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CONTRACTUAL DISCRETION IN SINGAPORE: A NEW FOUNDATION FOR THE *BRAGANZA* DUTY

The implied "*Braganza* duty" governing contractual discretion was established by the UK Supreme Court in *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17. It has been readily adopted in Singapore. However, three doctrinal uncertainties persist: the duty's juridical basis, its scope, and the relevance of context. This article argues that these difficulties stem from an unsound analogy between contractual discretion and public power, given fundamental differences between contract and public law in rationale, remedies, and relationships. The *Braganza* duty is better grounded in an independent doctrine of non-arbitrariness. This can help address the three doctrinal uncertainties in the law.

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I. Introduction

1 Contracts frequently confer discretionary powers on one or both parties. A contract may, *eg*, entitle one party to determine the remuneration payable for specified services, sometimes at its "sole" or "absolute discretion". Is the decision-maker free to act as it sees fit? Or might the exercise of a contractual discretion constitute a breach of contract? If so, when?

1 The authors are grateful to the anonymous reviewer for the very helpful comments. The opinions expressed in this article are solely those of the authors. They should not be construed as representing the views of their respective institutions.

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2 The UK Supreme Court's decision in *Braganza v BP Shipping Ltd*[2] ("*Braganza*") is an important milestone in the law's answer to this question. It marked a decisive shift in what had previously been a fragmented body of authority by expressly drawing on public law concepts and articulating the implied "*Braganza* duty".[3] This duty is commonly understood to require that contractual discretions be exercised lawfully, in good faith, rationally in the public law sense, consistently with their contractual purpose, and not dishonestly, arbitrarily, or capriciously.

3 In Singapore, the duty has been readily received and is now routinely invoked, but three doctrinal issues remain unresolved. First, the juridical basis of the duty is uncertain: courts oscillate between treating it as a term implied in fact and as one implied in law. Second, its scope is unclear. The courts have held that the duty applies only to contractual discretions and not to absolute rights such as termination rights. However, how does one distinguish contractual discretions from absolute rights? Also, does the duty apply to all discretions which are not absolute rights, or only to some discretions, and if the latter, which? Third, the relevance of context is unsettled. Does it affect the content of the implied term and the degree of judicial scrutiny?

4 These difficulties are not incidental. They reflect a deeper structural problem in the duty's foundations. In *Braganza* itself, the UK Supreme Court justified the duty by drawing a parallel between contractual discretion and public power, so that public law rules could be drawn upon to govern contractual discretion. However, is that parallel sound? If it does not hold, the duty's foundation becomes ambiguous, making the three doctrinal issues harder still to resolve. Yet the Singapore courts have not squarely examined whether the analogy endorsed in *Braganza* is conceptually appropriate within contract law.

5 This article makes two main claims. First, the *Braganza* duty ought not to be justified by reference to public law. There are three important differences between public law and contractual contexts that make drawing a parallel between them unhelpful: differences in rationale, remedies, and relationships between key actors. Second, the *Braganza* duty is better understood as based on an independent doctrine of non-arbitrariness. Non-arbitrariness answers the unresolved questions in the law without importing public law ideas developed for a fundamentally different context. Applying the idea of non-arbitrariness, the starting point is whether the clause in question gives rise to a true discretionary

2 [2015] 1 WLR 1661; [2015] UKSC 17.

3 Jason Varuhas, "Three Issues in the Law of Contractual Discretion" (2022) 42(3) *Oxford Journal of Legal Studies* 787 at 789.

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power: a power to decide something beyond merely whether that right should be enforced. If so, the next question is whether that power arises in a context of imbalance of power. If both answers are "yes", the duty should be implied in law unless expressly excluded. The contractual context should shape the content and intensity of the duty.

6 The argument proceeds in four stages. First, the article describes the development of the law on contractual discretion in Singapore. Second, it identifies the doctrinal problems that have arisen following the reception of *Braganza*, and traces them to the duty's normative basis. Third, it argues that the *Braganza* duty ought not to be grounded in an analogy to public law. Fourth, it explains the value of non-arbitrariness and how it can provide a foundation for the duty which also addresses the doctrinal problems.

7 As a matter of methodology, it is important to state that this article's focus is Singapore, not English, law. While the difficulties surrounding the duty's normative basis arise from English law, the focus is on the reception and application of *Braganza* in Singapore law, and on the doctrinal tensions that this transplantation has exposed.

