LEGAL EFFECT OF NO ORAL MODIFICATION CLAUSE IN MALAYSIA: A QUEST FOR FREEDOM OF CONTRACT

Ng Seng Yi*

Abstract

A 'No Oral Modification' clause ('NOM clause') essentially prohibits any subsequent variation of the contract unless it is similarly made in writing. Although such clause serves as a boilerplate clause in most circumstances, it has however unexpectedly become the cause of litigation in many instances across Commonwealth jurisdictions, dealing with the predicament of what should happen where the parties have subsequently orally agreed to vary their original agreement despite the existence of a NOM clause. This conundrum depicts that the notion of freedom of contract is itself not entirely straightforward. To this end, three distinct schools of thought in interpreting the same have been recently developed by the apex court of the United Kingdom and Singapore in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* and *Charles Lim Teng Siang and another v Hong Choon Hau and another* respectively. This article seeks to examine the legal approach(es) taken by the Malaysian courts in construing the enforceability of the NOM clause in the light of Malaysian case law and legislative regime, as well as the distinctive positions adopted by its judicial counterparts. It is found that while there appears to be at least two decisions of the Malaysian High Court adopting slightly diverging approaches, the local judicial trend largely suggests that the parties may contract out of section 92 of the Malaysian Evidence Act 1950 (and the exceptions therein) and the legal effect of the NOM clause is to be upheld. It is also submitted that a NOM clause is useful for several sensible commercial reasons.

Keywords: No oral modification, freedom of contract, contract law, Malaysia

* Advocate & Solicitor (High Court of Malaya). The author is immensely indebted to Tan Sri Dato' Seri Dr. Visu Sinnadurai and Mr. Low Weng Tchung for their constant intellectual inspiration and guidance. All errors in this article remain the author's own.

I INTRODUCTION

The concept of freedom of contract is so fundamental to,[1] and is often seen as a pivotal function of the law of contract.[2] To this end, contracting constitutes an expression of the free will of the parties[3] to agree on any terms they think fit. More often than not, a 'No Oral Modification' clause ('NOM clause') is incorporated in the contract to uphold the original contractual intention of the parties which has been reduced into writing. However, the question of whether such clause is legally effective to confine the parties' own future contractual rights arguably remains a controversial and evolving legal issue in Commonwealth jurisdictions. In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*,[4] Lord Sumption, who delivered the majority judgment of the UK Supreme Court held that a NOM clause is enforceable and shall be accorded full legal effect ('Lord Sumption's Approach'). Lord Briggs, in his Lordship's concurring judgment, agreed with Lord Sumption that a NOM clause has legal effect, but went on to state that parties could however agree to remove a NOM clause orally. To this end, the court must be satisfied that the parties have by necessary implication or express representation agreed to dispense with the requirement of the NOM clause to validate an oral variation ('Lord Briggs' Approach').

Indeed, the two distinct schools of thought in treating the enforceability of a NOM clause as propounded in *MWB* have sparked vigorous academic debates among legal scholars,[5] and have been judicially considered in other Commonwealth countries. One notable instance is the decision of the Singapore Court of Appeal in *Charles Lim Teng*

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1 In *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462, 465, Sir George Jessel MR notably observed that 'men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice'. This passage was cited by the Federal Court in *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1, 12 [27] (FC). See also, a brief discussion by the learned authors on the evolution of freedom of contract motivated by economic and social affairs: Sir Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract (*Oxford University Press, 31st ed, 2020) 4.

2 *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15, 38 [47] (FC). Freedom of contract is however qualified by law in certain circumstances, for instance, (i) public policy or illegality: Contracts Act 1950 (Malaysia) ('Contracts Act') s 24; *Merong Mahawangsa Sdn Bhd & Anor v Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619, 651 [69] (FC) (ii) restraint of trade: Contracts Act s 28; *Polygram Records Sdn Bhd v The Search & Anor* [1994] 3 MLJ 127, 162-163 (HC); (iii) penalty: Contracts Act s 75.

3 Janet O'Sullivan, *O'Sullivan & Hilliard's The Law of Contract* (Oxford University Press, 9th ed, 2020) 3-4.

4 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] 4 All ER 21 (UKSC) ('MWB').

5 Paul S Davies, 'Varying Contracts in the Supreme Court' (2018) 77(3) *Cambridge Law Journal* 464; James C Fisher, 'Contract Variation in the Common Law: A Critical Response to Rock Advertising v MWB Business Exchange' (2018) 47(3) *Common Law World Review* 196; Janet O'Sullivan, 'Party-agreed Formalities for Contractual Variation – A Rock of Sense in the Supreme Court?' (2019) 135(Jan) *Law Quarterly Review* 1; Joshua Tayar, 'Concerning the Enforceability of No Oral Modification Clauses: Rock Advertising Ltd v MWB Business Exchange Centres Ltd' (2019) 20(1) *Business Law International* 81; Elad Finkelstein and Shahar Lifshitz, 'The Tension between the Real and the Paper Deal Concerning "No Oral Modification" Clauses' (2021) 80(3) *Cambridge Law Journal* 460; Thomas Raphel, 'Tying Your Own Hands: the Supreme Court's Decision in Rock Advertising' (2022) 138 (Apr) *Law Quarterly Review* 299; Andrew Burrows, 'Anti-Oral Variation Clauses: Rock-Solid or Rocky?' in Paul S Davies and Magda Raczynska (ed) *Contents of Commercial Contracts Terms Affecting Freedoms* (Hart Publishing, 2020) 35.

Siang and another v Hong Choon Hau and another,[6] where it in turn suggested in *obiter* a diverging approach, ie a NOM clause merely raises a rebuttable presumption that there would be no effective variation in absence of a written agreement, and to rebut the same would necessitate cogent evidence of an oral variation agreed upon by the parties ('*Charles Lim*'s Approach').

It should be pointed out at this juncture, as a NOM clause is commonly found in written contracts as a boilerplate clause, the Malaysian courts have in fact in numerous earlier occasions adjudicated upon the legal effect of a NOM clause before *MWB* and *Charles Lim*. This article seeks to examine the legal approach(es) taken by the Malaysian courts in construing the enforceability of the NOM clause in the light of Malaysian case law and the local legislative regime, as well as the distinctive positions adopted by its judicial counterparts.

