *ibid*.
50. *Ibid*.
51. See *ibid* at paras 43–44.
52. 2014 SCC 53, Rothstein J [*Sattva*].
53. See *Honey Bee*, *supra* note 8 at paras 37–38.

Honey Bee and VitaSound.[54] The factual scenario was ambiguous, and the terms of the alleged oral agreement were unclear. Importantly, Lococo J made note of the "clear and unambiguous" NOM clause at this stage of the analysis as well.[55]

Honey Bee is not the only case in which a NOM clause was found to be enforceable by a Canadian common law court.[56] *Becker v Jane Doe No 1*, a 2015 decision of the Court of Queen's Bench of Alberta, concerned a residential tenant attempting to rely on an oral variation in a lease containing a NOM clause.[57] As in *Honey Bee*, the oral agreement was found to be invalid because of both evidentiary uncertainty and the NOM clause. However, rather than looking to the Ontario decision of *Shelanu*, Master Prowse engaged in a more original analysis. First, he commented on the overall fairness of the clause, noting that it was to the benefit of both parties that the integrity of their lease could be preserved by preventing claims of modification and that there was nothing unconscionable about the clause as it stood.[58] Second, he cited a previous case of his court for the authority that NOM clauses are enforceable for the same reason that "whole contract clauses" are enforceable, that reason being that such terms allow parties to protect themselves from uncertainty in a manner that conforms to their earlier intentions.[59] Finally, he analogized to the power to overrule exclusion clauses as presented in *Tercon*, and on that test he held that there is no doctrinal or public policy reason to deny enforcement of the NOM clause.[60]

Despite the principled opposition to the enforcement of NOM clauses articulated by Weiler JA in *Shelanu*, it is evident that Canadian law on the subject is not fully settled. *Honey Bee* in particular illustrates that, with the right set of facts, the test for the enforceability of NOM clauses articulated in *Shelanu* can be used to enforce a NOM clause against a subsequent oral amendment. This case highlights a tension between the test set out in *Shelanu*, constructed in reliance on comparisons with entire agreement and exclusion clauses, and the intention-based analysis articulated in *obiter dicta* in *Shelanu* and adopted in *Paramount* and *Premier Marketing*.

54. *Ibid* at para 46.

55. *Ibid* at para 39.

56. See e.g. *Becker v Jane Doe No 1*, 2015 ABQB 144 [*Becker*]; *Xu v 2412367 Ontario Limited*, 2017 ONSC 4445 at para 53, Favreau J.

57. See *supra* note 56.

58. See *ibid* at paras 34–36.

59. *Ibid* at para 37.

60. See *ibid* at paras 38–40.

As Part III of this paper demonstrates, courts in other jurisdictions have grappled with the questions posed by NOM clauses as well, and this jurisprudence may be influential in developing a clearer Canadian approach.

III. Developments Abroad

A. The United Kingdom

The United Kingdom has been an abundant and influential source of recent jurisprudence concerning NOM clauses. A review of cases from the Court of Appeal of England and Wales and the Supreme Court of the United Kingdom will showcase their most persuasive components and provide strong examples of the competing approaches toward NOM clauses.

Prior to *Globe Motors*, there were two conflicting judgments from the Court of Appeal of England and Wales on the question of NOM clauses. The first was *United Bank v Asif*, an unreported case.[61] The Court in *United Bank* held that a contract containing a NOM clause could only be amended in compliance with that clause. The second case was *World Online Telecom v I-Way Ltd*.[62] Though *World Online Telecom* was an appeal from a summary judgment, and as such the Court held only that the law was insufficiently settled to suit summary determination, the discussion of how the law would treat a NOM clause gave support to oral variation notwithstanding any applicable NOM clause.[63]

In *Globe Motors*, the Court of Appeal resolved the conflict between *United Bank* and *World Online Telecom*. *Globe Motors* concerned a change in the ongoing supply contract between Globe Motors Inc. (Globe), a supplier of electric motors, and TRW LucasVarity Electric Steering Ltd. (TRW), a purchaser of such motors. Though the primary issue at trial and on appeal related to the supply contract itself, the Court was also called on to address whether Globe's Portuguese subsidiary (Porto) was a party to the supply contract. The trial judge found that Porto had been participating in the supply arrangement for some time and had direct written contact with TRW.[64] However, the supply agreement contained a NOM clause, and TRW wished to

61. (2 November 2000), England and Wales (EWCA Civ) (unreported); *Globe Motors*, *supra* note 1 at para 51.

62. [2002] EWCA Civ 413 [*World Online Telecom*].

63. See *ibid* at paras 12–15.

64. See *Globe Motors*, *supra* note 1 at para 52.

rely on this clause to preclude Porto from becoming party to the agreement.[65]

There were three separate judgments in *Globe Motors*, offering three related rationales for enforcing the oral variation. Lord Justice Beatson reasoned that because, absent common law or statutory restrictions, parties are free to make or unmake their contracts in whatever form they choose, whether by document, conduct, or word of mouth, the variation was valid notwithstanding the clause.[66] Moreover, he maintained that concerns about frivolous claims of variation are not as serious as advocates of NOM clauses might think, given the high evidentiary standards for proving a variation.[67] Lord Justice Underhill agreed with Beatson LJ's conclusion. Though he expressed some sympathy for commercial parties' desire to prevent ill-founded allegations of variation, he noted that he had trouble finding any doctrinally coherent way justifying NOM clauses, especially given the strong case being made for the more "flexible" approach of allowing variation.[68] He proposed that the NOM clause may have the effect of raising the evidentiary burden on the party attempting to show variation by forcing them to demonstrate intention to vary when their agreement had previously contemplated no variation.[69] Lord Justice Moore-Bick, in concurrence, wrote strongly in favour of party autonomy as the prevailing concern, noting that:

> The governing principle, in my view, is that of party autonomy . . . 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.[70]

Globe Motors represents a high-water mark of success for critics of enforceable NOM clauses. Its reasoning was applied once again when *Rock Advertising* reached the Court of Appeal of England and Wales.[71] The facts of *Rock Advertising* were relatively simple.[72] Rock Advertising Ltd. (Rock) was leasing its office space from MWB Business Exchange Centres

65. See *ibid* at para 53.

66. See *ibid* at para 100.

67. See *ibid* at para 109.

68. See *ibid* at para 116.

69. See *ibid* at para 117.

70. *Ibid* at para 119.

