No Oral Amendment clauses

By: Jens Christian Westly

1 Introduction

The topic of this paper is the effects of a “No Oral Amendment clause” (also known as “No Oral Modifications clause,” “Written Modifications clause” or ”No Oral Variations clause,” hereafter referred to as the “NOA-clause”). This clause is a one of the most common clauses in commercial contracts,¹ and it is used irrespective of the type of transaction that is regulated by the contract.

The NOA-clause was originally developed to function in contracts governed by common law. Civil law systems have different requirements, and difficulties in interpretation may arise when the clause is used to regulate a contract which is governed by Norwegian law. The object of this paper is to analyse the effects of the NOA-clause under common law, and to verify whether the intended effects of the clause can be reached if the contract is governed by Norwegian law.²

The NOA-clause is a typical boilerplate clause, which means that its wording has the same meaning in all types of contracts. The purpose of the NOA-clause is to preclude all variations which are not in accordance with the formalities required by the clause. There are some variations in the wording, but the essence of the clause is always the same.

A typical NOA-clause might read: “No amendment or variation to this Agreement shall take effect unless it is in writing, signed by authorised representatives of each of the

¹ Rose, Only In Writing - Prohibitions on varying a document orally in Commercial Lawyer (1997/19) pages 28-29 (hereafter “Rose”)
² This paper is part of the “Anglo American Contract Models” project at University of Oslo. Find more information about the project on the project website: http://www.jus.uio.no/ifp/forskning/prosjekter/anglo-project/
There are two important elements which are usually present in this clause. The first element of the clause is that all variations must be made or, in some cases evidenced, in writing.

The second element of the clause limits who are allowed to vary the agreement. It can, for instance, be made by a reference to “authorised representatives” like in the example clause. Another common method is to refer to those who signed the original agreement or by reference to specific persons.

The NOA-clause is closely related to other boilerplate clauses, like the “Entire Agreement”-clause (“EA-clause”) and the “No Waiver”-clause (“NW-clause”). These clauses have been dealt with earlier in this project. The EA-clause supersedes all informal understandings and oral agreements relating to the subject matter of the contract. However, the clause does not bar evidence of subsequent negotiations to show variation of the contract.

NW-clauses, on the other hand, are inserted to prevent a party from losing his right to take action of any breach of the contract by not acting upon it. The NW-clauses sometimes require a waiver to be written and signed by both parties in order to be binding. There are few differences between the NW-clause and the NOA-clause in these situations, and the parties often include a clause which incorporates both the NW-clause and the NOA-clause. The distinction between the waiver clause and the variation clause can be said to be that the former regulates how a party can renounce its right to enforce a breach of the contract, while the latter regulates how the parties can agree to variations of the contract in the future.

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4 See the project webpage, [http://www.jus.uio.no/ifp/forskning/prosjekter/anglo-project/](http://www.jus.uio.no/ifp/forskning/prosjekter/anglo-project/)
5 Black’s Law Dictionary, p. 359 and p. 237
This paper focuses mainly on English common law compared with Norwegian law, but I will also have a brief look at the effects of the NOA-clause under American law.

2 What legal effect is the NOA-clause originally intended to achieve?

2.1 Introduction

NOA-clauses are commonly used in all types of large contracts. The most important reason for including a NOA-clause is “not to prevent the recognition of oral variations, but rather, casual and unfounded allegations of such variations being made.”7 It has been said that the NOA-clause is inserted “as a protection against anything other than a full-blown variation which really does have the agreement of both parties.”8

2.2 Protection against fraudulent claims of oral variations – A private “statute of frauds”

The original reason for inserting No Oral Amendment-clauses in contracts was to give added protection against fraudulent or mistaken oral testimony of alteration of the written contract.9 The clause is therefore often said to be intended to operate as a private statute of frauds. This effect of the NOA-clause was also emphasised by the drafters of the Uniform Universal Code under American sales law.10 It is held to be harder to produce a fake contract than to make someone testify falsely, and the NOA-clause was considered to be a good way to protect the parties.

The purpose of the Statute of Frauds11 is to give protection against fraudulent or mistaken oral testimony regarding alleged oral variations to agreements which are required by the statute to be in writing. The Statute

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7 World Online Telecom v I-Way Ltd [2002] EWCA Civ 413, paragraph 17
8 Rose, p. 29
9 Corbin On Contracts One Volume Edition (1952) p. 1066
11 The Statute of Frauds mainly applies to six types of contracts under American law. The English Statute of Frauds was mostly repealed in 1954 but it still applies to contracts of guarantee, see Farnsworth II, p 107,
was originally enacted in England in 1677. At that time the parties to a trial of an action based on an oral contract were not permitted to testify. It was a common problem in the 17th century that the plaintiff procured a false testimony which convinced the jury that an oral contract was agreed upon. The judge could not verify the verdict from the jury.12 By requiring the contract to be evidenced and signed in writing, the courts could more easily distinguish real contracts from false contracts.

The use of a NOA-clause to prevent fraudulent testimony that the contract has been altered orally should, however, not be necessary. It is a punishable crime to testify wrongfully, and that alone should give the parties sufficient protection against false testimonies.

On the other hand, the NOA-clause does not necessarily give protection against fraudulent oral testimony. The clause may also work the other way, by encouraging a party to deny the existence of an oral amendment.13 A party might, for instance, agree orally to adjust a term in a contract, watch the altered contract being performed and then claim damages for breach of the contract. Even if the clause is not effective, the clause may be used as evidence against the party who claims that the contract was varied.

While the protection against fraudulent claims was one of the original reasons why the clause emerged in United States in the 19th century, it is not the most important reason for using it today.

2.3 Predictability

2.3.1 Introduction

The most important reason why the parties include a NOA-clause today is to ensure predictability and certainty.14 When a contract is in writing, it is easier to determine its

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12 Farnsworth II, p. 102.
14 See, for instance, Hillman, p 449: “Parties who agree to a NOM clause believe that their gains in increased certainty and stability outweigh the increased costs of contractual modifications.” Increased certainty is also the main reason why the parties include EA-clauses, and the two clauses are sometimes also combined.
terms than if it is made orally. When it is in writing, both parties know what is agreed, and the parties have a better chance of assuming their legal position in the case of a conflict.