In this article, Part II seeks to discuss the case of *MWB* alongside the approaches propounded by Lord Sumption and Lord Briggs, whereas Part III studies the decision of the Singapore Court of Appeal in *Charles Lim*. Part IV discusses the relevant local legislative regime and case law in Malaysia, supplemented by a brief discussion on the relevant policy considerations. Finally, this article concludes in Part V.

II THE CASE OF *MWB*

In *MWB*, the parties entered into a licence agreement where Rock Advertising was to rent an office space from MWB for a term of twelve months in return for the payment of licence fees. Rock Advertising fell into arrears of the said fees. Pursuant to verbal discussions between the principal of Rock Advertising and a senior credit controller of MWB, the parties agreed on a revised payment schedule. A more senior representative of MWB subsequently rejected this proposal, and sought to evict Rock Advertising and to claim arrears of the outstanding rent. One of the issues before the court was whether the oral agreement between the parties in respect of the payment plan had varied the licence notwithstanding the existence of a NOM clause in the licence agreement. The trial judge ruled that, *inter alia*, the variation was ineffective as it was not recorded in writing as required by the NOM clause therein. On appeal, Kitchin LJ (with whom McCombe LJ and Arden LJ concurred) held that the oral variation was effective notwithstanding its non-compliance with the NOM clause. It was noted that the overriding notions of freedom of contract and party autonomy allow parties to remain free to depart from the NOM clause previously agreed upon by the parties. Interestingly, this ruling coincided with the earlier English case laws, including the *obiter* view of the England and Wales Court of Appeal's decision in *Globe Motors Inc and others v TRW Lucas Varity Electric Steering Ltd and another*.[7]

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6 *Charles Lim Teng Siang and another v Hong Choon Hau and another* [2021] 2 SLR 153 (CA Singapore) ('Charles Lim').

7 *Globe Motors Inc and others v TRW Lucas Varity Electric Steering Ltd and another* [2017] 1 All ER (Comm) 601 (EWCA). In *Glove Motors*, the England and Wales Court of Appeal in examining its two earlier conflicting authorities in *United Bank Ltd v Asif* (unreported) and *I-Way Ltd v World Online Telecom UK Ltd (formerly Localtel Ltd)* [2002] EWCA Civ 413, preferred the latter which held that a contract could, in principle, be varied orally notwithstanding a NOM clause. This mirrors a well-known passage of the New York Court of

At the Supreme Court, Lord Sumption (with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed) in delivering the leading judgment, reversed the Court of Appeal's ruling and upheld the decision at first instance that a NOM clause was legally effective invalidating the said impugned oral variation. Lord Briggs concurred but for different reasons.

Lord Sumption perceived party autonomy as a 'fallacy' which merely 'operates up to the point when contract is made, but thereafter only to the extent that the contract allows'.[8] His Lordship suggested that failing to enforce a NOM clause is the real threat to party autonomy as it does not give effect to the parties' freedom to autonomously decide the form of any variation.[9] Whilst acknowledging that simple contracts are not constrained by any formal requirements where oral agreements can be enforceable,[10] and that such flexibility 'enables agreements to be made quickly, informally and without the intervention of lawyers or legally drafted documents',[11] Lord Sumption suggested that there are legitimate commercial reasons that businessmen might see such flexibility as a 'mixed blessing' and therefore seek to give effect to a NOM clause for three reasons, ie (i) to prevent 'attempts to undermine written agreements by informal means', (ii) to avoid 'disputes not just about whether a variation was intended but also about its exact terms', and (iii) as 'a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree to them'.[12] Besides, Lord Sumption said that both entire agreement and NOM clauses essentially serve a similar purpose, ie to 'achieve contractual certainty about the terms agreed' by the contracting parties, and there is no sensible reason to enforce one but not the other.[13] Lord Sumption also suggested that parties' failure to comply with the formalities prescribed in a NOM clause is often not that they intend to dispense with it, but rather that they have overlooked it.[14]

On the other hand, whilst agreeing with Lord Sumption in general, Lord Briggs in his Lordship's concurring judgment took a slightly different approach. Lord Briggs opined that if the parties enter into a written agreement containing a NOM clause, such clause is enforceable as long as either party insists upon it. Accordingly, any oral variations shall be treated as invalid unless and until they are reduced to writing, or the NOM clause is itself expressly dispensed with by the parties. This, in turn, 'fully reflects the autonomy of parties to bind themselves as to their future conduct, while preserving their autonomy to agree to release themselves from that inhibition'.[15] Next, Lord Briggs disagreed with Lord Sumption's analogy on the entire agreement clause. His Lordship viewed that, unlike a NOM clause, an entire agreement clause does not seek to bind the parties as to their

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Appeal's judgment in *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 at 387-388 where Cardozo J stated that '[t]hose 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'.

8 *MWB* (n 4), 26-27 [11].

9 Ibid.

10 *MWB* (n 4), 25-26 [7].

11 *MWB* (n 4), 27 [12].

12 Ibid.

13 *MWB* (n 4), 28-29 [14].

14 *MWB* (n 4), 29-30 [15].

15 *MWB* (n 4), 32 [25].

future conduct.[16] Lord Briggs endorsed a 'more cautious recognition of the effect of a NOM clause, namely that it continues to bind until the parties have expressly (or strictly by necessary implication) agreed to do away with it', which would ultimately promote commercial certainty and avoid disputes on the alleged oral variation.[17]

Following the diverging approaches propounded in *MWB*, a cursory review of the English case law decided thereafter reveals that Lord Sumption's Approach has generally been adopted by the English courts to enforce a NOM clause regulating the manner in which a contract can be validly modified.[18]

III THE CASE OF *CHARLES LIM*

In *Charles Lim*, two intriguing issues were put before the enlarged five-judge coram of the Singapore Court of Appeal,[19] ie (i) whether a clause which prohibits variation, supplement, deletion or replacement unless made in writing and signed by or on behalf of both parties applies to rescission, and (ii) assuming that an oral variation has been proved, can the other party rely on such a clause to invalidate such variation?[20]

The appellants commenced an action against the respondents for a breach of a sale and purchase agreement ('SPA') due to failure to complete a purported share transaction. The respondents contended that the SPA had earlier been orally rescinded by mutual agreement, but such position was contested by the appellants. The Singapore High Court found that the SPA was validly rescinded.[21] On appeal, the appellants raised a new point pertaining to a NOM clause contained in the impugned SPA, which stipulated that:

> No variation, supplement, deletion or replacement of or from this Agreement or any of its terms shall be effective unless made in writing and signed by or on behalf of each Party.