71. See *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*, [2016] EWCA Civ 553 [*Rock Advertising* 2016].

72. See *Rock Advertising* 2018, *supra* note 1 at paras 2–5.

Ltd (MWB) under a licence agreement and had fallen into arrears. Rock's director spoke with MWB's credit agent and proposed a change in the terms of the licence agreement, though the parties later contested whether MWB's agent accepted this amendment. The licence agreement contained a NOM clause. Rock's director believed that they had agreed to the variation, though MWB's credit agent took Rock's proposal to her superior, who rejected it. Several weeks later, MWB barred Rock from accessing the premises and sued Rock for the arrears. At trial, Moloney J found that MWB's agent did accept Rock's proposal, though he held that the amendment was nonetheless invalidated by the presence of the NOM clause.[73] On appeal, Kitchin LJ, with McCombe and Arden LJJ concurring, reversed Moloney J's holding, finding that the NOM clause was unenforceable. In doing so, Kitchin LJ endorsed the reasoning of Moore-Bick LJ in *Globe Motors*, emphasizing the primacy of contractual freedom.[74]

However, the Supreme Court of the United Kingdom reversed the Court of Appeal of England and Wales' decision. Lord Sumption, author of the lead judgment, engaged with both the theoretical and practical implications of NOM clauses. On the question of whether NOM clauses infringe party autonomy, Lord Sumption JSC reasoned that party autonomy is operative only to the point at which the terms are agreed, and after that only to the extent that the contract allows.[75] Beyond this point, the parties have bound themselves to some course of conduct and this is necessarily restrictive of their autonomy. In his view, the true infringement on autonomy would come from an infringement on the capacity of parties to bind themselves through restricting the manner of variation. Moreover, given longstanding precedent set by formalities imposed on contracts by statute, such as requirements for the sale of land needing to be in writing, as well as the codification of NOM clauses in international legal codes, it was difficult for Lord Sumption JSC to see why parties could not agree to such formalities on their own.[76] Like his Canadian counterparts, Lord Sumption JSC also analogized to entire agreement clauses, noting that these clauses share a common purpose in removing uncertainty by keeping the entirety of the clause contained to the written form. Since these clauses have rarely been challenged, he maintained that NOM clauses ought to be given similar treatment.[77]

73. See *ibid* at para 4.

74. See *Rock Advertising* 2016, *supra* note 71 at para 34.

75. See *Rock Advertising* 2018, *supra* note 1 at para 11.

76. See *ibid* at paras 11, 13.

77. See *ibid* at para 14.

Importantly, Lord Sumption JSC did not ignore the possibility that unfairness may result if a party detrimentally relies on the counterparty's agreement to amend. He suggested that there is a role for estoppel in protecting the relying party, though he posited 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".[78] Lord Sumption JSC maintained that, for estoppel to be pleaded successfully in this context, there would have to be "some words or conduct unequivocally representing that the variation was valid notwithstanding its informality" and "something more would be required for this purpose than the informal promise itself".[79]

Lord Sumption's judgment is also notable for its articulation of many of the purported practical benefits of NOM clauses, including protection from attempts to undermine the agreement, clarity about the terms of a variation, and the policing of internal restrictions on agents who might otherwise exercise their authority in ways that bind the party to an unexpected outcome.[80]

Lord Briggs wrote a concurring judgment that was much more cautious in its acceptance of NOM clauses. Lord Briggs separated the issue of whether the NOM clause was enforceable into two distinct questions. First, can parties agree to remove a NOM clause orally? Second, is it implied in any oral variation of the substance of their agreement that the NOM clause is being waived? The first question, in contrast with Lord Sumption JSC, he answered in the affirmative. The second he answered in the negative.[81] He rejected Lord Sumption JSC's position that failing to give effect to a NOM clause when an oral variation was made is an infringement on the parties' autonomy, on the grounds that such a clause can still be enforced so long as at least one party wishes it to have effect. Where both parties wish to do away with the clause, however, their freedom of contract allows them to do so in whatever form they please. However, he noted that there is no waiver of the NOM clause when a variation is made unless it is necessary to make such an implication to give effect to it. In making this point he analogized to contractual negotiation, in which parties negotiating under the "subject to contract umbrella" will not be bound to the terms upon which they have agreed until they have made the contract formal or agreed to abandon the "subject to contract" condition. The abandonment of this condition will not be found merely because an agreement was made unless it was necessarily implied.[82]

78. *Ibid* at para 16.

79. *Ibid*.

80. See *ibid* at para 12.

81. See *ibid* at para 24.

82. See *ibid* at paras 29–30.

Lord Sumption's judgment in *Rock Advertising* remains the definitive statement of the law concerning NOM clauses in the United Kingdom. This is reflected in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*, a 2020 decision of the Court of Appeal of England and Wales, in which the NOM clauses at issue were found to apply.[83] In the lead judgment, Flaux LJ held that the NOM clauses could only be overridden to the extent that the test for estoppel set out by Lord Sumption JSC in *Rock Advertising* was satisfied.[84] Further, Flaux LJ maintained that principles of good faith and fair dealing could not override the clear wording of the contract.[85]

B. Australia

In contrast to the dramatic turn taken by the Supreme Court of the United Kingdom, Australian jurisprudence has remained consistently opposed to enforceable NOM clauses. The position of Australian law provides a compelling counterpoint both to the approach taken by Lord Sumption JSC in *Rock Advertising*, as well as the more ambiguous framework in effect in Canada.

The Australian position concerning NOM clauses was first established in *Liebe v Molloy*, a 1906 decision of the High Court of Australia.[86] At issue in this case was whether a contractor was able to obtain payment for additional work performed on a construction project pursuant to an oral amendment, notwithstanding the presence of a NOM clause in the construction contract. Chief Justice Griffith, for the High Court of Australia, held that by agreeing to the contractor's performance of the additional work, the project owner had entered an implied agreement to pay the contractor, and that the NOM clause was ineffective against such an agreement.[87]

The current rationale for refusing to give effect to NOM clauses was articulated more clearly in *Commonwealth of Australia v Crothall Hospital Services*,[88] though the clause at issue in this case was not a NOM clause as I have defined in this paper. Crothall Hospital Services (Crothall) had agreed to carry out cleaning services at several Australian government buildings. The contract set out a procedure by which the contract price could be varied. Over time, Crothall began requesting compensation in an amount greater than that contemplated by the contract.

83. [2020] EWCA Civ 6, Flaux LJ.

84. See *ibid* at para 76.

85. See *ibid* at para 77.

86. [1906] 4 CLR 347, 13 ALR 106 (HCA), Griffith CJ.

87. See *ibid* at 354.

88. [1981] 54 FLR 439, 36 ALR 567 (FCA), Ellicott J [*Crothall*].