The certainty of the written contract may also help the parties calculate the value of the contract they have entered, or the possible damages they may be responsible for in case of a breach of the contract. These circumstances may also influence the price if a party wants to take out liability insurance.

The predictability which a written instrument gives may be lost if the contract is varied orally. It may also be unclear if a variation has really been made. The parties may not always act in accordance with the written agreement. The delivery date may, for instance, be changed for some of the deliveries in a long-term delivery contract without the other party complaining, but the parties do not necessarily want to alter the contract for that reason. The NOA-clause is used to prevent this uncertainty.

2.3.2 Limitation of authority

There is also another reason why it may be uncertain whether the contract has been varied or not. If a representative agrees to vary the contract without the consent of the management, it may not know that the contract has been varied at all. And even if the management knows that the contract has been varied, it may not know what the new terms are, otherwise they may not have approved of the variation.

By limiting those who are allowed to vary the contract in the NOA-clause and how variations are made, the parties try to increase the predictability and stability of the contract and prevent unwanted variations. This part of the NOA-clause may also protect the party from claims that the contract was amended by an agent or a low-level representative who are not allowed to vary the contract.
2.3.3 Evidentiary effect

A third reason why predictability can be reduced if the contract is varied orally is that it may be uncertain what the new terms are. Oral statements are often vague, and more exposed to misunderstandings than a written contract. This may not be a problem if the contract is executed immediately, but in a large building project, for instance, the consequences of the variation may not be visible until later.

If the parties do not include a NOA-clause and then vary the contract informally, it may not only be difficult to interpret the oral terms. It may also be difficult to distinguish the terms of the amendment from statements made in the bargaining process, which are not intended to be binding.

To prevent this uncertainty, the clause may therefore also be inserted, as a discipline to the parties. The mere existence of the clause can function as a reminder to the parties that all amendments of the contract shall be in writing. It is also asserted that the parties are more cautious when entering into written agreements than they are when they agree to something orally.

By always varying the contract in writing, the certainty which the writing provides can be kept even after many alterations. This is especially important in long-lasting contractual relationships between companies. In these types of contracts, the parties’ representatives may change during the period of the agreement, and if the contract has been varied informally, the knowledge of these variations may get lost, and this reduces predictability. On the other hand, if all variations are in writing, anyone can look in the contract with its amendments and determine the terms of the agreement.

2.4 Unwanted effects of enforcing a NOA-clause

A problem with strict enforcement of NOA-clauses in a contractual relationship is that, in the event of unforeseen circumstances, the parties may orally agree to vary the contract
without giving thought to the original agreement. There may, for instance, be a tacit understanding between the parties that the NOA-clause will not be enforced. However, if the promisor is replaced by a legal trustee (e.g., in the case of bankruptcy), the trustee is obligated to pursue its strict legal rights. The contract may also be sold to a third party who is unaware of the oral amendment and therefore wants to enforce the original contract. In these situations a strict enforcement of the NOA-clause may lead to results which the original parties did not intend to achieve.

A possible scenario may also be that the owner in a construction contract orally orders additional work done, watches it being performed, and then refuses to pay under referral to the NOA-clause.\(^{15}\) In a case such as this, it would be unfavourable if the courts refused to enforce the amendment.

### 3 Legal consequences of a NOA-clause under common law - Is it possible to define the procedure for valid changes?

#### 3.1 Introduction

English and American law do not classify contracts only as either “valid” or “void.” There is also an intermediate position, where a valid contract may be held unenforceable.\(^{16}\) The unenforceable contract is an agreement which is binding between the parties, but which cannot be enforced by the courts. It is, in other words, not a question of substantial law, but a procedural question. Below I will discuss whether or not an otherwise valid oral contract can vary a written contract which has a provision prohibiting such amendments.

The freedom of contract is a central principle under both civil and common law. There are two sides of this principle that are relevant regarding the NOA-clause. On one hand, the parties should be allowed to agree to the way in which a contract should be modified. On the other hand, the parties will always be free to orally enter into a later agreement. Neither

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\(^{15}\) This was the case in Universal Builders v. Moon Motor Lodge, 244 A.2d. 10, 16 (Pa. 1968)

\(^{16}\) Furmston p. 259
legal system requires a contract to be in writing – an oral agreement is as binding as a written one. In a dispute regarding the NOA-clause, it can be said that the question is not whether or not the courts shall enforce the contract. It will rather be which contract they shall enforce.

3.2 Contracts which are required to be in writing by statutory law

The reasons why some contracts are required by law to be, or evidenced, in writing are often the same as why the parties include a NOA-clause in their contracts. To understand how NOA-clauses may affect an agreement, it is therefore useful to have a look at contracts which are required, by law, to be in writing.

The general rule under English law is that there is no formality required to make a promise binding. Some agreements are, however, required by law to be in writing. The most important type of contracts which must be made in writing are consumer credit agreements and contracts for the sale or disposition on an interest in land. These are contracts which have to be made in writing. It is, in other words, not enough to evidence the contract in writing afterwards. Other contracts are required to be evidenced in writing, such as contracts of guarantee under the Statute of Frauds.

Even though a contract is required to be made or evidenced in writing, there are no formal requirements on how the contract can be unmade. The general principle is, therefore, that a contract which is required to be in writing may be rescinded by an oral agreement which has the mutual consent of the parties.

\[\text{See, for instance, the NL 5-1-2 in Norwegian Law.}\]
\[\text{Treitel 5-009 ff.}\]
\[\text{Originally there were six classes of contracts which were required to be in writing by the Statute of Frauds, but contracts of guarantee are the only type of contract to which the formal requirements still apply. See Treitel 5-009.}\]
\[\text{Treitel 5-026}\]
On the other hand it is clear that a contract which has to be made in writing can only be varied in writing. This is based on the principle that a variation is a new agreement, and the same formal requirements apply to this new agreement. The same applies to contracts which are evidenced in writing.

In some cases, the courts interpret the intended variation as a rescission of the original contract, followed by a new contract affecting the same subject-matter. In these cases, the rescission of the original contract will be binding, while the new subsequent agreement will be unenforceable because it is not made or evidenced in writing.

However, these rules apply only to contracts which are subject to formal requirements imposed by law. For instance, if a contract is made by a deed even though there was no such legal requirement, it can be varied by a subsequent oral agreement.

