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This paper analyses the process known as a 'third-party expert determination' (ED), where, by virtue of an ED clause in the contract, the parties agree to refer an issue, difference or dispute to an expert, whose decision is final and binding on them. In particular, it examines the validity of the oft-repeated proposition that the grounds for challenging ED are very limited, and argues that this oversimplifies the true state of the law, and that ideas of freedom of contract and party autonomy are insufficiently implemented in the law on ED. This paper proposes solutions that promote finality, which is vital to the effectiveness and reliability of the ED process, and that restrict room for judicial interference. Further, the paper demonstrates the increasing complexity of the law on ED and advocates approaches that are conducive to greater legal certainty.

Keywords: Third-party expert determination, contractual performance, dispute resolution, party autonomy, finality, judicial intervention.

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1 Introduction

The need for efficiency and smooth running of transactions often leads to commercial parties choosing the process known as a 'third-party expert determination' (ED). By virtue of an ED clause in the contract, the parties agree to refer an issue, difference or dispute to an expert, whose decision is final and binding on them.[1] The rationale for this mechanism is entirely pragmatic. It is intended to bring finality and avoid disputes as well as costs, time and effort such disputes would otherwise generate. ED is generally a speedy, inexpensive, informal, confidential, relatively non-adversarial and confidential resolution by someone with the relevant expertise. ED has two inter-related functions. One is for an expert to determine a step in the contractual performance, such as reviewing a price in a long-term sales agreement or determining whether in a building contract the conditions triggering the contractor's right to an extension of time are met. The other function is to resolve disputes or differences that have already arisen. In this latter case, ED is a mode of alternative dispute resolution (ADR).

With its origins lying in non-contentious valuation,[2] its practical benefits made ED a widely used mechanism in many industries to resolve various issues — technical, factual or legal — arising from commercial contracts. The common law courts increasingly speak of the ED clauses as being 'commonplace';[3] part of 'a wider trend for an expeditious, economical and user-friendly alternative to litigation and arbitration'.[4] Although this process is used in many countries, legal responses to ED across jurisdictions not only vary greatly[5] but are also yet to emerge with sufficient clarity and detail. In contrast, English law and some other common law jurisdictions such as Australia have developed detailed legal responses to ED. On the whole, the common law supports and promotes ED because of: (a) its favourable policy towards ADR; and (b) its respect towards party autonomy and freedom of contract. As regards (b), since ED is based on the parties' agreement, the law on ED (an area of contract law) generally seeks to

1 This article is not concerned with cases where experts are asked to provide non-binding determinations.

2 See further C Freedman and J Farrell, *Kendall on Expert Determination*, 5th edn (Sweet & Maxwell-Thomson Reuters 2015) 1, 7.

3 See, eg, *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 [17].

4 *Evergreat Construction Ltd Pte Ltd v Presscrete Engineering Pte Ltd* [2005] SGHC 224, [2006] 1 SLR(R) 634 [37]. See, similarly, *Straits Exploration (Australia) Pty Ltd v Murchison United Nl* [2005] WASCA 241 [14].

5 See Freedman and Farrell (n 2) 449–482 for a helpful overview of the approaches of many jurisdictions.

limit judicial interference in the ED process or its finality. Courts stress repeatedly that the grounds for challenging ED are very limited.

This paper examines whether the latter proposition is true. The underlying question is: to what extent does the common law really support ED and protect its finality? Clearly, the wider the range of challenges, the greater the room for judicial interference in ED, undermining the reasons for its extensive use and, ultimately, its reliability and viability. It is shown that judicial pronouncements to the effect that challenges to ED are limited oversimplify the true state of the law. On closer examination, the range of challenges is much wider than it initially seems to be, with individual grounds for challenging ED conferring a broad judicial discretion. As a result, courts have considerable power to interfere with the ED process and its finality. Exploring competing policies underlying the law on ED and some key grounds for challenging ED, the paper argues that the ideas of freedom of contract and party autonomy are insufficiently implemented in the law on ED. It proposes solutions that promote finality, which is vital to the effectiveness and reliability of the ED process, and restrict room for judicial interference. Further, the paper demonstrates the increasing complexity of the law on ED and advocates approaches that are conducive to greater legal certainty.

The paper mainly focuses on English law but also draws on the experience of Australian law and, to a lesser extent, the law of Singapore and New Zealand. This examination highlights the direction of the common law in respect of ED, analysing certain differences between individual jurisdictions. The paper begins by exploring the nature and functions of ED and policies of the law on ED. It proceeds by identifying the multiplicity of possible challenges to ED. Individual grounds for challenging ED are subsequently evaluated in the context of broad themes, namely: (a) the problem of overlapping categories; (b) the choice between automatic and fact-sensitive solutions; and (c) the uneasiness of the law with experts addressing questions of law. The conclusions are drawn in the final part.

2 The nature and functions of ED

ED is a process whereby parties agree to refer an issue, arising from their contract, to be resolved by a third-party expert normally with the relevant expertise.[6] The contracting parties may entrust an expert to determine *a step in the contractual performance* in order to avoid disputes. For example, the expert may be entrusted to determine: a rent reviewable under a long-term rental agreement; the value of shares in a share sale agreement; whether there has been a fundamental change of circumstances, which in turn affects certain rights and obligations; the quality, description or other aspects of goods in a sale contract; whether the discovery of oil and gas is commercial in a petroleum exploration and production contract; or how a petroleum reservoir must be re-determined in a unitisation agreement. Alternatively, disputes may arise in relation to these or other contractual matters. If so, the contract may refer such disputes to ED, in which case ED is a *form of ADR*. Typically, a contractual ED clause provides that the expert's decision is final and binding on the parties and this legal effect of ED is crucial to why ED has become a widely used method of resolving issues.

The finality of ED avoids disputes, including time, effort and expense to which these disputes would otherwise generate.[7] Compared to litigation and arbitration, ED is relatively inexpensive and much speedier, reinforcing its time and cost efficiency. There are no statutes or rules on procedure or evidence governing ED.[8] It is up to the parties to decide if ED should be subjected to any procedural rules and, absent such provisions, the expert decides how to proceed.[9] It is reported that whilst in theory ED 'can involve several rounds of submissions and evidence and/or oral proceedings before the expert', in practice most EDs 'do not involve a hearing and provide for only limited exchanges of submissions'.[10] These features make ED an informal and simple process, well suited to long-term contracts since it helps parties overcome deadlocks and resolve issues in a way that is less adversarial than that in which

6 See, eg, Freedman and Farrell (n 2) 1; J Farrell, 'Expert Determination' in R King (ed), *Dispute Resolution in the Energy Sector: A Practitioner's Handbook* (Globe Law and Business 2012) 39.

7 These benefits of ED are widely acknowledged by the common law courts. See, eg, *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 [16]–[17].

8 *Heart Research Institute Ltd v Psiron Ltd* (n 7) [17]; *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291 [37].

9 *Amec Civil Engineering Ltd v Secretary of State for Transport* (n 8) [37].

10 Farrell (n 6) 39.

litigation and arbitration are conducted. The informality of ED also enables it to be used to resolve issues that cannot be referred to courts.[11] Similar to arbitration, ED is confidential but, unlike arbitration, ED is not subject to court supervision.[12] Nor is ED subject to appeal.[13] The absence of procedural rules results in the absence of remedies for procedural irregularity.[14]

ED is thus rooted entirely in the parties' contract and governed by contract law. It is not of itself directly enforceable, as might be the case for court judgments or arbitral awards. A party wishing to enforce ED must bring a breach of contract action against the party[15] refusing to accept an expert's decision. Conversely, a losing party can challenge ED on the basis of supposedly limited grounds, the characterisation that is questioned in this article. An expert himself/herself[16] is open to liability in negligence.

3 Competing policies

The question of challenging the ED process or its finality lies at the centre of the battlefield of competing policies. One set of interlinked and 'pro-ED' policies points towards the need to encourage the contracting parties' use of ED, enforce agreements to use ED and recognise ED as final and binding. At the heart of this set of policies lies the *freedom of contract* which gives primacy to the parties' agreement. If commercial parties agree to rely on ED as being final and binding on them, effect must be given to such agreements.[17] The parties must be taken

11 'The classic, and probably entirely academic example of such a non-justiciable issue is the decision about which colour to paint a fence between two adjoining properties with different owners': Freedman and Farrell (n 2) 4.

12 See, eg, *Amec Civil Engineering Ltd v Secretary of State for Transport* (n 8) [37].

13 Freedman and Farrell (n 2) 15–16.

14 Ibid 3.

15 Procedurally, a party may seek summary judgment or, if the issue is not suitable for summary judgment, it may be appropriate for the enforceability of ED to be tried as a preliminary issue. Where an expert's decision is that a party should carry out an act or refrain from it, such a decision can be enforced by a court's order for specific performance or an injunction (for these and other issues aspects of enforcing ED, see Freedman and Farrell (n 2) 303–17).