Though Crothall did not conform with the price variation process set out in the contract, the Commonwealth paid the varied price for several years before ultimately objecting to the variations on the grounds that they did not comply with the formal variation procedure. The Federal Court of Australia held that the variation in the price was enforceable, as it could be inferred from the conduct of the Commonwealth that it accepted the variation.[89] In his judgment, Ellicott J noted that: "It is open to the parties to a written contract to vary it. This may be done in writing or, except where the contract is required by law to be evidenced in writing, by oral agreement. The agreement to vary may be express or implied from conduct."[90]

In *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited*,[91] a widely cited decision of the Federal Court of Australia, Finn J adopted the above-noted excerpt from *Crothall* as an articulation of the principle that a subsequent oral amendment will be enforceable notwithstanding the presence of a NOM clause.[92] He noted that NOM clauses may also be rendered ineffective on the basis of estoppel, where one party has induced the other to rely on its representation that the formality requirements found in the NOM clause will be waived.[93] Justice Finn endorsed the perspective that, since an agreement to amend is more recent than the initial agreement, it is fair and reasonable to consider it a more accurate representation of the wishes of the parties.[94] Importantly, he stressed that this was particularly true in the case of "relational" contracts, which he characterized as having an evolutionary nature as well as involving "not merely an exchange, but also a relationship, between the contracting parties".[95]

Australian jurisprudence is notable for its explicit discussion of the evidentiary role created by NOM clauses. In *GEC Marconi*, Finn J drew attention to the fact that: "Though lacking legal effect in the face of a subsequent oral or implied agreement, it seems to be accepted that a no oral modification clause can have significant evidentiary effect."[96]

89. See *ibid* at 581.
90. See *ibid* at 576.
91. [2003] FCA 50, Finn J [*GEC Marconi*].
92. See *ibid* at para 217.
93. See *ibid*.
94. See *ibid* at para 220.
95. *Ibid* at paras 220, 224.
96. *Ibid* at para 221.

The Australian case law represents a clear and coherent stance against enforceable NOM clauses. Though two recent decisions of the New South Wales Court of Appeal have made reference to the countervailing arguments found in *Rock Advertising*, neither case indicated a willingness among Australian judges to follow the Supreme Court of the United Kingdom.[97] Rather, the Australian jurisprudence mirrors the reasoning of the Court of Appeal of England and Wales in *Globe Motors*, with its emphasis on the parties' inalienable capacity to reach a subsequent agreement modifying the content of the prior written one.

IV. Reconsidering the Canadian Approach

The United Kingdom and Australia offer two starkly opposing frameworks that can be used to determine whether NOM clauses should be enforced. These frameworks have been developed through direct consideration of the unique issues raised by such clauses and form the basis of readily applicable principles of law. By contrast, Canadian law appears incoherent and unsettled, capable of leading either to enforceability or unenforceability depending on whether the court treats the NOM clause like any exclusion clause or whether it follows the principles articulated by Weiler JA in *Shelanu*. This lack of clarity presents an opportunity to consider a revised Canadian framework that can reliably give effect to the intention of the parties while remaining consistent with broader principles of Canadian contract law.

In Part IV of this paper, I will directly address the question of how Canadian courts should treat NOM clauses. This will require consideration of the many issues raised by NOM clauses, including the relationship between NOM clauses and freedom of contract, the role that intention and the principles of contractual interpretation play in determining how a NOM clause and a subsequent amendment should be treated, the relationship between NOM clauses and exclusion clauses, and the practical implications of enforcing NOM clauses. In doing so, I will consider the reasoning offered by courts in the United Kingdom and Australia, as well as relevant principles of Canadian contract law. Taking the foregoing issues into account, I propose that Canadian courts should not treat NOM clauses as enforceable on their own terms.

97. See *Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd*; *TWT Property Group Pty Limited v Cenric Group Pty Limited*, [2019] NSWCA 87 at para 122, Gleeson JA [*Bundanoon*]. See also *White v Philips Electronics Australia Ltd t/as Philips Healthcare*, [2019] NSWCA 115 at para 42, Bell P (in which Bell P declines to consider the issue of whether NOM clauses are enforceable, citing *Bundanoon*, *supra* note 97 at para 122).

A. Freedom of Contract

Competing views of freedom of contract, otherwise referred to as "party autonomy", are at the core of the debate concerning the enforceability of NOM clauses. Freedom of contract entails that contracting parties have the right to agree to whatever terms they choose, subject to limits of public policy.[98] Though its primacy as a principle of contract law has waned since the nineteenth and early twentieth centuries, freedom of contract remains an important consideration for common law courts.[99] Its significance can be plainly seen in decisions such as *Tercon*, in which Binnie J, expressing the Supreme Court of Canada's view on the matter,[100] held that a party seeking to avoid enforcement of an exclusion clause must point to some paramount consideration of public policy sufficient to override "the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties".[101] Likewise, Professor Waddams notes that freedom of contract, with its emphasis on stability, certainty, and predictability, embodies important values for the system of contract law, though these must be balanced with the competing values associated with "protecting the weak, the foolish, and the thoughtless from imposition and oppression and the avoidance of unjust enrichments".[102]

It is therefore important to determine which position on NOM clause enforceability is more consistent with the principle of freedom of contract. In Parts II and III of this paper I have described several decisions supporting the idea that enforceable NOM clauses are inconsistent with freedom of contract. This position is articulated most clearly by Beatson and Moore-Bick LLJ in *Globe Motors* and can be summarized by the proposition that the same freedom which allows parties to form a contract in whatever manner they choose can be used to modify that same contract in whatever manner they choose. This view is supported by the Australian case of *Crothall* and is mirrored by the excerpt from *Corbin on Contracts*, adopted by Weiler JA in *Shelanu*, stating that: "Two contractors cannot by mutual agreement limit their power to control their legal

98. See *Globe Motors*, *supra* note 1 at para 119. For a detailed discussion of the origins of freedom of contract, see SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters Canada, 2017) at paras 1–3.

99. See Waddams, *supra* note 98 at para 446.

100. See *supra* note 36 at para 62.

101. *Ibid* at para 82.

102. Waddams, *supra* note 98 at para 446.

relations by future mutual agreement."[103] This is also the approach taken by Lord Briggs JSC in *Rock Advertising*.[104]

Lord Sumption's analysis in *Rock Advertising* directly challenges this position, insisting not only that enforceable NOM clauses are consistent with freedom of contract, but that it is in fact contrary to freedom of contract to enforce a subsequent oral agreement in the face of a NOM clause.[105] In order to determine whether Canadian courts should enforce NOM clauses, it is necessary to compare the persuasiveness of Lord Sumption JSC's reasons with those of his opponents.

Lord Sumption began his analysis by stating that, in contrast to the position taken by Kitchin LJ at the Court of Appeal of England and Wales, there is no conceptual difficulty with NOM clauses from the perspective of party autonomy, as all contracts restrict party autonomy once they are in effect.[106] This proposition relies on a redefinition of party autonomy that differs from its generally understood meaning as well as the meaning implied by critics of enforceable NOM clauses. Party autonomy, in the commonly understood sense, does not require that the parties be free to conduct themselves however they wish once a contract is formed. Rather, it requires that the parties be able to enter into binding agreements freely, provided that their terms do not contravene public policy.[107] This view of party autonomy implies that the parties should be bound by their prior agreement, but that they may nevertheless enter into a new agreement to modify it.[108] Put differently, a binding, enforceable agreement between two autonomous parties prohibits unilateral deviation from the agreed terms, but nevertheless allows for bilateral deviation where that deviation is consistent with the parties' intentions as objectively understood in a subsequent agreement to amend. By contrast, the NOM clause puts restrictions not only on unilateral deviation but also on bilateral deviation.[109] In this sense, it limits party autonomy more significantly than other contractual terms.

