The Tension Between the Real and the Paper Deal Concerning “No Oral Modification” Clauses

# I. Introduction

 A contract is a risk allocation instrument that predicts and regulates the future relations between the parties. Often, over the course of time, parties agree to act differently in certain respects from that which is stipulated in the formal contract, or in practice their conduct deviates from the contract. Such cases result in tension between two aspects of the contractual relationship. On the one hand, at the stage of the formation of the contract, there is a desire to fully regulate the relations between the parties, or at least to require formalization of future updates of the contract. To this end, many contracts contain a clause stipulating that deviations from the contract will be binding only if they are made in writing and formally. These are referred to as no oral modification (NOM) clauses. On the other hand, because contractual relationships are rich and dynamic, many believe that even when the original contract contains an NOM clause, focusing on the original contract and disregarding later agreements and practices thwarts the wishes of the parties and leads to inequitable results.

This tension is reflected in the different attitude of the law of various countries regarding the enforcement of NOM clauses. According to one position, such clauses should not be enforced. This position was recognized in the second Restatement in the U.S.,[[1]](#footnote-2) and has been accepted in several states there,[[2]](#footnote-3) as well as in Australia,[[3]](#footnote-4) and certain European countries.[[4]](#footnote-5) Until recently, this position guided significant cases in the UK.[[5]](#footnote-6) The main justification of this approach, both in case law and in academic literature,[[6]](#footnote-7) is the desire to honor the autonomy of the parties and their absolute freedom to modify their prior agreements, including agreements on the manner by which the contract should be modified. A clear expression of this position was given by Justice Cardozo in the *Alfred C Beatty v Guggenheim Exploration Company* judgment. In his words: “*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*.[[7]](#footnote-8)“ At least some of those advocating this position nonetheless purport that a NOM clause should not be ignored entirely, and therefore its existence requires stronger evidence regarding the intention of the parties to modify the contract.[[8]](#footnote-9)

According to the competing position, NOM clauses are valid. This is the prevalent view, although usually subject to exceptions, in the United Nations Convention on Contracts for the International Sale of Goods (CISG),[[9]](#footnote-10) in international legislative initiatives in Europe,[[10]](#footnote-11) in some European countries,[[11]](#footnote-12) in the Uniform Commercial Code in the U.S.,[[12]](#footnote-13) and even in some states in the US, the most prominent of which is New York.[[13]](#footnote-14) Recently, in the MWB Business Exchange v Rock Advertisingruling,[[14]](#footnote-15) this view was adopted by majority opinion as the guiding position in the UK.

With respect to the value of autonomy, this position clashes with the previous one in two respects: First, on the ethical level, it holds that the proper realization of the value of autonomy does not lie in the recognition of the parties’ right to modify a contract they have signed, but rather in the parties’ self-enforcing ability regarding the manner in which the contract is modified.[[15]](#footnote-16) Second, proponents of this position argue that even at the factual level, conduct or oral agreement that deviate from that which is written in the contract can reflect a desire for legal change of the issue in question, but does not necessarily reflect a desire to abolish the NOM.[[16]](#footnote-17) From time to time, even representatives of this position admit that it is often not equitable to demand that a party that has relied on the promise or conduct of the other party that has deviated from the written agreement be nevertheless bound by the original contract.[[17]](#footnote-18) It has been argued, however, that these concerns can be addressed with the doctrine of estoppel,[[18]](#footnote-19) emphasizing that the law must ensure that adherence to this doctrine is prudent and specific, so that in most instances the legal validity of the NOM clause is preserved.[[19]](#footnote-20)

In this article, we wish to add a significant layer to the theoretical discussion of NOM clauses, and subsequently, propose a new model for their practical regulation. In our opinion, the debate regarding the validity of NOMs reflects a fundamental tension underlying modern contract law between the formal –written contract and the contractual relationship as a whole. Due to the work of scholars such as Macauley,[[20]](#footnote-21) Macneil,[[21]](#footnote-22) Scott,[[22]](#footnote-23) Collins,[[23]](#footnote-24) Campbell,[[24]](#footnote-25) Kimel,[[25]](#footnote-26) Zamir,[[26]](#footnote-27) Brownsword,[[27]](#footnote-28) and other contract law theorists, there has been growing recognition since the late 20th century that the formal contract does not exhaust the relationship between the parties to it, and that there are significant aspects in relationships that are not expressed in the formal contract. Despite such recognition, however, there is still serious controversy over whether **contract law** should give contractual validity to the entire set of relationships and expectations between the parties, without material distinction between the aspects expressed in the formal contract and those that are part of the relationship but not formally enshrined in the contract. Two main approaches have emerged on this issue. One, held by scholars of relational contract theory, seeks to give contractual validity to all the understandings, both formal and informal, which make up the relationship between the parties.[[28]](#footnote-29) By contrast, neo-formalist scholars acknowledge the existence of rich informal components in the relationships between the parties,[[29]](#footnote-30) but hold that contract law should avoid giving contractual validity to these components, which should be relegated to the domain of extralegal incentive systems.

The controversy over the contractual status of the informal dimensions of relationships, which include, for example, social and cultural aspects, is broad and encompasses diverse components of contract law. The best known implications of this controversy relate to contract formation and, in particular, to the requirement of indefiniteness,[[30]](#footnote-31) interpretation,[[31]](#footnote-32) and frustration.[[32]](#footnote-33) This article demonstrates how the controversy between neo-formalist and relational contract theory may contribute to the theoretical analysis and practical regulation of NOM clauses.[[33]](#footnote-34)

Our theoretical analysis contributes to the current debate concerning NOM clauses in three areas. First, from the perspective of ’parties’ autonomy, the article seeks to offer a deeper understanding of ’parties’ wishes in contracts, distinguishing between intentions focused on the legal relationships and those focused on extra-contractual relations. Second, our analysis exposes the fact that the regulation of NOM not only reflects the intention and relationship of the parties but that it also constitutes and shapes it. Therefore our analysis goes beyond ’parties’ autonomy perspective, and explains how legal enforcement of NOM may influence the parties’ behavior and relations. Third, the article adds an aspect of economic analysis that clarifies the roles played by efficiency and institutional considerations, like the need for certainty and decreasing the costs of litigation.

Following a theoretical analysis, the article proposes a comprehensive model for regulating NOM clauses.

The key innovation advanced by the model, is a shift from dichotomous regulation to context-dependent regulation which includes two main aspects.

First, we distinguish between three **types of relationships**: The first type of relationship is between two sophisticated and equally powerful parties, concerning which neo-formalist arguments appear to be more applicable; therefore, in such relationships, it is appropriate to enforce NOM clauses. The second, is a relationship between two unsophisticated and equally powerful parties, with respect to whom, the arguments advanced by relational theory in favor of not enforcing NOM clauses, are more persuasive. The third type of relationship is characterized by power disparities. In such circumstances, when the deviation from the formal contract favors the stronger party, it is appropriate to enforce NOMs, but in situations in which the deviation from the formal contract favors the weaker side, as a rule, we recommend not to enforce the NOM clause.

Second, we offer criteria to distinguish between cases where the deviation from the contract indicates the parties’ desire for legal changes to their relationship, from cases where the deviation should not be granted contractual validity. Our criteria include: the parties’ awareness of the deviation from the formal agreement; the duration, consistency, and significance of the modification; the degree of investment in contract formation, and the formality of the ongoing relationship between the parties; the reasons behind the original deviation from the formal contract, and the current demand to return to it.

The contextual model introduced in this article does not present a one-dimensional position regarding each relationship, but recommends ways to refine conclusions and take into account the opposing considerations in each case. On the one hand, according to the proposed model, even when the NOM clause is held to be valid, the results can still be refined by the doctrine of estoppel. On the other hand, according to our approach, even when the relational theory is compelling, and NOM clauses ought not to be granted full legal validity, the neo-formalist arguments are not neglected and gain expression through auxiliary tests aimed at ensuring that the modification made by the parties reflects their intention to make legal changes as well.

The controversy between the relational and the neo-formalist approaches, and its contribution to the theoretical debate on the question of enforcement of NOM clauses, are reviewed in Part II of this article. Part III offers an innovative and nuanced model for a practical regulation of NOM clauses.

# II. A New Look at NOM Clauses in Light of the Controversy Between Relational and Neo-Formalist Theories

 The Relational – Neo-formalist Controversy, rests primarily on three main dimensions: (1) The autonomy dimension seeks to shape the law in a way that reflects the parties’ intention. Therefore, it involves sociological arguments on how to understand parties’ legal intentions. (2) The constitutive normative dimension focuses on the influence the law has on the parties’ behavior and relations. (3) Finally, the institutional and efficiency dimension addresses the interplay between costs of drafting, litigation, and certainty, both with respect to the parties, and for the legal system as a whole.[[34]](#footnote-35) Accordingly, below, we analyze how the controversy between the relational and the neo-formalist approaches in these three dimensions, contributes to the debate regarding NOM Clauses.

## *A. A New Set of Autonomy Arguments in light of Sociological Analysis of Contractual Relationships*

###  *1. The relational preference of relations over a written contract*

 Classic contract law[[35]](#footnote-36) has been criticized over the years for focusing exclusively on the formal interaction between the parties to the contract (the so-called “paper deal”), ignoring many aspects of the relationship (the so-called “real deal”) that do not gain expression in the formal contract.[[36]](#footnote-37) This type of criticism was expressed most systematically by relational contract theory,[[37]](#footnote-38) which argues, that the relationship between the parties to a contract is much richer than the prescriptions formally captured by the contract. The sociological aspect of the theory is empirically based on studies showing that contracting parties ascribe great importance to extralegal considerations, such as maintaining a good reputation with the public at large, a desire for future transactions, moral perceptions, mutual trust, their standing in the relevant community, and more.[[38]](#footnote-39) Relational contract theory has developed beyond this sociological insight, and with time has become a normative theory arguing that contract law should be shaped in a way that takes account of the parties’ actual conduct , and that the focus should not be limited to the formal interactions between them.

