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Challenging a Third-Party Expert Determination (Part II)

Djakhongir Saidov*

Introduction

Part I of this article has examined challenges, available in law, to a 'third-party expert determination' (ED), a contractual mechanism whereby contracting parties agree to use ED to resolve a particular issue, difference or dispute and to treat ED as final and binding on them. Whilst revealing a sophisticated legal framework governing challenges to ED in law, Part I has argued that the common law does not attribute sufficient weight to freedom of contract and legal certainty, both of which require greater protection of the finality of ED than is currently afforded, and proposed an optimum legal framework. This second part of the article (Part II) takes the examination of the law on ED further by focussing on two other areas that have received little attention in legal literature. One concerns a challenge based on a contractual clause providing for 'manifest error' (ME). Given how frequently this clause is encountered, it is important to understand and evaluate the analytical framework through which courts interpret ME. Case law on ME is arguably an integral part of the law on ED and should have implications for challenges to ED in law.

The other area concerns the legal consequences flowing from a successful challenge to ED, whether on the basis of ME or grounds available in law. This stage gives rise to complex legal questions. First, when should the matter be remitted to the original expert for correction/resolution or to a new contractual ED? Secondly, when should the court resolve the issue through its own machinery? Thirdly, can ED be severable? Finally, do different challenges produce different legal effects on EDs?

All these issues are addressed in Part II from the perspective of English law. However, Scottish and Irish cases and those from other common law jurisdictions, such as Singapore, are also engaged with. These areas of the law on ED are replete with conflicting policies and Part II of this article develops its position on how the balance between them should be struck most optimally. It examines and evaluates the relevant legal framework, identifying criteria that duly

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implement the relevant policies. Various legal questions and problems are also underscored and the appropriate legal responses are proposed.

1. Manifest error

1.1 General

Case law on the ME clause is an integral part of the law on ED. Although its focus is on a contractual clause, courts inevitably make policy choices in developing its precise meaning.[1] These choices are made against the background of challenges to ED, available in law. The broad policy question is: by what margin should the ME clause extend the scope of the otherwise available challenges to ED? Specifically, two sets of competing policies are at work.

First, what needs to be highlighted is the change in the law in the mid-1970s, when the 'material mistake' exception to the finality of ED was abandoned with a view to restricting challenges to ED and promoting freedom of contract, ED and ADR generally. The ME clause has then emerged as a contractual tool performing a (similar) function that the 'material mistake' used to perform.[2] This view of the function of the ME clause must be counterbalanced against a policy thrust of the law on ED that the grounds for interfering with the finality of ED must be tightly circumscribed.[3] In a similar vein, some courts state that '[m]anifest is a word which gives a *very limited window of opportunity to challenge*',[4] underscoring the difference with the 'material mistake' test. The second set of competing policies comprises, on the one hand, pursuing *finality*[5] (and with that legal certainty and predictability) and, on the other, fairness between the parties that requires *flexibility* and sensitivity to the *context*. This tension

[1] In principle, the parties' intention controls the meaning of this clause but, given its brevity, the policy choices exert much influence on how courts determine the scope and meaning of the ME test.
[2] 'The exception for 'manifest error'…seems to me…to be designed essentially to fill the gap in the law created by the…overthrow of the *Dean v Prince* principle of setting aside determinations for mistake.' (*Veba Oil Supply and Trading GmbH v Petrotrade Inc ('The Robin')* [2002] CLC 405, para. [33] (Simon-Brown LJ)).
[3] See, eg, *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826, para. [29].
[4] *Walton Homes Ltd v Staffordshire County Council* [2013] EWHC 2554, para. [46] (emphasis added).
[5] *Invensys Ptc v Automotive Sealing Systems Ltd*, 2001 WL 1676853, para. [22], linking ME with the need for finality in the law of ED.

equally permeates the entire law on challenges to ED,[6] showing how interwoven case law on ME is with the law on ED.

The starting point is that ME is an error that is 'plain', 'obvious'[7] or 'easily demonstrable without extensive investigation'.[8] MEs are 'oversights and blunders so obvious as to admit of no difference of opinion'.[9] The examples of such errors include those: of transcription;[10] made 'in testing or in sampling or in mixing the samples';[11] revealing clear mathematical miscalculations or referring to a non-existent asset.[12] The ME exception requires 'swift and easy persuasion and rapid recognition of the suggested error'.[13] MEs can be both inadvertent and deliberate.[14] Whether a determination is contractually required to provide reasoning (a speaking award) or not (a non-speaking award) is highly relevant to ME. In a non-speaking award, it may be impossible to establish whether an error has been made.[15] In a speaking award or where an expert chooses to give reasons, on his/her own initiative or in responding to a party's query/comment, courts consider it 'right' to examine the 'totality' of these reasons.[16]

1.2 Finality v. context-sensitivity

A. Obviousness of an error

The value of ED lies in its ability to resolve an issue conclusively, avoiding further disputes and costs, and speedily, enabling parties to carry on with their transaction without much delay and disruption. The natural meaning of ME and the guidelines on it are, in principle, aligned

[6] See Part I of this article.
[7] *Invensys* (n 5) para. [22]; *North Shore Ventures Ltd v Anstead Holdings* Inc [2011] EWCA Civ 230, para. [51].
8 *IIG Capital Llc v Van Der Merwe & Anr* [2008] EWCA Civ 542, para. [52].
[9] *Conoco (UK) Ltd v Phillips Petroleum Co United Kingdom Ltd* [1996] Lexis Citation 3840, 29. But see the qualification by Simon-Brown LJ in *Veba* (n 2) para. [33].
[10] *Galaxy Energy International Ltd (BVI) v Eurobunker SPA* [2001] CLC 1725, para. [16].
[11] Ibid; *Veba* (n 2) and *AIC Ltd v ITS Testing Services (UK) Ltd (The 'Kriti Palm')* [2006] EWCA Civ 1601.
[12] *Walton* (n 4) para. [46]; *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] SGHC 236.
[13] *Natoli v Walker* (1994) 217 ALR 201, cited in *Walton* (n 4) para. [12].
[14] *IG Index plc v James Colley* [2013] EWHC 478 (QB).
[15] C Freedman and J Farrell, *Kendall on Expert Determination*, 5th edn (London, Sweet & Maxwell-Thomson Reuters, 2015) 172.
[16] *Invensys* (n 5) para. [19]; also *IIG Capital* (n 8) paras. [33]-[35].

with these practical benefits of ED in that they stress that MEs must be obvious and easily and swiftly determinable. This starting point for interpreting the ME clause thus promotes speed and simplicity, facilitating finality and certainty. This approach is evident in cases that stress the importance of the notion of 'manifest'. Emphasising that this notion must not be diluted,[17] cases reveal many EDs on issues of fact and law, where a failure to demonstrate that an ED was obviously wrong meant that it was final and binding. In a case,[18] involving the sale and purchase of land, an independent chartered surveyor had to determine the meaning of an 'additional consideration', the payment of which was provided for by the contract and which represented the difference between the open market value of the property with and without planning permission. The fact, that there were 'very strong' competing arguments regarding the meaning of the planning permission and that the expert gave 'perfectly acceptable reasons for his conclusion', led to the decision that there was nothing manifestly wrong about the ED.[19] The decision makes clear that even if the expert's reasoning were wrong 'if one was pressed to argue it',[20] the ED would still not be manifestly erroneous.