II. Contractual discretion in Singapore law

*A. Pre-*Braganza *foundations in Singapore*

8 As in the UK, the Singapore courts had recognised limits on contractual discretion even before *Braganza*, through case law addressing concerns about fairness and rationality in discretionary decision-making.

9 The Singapore High Court's decision in *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd*[4] ("*MGA International*") illustrates the pre-*Braganza* position. One issue was whether there were legal limits on a party's discretion to decide its own remuneration and commission for trade financing services. Counsel argued that the discretion was absolute. The court held, however, that it was not unfettered. Parties expected discretion to be exercised fairly and rationally. In support, the court cited pre-*Braganza* English authorities. The first was *Horkulak v Cantor Fitzgerald International*,[5] an employment case which grounded the limitation in the presumed common intention of the parties. There, the court stated that where the parties are likely to have conflicting interests and the contract places resolution of that

4 [2010] SGHC 319.
5 [2005] ICR 402.

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conflict in the hands of the party exercising the discretion, it is presumed to be the common intention of the parties that the discretion be exercised genuinely and rationally. The second, *Socimer Bank Ltd v Standard Bank Ltd*,[6] concerned not employment but the defendant's right to liquidate the plaintiff's portfolio upon an event of default. The contract gave the defendant discretion to value the assets, and the issue was whether it was nevertheless under an implied obligation to take reasonable care to ascertain the true market value of the plaintiff's assets. The court justified an implied limitation as a necessary control against abuse. A further non-employment case, *JML Direct v Freesat UK Ltd*,[7] cited those two cases as authority that a discretion conferred on one party by the other is not wholly unfettered.

10 *MGA International* is significant for several reasons. First, the court did not invoke a public law rationale, which suggests that such reasoning entered Singapore law only with *Braganza*. Second, the court relied on both employment and non-employment authorities without drawing a distinction between them, implying that limits on contractual discretion were of general application. Third, its reasoning suggested that the limitation was implied both in fact and in law,[8] without addressing the conceptual differences or identifying which basis applied.

11 Subsequently, in *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd*,[9] the High Court considered a commercial banking and loan facility. Where the borrower failed to provide additional security, the facility gave the bank an "absolute discretion"[10] to convert currency and "sole discretion"[11] to assess the security's value. The court, citing *MGA International*, held that the discretion was subject to an implied term requiring it to be exercised honestly, rationally, and for the purpose for which it was conferred. Again, the court did not refer to public law. Neither did it address whether the term arose in fact or in law, or whether the express grants of "absolute discretion" and "sole discretion" could potentially be at odds with such implication.

6 [2008] 1 Lloyd's Rep 558.
7 [2009] EWHC 616.
8 Ewan McKendrick, "Implied Terms" in *Chitty on Contracts* (Hugh Beale ed) (Sweet & Maxwell, 36th Ed, 2026) at paras 17-007–17-022.
9 [2012] SGHC 61.
10 *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [43].
11 *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [43].

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12 In *TYC Investment Pte Ltd v Tay Yun Chwan Henry*[12] ("*TYC Investment Pte Ltd*"), the court rejected the implication of any term restricting the exercise of a contractual power conferred by a settlement agreement between two company directors. Counsel had advanced the argument on the basis of implication in fact. The court first rejected the possibility that a discretion would be restricted by a term implied in law where a party has an exclusive contractual right to make a decision that may adversely affect another. Any such restriction had to be implied in fact. Emphasising freedom of contract, the court then observed that there was no general principle preventing parties from conferring unfettered discretion, even where its exercise may adversely affect one or both parties.[13] On the facts, no such term could be implied, as the agreement remained efficacious without it: the directors were already subject to duties imposed in law constraining them not to exercise their powers dishonestly, for an improper purpose, capriciously, or arbitrarily.[14]

13 A further case, *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd*,[15] was decided shortly after *Braganza* but without express reference to it. A contract gave the bank the right to act at its "reasonable discretion"[16] upon the client's default. It was common ground that this was not an unfettered or absolute discretion. The real dispute concerned the threshold for impugning the bank's conduct. The court held that it would be slow to intervene absent arbitrariness, capriciousness, perversity, or irrationality, reasoning that the clause was designed to give the bank latitude to act quickly to close out its position and minimise losses.