 Relational contract theory, provides theoretical depth to the approaches which oppose enforcing NOM clauses. According to the theory, the formal contract is intended primarily to build trust between the parties. However, as relations develop and trust evolves, the importance of the initial formal agreement diminishes over time.[[39]](#footnote-40) Hence, the parties’ conduct over the course of performance, is the best indicator of their actual intentions and of the modifications they agreed to.[[40]](#footnote-41) Therefore, precisely out of respect for the value of autonomy, it is necessary to ascribe contractual meaning to the evolving relations between the parties, and the informal agreements formed between them over time.[[41]](#footnote-42) It is therefore clear that this version endorses the position that rejects NOM clauses, and believes that a contractual agreement cannot be set in stone in its early stages.

### *2. Neo-formalist Support for NOM Clauses*

 Neo-formalist theory emerged in opposition to relational contract theory. In contrast to the classic formalist approach, which was blamed for lack of awareness of the informal aspects of contractual relations, the neo-formalist approach is well aware of these elements. Yet, awareness of the existence and importance of informal aspects of contractual relations notwithstanding, neo-formalists argue that contractual validity should be granted only to the formal contract, not to the parties’ broader relations, which are not reflected in the formal contract. According to neo-formalist sociological analysis, even when the relationship between the parties is rich, and includes non-formal aspects, the parties still prefer that legal regulation focus strictly on the formal aspect of this relationship. It has been argued,[[42]](#footnote-43) that contracting parties wish to separate the extralegal norms that characterize the parties’ relationship in **peacetime** (that is, as long as the relationship lasts), from the legal norms that apply in **wartime** (that is, when a conflict arises between the parties and the relations are no longer expected to continue).[[43]](#footnote-44) While parties’ behavior in peacetime frequently deviates from the formal contract, the parties themselves want the legal arrangement of contractual relations during any war to focus on the written contractual arrangement, and not on the practices that evolved during peacetime. [[44]](#footnote-45)

 The common justifications for granting validity to NOM clauses have been based on the right of the parties to bind themselves against future modifications of the contract.[[45]](#footnote-46) The neo-formalist approach clarifies that by including such a clause, the parties clearly delineate the distinction between arrangements that apply in wartime, from those that apply in peacetime. Therefore, enforcing NOMs doesn’t merely reflects blind compliance to the parties’ pre-commitment, but also a respect of the distinction between war-time and peace-time relationships.

3. A New Intermediate Position

In existing legal discourse, alongside two extreme opinions expressed in the *MWB Business Exchange v Rock Advertising* verdict, which sweepingly reject or support the possibility of the parties binding themselves through NOM clauses, we also identified the intermediate position expressed by Lord Briggs. This position recognizes the parties’ right to deviate from the NOM clause, but holds that even if the conduct or statement that deviates from the stipulations in the contract reflects a desire to move away from the contractual arrangement regarding the particular point in question, it does not necessarily reflect a desire to change the NOM clause.[[46]](#footnote-47) In the spirit of this intermediate position, some legal systems have required, as a condition for deviating from a NOM clause, explicit reference to both a desire to change the arrangement, and a desire to change the NOM clause.[[47]](#footnote-48)

In the previous section we showed that the distinction between war-time and peace-time lead neo-formalists to support enforcement of NOM Clauses. In contrast, in this section, on the basis of the same distinction, we offer a new version of an intermediate position. According to which, the distinction between wartime and peacetime suggests that, at times, conduct-based and oral deviation from the written arrangement not only fails to indicate a desire to change the NOM clause, as Lord Briggs suggests, but often, it is not possible to infer from it any desire to make a permanent legal change that will be applicable in times of war. Therefore, according to our position, even in cases where there is no NOM clause, all the more so in instances where such a stipulation does exist, one must ensure that the conduct deviating from the contract reflects agreement to effect a permanent legal modification of the formal contract. Only after it transpires that such consent exists, should one examine, in the spirit of Lord Briggs’ demand, also whether the parties intended to rescind the NOM clause.

The proposed intermediate position contributes to the debate in another way. Relational contract theory and the neo-formalist approach offer opposing positions with respect to enforcement of NOM clauses. In contrast, the intermediate position proposed by Lord Briggs expects the judge to decide, ad hoc, what the parties’ intention was in the concrete case, but does not guide him as to how to achieve that goal. The position we offer continues the intermediate position in that it accepts the stance that a sweeping answer to the question of whether or not to enforce a NOM clause cannot be provided, however, in the third chapter we will suggest distinctions between different relationships, and auxiliary tests which distinguish different circumstances, the purpose of which is to guide the judge on when to respect the clause.

## *B. Beyond Autonomy: The Normative Aspects of the Debate*

 Thus far, we have covered the distinctions between the sociological analysis of contractual relations, and the typical intentions of parties to a contract as between relational contract theory and neo-formalism. We have demonstrated how the sociological argument bestows analytical depth on claims of autonomy raised in the context of NOM clauses. However, the debate between relational contract theory and neo-formalism is not limited to the sociological argument as to how to understand the parties’ intentions. In many instances, there is a normative value-laden argument, and in others, economic and institutional factors also play a part. In this chapter, we will clarify how these aspects of the debate between relational contract theory and the neo-formalist approach may contribute to the lively discussion with respect to the enforcement of NOM clauses.

### *1. Relational Theory Supports the Non-Enforcement of NOM clauses*

Relational contract theory emerges in two versions – communitarian and libertarian – both present different perceptions on the extent to which the theory should be implemented.[[48]](#footnote-49)

The libertarian version of relational contract theory, seeks to grant contractual validity to norms that reflect values ​​such as interpersonal solidarity, cooperation, and mutual consideration,[[49]](#footnote-50) but the inclusion of non-formal value-based norms is limited to those that have been adopted in practice (even if not formally) by the parties by their conduct, or by virtue of their shared culture. This version refuses to impose moral values and considerations of justice ​​that the parties did not intend to apply to their relations.[[50]](#footnote-51)

For the purposes of the discussion in the previous section, which focused on the autonomy claim, the libertarian version of relational contract theory was enough to justify the non-enforcement of NOM clauses. However, relational contract theory also includes a communitarian version.

 The communitarian version imposes moral values and considerations of justice on contractual relationships, even in situations in which these values and considerations do not reflect the parties’ actual behavior and intentions.[[51]](#footnote-52)

 Applying the communitarian version of relational contract theory[[52]](#footnote-53) to the discussion of NOM clauses, provides two important justifications for non-enforcement of NOM clauses, that go beyond the autonomy justification. First, it drives the conclusion that after the parties have already deviated from the original contract by their own conduct, and especially when one of the parties has already relied on the change, insistence on observing the formal requirement leads to unjust results.[[53]](#footnote-54) Therefore, it is necessary to apply Equity doctrines to justify deviation from the NOM clause.[[54]](#footnote-55) Second, granting legal validity to the informal components of the relationship, strengthens those components. Legal involvement helps create new social domains, and expands the relations between the parties. For example, it has been argued, that the publication of legal sanctions helps disseminate information about the parties’ misconduct, thus enabling market players to create and consolidate extralegal sanctions and incentives where these are lacking or insufficiently developed.[[55]](#footnote-56) By contrast, rigid separation between the paper deal and the real deal, and focusing merely on the former, may create an incentive for opportunistic behavior, thereby damaging the trust between the parties as well as the relationship between them.[[56]](#footnote-57) Given that enforcement of NOM clauses means that the law is to ignore the informal elements in the parties’ relations, it is reasonable to assume that such a legal regime may prevent the development of these elements in the long term. Thus, enforcement of NOM clauses should be opposed not only because honoring the autonomy of parties to a contract also means honoring their ability to change their minds, but also because of broad considerations that seek to enrich contractual relations, and strengthen their informal aspects.

### *2. The Neo-Formalist Normative Arguments in Favor of Enforcement of NOM Clauses*

 In the previous chapter, we demonstrated the manner by which the sociological analysis of neo-formalism establishes a distinction between the rules for war and the rules for peace, and in the context of this paper supports the enforcement of NOM clauses out of respect for the parties autonomy.

 Whereas the sociological argument assumes that the law should reflect the intentions of parties, the normative argument deals with the manner in which contractual relations and parties’ expectations should be constructed in the first place. According to the neo-formalist normative argument, non-judicial dimensions and extralegal norms improve the relations between the parties and reduce, *ab initio*, the likelihood of disputes going to court. By contrast, juridicizing the complete relationship between the parties, especially the informal aspects, is liable to lead to the extinction of informal aspects, harming the relations between the parties. For example, if the parties to the contract know that concessions made over the course of the life of the contract will create an obligation for them, they will avoid making such concessions, and adopt a more rigid approach towards the other parties, which will harm their overall relationship.[[57]](#footnote-58) According to neo-formalist theory, it is precisely the legal focus on the written contract, and the distinction between the legal and non-legal dimensions of the relations between the parties, that will improve the parties’ relations and provide a “safe zone” for them in the long term, where they can demonstrate generosity and friendship without such actions being used against them on a legal level.[[58]](#footnote-59) This neo-formalist position cautions against granting legal validity to developments in the parties’ relations after the formal contract has been signed, even when the original contract did not include a NOM clause. This is all the more true when the parties themselves have sought to create a buffer between the written legal contract, and future non-legal developments by means of the NOM clause. Social interest in enabling the creation of a non-legal private trust domain supports the validation of such clauses.