Take another case[21] involving the sale and purchase of companies. One issue was whether there was ME given that the expert understood the parties' submissions to mean that the factored debts should be treated on the same basis for the purpose of the Final Debt/Cash balance and the Aggregate Working Capital. This understanding resulted in determining the factored debts as excluded for the purpose of the Final External Debt/Cash balance because they were also excluded from the Working Capital. The court held that there was 'ample justification' for the expert's conclusion, considering that the purchasers failed to make their position clear and that the expert was a firm of accountants and not a lawyer. The second question was whether there was ME in the decision that there was an interrelationship between the contractual provisions concerning the Aggregate Working Capital and those concerning the Final External Debt/Cash Balance. According to the court, even if a party challenging the ED (purchasers) demonstrates that its interpretation is correct, that in itself does not amount to ME: purchasers had 'to show that the Expert's interpretation of the agreement was obviously wrong'.[22] The court held that the documentation confirmed the interrelationship, as determined by the expert who as a leading firm of accountants 'would approach the interpretation of the

[17] *Invensys* (n 5).
[18] *Walton* (n 4).
[19] *Walton* (n 4), para. [46].
[20] Ibid.
[21] *Invensys* (n 5).
[22] Para. [48].

agreement against their knowledge of accounting principles and of the commercial purpose of the various provisions of the agreement'.[23]

Yet another example is *Galaxy Energy International Ltd (BVI) V Eurobunker SPA*,[24] involving the contract of sale of oil that required the pour point of the oil at loadport to be -3°C and the disport +3°C max. and provided for the quality inspection at disport to be final and binding. When the cargo was discharged at Malta, the inspectors examined composite sample representing the parcel to be discharged (A), a sample from the shore tank (B) and a composite sample from all the ship's tanks (C). The results in the inspection certificate were +3°C, +3°C and +9°C. The buyer took delivery of part of the cargo but declined to accept the remainder on the ground that the specification of the oil did not comply with the contract in respect of the pour point. Sample A was re-tested and a new sample was prepared from the ship's tanks representing the cargo discharged at Malta. The results were +6°C and +12°C. In the seller's action for summary judgment, the court held that these inconsistencies did not undermine the certificate. The contractually relevant sample was sample A, which was within the margin of +/- 3°C applicable for repeatability.[25] Insofar as it might have been appropriate to consider the new composite sample, the court held, the reproducibility range applied and there was no error when that result was compared with that in the certificate.[26] The court further reasoned:

> 'even assuming that it is appropriate to apply the repeatability range to the new composite sample prepared…(so that the result is outside the range) and/or that it is appropriate to rely upon the test results of samples B and C and apply to them the repeatability range (so that the results are outside the range), then these results would point to an inconsistency, but nothing more. I do not consider that they give rise to any real prospect of showing that there was a plain and obvious error in the certificate or the testing or sampling. On the evidence, there is nothing to show that a plain and obvious error occurred in these tasks; at the highest it shows that if the sampling was done differently, there might have been a different result. This might have been caused

[23] Para. [46].
[24] *Galaxy Energy* (n 10).
[25] 'Repeatability was the closeness of test results of the same sample using the same test method and the same laboratory' (ibid, para. [18]). The court held that other tests at Malta were 'within the reproducibility range of sample A and thus no error could be inferred from such tests' (para. [24]). 'Reproducibility' meant 'the closeness of the test result of the same sample using the same test method but by a different laboratory' (para. [18]).'
[26] Ibid, para. [27]

by some form of error, but even an error (and not merely the possibility of an error) is not enough. There is no evidence of plain and obvious error.'[27]

The approach, emphasising the need for an *obvious* error, helps determine whether there is ME with relative speed and simplicity because the ME exception is not triggered even if: the court would resolve the issue differently; the arguments by a party, challenging the ED, are correct; there is a possibility of an error; there is an error but not obviously so. At this stage, case law on ME promotes finality and legal certainty, although its very existence demonstrates that being imprecise the notion of 'manifest' can invite litigation.

B. The face of an ED v. extrinsic evidence

If case law stood uncompromisingly on the certainty and finality end of the policy spectrum, it would confine the ME test to: (a) 'the face' of an ED; and (b) the time when the ED is completed. Doing so would preclude any need to look beyond the four corners of the document containing the ED. Whilst some common law courts occasionally take this restrictive position,[28] the prevailing position is that evidence outside the ED can be relevant to the ME test. To start with, the parties' technical knowledge needs to be taken into consideration.[29] Although this may not necessarily require resorting to extrinsic evidence, the parties' knowledge is naturally based on the context surrounding their transaction and ED, making ME context-sensitive and achieving a similar effect to that of resorting to extrinsic evidence.

What pieces of extrinsic evidence can be considered? First, it is the parties' *agreement*. If in a building contract an expert issues a certificate of 'practical completion' of a building built without an extra storey, it is impossible to say whether there is anything wrong with this certificate without referring to the contract which requires that extra storey.[30] If ED involves contract interpretation, it may be difficult, if not impossible, to assess the relevant reasoning in the ED without examining the contract as a whole.[31] Secondly, if the ED expressly refers to certain documents, materials or the parties' submissions forming an essential part of the

[27] Ibid, para. [28].
[28] *Geowin Construction Pte Ltd* v *Management Corporation Strata Title No 1256* [2006] SGHC 245.
[29] *Galaxy Energy* (n 10) para. [16].
[30] *Menolly Investments 2 SARL, Menolly Homes v Cerep SARL* [2009] EWHC 516 (Ch), para. [82].
[31] *Invensys* (n 5) para. [21].

expert's reasoning, it is similarly permissible to examine such *documents/materials/submissions*.[32] Thirdly, without the relevant *factual evidence 'on the ground'*, it may be impossible to ascertain whether there is ME. Recall an earlier example of the absence of an extra storey where ME is indeterminable without looking at the building itself.[33] Fourthly, the *market conditions* surrounding the transaction appear to be relevant. Take a case[34] where an employee of a company specialising in spread betting transactions (IG Index) committed fraud against IG Index by acting together with other parties and enabling them to place spread bets with IG Index at artificially low and hence false prices, resulting in artificially high profits or low losses. The spread betting customer agreement between IG Index and those parties gave IG Index the right to void or amend the terms of any bet 'containing or based upon' ME and provided that, in deciding whether there was ME, IG Index could consider 'any relevant information including without limitation the state of the Underlying Market at the time of the error'.[35] The relevance of market conditions was indicated in the contract, but the court stated that this approach was 'entirely consistent' with the general approach of the courts:[36]

> 'It would be difficult, if not impossible, in many, if not most, cases where incorrect information has been inserted into bets accepted by IG Index, to determine whether they were incorrect, and if so, whether they were the result of manifest error if the issue could only be determined by reference to the terms of the bet itself or the document in which it was contained.'[37]

The remaining sources of extrinsic evidence not only continue to show that the ME test operates with reference to factors far beyond the 'face' of the determination, but also demonstrate this test is by no means fixed to the time of ED since these sources concern *developments subsequent to ED*.[38] Thus, the *parties' subsequent conduct* and especially that of a party invoking ME is taken into account. In *Galaxy Energy*,[39] a factor that reinforced the court's conclusion on the absence of ME was the buyer's lack of protest to the certificate. The court stated that '[i]t is difficult to see how it can be said there was a plain and obvious error when nothing was expressed about it at the time the certificate was produced and part of the

[32] Ibid, paras. [21]-[22].
[33] *Menolly* (n 30) para. [82].
[34] *IG Index* (n 14).
[35] Para. [792].
[36] Para. [817] (citing *Galaxy Energy* (n 10) and *Axa Sunlife Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, which also supports resorting to extrinsic evidence).
[37] Para. [818].
[38] But see n 64 and the accompanying main text.
[39] (n 10). See also nn 24-27 and the accompanying main text.

cargo accepted'.[40] However, an error may amount to ME even despite being undetected for years, if this is caused by fraudulent concealment. In the spread betting case,[41] the IG Index's inability to detect the errors was due to the fraudulent and dishonest timing of the removal of false dividends, which ensured that they were concealed at the time of IG Index's checks. Such a scenario did not prevent the errors from being 'obvious or easily demonstrable without extensive investigation':[42]

> 'But for the fraudulent insertion and temporary retention of the false dividends in IG Index's pricing systems…the manifest errors would probably have been revealed easily and quickly. They would not have required extensive investigation to identify.'[43]

Whether there is ME may hinge on how a contractual issue, outside an expert's remit, is interpreted. The correct interpretation having to be determined by means of dispute resolution, the ME test may depend on the outcome of *litigation/arbitration subsequent to ED*.[44] In one case,[45] a certificate of the indebtedness and/or amounts due signed by a party, who has advanced a loan to another, was under the terms of a guarantee conclusive evidence against the guarantors unless manifestly incorrect. Whether there was ME in the certificate, presented to the Guarantor in May 2008, depended on whether there had been a prior agreement between the parties to the loan agreement to vary the interest rates. The Court of Appeal (CA) reversed the first instance decision that there had been no variation. Not being based on a varied interest rate structure, the certificate was held to be of no effect due to ME. Sir Andrew Morrit C reasoned:

> 'It is quite possible for one person to certify the existence of some fact at a particular moment in time which the other person, the recipient of the certificate, cannot verify save after the occurrence of a subsequent event. I can see no reason why the error must be manifest at the time of the certificate.'[46]

Smith LJ found this issue difficult because at first sight ME was 'one which is capable of being demonstrated by the reference to the certificate itself'.[47] However, on closer examination he

[40] *Galaxy Energy* (n 10) para. [29].
[41] See nn 34-37 and the accompanying main text.
[42] *IG Index* (n 14) para. [826].
[43] Ibid.
[44] But see n 64 and the accompanying main text.
[45] *North Shore* (n 7).
[46] Ibid, para. [53].
[47] Ibid, para. [60].