B. The Braganza *decision*

14 At this point, the UK Supreme Court handed down *Braganza*, a significant milestone in English law on the limits to contractual discretion. In this case, a contractual clause gave BP Shipping Ltd ("BP") the power to decide, "in [its] opinion",[17] whether an employee's death resulted from his own wilful act. If so, this would exclude death benefits. After Mr Braganza disappeared at sea, BP relied on an internal investigation to conclude that he had committed suicide, and denied his widow compensation.

12 [2014] 4 SLR 1149.
13 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [209].
14 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [187] and [211].
15 [2016] 1 SLR 186.
16 *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [64].
17 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17 at [1].

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15 The key issue was whether BP was entitled to reach that opinion under the contract. This required the court to consider the limits on contractual discretion. It held that such discretions were constrained by an implied term requiring "rationality" in a public law sense, often described as "*Wednesbury* reasonableness". This imports two linked limits: (a) the decision-maker must take into account relevant considerations and ignore irrelevant ones; and (b) the decision-maker must not reach a conclusion that is irrational or perverse.[18] The court emphasised the analogy with judicial review, holding that "[t]here is an obvious parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute (or the royal prerogative) assigns a decision-making function to a public authority".[19]

16 The content of the implied term would depend on the terms and context of the particular contract. The court observed that an employment contract is of a different character from an ordinary commercial contract. An employment relationship is a personal one in which any decision-making function entrusted to the employer must be exercised consistently with the implied obligation of mutual trust and confidence. This justifies the more intensive scrutiny of the decision-making process in employment contracts than in commercial contracts.[20]

17 The court ultimately held that the discretion exercised was a fact-finding power depriving the employee's family of a contractual benefit. BP was required to approach the question with care, recognising that suicide was inherently improbable and required cogent evidence. It failed to do so. It did not properly consider a plausible alternative and relied on weak, circumstantial "straws in the wind".[21] The decision was therefore flawed in process and unreasonable in the *Wednesbury* sense, even if it was not made in bad faith.

C. ***Post*-Braganza *acceptance***

18 Returning to Singapore law, it is clear that prior to *Braganza* the courts had already recognised certain limits on contractual discretion. However, what was less developed was the juridical basis of those limits and the precise content of the constraints they imposed.

19 The Singapore courts have since readily drawn on *Braganza* to supply the basis of these limits. The post-*Braganza* cases suggest that

18 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17 at [29].
19 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17 at [19].
20 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17 at [32].
21 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17 at [40].

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Braganza has supplied a convenient label and organising framework for limits already recognised in Singapore law. For example, in *Leiman, Ricardo v Noble Resources Ltd*[22] ("*Leiman*") the court cited *Braganza* but immediately noted that "[t]hese principles have been accepted by the local courts", referring to *MGA International* and its reliance on pre-*Braganza* English authorities.[23] The *Braganza* duty has also been described as an expanded default set of implied terms governing the exercise of contractual discretion.[24]

20 The substantive test applied post-*Braganza* appears materially identical to the one applied pre-*Braganza*. However, the courts have neither scrutinised the juridical basis of *Braganza*[25] nor suggested that its importation would modify the existing Singapore law approach to contractual discretions. Three doctrinal issues therefore remain: uncertainty over the duty's juridical basis, continuing difficulties in defining the scope of the duty, and limited engagement with the possibility of variation in content and intensity across contractual settings. These point to a deeper normative issue about the duty's justification. Each will be discussed in turn.

III. Unresolved questions in Singapore law

A. Juridical basis of Braganza *duty*

21 The first issue concerns the uncertain juridical basis of the *Braganza* duty in Singapore law. In some cases, the courts have treated the duty as a term implied in law. In *Maybank Singapore Ltd v Synergy Global Resources Pte Ltd*,[26] the General Division of the High Court described the *Braganza* duty as an expanded default set of implied terms justified on the basis that courts will not permit one party to subject the other to its uninhibited whim. The court thus characterised the duty in a manner broader than pre-*Braganza* controls and suggested that it operates as a term implied in law. The court in *Deutsche Bank AG Singapore Branch v ARJ Holding Ltd*[27] ("*Deutsche Bank AG Singapore Branch*") also treated earlier High Court authorities as having proceeded on the basis that the