C. Institutional and Efficiency Considerations

 Even in the absence of NOM clauses, the debate between neo-formalist scholars to their relational contract peers continues to exist with respect the question of whether it is proper to give effect to later conduct by the parties that deviates from the written agreement. This debate mixes institutional considerations with efficiency concerns.

 Neo-formalists assume that, for the most part, formal norms are clearer than conduct or verbal utterances. Therefore, the neo-formalist approach rejects validating informal norms, because focusing on the formal written contract encourages stability, and prevents litigation.[[59]](#footnote-60) Moreover, even when there is a dispute with respect to the interpretation of the formal contract, the costs of a legal argument which focuses on the linguistic content of a formal stipulation in a contract, are cheaper than litigation that demands proof of conduct or verbal statements which followed the contract’s execution. For this reason, focusing on the formal content would, of necessity, reduce litigation costs.[[60]](#footnote-61) For this reason, according to the neo-formalistic approach, later contractual modification which is not anchored formally, should not be given effect.

Adherents of relational contract theory do not reject the stability and certainty arguments. Nevertheless, according to the relational approach, the recognition of informal aspects encourages contractual certainty, because often it is later conduct that clarifies the parties’ intention. [[61]](#footnote-64) Moreover, recognizing future behavior saves contract formation costs, as it is impossible to address every future scenario in a contract.[[62]](#footnote-65) Thus, scholars of the relational contract theory argue that efficiency considerations support providing legal validity to parties’ behavior that deviates from the formal contract.

In the instances in which the contract itself does not contain a NOM clause, we believe that both parties – neo-formalist and relational – are partially correct in this debate. Alongside cases in which focusing on the written contract contributes to certainty, prevents litigation, and saves costs, there are other cases in which the opposite is true. Because of this complexity, we should allow the parties, who best know the concrete circumstances of the deal they are planning, to determine in advance whether they prefer litigation based on the written contract, and therefore prefer to invest in contract formation to reduce later costs, or whether they prefer to grant legal validity to informal understandings to promote certainty and reduce costs.

This analysis has, in our opinion, significant implications on the proper legal attitude to enforcement of NOM clauses. We believe, that enforcing NOM clauses allowing the parties to choose between litigation limited to the written contract, and litigation that requires reference to subsequent developments, thereby signaling which arrangement is more efficient. Thus, honoring the NOM clause reflects not only respect for the parties’ autonomy, but also helps realize the institutional goal of promoting certainty and efficiency.[[63]](#footnote-66)

At first glance therefore, it appears that institutional concerns and efficiency arguments unequivocally support the neo-formalist position to enforce NOM clauses.[[64]](#footnote-67)

This conclusion must be updated as it is based on the assumption that the fact that the clause exists at all evidences that the parties have considered the dilemma between the costs of drafting and the costs of later litigation, and preferred to save the latter.

As demonstrated below, this conclusion must be qualified for relationships between equal and sophisticated parties, when it is reasonable to believe that the inclusion of the NOM clause, or alternatively, its waiver, reflects the parties’ conscious and informed intent regarding the types of cost they prefer.

In this context, enforcing NOM clauses echoes conventional English commercial law, according to which, a signed document should be treated as definitive of the terms of the contract.[[65]](#footnote-68)

By contrast, in the case of non-sophisticated parties, or where there are power disparities between them, we doubt that this analysis holds. In the next section, we will deal with the need to distinguish between these three prototypical relationships.

# III. A New Model for Regulating NOM Clauses and Modifying Contracts by Conduct

Based on the new theoretical understanding offered in this article, we propose a coherent outline for the legal regulation of NOM clauses, and for modification of contracts by conduct, even absent a NOM clause.

## *A. Contextuality*

For a long time, relational and neo-formalist theories were situated at two opposite poles of the theoretical discourse in contract law. Recently, however, writers have concluded that the disagreement between the relational and neo-formalist theories was largely due to the fact that each theory considered concrete relationships, but at the same time, sought to formulate arrangements that would apply to contract law in its entirety.[[66]](#footnote-69) Hence, scholars belonging to both groups have come to the realization that the scope of the controversy is not large, and that instead of arguing across the board, the focus should be on adapting each approach to the relationships relevant to it.[[67]](#footnote-70) In this section, we apply the contextual approach to NOM clauses, and propose a detailed legal model explaining how the legal attitude toward NOM clauses should be affected by different types of relationships.[[68]](#footnote-71)

### *Adopting the neo-formalist approach with respect to sophisticated parties and organizations*

 In contract law academic literature[[69]](#footnote-72), and in certain respects also in case law[[70]](#footnote-73), a recognition is forming that the case of commercial relations between sophisticated and legally advised parties should be viewed as a distinctive category of contracts, with respect to which neo-formalist norms should be adopted. In the context of the current article, these norms call for stricter tests for recognizing contract modifications by conduct, even without NOM clauses, and grant contractual validity to NOM clauses in which the parties explicitly reject the possibility of modifying the contract by conduct.

 To date, the concept “sophisticated parties” has not been sufficiently defined in case law which resorts to its use.[[71]](#footnote-76) Academic literature by Schwartz & Scott has suggested a definition of sophisticated parties with reference to the size of the firm, its type of incorporation, and its fields of occupation.[[72]](#footnote-77) However, we fear that a technical definition, no matter how brilliant, will fail to fully realize the rationale for which we seek to refer to sophisticated parties as a distinct category for the purposes of NOM clauses, and contractual modification by conduct. Therefore, in stead of a dichotomous approach, and a one-dimensional, technical definition, we wish to propose several variables that would define parties as sophisticated for the purposes of enforcing NOM clauses. These variables include: (1) Legal advice accompanying not only the stage of the contract’s drafting, but also the life of the contract. (2) The commercial and professional experience of the active players, who in many instances are repeat players in the market. (3) Businesses with a complex organizational structure, which distinguishes managerial parties from field agents. When these variables exist, the logic underlying the neo-formalist case to enforce NOM clauses and grant limited validity to behavioral modifications not anchored in a formal agreement even in the absence of such a clause, is stronger.

 First, in the case of experienced and legally advised parties, one can reasonably assume that the fact that the parties failed to formally anchor the changes, is not absentmindedness, and is not attributable to the unavailability of the required legal representation. Therefore, one can assume, that the parties themselves did not view these changes as legally binding.

 Second, when dealing with repeat players, and in particular with large entities, the extra-legal mechanism described by neo-formalist literature as deterring breach of promises, such as harm to one’s reputation, become crucial. Thus, there is a certain logic to the parties leaving some aspects of their relationship as non-legal, in reliance on these mechanisms.

 Third, in the case of commercial relationships between economically-oriented parties, the efficacy considerations that seek to enable the parties to strengthen contractual certainty, and to reduce future litigation costs, are valid.[[73]](#footnote-80)

 Finally, our support for adopting the neo-formalist approach is particularly strong in the case of large organizations, where those who formulate the contracts, and those who carry them out, are not the same individuals. In these cases, a clause denying the possibility of modifying the contract by conduct is in practice a managerial and organizational tool, intended to prevent agents of the organization from making irreversible changes. Note that in cases in which public entities such as the state are involved, an administrative dimension is added to the clauses that negates the modification of contracts by conduct, preventing the possibility of officials in the field from granting benefits without authority (*e.g.*, deviating from tender procedures or protocol).[[74]](#footnote-81)

 On this point, we wish to add several comments:

First, despite our attempt to define sophisticated parties, we recognize that it sits in fact on a spectrum, and that grey areas exist. This fact alone may impair legal certainty. We will relate in detail to the tension between the need to formulate a complex model that provides tailored solutions to a wide range of circumstances, and considerations of certainty, in the paper’s concluding chapter.

 Second, together with distinguishing the various prototypes of parties to a contact, this paper also proposes a series of tests that will aid in examining the point on the level of the concrete deal, for instance, how detailed the original contract was, or to what degree was the relationship between the parties in question characterized by formality. These tests, to a degree, relax the binary nature of the distinctions between the types of contractual parties, and are particularly significant in the grey areas where classification of the parties’ relationship is challenging.

Finally, despite our support for the adoption of the neo-formalist approach with respect to sophisticated parties and large-scale organizations, in some circumstance, the results of a NOM clause must be blunted by the application of equitable doctrines, such as estoppel. In the next section, we discuss the application of the doctrine of estoppel, and suggest legal mechanisms for ensuring that it does not entirely undermine the NOM clause.[[75]](#footnote-82)

### *2. Adopting the Relational Contract Approach with Respect to Unsophisticated, Evenly Matched Parties*

 In the case of evenly powered, unsophisticated parties, we tend to recognize the benefits of the relational approach, which does not honor NOM clauses.[[76]](#footnote-83)

 Similarly to the case of the definition of sophisticated parties, also the definition of unsophisticated parties is not binary or dichotomous, and it refers to: (1) Small entities or private individuals; and (2) parties that lack continuous access to legal advice, and therefore, are represented, at most, during the stage of the contract’s drafting and execution.

 Under such circumstances, the case for non-enforcement of NOM clauses is strengthened for the following reasons:

 First, since the parties lack ongoing representation over the life of the contract, in many instances they are not aware of the need to formally draft the changes, and thus their choice not to formally write down the modification should not be interpreted as reflecting their wishes not to be legally bound by them.[[77]](#footnote-84)

 Second, from an economic perspective, requiring a formal definition of every contractual change that necessitates hiring a lawyer, is not cost-effective in such a relationship.[[78]](#footnote-85)

 Third, whereas in large organizations, NOM clauses are sometimes justified as means for those shaping the deal and management to limit the agents operating in the field, when dealing with small organizations, or private individuals who are not incorporated, there is identity between the parties shaping the deal and those carrying it out, and therefore, the need for managerial supervision never arises. Finally, in view of the personal identity between the field agents and management shaping the deal, the sharp distinction between the stage of shaping the deal which represents, according to the neo-formalist claim, the rules for war-time and the ongoing relationship stage which represents, according to the neo-formalist claim, the rules for peace-time, is blurred.