Steven Chong JCA, in delivering the judgment of the Singapore Court of Appeal, dismissed the appeal for two reasons, ie (i) the wordings employed in the NOM clause demonstrated that it did not apply to oral rescission, and (ii) even if the said NOM clause had invalidated the oral rescission, the appellants would have been estopped from

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16 *MWB* (n 4), 33 [28].

17 *MWB* (n 4), 34 [31].

18 See, eg, *NHS Commissioning Board v Vasant (trading as MK Vasant & Associates) and other* [2020] 1 All ER (Comm) 799, 807 [32] (EWCA); *Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd and others* [2020] 2 All ER (Comm) 97, 103 [24] (EWCA); *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 [77]-[81] (EWCA).

19 Notably, a five-judge panel of the Singapore Court of Appeal would normally only convene to hear 'selected cases of jurisprudential significance, so that where difficult or unsettled issues arise for consideration, these are resolved with the benefit of the collective wisdom and insights of a larger pool of judges: see Sundaresh Menon, 'Response by Chief Justice Sundaresh Menon' (Opening of the Legal Year 2014, Singapore, 3 January 2014) [31]. See also, Lau Kwan Ho, 'Enlarged Panels in the Court of Appeal of Singapore' [2019] 31 *Singapore Academy of Law Journal* 907.

20 *Charles Lim* (n 6), 156 [2].

21 *Lim Teng Siang Charles and another v Hong Choon Hau and another* [2020] SGHC 182 (HC Singapore).

enforcing the SPA.[22] Notwithstanding the fact that the NOM clause in question was not engaged, the Singapore Court of Appeal nevertheless went on to make certain provisional observations on the legal effect of a NOM clause.

Whilst acknowledging that there are legitimate commercial reasons to incorporate a NOM clause (similar to those set out by Lord Sumption in *MWB*),[23] Steven Chong JCA enunciated that the existence of such reasons 'do not offer a legitimate basis to prevent parties from varying a contract orally where such an oral variation can be proven',[24] and went further to set out three schools of judicial thought pertaining to the legal effect of a NOM clause. Apart from Lord Sumption's Approach and Lord Briggs' Approach in *MWB*, Steven Chong JCA identified a third approach as the proposition endorsed in obiter by the Singapore Court of Appeal earlier in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd*,[25] ie 'a NOM clause merely raises a rebuttable presumption that in the absence of an agreement in writing, there would be no variation'.[26] His Honour expressed reservations against the approaches propounded by Lord Sumption and Lord Briggs, and preferred the *Comfort Management* approach.

To begin with, Steven Chong JCA disagreed with Lord Sumption's Approach as to what party autonomy entails. In His Honour's view, there ought to be a fine distinction between individual autonomy and the collective autonomy of the contracting parties. Save for limited situations such as illegality, if the parties mutually agree to subsequently vary the contract orally notwithstanding an initial limitation imposed by a NOM clause, their autonomy to do so should be upheld as it reflects the 'more recent intention of the parties'.[27] Whilst His Honour concurred with some of the statements of Lord Briggs which uphold the parties' collective autonomy, it was opined that Lord Briggs' Approach was impractical,[28] and that the *Comfort Management* approach was preferred because under this approach, in inferring that the parties have by necessary implication agreed to depart from a NOM clause, it does not strictly require the parties to 'have specifically addressed their minds to dispense with the NOM clause when agreeing to an oral variation'.[29] Rather, the test should be:

> [W]hether at the point when parties agreed on the oral variation, they would necessarily have agreed to depart from the NOM clause had they addressed their mind to the question, regardless of whether they had actually considered the question or not.[30]

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22 *Charles Lim* (n 6), 178-179 [86].

23 *Charles Lim* (n 6), 164 [36].

24 *Charles Lim* (n 6), 164 [37].

25 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 (CA Singapore).

26 *Charles Lim* (n 6), 165 [38].

27 *Charles Lim* (n 6), 166-167 [43]-[47].

28 *Charles Lim* (n 6), 169 [52].

29 *Charles Lim* (n 6), 171-172 [61].

30 *Charles Lim* (n 6), 169 [54]. Curiously, it is conceptually similar to the necessity test as explained by Lord Briggs in *MWB* (n 4), 33 [30].

The test appears to then focus on the proper application of evidential rules and not by the law of contract. Drawing an analogy with the inherent difficulty in proving civil fraud, Steven Chong JCA emphasised that whilst the *Comfort Management* approach requires the party alleging oral variation to rebut the presumption by adducing more cogent evidence to prove the same, it does not constitute a third standard of proof.[31] In other words, the standard remains as the civil standard on a balance of probabilities. Once the burden of proof is discharged, the NOM clause would not apply because the purported oral variation reflects the collective decision of the contracting parties.[32]

On this note, it may be relevant to highlight at this juncture that while the Singapore Court of Appeal in *Charles Lim* postulated its approach premised on evidential rules, it however did not seem to have considered the scope of section 94 of the Singapore Evidence Act 1893[33] (*in pari materia* with section 92 of the Malaysian Evidence Act 1950 which is modelled upon the Indian Evidence Act) which in essence provides for the exclusion of evidence of oral agreement save for certain exceptions. For the discussions that follow in the next section to this article, it would appear that the decision of the Singapore Court of Appeal in *Charles Lim* on the issue of construction of extrinsic evidence may be inconsistent with its earlier decisions, especially in relation to its omission to consider section 94 of the Singapore Evidence Act 1893 (and the provisos therein).