3.3 “Full-blown” oral variations by authorised representatives

3.3.1 Introduction

In the following section I will discuss whether a NOA-clause can render unenforceable an otherwise valid oral agreement which varies from the original contract. And, if the varied agreement has been executed, can the other party claim damages for breach of the original contract?

Under English law, the NOA-clause has given rise to very few disputes. While the NOA-clause has been discussed in a number of American cases since the end of the 19th century, there is only one English case which discusses the validity of such a clause.

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22 Chitty *On contracts* 29th ed. (2004) vol 1 General principles (Hereafter “Chitty”) 4-056 regarding the Law of Property Act s2
23 Treitel 5-026
24 Berry v. Berry [1929] 2 K.B. 316, Treitel 5-031
25 See Bartlett v. Stanchfield 19 N.E. 549 (1889)
26 World Online Telecom Ltd v I-Way Ltd. [2002] EWAC Civ 413
In *World Online Telecom Ltd. v. I-Way Ltd.* (hereafter “*World Online*”) I-Way alleged that there had been an oral agreement to vary the terms of the original contract. In the agreement between the parties there was a clause prohibiting oral variations. The question was whether or not this claim should be allowed to go to trial. The Court of Appeal held that I-Way’s claims in respect of the oral agreement should go to trial despite the fact that the requirements of the NOA-clause were not satisfied. Lord Justice Schiemann acknowledged that the effect of allowing such a claim to go to trial was to allow something which the parties may be regarded as having sought to safeguard themselves against. However, even though the Court of Appeal allowed this claim to go to trial, it does not follow from the decision that NOA-clauses are ineffective under English law. The Court of Appeal held this question open in the summary judgement.  

From the *World Online*-case it can be learned that a NOA-clause will not be able to prevent a case regarding oral variations to a written contract from going to trial. Furthermore, the case shows that there are several obstacles which can prevent the clause from being effective.  

This conclusion is in accordance with how the NOA-clause has been interpreted under American common law. Such clauses prohibiting oral modifications are generally held to be ineffective in United States. The reason is that “*every agreement of that kind is ended*

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27 Lord Justice Sedley: “*These are issues which plainly have to be tried out. They cannot be short-circuited by Mr. Nasir’s submission, powerful though as it is, that to countenance any variation by parole or by conduct is to render any clause like clause 21.1 a dead letter.*” In the full trial, the court did not deal with the submission regarding the NOA-clause, but solved the case on different grounds. See I-Way Ltd. v World Online Telecom Ltd. [2004] EWHC 244

28 See also Treitel, 5-031 in note 170: “*The contract may contain a term stipulating that it cannot be modified or varied unless in writing, but there appears to be tacit acceptance that this can be overridden by the parties’ oral agreement: I-Way Ltd v World Online Telecom ...at [9] *” and Thorpe, Commercial Contracts - A practical guide to deals, contracts, agreements and promises (1996), p 165: “*While the court will give due weight to the parties intention that no oral variation should be effective, that express intention would in our view have to give way in the face of clear evidence of an oral variation agreed by individuals who plainly had both the authority and the intention to make it.*”

by the new one, which contradicts it,”30 and that the “existence of an express bar against oral modification does not remove the parties’ continuing rights to ... modify or rescind the oral modification provision like any other term.”31 There are many cases which have come to the same conclusion: NOA-clauses cannot prevent the contract from being varied orally. In other words, the courts seem to enforce the second contract.

Common for these cases, is that one party has relied on the oral variation of the contract.32 Farnsworth therefore argues that if neither party has relied on the variation, the NOA-clause will be held enforceable and the variation discarded.33 Corbin on the other hand, does not seem to agree with him on this point. His opinion is that the clause is generally ineffective, and he does not limit its ineffectiveness to cases where the other party has relied on the clause.34

The obstacles which prevent a NOA-clause from being held effective by the courts will be discussed in the following section.

3.3.2 Implied waiver of the clause

In the case of a NOA-clause, the evidence required to establish an oral variation would have to be especially clear.35 However, if the evidence is clear, or if it is undisputed that there was an oral agreement to vary the contract, the new and altered contract will probably be enforced. The informal variation agreement will, in these cases, probably be understood as to include an implied waiver of the requirement of the clause in the original contract which forbids such agreements.

30 Teer v. George A. Fuller Co., 30 F.2d 30 (4th Cir. 1929)
31 Clark v. Clark, 535 A.2d 872 (D.C. 1987)
32 Farnsworth II, p. 260. “The cases that have proclaimed the ineffectiveness of no-oral-modification clauses more broadly than this, without regard to reliance, fall short of holding that absent reliance an oral modification is enforceable in the face of such a clause, and are contradicted by sound authority.”
33 i.e.
34 Corbin On Contracts Revised Edition (2003) vol 13 Discharge, p. 421: “Despite this generally accepted principle at common law that a subsequent oral modification is enforceable notwithstanding a provision prohibiting such modifications, some courts require reliance on the oral modification before enforcing the agreement.”
35 Thorpe, Commercial Contracts - A practical guide to deals, contracts, agreements and promises (1996), p 165
In construction contracts, change orders are often required to be in writing. Change orders are variations of the work ordered by the owner or his representatives. These variations must generally be in accordance with the requirements of the contract. If the contract requires change orders to be in writing, and the builder has performed extra work which was ordered orally, the general rule is that he may not claim compensation for the extra work.

There are, however, some exceptions to this rule. If the extra work is ordered by the owner personally, or from the board or the highest level of management in a company, the contractor may claim compensation for that extra work. In such cases, the requirement of writing is considered to implicitly be waived. The requirement of writing may also be waived if the owner knows that his people often orders variations informally without his doing anything about it.

If the owner orally orders work to be done which he knows, or is told, will cause extra cost and the contractor performs this work, the courts may find that there is an implied promise to pay for the extra work and that the requirement of writing has been waived. This reasoning will also be valid in cases regarding a contract with a NOA-clause. Clauses which requires change orders to be in writing are also held to be valid and effective under American law. And as with English law, such requirement can be waived.