took the view that ME did not depend on a party's ability to demonstrate ME immediately and conclusively:

> 'the guarantors were able to recognise immediately that the certificate was based upon the interest rates as set out in the original loan agreement and not as varied in November 2004. They could see that it was manifestly incorrect. They could not immediately demonstrate that conclusively; they could not do so until the court had determined the issue of variation.'[48]

A similar case[49] is that involving a contract for the rehabilitation, maintenance and operation of the road network in Birmingham that entrusted an independent certifier to certify 'milestone completion' of services by the contractor. Several certificates were issued, despite parts of the roads and footpaths having been unrepaired. The point of contention was whether the contractor had a duty to rehabilitate/maintain the road network as it actually existed or whether the performance could be based on a *hypothetical* road network. Both parties knew that the latter was based upon default data which, the contractor argued, it was not required to update with reference to *actual* survey data. Whether the certificates were manifestly erroneous depended on how the contract was to be interpreted. Agreeing with Smith LJ's dictum above,[50] the court upheld the Birmingham City Council (BCC)'s interpretation, namely, that the contractor ought to have performed based on the actual state of the network:

> 'On the dates when the independent certifier issued milestone certificates 6, 7, 8 and 9 everyone knew those certificates would be based upon erroneous calculations, if BCC's case on the interpretation of the contract prevailed. In the event BCC's interpretation of the contract has prevailed.'[51]

C. Impact of an error on ED

The ME test's context-sensitivity is further evident in its being interpreted in a way that an ED must be *affected*. Demonstrating the obviousness of an error is insufficient because its impact on the determination must also be proved. Consequently, MEs are defined as 'oversights and

[48] Para. [61].
[49] *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264.
[50] See the main text accompanying nn 47-48.
[51] *Amey* (n 49) para. [91].

blunders so obvious *and obviously capable of affecting the determination* as to admit of no difference of opinion'.[52] It is difficult to state definitively what this approach signals in terms of a policy direction. On the one hand, this interpretation heightens the ME threshold, making it more difficult to set aside an ED. Here the policies of fairness and finality may unusually converge, with the possible rationale being this: it cannot be 'fair' for the ED to be set aside and deprived of finality, if an error is irrelevant to the outcome of the ED. This perspective is reinforced if it is borne in mind that this approach was apparently introduced to fill the gap[53] created by the abandonment of the 'material mistake' test, which was defined as 'one which materially affects the ultimate result'.[54] On the other hand, this approach requires a facts-sensitive examination of the impact of an error, generating complexity and possibly undermining legal certainty/predictability.

Tension as to what role finality and certainty should play in interpreting ME is evident in differences in judicial perspectives. In the first instance in *Veba Oil Supply and Trading GmbH v Petrotrade Inc*,[55] Morison J, whose decision overall emphasises the importance of finality in the law on ED,[56] was inclined to regard a non-contractual method of inspecting goods in the quality certificate as amounting to ME, despite the irrelevance of the non-contractual method to the outcome. However, Simon Brown LJ in the CA disagreed and, treating ME as filling the gap of the material mistake test, interpreted ME as requiring the evaluation of the impact of an error.[57] Whilst this latter interpretation may not have been intended to compromise on finality and certainty, it can certainly have this effect. One example, based on the material mistake test, is where an expert was required to certify the purchase price of a company based on the difference between the excess of its assets over liabilities. When stating the capital amount owned by the company on hire-purchase the certificate provided that that amount did 'not' include future interest, whereas in fact it did. However, because the mistake – wrongly including the word 'not' – did not affect the arithmetical result, with the price of the company still remaining nill, it was not deemed material. Although the current interpretation of the ME

[52] Simon Brown LJ's dictum in *Veba* (n 2) para. [33]. In this respect, the ME test is seen as different from the material departure from instructions that is a ground (in law) for challenging ED.

[53] *Veba* (n 2) para. [33] (Simon Brown LJ).
[54] Ibid, 529.
[55] [2001] 2 Lloyd's Rep 731.
[56] Ibid, paras. [11], [15].
[57] *Veba* (n 2), para. [33].

test does not seem to require an error to be 'material' or its impact to be 'material', it is suggested that this scenario is likely to be treated in the same way today.[58]

Does this mean that ME is the same as 'material mistake'? Given the paucity of case law on the latter, it is difficult to answer conclusively. If the ME test is seen as a contractual equivalent of the material mistake test, as Simon Brown LJ's dictum suggests, the answer may well be 'yes'. But some examples of a material mistake are arguably stated too broadly and may not necessarily meet the ME test. In *Dean v Prince*,[59] Denning LJ stated that courts would interfere in ED if: 'the expert added his figures wrongly; or took something into account which he ought not to have taken into account, or conversely; or interpreted the agreement wrongly; or proceeded on some erroneous principle'.[60] Take the latter example of proceeding on an erroneous principle, which bears a close similarity to cases on ME involving a certifier using a non-contractual inspection method. Whether there is ME depends on whether the outcome of the ED is affected.[61] Using an erroneous principle or method is not in itself ME.

For instance, in *Veba* the use of a non-contractual density testing method - more advanced and accurate than the contractual method - would not have been ME because its application still showed that the contractual density requirement was met.[62] However, a non-contractual inspection method may well produce a different result to the one that would be reached by the contractual method, which *would be* ME. Even where the two tests produce similar results, the impact on the ultimate outcome may be analysed in other ways. Where a certificate showed a non-contractual method of testing the Reid vapour pressure (RVP) of gasoline, the court took the view that that was ME by seemingly relying on two factors.[63] First, although the judge concluded that the two results produced comparable results, in the *course of performing* the contract the parties believed that the non-contractual method produced a lower or different RVP reading than the contractual method.[64] Secondly, conformity with 'The

[58] Even if ME can be less than material, it is difficult to see how and why this scenario would be treated differently now given that courts were prepared not to vitiate the certificate based on a more demanding test.
[59] [1954] Ch 409.
[60] Ibid, 427.
[61] Although the same was probably the case under the material mistake test (see n 54 and the accompanying main text).
[62] The certificate was invalidated due to the material departure from instructions. Simon Brown LJ's statement regarding how the ME test would have been applied was *obiter* (para. [34]).
[63] *AIC* (n 11).
[64] If this was indeed why the ME exception was deemed applicable, there is a question whether relying on this reason contravenes the approach, explored above, whereby courts rely on developments subsequent to ED. In this case, the subsequent litigation revealed that the results of both tests were comparable, presumably making no difference to the outcome. If this subsequent litigation were taken into account, as it was in other cases (see nn 45-51 and the accompanying main text), it would point to there being no ME. A way to reconcile this apparent

Colonial Pipeline Specification' (CPS), containing the required maximum RVP and having the statutory force in the US, was necessary for import to the US.[65] Thus, whether an error is manifest or, for that matter, 'material' can hardly be stated in the abstract as was done by Denning LJ.

1.3 Concluding remarks

Cases evidence tension between promoting finality of ED/legal certainty and fairness/flexibility enabling courts to interfere with EDs. Case law leans towards finality only in requiring an error to be obvious. In other respects, it requires a context-sensitive analysis whose *effect*, intended or not, is to generate complexity and undermine finality. The range of contextual factors, relevant to establishing ME, can hardly be more comprehensive: the parties' technical knowledge; extrinsic evidence; developments subsequent to ED; and the need to determine whether an ED affects the ultimate outcome. These factors render the scope of the ME test broad, making it a powerful challenge to ED. At the very least, the multiplicity of contextual factors makes the notion of 'manifest' a very relative one. Subsequent developments are a case in point. Determining ME based on the outcomes of litigation subsequent to ED or the parties' subsequent conduct conflicts with the ability of ME to be recognised swiftly, without extensive investigation. Cases, establishing *post*-ED an agreement to vary an interest rate[66] or that the contractor ought to have relied on the actual not hypothetical data,[67] can hardly be said not to have entailed 'extensive investigation'.

In some cases, this context-sensitive approach to ME is necessary whilst in others it results from a judicial policy choice. As cases show, it can be necessary for some extrinsic sources to be considered; otherwise, ED and the possibility of an error cannot be duly evaluated. Regard for subsequent litigation, determining the content[68] or interpretation of the

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difference in the approach is to highlight that in this case there was also another relevant factor: namely, the rules on import to the US (see n 65 and the accompanying main text).