22 [2018] SGHC 166.
23 *Leiman, Ricardo v Noble Resources Ltd* [2018] SGHC 166 at [113].
24 *Maybank Singapore Ltd v Synergy Global Resources Pte Ltd* [2024] 3 SLR 1316.
25 In *Leiman, Ricardo v Noble Resources Ltd* [2018] SGHC 166 at [114], the High Court noted but declined to decide whether the principles of judicial review may apply in the contractual context. It was not necessary for the court to do so, as the established contractual standard was sufficient to resolve the dispute.
26 [2024] 3 SLR 1316.
27 [2025] SGHC 163.

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Braganza duty is a term implied in law rather than in fact. In that case, the bank was entitled to value collateral at a percentage determined at its "sole discretion"[28] and had "absolute discretion"[29] to prescribe the amount of collateral required. The duty was held to be implied in law to restrict that discretion. It is worth noting that in doing so, the court relied on *MGA International*, which referred to the reasonable expectations – and thus common intention – of the parties that discretion would be exercised genuinely and rationally, and that the decision-maker's discretion should not be abused. However, that reference does little to clarify the duty's juridical nature. As observed earlier, the reasoning in *MGA International* drew simultaneously on concepts associated with implication in fact (common intention and reasonable expectations) and implication in law (general concern to prevent abuse of discretion).[30]

22 On other occasions, the courts have suggested that the *Braganza* duty was better understood as implied in fact. In *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency*[31] ("*Center for Competency-Based Learning and Development*") and *Rajesh Harichandra Budhrani v INTL FCStone*,[32] the courts framed the *Braganza* duty in terms of presumed intention. A similar position was taken in the decision of the Appellate Division of the High Court ("Appellate Division") in *Shipworks Engineering Pte Ltd v Sembcorp Marine Integrated Yard Pte Ltd*[33] ("*Shipworks Engineering*"), The plaintiffs were subcontractors who had supplied manpower and carried out works for the defendant shipyards. Clauses 9(a) and 17 of the governing agreements reserved to the defendants the "absolute right and discretion"[34] to decide the extent of the works completed and the commercial value of those works, and cl 9(a) barred any challenge to that discretion save on the ground of fraud. When the defendants reassessed the value of completed works at final payment, the plaintiffs contended that the discretion was subject to an implied limitation. The Appellate Division held that cl 9(a) was confined to the valuation of work in progress, and that cl 17, governing final payment, said nothing about the grounds of challenge. A true gap therefore existed. To fill the gap,

28 *Deutsche Bank AG Singapore Branch v ARJ Holding Ltd* [2025] SGHC 163 at [31].
29 *Deutsche Bank AG Singapore Branch v ARJ Holding Ltd* [2025] SGHC 163 at [31].
30 Ong has argued that the basis for the control of discretion in *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 was actually a term implied in law, since the implication rested on a series of cases establishing that such a term will be implied whenever a discretion is conferred on one party: see Ong Ken Wei, "The Limits to Contractual Discretion" (2021) 33 SAcLJ 919.
31 [2024] 5 SLR 481.
32 [2024] SGHC(A) 29.
33 [2026] SGHC(A) 22 at [216]–[231].
34 *Shipworks Engineering Pte Ltd v Sembcorp Marine Integrated Yard Pte Ltd* [2026] SGHC(A) 22 at [219].

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the court then implied a term that the discretion under cl 17 must be exercised in good faith and not arbitrarily or capriciously.

23 The case is significant because of how the court implied the *Braganza* duty. The analysis proceeded through the orthodox framework for implication in fact: a search for a true gap, then an inquiry into the term required to fill it. Yet, it is worth pointing out that the content of the implied term was not derived from anything specific to this bargain. Rather, it was supplied by what the court described as the settled position in Singapore law: namely that a contractual discretion, even one expressed in absolute terms, must be exercised in good faith and not arbitrarily or capriciously. The reasoning in this case therefore has the form of implication in fact and the substance of implication in law.