IV LEGAL ANALYSIS

A *Oral agreement (variation) in Malaysia*

In general, oral agreement has legal effect and is enforceable by the contracting parties. In fact, under the Malaysian contract law regime, so long as the legal requirements such as offer,[34] acceptance,[35] consideration[36] and capacity[37] are fulfilled, an agreement enforceable by law[38] is a contract[39] and is binding upon the parties.[40] It does not require a contract to be reduced into writing before it is to be accorded with legal force. The law is trite in this regard.[41]

What is often contentious is not the validity or legal effect of an oral agreement per se, but the existence of the oral agreement. In many instances, the issue of whether an oral agreement exists, albeit the evidence of which in certain circumstances is admittedly

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31 *Charles Lim* (n 6), 170 [56].

32 *Charles Lim* (n 6), 170-171 [58].

33 Evidence Act 1893 (Chapter 97) (Singapore).

34 Contracts Act s 2(a).

35 Contracts Act s 2(b).

36 Contracts Act s 2(d).

37 Contracts Act s 11.

38 A contract may be vitiated and voidable in the absence of free consent of the parties. In this regard, a consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation and mistake: see Contracts Act ss 14-18, 21-23. An agreement is void if, *inter alia*, it is against public policy, illegal, in restraint of trade, uncertainty or by wager: see Contracts Act ss 24-31.

39 Contracts Act s 2(h).

40 See *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1, 32 [57] (CA); *Philip Bell Booth Capping Corp Ltd v Navaratnam a/l Narayanan* [2016] 6 MLJ 698, 714 [50] (CA).

41 See generally, Visu Sinnadurai, *Sinnadurai: Law of Contract* (Lexis Nexis, 4th ed, 2011) Ch 2-3 and 7.

not easily recognised by the courts,[42] is a factual question or triable issue[43] to be dealt with by the trial court based on the civil standard of proof on a balance of probabilities, having due regard to oral and documentary evidence adduced by the litigating parties[44] and the surrounding facts and circumstances.[45] To that end, the Malaysian apex or appellate courts would usually not disturb the finding of the existence of an oral agreement as found by the trial judge.[46]

Under the Malaysian Evidence Act 1950, it is a general evidential rule that evidence of oral agreement shall not be admitted to contradict, vary, add to or subtract from the terms of a written contract, subject to several exceptions.[47] It should be noted that the admissibility of extrinsic evidence as governed by, *inter alia*, section 92 of the Malaysian Evidence Act 1950, is analogous to section 94 of the Singapore Evidence Act 1893, both of which are largely modelled on the Indian Evidence Act drafted by Sir James Fitzjames Stephen. Accordingly, the Indian and Singapore case law which discuss the said provision may be of relevance in this context.

To this end, the Indian Supreme Court in *Bai Hira Devi and others v the Official Assignee of Bombay*[48] had an instance to consider, *inter alia*, the scope and effect of section 92 of the Indian Evidence Act. It was held that the said section 92 only applies to the contracting parties. In other words, a non-contracting party would not be precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the agreement.[49] The Privy Council in an earlier occasion in *Maung Kyin and another v Ma Shwe La and others*[50] similarly held that a non-contracting party is not governed by the said section or by the rule of evidence which it contains. The Privy Council, on an appeal from the Chief Court of Lower Burma in its appellate jurisdiction, further observed in *obiter* that it is trite law that oral evidence is not admissible despite 'attempts have

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42 *Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd v Dae Hanguru Infra Sdn Bhd and another appeal* [2020] 5 MLJ 630, 634 [4] (CA).

43 *Syarikat Seri Padu Sdn Bhd v Intan Enterprises Company* [1982] 2 MLJ 17, 18 (FC).

44 See, eg, *Desa Samudra Sdn Bhd v Autoways Construction Sdn Bhd & Ors* [2009] 8 MLJ 335, 345-346 [34] (HC)

45 See, eg, *Thiagrajen a/l Veluchamy v Suraish Naidu a/l Re Naidu & Anor* [2009] 9 MLJ 68, 77-83 [23]-[34] (HC)

46 See, eg, *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783,793 [25] (FC); *John Ambrose v Peter Anthony & Anor* [2017] 4 MLJ 374, 384-386 [27]-[34] (CA); *Mega Meisa Sdn Bhd & Ors v Mustapah bin Dorani and another appeal* [2020] 6 MLJ 594, 624 [72](CA). It is trite law that an appellate court should not interfere with the trial judge's findings on primary facts unless satisfied that the learned trial judge was plainly wrong: see, eg, *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, 117 [148] (FC).

47 Evidence Act 1950 (Malaysia) s 91 read together with s 92. For completeness, the prohibition against the admissibility of oral evidence under section 92 of the Malaysian Evidence Act 1950 would apply when all, as opposed to some only, of the contractual terms are reduced into writing in an agreement. Where there is evidence that some terms are given orally and some in writing, oral evidence can be given to prove the terms orally agreed to: see *Tan Chong & Sons Motor Company Sdn Bhd v Alan Mcknight* [1983] 1 MLJ 220, 229 (FC). For completeness, reliance upon a proviso must be specifically pleaded: *Ho Shee Jan v Hadayat Harta Holdings Sdn Bhd* [1989] 1 MLJ 33, 35 (SC).

48 *Bai Hira Devi and others v the Official Assignee of Bombay* (1958) 2 Madras LJ 108 (SC Indian).