 In light of the totality of the abovementioned reasons, in this type of relationship we recommend continuing the policy reflected by the District Court in re Rock[[79]](#footnote-86), according to which, a change of conduct can be viewed also as a modification of the NOM clause, in the setting of the parties freedom to deviate from former undertakings.

 Even in this regard, however, we must remember our caution that not every deviation by behavior from written contractual instructions indicates a desire to change the contract permanently in a legally binding manner for the future as well. According to our analysis, even in the case of evenly matched unsophisticated parties, only in instances in which the court is persuaded that deviation from the written contract constitutes a desire to modify it permanently, should the NOM clause not be enforced. By contrast, when there is concern that the deviation from the contract does not reflect a desire for a permanent and binding legal change, the written contract must be adhered to, in line with, but regardless of, the NOM. Below we propose auxiliary tests to help distinguish between the two types of cases.[[80]](#footnote-88)

Thus far, we have discussed the cases in which the justification relational contract theory offered for non-enforcement of NOM clauses, was based on the liberal argument that it is precisely granting effect to the parties’ later conduct, rather to their earlier formal agreement, that more deeply reflects the parties’ intention, thus respecting their autonomy. However, as we have seen, at least the communitarian version of the relational contract is willing at times to justify not honoring NOM clauses for reasons of fairness and integrity. In this spirit, we believe, that in the extreme cases in which exercising the NOM clause and disregarding the behavioral modification would result in extreme injustice and significant departure from the parties’ legitimate expectations, as these have evolved over time, one should consider applying doctrines such as material unconscionability[[81]](#footnote-89) and application of the UCTA 1977, that permits rescission of unreasonable stipulations, in order to cancel the NOM clause[[82]](#footnote-90).

### *3. The Complex Case of Power Disparities*

A third type of relationship is characterized by power disparities. In the case of such relations, it is necessary to distinguish whether the deviation serves the stronger or the weaker party.

 When the deviation from the written contract works in favor of the strong party, it makes sense to give effect to the NOM, because the stronger and legally represented party can be expected to insist that the agreed deviation by conduct be given formal legal expression. Moreover, in such cases, it is not at all clear that the weaker party is aware of the deviation from the contractual agreement, or its binding legal significance.

In contrast, in the case of a deviation from the contract that favors the weaker party, our position is more complex. In this case, over the life of the contract, the parties have deviated from the written contract in favor of the weaker party, and subsequently, the stronger party seeks to renounce the deviation and re-assert its rights under the original contract. Normally, power disparities are precisely situations in which stronger parties make sure to incorporate into the contract a clause that prohibits modification by conduct, and therefore the stronger party intends to rely on this clause. As a rule, we believe that in these cases, the position of non-compliance with NOMs is justified, and the considerations expounded by the relational contract approach, especially its communitarian version, are pertinent.[[83]](#footnote-93)

For this reason, in such cases, to the extent that we are dealing with a consumer contract within the meaning of that term in the Consumer Contracts (*sic*) Act[[84]](#footnote-94), widespread use of S. 62 of the Consumer Rights Act 2015 should be encouraged, and to claim in view of the section, that the NOM clause would very likely “cause a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer” and thus be unenforceable. However, we believe, even in cases that are not formally classified as consumer relations, yet there is still considerable disparity between the parties experience,[[85]](#footnote-96) or their access to legal advice,[[86]](#footnote-97) there is scope to applying general doctrines that facilitate interference with contracts, such as unconscionability or unreasonableness under the UCTA, to facilitate rescission of the NOM clause.[[87]](#footnote-98)

At the same time, there are two significant exceptions to our general position on this point.

First, we accept the right of complex organizations to deny their field agents the authority to amend legal contracts without the supervision of the authorized bodies within the organization. Therefore, when the NOM clause does not reflect a mere desire to renege on a promise, but a managerial means of controlling decision-making in the organization, it should be respected.[[88]](#footnote-102)

 At the same time, precisely in such cases, it is also necessary to protect weaker parties from relying on promises and representations by the organization or its officers. Therefore, for these types of cases, middle-ground solutions should be developed. While generally recognizing that a NOM clause negates contract modification by conduct, exceptions should be made for justice and fairness considerations (in which case, the NOM may be nullified or granted only partial validity). As shown below, informed use of equity doctrines such as estoppel can result in the acceptance of such middle-ground solutions.

Second, in the long term, the ability of strong parties to rely on NOMs may at times benefit weak parties, whereas not honoring these clauses out of a motivation to protect the weak parties, may work to their detriment. The motivation lies in the neo-formalist distinction between peacetime and wartime rules. A strong party that knows that a concession in favor of a weak party will not be binding in the future because of the presence of a NOM clause, may allow itself to assume a generous stance toward the weak party. In contrast, an approach that negates the validity of the NOM clause, may prevent the strong party from showing generosity toward the weak party and making a concession in a certain case, for fear that such voluntary conduct may become binding. Therefore even if the NOM clause is not enforced, caution must be exercised not to interpret every deviation from the contract of a strong party in favor of a weak one as reflecting a willingness to make a legal change. This warning is especially true when the change in conduct is not mutual (involving an exchange of benefits) but is a unilateral gesture on the part of the strong party.

## *B. When Does the Conduct of the Parties Indicate Agreement to Legal Change?*

Our analysis reveals that in the case of unsophisticated parties or those characterized by power disparities, when the deviations are in favor of the weak party, the neo-formalist justifications for enforcing the NOM clauses are weakened. It appears, therefore, that in the context of these relationships, binding contractual validity must be given to the actual conduct of the parties, even when it is contrary to the formal provisions of the contract, and even if the contract includes a NOM clause.

In the present section we wish to refine this conclusion. In too many cases, the discussion of NOM clauses implicitly assumes that by having deviated by conduct from the provisions of the contract, the parties intended to legally modify these provisions, and therefore the discussion focuses on whether this legal modification is possible in view of the NOM clause. This approach, however, ignores the claims of the neo-formalist position, according to which, in light of the distinction made by the parties between the wartime and peacetime relations, it is not always possible to deduce from a deviation from the provisions of the contract a desire to change the relations between the parties in a permanent, legal way.[[89]](#footnote-103) This neo-formalist caveat should be taken seriously even without a NOM clause,[[90]](#footnote-104) and certainly when such a clause exists. In this section, we propose several auxiliary tests aimed at distinguishing between cases in which the deviation from the contract indicates a desire to modify the contract, and cases in which the deviation should not be granted contractual validity. Our proposed auxiliary tests combine an in-depth evaluation of the parties’ intent with normative and institutional considerations.

### *1. The parties’ awareness of the deviation from the formal agreement*

Conventional wisdom views modification of a contract as the formation of a new contract, and therefore examines the validity of the modification based on the usual tests for contract formation. By contrast, especially in the case of unsophisticated parties, there are instances in which a party is not at all aware that its conduct has deviated from the contract. Apparently, according to the objective test for contract formation, subjective lack of awareness makes no difference. But in the spirit of the neo-formalist position, we believe that unless it has been proven that the parties were aware that their actual behavior deviated from the formal agreement, such deviation did not indicate consent to legal change. This is because, the parties trust their lawyers to draft the legal arrangement in writing, with the understanding that their future conduct will not necessarily have legal validity. Therefore, it is unreasonable to assume that they have checked whether their conduct conforms to the written contract. Under these circumstances, examining whether the parties have objectively deviated from the contract as is common in the case of contract formation, is not sufficient. It is necessary to verify that the parties have deliberately decided to deviate from the contract to provide legal validity for this deviation.

Nevertheless, this conclusion must be qualified because the awareness test is not only factual but also normative. Therefore, in some cases, it is appropriate to apply a concept of constructive knowledge and to attribute such awareness to the party that should have known about the modification by virtue of professional status and education, even if knowledge in practice remains unproven.

### *2. Duration and consistency*

We propose to balance or bridge the neo-formalist and relational approaches by differentiating between one-time conduct or a sporadic deviation in the short term on the one hand and consistent deviation in the long term on the other. Only a consistent deviation over a long time should be recognized in our context as having legal validity. The neo-formalist approach is usually correct in cautioning against granting contractual validity to modification by conduct in cases of one-time conduct, both based on in-depth analysis of the parties’ intent and on an economical consideration that seeks to enable the parties to show consideration for each other and act generously when required, without such conduct being held against them. By contrast, in the case of unsophisticated parties, and when dealing with constant change over time, the relational approach is better suited to the actual reality in arguing that ignoring the change and demanding a return to the written contract, which clearly does not represent the relationship in practice, is unjustified and does not reflect the understanding of the parties.

Relational contract theory is also correct in stating that an informal agreement to deviate from the formal contract forms during the course of the relations between the parties, without a concrete point in time in which the understanding between the parties has taken shape. Therefore, flexible tests considering the relations between the parties as a whole are needed (i.e., tests that can identify agreements between parties that have evolved linearly over time, with or without specifying a concrete point in time at which the contract was modified).[[91]](#footnote-105)

### *3. Significance of the modification*

Another way of expressing the concern for recognizing contractual modification by conduct is to test its significance. According to this test, the court must recognize modifications by conduct only in matters that do not lie at the core of the contract. The demand that every minor change be anchored in writing is burdensome for unsophisticated and underrepresented parties. In contrast, in the case of material change to the core content of the contract, conduct should generally not be granted contractual validity, and certainly not contrary to a NOM clause. The expectation that a significant change be anchored in writing is justified from both from the point of view of the parties’ intention and from the economic perspective of cost savings.