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39 Hudson 7-078
40 Keating, 4-047
41 Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority (Ohio 1997) 678 N.E.2d 519 in [1]
42 Universal Builders, Inc. v. Moon Motor Lodge, Inc. (1968) 433 Pa. 550 on page 560. See also Farnsworth II on page 260 note 10 and Sweet, *Legal Aspects of Architecture, Engineering and the Construction Process*, 5th ed. (1994) p. 455: “Generally it appears that the owner orally ordered the changed work, it will be assumed that the writing requirement has been waived” (Referred in Barbo, *Kontraksomlegging i Entrepriseforhold* (1997) p. 185).
Another approach to change-orders under American law is that the owner’s oral change-order was a breach of the contract if the work gets done. Therefore the contractor could claim damages from the owner since he had performed work which he could not get paid for because the change-order was not in writing. The damages would amount to what he was entitled to if the change-order had been in writing. This is called a “constructive change-order.” The “constructive change-order” is a good example of how far the courts are willing to go to avoid unjust results from the requirement of writing.

Changes or variations which can be ordered by a change-order are, however, not considered to be a variation of the contract. The contract’s regulation for which changes can be ordered by the owner, and how they must be ordered to be valid, shows that such changes are within the scope of the original contract and not a variation of the contract. Even though change-orders are not variations of the contract, the courts seem to acknowledge that the requirement for writing may be waived.

If the courts find that the subsequent amendment of the contract includes an implied waiver of the NOA-clause, the new varied agreement will be enforceable and the variation will be permanent.

3.3.3 Rescission and a new contract

Another approach may be to rescind the original contract with the NOA-clause and then orally enter a new contract on the same subject-matter with the varied terms, but without the NOA-clause.

Under the statute of frauds, a contract which is required by the statute to be in writing can nevertheless be rescinded orally. If the courts hold the NOA-clause enforceable, it is probable that the same limitation will apply to contracts with a NOA-clause unless the NOA-clause also specifically requires rescission to be in writing as well.

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43 Sweet, op.cit. p. 446-447 and Barbo, op.cit. p. 185.
44 Under American law, see, for instance, Green v. Doniger, 90 N.E.2d 56, 58 (N.Y. 1949). Under a contract which was regulated by a New York statute which held NOA-clauses to be effective, the court found that the parties had rescinded the written contract and made a new oral one at the same time. See Snyder, p. 642.
45 Treitel, 5-026
There is, however, an important difference between contracts which are required to be in writing by the statute and contracts which cannot be modified orally because of a NOA-clause. Under the Statute of Frauds, the new contract will not be enforceable since it is not made in writing – and therefore is not in accordance with the statute, but the old contract will be rescinded.\textsuperscript{46} NOA-clauses, on the other hand, apply only to the original agreement for which it is written. When the original agreement is rescinded, the NOA-clause is also rescinded, and the new contract will therefore be valid and enforceable.

For the contract to be rescinded and substituted by a new contract, it is not enough that a simple term has been varied. For instance, if only the delivery date has been changed, it would not be natural to assume that the parties actually rescinded the entire contract and substituted it for a new contract with the exact same terms except from the delivery date. The distinction between rescission and variation is said to depend on whether it alters the contract in some essential way.\textsuperscript{47}

However, in cases where the contract has not been amended in such an essential way, it might be possible that the courts find that only the NOA-clause has been waived. If the parties have waived the NOA-clause, the later, orally amended contract, is enforceable.\textsuperscript{48}

The consequence of rescinding the entire contract and replacing it with a new contract is that the new contract is entirely oral. The advantages of having the contract in writing will therefore be lost.

3.3.4 Promissory estoppel

If the contract has been varied and the party has acted and relied on the variation, there is also another doctrine which may prevent the other party from invoking the clause even if the parties did not implicitly waive the NOA-clause. The other party may be estopped from enforcing it.

\textsuperscript{47} Treitel 5-030
\textsuperscript{48} See Section 3.3.2
The doctrine of promissory estoppel was originally developed to prevent injustice from arising from situations where one party promises to forgo his strict legal rights under the contract, and the other party acts in reliance of the promise. Under common law, an alteration of the contract requires fresh consideration to be enforceable. The alteration will often be an advantage to both parties, and it is therefore automatically supported by consideration, since there is a mutual exchange of benefits. However, in some cases, a variation will only be a benefit to one party without the other party receiving consideration.

In these cases, the doctrine of promissory estoppel may prevent the promisor from going back on his alteration promise, and therefore the original contract will be enforced if that would be inequitable. However, the doctrine of promissory estoppel will generally not extinguish the original rights under the contract, it will merely suspend them. The promisor may resume his strict legal rights after giving the promisee a reasonable notice.

There are some situations where an estoppel cannot be abolished. First of all, the estoppel may have an extinctive effect if it is impossible to perform the original obligation, or if the contract has been executed. The estoppel may also have an extinctive effect if it would be highly inequitable to require original performance.

If the NOA-clause is held to be effective under English common law, an oral variation which has been acted upon will have much in common with a variation which is unsupported by consideration. In both cases the consequence for the promisee will be the same. If the promisee has relied on the variation to his detriment, it may be inequitable to enforce the original contract because of the NOA-clause.

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49 Stilk v Myrick (1809) 2 Camp 317, 170 ER 1168
51 Hughes v Metropolitan Railway Co. (1877) 2 App Cas 439, Poole p. 157.
53 Treitel 3-088
Even though the doctrine of estoppel was originally created to avoid unjust results in cases where a party has relied on a variation which is not supported by consideration, the courts have also applied the doctrine in other situations. In *Charles Rickard Ltd v. Oppenheim*, Denning LJ applied the doctrine of estoppel on a case regarding the enforcement of a “time is of the essence”-clause. He said that:

“If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.”

In construction contracts, change-orders are, as discussed above, often required to be in writing in order to be binding. However, under certain circumstances, the builder may be estopped from using the absence of a written change order to bar a claim for compensation for extra work. It is therefore reasonable to believe that a party may also be estopped from relying on a NOA-clause.

If a party is estopped from relying on the clause, the consequence is that the NOA-clause itself is suspended, and the alteration agreement will be enforceable. This will apply to both limitations of the original obligations and addition of new obligations. But estoppel can be retracted by reasonable notice, and the variation will therefore not be permanent.