[65] '[C]ritically, conformity with CPS was necessary under US law for importation of the cargo into the US as regular gasoline of the appropriate grade. Thus, the cargo could not be imported as such, without either being blended anew so as to render its RVP to conform to CPS or being downgraded from regular gasoline to a blend stock. Moreover, although at trial, after hearing expert' (para. [36]).

[66] *North Shore* (n 7).

[67] *Amey* (n 49).

[68] As was the case when it came to determining whether the contract was varied in respect of an interest rate in *North Shore* (n 7).

contract,[69] is also close to being necessary. In contrast, regard for the parties' subsequent conduct stems from a judicial choice. Interpreting the test as requiring an impact on the ED's ultimate outcome also represents a policy choice,[70] as evidenced by different judicial perspectives in *Veba*.

Given the adverse repercussions of the contextual approach on finality, certainty and predictability, so vital for the law on ED, should this approach be changed or abandoned? 'No' is the suggested answer. When it comes to the relevance of the context, case law is remarkably consistent, providing much detailed guidance. Although this body of cases makes ME a complex test, the guidance in it nevertheless provides certainty, albeit of a complex kind. Little will be gained if this consistency is disturbed. Instead, attention should be reverted to the grounds for challenging ED in law where, as argued earlier,[71] there is much room for judicial interference that undermines the value and viability of ED. This, together with the broad protection the ME clause provides and ease with which it can be contractually incorporated, means that the grounds *in law* should, where possible, be interpreted restrictively[72] to promote finality of ED.

2. Consequences of a successful challenge

2.1 General

The next part of the law on ED to be examined concerns the consequences that ought to follow from a successful challenge to ED. Several questions arise. First, when should the matter be remitted to the original expert for correction/resolution or to a new contractual ED? Secondly, when should the court resolve the issue by ordering its alternative machinery, including its own decision? Thirdly, are EDs wholly vitiated or can they be severable? Finally, do different successful challenges produce different legal effects on EDs? Each of these questions is explored in turn.

[69] As was the case in *Amey* (n 49) where the issue was which version of contract interpretation was correct.
[70] As explained, this interpretation derives from the view that the ME test fills the gap created by the abandonment of the 'material mistake' test.
[71] See Part I of this article.
[72] For concrete proposals in this regard, see ibid.

2.2 Remitting the matter to the original expert or another contractual ED

It is often the case that a successfully challenged ED leads the court to order the expert, who made this ED, to correct it or make a new determination.[73] The example of correcting the determination is *Halifax Life Ltd v Equitable Life Assurance Society* ,[74] where the expert failed to provide adequate reasoning in a speaking award and the court ordered the expert to state further reasons.[75] Another example is a Singaporean case where the ED contained valuation and calculation errors. In *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd*,[76] concerned with the valuation of an insurance claim, the court directed the expert to correct valuation and calculation errors giving detailed guidance on how to do so. Recognising that it could be more expedient for the court to make those corrections and arrive at the final correct valuation, the court thought it more appropriate to remit the issue to the expert. First, doing so was thought to be in line with the contractual nature of ED.[77] Secondly, if the issue were not so remitted, the expert would be open to a professional negligence claim and, if inadequately insured, would be exposed to a substantial personal liability. Enabling the expert to correct the award eliminated that risk.[78] As regards the reason for guidance, the court explained that it would prevent a possible challenge to the revised ED and the resulting waste of the judicial and parties' resources.[79]

The court may, however, order an entirely new ED process. In *Dutton v Dutton*,[80] concerned with the valuation of a testator's interest in a property, the expert failed to value that interest on the basis of a fair and reasonable price, as (as the court found) he ought to have done. Giving guidance, the court held that a further valuation was required by a *new* expert so

[73] See Freedman and Farrell (n 15) 371.
[74] [2007] EWHC 503 (Comm).
[75] Ibid, paras. [95]-[96].
[76] n 12. The basis for the successful challenge was ME on the face of the award, which the court appeared to treat as a ground in law. This is different from English law where ME is not a ground in law.
[77] *Oriental Insurance* (n 12) para. [175].
[78] Ibid, para. [208].
[79] Ibid, para. [81]. See another Singaporean case, *Geowin Construction* (n 28), where the 'speaking' ED was remitted to the expert to correct a mathematical error. The court took the view that the ED could be corrected by the expert only if an error appeared on the face of the ED.
[80] [2000] EWHC Ch 167.

that the parties would have confidence in the next valuation.[81] Similar decisions can arise in other scenarios, such as where the expert is found not to have jurisdiction because he/she incorrectly understood or interpreted the relevant contractual provisions or legal rules/principles. The expert may not have the required legal expertise and the court may order a fresh ED by another expert.

What is not always clear is whether in such cases courts order the implementation of the agreement on ED *or* substitute the latter with their own ED machinery. This distinction may seem to be without a difference (in terms of the practical effect on the parties), but it is suggested that this is not so because of the differences in the applicable legal framework. If ordering a new ED is another implementation of the parties' agreement on ED, no legal preconditions other than those in the contract need to be fulfilled. But if such an order replaces the contractual ED with the court's own machinery, additional preconditions need to be met,[82] requiring a more complex legal analysis.

As a general policy, it is suggested that courts should be slow to substitute the contractual machinery with their own because of the primacy and freedom of contract: ED is contractual in nature and the parties' agreement to resolve an issue/difference/dispute through ED must be respected and enforced. Therefore, the orders of new EDs should, whenever possible, be intended and seen as implementing the agreement on ED. For this reason, it is submitted that the order in *Dutton*[83] should be seen as implementing the agreement on ED,[84] as appears to be suggested by the judge:

> 'Under the terms of clause 3 [the valuer] must be appointed by the executors, and I propose to make orders reinstituting this procedure which the testator laid down rather than order an inquiry…An inquiry is likely in those circumstances merely to increase the costs of this litigation'.[85]

[81] '…it is important that all parties have confidence in the next valuation and for that purpose…it is right to choose a value about whom there could be no misgiving by any party based on the previous valuation of Mr Lewis.' (para. [51]).
[82] See the next section.
[83] n 80.
[84] Freedman and Farrell (n 15) 371-372 seemingly take a different view.
[85] Para. [55]. The decision goes on to state that '[b]efore selecting a new valuer, the executors must consult with the beneficiaries and the identity of the new valuer should if possible be agreed with them.' The need to agree with the beneficiaries does not seem to be required by clause 3 of the will and this may raise doubts about whether the court's order was fully intended to implement clause 3.

The fact that the court gave guidance to the new expert is not an obstacle to the proposed interpretation of *Dutton* because guidance largely consisted of fleshing out how the contract ought to be interpreted[86] to ensure that the next ED was based on the correct contract interpretation. Such judicial guidance in fact facilitates the implementation of the contractual ED, promotes its finality and reduces the scope for further challenges,[87] avoiding waste of judicial and the parties' resources.[88]

2.3 Court's alternative machinery or own resolution

There are cases where courts make clear that ordering a new ED is a court's own machinery in substitution of the contractual ED. This was so in *Macro v Thompson (No 3)*,[89] where the companies' shares were required to be valued by the companies' auditors. With the contractual ED machinery deemed broken down, the court held that ordering the same valuer to make a new determination would be 'a most unsatisfactory outcome'.[90] The court refused to order a new valuation as part of the contractual mechanism because that would require the valuer to resign as the companies' auditor and a new auditor to be found, all of which could invite further litigation.[91] These concerns were acute because of a protracted litigation which, the court stated, 'must be brought to an end'.[92] Stating that it had jurisdiction to provide an alternative machinery,[93] the court ordered each party to nominate its accountant who would then arrive at the valuation.[94] *Macro* is a good example of factors that can make it unjustifiable to continue with the contractual machinery.[95] Party autonomy/freedom of contract should not be pursued relentlessly and it is right for courts to decide on the best course of action.

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[86] But the guidance may have gone beyond the requirements of the will. The court directed that the new valuer should be 'valuer with local knowledge' (para. [55]) or that the instructions to the valuer should be prepared by the 'executors in consultation with the beneficiaries' (para. [60]). These do not appear to have been specified in the will.
[87] See the citation from *Dutton* (n 80) in the main text accompanying n 85.
[88] See the main text accompanying n 79.
[89] [1997] 2 BCLC 36.
[90] Ibid, 68.
[91] Ibid, 68-69.
[92] Ibid, 69.
[93] Citing *Sudbrook* (n 103).
[94] *Macro* (n 89) 69. In ordering this machinery, the court was keen to 'resist the temptation for the court itself to make a 'non-speaking valuation' (ibid).
[95] See the previous section.