49 Ibid, 111-112 .

50 *Maung Kyin and another v Ma Shwe La and others* (1917) 2 Madras LJ 648 (PC).

been made to engraft an exception on this rule in favour of evidence relating to the acts and conduct of the parties'.[51]

The Singapore Court of Appeal had also in several earlier occasions[52] considered the scope and application of, *inter alia,* section 94 of the Singapore Evidence Act 1893 (and the provisos therein). In *Ng Lay Choo Marion v Lok Lai Oi,*[53] the Singapore apex court in considering the applicability of proviso (b) to section 94, said that consideration should be given to the degree of formality of the agreement. In this instance, evidence was inadmissible to prove the oral terms as the agreement in question had indeed a high degree of formality and the parties were fully aware of the alleged subject matter of the oral terms.[54] In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*,[55] the Singapore Court of Appeal noted that the courts generally ought to be more reluctant to permit extrinsic evidence to affect an agreement. Whilst an extrinsic evidence may be admissible under proviso (f) to section 94, 'so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context', and that such extrinsic evidence 'must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon', the Singapore apex court went on to emphasise that courts should always be 'careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them'[56] Pausing here, it can be seen from the earlier case law in the Indian and Singapore jurisdictions that courts would generally be reluctant to allow extrinsic evidence to vary the terms of a written contract.

Back home, and for the purpose of this article, proviso (d) to section 92 of the Malaysian Evidence Act 1950 is of relevance here:

> *Exclusion of evidence of oral agreement*
> 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:
>
> Provided that –
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> …
>
> (d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved

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51 Ibid, 649. See also, *J. Kalayarasi and another v SAM Ibrahim Sahib* [2011] 1 Madras LJ 1136 [25] (HC Indian); *Sait Balumal Dharmadas Firm Bankers v Gollapudi Venkata Chelapathi Rao and another* (1955) 1 Madras LJ 12 [15] (HC Indian).

52 See, eg, *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 (CA Singapore); *Latham v Credit Suisse First Boston* [2000] 2 SLR 693 (CA Singapore); *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221 (CA Singapore).

53 *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221 (CA Singapore).

54 Ibid, 227-228.

55 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 (CA Singapore).

56 Ibid, 1096-1097 [132].

> except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

It would appear from the said proviso (d) that the parties are entitled to adduce evidence to demonstrate the existence of a subsequent oral agreement to rescind or modify terms of a written contract,[57] unless such contract falls into the category of a contract which is by law required to be in writing, for instance, a lease registrable under the Sabah Land Ordinance,[58] a standard form of contract of sale prescribed under the Housing Development (Control and Licensing) Regulations 1989[59] and the like. In the same vein, it is trite law that an agreement which varies or modifies the contract required by law to be in writing must also be reduced into writing.[60]

B *Case law – contracting out of section 92 of the Malaysian Evidence Act 1950 and the legal effect of a NOM clause*

In light of the statutory evidential rules set out in the above section, one may wonder whether parties may contract out of section 92 of the Malaysian Evidence Act 1950 (including the exceptions thereof) by incorporating a NOM clause into a contract. In other words, can parties exercise their autonomy and freedom of contract to limit their future contractual freedom by incorporating a NOM clause to strictly prevent any oral variations to the terms of a written contract unless made in the prescribed manner, which in effect disregards the said statutory evidential rules?

The case of *Macronet Sdn Bhd v RHB Bank Sdn Bhd*[61] arguably serves as a starting point to shed some light on this. One of the contentious issues submitted before the Malaysian High Court therein was, whether the evidence of a precontractual representation and an oral agreement could be admitted and relied upon by the parties to demonstrate a variation to the written contract in the light of section 92 of the Malaysian Evidence Act 1950 and a purportedly designated entire agreement clause contained in the said contract.

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[57] *Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased)) v Cheok Toh Gong & Ors* [1996] 1 MLJ 843, 853D (SC). *Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor* [1999] 1 MLJ 193, 226 (FC); *KSK Sawmill Sdn Bhd v FW Solutions Sdn Bhd* [2020] 2 MLJ 423, 432 [19] (CA).

[58] *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241 (FC). See also, *Leong Gan & Ors v Tan Chong Motor Co Ltd* [1969] 2 MLJ 8, 9 (OCJ).

[59] It is trite law that parties cannot add to or vary the prescribed contract of sale. Any unauthorised modification or variation would be null and void: see, eg, *Sea Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31, 34 (FC); *Loh Tina & Ors v Kemuning Setia Sdn Bhd & Ors and another appeal* [2020] 6 MLJ 191, 216 [98]-[100] (CA).

[60] *Teo Siew Peng v Guok Sing Ong & Anor* [1983] 1 MLJ 132, 133-134 (CA Singapore).

[61] *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11 (HC) (Macronet'). See also, *Antara Elektrik Sdn Bhd v Bell & Order Bhd* [2002] 3 MLJ 321, 324 (HC) which was decided approximately a month before *Macronet*. There, although it was unclear from the judgment whether a NOM clause existed in the impugned contract, it was nevertheless observed that 'parties are bound by what they have agreed and neither party can go against what they had earlier agreed unless it was mutually varied. A variation of a written agreement must be made in writing'.

It should be highlighted that, the said entire agreement clause also incorporated the effect of a NOM clause as follows:[62]

> This agreement (together with any documents referred to herein) constitute the whole agreement between the parties hereto and *it is expressly declared that no variation hereof shall be effective unless made in writing and agreed to by both parties*. (emphasis added)

The Malaysian High Court judge Abdul Aziz J (later FCJ) enunciated that the said entire agreement clause (which in effect incorporated a NOM clause) was an agreement between the parties, and in adhering to such a clause, they 'must be presumed to have known of the existence of s 92 and of the exceptions in it and to have intended what the clause intended, that is to exclude any attempt to vary the agreement by an oral agreement or statement, which attempt can only be made through the exceptions in s 92'.[63] By doing so, the parties were in fact agreeing not to resort to those exceptions.

The principle of law in *Macronet* was subsequently referred to and applied by the Malaysian Court of Appeal in several notable occasions.[64] In *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd*,[65] the impugned sale and purchase agreement between the parties therein contained an entire agreement clause and a NOM clause separately. Although *Macronet* was considered in the context of the entire agreement clause,[66] Nik Hashim JCA in delivering the judgment of the Malaysian Court of Appeal nevertheless went on to describe the distinct NOM clause therein to essentially mean that '[u]ntil an agreement in writing is reached by the parties, all rights and obligations under the agreement remain valid and enforceable'.[67]

In *Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor*,[68] the impugned distributorship agreement between the parties therein stipulated an entire agreement clause which also incorporated a NOM clause (similar to the clause in *Macronet*). The Malaysian Court of Appeal referred to *Macronet* and rejected the contention by one of the parties to the said distributorship agreement alleging the existence of a subsequent oral partnership agreement, due to the presence of the entire agreement clause therein.