16 In contrast with arbitration, ED can also be performed by a corporate body.

17 *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103, 109: 'if there is a leaning to be discerned, it is in favour of allowing the parties to do what they wish and keeping parties to their agreement, if they make one, that an expert, as opposed to the courts, should decide particular issues. The parties may well have all sorts of very justifiable reasons for preferring an expert's decision in such a matter over the decision that might be

to assume risks arising from ED and the grounds for challenging the ED clause, process and its finality must be as restricted as possible. A related policy is to *encourage ADR*, including ED, that provides efficient, cost effective and expert driven mode of resolving commercial disputes.[18] However, being more than a mode of ADR, ED can be an effective means of *avoiding disputes*, which reinforces the desirability of using ED and the need to promote this mechanism and its finality.

The other set of policies points towards the need to regulate ED primarily by means of a range of grounds for challenging the ED clause, process and its finality. One such policy is that the contracting parties cannot *oust the jurisdiction of the courts*, especially in respect of questions of *law*.[19] Courts have been uneasy about allowing all questions of law being left to a final decision of an expert, who may not even be a lawyer.[20] To a significant extent, this policy flows from the desire of courts to act as the ultimate arbiters on matters of law.[21] But it is also linked with the policy of *fairness* between the parties.[22] From the perspective of a fair balance between the parties' often-competing interests, it is arguably necessary for courts to prevent the law being incorrectly interpreted or applied. More broadly, the policy of fairness demands a broad range of flexible grounds for challenging the ED clause, process and its finality to prevent injustices or a party being exposed to risks that are deemed unjustifiable.

Accommodating these competing policies, the law on ED inevitably contains areas of tension. Tension is reflected primarily in legal complexity, arising from the multiplicity of available challenges to ED that provide courts with much discretion. This discretion can then be exercised in a way that implements a given court's policy stance. It is not surprising therefore

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reached in the courts, and I do not, myself, discern any particular policy of the law as being likely to lead to any different result in that regard.'

18 See, eg, r 1.4(2)(e), CPR (UK); *RE Brown v GIO Insurance Ltd* [1998] CLC 650, 658; *Heart Research Institute Ltd v Psiron Ltd* (n 7) [16], [24]–[25], [83]–[86]; *Straits Exploration (Australia) Pty Ltd v Murchison United Nl* (n 4) [14]; *Mineral Resources Ltd v Pilbara Minerals Ltd* [2016] WASC 338 [59].

19 *Lee v The Showmen's Guild of Great Britain* [1952] 2 QB 329, 342; *In re Davstone Estates Ltd's Leases Manprop Ltd v O'Dell* [1969] 2 Ch 378, 385–386; *RE Brown v GIO Insurance Ltd* (n 18) 659; *Dobbs v The National Bank of Australia Ltd* (1935) 53 CLR 643, 654; *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*, 1997, BC970464, 1, 7–9; A Berg, 'Ousting the Jurisdiction' (1993) 109 LQR 38–39.

20 See Part 7 below.

21 *Lee v The Showmen's Guild of Great Britain* (n 19) 342; *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48. See further n 160 and accompanying text below.

22 *Baber v Kenwood Manufacturing Co Ltd and Whinney Murry & Co* [1978] 1 Lloyd's Rep 175, 181.

to see judges sometimes emphasising different policies and solutions.[23] Finally, competing policies can be approached from the perspective of a spectrum between *legal certainty* at one end and *flexibility* of the law at the other end. Legal certainty flows from the first policy set that prefers the finality of ED and results in the 'automaticity' in the application of various concepts and mechanisms. Flexibility results from the second policy set that favours the courts' wide discretion and ability to regulate all aspects of ED.

4 Multiplicity of challenges

ED can be challenged at different stages. Challenges can be raised before parties embark on or during the ED process, such as where a party starts court proceedings asking the court to determine the issue, which is subject to ED; the other party then requests the court to *stay proceedings*, seeking to enforce ED. The court has an inherent discretion to rule on its jurisdiction[24] and its refusal to grant a stay blocks ED. A party's successful challenge to the ED clause as being *void for uncertainty* invalidates this clause and the agreement to use ED.[25] The ED clause and the process agreed in it may be challenged on the basis that, despite being called 'ED', it constitutes an *arbitration* mechanism and the parties ought to proceed with arbitration.[26] At all stages,[27] including after ED is completed, a party may challenge the *expert's jurisdiction*.[28] Another challenge at all stages is that ED *ousts the jurisdiction of the court*. The common law courts emphasise that parties cannot oust the jurisdiction of the

23 See, eg, nn 57–61, 95–103, 145–146 and the accompanying text below.

24 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 352, 355.

25 See these Australian cases where the ED clause was void for uncertainty: *Heart Research Institute Ltd v Psiron Ltd* (n 7) (inconsistency with the ED Rules); *State of New South Wales v Banabelle Electrical Pty Ltd* [2002] NSWSC 178 [70]; *Raskin v Mediterranean Olives Estate Ltd* [2017] VSC 94 [37]–[42] (drawing the distinction between simple and complex cases; the clause was void for uncertainty because there were no procedural directions in it and it did not address how disputes involving overlapping fields of expertise were to be resolved). But see *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*, 1996, BC9705205 1, 23–24, where the clause was not void simply because it did not provide for the ED procedure.

26 See, eg, *Raskin v Mediterranean Olives Estate Ltd* (n 25); *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 97.

27 On the approach to a possible determination by the court of an expert's jurisdiction *ahead* of ED, see, eg, *British Shipbuilders v VSEL Consortium Plc* [1997] 1 Lloyd's Rep 106, 109.

28 See, eg, *National Grid Company Plc v M25 Group Ltd*, 1998 WL 1044015; Freedman and Farrell (n 2) 261.

courts,[29] although they differ on whether the particular ED process did so.[30] If the ED clause and process are found to oust the jurisdiction of the court, the agreement on ED is null and void.

As regards challenges available *after* ED is completed, English law underwent a substantial change. Although it always stressed the significance of freedom of contract and of respecting agreements to use ED,[31] the position before the mid-1970s was that a material mistake in the expert's decision vitiated it.[32] In the mid-1970s, however, the law began to change by not only strengthening the idea of party autonomy [33] but also introducing tortious liability for professional negligence. [34] These factors caused the need to restrict the grounds for challenging ED. Consequently, at least in the UK[35] a material mistake in an expert's decision ceased to be a challenge, reinforcing the freedom of contract and the ED mechanism. The well-known statement by Lord Denning MR in *Campbell v Edward*[36] captures this turning point:

> In former times (when it was thought that the valuer was not liable for negligence) the courts used to look for some way of upsetting a valuation F which was shown to be wholly erroneous. They used to say that it could be upset, not only for fraud or collusion, but also on the ground of mistake: see for instance what I said in *Dean v. Prince* [1954] Ch. 409, 427. But those cases

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29 See n 19 above.

30 Compare *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (n 19) with *Straits Exploration (Australia) Pty Ltd v Murchison United Nl* (n 4) [12]–[23]; *Fletcher Construction Australia Ltd v MPN Group Lty Ltd* (n 25) 18–19; and *Dobbs v The National Bank of Australia Ltd* (n 19).

31 See, eg, *Frank H (Construction) Ltd v Frodoor Ltd* [1967] 1 WLR 506, 524.

32 *Dean v Prince* [1954] Ch 409; see further the text accompanying n 37 below.

33 See *Alfred C Toepfer v Continental Grain Co* [1974] 1 Lloyd's Rep 11, 13–14; *Campbell v Edward* (n 36), discussed in the text accompanying nn 36–37 below.

34 See *Arenson v Casson Beckman Rutley & Co* [1977] AC 405. But see Berg (n 19) 37–38, questioning the link between liability in negligence and restricting the challenges to the finality of ED.

35 The position seems different in Singapore where some decisions treat 'manifest error' as a ground invalidating ED even where there is no clause to this effect. See *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] SGHC 236, [2009] 2 SLR(R) 385 [47], [85]–[86]; *Tan Yeow Khoon v Tan Yeow Tat* [2003] SGHC 36, [2003] 3 SLR(R) 486. See also *Geowin Construction Pte Ltd* v *Management Corporation Strata Title No 1256* [2006] SGHC 245, [2007] 1 SLR(R) 1004, where the court cautioned that such an approach was not taken by other common law courts and interpreted relying on manifest error in *Tan Yeow Khoon* as 'no more than a convenient shorthand reference to a patent error on the "face" of the award or decision' ([16]). The court also stressed that there was no 'inclination or desire by the courts in Singapore to intervene with greater alacrity to correct decisions made by an expert' ([17]). Nevertheless, the later decision in *The Oriental Insurance* treats a manifest error as a standalone challenge to ED.