 Nevertheless, an exception to this principle is in order because, in some situations, conduct that deviates significantly from the provisions of the contract completely undermines the foundations of the contract and renders the insistence on the execution of the written contract irrelevant. Such cases do not constitute contract modification by conduct but rather a complete cancellation of the original agreement, which can also be accomplished both orally and by conduct.[[92]](#footnote-106) Note, incidentally, that this exception is consistent with economic considerations that oppose legal validation of the parties’ conduct because of the difficulty of proving such conduct.[[93]](#footnote-107) In the case of a dramatic change that completely undermines the contract, modification is easily proven.

### *4. Degree of investment in contract formation and the formality of the ongoing relationship between the parties*

Another way to bridge the dichotomous approaches is by taking into account the level of formality that characterizes the relations between the parties. Parties that have invested time and money in formulating a detailed contract that takes into account a range of issues and scenarios that may materialize in the future, have signaled their intention to regulate their legal relations through the contract, and not to recognize conduct deviating from the contract as ground for its modification. By contrast, parties that choose not to invest in the drafting of the original contract and have not elaborated their agreement in detail, indicate the formation of a flexible framework, their intention to form dynamic relations, and the possibility of contract modification by conduct.[[94]](#footnote-108)

Beyond examining the level of formality of the parties at the beginning of the relations, we propose a cross-sectional examination of the parties’ conduct over the ongoing contractual relationship. According to this test, when over the course of the life of the contract the parties conducted themselves formally, in other words, they were not content with modifications by conduct but every time the need arose for a modification they insisted on making the modification formal, it is difficult to accept the claim that in a particular case the parties sought change the original contract by conduct, without a formal modification. By contrast, when over their ongoing relations the parties did not insist that deviations from the original contract be formalized, they reinforce the position of the relational approach that seeks to recognize the conduct of the parties as a basis for their intention to legally change the contract.

Alongside its the focus on the parties’ intention, the proposed distinction between different levels of formality in the formulation of the contract and the course of the relations also has institutional-economic logic. Recall that one of the neo-formalist arguments against recognizing contractual modification by conduct was the desire to give parties an incentive to formulate a detailed contract that can prevent future litigation.[[95]](#footnote-109) A policy that assigns decisive weight to the level of detail of the contract gives an incentive to parties that wish to ensure that the court will act in accordance with the contract to invest in its drafting.[[96]](#footnote-110) Similarly, the desire to encourage stability and certainty is likely to provide parties with an incentive to make sure that modifications are granted contractual validity and are carried out formally.

Nevertheless, there are other cases in which efficiency considerations discourage investment in the original drafting of the contract. For example, when it is difficult to anticipate the full range of future scenarios and circumstances, it may be wrong to give parties an incentive to invest in careful and costly drafting of the contract and in formal execution of any deviation, since the cost involved may exceed the deliberative cost of recognizing the modification by conduct. Similarly, there are cases in which efficiency considerations discourage investment in the formal elaboration of the ongoing relationship. For example, in situations of material change that undermine the foundations of the original agreement, the cost of proving modification is not high, and at times is lower than the cost of drafting a new formal contract. In cases of this type, the law should adopt the relational contract approach, which recognizes contract modification by conduct

Clearly, in the case of a significant change that is considered tantamount to the cancelation of the previous contract, there is no need to insist on a formal cancelation. Similarly to our argument in the previous section, [[97]](#footnote-111) modification by conduct is sufficient.

*5. The Reasons Behind the Original Deviation from the Formal Contract and for the Later Demand to Return to it.*

Taking into account normative considerations regarding the morality of ongoing contractual relations,[[98]](#footnote-112) the reason behind deviation from the provisions of the contract may affect the question of the legal effect of the modification. When the modification is required because of the failure of one of the parties to fulfil the stipulations of the contract, even if the other party did not immediately insist on the exercise of its rights, this should not be considered consent to the modification. In contrast, if the modification is made necessary by objective circumstances, though such circumstances may not grant a party the right to demand the modification of the contract without the other’s consent, it is more appropriate to grant contractual validity to unilateral modification by conduct, even if it has not been formally agreed.

Furthermore, a party’s demand to return to the provisions of the original formal contract should also be examined from a moral-ethical perspective. To the extent that the demand to revert to the original contract results from the fact that prior circumstances allowing the deviation from the original contract no longer apply, the demand to revert to the written agreement is justified. Conversely, when both parties appear to have agreed to modification by conduct, and the reason for the demand to revert to the original contract stems from a desire to harass the other party or gain tactical benefits with respect to other disputes between parties, which are not relevant to the modification itself, the legitimacy of the demand to revert to the original contract diminishes.

Two reservations are relevant in this regard. First, especially in cases of power disparities, one of the parties may not have protested in real time to the modification due fear of the other. In these situations, protest is legitimate when the relationship is over. Moreover, at times a party may have agreed to show restraint toward the modification by conduct so long as peaceful relations between the parties continued. In these cases, the party that did not protest in real time against the modification but raised the issue after the relationship deteriorated should not be blamed. Therefore, this test, which examines the reason for reversing the modification, must be applied with caution, showing sensitivity to the distinction between behavior expected in peacetime and that which is expected in wartime.

A “reciprocity” test can provide another ethical distinction between those who wish to revert to the original contract as a tactical move and those who do so as part of a legitimate desire to return to wartime rules after the relations between the parties deteriorated. According to this test, to the extent that a system of mutual concessions has evolved between the parties, it is unfair for one party to withdraw from one of the concessions and demand a return to the written contract. By contrast, to the extent that concessions were unilateral, the legitimacy of the party that has renounced its rights as expressed in the original contract is strengthened.

## *C. The Role of the Doctrine of Estoppel When the NOM Clause is Valid*

The *MWB Business Exchange v Rock Advertising*[[99]](#footnote-113) ruling opened the door to enforcement of NOM clauses. The discussion in this article supports the ruling in specific circumstances, including the case of evenly matched sophisticated parties. Nevertheless, our discussion has shown that even when enforcing the NOM clause, consideration should be given to the harm that may be caused to the party that has acted in reliance on the conduct or explicit statements of the other party or its representatives.[[100]](#footnote-114) Even legal systems having an established tradition of enforcing NOMs, such as in some states in the U.S.,[[101]](#footnote-115) refine this practice through the use of the estoppel doctrine, which protects a party’s reliance on the conduct of the other party in such circumstances.

The doctrine of equitable estoppel[[102]](#footnote-116) requires the following conditions: “Where: (a) one person (the inducing party) plays a role in the adoption by another person (the relying party) of an assumption of fact, existing legal rights, or future conduct; and (b) in the circumstances the inducing party ought reasonably to expect that the relying party might act in reliance on the assumption in such a way that he or she will suffer detriment if the inducing party behaves inconsistently with that assumption; and (c) the relying party does act on the assumption in such a way, then it is unconscionable for the inducing party to act inconsistently with the assumption, at least without taking steps to ensure that the relying party suffers no detriment as a result of the action he or she took in reliance on the assumption.”[[103]](#footnote-117)

Application of the doctrine of estoppel in the case of NOMs is almost a necessity. Yet it raises a concern that use of the doctrine will eventually drain the NOM clause of content, even in situations in which, according to our analysis, it is necessary to grant legal validity to the NOM clause. In the *MWB Business Exchange v Rock Advertising* case, the Court was aware of this concern, and therefore, it cautioned that such use should be moderate.[[104]](#footnote-118) At the same time, the Court did not clarify the criteria that would allow the use of the doctrine of estoppel as a means of reducing the injustice that enforcement of the NOM clause can produce, on the one hand, and not render the clause void, on the other. In this section, we seek to fill the gap with two criteria that limit the breadth of cases in which the doctrine of estoppel can be used.

First, the doctrine of estoppel should be applied as a rule only to the past. To the extent that the case involves a party that has deviated from the written contract based on representations, promises, and actions of the other party, it is justified to apply the doctrine of estoppel and to prevent the other party from suing for the past deviation despite the fact that the contract contained a NOM clause.[[105]](#footnote-119) In contrast, a demand of one of the parties, based on the doctrine of estoppel, to continue deviating from the contract in the future, or alternatively, a demand from the other party to continue to provide services that were not required by the written contract, should be rejected. In this way, a difference is created between cases in which the NOM clause is not enforced, and therefore the conduct that deviates from the written contract is granted full contractual validity, and cases in which the NOM clause is enforced, and therefore the conduct that deviates from the formal contract is granted only limited validity by virtue of the doctrine of estoppel.[[106]](#footnote-120)

Second, although generally the doctrine of estoppel should not be applied regarding the future, in situations in which reliance on false promise regarding the future causes damage, compensation may be called for. Nevertheless, according to our proposed regime, in this context, the result of the estoppel doctrine should be limited. [[107]](#footnote-121) While generally the remedies for damage due to breach of contract include anticipatory damages, when the claim is based on the doctrine of estoppel, we propose that only reliance damages should be recognized.[[108]](#footnote-122) In other words, the injured party should be entitled to compensation for damages related to investments or expenses that have resulted from the presentation of future conduct by the other party, but the doctrine of estoppel should not allow one party to realize expected profits due to modification by conduct that contradicts the NOM clause. Therefore, the doctrine of estoppel should be applied in this case in narrow form. To conclude, in some circumstances our proposed approach opens the door to the application of estoppel as a claim that creates a new right even in the future, but restricts it to reliance compensation in the event of a breach. Our approach differs, therefore, from the prevailing opinion in U.S. case law that tend to award expectation damages, rather than restricting awards to reliance damages[[109]](#footnote-123)

# V. Conclusion

The conventional debate on NOM clauses focuses on the question of autonomy: The right of parties to limit themselves in the future, or alternatively, to deviate from their previous agreements. The presentation of this debate often creates a sense of dichotomy that lacks sensitivity to nuance, circumstance, and context.