Another difference between holding the NOA-clause ineffective because the amendment agreement includes a waiver of the NOA-clause, and holding it unenforceable because of an estoppel, is that it is not possible to sue on an estoppel. The promisee cannot sue to

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54 [1950] 1 K.B. 616 on page 623
55 See Keating 4-047, note 29.
56 This was pleaded in World Online Telecom v I-way, but the court did not deal with that submission.
57 Under New York law, see, for instance, Rose v. Spa Realty Associates, 366 N.E.2d 1279, 1281 (N.Y. 1977). The court held that “when a party’s conduct induces another’s significant and substantial reliance on the agreement to modify, albeit oral, that party may be estopped from disputing the modification notwithstanding the statute.” Snyder p. 643
enforce his rights under the alteration agreement; he may only use the estoppel in defence or in a counterclaim.

### 3.3.5 Separate agreement

If the oral agreement only adds new terms to the contract without altering the existing contract, the oral agreement may be considered to be a separate contract which is not affected by the NOA-clause.

Under English law, the written contract has a strong position. A written contract cannot be complemented by parole evidence unless in special circumstances. One of these exceptions is evidence regarding a collateral agreement. A collateral agreement is an independent contract which relates to the same subject as the main agreement. The collateral agreement can either supplement or contradict the terms of the written contract. However, if the written document contains an Entire Agreement-clause, the parties cannot complement or contradict the main written contract with extrinsic evidence of a collateral agreement.

In *Inntrepreneur Pub Co v East Crown Ltd*, where evidence regarding a collateral agreement to a contract with an Entire Agreement-clause was held inadmissible, Mr Justice Lightman reasoned that “[t]he purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty.”

From this case it can be learned that parties to one contract can agree that a side agreement regarding the same subject as the main contract is unenforceable unless it is contained in, or in accordance with, the main contract. This is contrary to American law, where even a

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59 City and Westminster Property Ltd v. Mudd [1959] Ch. 129, Treitel/Peel, para. 6-026 p. 222: ”There is no compelling reason why this [collateral] agreement should not contradict the written document.”

completely integrated\textsuperscript{61} agreement can be complemented by a collateral agreement as long as it does not contradict it.\textsuperscript{62}

The difference between American and English law on this subject is interesting, because English common law seems to acknowledge the parties right to cut off extrinsic evidence regarding a separate agreement. Based on this argument, the parties should also be able to cut off extrinsic evidence regarding an alleged variation of the contract. However, there is a main difference between the two situations. When the written contract is agreed later than, or approximately at the same time as, the alleged collateral agreement, it will not be a limitation to the parties’ ability to enter into future agreements. But a NOA-clause, if held effective, will have that consequence. The parties’ ability to enter into future agreements will then be limited by the earlier agreement.

The No Oral Amendment-clause can only have effect under the agreement in which it is included. The clause cannot prevent the parties from orally entering into other agreements. As long as the separate agreement does not contradict the original contract with a NOA-clause, the NOA-clause cannot prevent that agreement from being valid or enforceable.

3.4 Which effects does the clause have?

3.4.1 Introduction

On the basis of the discussion above, it is, in my opinion, possible to conclude that English courts will not reject an oral variation which clearly is intended to be binding even if the parties have included a NOA-clause in their original contract. However, the clause still has some effects.

\textsuperscript{61} In other words: A contract with an Entire Agreement-clause.
\textsuperscript{62} Farnsworth II, p. 235 “The fact that an agreement is completely integrated does not, of course, affect an attempt to show an entirely separate and distinct between the same parties. This truism forms the basis of the “collateral agreement” rule. Under this rule even the finding of a completely integrated agreement does not preclude a showing of a “collateral agreement,” as long as it does not contradict the main agreement.”
3.4.2 **NOA-clauses under the Uniform Commercial Code**

Under American sales law, the Uniform Commercial Code (hereafter “UCC”) gives effect to NOA-clauses in sale contracts. According to UCC article 2:209 (2), a “signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded.”

The UCC is a uniform act written by the American Law Institute and the National Conference of Commissioners on Uniform State Laws with the purpose of harmonizing the law of sales and other commercial transactions in all 50 states of America. Every state in United States has adopted the entire UCC, except Louisiana which has only adopted parts of it. The relevant article of the code is article 2 which regulates the sale of goods.

A major revision of article 2 of the code was proposed by the American Law Institute and the National Conference of Commissioners on Uniform State Laws in 2003, but this revision has, as far as I know, not yet been adopted by any state. There were, however, no major changes to Section 2:209 which is the relevant section regarding the NOA-clause.

This seems to be a consequence of the code’s abolition of the requirement of consideration to enforce a variation of the contract. Eliminating the doctrine of consideration from contract variations removed the protection the requirement of consideration gave against unfounded alleged modifications. By acknowledging the NOA-clause, the parties are able to protect themselves by establishing a private “statute of fraud.”

However, not even the UCC approach acknowledges the NOA-clause to the full extent. According to article 2:209 (4), “an attempt at modification or rescission [which] does not satisfy the requirements of subsection (2) or (3) ... may operate as a waiver.” A waiver which only affects an executory part of the contract may, however, be retracted “by reasonable notification ... unless the retraction would be unjust in view of a material change of position in reliance on the waiver” (Subsection (5)). The code’s approach has been subject to much discussion among scholars.

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63 Hillman p. 452
In *Wisconsin Knife Works v. National Metal Crafters*\(^6^5\) Judge Posner, as representative of the majority, argued that an attempt at modifying the contract can operate as a waiver only if there is reliance. He reasoned that if subsection (2) was interpreted so broadly that any oral modification is effective as a waiver, then both subsections (2) and (4) of the article would be superfluous. Judge Easterbrook, on the other hand, disagreed. In his dissent, he argued that any attempted modification may operate as a waiver, but if the waiver affects an executory portion of the contract, reliance is required to prevent the other party from retracting the waiver.\(^6^6\)

Even though the UCC applies only to sales-contracts under American law, it is interesting to see that the drafters of the UCC have chosen this approach to NOA-clauses. It is an ongoing debate in many common law jurisdictions whether or not to uphold the requirement of fresh consideration for variations of a contract,\(^6^7\) and this will perhaps also affect the court’s view on NOA-clauses. However, for the time being, the UCC approach is limited to sales-contracts.\(^6^8\) The fact that § 2-209 (2) has not been adopted into the Restatement (second) of Contracts supports this view.\(^6^9\)

The Restatement has been revised after the major revision of the UCC in 1957, to incorporate the changes of the UCC into the Restatement. While the Code was written and proposed to become law of the states, the Restatement is a collection and codification of what the law of contract *is* and not what it ought to be.\(^7^0\) This explains why the Restatement has not adopted article 2:209 of the UCC.