A court's decision to proceed with an alternative machinery may result not in an alternative ED but in a court simply resolving the issue. It is practical considerations broadly analogous to those in *Macro* that will lead the court to choose this course. In *Smith v Gale,*[96] concerned with the agreement on allocation of funds to be paid to a partner retiring from a solicitors' firm, an auditor entrusted with preparing the accounts wrongly interpreted the agreement. The court took the view that it could not simply leave the matter by holding that the certificate was not binding as that would leave the plaintiff solicitor in a 'very unsatisfactory position if [the auditor] should feel himself conscientiously unable to give a different certificate'.[97] With the partnership dissolved, the business taken over by one of the partners together with his new partners and part of the funds paid, the court stated that the plaintiff would be unable to obtain part of the funds due to him. Given that the court could arrive at the correct figure without difficulty, it resolved the matter by fixing the sum due to the plaintiff.[98]

In *John Barker Construction Ltd v London Portman Hotel Ltd,*[99] involving a contract for refurbishment works that authorised an architect to determine a 'fair and reasonable' extension of time available to the contractor, the architect's decision was invalidated largely on the ground of unfairness. The court refused to remit the matter to the same architect because: (a) given the passage of time and absence of contemporaneous notes, the architect's memory of the works' history was 'seriously awry'; (b) the decision was so flawed that the architect would have to start 'from square one', necessitating further delay, bearing in mind the time and money already spent.[100] The court did not consider ordering ED by another architect (possibly out of concern for further delay and costs) and fixed the extension itself:

> 'this is a case in which the contractual machinery…had broken down to such an extent that it would not now be practicable or just for the matter to be remitted to the architect for re-determination; and…in those circumstances the court must determine on the present evidence what was a fair and reasonable extension of time.'[101]

As this statement makes clear, courts can use their own machinery to resolve the issue if the contractual machinery *breaks down*. Another example where this is the case is a

[96] [1974] 1 All ER 401.
[97] Ibid, 414.
[98] But the court stated that by fixing the sum it was partly enforcing the parties' agreement because that sum would have also been fixed by the expert had he interpreted the contract correctly (ibid).
[99] *John Barker Construction Ltd v London Portman Hotel Ltd* (1997) 50 Con L Rev 43.
[100] Ibid, 68.
[101] Ibid, 68.

contracting party's refusal to cooperate[102] and appoint the expert. In this situation, it may be most expedient for the court to resolve the issue. This was done in *Sudbrook Trading Estate Ltd v Eggleton*,[103] where the lessees exercised their option under the lease, requiring the price to be agreed upon by two valuers nominated by each party, but the lessors failed to appoint their valuer. What *Sudbrook* makes clear, however, is that breaking down of a contractual machinery is not the only pre-condition for the court to order its alternative machinery. The contractual machinery must also *not be essential*, as stated by Lord Fraser of Tullybelton: 'I prefer to rest my decision on the general principle that, where the machinery is not essential, if it breaks down for any reason the court will substitute its own machinery.'[104] If the contractual machinery *is* essential and *does* break down, the parties' agreement will be ineffective and void for uncertainty or incompleteness[105] and will be struck down.[106] However, as *Sudbrook* illustrates, courts are reluctant to so conclude and strive to recognise agreements as binding where the parties' intention to be bound is not in doubt, especially if they have acted on their agreement.[107]

2.4 Letting non-essential EDs break down

Can the broken-down ED mechanism *not* be remitted to the original expert/contractual ED or be replaced with the court's machinery, with the contract being alive? 'Yes', if the mechanism is non-essential.[108] A typical case is a sales contract providing for an inspection certificate to be final and binding. The effect of the invalidity of the certificate is that parties lose this arguably non-essential mechanism for achieving finality, intended to avoid disputes about the goods' conformity. In this case, a court may choose not to order any of the options discussed in the previous two sections because neither party loses any right and remains free to prove (non-)conformity in the ordinary way.[109]

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[102] In which case, the party will be in breach of an implied duty to cooperate.
[103] [1983] 1 AC 444.
[104] Ibid, 484.
[105] See generally, *Chitty on Contracts*, 33rd edn (London, Sweet & Maxwell 2019) [2-120], [2-139].
[106] See, eg: s. 9, the Sale of Goods Act 1979, reflecting the general contract law principles (M Bridge (ed), *Benjamin's Sale of Goods*, 10th edn (London, Sweet & Maxwell 2019) [2-049]); Lord Diplock in *Sudbrook* quoted in the main text accompanying n 117.
[107] See, generally *Chitty* (n 105) [2-124], [2-133], [2-136].
[108] See nn 105 and 106 and the accompanying main text.
[109] That is, by evidentiary means other than the contractually specified inspection certificate. See *Minster Trust Ld v Traps Tractors Ld* [1954] 1 WLR 963, 988.

The position is more complex where an inspection certificate is intended to be the *exclusive* mode of establishing (non-)conformity.[110] Thus, the contract may prevent the buyer from invoking non-conformity unless it is established by a prescribed inspection. The invalidity of the inspection certificate precludes a remedy for this breach by the seller. Given the exclusivity of the certificate, a court may order one of the options, discussed in the previous two sections, so as not to deprive the buyer of its valuable right. But there is a risk that this exclusive mechanism may be deemed essential, in which case its breaking down may result in the contract being void for uncertainty or incompleteness.[111]

2.5 Is there a sound policy and legal framework?

Case law thus reveals no one answer to the question of what consequences follow from a successful challenge to ED. Courts approach it on a case-by-case basis. This does not mean that the consequences are unpredictable because courts exercise their discretion within a policy and legal framework. As explained, the policy considerations pointing towards remitting the issue to the original expert/new contractual ED include party autonomy/freedom of contract and an expert's potential exposure to liability for professional negligence. If such an order is accompanied by guidance of the court, such guidance can reduce or prevent further disputes/litigation, delays, waste of the judicial and parties' resources. In terms of deciding whether to remit the matter to the original expert/new contractual ED, it is suggested that the relevant considerations should include whether: the parties can have confidence in the original expert; this expert has the required competence, ability or willingness to correct the initial determination or resolve the issue afresh; there are doubts about the competence or ability of a potentially new expert; there are doubts about the parties' willingness to cooperate.

The considerations that can lead the court to order its own machinery include: the need to avoid/minimise (further) delays, litigation and costs; doubts about the ability or competence of the original expert and any potentially new expert as part of the contractual machinery; a party's failure to cooperate in the contractual ED process. How do courts decide whether to order new ED *alternative to* the contractual ED or whether to resolve the issue themselves?

[110] Such an agreement is not lightly inferred (*Aston FFI (Suisse) SA v Louis Dreyfus Commodities Suisse SA* [2015] EWHC 80 (Comm)).
[111] See nn 105 and 106 and the accompanying main text.

The practical considerations - such as time and resources already spent, time/resources required for new ED – are highly relevant. Similarly, the level of complexity involved can also be relevant. If the issue is simple and can be resolved by the court speedily, as in *Smith v Gale*, that points in favour of the court resolving the matter itself.[112]

Concerns about further delays, litigation and costs, can support an order of either the contractual machinery or a court's machinery. Freedom of contract/party autonomy and, to a lesser degree, an expert's exposure to personal liability support the former, but they need to be balanced against competing considerations, noted in the previous paragraph. The need to respect and enforce the contractually agreed ED requires courts to be slow to depart from this mechanism. But given the context-sensitive nature of the relevant considerations, it is right that courts have a considerable discretion when determining the consequences.[113] They are best placed to evaluate and balance the relevant factors in order to achieve a just outcome.

As noted, the court's power to order an alternative machinery is subject to the contractual machinery *breaking down* and being *non-essential*. The former occurs where the contractual machinery proves unworkable, such as where, as in *Sudbrook*, a party refuses to participate in appointing the expert.[114] However, the threshold does not have to be that high since, as in *John Barker*, the gravity of difficulties of enforcing the contractual machinery can also lead to the conclusion that the contractual ED broke down. This precondition leaves much room for interpretation and is not immune from tension between conflicting policies. It does not seem to depend on a specific ground on which ED is challenged. For instance, an expert may have materially departed from the contractual instructions, invalidating the ED. However, that may have been due to the expert's: (a) incompetence; or (b) mistake. In (a), the court may hold that the issue cannot be remitted to the same expert and a new contractual ED is inappropriate because of further delays and costs; if the matter is relatively straightforward, the court may resolve the issue itself. In (b), the court may order this expert to correct his/her

[112] But see n 94.