The central challenge of the NOM clause, from the perspective of freedom of contract, is that two agreements are at issue: the initial agreement containing the NOM clause and the subsequent oral amendment. It must be conceded

103. *Shelanu*, *supra* note 8 at para 50.

104. See *Rock Advertising* 2018, *supra* note 1 at paras 23–24.

105. See *ibid* at para 11.

106. See *ibid*.

107. See *Globe Motors*, *supra* note 1 at para 119.

108. See Pasas, *supra* note 6 at 149. See also Roberts, *supra* note 6 at 14.

109. See Florian Wagner-von Papp, "European Contract Law: Are No Oral Modification Clauses Not Worth the Paper They Are Written On?" (2010) 63:1 Current Leg Probs 511.

that both agreements cannot be strictly enforced in their entirety on their own terms. However, some critics of enforceable NOM clauses argue that it is possible to enforce the subsequent oral amendment while still giving effect to both contracts, albeit not at the same time.[110] That is, the initial agreement will be in effect until the subsequent agreement is reached, at which point it will be set aside in accordance with the parties' wishes. This argument may appear to some as a pedantic refusal to engage with the true issue, which is the enforceability of the NOM clause itself, on its own terms, as against the oral amendment. However, when the possibility of waiver of the NOM clause, express or implied, is considered, this argument becomes much more compelling. If the parties have waived the NOM clause in their subsequent agreement, then the NOM clause has served its purpose: it remained a part of the contract, reflecting the parties' intentions, until the parties agreed to dispense with it. By contrast, Lord Sumption JSC's view is, with respect, deficient because it gives primacy to the initial contract at the cost of the parties' freedom to enter into the subsequent amendment.

Further, by stating that "[t]he real offence against party autonomy is the suggestion that [the parties] cannot bind themselves as to the form of any variation",[111] Lord Sumption JSC is framing the parties' exercise of their freestanding rights to contractual formation as subject to a prior exercise of those same rights.

There is more than one way of justifying the principle that an agreement made earlier in time should not restrict the ability of those same parties to make another agreement later. One approach, based on direct interpretation of the parties' competing intentions, will be discussed independently in Section IV.B. However, another approach is to examine the conceptual tensions created by the enforcement of NOM clauses.

Contract law is principally concerned with protecting the reasonable expectations of parties created by their mutual promises.[112] Freedom of contract is a key principle of contract law because it protects the ability of reasonable parties to order their affairs in whichever way they choose, presumably for their mutual benefit.[113] The binding nature of contract is critical to the success of this system because it assures parties that their reasonable expectations will be met and guarantees recourse to a remedy when they are not. Without such

110. See *Rock Advertising* 2018, *supra* note 1 at para 25 (wherein Lord Briggs JSC articulates this position).

111. *Ibid* at para 11.

112. See Waddams, *supra* note 98 at para 141.

113. See *ibid* at para 1, citing Henry Sidgwick, *The Elements of Politics*, 3rd ed (London, UK: Macmillan, 1879) at 82.

guarantees, reasonable parties would be reluctant to offer valuable consideration in support of, or take any steps to rely on, their agreements with others.[114]

Yet where the intention giving rise to that expectation has been contradicted by a subsequent shared intention, objectively understood, the rationale for enforceability of any agreement is greatly weakened.[115] The freedom to agree to a NOM clause is of little value if it will only be used to undermine the parties' ability to adjust their expectations and reorder their affairs as circumstances change. By contrast, the freedom to reach a subsequent agreement is perfectly consistent with the overall rationale in support of freedom of contract, as it allows for reasonable parties to rely on one another's representations as they are made and adjust their expectations accordingly.

This issue is closely related to that of alienability. Freedom of contract is premised on a model of freely negotiated exchange between autonomous, self-interested parties capable of advocating for themselves.[116] Yet in order for this model to produce its desired results, the legal system must impose a series of basic rules guaranteeing that parties are capable of free action and that the exchanges they enter into can in fact be used to advance their interests.[117] The same is true for the exercise of any other set of rights guaranteed in a liberal democracy, including various personal and political rights. Part of the system of basic rules guaranteeing the proper functioning of a liberal society is the placement of inflexible restrictions on the alienation of certain rights.[118] For instance, parties cannot voluntarily trade away their right to vote or their right to receive compensation for intentional bodily harm.[119] As Professor Margaret Radin writes: "Those entitlements that are inalienable, or at least less readily alienable, are components of 'public' regimes underwritten by the polity for the sake of the structure of the polity itself."[120] According to her view, obtaining redress of grievances, such as accessing a remedy for breach of contract or

114. See Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton, NJ: Princeton University Press, 2012) at 173. As Professor Margaret Radin writes: "[I]f the remedies for breach of contract or for exchanges obtained through coercion or deception are nonexistent or inadequate, then the liberal ideal of private ordering cannot be implemented." *Ibid*.

115. See Roberts, *supra* note 6 at 14–15.

116. See Radin, *supra* note 114 at 35. See also *Uber Technologies Inc v Heller*, 2020 SCC 16 at para 56, Abella and Rowe JJ [*Heller*].

117. See *ibid* at 34–36, 55–56.

118. See *ibid* at 159.

119. See *ibid*.

120. *Ibid* at 173.

for entering into a contract based on deception, is primary among these inalienable entitlements because the system of free exchange could not be implemented without it.[121]

Professor Radin's perspective on the inalienability of the right to obtain redress of grievances provides an insightful theoretical lens through which NOM clauses can be viewed. By agreeing to impose restrictions on how they can modify their contract, the parties are in effect attempting to invalidate what courts would otherwise consider to be valid, enforceable agreements. These restrictions deny the party wishing to enforce the subsequent agreement access to the system of redress of grievances and thereby act as an exercise of private rights to set aside the higher- order rules governing contract formation established by the common law.

In advancing this argument, it is critical to distinguish NOM clauses from the many important legal doctrines that can be used to render agreements between parties unenforceable. These doctrines include unconscionability, illegality, and the parol evidence rule, among many others. Unlike NOM clauses, these doctrines are not private attempts to set aside the rules of contract formation. Rather, they are rules created by courts to advance a purpose consistent with the parties' rights and the proper functioning of the legal system more generally. As such, the fact that they deny contracting parties access to redress is not repugnant to the broader system of contractual rights.