Under Norwegian law, the Vienna Convention on International Sale of Goods (“CISG”) gives almost the same effect to NOA-clauses in International Sale Contracts.\(^7^1\) The provision is, however, only applied to international sale contracts. It is not clarified whether it can be analogously applied to domestic sale contracts.

\(^6^5\) 781 F.2d 1280 (7th Cir. 1986)

\(^6^6\) *Wisconsin Knife Work*, p. 1292

\(^6^7\) The so-called pre-existing duty rule, see, for instance, Farnsworth I p. 527 ff. and Snyder p. 608 ff.

\(^6^8\) Farnsworth II, p. 261 note 13.


\(^7^0\) i.e. p. 321

\(^7^1\) The Norwegian Sale of Goods act (“kjøpsloven”) § 93.
3.4.3 Effective as a presumption clause

Even though the clause cannot prevent oral variations outside the scope of UCC, it will be very difficult to argue that an agreement with a NOA-clause has been impliedly varied informally or by conduct. Unless there is clear evidence that both of the parties intended to vary the contract, the courts will probably find that the contract has not been varied. The NOA-clause establishes a strong presumption that the contract is not intended to be varied unless it is done in writing.

The clause will also have this effect under Norwegian law, and the Principle of European Contract Law (“PECL”) article 2:106 gives this effect to the NOA-clause.

Article 2:106 of PECL reads: “(1) A clause in a written contract requiring any modification or ending by agreement to be made in writing establishes only a presumption that an agreement to modify or end the contract is not intended to be legally binding unless it is in writing.”

The idea behind this provision in PECL is that it would be contrary to good faith to give the clause literal effect. If the parties agree to a subsequent oral agreement, it would be contrary to good faith to enforce the NOA-clause.

It can be discussed whether the NOA-clause is needed to achieve this. The evidentiary burden on the party who alleged that a written contract which has not been acted upon has been varied orally is already heavy. In those cases where the court finds that a party has proved that the contract has been varied, the clause will most likely not make any difference at all. There might, however, be some situations where the court is uncertain about whether the contract has really been varied, or whether there is only a granted forbearance. In these cases the NOA-clause may be decisive.

Under common law, a contract must be intended to be legally binding by the parties if the courts shall enforce it. A NOA-clause may also add a presumption that even if the parties varied the contract, they did not intend the variation to be legally binding.

72 See, for instance, Krüger, Norsk Kontraktsrett 1989 p. 475. For Danish law, see, for instance, Gomard, Almindelig Kontraktsret 2nd ed. 1996 p. 73
3.4.4 Protection against variations by unauthorised representatives

The NOA-clause can as we have seen not prevent amendments which are intended to be binding by both parties even though it is not in writing. However, the clause may probably prevent amendments from any other than those who are allowed to vary the agreement.

Under English law, a principal may get bound to an agreement with a third party made by an agent, even though the agent was not expressly authorised by the principal. An agent or employee may, for instance, be authorised by the doctrine of apparent authority or the doctrine of usual authority.

The doctrine of usual authority refers to authority which is ‘usually’ attached to a particular job.\textsuperscript{73} A manager of a company is, for instance, usually authorised to buy goods for the company. But if the other party is aware of limitations of the authority, he may not rely on the implied usual authority.\textsuperscript{74}

Apparent authority is \textit{“a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the apparent authority as to render the principal liable to perform any obligations imposed upon him by such a contract.”}\textsuperscript{75}

The representation may come from both statements and conduct.

If the parties have agreed to a contract with a NOA-clause which specify who are allowed to vary the contract, the party knows that the agent is not authorised, and it can therefore not rely on any such representations or usual authority.\textsuperscript{76} The NOA-clause may therefore

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{73} Stone, \textit{The Modern Law of Contract} (2007) p. 213
\item \textsuperscript{74} Daun v. Simmins, (1871) 41 LT 483, Referred in Stone, ibid, p. 213
\item \textsuperscript{76} Christou, \textit{Boilerplate: Practical clauses}, 4\textsuperscript{th} ed. (2005) p. 235
\end{itemize}
\end{footnotesize}
possibly prevent unauthorised variations which would otherwise be binding under these doctrines.

Under construction law, however, the party may be bound in some cases. For instance, if the employer knows that the architect orders extra work which the employer desires, and then watches the builder perform the extra work, it would, in some cases, be fraud on the part of the employer to refuse to pay.\(^\text{77}\)

Under Norwegian law, as with construction law, this effect of the clause cannot be achieved to its full extent. If the principal knows that the contractor believes that a variation made by an unauthorised agent is binding, and does nothing to prevent the misunderstanding, it may in some cases be bound to the variation despite a NOA-clause.\(^\text{78}\) This is a consequence of the principle of good faith under Norwegian contract law. The scope of this exception is, however, very limited.

### 3.5 Conclusion – the effect of a NOA-clause under English common law

The legal effects of the NOA-clause are not settled under English common law. The problem with the clause is that the principle of freedom of contract probably makes it impossible for the parties to limit their own ability to enter into future agreements. However, instead of admitting that the clause is ineffective, they would either find that it is waived implicitly or that the other party is estopped from relying on the clause.

On the other hand, the courts will try to acknowledge the parties’ intention with the NOA-clause. Instead of arguing that the variation is unenforceable because of the clause, they will probably argue that they cannot find sufficient evidence that the alleged variation was intended to be legally binding. The NOA-clause establishes a presumption that the parties did not intend to vary the contract which it is hard to rebut. Even though it is already

\(^{77}\) Keating, 4-047.

\(^{78}\) See Rt. 1992 p. 295 (“Custos”).
difficult to prove an oral agreement, the existence of a NOA-clause can make it even harder.\textsuperscript{79}

The clause may also have effect on a subsequent agreement which varies the original contract. If, for instance, the parties have agreed in a subsequent agreement that a term in the contract will not be enforced, or that a smaller rent than agreed will be accepted, the NOA-clause in the original contract may indicate that the subsequent agreement is only meant as agreed forbearance, and not as a binding variation which cannot be withdrawn.