On a practical level, on the one hand, doctrines such as estoppel have undermined the full enforcement of NOM clauses. On the other, the need to present evidence of the parties’ desire for permanent and enforceable change, has made it difficult to grant validity to modifications by conduct, even when the alleged NOM clause was apparently not enforced. The combination of those limitations of the apparently sweeping positions have blurred the practical difference between the positions, in a way that has created a dissonance between the theoretical poles, and a frequent practical overlap.

This article has sought to introduce a change to both the theoretical and practical levels. On a theoretical level, the paper shows how the controversy over NOM clauses reflects a profound disagreement between relational contract theory and neo-formalist theory about the balance between the written contract and contractual relations.

 Based on a novel theoretical construction, the article presents a contextual and nuanced model.

The model we propose distinguishes between three relationships: Sophisticated and evenly matched parties, unsophisticated and evenly matched parties, and parties of unequal power, taking into account the identity of the party for whose benefit the NOM clause works. For each one of these relationships, the model answers three questions:

1. Should the NOM clause be enforced?
2. Is the doctrine of estoppel to be applied, and if yes, to what extent?
3. How are auxiliary tests to be implemented to determine whether conduct indicates a desire for legal change.

Figure 1 below represents the algorithm created. We believe that if it is adopted by lawmakers, it will contribute to more adequate regulation of the domain.

The practical model proposed in the paper is based on two aspects: (1) A distinction between different types of relationships; and (2) Auxiliary tests which, in light of the circumstances of the case, examine whether the parties’ behavior reflects a desire for legal change. Although we have sought to offer clear categories, and conveniently applied auxiliary tests, we do not deny that in some cases the decision to which category of relationship a particular case falls is not dichotomous, and there are gray areas. Certainly the application of the auxiliary tests regarding the intention of the parties requires judicial discretion, and as such is not accurately predictable.

Thus, compared to existing models, the model we propose often leads to better results that are more sensitive to nuance. At the same time, there is no denying that it entails costs related to implementation difficulties, and perhaps adversely affects legal certainty.

At first glance therefore, these characteristics of the model proposed by us explain the choice of the existing discourse to prefer a simple dichotomous decision between enforcing or not enforcing NOM, over our choice in the article, to offer a complex and nuanced position, that even if it leads to more just results, is nevertheless more difficult to apply in practice.

However, a deeper look shows that presenting the choice facing the designers of law as a choice between a sensitive and nuanced but difficult-to-implement model, and “rough-and-ready” decisions which are easy to implement, is inaccurate. For example, as we noted at the beginning of this chapter, the neo-formalist approach that required recognizing NOM clauses in every case, opened the door to non-recognition by agency of the rule of estoppel. However, the question of when the rules of estoppel will be implemented, and how the general policy in favor of enforcement will be maintained notwithstanding those rules, remains in the dark. Because of this, a presentation of certainty is created that does not reflect the fact that actual implementation of the decision remains in the hands of the judge, without an unequivocal guiding criterion. At the same time, the relational contract approach that supported non-enforcement of NOM clauses, and the recognition of a contractual modification by conduct, still forces the courts to decide in which cases the parties actually intended to affect a permanent legal change by their conduct. However, the approach does not present a criterion according to which the judge will decide what the parties intended in any given case. Therefore, existing approaches make it difficult not only to achieve just and case-tailored results, but also to achieve efficiency and certainty.

 Therefore, the approach proposed in this paper, which is willing to acknowledge the complexity of the cases, and sets up distinctions and auxiliary tests, may in some contexts add not only nuance and solutions tailored to the situation, but also in some contexts present more certainty than existing alternatives.