[113] It is suggested that the basis for this judicial discretion is the court's inherent jurisdiction, as recognised in *Halifax*. But in *Halifax* the court also relied on two other bases. One was 'by way of a remedy in relation to the relevant contractual provisions', seen as applicable cumulatively or alternatively with the inherent jurisdiction. The other, alternative to the inherent jurisdiction (in case the court was wrong on jurisdiction), was by way of the court's case management powers (see *Halifax* (n 74) 104).

[114] However, where an expert could be nominated by one party only, the latter's failure to do so did not constitute the breaking down of the machinery and there was no question of the court's alternative machinery (*Arthur Gillatt v Sky Television Ltd* [2000] 1 All ER (Comm) 461, 470).

original determination, if there are no doubts about his/her competence/willingness or the parties' confidence in this expert.

The second precondition, concerned with the essential nature of the contractual ED, similarly requires a judgement as to the significance of this mechanism. Some guidance can be given. The contractual specification or identification of the expert or of an office the expert must hold may reflect the parties' intention that the ED mechanism is essential.[115] If the contract has no such specific indications and/or sets out objective criteria to be used in ED, such as a 'fair, reasonable or market price', that may point to the non-essential nature of ED as it may be seen as subsidiary to the main purpose of the contract, such as a share or property sale.[116] The difference between these lines of guidance is well captured by Lord Diplock in *Sudbrook*:

> 'It may be that where upon the true construction of the contract the price to be paid is not to be a fair and reasonable one assessed by objective standards used by valuers in the exercise of their professional task but a price fixed by a named individual applying such subjective standards as he personally thinks fit, and that individual, without being instigated by either party to the contract of sale, refuses to fix the price or is unable through death or disability to do so, the contract of sale is thereupon determined frustrated.'[117]

However, these are no more than factors and, in a given case, even the combination of the contract not specifying an expert and indicating an apparently objective criterion may not mean that the contractual ED is non-essential. In *Arthur Gillatt v Sky Television Ltd*,[118] concerned with sale of shares in a private company, the seller was contractually required to pay '55 per cent of the open market value [OMV] of such shares…as determined by an independent chartered accountant…' (cl. 6.1). The court held that this mechanism was essential. First, this clause was contrasted with another clause (cl. 4) that set out much more detailed criteria for settling disputes about the calculation of profits.[119] Secondly, the OMV was not treated as an

[115] *Sudbrook* (n 103) 483-484. Also *Macro* (n 89) 69 ('In large private companies where valuations are needed fairly often…the auditors have drills for producing valuations at short notice and no other expert could perform the task quickly or as efficiently').
[116] *Sudbrook* (n 103) 483.
[117] Ibid, 479.
[118] n 114.
[119] 'This is in contrast to the structure of clause 4 which sets out a detailed procedure for settling disputes between the parties about the calculation of the profits on which the Earn Out Payments are based…' (*Arthur Gillatt* (n 114) 469).

objective criterion because the contract contained no definition of it or criteria as to its meaning: 'in this case the parties expressly recognised that such a valuation is pre-eminently a matter of judgment for the independent accountant entrusted with the task by the parties.'[120] The court refused to intervene, emphasising freedom of contract and the need to enforce the agreement:

> 'the determination of open market value…was treated as a matter of judgment entrusted to [the accountant's] decision which the parties agreed to accept as final and binding. It is the duty of the court to give effect to the parties' agreement on ascertainment of entitlement to the final payment and to payment for…shares. It is not the function of the court to modify clause 6.1…so as to enable it to intervene and make its own valuation.'[121]

There seems to be tension between this case and *Sudbrook*, where a similar criterion of a fair/reasonable price was deemed objective and as pointing to the non-essential character of the contractual mechanism. This case may also reflect the court prioritising freedom of contract/party autonomy, showing that this precondition is sensitive to the court's policy stance. The decision can possibly be justified on the basis of a stark contrast between clauses 6.1 and 4, arguably reflecting the intention for clause 6.1 to be essential. To this extent, the result in *Arthur Gillatt* can perhaps be reconciled with that in *Sudbrook*.

The fact that resolving an issue by means of ED is a condition precedent to a party's right does not necessarily make the contractual ED machinery essential. For example, in *Neale v Richardson*,[122] the builder's right to payment was subject to a certificate by an architect, who was also to act as arbitrator in case of disputes. When the dispute arose, the nominated architect refused to issue a certificate and to arbitrate, resulting in a failure to resolve the issue of the builder's right to remuneration. Treating the issuance of the certificate as a condition precedent,[123] the court nevertheless held that it could determine the builder's remuneration.[124] Although the question whether the ED mechanism was essential was not explicitly addressed in this and similar case(s),[125] the fact that the court(s) resolved the issue, despite the ED being a condition precedent, arguably indicates the non-essential character of the contractual

[120] *Arthur Gillatt* (n 114) 470 (Mummery LJ).
[121] Ibid, 470.
[122] [1938] 1 All ER 753.
[123] Ibid, 755-756 (Slesser LJ).
[124] Ibid, 758. See also *Brodie v Corporation of Cardiff* [1919] AC 337, on which the decision in *Neale* (n 122) relied; *London Borough of Camden v Thomas McInerney & Sons Ltd* (1986) 9 ConLR 99.
[125] See cases in n 124.

machinery on the facts of *Neale* (and similar cases). Otherwise, if the contractual machinery in *Neale* were essential and broke down, the contract should arguably have been void.[126]

This policy and legal framework is complex, making it difficult to predict the precise consequences of a successful challenge to ED. But this does not make this framework unsatisfactory. It is suggested that the preconditions for a court's alternative machinery provide, on balance, a sound legal structure for exercising judicial discretion. Freedom of contract/party autonomy are strongly protected by the need for a contractual machinery to be non-essential and break down. If a mechanism is truly essential to the agreement, a court will not intervene, leaving parties to bear the legal and practical consequences of their agreement. The most extreme consequence is that the contract may be nullified if an essential mechanism breaks down, a conclusion courts do not reach lightly.[127] A mechanism being non-essential is insufficient for courts to intervene with their alternative machinery. If the difficulties with the contractual machinery do not result in its 'breaking down', the matter is likely to be remitted to the same expert or new contractual ED.[128] It is right for courts to intervene with their machinery *only if* the contractual ED is not vital to the agreement and not workable for all practical purposes. This legal structure strikes an optimum balance between freedom of contract and countervailing practical considerations. What is critical, for legal certainty and sending a coherent policy signal, is that these preconditions are consistently and fully implemented. There is some tension in cases as to what constitutes objective criteria for determining the (non-)essential character of the contractual ED. Cases, such as *Neale*, where the ED was a condition precedent to a party's right, did not regrettably rely on and engage with these two preconditions.

2.6 Severability of EDs

The next question is whether the entire ED is necessarily vitiated or whether it is possible to treat one part of it as non-affected by the successful challenge, separating it from the vitiated part. In the case of jurisdictional challenges, the general position is that EDs can be severable. However, construction contracts, the ED process under which (adjudication) is subject to the

[126] See nn 105 and 106 and the accompanying main text.
[127] See n 107 and the accompanying main text.
[128] But see the main text accompanying nn 108 and 111 for instances where this may not be the case.

Housing Grants Construction and Regeneration Act 1996 (HGCRA), deserve separate mention. The treatment of severability of EDs in these contracts has been fast evolving in recent years. Aikenhead J's dictum in *Cantillon Ltd v Urvasco Ltd*[129] has given rise to the position that whether ED is severable depends on whether only one or more than one dispute or difference is addressed by ED. If there is one dispute/difference, a successful jurisdictional challenge[130] renders the entire ED invalid or unenforceable. If there is more than one dispute/difference, 'a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).'[131] The rationale for this position is:

> 'where a single dispute or difference has been referred it will generally be difficult to show that the reasoning in relation to the part of the decision that it is being sought to sever had no impact on the reasoning leading to the decision actually reached, or that the actual outcome would still have been the same. If this is the case, the part cannot safely be severed from the whole.'[132]

The judicial tide in construction cases is now rightly moving away from this approach. First, this rationale may not be universally applicable as there will be cases where, in a single dispute ED, the reasoning concerning the vitiated part has no impact on the remaining part. If the latter can be practically and meaningfully severed from the former, it is difficult to justify why severability should not be available simply because ED involved a 'single' dispute.[133] Secondly, this approach incentivises those unhappy with the single dispute/difference ED to 'scrabble around for grounds to resist enforcement, because on any ground (even if it relates only to a relatively small part of the decision) will suffice to invalidate the entirety of the decision'.[134] This incentive will result in further litigation, legal complexity and uncertainty, waste of the parties' and judicial resources, all of which undermine finality and reliability of ED. If driven solely by the 'single v multiple disputes/differences' distinction, the law would generate outcomes that could be perceived as: (a) unjust, where the non-affected part can be meaningfully separated from the vitiated part; and/or (b) disproportionate, where a *small* part