In fact, as can be seen from a catena of the Malaysian High Court cases decided thereafter, it appears that the legal principle set out in *Macronet* has been consistently adopted by the Malaysian courts to oust the operation of the exceptions to section 92 of the Malaysian Evidence Act 1950 by reason of incorporation of a NOM clause in the contract.[69] To this end, local case law seems to indicate that a NOM clause is legally

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62 *Macronet* (n 61), 24.

63 *Macronet* (n 61), 25.

64 For completeness, see *Harin Corp Sdn Bhd v Rimbun Tekad Premix (Terengganu) Sdn Bhd* [2016] 3 MLJ 782, 792-793 [21]-[25] (CA), but it was in relation to an entire agreement clause.

65 *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585 (CA) ('Master Strike'), 592 [6].

66 Ibid, 594 [9].

67 Ibid, 598 [23].

68 *Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor* [2015] 4 MLJ 525 (CA).

69 *Orix Credit Malaysia Sdn Bhd v Raub Australian Gold Mining Sdn Bhd* [2015] 1 LNS 1065 [26]-[29] (HC). See also, *Maybank Investment Bank Berhad & Ors v Million Westlink Sdn Bhd & Anor* [2015] 1 LNS 1301

effective, and any subsequent variations to the written contract must be reduced into writing. Incidentally, this appears to be similar to Lord Sumption's Approach in according full legal effect to a NOM clause.

Notwithstanding the above case law, as can be seen from the discussion in the subsequent section to this article below, the Malaysian High Court in at least two instances thereafter appears to have adopted different approaches, ie the Lord Briggs' Approach and the *Charles Lim's* Approach, in construing the legal effect of a NOM clause. In other words, it appears that there are three different approaches presently taken by the Malaysian courts to interpret the effectiveness of a NOM clause.

C *The case of Ng Sau Foong (Lord Briggs' Approach)*

In *Ng Sau Foong v Rhombus Food & Lifestyle Sdn Bhd & Anor*,[70] one of the contentious issues before the Malaysian High Court was whether a condition precedent expressly provided in a share sale agreement has been varied or waived orally by the parties, notwithstanding the provision of a NOM clause in the said agreement (although it was arguably not raised in the pleadings). The said NOM clause provided that:

> 12.8 Amendments & Additions
> No amendment, variation, revocation, cancellation, substitution or waiver of or addition or supplemental to, any of the provisions of this agreement shall be effective unless it is in writing and signed by both of the parties.

In this regard, the Malaysian High Court Judge Ong Chee Kwan JC considered both Lord Sumption's Approach and Lord Briggs' Approach, and went on to adopt Lord Briggs' Approach with slight modifications. To that end, it was held that the impugned oral variation was valid despite the existence of a NOM clause contained in the share sale agreement.

Ong Chee Kwan JC's additions to Lord Briggs' Approach were in three-fold. Firstly, in a contract where a NOM clause is expressly agreed upon by the parties, it should be treated distinctly from a contract where a NOM clause is inserted into the contract by lawyers without the parties' conscious instructions. In the latter scenario, the court should 'more readily imply that by the parties' oral agreement to vary, the [NOM] clause is to be treated as done away with', because the parties might not be aware of the NOM clause.[71] Secondly, it is in the interest of businessmen to expect the courts to give effect to a contract mutually agreed upon by the parties, even if it was made orally disregarding the NOM clause contained in the said contract. It was also suggested that parties would have reduced their oral variation into writing or waived the formality of a NOM clause,

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[50(a)] (HC); *Ismail bin Othman & Ors v Seacera Group Bhd & Ors* [2022] 1 LNS 442 [28] (HC); For entire agreement clause: see, eg, *Amazing Place Sdn Bhd v Couture Homes Sdn Bhd & Anor* [2011] 7 MLJ 52, 61-62 [23]-[25] (HC); *Berjaya Times Square Sdn Bhd v Twingems Sdn Bhd & Anor* [2012] 1 LNS 166 [37]-[40](HC); *Da Land Sdn Bhd v Ong Koh Hou @ Won Kok Fong and another case* [2018] 1 LNS 205 [28] (HC).

70 *Ng Sau Foong v Rhombus Food & Lifestyle Sdn Bhd & Anor* [2020] 8 MLJ 155 (HC) ('Ng Sau Foong').

71 Ibid, 173 [37(a)].

if the same clause was brought to their knowledge during the purported oral variation.[72] Thirdly, whilst recognising the importance of contractual certainty and expediency, Ong Chee Kwan opined that it should not prevail over the doctrine of party autonomy.

Pertinently, Ong Chee Kwan JC went on to consider and distinguish some of the earlier cases, inter alia, the Malaysian High Court's decision in *HTJ Development Sdn Bhd v Teoh Chin Kee & Anor*,[73] and the case of *Macronet* which were subsequently applied by the Malaysian Court of Appeal in *Master Strike.* With the greatest of respect, such judicial considerations may however require careful inspection.

First, it is curious to note that the Malaysian High Court in *Ng Sau Foong* did not consider the fact that in *Macronet*, it dealt not only with pre-contractual representations, but also with an oral variation agreement made after the conclusion of the impugned contract between the parties, as explicitly found by the trial judge therein based on the affidavit evidence.[74] In addition, if one peruses the entire agreement clause in question in *Macronet* (see above) in detail, the said entire agreement clause also incorporated the essence of a NOM clause. As aptly explained by the learned trial judge in *Macronet* after citing the same in the judgment, '[t]he effect of that clause is that the agreement, because it constituted the whole agreement, could not be varied for any reason or under any circumstances except by another agreement in writing'.[75]

Second, as discussed in the earlier section of this article, unlike the impugned provision in *Macronet* with the combined effect of an entire agreement clause and a NOM clause, the sale and purchase agreement in *Master Strike* contained the same in two separate clauses. This is analogous to the standalone NOM clause in *Ng Sau Foong*. In specifically dealing with the NOM clause, the Malaysian Court of Appeal in *Master Strike* in fact accorded full legal effect to the NOM clause and observed that 'any variation to the agreement must be in writing'.[76]