1. Restatement of Contracts 1981 s. 149. [↑](#footnote-ref-2)
2. See *Pepsi-Cola Bottling Co. of Asbury Park v Pepsico, Inc*., [1972] 297 A. 2d 28 (Del.); *White v Ocean Bay Marina, Inc.,* [2001] 778 So. 2d 412, 412 (Fla. 3d DCA). [↑](#footnote-ref-3)
3. See G. Pasas, “No Oral Modification Clauses: An Australian Response to MWB Business Exchange Centres v Rock Advertising [[2018] 2 WLR 1603](http://www.law.uwa.edu.au/__data/assets/pdf_file/0011/3409733/5.-No-Oral-Modification-Clauses.pdf%22%20%5Ct%20%22_blank)“ (2019) *Western Australia Law Review* 141. [↑](#footnote-ref-4)
4. See F. Wagner-von Papp, ‘‘European Contract Law: Are No Oral Modification Clauses Not Worth the Paper They are Written on?” – DCFR II.-4:105 v. CISG 29(2), UNIDROIT Principles 2.1.18, UCC s. 2-209 and Comparative Law’ 2010. *Current Legal Problems* Vol. 63, 511-596. [↑](#footnote-ref-5)
5. See, *Globe Motors Inc. v TRW Lucas Varity Electric Steering Ltd*. [2016] EWCA Civ 39. But see *United Bank v Asif* [2000] WL 456. [↑](#footnote-ref-6)
6. Pasas, NOM Clauses, 144-145. Wagner-von Pap, European Contract Law, 535-538. [↑](#footnote-ref-7)
7. Beatty v Guggenheim Exploration Co [1919] 225 NY 380, 387. [↑](#footnote-ref-8)
8. *Quality Products & Concepts Co. v. Nagel Precision, Inc*., [2003] 469 Mich. 362, 666 N.W.2d 251; E. McKendrick “The legal effect of an anti-oral variation clause” (2017) 32(10) JIBLR 439, 441. [↑](#footnote-ref-9)
9. CISG ART 29(2). [↑](#footnote-ref-10)
10. Unidroit Prin. art 2.1.18. [↑](#footnote-ref-11)
11. Wagner-von Pap, European Contract Law, 528-533. [↑](#footnote-ref-12)
12. Uniform Commercial Code, Article 2 – Sales (2002), Part 2 Modification, Recession and Wavier s. 2-209(2) (2002). For critical review see D.V. Snyder, “The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver and Estoppel”(1999) 607 *Wisconsin Law Review* 647; R.A. Hillman, “Standards For Revising Article 2 of The UCC: The NOM Clause Model” (1994) 35 *William & Mary Law Review* 1509. [↑](#footnote-ref-13)
13. N.Y. Consolidation Law GOB s. 15-301(1) (McKinney 2010); Beekman, LLC V. Ann/Nassau Realty, LLC 2013 WL 362816 N.Y. App. Div (2013). [↑](#footnote-ref-14)
14. MWB Business Exchange v Rock Advertising [[2018] UKSC 24](https://www.bailii.org/uk/cases/UKSC/2018/24.html); L. Tattersall ‘‘No Oral Modification Clauses: Contractual Freedom Under English And New York Law’’ (2019) *[Journal of International and Comparative Law](https://search.proquest.com/pubidlinkhandler/sng/pubtitle/Journal%2Bof%2BInternational%2Band%2BComparative%2BLaw/%24N/4364864/OpenView/2263280359/%24B/289ADB4FFB234274PQ/1%22%20%5Co%20%22Click%20to%20search%20for%20more%20items%20from%20this%20journal)* Vol. 6 Iss. 1, 117–138. [↑](#footnote-ref-15)
15. This was the ruling of Lord Sumption in MWB Business ibid. With the agreement of Lady Hale, Lord Wilson and Lord Lloyd-Jones. For academic support see L. Dodd ‘No oral modification clauses: solid as a rock’ (2019), *Juridical Review* 4, 342-349; J. Morgan, “Contracting For Self-Denial: On Enforcing ‘No Oral Modification’ Clauses” (2017) *Cambridge Law Journal*, 76(3), 589–615; J. O’Sullivan ‘Unconsidered Modifications’ (2017) 133 LQR 191; E. McKendrick “The legal effect of an Anti-oral Variation Clause” (2017) 32 *Journal of International Banking Law and Regulation*, 439. [↑](#footnote-ref-16)
16. MWB v Rock Advertising [2018] UKSC 24 at [29] (Lord Briggs). [↑](#footnote-ref-17)
17. See L. A. DiMatteo “Equity’s Modification of Contract: An Analysis of the Twentieth Century’s Equitable Reformation of Contract Law” (1998) 33 *New Engand Law Review* 265. For the adoption of this approach in the British law, see *Professional Insurance Corp. v. Cahill*, 90 So. 2d 916, 918 (Fla. 1956). [↑](#footnote-ref-18)
18. See L. Tattersall, “No Oral Modification Clauses”, 121, 130-131 See also B. OglindᾸ, ‘‘Modification of Clauses on the Basis of the Contractual Conduct of the Parties. Application of Estoppel Doctrine’’ (2014) 3 *[Perspectives of Law and Public Administration](https://ideas.repec.org/s/sja/journl.html)* 184*.*  [↑](#footnote-ref-19)
19. See MWB v Rock Advertising [2018] UKSC 24 (Lord Sumption). [↑](#footnote-ref-20)
20. See S. Macaulay “Non-Contractual Relations in Business: A Preliminary Study” (1963) 28 *American Sociological Review* 55. [↑](#footnote-ref-21)
21. See I. R. Macneil, “The Many Futures of Contracts” (1974) 47 *Southern California Law Review* 691; I. R. Macneil, “Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law”, 72 *North Western University Law Review* 854. [↑](#footnote-ref-22)
22. R. E. Scott, “Formalism in Relational Contract” (2000) 94 *North Western University Law Review* 847; R. Scott, R. Gilson and C. Sabel Braiding, “The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine” (2010) 110 *Columbia Law Review* 1377. [↑](#footnote-ref-23)
23. See H. Collins, *Is a relational contract a legal concept?* (2016) Degeling, Simone, Edelman, James and Goudkamp, James, (eds.) Contract in Commercial Law. Thomson Reuters, Toronto, Canada. [↑](#footnote-ref-24)
24. See D. Campbell, ‘‘Good Faith and the Ubiquity of the ‘Relational’ Contract” (2014) 77 *The Modern Law Review* 460; D. Campbell, *The Relational Constitution of the Discrete Contract* (1996) Campbell and Peter Vincent-Jones (eds), Contract and Economic Organisation: Socio-legal Initiatives. . [↑](#footnote-ref-25)
25. See D. Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart 2003); D. Kimel,‘‘The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model’’ (2007) *Oxford Journal of Legal Studies*, vol. 27, Issue 2, 233. [↑](#footnote-ref-26)
26. E. Zamir, ‘‘Contract Law and Theory – Three Views of the Cathedral’’ (2014) 81 *University of Chicago Law Review* 2077–2123. [↑](#footnote-ref-27)
27. See R. Brownsword, *After Investors: Interpretation, Expectation and the Implicit Dimension of the ‘New Contextualism’ Implicit Dimensions of Contract Discrete, Relational, and Network Contracts* (Editor(s): [David Campbell,](https://www.bloomsburyprofessional.com/uk/author/david-campbell) [Hugh Collins,](https://www.bloomsburyprofessional.com/uk/author/hugh-collins) [John Wightman](https://www.bloomsburyprofessional.com/uk/author/john-wightman) 2003); R. Brownsword, *Contract Law: Themes for the Twenty-First Century* (Oxford: Oxford University Press, 2nd ed, 2006). [↑](#footnote-ref-28)
28. See J.M. Feinman, “Relational Contract Theory: Unanswered Questions A Symposium in Honor Of Ian R. Macneil: Relational Contract Theory In Context” (2000) 94 *North Western University Law Review* 737; R.E. Speidel, “Relational Contract Theory: Unanswered Questions A Symposium In Honor Of Ian R. Macneil: The Characteristics And Challenges Of Relational Contracts” (2000) 94 *North Western University Law Review* 823. [↑](#footnote-ref-29)
29. See, e.g., J. Kidwell ‘‘A Caveat’’ [1985] *Wisconsin Law Review* 615 ; J. Gava, ‘‘False Lessons from the Real Deal’’ (2005) 21 *Journal of Contract Law* 182. [↑](#footnote-ref-30)
30. See R.E. Scott, “A Theory of Self-Enforcing Indefinite Agreements” (2003) 103 *Columbia Law Review* 1641. [↑](#footnote-ref-31)
31. See [S. Lifshitz](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Lifshitz%2C+Shahar) and [E. Finkelstein](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Finkelstein%2C+Elad) “A Hermeneutic Perspective on the Interpretation of Contracts” (2017) 54 *American Business Law Journal* 519; R. Scott and A. Schwartz *“*Contract Interpretation Redux” (2010) 119 *Yale Law Journal* 926; S.J. Burton, *Elements of Contract Interpretation 1* (2009). [↑](#footnote-ref-32)
32. See A. A. Schwartz “A Standard Clause Analysis of the Frustration Doctrine and the Material Adverse Change Clause” (2010) 57 *UCLA L. Rev.* 789. [↑](#footnote-ref-33)
33. For initial application of the general dispute to the NOM Clause See Morgan, “Contracting For Self-Denial” The Cambridge Law Journal (2017) 589. [↑](#footnote-ref-34)
34. See: [Lifshitz](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Lifshitz%2C+Shahar) and [Finkelstein](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Finkelstein%2C+Elad) 2017. [↑](#footnote-ref-35)
35. See R. Gilmore, *the Death Of Contract* (1974); P.S. Atiyah, *The Rise And Fall Of Freedom of Contract* (1979); R. Kreitner, *Calculating Promises — the Emergence of Modern American Contract Doctrine* (2007). [↑](#footnote-ref-36)
36. [S. Macaulay](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Macaulay%2C+Stewart), ‘The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules’’ (2003) 66 *Modern Law Review* 46. But see C. Mitchell, “Contracts and Contract Law: Challenging the Distinction between the ‘Real’ and ‘Paper’ Deal” (2009) 29 *Oxford Journal of Legal Studies* 675. [↑](#footnote-ref-37)
37. See R. Macneil, ‘‘Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law’’ (1978) 72 *North Western University Law Review* 85; C. Mitchell, *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation*, Hart, Oxford § 7–12 (2013). [↑](#footnote-ref-38)
38. See Macaulay, “Non-Contractual Relations in Business”; H. Beale and T. Dugdale, ‘‘Contracts between Businessmen: Planning and the Use of Contractual Remedies’’ (1975) vol. 2 *British Journal of Law and Society* 45–60. [↑](#footnote-ref-39)
39. [Macaulay](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Macaulay%2C+Stewart), “The Real and the Paper Deal”pp.44-79. Bozovic Iva and Hadfield Gillian K., Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation (2015). USC CLASS Research Paper No. C12-3; USC Law Legal Studies Paper No. 12-16. at SSRN: [http://ssrn.com/abstract=1984915](http://ssrn.com/abstract%3D1984915); [↑](#footnote-ref-40)
40. See e.g. D. Lewinsohn-Zamir, ‘‘More is Not Always Better than Less – An Exploration in Property Law’’ (2008) *[92 Minnesota Law Review](http://www.lexis.com/research/buttonTFLink?_m=b5fd55a13d45bed30370cc3ef89df1f2&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b21%20Tex.%20J.%20Women%20%26%20L.%20119%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=258&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b92%20Minn.%20L.%20Rev.%20634%2cat%20713%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAl&_md5=2b6c5d1c25f74048e503b1694cc2493d)* [634, 710-11.](http://www.lexis.com/research/buttonTFLink?_m=b5fd55a13d45bed30370cc3ef89df1f2&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b21%20Tex.%20J.%20Women%20%26%20L.%20119%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=258&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b92%20Minn.%20L.%20Rev.%20634%2cat%20713%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAl&_md5=2b6c5d1c25f74048e503b1694cc2493d) For a critical review see: J. Morgan, Contract Law Minimalism – A Formalist Restatement Of Commercial Contract Law 189-253 (2013); J. Gava, ‘‘Taking Stewart Macaulay and Hugh Collins Seriously’’ (2016) 33 *Journal of Contract Law*, 2016, 108-134; [↑](#footnote-ref-41)
41. See E. Zamir ‘‘The Inverted Hierarchy of Contract Interpretation and Supplementation’’ (1997) *97 Columbia Law Review* 1710, 1771-1777. [↑](#footnote-ref-42)