36 [1976] 1 WLR 403.

have to be reconsidered now. I did reconsider them in the *Arenson* case in this court: [1973] Ch. 346, 363. I stand by what I there said. It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, G and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything.'[37]

Courts emphasise that an expert's decision will not be vitiated if it is based on a mistake,[38] and will be recognised and enforced, save for limited grounds such as: *fraud*, *collusion*, an expert's (actual) *bias*,[39] *dishonesty* or *bad faith*.[40] However, a closer examination reveals many other ways of challenging an expert's decision. First, it is well recognised that an expert's *material departure* (MD) from the contractual instructions invalidates the decision.[41] Secondly, an expert has an implied duty to act fairly and *unfairness* either in the decision or in the procedure also invalidates the decision.[42] Thirdly, if a contract requires an expert to state *reasons* for the decision (speaking award), a failure to do so or give adequate reasoning is a ground for challenging the decision.[43] Fourthly, if the agreement specifies a governing law, an expert's *failure to decide an issue in accordance with this law* can probably be relied upon to challenge the decision.[44] Fifthly, the decision being based on an expert's *incorrect understanding* of the relevant principles or contractual provisions — an aspect of a jurisdictional challenge or a MD from instructions[45] — is a ground for attacking the decision. Sixthly, an expert's decision must be certain, unambiguous, definitive[46] and readily understandable,[47] which means that its being *uncertain*, such as where the decision is

37 Ibid 407.

38 *Alfred C Toepfer v Continental Grain Co* (n 33) 13, where a certifier admitted a mistake.

39 See, eg, *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700.

40 See, eg, *Mercury Communications Ltd v Director General of Telecommunications* (n 21) 58; *Alfred C Toepfer v Continental Grain Co* (n 33) 14–15; *Baber v Kenwood Manufacturing Co Ltd and Whinney Murry & Co* (n 22) 181.

41 See further Parts 5 and 6 below.

42 See, eg, *George Worrall, Josephine Worrall v Ivor Topp* [2007] EWHC 1809 (Ch); see further Part 6 below.

43 On the meaning of 'reasons' and factors relevant to evaluating their adequacy, see *Halifax Life Ltd v Equitable Life Assurance Society* [2007] EWHC 503 (Comm) [85].

44 *Sunrock Aircraft Corp Ltd v Scandinavian Airlines System Denmark-Norway-Sweden* [2007] EWCA Civ 882 [39].

45 See Freedman and Farrell (n 2) 247.

46 *Fairfield Sentry Ltd v Migani* [2014] UKPC 9 [27].

47 *Minster Trust Ld v Traps Tractors Ld* [1954] 1 WLR 963, 982–983 (an inconclusive certificate).

qualified[48] or inconclusive, vitiates it.[49] Seventhly, certain decisions, such as certificates, may be contractually required to be of a *particular type* or to have a *certain form*.[50] For instance, cases distinguish certificates *in rem* (such as those relying on standards that are universally understood) and *in personam* (of value only to the contracting parties). If the former is required but the expert provides the latter, the decision is open to challenge. Similarly, take the contractual requirement that a certificate must be 'issued', which is interpreted as meaning that it ought to be 'put into circulation'.[51] Consequently, merely being signed deprives the certificate of any effect, as it is nothing more than a 'piece of paper'.[52] Eighthly, *flaws in issuing or delivering a decision*, such as where it is issued late,[53] are a ground for challenge.[54] Finally, mention must be made of a contractual *'manifest error'* exception which, whilst not a challenge in law, still needs to be borne in mind in assessing the extent to which the law supports and enforces ED. The frequent contractual incorporation of this exception led to case law concerning this clause, influenced by the broader forces within the law on ED.

A quick glance at this list shows that judicial pronouncements to the effect that challenges to ED are limited do not describe the law on ED fully and precisely. A wide range of available challenges reveals the increasing complexity of the law. Some of these challenges, such as an MD from contractual instructions,[55] or those relating to requirements concerning certificates, are closely linked to the policies of freedom of contract, finality and legal certainty. Most, however, serve the second policy set,[56] favouring a more regulatory stance of the law. There are occasional calls for an even greater judicial interference with the finality of ED. For instance, Lord Neuberger MR (as he then was) in *Barclays Bank plc v Nylon Capital LLP*[57] took the view that ED on a point of law should be reviewable by courts, apparently even outside

48 *Shorrock Ltd v Meggitt plc* [1991] BCC 471, 475.
49 See Part 7 below.
50 See *Fairfield Sentry Ltd v Migani* (n 46) [27] for the definitional ingredients of a certificate, which seem to be treated as 'formal requirements'. If so, these add to a range of challenges to the finality of a certificate.
51 *Camden LBC v Thomas McInerney & Sons Ltd* (1986) 2 Const LJ 293, 299–300.
52 Ibid 300, 302–303.
53 See *Lee v Chartered Properties (Buildings) Ltd* (2011) 27 Const LJ 191.
54 See Part 6 below.
55 For the rationale of the MD test, see the text accompanying nn 104–105 below.
56 See Part 3 above.
57 [2011] EWCA Civ 826 [66]–[70].

the question whether an incorrect understanding of the law exceeds the expert's jurisdiction.[58]

It is suggested that courts already have too much room, discretion and conceptual flexibility to interfere with ED. The extensive menu of possible challenges and legal complexity thereby created undermine the practical benefits making parties choose ED: its low cost, speed, efficiency, confidentiality, binding and non-adversarial nature and finality. More so, as argued below, there is a need for restraining possible challenges to ED.[59] From this perspective, a later Court of Appeal (CA) decision in *Premier Telecommunications Group Ltd v Webb*,[60] casting doubt on Lord Neuberger MR's view and highlighting the risk of its undermining the value of the ED procedure, is a welcome development:

> [Lord Neuberger MR's] comments were obiter and … neither of the other members of the court expressed agreement with them. It is possible that the parties might by their agreement define the terms of the expert's mandate in such a way that any error of law on his part rendered his decision invalid, but in many cases to do so would risk undermining the whole purpose of the reference. Ultimately, however, as Lord Denning MR observed in *Campbell v Edwards* … (and as Lord Neuberger himself was at pains to emphasise in *Barclays Bank v Nylon Capital*), it all comes down to the construction of the contract under which the expert was appointed to act. Only by construing the contract can one identify the matters that were referred for his decision, the meaning and effect of any special instructions and the extent to which his decisions on questions of law or mixed fact and law were intended to bind the parties.[61]

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58 Lord Neuberger MR stated ([60]) that Knox J's observation in *Nikko Hotels (UK) Ltd v MEPC plc* (n 17) 108 did not represent the general rule. The relevant statement by Knox J was this: 'The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, *unless it can be shown that the expert has not performed the task assigned to him*.' (emphasis added).

59 See Part 7 below.

60 [2016] BCC 439.

61 Ibid 443–444.

5 Overlapping categories

The complexity of the law on ED is evident not only in a wide range of possible challenges but also in some overlap between them. Compare a challenge to an expert's jurisdiction — namely, the scope of the expert's decision-making power, mandate[62] or task[63] — with that asserting the expert's MD from contractual instructions. Many issues can be classified as one or the other and the dividing line is relative and blurry. A key aspect of the expert's remit is that the right question must be answered (in which case even if answered wrongly, the decision is final and binding).[64] Conversely, the expert's answering the wrong question invalidates the decision.[65] Whether the former or the latter is the case is a question of fact and degree,[66] making determining the jurisdictional scope dependent on the court's evaluation in the light of the facts.[67] In a similar vein, any non-compliance with the contract is, by definition, a 'departure' from the contractual instructions. The conceptual fluidity therefore makes the distinction between the two too fine.[68]

Any of these examples can, in principle, be described as the expert's acting outside his/her jurisdiction/remit or departing from the contractual instructions: valuing shares in a company with reference to assets of another[69] or, when determining the contractually stipulated price adjustment of a ship, relying on another ship's information;[70] valuing a wrong number of shares;[71] failing to value a sum or an asset within the limits required by the contract (such as

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62 'The use of the term "the jurisdiction of the expert" is a convenient way of encapsulating the question as to whether under the contract the expert has a mandate to enter into a determination of any part of the dispute between the parties': *Barclays Bank plc v Nylon Capital LLP* (n 57) [21].

63 See, eg, Freedman and Farrell (n 2) 234.

64 *Nikko Hotels (UK) Ltd v MEPC plc* (n 17) 108.

65 Ibid. On whether the decision is severable, see nn 77 and 78 and the accompanying text below.

66 See, eg, *Menolly Investments 3 SARL, Menolly Homes v Cerep SARL* [2009] EWHC 516 (Ch) [85].

67 'Sometimes … the dividing line between the expert having gone outside the ambit of what the contract required … and making a mistake or reaching a wrong result after doing what the contract required … is not bright': *Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd* [2019] NSWSC 576 [45].

68 See, similarly, Freedman and Farrell (n 2) 247, noting this overlap between the two categories in the context of errors of law (on which see Part 7 below).

69 *Macro v Thompson* [1996] BCC 707 (an MD). A similar example of (valuing shares in the wrong company) was treated as acting outside jurisdiction in a case from New Zealand, *Peregrine Estate Ltd v Gregory James Hay and Kim Edward Hollows* [2017] NZCA 496 [32].

70 *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] EWHC 977 (Comm).