24 This uncertainty about the *Braganza* duty's juridical status is not confined to Singapore. In the UK, while Varuhas argued that the law has moved towards the latter characterisation, the question remains unsettled.[35] This uncertainty matters. There are significant differences between terms implied in fact and terms implied in law.[36] A term implied in fact is confined to the particular contract before the court and is justified by reference to the presumed common intention of the parties.[37] A term is implied in fact if it is necessary to give business efficacy to the contract or where it represents the obvious but unexpressed intention of parties.[38] The inquiry is directed to the relationship between the parties to that specific contract.

25 By contrast, a term implied in law is imposed as a necessary incident of all contracts of a defined class.[39] The test is broader and more flexible than that for implication in fact; the focus is not primarily on the intentions of the individual parties but on broader considerations of reasonableness, fairness, and policy.[40] Such terms operate as standardised defaults applicable to all contracts of that type unless expressly excluded.

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35 Jason Varuhas, "Three Issues in the Law of Contractual Discretion" (2022) 42(3) *Oxford Journal of Legal Studies* 787.

36 Ewan McKendrick, "Implied Terms" in *Chitty on Contracts* (Hugh Beale ed) (Sweet & Maxwell, 36th Ed, 2026) at para 17-007.

37 Ewan McKendrick, "Implied Terms" in *Chitty on Contracts* (Hugh Beale ed) (Sweet & Maxwell, 36th Ed, 2026) at para 17-007.

38 Ewan McKendrick, "Implied Terms" in *Chitty on Contracts* (Hugh Beale ed) (Sweet & Maxwell, 36th Ed, 2026) at para 17-008.

39 Ewan McKendrick, "Implied Terms" in *Chitty on Contracts* (Hugh Beale ed) (Sweet & Maxwell, 36th Ed, 2026) at paras 17-007 and 17-017–17-018.

40 Ewan McKendrick, "Implied Terms" in *Chitty on Contracts* (Hugh Beale ed) (Sweet & Maxwell, 36th Ed, 2026) at paras 17-016–17-017.

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26 The unresolved tension between both understandings of the *Braganza* duty reveals a deeper conceptual difficulty. If the duty is a term implied in law, as its routine and default application suggests, that must be reconciled with the reluctance expressed in *TYC Investment Pte Ltd* to recognise a general implied term regulating all powers of contractual discretion. Conversely, if it is implied in fact by reference to the parties' intentions, it is unclear how that squares with its borrowed public law rationale. Clarification is therefore necessary. This question is addressed below,[41] where it will be argued that the duty is best analysed as a term implied in law, and that the value of non-arbitrariness supplies the justification for that characterisation.

B. Scope of Braganza *duty*

27 A second issue concerns the scope of the *Braganza* duty. The clearest position concerns termination: the Singapore courts have maintained that the duty does not extend to the contractual right of termination. In *Dong Wei v Shell Eastern Trading (Pte) Ltd*[42] ("*Dong Wei*"), the court observed *obiter* that the *Braganza* duty does not apply to an employer's right to terminate a contract. The court reasoned that the restrictions in prior cases related to rights subsisting within the contracts. They were designed to ensure that a party's discretion was not exercised in a manner which deprived its counterparty of its contractual rights, or which warped their contractual bargain. By contrast, the court drew a "crucial distinction" between such discretions and the right to bring a contract to an end, noting that the earlier cases did not purport to limit parties' rights to bring their respective contracts to an end. This would otherwise effectively limit parties' freedom to exit contracts.[43] *Dong Wei* was affirmed in *Prashant Mudgal v SAP Asia Pte Ltd*,[44] on the basis that freedom to exit contracts is a natural corollary of freedom to enter them.

28 At the same time, the cases also show that the *Braganza* duty may still apply where the right to terminate is conditioned on an antecedent evaluative judgment. In *Center for Competency-Based Learning and Development*, the court considered a two-stage termination mechanism. At the first stage, the contract vested "sole discretion" in one party to determine whether the other had done something that amounted to gross moral turpitude. If so, then at the second stage, termination was permitted. The court held that while the ultimate right of termination was not subject to the *Braganza* duty, the duty did apply to the antecedent

41 See paras 96–124 below.
42 [2022] 1 SLR 1318.
43 *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [91]–[92].
44 [2026] 3 SLR 914.

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exercise of discretion at the first stage.[45] Parties could not have intended that this decision be formed without any basis, capriciously, or arbitrarily. The court emphasised that this made no inroads on the principle that there should be no fetter on the contractual power to terminate contracts.[46] The *Braganza* duty can therefore bear on whether a right to terminate has arisen, even though it does not apply to the right to terminate itself.