[129] [2008] EWHC 282 (TCC).
[130] Or the breach of 'natural justice'. On its relevance in adjudication, see Freedman and Farrell (n 15) 111-113.
[131] *Cantillon* (n 129) para. [63].
[132] *Lidl UK GmbH v R G Carter Colchester Ltd* [2012] EWHC 3138 (TCC), para. [61].
[133] Similarly, ibid, para. [61]; *Dickie & Moore Ltd v Ronald James Mcleish, Mrs Diane Mcleish and Catriona Watt* [2019] CSOH 87, para. [46].
[134] *Dickie* (n 133) para. [46].

invalidates ED entirely.[135] This perception would damage confidence in ED, undermining its viability and contravening the policy of promoting ED and ADR generally. For these reasons, the abandonment of the 'single v. multiple disputes/differences' distinction is a welcome development. The following formulates the newly emerging position in construction cases:

> 'the proper question is not…to focus on whether there was a single dispute or difference but upon whether it is clear that there is anything left that can be safely enforced once one disregards that part of the adjudicator's reasoning that has been found to be obviously flawed. Such analysis need not be detailed and, in many cases, it may remain the position that the entire enforcement application should fail. It would, however, further the statutory aim of supporting the enforcement of adjudication decisions pending final resolution by litigation or arbitration if the TCC were rather more willing to order severance where one can clearly identify a core nucleus of the decision that can be safely enforced.'[136]

The law on ED in construction contracts is thus brought in line with the law on ED in other contracts. It may be questioned, however, whether severability should be possible at all. The possibility of severing an ED hinders legal predictability. The advantage of disallowing severability is that a successful challenge eliminates any legal effect flowing from ED.[137] The prospect of severability invites further 'satellite' litigation about: whether the determination *should be* severable; which parts of it are not affected by the challenge; and/or which parts are to be revised and replaced by the court.[138] As stated in one case, where the ED was non-severable, 'the parties have to accept the decision "warts and all" and cannot come to the court to have a decision revised and replaced with what is or was thought to be right, unless the court is the ultimate tribunal'.[139]

A countervailing argument is that disallowing severability brings only short-term clarity by preventing the entire ED from having any effect. But what about the next steps? The answer requires the analysis of complex questions discussed above. Severability allows for the ED to be partly enforced, resolving *some* disputes/differences in accordance with the contract.

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[135] Ibid, para. [46].
[136] *Willow Corp S.À.R.L. v MTD Contractors Ltd* [2019] EWHC 1591 (TCC), para. [74] (endorsed in *Dickie* (n 133) para. [46]).
[137] But see further the paragraphs accompanying nn 161 and 167.
[138] This point is emphasised in construction cases and linked with the ED's temporary character under the Housing Grants Construction and Regeneration Act 1996 (*Cleveland Bridge (UK) Limited v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC), para. [118]).
[139] Ibid, para. [119].

If the contractual machinery has worked in part which can be meaningfully separated from the ED's defective part, the primacy of party autonomy and fairness to the parties strongly support severability. This latter policy thrust has prevailed.

It is right for the law to take this position. EDs can be used in all contracts to determine many issues, factual and legal. This makes this area of the law highly context sensitive. Disallowing severability is a response that is too simplistic, rigid and inadequate.[140] That said, concerns about severability cannot be ignored and require a high threshold. With this in mind, the following framework is proposed for deciding whether an ED is severable.[141] All criteria in this framework have been articulated in cases but not consistently and cumulatively.[142]

The first criterion for severability, already noted, is that a core *nucleus* or *substance* of the decision must be unaffected by its defective part. It is difficult to define it precisely given a wide range of issues that can be subject to EDs. One example concerns cases, where the proportion between the decision's defective and 'good' parts *and* the sums awarded by the expert in the context of each part indicates whether the core is affected. In a case,[143] involving a sub-contract for the mechanical services installation in a project for fitting out works at office accommodation, the sub-contractor sought to enforce the ED that awarded it various sums for twelve items. Two of them, totalling £25,378.80, were outside the expert's jurisdiction. With the remaining ten claims totalling £275,653.20, the decision was severable because the court took the view that the 'substance' and 'large bulk'[144] of the ED could still be enforced.

Another example relates to a case where the reasons, rendering one part of ED defective, are irrelevant to or not logically connected with the other part, covering a substantial number of matters. In this situation, a core of ED is likely to be unaffected.[145] In a Scottish case,[146] the ED in respect of the extension of time, the loss, expense and liquidated damages resulting therefrom, was set aside. The decision on the extension of time and associated loss and expense was, however, found not to have influenced other matters addressed by that ED: namely, the value of other operations by the contractor and sums to be deducted by the other

[140] Analogy can be drawn with the single dispute category, criticised above.
[141] This framework is proposed for all contracts, including construction contracts using 'adjudication'.
[142] See, eg, *Level Properties Ltd v Balls Brothers Ltd* [2008] 1 P & CR 1, para. [49], where the ED was held severable without explanation or engaging with any criteria discussed in the main text.
[143] *Working Environments Ltd v Greencoat Construction Ltd* [2012] EWHC 1039 (TCC).
[144] Ibid, para. [34]. See also *Willow* (n 136) para. [75].
[145] See the rationale for the 'single v multiple disputes' distinction that is relevant here (the main text accompanying n 132).
[146] *Dickie* (n 133).

party (incurred to remedy defects for which the contractor was responsible).[147] These latter sums were calculated independently of the extension of time and associated losses/expenses decision and were treated as part of the core of the ED by the court, which held that 'there is a core nucleus of the decision which may be safely enforced'.[148]

Yet another example is where ED is intended by the parties to be a unified and complete process,[149] especially if intended to produce a final sum to be paid by one party to the other. An Irish court so interpreted the parties' intentions in a case, involving a dispute about the payments to be made for the works by the contractor which the expert was appointed to value. Finding that the expert had performed only part of the task entrusted to him, with the other part being outside his jurisdiction, the judge held:

> 'The parties did not contemplate an arrangement which would be partial and which could only reach a final figure in the event that the parties were subsequently able to agree on the fact of defective workmanship, the fact as to what was or was not done by or on behalf of [the contractor]. In those circumstances…the agreement between the parties cannot be severed in such a manner as to give effect to what was actually determined by [the expert].'[150]

The second criterion, it is suggested, should be whether if severed the decision that is enforced needs *the court's input*. The concern, stemming from party autonomy/freedom of contract, is that severability may require the court to re-write the contract. Courts have rightly resisted doing so. In one case[151] the ED clause whereby a surveyor's certificate was to be final for the purpose of verifying the lessor's expenses to which the lessee was to contribute, was found void for ousting the court's jurisdiction. This decision was reached because the certificate dealt, amongst others, with matters of law.[152] The certificate was held to be non-severable:

> 'The difficulty on severance…is that the objectionable part ousting the jurisdiction of the court on questions of law is not separately expressed so as to be severable and leave the unobjectionable part unaffected. The same words which make the certificate final on questions of law make it final on all other questions too, including those on which

[147] Ibid, paras. [50]-[54].
[148] Para. [54].
[149] *James O'Mahony v Patrick O'Connor Builders (Waterford) Ltd* [2005] 3 IR 167, para. [11.3].
[150] Ibid, para. [11.3].
[151] *In re Davstone Estates Ltd's Leases Manprop Ltd v O'Dell* [1969] 2 Ch 378.
[152] On the relevance of this challenge today, see Part I of this article.

its finality is free from objection. The result is that the objectionable aspects cannot be separated from the unobjectionable aspects by severance but only by re-moulding the proviso, that is, by re-moulding the agreement between the parties: and this is not within the province of the courts.'[153]

A closely related third criterion is whether the 'good' part after severance is *clearly identifiable*. It must be clear what exactly that part determines. This criterion is frequently relied on in cases. Many factors can be relevant. If the good and defective parts can be separated verbally and/or arithmetically, by inference or because the ED presents its findings separately,[154] that points towards severability. Other factors include whether: the claims in the good and defective parts are presented separately prior to/during ED;[155] separate arguments are made to support the claims prior to/during ED;[156] the claims concern different time periods and/or are logically inter-connected;[157] the claims are supported by different and separable evidence;[158] the ED includes an alternative decision in case the expert lacks jurisdiction on some issues.