71 This example is seen as an MD in *Jones v Sherwood Computer Services Plc* [1992] 1 WLR 277, 287, but as acting outside jurisdiction in *Peregrine Estate Ltd v Gregory James Hay and Kim Edward Hollows* (n 69).

those based on data presented by one party[72] or where the determination must fall within the range between the parties' representations); failing to use the contractually specified computer programme to re-determine an oil and gas reservoir under a unitisation agreement;[73] reaching a decision on the basis of an incorrect understanding of the relevant contractual provisions or legal principles;[74] or undertaking a task that ought to have been undertaken by another expert.[75] It is therefore unsurprising to see some courts relying on both to conceptualise the same issue. For example, a Singaporean court treated an expert's failure to value an insurance claim with reference to the contractually specified date both as acting outside jurisdiction and an MD from instructions.[76]

The overlap does not simply create uncertainty about how an issue should be classified, potentially stretching a range of challenges (since the same issue can be used to attack ED on two separate grounds). A classificatory choice can also generate different legal consequences. At least in English law, an MD from instructions probably invalidates a decision as a whole.[77] Acting outside jurisdiction/remit, in contrast, does not necessarily do so: the part that does not comply with the contractual jurisdiction/remit is invalidated, but the part where the jurisdiction/remit is observed remains binding.[78] Arguably, it is not justifiable for one issue to have different legal effects, depending on the chosen classificatory label. How should this overlap be dealt with then?

One alternative emerges from Australia where the distinction between the expert's jurisdiction and MD does not appear to feature, at least not as expressly and prominently as in the UK. The focus is on this broad question: what did the contracting parties agree that the

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72 *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1988] FC 79.

73 *Shell UK Ltd, Esso Exploration & Production UK Ltd v Enterprise Oil Plc, Elf Exploration UK Plc, Intrepid Energy CNS Ltd*, 1999 WL 249838 [144] (an MD).

74 See Part 7 below.

75 *Jones (M) v Jones (RR)* [1971] 1 WLR 840, 854. See also *Peregrine Estate Ltd v Gregory James Hay and Kim Edward Hollows* (n 69) [32], where the New Zealand Court of Appeal appears to have treated some scenarios, similar to examples in the main text, as instances of the expert's acting outside jurisdiction (by referring to them as examples of errors 'the expert was not entrusted to make').

76 *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* (n 35) [73].

77 *Ackerman v Ackerman* [2012] EWCA Civ 768 [22]; Freedman and Farrell (n 2) 369.

78 *Level Properties Ltd v Balls Brothers Ltd* [2008] 1 P & CR 1; also Freedman and Farrell (n 2) 369.

expert should do and is the expert's decision in accordance with this agreement?[79] This approach is reflected in this quotation from one case:

> A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract.[80]

The emphasis here is on the gravity and extent of the expert's departure from the contract. If it is so fundamental to the contract — such as where a wrong subject-matter is valued — it is of no effect. This approach is largely analogous to that of English law which, as noted, focuses on whether the expert asks the right or wrong question, which in turn is a matter of fact and degree. But the difference between the English and Australian cases is that apart from reviewing ED from the perspective of the expert's jurisdiction, English law also evaluates ED with reference to the MD test. The Australian approach either treats the two categories as being one or, more likely, focuses on the jurisdictional question without using the MD test at all. If so, is the Australian approach a better way forward?

'No' is the suggested answer. First, the two categories can be functionally different and there are jurisdictional matters that do not fall within the MD test. Take the situation where the parties dispute the meaning of a clause that is a precondition to ED. In one case,[81] the expert's

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79 *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1988] FC 79; *Kavinah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2002] NSWCA 180 [50]: 'A mistake by the valuer will only matter if it shows that the valuation was not made in accordance with the contract'; also MS Jacobs QC, 'Impugning Expert Determinations in Australia' (2000) 74 Austr LJ 858, where the MD test is not mentioned.

80 *Legal & General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335–336.

81 *Barclays Bank plc v Nylon Capital LLP* (n 57).

remit was, amongst others, to determine the allocation of profits between members of a limited liability partnership (LLP). The court interpreted the contract as meaning that the expert did not have jurisdiction *until* there was an allocation of profits by one of the partners of the LLP, which was not done.[82] Consequently, not having been validly appointed, the expert had no jurisdiction. This case is not about a departure from instructions but about whether the preconditions for appointing the expert are met. The jurisdictional ground is necessary to cover this type of case. Conversely, as argued below,[83] such matters as detailed methods or technical criteria, which do not involve an expert's discretion, should be within the scope of the MD test, not the jurisdictional challenge.

Secondly, the two categories are well-settled in English law and abandoning one of them[84] would unnecessarily disrupt the legal and conceptual framework (and a degree of certainty that comes with it) to which the legal and commercial community is accustomed. Thirdly, despite the potential overlap there is sound logic underlying the two categories. As English courts emphasise, these categories are different steps in the process. The jurisdictional inquiry is the first step that concerns this question: *What* is the expert contractually entrusted and required to do? If the expert has addressed the right question, the second step then concerns *how* the expert must go about answering that (right) question. The MD test is relevant to the second step: has the expert materially departed from the contractual instructions concerning how the (right) question is to be pursued?

Even this clear logic and sequence of steps, however, do not prevent a classificatory overlap when specific issues are categorised. There is no abstract solution because what the expert's jurisdiction is and how the expert ought to pursue his/her remit must be determined by interpreting the contract. Nevertheless, when dealing with the first step courts probably lean towards viewing the expert's remit at a level of generality or abstraction,[85] treating such

82 Ibid [55].

83 See the text accompanying nn 85–94 below.

84 There is probably no question of abandoning the jurisdictional challenge. Courts always have the power to review an expert's jurisdiction, including post-ED. The question of abandonment would only concern the MD test.

85 To illustrate this proposition, consider the earlier example of where an expert is required to re-determine an oil reservoir and where the contract specifies a computer programme to be used as 'Z-Map Plus'. Is the expert's jurisdiction/remit 'to re-determine an oil reservoir' or 'to re-determine an oil reservoir *by means*

issues as detailed methods or technical criteria to be followed in pursuing the task as matters of the second step. Thus, the experts were deemed, expressly or implicitly, to have acted within their jurisdiction where: in a share sale the expert, required to value the shares of one company, valued the assets of another company;[86] in a unitisation agreement the expert used a wrong computer programme to re-determine an oil field;[87] in a ship sale the expert assessed a vessel's condition at a date different to that specified in the agreement;[88] in a building contract the expert's valuation of the works done by the sub-contractor and other sums was challenged on the basis that it was done on a 'gross' contract price basis.[89]

This approach can help maintain a relatively meaningful borderline between the two categories, reducing a potential overlap, and should therefore continue to be taken. That said, a mistake in a method (normally part of the second step) may be so vital to the task entrusted to the expert that it may be fatal to the jurisdictional issue (the first step). An expert entrusted with certifying a building may do so by, say, missing a porch or an entire storey.[90] Missing the porch may not prevent the expert from acting within jurisdiction. But missing a storey will do so because what was certified differs so radically from the required subject-matter of ED that the expert cannot be said to have undertaken the right task or answered the right question.[91]

Does the applicability of the MD test at the stage where the right question is being answered conflict with the position that ED is final and binding even if the right question is answered wrongly? 'No' is probably the answer. The issue of a MD arises where clear instructions are discernible from the contract, such as what company's shares to value, which date to rely on in valuing an asset or which computer programme to use. Cases on the MD test are normally concerned with whether a departure is 'material'. These are not situations where there is room for an expert's judgement or opinion in deciding how to execute his/her task. The expert's decision is final and binding even if the judgement/opinion is incorrect or the wrong

of using Z-Map Plus'? Courts generally choose the former approach when formulating the expert's jurisdiction/remit. But see further the discussion in the next paragraph in the main text.

86 *Macro v Thompson* (n 69).

87 *Shell UK Ltd v Enterprise Oil Plc* (n 73) (an MD established).

88 *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* (n 70) [72].

89 Without taking account of 5% of the contract sum, which was retention moneys that were not yet due for payment to the sub-contractor which was not yet due for payment.

90 An example given in *Menolly Investments 3 SARL, Menolly Homes v Cerep SARL* (n 66) [85].

91 The same view is taken in ibid.

result is achieved. Compare *Jones v Sherwood Computer Services PLC*[92] with *Macro v Thompson*.[93] *Sherwood* involved a share sale agreement, where an expert made a mistake in determining the total amount of sales of products by the relevant company because certain transactions were not taken into account. In *Macro*, where the expert valued the shares of one company based on the assets of another, *Sherwood* was rightly distinguished on the said basis:

> In *Jones v Sherwood* there was a dispute between the parties' valuers as to what sales should be taken into account. That was a question of judgment and opinion to be arrived at by the valuer. In the present case the fault did not derive from a question of judgment or opinion. It came from the instructions. The instructions were to value, using the assets of the company, the value of a share. Unfortunately, Mr Foster did not use the value of Earliba's assets; he used those of Macro.[94]

It is right, it is suggested, that the applicability of the MD test should depend on the distinction between the cases involving a flaw in the expert's judgement/opinion *and* the expert's departure from clearly discernible contractual instructions not requiring an interpretation, discretion or judgement. Otherwise, the position that ED cannot be challenged if the right question is answered wrongly — and ultimately the reliability of the ED procedure — would be undermined. Wrong answers to the right questions would be subject to the MD test, increasing challenges many of which would invalidate expert decisions.