Another effect of the NOA-clause which the courts will acknowledge is that the subsequent amendment will not be binding unless it has been made by an authorised representative.

4 Evaluation under Norwegian Law

4.1 Introduction

Under English law, it is certain how the NOA-clause shall be interpreted. The sole question under English common law is thus whether or not it is possible to achieve the intended effects of the clause. The discussion above shows that there are many ways to circumvent a NOA-clause if the parties have orally varied the contract, thus rendering the clause not effective.

Under Norwegian law, the principles for contractual interpretation are different. The first question under Norwegian law is how the NOA-clause shall be interpreted. This question is not settled under Norwegian law, and will be discussed in Section 4.2 below. In Section 4.3 I will discuss whether the originally intended effects of the clause\textsuperscript{80} are possible to achieve. The actual effects of the NOA-clause under Norwegian law are discussed in Section 4.4.

\textsuperscript{79} If the contract is executed it is probably evidence enough to show that the varied performance was accepted. But if the contract is still executory, clear evidence may be hard to find in the absence of writing.

\textsuperscript{80} See Section 2.
4.2 Contractual interpretation and formal requirements

4.2.1 Contractual interpretation

A main difference between English common law and Norwegian civil law is the principles for contractual interpretation.\textsuperscript{81} The wording of the contract has greater authority under common law than under Norwegian law. Under English law the purpose of the interpretation is to find the meaning of the \textit{words} in the contract. The purpose of the interpretation process under Norwegian law is to reach the \textit{parties’ intention} with the contract. One of the key factors in this process is the wording; however, this is not the only factor. This difference is especially important when interpreting boilerplate clauses. Such clauses are seldom subject to negotiations between the parties, and the wording of the boilerplate may therefore not reflect the parties’ meaning precisely. As a result of this, other factors than the wording may lead to a different interpretation of NOA-clauses in contracts governed by Norwegian law.

Another difference between Norwegian and English contract interpretation is that Norwegian contract law puts greater emphasis on reaching a reasonable solution in a specific case, based on good-faith principles. However, freedom of contract and predictability are also important under Norwegian law, especially in commercial relations.\textsuperscript{82}

4.2.2 Formal requirements

The general rule under Norwegian law is that no formal requirements are needed to make a contract binding. An oral agreement is as binding as a written agreement.\textsuperscript{83} However, parties may agree that contracts between them must be in writing.\textsuperscript{84} This does, in principle, give effect to NOA-clauses under Norwegian law.

\textsuperscript{81} Norwegian law does not distinguish determination of terms from interpretation.
\textsuperscript{82} Rt. 2002 p. 1155.
\textsuperscript{83} NL-5-1-1.
\textsuperscript{84} Formation of Agreements Act Section 1, see i.e. Arnholm, \textit{Alminnelig avtalerett} p. 124, Woxholth, \textit{Avtalerett} p. 150 and Hov, \textit{Avtaleslutning og ugyldighet} p. 136
However, as pointed out above, the purpose of the interpretation process under Norwegian law is to find the parties’ common intention of the agreement. If the parties have intended to vary the contract, the Norwegian courts will probably respect the parties’ intention with the alteration contract, even if the alteration is done orally. On the other hand, if the parties really intended to cut off all oral variations, this is possible; according to the principle of the Formation of Agreements Act Section 1. It may, however, be other doctrines that prevent the NOA-clause from having its intended effect. These doctrines are discussed below.

4.2.3 How the NOA-clause is interpreted under Norwegian law

As mentioned above, it is not settled how the NOA-clause shall be interpreted under Norwegian law. There are two main alternatives. The first alternative is to interpret the clause as a formal requirement to make an amendment binding. This is how the clause is interpreted under English law. The second alternative is to interpret the NOA-clause as a mere presumption clause. PECL, for instance, gives this effect to the NOA-clause.

The most important reason why the parties include a NOA-clause today is to ensure predictability and certainty. The purpose of the NOA-clause is to ensure predictability by cutting off all alleged oral amendments. The purpose of the clause, therefore, weighs heavily towards the first interpretation alternative.

According to Norwegian judicial guidelines for interpretation, an interpretation that gives effect to all the provisions in a contract shall be preferred. According to this principle, the first interpretation alternative is preferred. There is a presumption under Norwegian law that a written contract has not been varied orally, and that large commercial agreements are made in writing. It is not necessary to include a NOA-clause in the contract to establish that presumption. However, due to the boilerplate nature of the NOA-clause, this argument does not carry as much weight as usual.

85 Principles of European Contract Law article 2:106.
86 See Section 2.3
Under Norwegian law, a fair and reasonable result of a particular case is often more important than a result that could be predicted when the agreement was entered into. According to Norwegian judicial guidelines for interpretation, an interpretation that avoids the most unreasonable results is preferred. This principle favours the second interpretation alternative. However, Norwegian law puts a heavy burden of proof on a party who seeks a solution that is contrary to the wording of the contract, especially in commercial relations. The most unreasonable results may also be avoided by other doctrines, which are discussed below.

Based on the discussion above, it is my opinion that the NOA-clause shall be interpreted according to the first alternative. However, the exact wording of the NOA-clause, the parties’ intention with the oral amendment and the consequences of the clause for the parties in the particular case are important factors which must be taken into account when interpreting the NOA-clause in a specific contract. It is therefore not possible to give a certain answer to how the NOA-clause shall be interpreted under Norwegian law.

4.3 Are the originally intended legal effects possible under Norwegian law?

4.3.1 Introduction

In Section 4.2.2 above, I concluded that the Formation of Agreements Act,\textsuperscript{88} in theory, gives effect to NOA-clauses. Below I will discuss whether there are other principles or doctrines that may prevent the NOA-clause from having the original intended effect.\textsuperscript{89}

4.3.2 The NOA-clause may be interpreted as a presumption clause

As mentioned above in Section 4.2 it is not settled how the NOA-clause shall be interpreted. It is possible that the clause will be interpreted as a mere presumption clause under Norwegian law. The original intended legal effect of the clause – to cut off all oral

\textsuperscript{88} Avtaleloven

\textsuperscript{89} See Section 2
variations – will not be fully reached if the clause is interpreted as a presumption clause. However, the clause will make it more difficult to argue that the contract has been orally amended. This aspect is discussed for both Norwegian and English law in Section 3.4.3 above.