This perspective on NOM clauses has analogues in the literature and jurisprudence. Judges and commentators have compared the unenforceability of NOM clauses to the longstanding principle of British constitutional law that Parliament cannot bind its successors.[122] Though the exercise of parliamentary sovereignty involves different policy considerations, the comparison shows how it is commonly understood that the proper functioning of a system of agenda-setting rights requires that those granted such rights be incapable of forfeiting them. Likewise, Canadian courts have made clear that certain fundamental contractual rights cannot be forfeited. For instance, the parties cannot agree not to be bound by the duty to perform contractual obligations honestly.[123] Much like the prohibition on enforceable NOM clauses, the inalienability of this right (or duty) is a direct consequence of upholding the reasonable expectations of the parties.[124]

121. See *ibid*.

122. See *Globe Motors*, *supra* note 1 at para 119; Davies, *supra* note 3 at 465.

123. See *Bhasin v Hrynew*, 2014 SCC 71 at para 75, Cromwell J [*Bhasin*].

124. See *ibid* at paras 1, 60.

Lord Sumption attempted to overcome the conceptual difficulties raised by NOM clauses by citing examples of accepted formality requirements or analogous clauses which courts in the United Kingdom or elsewhere routinely enforce despite their simultaneous commitment to freedom of contract. It is important to note, however, that with the exception of entire agreement clauses, whose distinction from NOM clauses I have addressed in Part I, all examples raised by Lord Sumption JSC arise from statute. Yet legislative intervention does not resolve the conceptual inconsistency. Rather, it overrides the conceptual debate by imposing a separate principle: that rules imposed by legislation replace those set by the common law.[125] As such, the enforceability of statutory requirements is irrelevant to the issue of freedom of contract.

The conceptual weaknesses outlined above, and the inability of Lord Sumption JSC's reasons to resolve them, illustrate that the enforceability of NOM clauses on their own terms is inconsistent with freedom of contract. Canadian courts should therefore be reluctant to accept the majority view advanced in *Rock Advertising*. Further difficulties with enforceable NOM clauses are revealed by examining how best to give effect to the parties' intentions when there is conflict between an earlier and a later shared intention.

B. Understanding Intention

When a NOM clause is followed by an oral variation, two seemingly contradictory agreements become relevant. From the perspective of a court attempting to give effect to the parties' objective intentions, resolving this problem requires an analysis of what the parties understood one another to be agreeing upon both when the original contract was made and when the variation was made.

As noted in Part II, the leading Canadian case concerning contractual interpretation is *Sattva*.[126] Writing for a unanimous Supreme Court of Canada, Rothstein J made clear that the overriding concern of contractual interpretation is to determine the intentions of the parties and the scope of their understanding, taking into account the wording of the contract and the surrounding factual matrix.[127] However, although the surrounding circumstances must play a role in interpreting the terms of the contract, they cannot be allowed to overwhelm the words of the agreement.[128] Further, admissible evidence of context must

125. See *Rock Advertising* 2018, *supra* note 1 at para 26; Fisher, *supra* note 3 at 200.

126. See *supra* note 52.

127. See *ibid* at paras 47, 50.

128. See *ibid* at para 57.

be limited to facts that were objectively knowable by the parties at the time of the contract's creation.[129]

How must a Canadian court apply these principles to a subsequent oral variation in the face of a NOM clause? Given the importance of the factual matrix, it is helpful to reason by using examples. First, we can consider a scenario in which agents of each party to a contract containing a NOM clause have reached an oral agreement, supported by consideration, to modify the substance of the contract while explicitly acknowledging that the NOM clause will be overridden. The principal of one party later disputes the validity of that oral agreement on the grounds that the contract contains a NOM clause. In this straightforward and perhaps unlikely example, Lord Sumption JSC's framework would preclude the variation. However, there are many reasons to interpret the parties' words and actions as demonstrating an overall intention to do away with the clause. In the variation contract, their words explicitly indicate that they no longer wish to be bound by the stipulated formalities. The fact that they have reached the agreement orally without the immediate invocation of the NOM clause against such a variation indicates that they understood that their agreement should have effect notwithstanding the earlier agreement. This is reinforced by the fact that it was both objectively knowable and explicit in their variation agreement that they had a previous understanding that they would not do so. We do not need to assume that the parties preferred their later intention in this scenario, as they have demonstrated it themselves.

Yet how should the court address the fact that the parties included a NOM clause in the original written agreement? It cannot disregard the parties' express intention when they struck their bargain and put it in writing. To do so would amount to ignoring the explicit words of the written contract and its surrounding circumstances. However, as demonstrated above, it would contradict the fundamental principles of contract law to deny the parties the capacity to vary their agreement where they have plainly intended to do so.

The solution to this problem is found in considering the existence of the NOM clause when the variation is being proven. This is because the party seeking to prove that the variation occurred will still be tasked with demonstrating that the variation met the requirements of an enforceable contract. Namely, that there was an offer, acceptance, and consideration all indicating an intention to create a binding contract containing the agreed-upon terms. Where a NOM clause has been included, the party seeking to prove the variation will need to put forward a compelling evidentiary record demonstrating that they intended to make the variation despite the fact that they had previously agreed that such variations would not be accepted. As discussed in Part III, this was the

129. See *ibid* at para 58.

favoured approach of Underhill LJ in *Globe Motors* and has been fully adopted in the Australian jurisprudence. Likewise, as noted in Part II, Lococo J in *Honey Bee* has already introduced this line of reasoning in Canada, specifically following *Sattva* in his analysis of whether the parties intended to reach a binding, oral agreement. Canadian courts would have a sound foundation for embracing this perspective more fully.

It is critical to note that not every NOM clause will have the same evidentiary implications. The nature of the relationship between the parties is often an important factor in interpreting what the parties intended by including a NOM clause, and this should not be overlooked. As Finn J indicated in *GEC Marconi*, parties with an evolving relationship, who understand that relationship to be not simply a one-time exchange, should be expected to be more accepting of adjustments to the contractual terms.[130] Adopting this perspective in Canada would be consistent with Weiler JA's reasoning in *Shelanu*, which considered the parties' conduct throughout their entire relationship, not just the BCD agreement.[131] It would also be consistent with the requirement to consider all the surrounding circumstances set out in *Sattva*. Likewise, it follows from the requirement to consider the wording of the contract that the rigour of the formalities set out in the NOM clause should indicate the strength of the parties' intentions to prevent modifications. It may also be relevant to consider whether the NOM clause was included as part of a set of standard-form or "boilerplate" terms, or whether it was specifically negotiated. To this end, the sophistication of the parties and whether they had the advice of counsel may play a role in determining whether the parties objectively intended the clause to have its stated effect.

Adopting this approach is in no way contradictory to the principle of freedom of contract discussed in Section IV.A of this paper. Freedom of contract is concerned with ensuring that parties may enter into binding agreements freely on terms of their own choosing. Discerning the content of those agreements, however, requires interpretation of the parties' objective intentions. The fact that the parties have included a NOM clause in their agreement is one factor among many that signals how their intentions ought to be understood. The inherent unenforceability of the NOM clause on its own terms is of little concern at this stage of the analysis, as it is merely a signal of intention. This is not a pragmatic compromise between freedom of contract and the desire for parties to bind themselves with effective NOM clauses. Rather, it is a direct application of the objective principle of contractual formation and interpretation to the inclusion of a NOM clause in an agreement.

130. See *supra* note 91 at para 220.

131. See *Shelanu*, *supra* note 8 at para 54.

The example of an agreement explicitly overriding a NOM clause is a helpful starting point for the discussion of how interpreting the intention of the parties can resolve the problem of conflicting agreements. However, the case law illustrates that it is far more common for parties simply not to reference the NOM clause when agreeing to an oral variation. On this point, the approaches of Lord Sumption and Lord Briggs JJSC converge in most circumstances.