6 Automaticity v factual sensitivity

6.1 Material departure from contractual instructions

A perennial challenge of commercial law trying to strike a balance between certainty and fairness arises acutely in the law on ED. Legal certainty favours automatic solutions. Fairness

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92 *Jones v Sherwood Computer Services PLC* (n 71).
93 *Macro v Thompson* (n 69).
94 Ibid 713–714.

demands factual inquiries and a careful balance of relevant factors. The tension between these two ends of the spectrum is present in many areas of the law on ED. One example is the already mentioned MD test, in respect of which several judicial perspectives should be noted. The first focuses on the test of 'materiality', distinguishing between 'substantive' and 'procedural' instructions: a departure from substantive instructions automatically invalidates ED (subject to *de minimis*),[95] whereas a departure from procedural instructions does not always do so.[96] The second view also distinguishes between the two types of instructions, but ultimately subjects 'materiality' to the parties' intentions:

> So what is the test by which materiality is to be judged? Surely it is simply whether the *parties would reasonably have regarded the departure as sufficient to invalidate the determination*. At one end of the spectrum will be departures of form or procedure which could have no bearing on the substance of the determination. Unless the parties have so agreed expressly or by necessary implication, it will be a rare case in which a court would hold that they have impliedly agreed that such a departure would invalidate a determination. At the other extreme will be significant departures of substance.[97]

On this view, even a departure from substantive instructions may not invalidate ED,[98] in contrast with the first perspective.

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95 Cf n 98 below.

96 Vos J in the first instance in *Ackerman v Ackerman* [2011] EWHC 3428 (Ch) [274].

97 *Veba Oil Supply and Trading GmbH v Petrotrade Inc ('The Robin')* [47] (dissenting judgment of Dyson LJ).

98 'I would not rule out the possibility that there may be cases in which a departure from instructions would reasonably be regarded by the parties as immaterial because, although the expert's mistake is not one of form or procedure, it is clear beyond argument that the departure could not affect the result, however the result is characterised. Such a mistake is immaterial because the parties could not reasonably consider it to be material.' ([48]). On this view, *de minimis* does not feature as a general legal principle; its applicability depends on the parties' intentions ([46]).

The third (majority) perspective makes the 'materiality' test fact-sensitive and the required factual inquiries include determining the impact[99] of a departure on the parties[100] and the time for assessing materiality.[101] However, once an MD is established its effect is automatic: the decision is invalidated without further factual inquiries. The fact, that the outcome for the parties would be the same even if there were no MD, is irrelevant.[102] Otherwise, 'the court would have to try the facts to see if the error made a material difference', whereas 'the whole purpose of the final determination provision is designed to avoid such a trial'.[103] It is submitted that the law should continue to be based on this perspective.

The rigid distinction between procedural and substantive instructions, underlying the first view, balances certainty against flexibility unsatisfactorily. Whilst it introduces automaticity (and hence certainty) in respect of substantive instructions, its other part — procedural instructions — still requires a factual inquiry. Its benefit of certainty is only partial. Even then, there is little justification in assuming that *any* departure from a substantive instruction is material. This distinction also increases legal complexity by the need to differentiate between 'substantive' or 'procedural' issues, whereas the line between two can be unclear. The second view is also not entirely satisfactory as it does not distinguish between establishing materiality and a legal effect flowing therefrom.

The third perspective is more conceptually transparent and strikes a better balance between fairness and certainty. Fairness is implemented through the fact-sensitive materiality test,

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99 The assessment may well be on the potential, rather than actual, impact: 'it cannot be necessary or possible to wait until the outcome or effect of the error is known, which may be a long way down the line, before being able to decide whether the error is sufficiently material to vitiate the expert's act. It is therefore a question of assessing materiality by reference not to whether it actually affects the ultimate result, but according to its potential effect on the result and, perhaps even more importantly, on the process, including the ability of the parties to manage and deal with the procedure in accordance with the contract.' (*Shell UK Ltd v Enterprise Oil Plc* (n 73) [97]).

100 In *Shell UK Ltd v Enterprise Oil Plc* (n 73), the expert's use of a wrong computer programme was an MD because it had put one party, who used a different programme (specified in the contract), at a significant disadvantage in dealing with the expert's documents ([144]).

101 '[T]he test of materiality has to be capable of being applied, at the latest, at the moment when the error first comes to light, which is likely to be in the first formal document produced by the expert after the error has occurred, or on a request for clarification by one or another party soon thereafter.' ([97]).

102 See Moore-Bick LJ in giving permission to appeal in *Ackerman v Ackerman* (n 77) [22].

103 These are statements by Morison J in the first instance in *Veba Oil Supply and Trading GmbH v Petrotrade Inc* ([2001] 2 Lloyd's Rep 731, 734), with whom the majority of the CA agreed (*Veba Oil Supply and Trading GmbH v Petrotrade Inc ('The Robin')* (n 97) [28]).

requiring *all* relevant factors to be taken into account. Certainty emerges with (not) establishing an MD. The invalidating effect of a MD is essential to the finality of ED.[104] Finality is a serious consequence, which should only arise if the instructions are strictly complied with. The MD test is a tool for determining whether there is such compliance. The need to comply *strictly* explains why the threshold of materiality is low: a departure is material unless it is trivial or *de minimis*.[105]

6.2 Fairness

Where the law on ED sides with flexibility is when it comes to *fairness*. Whilst no principles of 'natural justice'[106] or 'due process'[107] are applicable to ED, a broad duty for an expert to act 'fairly' is implied. A breach of this duty — if an ED process or decision are 'unfair' — probably invalidates the decision.[108] This invalidating effect is the only automatic aspect of fairness whereas its meaning, which is applicable to all issues (procedural and substantive) and has much broader scope than the MD test, is entirely context-dependent. With courts emphasising its 'flexible'[109] and 'elastic'[110] nature, there is no 'objective' and universally applicable benchmark of fairness.[111] As regards the process, specific circumstances may point to unfairness if the expert fails to: communicate with both parties; give equal opportunities for each party to make representations; or issue a decision.[112] However, whether any of these scenarios constitutes unfairness is to be decided on a case-by-case basis and it may well be that this will not be so. In a case involving a road construction contract referring any 'dispute or difference' to an engineer (subject to the timely commencement of arbitration), no unfairness was deemed committed when the contractor had not been given an opportunity to make representations. This was so held[113] because the statutory limitation period for commencing arbitration was soon to expire and one party requested a speedy ED:

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104 See, eg, *Veba Oil Supply and Trading GmbH v Petrotrade Inc ('The Robin')* (n 97) [16].
105 Ibid [28].
106 *Amec Civil Engineering Ltd v Secretary of State for Transport* (n 8) [46].
107 *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* (n 35) [194]–[195], [205].
108 See, eg, *John Barker Construction Ltd v London Portman Hotel Ltd* [1997] 83 BLR 31, 62; *Canterbury Pipe Lines Ltd v The Christchurch Drainage Board* (1979) 16 BLR 76, 100.
109 *Amec Civil Engineering Ltd v Secretary of State for Transport* (n 8) [47].
110 *Canterbury Pipe Lines Ltd v The Christchurch Drainage Board* (n 108) 98.
111 Freedman and Farrell (n 2) 355.
112 *Canterbury Pipe Lines Ltd v The Christchurch Drainage Board* (n 108).
113 By the majority of the Court of Appeal, with Rix LJ dissenting (see further n 120 below).

> Fairness also entitles one or both parties to ask for a speedy decision, if limitation is becoming a problem; and fairness obliges the engineer, I think, to give a speedy decision in such circumstances, provided that it is given honestly and independently and that it is in truth a properly considered decision. There is no basis for saying that the decision in the present case was not properly and sufficiently considered.[114]

Fairness can also police the substance of ED. Where a contract for refurbishment works authorised an architect to determine a 'fair and reasonable' extension of time, the architect's decision was invalidated largely on the ground of unfairness.[115] The decision was deemed 'fundamentally flawed' because the architect: (a) did not logically and methodically examine the impact of the relevant factors on the contractor's programme; (b) made 'an impressionistic, rather than a calculated, assessment of the time which he thought was reasonable'; (c) failed to ensure that allowances made, when extending time for relevant events, bore a 'logical or reasonable relation to the delay caused'; (d) misapplied the contractual provisions by failing to apply the relevant industry standard and wrongly rejecting as relevant events certain items, which resulted in an 'error of law'.[116] All these reasons made the decision 'not a fair determination' and not one 'based on a proper application of the provisions of the contract'.[117] It is not clear how each reason was categorised, but it is likely that (a)–(c) fell within the scope of fairness.[118] Treating (d) as part of fairness would be an undesirable extension of its scope. As shown below,[119] an error of law already features in other categories and its being part of fairness would create an overlap between fairness and other grounds, adding to the complexity of the law on ED.[120]

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114 *Amec Civil Engineering Ltd v Secretary of State for Transport* (n 8) [49] (May LJ).