42. See L. Bernstein, ‘‘Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’’ (1992) 21 *The Journal of Legal Studies* 115; L. Bernstein, ‘‘Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions’’ (2001), 99 *Michigan Law Review* 1724 ; G. Miller and T. Eisenberg, ‘The Market for Contracts’ (2009)30 *Cardozo Law Review* 2073. but See U. Benoliel, ‘‘The Course of Performance Doctrine in Commercial Contracts: An Empirical Analysis’’ (2018) 68 *Depaul Law Review* 1. [↑](#footnote-ref-43)
43. See L. Bernstein, ‘‘The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study’’ (1999) 66 *University of Chicago Law Review* 710. See also R.E. Scott, ‘‘The Death of Contract Law’’ (2004) 54(4**)** *University of Toronto Law Journal*369. [↑](#footnote-ref-44)
44. Adherents of relational contract theory reject neo-formalist sociological analysis. They claim that contractual parties typically expect all relations between them, in particular conduct that attests to solidarity and mutual consideration, be given contractual validity See E.J. Leib, “Contracts and Friendships” (2009-2010) 59 *Emory Law Journal* 649. [↑](#footnote-ref-45)
45. See above, the introductory chapter. [↑](#footnote-ref-46)
46. See Lord Briggs’s position in *MWB v Rock* [2019] AC 119. [↑](#footnote-ref-47)
47. See Wagner-von Papp, ‘European Contract Law” 18-19, 50-52, 63-65. [↑](#footnote-ref-48)
48. See Mitchell, *Contract Law and Contract Practice*, Ch. 6. [↑](#footnote-ref-49)
49. See e.g. Section J of Fraser J’s judgment in *Alan Bates & others v Post Office Ltd (No. 3)* [2019] EWHC 606 (QB). [↑](#footnote-ref-50)
50. R.E. Barnett, ‘The Sound of Silence: Default Rules And Contractual Consent’ (1992) 78 *Virginia Law Review* 821; Mitchell, *Contract Law and Contract Practice*, ch. 6. [↑](#footnote-ref-51)
51. See S. Macaulay, “Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein” (2000) 94 *North Western University Law Review* 775-804. [↑](#footnote-ref-52)
52. See above, Chapter II Part A. [↑](#footnote-ref-53)
53. See *Professional Insurance Corp. v. Cahill*, 90 So. 2d 916, 918 (Fla. 1956). [↑](#footnote-ref-54)
54. In many cases, these arguments are based on the rationale of estoppel. See A. Robertson, *Revolutions and Counterrevolutions in Equitable Estoppel* Published in S. Worthington, A Robertson and G Virgo (eds), Revolution and Evolution in Private Law (Oxford, Hart Publishing, 2018) 161–175. [↑](#footnote-ref-55)
55. S. Baker and A.H. Choi, ‘‘Contract’s Role in Relational Contract’’ 101 Virginia Law Review, (2015) 559-607. [↑](#footnote-ref-56)
56. See Macaulay, “Relational Contracts Floating on a Sea of Custom”. [↑](#footnote-ref-57)
57. The neo-formalist opposition is based also on psychological research of the effect of crowding out, according to which, in some situations, external reinforcement of a particular behavior eventually leads to its extinction. See U. Gneezy and A. Rustichini, “A Fine Is a Price” (2000) 29 *The Journal of Legal Studies* 29, 1. See also E.H. Atiq, “Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives” (2014) 123 *Yale Law Journal* .862 [↑](#footnote-ref-58)
58. See above Chapter II, Part B. [↑](#footnote-ref-59)
59. See C.J. Goetz and R.E. Scott, ‘‘The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms’’ (1985) 73 *California Law Review* 261. See also: O. B. Shahar Formalism ‘‘In Commercial Law: The Tentative Case against Flexibility in Commercial Law’’(1999) 66 *University of Chicago Law Review* 781, 811-813. [↑](#footnote-ref-60)
60. Formal legal norms are more efficient and preferable to non-legal ones because they are clearer and easier to prove in court. See Eric A. Posner A Theory of Contract Law Under Conditions of Radical Judicial Error (2002) 94 *Nw. U. L. Rev*. 749 (2000). *Cf*: Lifshitz and Finkelshtein. [↑](#footnote-ref-61)
61. For example, when the contract terms are unclear, focusing merely on these terms might lead to litigation, while broadening the perspective to the parties’ actual behavior may be easier to prove in practice. See F. Ellinghaus and T. Wright, ‘‘The Common Law of Contracts: Are Broad Principles Better than Detailed Ones? An Empirical Investigation’’ (2005) *Texas Wesleyan Law Review* Vol. 11, No. 2. [↑](#footnote-ref-64)
62. See Mitchell, *Contract Law and Contract Practice*, at 86-88. Leib, “Contracts and Friendships,” 670. [↑](#footnote-ref-65)
63. For an analysis of the economic logic underlying NOM clauses, see para. 12 to the opinion of Lord Sumption in MWB v Rock Advertising [2018] UKSC 24. [↑](#footnote-ref-66)
64. For a similar conclusion *cf*.: Morgan, “Contracting For Self-Denial” 589–615. [↑](#footnote-ref-67)
65. See Morgan, *ibid.* [↑](#footnote-ref-68)
66. See R.J. Gilson, C.F. Sabel and R.E Scott*, ‘‘*Text and Context: Contract Interpretation as Contract Design’’ (2014) 100 *Cornell Law Review* 23. [↑](#footnote-ref-69)
67. See Morgan, “Contracting For Self-Denial” 112; J. Gava, “How Should Judges Decide Commercial Contract Cases?” (2013) 134 30 *Journal of Contract Law.* See also: *Alan Bates & others v Post Office Ltd (No. 3)* [2019] EWHC 606 (QB) para 715.; See also: R. A. Hillman, “How to Create a Commercial Calamity” (2007) 68 *Ohio State Law Journal* 335. [↑](#footnote-ref-70)
68. See W. Shaw, ‘Contracting Out Of Contractual Freedom: No-Oral Modification Clauses And Effecting Party Intention’ *A dissertation submitted in partial fulfillment of the degree of Bachelor of Laws (with Honours) at the University of Otago* ;October 2018. [↑](#footnote-ref-71)
69. Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 Yale L. J. 541 (2003). [↑](#footnote-ref-72)
70. For extensive use of this category in many contexts of customary law, see . [↑](#footnote-ref-73)
71. See Miller, *ibid*. [↑](#footnote-ref-76)
72. See Schwartz & Scott, \_\_\_\_ “(1) an entity that is organized in the corporate form and that has five or more employees, (2) a limited partnership, or (3) a professional partnership such as a law or accounting firm.” [↑](#footnote-ref-77)
73. See above, Chapter II, Part B (3). [↑](#footnote-ref-80)
74. See P. Frimpong-Manso and A. Nikas, “The application of post tender negotiation procedure: a public sector procurement perspective in UK” [2016] *International Journal of Information Systems and Project Management* Vol. 4, No. 2, 23-39. [↑](#footnote-ref-81)
75. See below, in Chapter III, Part C . [↑](#footnote-ref-82)
76. See: Gilson, Sabel and Scott*,* “Text and Context”. See also: Shaw, “Contracting Out Of Contractual Freedom”. [↑](#footnote-ref-83)
77. Less common instances also exist in which parties who are not considered sophisticated but where nevertheless legally advised throughout their relationship. Since these are intermediate cases, they must be delt with in accordance with their concrete circumstances. [↑](#footnote-ref-84)
78. See our analysis above, in Chapter II . [↑](#footnote-ref-85)
79. MWB Business Exchange Centres Ltd. v Rock Advertising Ltd [2016] EWCA Civ 553 (21 June 2016). [↑](#footnote-ref-86)
80. See Chapter IV, Part B below. [↑](#footnote-ref-88)
81. Arthur A. Leff “*Unconscionability and the Code - The Emperor’s New Clause*” 115 U. Pa. L. Rev. 485 (1967); Enonchong, N. (2018). *The modern English doctrine of unconscionability*. Journal of Contract Law, 34(3), 211-239. [↑](#footnote-ref-89)
82. *Cf.*: MORAGN (2017) which raises the possibility of using the aforementioned clause, but at the same time points to the difficulty in applying it in the event of equally balanced parties. [↑](#footnote-ref-90)
83. See above Chapter II, Part A. [↑](#footnote-ref-93)
84. Consumer Rights Act 2015, S. 62. [↑](#footnote-ref-94)
85. See Morgan, *ibid.* [↑](#footnote-ref-96)
86. Miller, *ibid*., proposes a similar definition of the distinction between experienced parties and parties characterized by power disparities. [↑](#footnote-ref-97)
87. See *supra*., Part IIA2 where we discussed the difficulty in applying these doctrines between equally powerful parties, and therefore, following Morgan, *ibid.*, we opined that their use should be limited to extreme cases only. On the other hand, as part of the trend suggested in the paper not to adhere to unequivocal binary definitions, we can imagine scenarios which will not be included in the formal definition of consumer laws, but would still materially justify suspicion of a NOM clause. In those cases, we believe, there is scope for more widespread application of the general doctrines. However, accurate analysis of existing case law, the question of whether it can be correlated to existing case law, or that current case law should be departed from, and a new category developed, is beyond the scope of this paper. [↑](#footnote-ref-98)
88. See Wagner-von Papp, “European Contract Law” 35. See also: *Energy Venture Partners Ltd. v Malabu Oil and Gas Ltd*. [2013] EWHC 2118 (Comm) 274. [↑](#footnote-ref-102)
89. See *Rose v. Spa Realty Assoc*. 42 N.Y.2d 338 (1977). [↑](#footnote-ref-103)
90. In the event that there is no NOM clause, these auxiliary tests will be significant also for sophisticated parties in order to understand whether the modification by conduct does indeed reflect a desire for significant change. [↑](#footnote-ref-104)
91. See *Williams v Roffey Bros & Nicholls* (Contractors) Ltd [1989] EWCA Civ 5. [↑](#footnote-ref-105)
92. See Wagner-von Papp, “European Contract Law”, 39. [↑](#footnote-ref-106)
93. See above, Chapter II, Part B (3). [↑](#footnote-ref-107)
94. For a new ruling in Israel in this spirit, see Judge Alex Stein’s decision in: CA 7649/18 *Bibi Roads Dirt and Development Ltd. v. Israel Railways Ltd*. (Posted in Nevo 20.11.2019) Judge Ofer Grosskopf, in this case, proposed another distinction that is focused more on the identity of the parties to the contract, a distinction reminiscent of that proposed by us in the chapter dealing with context. See above Chapter IV Part A. [↑](#footnote-ref-108)
95. See above, Chapter II, Part B (3). [↑](#footnote-ref-109)
96. See E.A. Posner, “There Are No Penalty Default Rules in Contract Law” (2006) 33 *Fla. St. U. L. Rev*. 563. [↑](#footnote-ref-110)
97. See above, Chapter VI, Part B(3). [↑](#footnote-ref-111)
98. See above, Chapter II, Part B. [↑](#footnote-ref-112)
99. MWB Business Exchange v Rock Advertising [2019] AC 119 [↑](#footnote-ref-113)
100. See above, Chapter III B. [↑](#footnote-ref-114)
101. N.Y. Consolidation Law GOB s. 15-301(1) (McKinney 2010); Beekman, LLC V. Ann/Nassau Realty, LLC 2013 WL 362816 N.Y. App. Div (2013) [↑](#footnote-ref-115)
102. SeeM.J. Jimenez, ‘The Many Faces Of Promissory Estoppel: An Empirical Analysis Under The Restatement (Second) Of Contracts’ (2010) 57 *UCLA Law Review* 669. [↑](#footnote-ref-116)
103. See Robertson, *Revolutions and Counterrevolutions*, 161–175 . [↑](#footnote-ref-117)
104. MWB Business Exchange v Rock Advertising [2019] AC 119, at [16] (Lord Sumption) . [↑](#footnote-ref-118)
105. See in the U.S.: EMI Music Mktg. v. Avatar Records, Inc., 317 F.Supp.2d 412, 421 (S.D.N.Y.2004). [↑](#footnote-ref-119)
106. See Robertson, *Revolutions and Counterrevolutions*, 10. [↑](#footnote-ref-120)
107. Note that the position presented here represents a middle ground between two fundamental approaches regarding estoppel and its ability to create a new right. Ibid., at 162. [↑](#footnote-ref-121)
108. See L. L. Fuller and W.R. Perdue, “The Reliance Interest in Contract Damages” (1937) 2, 46 *Yale Law Journal.* [↑](#footnote-ref-122)
109. See Jimenez, “The Many Faces Of Promissory Estoppel”. [↑](#footnote-ref-123)