While it may appear that Lord Briggs JSC left open the possibility of a waiver of the NOM clause by "necessary implication", there is little doubt that the circumstances in which such a waiver will occur are rare.[132] In his decision, Lord Briggs JSC specifically noted that necessity in this context is a "strict test", intended to apply to agreements that stipulate urgent or immediate changes in performance:

> It will, perhaps unfortunately, commonly be the case that the persons charged with the day to day performance of a business contract will, with full authority to do so, agree some variation in the manner in which it is to be performed, blissfully unaware that the governing contract has, buried away in the small print of standard terms, a NOM clause inserted by diligent lawyers anxious to minimise the risk of litigation about its terms. That will be arid ground for an implied term that the NOM clause, of which they were unaware, was agreed to be treated as done away with. Where however the orally agreed variation called for immediately different performance from that originally contracted for, before any written record of the variation could be made and signed, then necessity may lead to the implication of an agreed departure from the NOM clause, but the same facts would be equally likely to give rise to an estoppel, even if not. But that is far from the facts of this case, where there was no such urgency.[133]

As such, though it may at first seem that Lord Briggs JSC offers a similar approach to that of Underhill LJ in *Globe Motors* or Finn J in *GEC Marconi*, he has in fact only created a narrow exception that gives little effect to the intention of the parties as understood between them.

Canadian courts should not be persuaded by either approach taken in *Rock Advertising* toward implied waiver of the NOM clause. As Richard Calnan argues, *Rock Advertising* prioritizes form over substance,

132. See *Rock Advertising* 2018, *supra* note 1 at paras 30–31.

133. *Ibid* at para 30.

emphasizing the wording of the written agreement while disregarding the fact that, by making a valid oral agreement that substantively modifies the terms of the contract, they have by necessary implication intended to be bound by those new terms.[134] George Pasas describes the situation succinctly in saying that "no party would take the time to agree to something that would be ineffective".[135] It should be added that no party would offer valuable consideration in support of such an agreement either. This is a full and satisfactory response to proponents of NOM clauses who argue that, given the ease with which the parties could reach a written agreement, they would manifest their intent to enter binding relations by reducing the variation to writing.[136] Ultimately, the objective intention of the parties must be determined based on what the parties would have understood one another to be agreeing.[137] It would be highly unusual for a court to find that the parties reasonably understood one another to be making a non-binding offer at the time of the variation simply because they had agreed to a NOM clause when the initial agreement was formed.

In assessing how a Canadian court should interpret an informal agreement to amend a contract containing a NOM clause, it is also important to consider the words of Cromwell J in *Bhasin v Hrynew*, the 2014 decision of the Supreme Court of Canada establishing the existence of a "general organizing principle" of good faith in Canadian contract law.[138] In discussing the role that good faith plays in contractual interpretation, he stated that:

> The primary object of contractual interpretation is of course to give effect to the intentions of the parties at the time of contract formation. However, considerations of good faith inform this process. Parties may generally be assumed to intend certain minimum standards of conduct. Further, as Lord Reid observed in *Schuler A.G. v Wickman Machine Tool Sales Ltd.* . . . "[t]he more unreasonable the result the more unlikely it is that the parties can have intended it."[139]

It is unlikely that a court applying these principles would be willing to allow a NOM clause to take precedence over a subsequent amendment that demonstrates a clear intention to override the effect of the clause. To do so, particularly where the parties understood one another to have a flexible relationship

134. See Calnan, *supra* note 6 at 489.

135. Pasas, *supra* note 6 at 152.

136. See Tattersall, *supra* note 6 at 125.

137. See Waddams, *supra* note 98 at paras 144–145.

138. *Supra* note 123 at para 33.

139. *Ibid* at para 45.

subject to change, would be to force an unreasonable result on the parties that they would not likely have intended.

It is notable that Lord Briggs JSC analogized to "subject to contract" clauses in support of his holding that oral variation does not imply waiver of the NOM clause. The difficulty with this comparison lies in the fact that courts have recognized that parties can waive a subject to contract clause by their conduct.[140] This is because subject to contract clauses are also limited in effect by the objective approach to contractual formation and interpretation. As Professor Waddams notes:

> The use of a well-known formula like "subject to contract" is certainly strongly suggestive that there is no concluded contract, but it should not, it is suggested, be decisive. The law does not favour magic formulas, and no expression is sacrosanct. The court should take into account all the circumstances in deciding whether a contract is formed or not.[141]

By analyzing NOM clauses with an aim of discovering intention, the rationale for their enforceability is undermined. Though it is apparent that a clear, subsequent intention to vary should always override a NOM clause in this framework, the effect of the clause can still be felt in an evidentiary capacity. This approach balances intentions at both points in time, ensuring that courts are better able to enforce the parties' reasonable expectations.

C. Relationship with Exclusion Clauses

Throughout the case law surveyed in Parts II and III of this paper, courts have compared NOM clauses to entire agreement or exclusion clauses. In Canada, the treatment of NOM clauses as exclusion clauses has been a source of incoherence in the law, putting into question whether NOM clauses are strictly unenforceable against subsequent oral amendments or whether they are only unenforceable in certain circumstances. If there are strong reasons to treat NOM clauses as exclusion clauses, then their enforceability should be analyzed according to the test in *Tercon*. If there are not, then courts should be free

140. See *RTS Flexible Systems Limited v Molkerei Alois Müller Gmbh & Company KG*, [2010] UKSC 14, Clarke LJ. See also Josias Senu & Mahmoud Serewel, "Between a Rock and a Hard Place: No Oral Modification Clauses after *Rock Advertising v MWB*" (2018) 18:2 OUCLJ 150 at 159.

141. Waddams, *supra* note 98 at para 53.

to treat them as *sui generis* and strictly unenforceable against a subsequent amendment.

In Canada, exclusion clauses are generally understood to refer to terms that limit the liability of a party for breaching the relevant contract.[142] Such clauses can be quite valuable to parties, as they enable them to allocate risk between one another in predictable ways.[143] However, they also carry enormous potential to create undesirable situations that were not in the contemplation of the parties. For instance, an exclusion clause found deep in a commercial party's standard form contract may be overlooked by a customer purchasing its product, resulting in an unconscionable bargain in which that customer unwittingly forfeits the right to receive compensation for a serious injury later arising from the use of that product. In order to strike a balance between protecting parties from unfairness and upholding the freedom of parties to agree to whichever terms may benefit them, Canadian courts have developed means to limit the enforceability of these clauses, first through the doctrine of fundamental breach and ultimately through the test articulated in *Tercon*.[144] Yet it is critical to note that the test in *Tercon* treats an applicable exclusion clause as enforceable unless it is either unconscionable or against public policy. This is because the underlying assumption about exclusion clauses is that their application is a valid consequence of contractual freedom.[145]

In contrast to exclusion clauses, the enforcement of a NOM clause against an oral amendment is not a valid consequence of contractual freedom. As I have illustrated in Section IV.A of this paper, enforcing such a clause is in fact inconsistent with contractual freedom and the rationale underlying the enforcement of freely negotiated contracts. The balancing of values on which the enforcement of exclusion clauses is predicated is therefore entirely inappropriate when applied to NOM clauses. This is reflected in the fact that the test from *Tercon* is a rather awkward instrument when used to address the unfairness arising from a NOM clause, as I demonstrate in Section IV.D of this paper.