115 *John Barker Construction Ltd v London Portman Hotel Ltd* (n 108).

116 Ibid 286.

117 Ibid.

118 Freedman and Farrell (n 2) 359–360 (characterising this decision in terms of an MD).

119 See Part 7 below.

120 The contextual nature of fairness, requiring the balancing of often-competing factors, creates complexity and uncertainty. These are also exacerbated by the possibility of inconsistent decisions. See, eg, the dissenting judgment of Rix LJ in *Amec*, taking the view that the expert was not entitled to reach a decision without any reference to the contractor (*Amec Civil Engineering Ltd v Secretary of State for Transport* (n 8) [82]).

The elasticity of its meaning and its broad scope make fairness a powerful tool for policing ED. Given the considerable room it provides for challenging the finality and reliability of the ED process, there is much to be said for not inferring unfairness lightly. Unfairness should comprise those procedural and substantive problems that are of a serious character in the light of, and have a substantially adverse impact on, the intended purpose of ED, contractual scheme and the parties. Fortunately, this has been the approach by the courts so far. Looking at procedural challenges, take a case[121] where the court started with the premise that fairness ought to 'generally demand that each party should have an opportunity to respond to contentions made by any other party'.[122] But emphasising that the finding of unfairness depended on the circumstances, the court concluded, after examining the facts,[123] that a failure to send documents to one party 'was not a serious lapse and it had no effect on the decision making process'.[124] Similarly, in a case involving the sale of vessels the court held that a determination based on materials to which the sellers had no access was not unfair because, amongst others,[125] doing so was within the expert's remit and 'did not offend the contractual regime for the references'.[126]

6.3 Late decisions

Another example of where the law on ED fluctuates between automaticity and flexibility is in respect of late decisions. Here, this tension may be exacerbated by a contractual clause differentiating between 'reaching' a decision and 'sending' it to the parties, as is the case in some building standard form contracts. This clause may require an expert to reach a decision within, say, '28 days' of the dispute or difference being referred to him/her and then send it 'forthwith'[127] or 'as soon as possible'[128] to the parties. If the decision is not *reached* within

121 *George Worrall, Josephine Worrall v Ivor Topp* (n 42).
122 Ibid [21].
123 Ibid [25]–[34].
124 Ibid [35].
125 See *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* (n 70) [100] for further factors pointing against the finding of procedural unfairness.
126 Ibid [100].
127 See, eg, cl 41A.5.3 in the JCT standard form 1998 that was at issue in *Cubitt Building & Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC) and designed to comply with s 108 of the Housing Grants Construction and Regeneration Act 1996 (UK).
128 *Lee v Chartered Properties (Buildings) Ltd* (n 53) 203.

the specified period, it is 'probably a nullity'.[129] If it is a settled position, the law has chosen in favour automaticity and certainty.

What if the decision is reached within the prescribed time but sent or communicated to the parties after that time? Here too, courts underscore the significance of certainty but clauses such as 'forthwith' and the like provide a little leeway. In a case where the deadline for reaching the decision was 24 November, the sending of it on the noon of 25 November was deemed sent forthwith.[130] This decision reflects the tension between certainty and fairness by: stressing that these are exceptional cases and 'the adjudicator must aim' to both reach and communicate the decision by the set date;[131] and stating that the timeframes were 'not a fundamental breach of the adjudication agreement' and a 'practical businessman … would be surprised at the suggestion' that the decision communicated on 25 November was a nullity.[132] In another case,[133] where the decision was to be delivered to the parties 'asap', a three-day delay rendered it unenforceable. The court stressed that there was no 'obvious good reason' why the decision could not have been communicated on the deadline for completing it.[134]

Whilst the results in both cases seem right, some statements may give cause for concern. The statement in the first case that the time it took to reach and send a decision was not a 'fundamental breach' can suggest that that is the test for deciding whether a delay invalidates a decision. Such a position would be highly undesirable as it would introduce a difficult test of a fundamental breach to deal with a relatively marginal issue, creating complexity and generating disputes. It is submitted that the statement should not be seen as introducing any new test and simply mean that the time the expert took was not fundamental to the parties and their agreement. For the same reason, the presence/absence of an 'obvious good reason'

129 *Cubitt Building & Interiors Ltd v Fleetglade Ltd* (n 127) [76].

130 Ibid. The court also recognised the danger of experts abusing the system 'by claiming (wrongly) that a decision was complete by the deadline date, and then using a longer period to finish the decision, thereafter claiming that the longer period was just the time it took to communicate the decision to the parties' ([88]).

131 Ibid [92].

132 Ibid [86].

133 *Lee v Chartered Properties (Buildings) Ltd* (n 53).

134 Ibid 207.

for a delay in communicating the decision in the second case should not be taken as introducing any new test and is, at most, a factor in interpreting the 'asap' clause.

What about cases where the contract sets *the same* deadline for reaching and communicating a decision and has no 'leeway' clause, requiring the decision to be communicated 'forthwith' or 'asap'? If the expert reaches the decision within the deadline but communicates it outside the deadline, is it invalid? The need for certainty dictates an affirmative answer.[135] This is the answer the law gives in respect of a decision *reached* outside the deadline,[136] signalling its preference for automaticity and certainty. This point is reinforced by the argument that if the parties intended to allow for a margin of tolerance, they would contractually incorporate a 'forthwith' or 'asap' clause. However, even here the law is likely to balance automaticity against flexibility by implying a term, in most contracts,[137] that an expert can correct accidental and obvious errors/omissions (or remove and clarify any ambiguity) to maintain 'broad justice' between the parties.[138] Correcting a decision, which must not be about an expert rethinking his/her original decision, takes time. It must not exceed a 'reasonable time' and there must be no prejudice to the parties.[139] This state of the law may be just about an acceptable compromise as minor delays do not invalidate decisions *only* in cases of correcting obvious errors. Even then, the 'reasonable time' test is too generous and other tests requiring greater urgency — such as 'asap' or 'without undue delay' — would be preferable.

7 Questions of law

Traditionally, courts guarded jealously their jurisdiction over matters of law. Contracting parties could entrust a private tribunal to resolve factual matters but could not take issues of

135 Given also that speed is a major reason for using ED.

136 Although the argument that a decision was not a decision until it was communicated was rejected in *Cubitt* in the context of the clause and prior authorities (*Cubitt Building & Interiors Ltd v Fleetglade Ltd* (n 127) [76]).

137 Similarly, Freedman and Farrell (n 2) 337. However, such a term is not implied in commodity sales contracts. See *Soules CAF v Louis Dreyfus Negoce SA* [2001] CLC 797 [20], [27]–[28].

138 *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* (2000) 2 TCLR 914, 921–923.

139 Ibid 923.

law 'out of the hands of the courts'.[140] Although courts are more favourable towards ADR today,[141] they are still uneasy about matters of law being resolved by an expert. One area where this is evident concerns the question whether an agreement on the exclusive jurisdiction and finality of ED in respect of legal matters contravenes public policy as it *ousts the jurisdiction of the courts*.[142] In English law, this question is increasingly answered in the negative as some decisions question the existence of such a policy[143] or treat it as a 'partial exception' to this policy.[144] Australian law has probably experienced greater tension. Some cases treat an ED clause, covering 'any' dispute or difference, as void because it purports to oust the court's jurisdiction. Here is the reasoning from one such case:

> [C]l20 provides for the resolution by the referee of any dispute arising out of the contract, whether or not the determination of the dispute is within his particular field of expertise. Further, the clause purports to make the referee's decision final, rather than making the determination nothing more than a condition precedent to a legal right capable of enforcement by action through the Court. To that extent it operates to outs the jurisdiction of the Court and will not be recognised.[145]

Other cases, however, do not regard clauses of similarly broad scope as having this effect, emphasising the freedom of contract:

> It is an agreement between the parties that the specified disputes shall be determined by an expert. There is nothing unusual about such a provision and parties are held to their bargain if they agree to such a clause. Nor is there anything unusual about the clause providing that the expert's decision shall be 'final and binding' or 'conclusive', and provisions such as that do not oust the jurisdiction of the Court.[146]

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140 See *Lee v The Showmen's Guild of Great Britain* (n 19) 342; see further n 19 above.

141 See n 18 above.

142 See n 19 above.

143 *Nikko Hotels (UK) Ltd v MEPC plc* (n 17) 109.

144 *West of England Shipowners Mutual Insurance Association (Luxembourg) v Cristal Ltd. (The 'Glacier Bay')* [1996] 1 Lloyd's Rep 370, 377; also *Cubitt Building & Interiors Ltd v Fleetglade Ltd* (n 127) (a stay was refused but there was no ouster of the court's jurisdiction).

145 *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*, 1997, BC9706464 2, 7.