Finally, the discussion shows that severability has thus far been mainly addressed in the context of jurisdictional challenges.[159] Does this mean that the ED cannot be severable in the case of other challenges? There is no reason, it is submitted, why severability of the ED should depend on the particular challenge. The law has chosen in favour of severability and the reasons underlying this choice are relevant and should be consistently applied to *all* EDs. This position probably requires a change to the law since presently an expert's material departure from instructions appears to invalidate the entire ED with no possibility of severability.[160]

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[153] Ibid, 387. See similarly *Cleveland Bridge* (n 138) para. [120] and the statement in the main text accompanying n 139; also P Sheridan, 'Construction Act Review: Adjudicators' Decisions – Severability Update' (2014) 30 Construction L J 249, 255-256, 265.

[154] *Cleveland Bridge* (n 138) para. [76] ('The decision is in fact arithmetically divisible.'); *Bovis Lend Lease Ltd v The Trustees of the London Clinic* [2009] EWHC 64 (TCC), para. [69] ('The Award was eminently severable. The Adjudicator indicated clearly what "redress" he was granting with regard to the extension and liquidated damages issues.").

[155] *Beck Interiors Ltd v UK Flooring Contractors Ltd* [2012] EWHC 1808 (TCC), para. [32] ('It is clear from the body of the Notice of Adjudication that the presented claim is made up essentially of two parts, £31,148.97 and the £36,000 for the new liquidated damages claim').

[156] *Cantillon* (n 129) para. [76].

[157] Ibid.

[158] *Beck Interiors* (n 155) para. [32].

[159] The different types of jurisdictional challenges affect the analysis on severability. An expert may exceed his/her jurisdiction because the issue is outside his/her remit *or* is within the remit but the expert incorrectly understood the relevant legal principles/contractual provisions. In the former case, the court can identify with relative ease the decision's good and defective parts. The latter case requires determining to which part(s) of ED the principles/provisions, incorrectly understood, are relevant and applicable.

[160] *Ackerman v Ackerman* [2012] EWCA Civ 768, para. [22]; Freedman and Farrell (n 15) 369.

Suppose the expert must resolve two issues in one determination arising from a gas sales agreement: one concerns an aspect of pricing and the other - gas measurement. A *material departure* from the instructions or *ME* in the case of the former may have no connection with the latter. As long as the criteria for establishing severability are met, there is no reason why the ED should not be severable. This argument applies to all other grounds. However, some grounds may make severability unlikely. *Fraud, bad faith, dishonesty or (actual) bias*, even established in respect of a particular part of the ED, may taint the entire decision. To some extent, this point may also apply to *unfairness*, procedural and substantive. Where ED is successfully challenged because it does not comply with the *contractual requirements as to form/type* or there are *flaws in issuing or delivering it*, these defects prevent severability if they concern the entire ED.

2.7 Legal effect of a challenge on EDs

Courts characterise the precise legal effect of a successful challenge on EDs in numerous ways, including EDs becoming null, void, invalid, of no effect, non-binding, unenforceable or being set aside. Do all such characterisations imply that EDs become a nullity (deprived of any legal effect) and does this matter? It is conceivable that ED can be non-binding and/or unenforceable without being a nullity, although courts typically use these terms cumulatively or interchangeably.[161] *If* this proposition is correct, a possible difference in legal effect seems irrelevant to EDs, intended to be final and binding. Becoming non-binding/unenforceable, even without being null/invalid, defeats the very reason why ED is contractually incorporated: namely, to provide a speedy, conclusive and binding expert-driven resolution. It is the loss of finality and binding nature that matters. In this context, ED performs no other function. Neither is the difference in legal effect relevant to consequences of a successful challenge, which depend on criteria unrelated to the precise effect of a challenge.[162]

[161] See, eg *Veba* (n 2) paras. [43] and [47].

[162] It may be argued that whether to remit the issue to the original expert depends on the legal effect of a challenge: if an ED is invalid that may raise doubts about the expert's competence. Whether this is the case depends on the reasons for invalidity. An expert may have materially departed from the instructions by using a non-contractual inspection method in a sales contract. Whilst this would render the determination invalid, the expert may have the required competence to make a new ED and it may be practically expedient for him/her to re-inspect. But if the matter falls outside the issues entrusted to the expert (as opposed to a lack of jurisdiction where an expert departs from instructions or incorrectly interprets the contract or a rule/principle), there is no question of remitting this matter to the expert.

The position may be different for EDs that are preconditions to a party's right to invoke court/arbitration proceedings or to a party's legal right, such as where a seller's right to payment is conditioned on the presentation of an inspection certificate.[163] In these cases, it seems that if an ED is not null, despite being defective, a party may still be able to rely on it to invoke court/arbitration proceedings[164] or exercise its contractual right that was subject to ED.[165] If so, it is important to identify the precise effect of each challenge. Whilst this requires a separate examination, it appears that only one challenge may lead to EDs being non-binding but not a nullity, namely, an expert's failure to give adequate reasons in a speaking award.[166] The other challenges appear to invalidate EDs.[167]

Conclusion

This examination reveals that the two parts of the law on ED discussed in this Part II of the article have experienced considerable tension between competing policies. The law on the ME clause balances promoting finality of ED and legal certainty, vital to the law on ED, *with* fairness and flexibility that give courts broad powers to intervene. The former is implemented by focussing on the 'obviousness' of an error, while the latter – by a context-sensitive interpretation of ME by considering factors outside the face of an ED and requiring an error to have an impact on ED. Whilst accommodating conflicting policies results in the ME test requiring a complex and nuanced analysis, case law that adopts a context-sensitive approach is remarkably consistent, providing much detailed guidance and in this way facilitating certainty/predictability. It has been suggested that this consistency should not be disturbed. Instead, the broad protection provided by ME should impact on challenges to ED available in

[163] See further K Lewison, *The Interpretation of Contracts*, 6th edn (Sweet & Maxwell, London 2017) [14.09].
[164] But see Rix LJ (dissenting on other grounds) in *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291, para. [84], treating invalidity of ED, a condition precedent to a party's right to invoke arbitration, as irrelevant to this right. If this represents the law, the relevance of this distinction is diminished.
[165] Suppose an inspection certificate fails to state the reasons why the goods are on-/off-specifications, as required by the sales contract. It may lose its finality but if it is not null and void, the seller may be entitled to payment, subject to the buyer's right to reject non-conforming documents and refuse to pay (in the 'cash against documents' case).
[166] *Halifax* (n 74).
[167] See, eg, *Campbell v Edward* [1976] 1 WLR 403, 407 (on fraud and collusion); *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103, 108 (acting outside jurisdiction) *John Barker* (n 99) 62 (unfairness); *Veba* (n 2) para. [47] (material departure); *Cubitt Building & Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC), paras. [76], [86] (ED not reached *or* communicated within the prescribed period); *Camden LBC v Thomas McInerney & Sons Ltd* (1986) 2 Const LJ 293, 302-303 (certificate not 'issued'); *Shorrock Ltd & Anor v Meggitt plc* [1991] BCC 471, 475 (certificate qualified and uncertain); *North Shore* (n 7) para. [61] (ME).

law. Given that parties can easily incorporate the ME clause and a broad range of challenges in law, the latter should be interpreted more restrictively to promote finality of ED.

The law on consequences of a successful challenge to ED is equally complex. When deciding whether to remit a decision to the contractual ED or substitute it with their alternative machinery, courts face competing considerations: on the one hand, freedom of contract/party autonomy and an expert's exposure to personal liability and, on the other, concerns about delays, litigation, costs, willingness/competence of an expert(s) under the contractual ED or the parties' failure to cooperate. How the balance is struck is decided on a case-by-case basis but with reference to sound legal criteria: the ED mechanism must be non-essential and break down. What is critical is that these criteria should be implemented consistently.

Legal complexity is further evident in the possibility of a severable ED. This article has argued that this is the right approach provided that several preconditions are met: a core nucleus/substance of the decision must be unaffected; severing and enforcing a decision in part would not require the court's input; and the decision's 'good' part must be clearly identifiable. Implementing these consistently ensures a high threshold, safeguarding concerns about severability. It has also been argued that severability should not depend on the specific ground on which ED is challenged. This proposal probably requires a change in the law which appears to treat an expert's material departure from instructions as invalidating the entire ED.

The law on ED is based on a mature and well-developed policy and legal framework. Its intricacy should give confidence to commercial parties that ED is governed by nuanced case law, accommodating many conflicting considerations. However, the law should develop in a way that incorporates the legal framework, demonstrated in this article, more fully and consistently than it has done thus far.