Even if courts were to accept that NOM clauses could be reconciled with freedom of contract, there would still be compelling reasons to treat them differently. This is because the NOM clause does not relate to the exercise of the same type of right as the exclusion clause. Exclusion clauses are used to disclaim liability in relation to what would otherwise be a right under the contract. By contrast, NOM clauses purport to restrict the right to create a new contract,

142. See John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 796.

143. See *ibid*.

144. See *ibid* at 797.

145. See *Tercon*, *supra* note 36 at paras 85–86, 96.

which exists independently of the rights established under the contract. In this regard, NOM clauses can be further distinguished from entire agreement clauses, which also exist to limit the scope of rights that already form part of the contract. As such, it is quite reasonable that entire agreement clauses could be treated in the same manner as exclusion clauses, while NOM clauses could not.

The opportunities for Canadian courts to recognize NOM clauses as *sui generis*, rather than as exclusion clauses, have not been precluded by the extant case law. First, it is important to note that Weiler JA in *Shelanu* recognized that the clauses at issue were not conventional exclusion clauses but treated them as such because this approach had already been taken with entire agreement clauses.[146] Yet, as demonstrated above, NOM clauses and entire agreement clauses are different in both theory and effect. Moreover, subsequent Canadian decisions have treated NOM clauses as a distinct type of clause from an entire agreement clause, which *Shelanu* did not.[147] Second, courts have been inconsistent in the application of the test for the enforceability of a NOM clause, making it unclear whether the current test for enforceability of exclusion clauses even applies. The Courts in *Archibald* and *Honey Bee* employed the *Hunter Engineering* test as applied in *Shelanu* even though both cases were heard after *Hunter Engineering* was superseded by *Tercon*. By contrast, the Courts in *Paramount*, *Premier Marketing*, and *Jack Ganz* did not employ any enforceability test at all and instead relied solely on Weiler JA's statements indicating that a written contract cannot be enforced in the face of a clear intention to override it. Only Master Prowse in *Becker* explicitly applied *Tercon* to a NOM clause. Third, it is difficult to reconcile Weiler JA's comments regarding the enforceability of NOM clauses in *Shelanu* with the new approach to enforceability of exclusion clauses articulated in *Tercon*. Much of Weiler JA's analysis was concerned with either interpreting the intentions of the parties[148] or with broader questions of fairness, equity, justice, or reasonableness.[149] With the exception of fairness between unequal parties, none of these considerations are relevant to the test in *Tercon*.

Canadian courts should resolve the prevailing uncertainty by treating NOM clauses not as exclusion clauses, but as *sui generis* clauses that cannot be enforced against a subsequent, validly formed oral amendment. This will guarantee conceptual coherence while ensuring that parties are able to enforce their reasonable expectations fairly and reliably.

146. See *supra* note 8 at para 31.

147. See *Archibald*, *supra* note 1 at paras 22–23. See also *Newton's Grove School Inc v J2ASM Inc*, 2018 ONSC 7691 at para 24, Monahan J; *Becker*, *supra* note 56 at para 37.

148. See *Shelanu*, *supra* note 8 at paras 54–56.

149. See *ibid* at paras 57, 59.

D. Practical Concerns

To this point, my analysis has focused mainly on the conceptual issues inherent in NOM clauses. Yet NOM clauses also raise a host of issues in practice. To their proponents, NOM clauses appear to guarantee certainty for parties who are concerned that ill-founded or unintentional variations could undermine their interests. The very fact that NOM clauses are so popular implies to some degree that contracting parties, especially business entities, want them and would benefit from them.[150]

However, on closer examination, the practical benefits of enforceable NOM clauses are far less than they appear. Many of their purported advantages can be guaranteed through the operation of other legal instruments or principles. Moreover, enforcing NOM clauses opens the door to many other practical problems, including unfairness and the imposition of unwanted rigidity in many contractual relationships.

In *Rock Advertising*, Lord Sumption JSC proposed that enforcing NOM clauses: (1) prevents attempts to undermine written agreements by informal means; (2) avoids disputes not just about whether a variation was intended but also about its exact terms; and (3) makes it easier for corporations to police internal rules restricting the authority to agree to them.[151]

Canadian law has already developed mechanisms for dealing with these issues. First, it is unlikely that a party could succeed in advancing a spurious claim of variation because Canadian courts have been empowered to exercise much broader fact-finding powers on summary judgment motions than their British counterparts.[152] It is therefore relatively easy for a claim alleging an amendment based on tenuous evidence to be dismissed in a motion for summary judgment brought by the counterparty. The capacity for Canadian courts to address such arguments adequately is evident from *Becker*, in which an alleged oral variation supported by limited evidence was found not to have occurred on summary judgment.[153] Second, though it is certainly true that the content of agreements is far easier to determine when evidenced in writing, the parties are always able to keep notes and records associated with

150. See Morgan, *supra* note 4 at 593.

151. See *Rock Advertising* 2018, *supra* note 1 at para 12.

152. See Richard Lizius, "Do What You Say, Not Just What You Write: Subsequent Oral Amendments to Written Contracts" (18 May 2016), online (blog): *McCarthy Tétrault Canadian Appeals Monitor* <www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/do-what-you-say-not-just-what-you-write-subsequent-oral-amendments-written-contracts>. See also *Hryniak v Mauldin*, 2014 SCC 7, Karakatsanis J.

153. See *supra* note 56.

informal variations, and these can be used to support a particular interpretation in a summary judgment motion or at trial.[154] Third, corporations are already able to control their employees' capacity to create legal relations through internal policies and by making clear representations to counterparties regarding who is entitled to modify contractual arrangements, thereby reducing the counterparty's ability to construct arguments based on ostensible authority.[155]

In many respects, the purported benefits of enforceable NOM clauses are far outweighed by their potential to create unfairness. One source of unfairness comes from the fact that they are a highly effective trap for the unwary. The NOM clause is especially susceptible to abuse in this regard because, unlike an exclusion clause or other instrument that can be used to take advantage of unsuspecting counterparties, the NOM clause is triggered specifically because the parties have reached an understanding that is at odds with the written terms. Unscrupulous strategies are made available by the ability to rely on those terms to override the subsequent understanding. For example, a commercial party's agent could reach an agreement that appears favourable at one point in time, then the party's principal could invoke the NOM clause to invalidate the agreement once it appears to be unfavourable.[156] The duty of honesty in contractual performance articulated in *Bhasin*, which stipulates that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract",[157] cannot be guaranteed to prevent all such opportunistic exercises of the NOM clauses.