146 *Fletcher Construction Australia Ltd v MPN Group Pty Ltd* (n 25) 18. See further *Straits Exploration (Australia) Pty Ltd v Murchison United Nl* (n 4) [15], stating that the 'effect of a valid expert determination clause, however, is not to oust the jurisdiction of the court, but to limit, in some circumstances, the matters which

The difference between the two perspectives is that of policy: should courts recognise and give effect to the agreement subjecting *any* dispute or difference, including that concerning questions of law, to the final and binding ED? It is argued that if ED is to become a truly viable and holistic method of determining contractual issues and of ADR, the policy of not ousting the court's jurisdiction should not intervene in ED. In cases involving sophisticated business parties, the policy thrust should be to hold them to their bargain.[147] Finally, given that the enforcement of ED requires commencing court proceedings it can hardly be said that the ED procedure ousts the court's jurisdiction.[148]

Another area, reflecting a concern about subjecting legal issues to ED, is also linked with the jurisdiction of the courts, namely, the court's power under its inherent jurisdiction to *stay proceedings*.[149] Having a broad discretion, the court will grant a stay where 'it thinks fit to do so'.[150] Many factors need to be balanced[151] but they can be broadly grouped within the notions of justice[152] and convenience.[153] Of relevance to this discussion are such interlinked factors as the nature of the dispute/difference *and* its suitability to be resolved by ED. Take an English case concerning a dispute about each party's minimum obligations under a contract that required one party to provide certain quantities of soft drinks and the other party to make available a facility to bottle and package a certain minimum quantity. The fact that the expert, a professional in the soft drinks industry, had no legal/dispute resolution experience exerted much influence on the court's decision to refuse to stay proceedings:

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the court can consider' and distinguishing *Baulderstone* (n 145); *Mineral Resources Ltd v Pilbara Minerals Ltd* (n 18) [57]–[59], [75].

147 See, similarly, T Thomas, 'Expert Determination in Major Construction Disputes: Public Policy, Uncertainty and Misclassification' (2009) Const LJ 483, 488–489. The position is different where a *contracting party* is entrusted to determine an issue, in which case it may well be 'repugnant to the very existence of a legally enforceable contract to leave [some matters of law] to the exclusive decision of one party' (*RE Brown v GIO Insurance Ltd* (n 18) 659).

148 See, similarly, R Hunt, 'The Law relating to Expert Determination', 9, at <http://www.roberthuntbarrister.com/ExpertDetLawApril2008.pdf>.

149 Section 49(3), Senior Courts Act 1981 (UK); *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (n 24).

150 Section 49(3), Senior Courts Act 1981 (UK).

151 See *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563 [27]–[37]; *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540, 548–550. For a helpful summary of factors, see Freedman and Farrell (n 2) 125–131. See also *Connect Plus (M25) Ltd v Highways England Co Ltd* [2017] QBD 33 (TCC), where a stay was refused on other grounds; *Raskin v Mediterranean Olives Estate Ltd* (n 25) [52]–[58].

152 See *Buurabalayji Thalanyji Aboriginal Corp v Onslow Salt Pty Ltd* [2017] FCA 1240, [72]–[73].

153 Freedman and Farrell (n 2) 125.

> [S]omeone whose experience is essentially in the soft drinks business, is far from being the most obvious person to determine as an expert questions which involves less than entirely straightforward questions of construction of a commercial agreement, and, perhaps, rather more fundamentally, questions as to the quantum of any compensation. … It … strikes me as curious that, in the circumstances of the particular dispute, it is said that the appropriate forum should be someone whose expertise is of a kind which would be adduced, if the matter were proceeding in the ordinary courts.[154]

A similar approach is taken in Australia, as exemplified by a case involving a share sale agreement where an expert-accountant had to determine, amongst others, whether there was a misrepresentation of bad debts. Underscoring the relevance of 'amenability' of a dispute to ED to staying of an action, the court refused to grant a stay in respect of this point:

> The less amenable the dispute is to this mode of resolution, the less appropriate this paradigm will be and the more likely it will be that the court will decline to stay an action brought on the contract so as to allow the expert determination to proceed … . There are … questions of mixed fact and law to be resolved as to whether a representation was made and the content of any representation. Such questions are more readily answered by a lawyer than an accountant. Whoever makes the determination, the process must involve some argument, legal in nature. This is not the paradigm of applying one's special knowledge to one's own observations.[155]

The fact that the issue is legal or involves both factual and legal inquiries can thus be critical to the court's decision to refuse a stay and prevent ED from proceeding. The ability to do so is an effective and flexible tool for judicial interference in the ED process where courts are uneasy about the suitability of an expert or ED procedure (or the lack of it)[156] to tackle matters

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154 *Cott UK Ltd v FE Barber Ltd* (n 151) 549, 550.

155 *Zeke Services Pty Ltd v Traffic Technologies Ltd* (n 151) [27], [30] agreeing with *Cott UK Ltd v FE Barber Ltd* (n 151) on this point. This decision, however, questions the relevance of other factors in *Cott* to staying an action, such as whether: the rules are identified in the contract or in the expert's professional association governing the mode of ED; the contract gives guidance as to the rules or principles pursuant to which the expert is to approach ED. See also *Raskin v Mediterranean Olives Estate Ltd* (n 25) [52], where the court agreed with *Zeke* with a qualification.

156 See *Cott UK Ltd v FE Barber Ltd* (n 151) 549; *Zeke Services Pty Ltd v Traffic Technologies Ltd* (n 151) [32].

of law or mixed questions of fact and law. The concern, that this judicial power damages the reliability of, and confidence in, the ED procedure, is somewhat alleviated by the premise that a stay is not refused lightly. The common law increasingly recognises the benefits of ADR and the parties' freedom to choose ADR.[157] This, in turn, leads to courts drawing a presumption that 'those who make agreements for the resolution of disputes must show good reasons for departing from them'.[158]

Finally, a powerful challenge to ED or its finality in matters of law is to argue that a decision, based on an *incorrect* understanding of the relevant principles/provisions, amounts to an expert's acting outside his/her jurisdiction. The expert, who does not understand the relevant principles/provisions correctly, asks the wrong question; this is not a case of answering the right question incorrectly.[159] Take a case[160] that involved an agreement for telephony interconnection, authorising the Director General of Telecommunications to decide whether a fundamental change in circumstances had occurred, which was a trigger for amending the agreement. One party argued that in his determination the Director had misinterpreted the relevant phrases in the other party's licence[161] (condition 13) for the running of telecommunication systems:

> What has to be done in the present case under condition 13, as incorporated in clause 29 of the agreement, depends upon the proper interpretation of the words 'fully allocated costs' which … raises a question of construction and therefore of law, and 'relevant overheads' which may raise analogous questions. If the Director misinterprets these phrases and makes a determination on the basis of an incorrect interpretation, he does not do what he was asked to do. If he interprets the words correctly then the application of those words to the H facts may in the absence of fraud be beyond challenge. In my view when the parties agreed

157 See n 18 above.

158 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (n 24) 353. This presumption was interpreted in *Cott UK Ltd v FE Barber Ltd* (n 151) 548 as reflecting 'the burden of persuasion'. The burden is seen as 'heavy' in Australian cases (see, eg, *Mineral Resources Ltd v Pilbara Minerals Ltd* (n 18) [103], where the stay was granted and the party opposing it was deemed to have 'bargained away that right in favour of the finality of an expert determination').

159 See K Lewison, *The Interpretation of Contracts*, 6th edn (Sweet & Maxwell 2017) para 18.06, rightly noting that the difficulty between answering the right question (albeit wrongly) and answering the wrong question is particularly difficult to draw in cases of the expert misinterpreting the contract.

160 *Mercury Communications Ltd v Director General of Telecommunications* (n 21).

161 Granted under s 7 of the Telecommunications Act 1984 (UK).

> in clause 29.5 that the Director's determination should be limited to such matters as the Director would have power to determine under condition 13 of the B.T. licence and that the principles to be applied by him should be 'those set out in those conditions' they intended him to deal with such matters and such principles as correctly interpreted. They did not intend him simply to apply such meaning as he himself thought they should bear.[162]

This approach is seen in some other cases. In one case,[163] an expert was to determine whether mineral reserves were exhausted or not economically recoverable, with the tenant thereby entitled to terminate the lease. It was held that the lease did not delegate it to the expert to determine the meaning of 'minerals' and doing so led to the setting aside of the expert's certificate, based on a wrong understanding of the lease. In another case,[164] following the referral under the rent review clause the expert had to determine the rent, which was to be the higher of the passing rent and the open market yearly rent. The correct interpretation of the lease was that the 'open market yearly rent' was to be determined on the basis of two lettings.[165] Because the expert did not interpret the lease in that way, the part of the decision that was based on this erroneous interpretation was not binding on the parties.[166]

This is an area where the law is in danger of intervening in ED excessively.[167] First, the reliability, effectiveness and finality of ED are already under much strain because of a wide range of challenges, some of which are broad in scope. Challenging ED on the basis of an incorrect understanding of the relevant principles/provisions casts the interventionist net too expansively. Commercial parties do not expect a perfect result from ED. An erroneous

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162 *Mercury Communications Ltd v Director General of Telecommunications* (n 21) 58-59 (Lord Slynn). But see Freedman and Farrell (n 2) 250–251, noting the possible influence of the statutory and public law context.

163 *Homepace Ltd v Sita South East Ltd* [2008] 1 P & CR 24 [52]–[54].