Third, while the Malaysian High Court in *HTJ Development* did refer to *MWB* purportedly on the issue of estoppel as pointed out by the learned High Court Judge in *Ng Sau Foong*, it should be noted that the Malaysian High Court in *HTJ Development* however took judicial cognisance that the same was 'not the key issue before the Supreme Court [in *MWB*]'.[77] In any event, it should be highlighted that in specifically dealing with the effectiveness of an entire agreement clause (with a combined effect of a NOM clause, as similarly found in *Macronet*), the Malaysian High Court in *HTJ Development* made reference to *Macronet* cited in its earlier proceedings, and went on to state that 'where there is an express contractual provision stating that any variation must be made in writing and signed by all parties, there cannot be any implied variation'.[78] Pertinently,

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72 Ibid, 173 [37(b)].

73 *HTJ Development Sdn Bhd v Teoh Chin Kee & Anor* [2018] 1 LNS 1849 (HC) ('HTJ Development').

74 *Macronet* (n 61), 22.

75 *Macronet Sdn* (n 61), 24.

76 *Master Strike* (n 65), 598 [23].

77 *HTJ* (n 73), [69].

78 *HTJ* (n 73), [42]-[44]. The Malaysian High Court also referred to the cases of *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysian Sdn Bhd* [2004] 6 MLJ 1 (HC) and *Paramaha Enterprises Sdn Bhd & Ors v The Government of the State of Sabah & Anor* [2015] 2 CLJ 268 (CA). Pertinently, the case of *MWB* was briefly discussed in the context of an estoppel issue at [68]-[72].

the case of *HTJ Development*, which was decided after *MWB*, appears to have adopted Lord Sumption's Approach that a NOM clause is legally effective.

Despite the reasons stated above, it remains curious that the Malaysian High Court in *Ng Sau Foong*, in interpreting the legal effect of a NOM clause, nevertheless went on to distinguish the earlier local cases of *Macronet, Master Strike* and *HTJ Development*. The truth remains that the factual matrix of these earlier cases share similar traits in substance as *Ng Sau Foong*.

D *The case of Bank Islam Malaysia Berhad (Charles Lim's Approach)*

In *Bank Islam Malaysia Bhd v Mustaffar @ Mustaffa bin Yacob & Anor*,[79] the Malaysian High Court in dealing with a NOM clause provided in a guarantee agreement, suggested that the evidence of subsequent oral variation 'must be of sufficient force to overcome the presumption that the complete agreement(s), which requires written consent to modification, expresses the intent of the parties'.[80] In this case, the Malaysian High Court concluded that the evidence adduced by the proponent of an oral modification was insufficient to warrant an inference that parties had reached an oral agreement to vary the written contract. This appears to be similar to the approach adopted by the Singapore Court of Appeal later in *Charles Lim* where a NOM clause was said to merely raise a rebuttable presumption that in the absence of an agreement in writing, there would be no variation. However, it should be noted that the Malaysian High Court in *Bank Islam Malaysia* did not consider the long line of established cases (including decisions of the Malaysian Court of Appeal) which in effect ruled that the provision of a NOM clause would oust the operation of the evidential rules under the Malaysian Evidence Act 1950, and a NOM clause is legally effective. In this regard, it may be difficult to see how the cases of *Bank Islam Malaysia* as well as *Ng Sau Foong* can be reconciled with the other cases, and it remains to be seen if these cases would be approved by the appellate court at an appropriate occasion in the near future.

E *The Malaysian common law*

It is trite that modern English common law may be persuasive, but is not strictly binding upon the Malaysian courts.[81] To this end, the Malaysian courts are 'free to formulate Malaysia's own common law',[82] having regard to the relevant written law in force in Malaysia (if any), and the 'local circumstances' or 'local inhabitants'.[83] In fact, the

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79 *Bank Islam Malaysia Bhd v Mustaffar @ Mustaffa bin Yacob & Anor* [2012] 6 MLJ 252 (HC).

80 Ibid, 263 [28].

81 *Jamil bin Harun v Yang Kamsiah & Anor* [1984] 1 MLJ 217, 219 (PC).

82 *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389, 415 [42] (FC) (per Abdul Hamid Mohamad FCJ).

83 Civil Law Act 1956 (Malaysia) s 3(1). See also the oft-cited observations made by Peh Swee Chin J (as he then was) in *Syarikat Batu Sinar Sdn Bhd & Ors v UMBC Finance Bhd & Ors* [1990] 3 MLJ 468, 473-474 (HC).

Malaysian courts have in several occasions decided to not follow English common law in dealing with cases involving the law of contract.[84]

As discussed above, it appears that the legal effect of a NOM clause has been judicially considered by the Malaysian courts in numerous occasions even before the decisions of the UK Supreme Court and Singapore Court of Appeal in *MWB* and *Charles Lim* respectively. Having considered the relevant provisions of the Malaysian Evidence Act 1950 (which are modelled on the Indian Evidence Act), the law appears to be relatively established (albeit yet to be considered by the Malaysian Federal Court), that the contracting parties may contract out of the said statutory regime, and that a NOM clause is legally effective which renders any subsequent oral variations invalid unless made in writing. This, in turn, happens to be similar to Lord Sumption's Approach in giving full legal effect to a NOM clause. It remains to be seen if the Malaysian Federal Court is accorded with an opportunity to consider these earlier decisions and the local legislative regime, as well as the decisions of its judicial counterparts in *MWB* and *Charles Lim*. At present, the legal position on the legal effect of a NOM clause using Lord Sumption's Approach as discussed above would still constitute good law.

F *Policy considerations*

For completeness, it would appear from local case law that in many instances, the provision of a NOM clause has been incorporated into an entire agreement clause.[85] Accordingly, it is argued that judicial observations made to interpret an entire agreement clause in these occasions may also be applicable to the interpretation of a NOM clause to a greater extent.