It may be argued that the doctrine of estoppel provides a safeguard against this type of unfairness. Yet estoppel raises unique challenges for enforceable NOM clauses. As Lord Sumption JSC recognized in *Rock Advertising*, a broad scope of estoppel would erode the parties' certainty in how the contract would be performed, undermining the key benefit of enforceable NOM clauses generally. At the same time, the rigorous test for estoppel set out by Lord Sumption JSC appears to be based on the highly unlikely scenario that the parties unequivocally communicated a desire to enforce the agreement notwithstanding the clause,

154. See Roberts, *supra* note 6 at 17.

155. See Waddams, *supra* note 98 at para 333.

156. Taking advantage of unenforceable promises arising from this type of formality clause is not new or speculative. As Professor McCamus writes with respect to the formalities established by the *Statute of Frauds*: "[T]he scheme of the statute itself facilitated yet another kind of fraud. If a person induced another to transfer value such as money in return for an oral undertaking to transfer, for example, an interest in land, the money would have been transferred in return for an unenforceable undertaking." McCamus, *supra* note 142 at 167.

157. *Bhasin*, *supra* note 123 at para 73.

above and beyond what would be conveyed in a simple amendment.[158] If the requirements for proving estoppel are too strict, it is possible to imagine that a party could incur considerable costs, or lose out on a significant benefit, because of representations made by ostensibly authorized agents of the counterparty. *Rock Advertising* itself is an example of such unfairness, as Rock was obliged to forfeit several months' worth of rental arrears because it relied on the representations of MWB's credit agent.

It may also be argued that the test for the enforceability of exclusion clauses from *Tercon* could adequately protect parties from unfairness while keeping NOM clauses mostly enforceable. As I have argued in Section IV.C, this test is inappropriate for addressing NOM clauses, which should be treated as *sui generis* rather than as exclusion clauses. Nevertheless, from a practical perspective this test is also ill-suited to prevent unfairness between the parties.

A court will decline to enforce a clause under the test in *Tercon* where that clause was either unconscionably entered or contrary to public policy. Both findings are exceptional. Unconscionability requires both an inequality of bargaining power and a resulting improvident bargain.[159] There are no "rigid limitations" on what types of disadvantages are contemplated by the term "inequality of bargaining power", though it can be generally described as a scenario in which one party cannot adequately protect its interests in the contracting process.[160] This type of inequality may occur in relationships of necessity, in which the weaker party is so dependent on the stronger that serious consequences would flow from not agreeing to a contract, as well as in relationships of "cognitive asymmetry", in which only one party can understand and appreciate the full import of the contractual terms.[161] Unconscionability also requires that the parties' assent to the NOM clause itself be unduly advantageous to the stronger party or unduly disadvantageous to the more vulnerable one.[162]

Unconscionability does not fully mitigate the unfairness caused by the enforcement of a NOM clause. It can certainly be admitted that undermining the ability for stronger parties to take advantage of weaker parties through the exercise of NOM clauses would eliminate the worst instances of unfairness. Yet protection would still be denied to many parties who, though on equal terms,

158. See *Rock Advertising* 2018, *supra* note 1 at para 16.

159. See *Heller*, *supra* note 116 at para 65.

160. *Ibid* at para 67.

161. *Ibid* at paras 69–71.

162. See *ibid* at para 74.

were led to believe that they entered a binding contract by the representations of the counterparties and lost some benefit as a result. In the case of exclusion clauses, freedom of contract is invoked to justify one party's loss through the misunderstanding of, or lack of attention to, a contractual term.[163] This can reasonably be described as fair, as parties should be responsible for understanding and enforcing the terms that they have negotiated. If properly advised commercial parties agree on a term, it must be presumed that they intended that term to have effect, and it would not be reasonable to allow them to preclude the enforcement of that intended effect. Yet matters are not so clear when the parties are dealing with separate, contradictory agreements. Taking the example of *Globe Motors*, is it truly fair to allow a NOM clause to override an intention to modify that contract evidenced by the "open, obvious, and consistent" conduct of the parties over many years?[164] The argument that commercial certainty is served by such an outcome rings hollow when the parties have long been conducting themselves according to the informal variation.

Public policy under the *Tercon* test does not provide much further assistance in restricting the potential unfairness of NOM clauses. Justice Binnie made explicit that the residual power of a court to decline enforcement "exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised."[165] The examples of viable public policy arguments suggested by Binnie J include refusing to enforce a limitation of liability clause where the party attempting to do so has created public health crises, knowingly sold defective and toxic products, or engaged in conduct approaching serious criminality or egregious fraud.[166] This apparently high standard is reinforced by the very language of the test, which requires that the party seeking to avoid enforcement of the clause prove that public policy interests override the "very strong public interest in the enforcement of contracts".[167] These factors make it unlikely that, were NOM clauses enforceable, routine instances of unfairness could be precluded.

Another practical outcome of enforceable NOM clauses is the reduction in flexibility afforded to parties. The absence of formalities allows parties to make swift changes to their agreements confidently in circumstances where

163. See *Tercon*, *supra* note 36 at paras 82, 85–86.

164. *Globe Motors*, *supra* note 1 at para 114.

165. *Tercon*, *supra* note 36 at para 117.

166. See *ibid* at paras 118–20.

167. *Ibid* at para 123.

immediate action is required.[168] It also allows small changes to be made without the need to involve professional advisors. These changes can, and should, be accompanied by records of the variation, and it can be expected that parties will protect their interests by ensuring that any variation made is well-evidenced. Yet by making NOM clauses enforceable, the process of contractual variation becomes less efficient and less responsive to changing circumstances.

There is no doubt that NOM clauses allow parties to avail of certain benefits, particularly in eliminating confusion over the content of variations. Yet the foregoing analysis illustrates that these benefits come with significant costs as well. These costs must be considered alongside the major conceptual difficulties that would arise from the enforcement of such clauses. It would be unwise for Canadian courts to embrace their enforceability solely to take advantage of their purported benefits to commercial parties.

Conclusion

In *Rock Advertising*, Lord Sumption JSC wrote that: "[T]he law of contract does not normally obstruct the legitimate intentions of businessmen except for overriding reasons of public policy."[169] Yet when a NOM clause is invoked to invalidate a subsequent oral amendment, "legitimate intentions" become far more difficult to discern, as a former intention and a latter intention come into direct conflict. In this paper, I have argued that the fundamental principles of freedom of contract and the objective approach to contractual interpretation demand that the latter intention must prevail, though the former may play an evidentiary role in proving the existence of the latter. Canadian courts have firm grounds on which they can more fully embrace this position, though doing so will require a departure from the line of cases in which NOM clauses have been treated as exclusion clauses. Adopting this approach will better guarantee that the intentions of the parties are fairly and reliably enforced, all while ensuring greater theoretical coherence.

168. See Joshua Tayar, "No Certainty and No Justice: The Counterintuitive Effects of Enforcing 'No Oral Modification Clauses'" (2019) 19:2 Global Jurist 1 at 4.

169. *Rock Advertising* 2018, *supra* note 1 at para 12.