4.3.3 Restrictive interpretation of the NOA-clause

The principle of good faith and loyalty in contractual relationships under Norwegian law may also prevent a party from invoking a NOA-clause. A party is not allowed to exploit the contract to his advantage under Norwegian law. If, for instance, the parties to a contract regarding restoration of a ship agree that all changes have to be in writing, and then orally agrees to some extra work, the employer cannot deny the builder’s claim for compensation.90 A method to avoid unjust results is to interpret the NOA-clause as restrictive, based on an assumption that the parties did not intend the clause to be effective under those specific circumstances. The consequence of restrictive interpretation is that if the NOA-clause leads to unjust result – which it very often will – the clause will not be held effective under those circumstances. This was the case in an unpublished Norwegian arbitration award from December 2007.91 It was held that the NOA-clause was not intended to have effect where the oral amendment was part of a scam.

4.3.4 Mandatory rules of law

According to Section 36 of the Norwegian Formation of Agreements Act, an agreement or a term may be amended or held to be void if it is deemed contrary to reasonableness and good faith to enforce it. This section is, however, rarely applied to commercial relations.92 Instead, the court will apply the principle of good faith and other doctrines based on good faith and reasonableness, which are discussed below.

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91 The arbitration tribunal consisted of Supreme Court lawyer Karl Wahl-Larsen (chairman), Supreme Court judge Jens Bugge and Professor Viggo Hagstrøm.
92 See, for instance, Rt. 2002 p. 1155
Another provision that regulates the NOA-clause is the Sale of Goods Act\textsuperscript{93} Section 91. According to the third subsection in Section 91, a contract with a NOA-clause cannot be amended orally. However, a party may be precluded by his conduct from asserting the provision if the other party has relied on the amendment. This Section only applies to international sales, and is based on the Vienna Convention on International Sale of Goods ("CISG") article 29 (2).\textsuperscript{94} Even though this provision only applies directly to international sales, it may be possible to apply the principle more generally based on an analogy from the provision.

4.3.5 \textit{Good faith doctrines - Passivity, conduct and reliance}

According to the Norwegian doctrine of conduct or passivity, the right to enforce a specific term may be lost if it is not asserted within a reasonable period time or if a party by its conduct gives the other party reason to believe that the term will not be enforced. These doctrines are based on the principle of good faith.

If a party, for instance, gives the other party the understanding that the oral variation has been accepted, either by conduct or passivity, it may be prevented from later enforcing the NOA-clause.

A party may also be prevented from enforcing the NOA-clause based on the principle of good faith itself. It would, for instance, be contrary to good faith if the party first gave the other party the impression that the oral variation was accepted, and then sued for breach of the original contract. It would also be contrary to good faith to accept a delivery according

\textsuperscript{93} Kjøpsloven
\textsuperscript{94} "A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct."
to the amended contract, and then refuse to pay because the amendment was not binding.\textsuperscript{95} In these cases it would be contrary to good faith to enforce the NOA-clause.

4.3.6 Conclusion

As pointed out in this Section, there are many methods and doctrines that can be used to circumvent a NOA-clause under Norwegian law. If one of the parties has relied on an oral variation, the other party may be precluded from asserting that the oral amendment is not binding.\textsuperscript{96} The court may also interpret the clause as restrictive to avoid the most unjust or unreasonable results, or Section 36 of the Formation of Agreements Act may prevent the clause from being effective.\textsuperscript{97}

4.4 Effects of the NOA-clause under Norwegian law

Even though the full intended effects of the NOA-clause cannot be achieved under Norwegian law, the clause still has some effects. These effects are generally the same effects as the clause has under English law, and are discussed in Section 3.4 above.

However, the clause may also have effect if neither of the parties has relied on the NOA-clause. As mentioned above in Section 4.2.2, it is possible to agree that a contract must be in writing to be binding according to the Formation of Agreements Act Section 1. A NOA-clause should therefore be accepted unless there are other doctrines that prevent the clause from having its intended effect. The doctrines that were discussed in Section 4.3, and that prevent the clause from having its intended effect, are based on good-faith principles and the principle of choosing a reasonable result. It is difficult to argue that the NOA-clause leads to unreasonable results before any of the parties has relied on the variation. It is, therefore, my opinion that the clause may cut off oral variations before any of the parties has relied on the variation. This is also the result according to the UNIDROIT Principles of

\textsuperscript{95} See, for instance, Barbo l.c. p. 186.
\textsuperscript{96} See Section 4.3.4.
International Commercial Contracts article 2:18,98 and according to the Norwegian Sale of Goods Act Section 93 which implements CISG article 29 (2).99 Ramberg100 and Adlercreutz101 have a similar view on the NOA-clause under Swedish law.

The most important effect of the NOA-clause under both English and Norwegian law is, however, that most parties believe that the clause is effective and act in accordance with the clause. The clause has also been said to be effective as a first line of defence when the other party alleges that the contract has been varied orally or by conduct. The fact that the NOA-clause has only been subject to one English case – and no Norwegian Supreme Court decisions - supports that conception.

5 How should the NOA-clause be drafted to achieve under Norwegian law the originally intended legal effects (if legally possible)?

Even though the NOA-clause has some effects under Norwegian law, especially if the parties have not relied on the variation, the full effects of the NOA-clause cannot be reached because of the principles of good faith and loyalty. Another problem with the NOA-clause is that it may be uncertain how the clause shall be interpreted under Norwegian law.

To avoid the discrepancy between the intended and actual effect of the NOA-clause, and to avoid interpretation uncertainty, the clause should be drafted otherwise. One possible solution which, in my opinion, is consistent with Norwegian law, is to draft the clause in accordance with UNIDROIT Principles article 2:18:

98 "A contract in writing which contains a clause requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct."
99 See Section 4.3.4.
“No amendment or variation to this Agreement shall take effect unless it is in writing, signed by duly authorised representatives of each of the Parties.

However a party may be precluded by his own conduct from asserting the invalidity of additions or variations not made in writing to the extent that the other party has relied on such conduct.”