In any event, as both the entire agreement and NOM clauses constitute boilerplate provisions mutually agreed by the parties, legally speaking it does not matter whether it has been included in the contract merely as a standard clause or otherwise. It bears reminding the basic rule in the law of contract that what have been agreed by the contracting parties should be given effect to. One would remember the oft-quoted statement by the Malaysian Federal Court in *Michael C Solle v United Malayan Banking Corporation*:[86]

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement.

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84 See, eg, the decision of the High Court in *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127 (HC), where Visu Sinnadurai J observed that the provisions of the Contracts Act in respect of the doctrine of restraint of trade differs from that under the common law, and therefore the English cases on restraint of trade could not be relied upon. See also, Visu Sinnadurai, *Sinnadurai: Contracts Act A Commentary* (Lexis Nexis, 2015) [1.10]-[1.13].

85 See, eg, *Wong Yee Boon v Gainvest Builders (M) Sdn Bhd* [2020] 3 MLJ 571, 598 [60] (FC) (dissenting judgment); *Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor* [2015] 4 MLJ 525, 540 [27] (CA); *Donald James Rae & Anor v Bruno Sorrentino and another appeal* [2015] 2 MLJ 218, [5] (CA); *Macronet* (n 61), 24.

86 *Michael C Solle v United Malayan Banking Corporation* [1986] 1 MLJ 45, 46-47 (FC).

Further, as the parties have made a commercial decision by choice to agree on the incorporation of a NOM clause, the parties ought to stand by it premised on the notion of freedom of contract.[87] This is especially so in the case of a written contract which is clear and unambiguous in setting out its provisions (including boilerplate clauses such as a NOM clause). There shall be no room to read into the said written contract once it has been concluded, and no extraneous evidence may be employed to modify or vary the contractual terms already set out in the written contract unless made in the prescribed written manner.[88]

To this end, the judicial policy consideration in upholding the NOM clause (incorporated in an entire agreement clause or otherwise) is understandably largely premised on the reason that it promotes contractual certainty.[89] As contractual variation is only valid if it is made in writing, it would arguably prevent false claims that parties have entered into an oral agreement to modify the contract. Be it a commercial organisation or an individual, it is also commercially wise to reduce commercial arrangements in writing and to maintain a proper written record of the contract including any modifications made thereto to avoid commercial ambiguity. This is particularly of considerable practical advantage to large commercial institutions as it may help eliminate the risk of an employee or agent, unintentionally or otherwise, in agreeing to a proposal which is not consistent with the written contract. Not to mention, it would substantially ease the burden of the parties to prove the existence of a contractual variation in litigation proceedings.

In addition, it is apposite to point out that despite the presence of a NOM clause in a written contract, the contracting parties may still depart from the said NOM clause or otherwise, so long as the prescribed manner to vary the same is adhered to accordingly. Parties' autonomy to specifically intend their contractual relationship to be reduced into a written form must be upheld accordingly. To this end, in the true essence of freedom of contract, the contracting parties should be allowed to limit their own contractual freedom within the confines of a commercial relationship.

V CONCLUSION

Although a NOM clause serves as a boilerplate clause in most circumstances, it has however unexpectedly constituted the cause of litigation in many instances across Commonwealth jurisdictions, dealing with the predicament of what should happen where the parties have subsequently orally agreed to vary their original agreement despite the existence of a NOM clause. This conundrum depicts that the notion of freedom of contract is itself not entirely straightforward. Three distinct schools of thought in construing the same have been recently developed via judicial pronouncements by the apex court in the UK and Singapore.

To this end, the Malaysian judicial trend in construing a NOM clause appears to be relatively consistent with Lord Sumption's Approach, even before *MWB* was decided in

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87 See also, *Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd* [2014] 2 MLJ 322 [29] (CA).

88 *Koh Siak Poo v Perkayuan Oks Sdn Bhd & Ors* [1989] 3 MLJ 164, 165 (SC).

89 See, eg, *Common Ground TTDI Sdn Bhd v Ken TTDI Sdn Bhd (Common Ground Works Sdn Bhd & Ors, third parties)* [2021] 1 LNS 1709 [56] (HC).

2018. This can be demonstrated through the earlier Malaysian High Court's decision in *Macronet,* as applied by the Malaysian Court of Appeal in *Master Strike* and *Network Pet Products*, which essentially ruled that a NOM clause mutually agreed by the contracting parties in effect ousts the operation of the exceptions to section 92 of the Malaysian Evidence Act 1950, and that any subsequent variations to the contract must strictly be reduced into writing.

Interestingly, despite the judicial trend as upheld by the Malaysian appellate court to render a NOM clause with full legal effect, the Malaysian High Court in at least two other decisions in *Ng Sau Foong* and *Bank Islam Malaysia Berhad* however, appear to have adopted slightly different approaches, ie the Lord Briggs' Approach and the *Charles Lim's* Approach respectively, in construing the legal effect of a NOM clause. On a relevant note, while Singapore has substantially similar statutory evidential rules as Malaysia (both of which are modelled upon the Indian Evidence Act), the Singapore Court of Appeal in *Charles Lim* unfortunately did not consider the legal effect of a NOM clause in the context of the Singapore Evidence Act 1893 (*in pari materia* with the Malaysian Evidence Act 1950). The said judicial pronouncement also appears to be inconsistent with the earlier decisions of the Singapore Court of Appeal on the construction of extrinsic evidence.

Therefore, it remains to be seen should the Singapore Court of Appeal in *Charles Lim* contemplate the same, whether the approach adopted to construe the legal effect of a NOM clause would be different, and whether such judicial analysis would then influence the Malaysian courts as both countries share similar legislative regime?

It would also be recalled that there are sensible commercial reasons to require contractual variations to be made in writing, for instance, to promote contractual certainty, and that the courts should respect parties' autonomy and freedom of contract to agree to impose such formality on themselves. In light of the relatively evolving legal position with respect to the effectiveness of a NOM clause across several Commonwealth countries, it is hoped that the Malaysian apex court would be accorded with an appropriate occasion in the near future to offer authoritative judicial guidance and clarity on the legal effect of a NOM clause in Malaysia.

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