164 *Level Properties Ltd v Balls Brothers Ltd* (n 78).

165 Because the premises were capable of being let as two separate units (ibid [33]).

166 Ibid [42]–[49]. For a similar approach in Australia, see *Fermentation Industries (Aust) Pty Ltd v Burns Philp & Co Ltd*, 1998, BC9800135, 1, 34–35, where the expert misinterpreted the pricing regime.

167 According to some decisions, there is no public policy that parties cannot remit questions of law to the exclusive and final jurisdiction of an expert (see *Nikko Hotels (UK) Ltd v MEPC plc* (n 17) 109; *Evergreat Construction Ltd Pte Ltd v Presscrete Engineering Pte Ltd* (n 4) [37]). It is suggested, however, that neither this policy direction nor the exclusivity of the expert's jurisdiction over a legal issue prevent the challenging of an ED. Courts always have the final say on what constitutes the expert's jurisdiction, even if it is intended to be exclusive. Therefore, it can always be argued that acting under an incorrect understanding amounts to acting outside the expert's exclusive jurisdiction.

decision is a risk inherent in ED which parties should bear. This risk is the price for the speed, informality, low cost, finality and non-adversarial character of ED.[168] Challenging ED on this ground necessitates further dispute resolution as it is only the court or arbitration tribunal who, on this approach, has a final say on what the 'correct' interpretation of the law or contract is. That would clearly undermine the reasons why ED is chosen. The second reason is that if parties truly intend to sacrifice the benefits of ED in favour of making its 'correctness' in legal matters reviewable by courts/arbitrators, they can be expected to contractually incorporate a clause to this effect.[169] This line of reasoning has already found favour in one case:

> Parties who refer a matter to an expert for decision usually do so in order to obtain a quick and relatively inexpensive decision of a binding nature on a matter that calls for informed judgment. Often that involves the application of principles and expressions that are familiar and well understood in the particular field of endeavor ... . In such cases it would be surprising if they had intended the expert's decision to be of no effect if it could be shown that he had made a mistake in the application of some well recognised principle. Parties who refer a dispute to an expert must be taken to have recognised that mistakes may be made, both of fact and law, but they are prepared to take that risk because they place a high degree of confidence in their chosen expert.[170]

Secondly, in terms of the commercial and legal outcome it often makes little difference to a party, disadvantaged by the decision, whether there is an error of law or fact, or both. Suppose an expert admits a mistake in his/her certificate by assigning a wrong grade or providing erroneous data in respect of the composition of goods. This mistake may result from errors of judgement and fact. The fact that these are not errors of law is of no consolation to a buyer who, bound by the finality of the certificate,[171] must pay the price having no remedy against the seller. In the case of *factual* errors EDs are largely unassailable

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168 See similarly *Baber v Kenwood Manufacturing Co Ltd and Whinney Murry & Co* (n 22) 181.

169 Even then, as one court recognises, doing so would in many cases 'risk undermining the whole purpose of the reference' to ED (*Premier Telecommunications Group Ltd v Webb* (n 60) [9]).

170 Ibid [12].

171 In respect of a matter covered by the certificate. See *Alfred C Toepfer v Continental Grain Co* (n 33); *NV Bunge v Compagnie Noga D'Importation ET D'Exportation SA (The 'Bow Cedar')* [1980] 2 Lloyd's Rep 601.

on jurisdictional grounds.[172] Given the little (if any) difference in the commercial outcome, why should errors of law be treated differently?

Thirdly, this challenge causes uncertainty. It requires differentiating between factual and legal issues, a distinction which may not only be easy to draw but may also not be intended to be drawn.[173] There is further an open question whether 'any issue of law' falls within the jurisdictional challenge.[174] If the affirmative answer is eventually given, this uncertainty will increase because elaborate distinctions will need to be drawn between legal issues that are part of the jurisdictional challenge and those that are not. It is doubtful whether such an exercise can be meaningfully performed.

The expert's jurisdiction/remit is, of course, a matter of the parties' intention.[175] Whether the expert acts outside his/her jurisdiction by interpreting the principles/provisions incorrectly must be decided by construing the contract.[176] It is submitted, however, that for the reasons just given, courts should be slow to infer an intention that the expert's jurisdiction is subject to his/her correct understanding. This inference should only be made where the contract clearly evidences this intention, such as where there is an express provision to this effect. In fact, the need for certainty and finality of ED makes it preferable to go further and advocate a presumption that the absence of such an express provision means that an expert's incorrect understanding of the relevant principles/provisions was not intended to be a part of the jurisdictional challenge; it should then be up to the party, challenging ED, to prove an implicit intention to the contrary in order to rebut this presumption. If this is deemed to be too radical a proposition, it is submitted that when interpreting contracts courts should still lean towards

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172 Recall the scenarios of an expert valuing the assets of a wrong company or a wrong number of shares, which are issues of fact. They are analysed in cases in the context of the MD test, not as a jurisdictional challenge (see, eg, *Macro v Thompson* (n 69); *Jones v Sherwood Computer Services PLC* (n 71) 287).

173 '[The contracting parties] are unlikely to have intended that fine and nice distinctions were to be drawn between factual matters which fall within the expert's remit and questions of law or question of mixed law and fact which do not' (the Court of Appeal in *Norwich Union Life Insurance Society v P&O Property Holdings Ltd* [1993] 1 EGLR 164, 169, citing with approval this statement by Sir Donald Nicholls Vice-Chancellor in the first instance).

174 *Premier Telecommunications Group Ltd v Webb* (n 60) [9].

175 As opposed to being an implied term. See, eg, *British Shipbuilders v VSEL Consortium Plc* (n 27); *National Grid Company Plc v M25 Group Ltd* (n 28).

176 See Freedman and Farrell (n 2) 256-258, for a helpful list of factors relevant in contract interpretation.

placing the risk of an incorrect understanding on the parties.[177] Given the (relatively) informal, simple, low cost and speedy nature of ED and ease with which parties can guard themselves, the proposed allocation of risk is fully justifiable. It promotes party autonomy, entailing greater responsibility on parties, certainty[178] and finality, so needed to protect the reliability of ED.

8 Conclusion

Does the common law adequately support and promote ED by protecting its final and binding nature? Courts recognise the practical benefits of ED and the value of its finality. However, this examination shows that legal responses to ED have generated considerable complexity and much room for judicial interference emanating from a wide range of challenges to ED, providing courts with a substantial discretion. This is arguably indicative of the maturity of the common law which recognises and accommodates competing policies. But it is argued that the way the common law strikes a balance between them 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. This policy perspective leads to this paper advocating the following framework.

The complexity of the jurisdictional challenge overlapping with the MD test is reduced by the position, whereby: (1) the two are treated as separate and successive steps in the process, with the first (jurisdictional) question being concerned with *what* the expert is contractually entrusted and required to do; (2) the MD test is relevant to the second step concerned with *how* the expert must go about answering the question in (1); (3) the jurisdiction/remit is

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177 This position does not contravene an implied term (see n 44 and the accompanying text above) that an expert must decide an issue in accordance with the applicable law. A duty to act in accordance with the law is conceptually separate from a legal consequence of a failure to do so. Even if the two must be aligned, the position here does not advocate that an incorrect understanding can never invalidate an ED. At most, a rebuttable presumption is proposed. See also *Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd* (n 67) [50], where an expert's mistake of law was not deemed to contradict a contractual clause requiring an expert to determine the dispute 'according to law'. The argument to the contrary was rejected partly because it would create 'commercial inconvenience'. The court reasoned, rightly it is suggested, that accepting it would 'have the consequence that the Determination is, in effect, subject to appeal on any and every question of law determined or legal precept relied on by the Expert, which, if determined or seen differently, would lead to a different result'.

178 The suggested policy thrust would signal some clarity as to whether ED might be challengeable.

defined in general terms, with detailed or technical matters falling within the second step; and (4) the MD test is only relevant where the contractual instructions are clearly discernible and do not require an expert to exercise his/her judgement or discretion. The MD test strikes the balance between automaticity and flexibility most optimally if 'materiality' is fact-sensitive but once established its effect, invaliding a decision, is automatic. Unfairness in the process or decision should not be inferred lightly and arise only where problems are of a serious character and have a substantially adverse impact on the intended purpose of ED, the contractual scheme and the parties. Where the contract draws no distinction between reaching and communicating a decision, late decisions should be ineffective, in the absence of clauses giving an expert some leeway. Whilst this position should be subject to an expert's right to correct obvious errors/omissions, this right should be exercised 'without delay' or 'asap'; more stringent tests than that of 'reasonable time' currently applied. The policy of ousting the court's jurisdiction should not intervene in ED. Given that the court's power to refuse to stay proceedings is an effective way of interfering with the ED process, it is right to continue with the position that a stay is not refused lightly. Finally, courts should be slow to infer an intention that an expert's incorrect understanding of the relevant provisions/principles vitiates a decision as part of the jurisdictional challenge. The proposal goes further by advocating a presumption that, where there is no express contractual clause to the contrary, a correct understanding is not intended to be a part of the expert's jurisdiction/remit.