29 Aside from the right to terminate, the law on the scope of the *Braganza* duty in Singapore law is much less clear. The decision in *The "CHLOE V"*[47] ("*The "CHLOE V"*") represents a notable attempt to shed light on this area, although English law governed the contract in that case.[48]

30 In *The "CHLOE V"*, the plaintiff mortgagee bank declined to issue a letter of quiet enjoyment ("LQE") to a prospective charterer in connection with a new charterparty. The issuance of a letter would have created a contractual relationship between the plaintiff and the charterer. The defendant shipowner counterclaimed that the refusal was an exercise of contractual discretion under a clause in the facilities agreement, which required the plaintiff's approval before certain charter commitments could be entered into, and that the exercise of discretion breached the *Braganza* duty.

31 One issue was whether the "approval" required under the clause extended to a decision to issue an LQE, and if so, whether the *Braganza* duty applied. The court held that, properly construed, the "approval" of a charter commitment did not encompass approval of a request to issue an LQE. In any event, any such discretion was "more in the nature of an unfettered choice or absolute right"[49] and so not subject to any *Braganza* duty. The court therefore drew a distinction between contractual discretions and absolute rights.

32 The court affirmed the settled English position that the *Braganza* duty does not apply where a party has an unfettered choice or absolute right as to what course of action to take. It then opined that the factors identified in *Braganza* and *UBS AG v Rose Capital Ventures*

45 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [189].
46 *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481 at [189].
47 [2026] 4 SLR 730.
48 *The "CHLOE V"* [2026] 4 SLR 730 at [41]–[42].
49 *The "CHLOE V"* [2026] 4 SLR 730 at [76].

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Ltd[50] ("*Rose Capital*") as ordinarily justifying "more intense scrutiny"[51] of a discretionary decision – namely, the presence of a clear conflict of interest, the decision-maker's role in the ongoing performance of the contract, and imbalances of power (employment relationships being the archetypal case) – were also relevant to whether the *Braganza* duty applied in the first place.[52]

33 The court identified three reasons why the decision relating to the issuance of an LQE fell outside the concerns the *Braganza* duty addresses. First, there was no imbalance of power between the sophisticated commercial parties dealing at arm's length. Second, the plaintiff's exercise of its approval rights attracted no relevant conflict of interest. Both parties' interests were aligned in wanting a lucrative charter arrangement. Third, the decision whether to issue an LQE engaged the plaintiff's absolute right of freedom to contract. Accordingly, even if such a discretion could be read into the clause, it would be an "absolute one that was not subject to any *Braganza* duty".[53]

34 A close reading of *The "CHLOE V"* reveals that there are two dimensions to the question of what kinds of contractual powers are properly subject to the *Braganza* duty.

35 The first dimension concerns the boundary between contractual discretions and absolute rights. As discussed, the Singapore courts have made clear that the duty applies only to rights subsisting within contracts, and hence not to rights to terminate or enter into contracts. However, it remains uncertain when a contractual power should be construed as an absolute right rather than a discretion.

36 It is worth noting that this uncertainty is not unique to Singapore. One line of English authority, beginning with *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*,[54] suggests that a contractual discretion is one which requires the decision-maker to make an assessment or choose from a range of options, taking into account the interests of both parties.[55] That distinction has, however, been questioned by Lord Leggatt in *Tesco Stores Ltd v Union of Shop, Distributive and*

50 [2019] 2 BCLC 47.
51 *The "CHLOE V"* [2026] 4 SLR 730 at [75].
52 *The "CHLOE V"* [2026] 4 SLR 730 at [74]–[75].
53 *The "CHLOE V"* [2026] 4 SLR 730 at [78].
54 [2013] EWCA Civ 200.
55 *Mid Essex Hospital Services NHS Trust v Compass Group* [2013] EWCA Civ 200 at [83]; *MacDonald Hotels Ltd v Bank of Scotland Plc* [2025] EWHC 32 (Comm) at [152].

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Allied Workers.[56] In particular, describing the term "right" as "notoriously ambiguous",[57] Lord Leggatt criticised the characterisation of termination clauses as absolute rights and doubted whether there is any material distinction between a discretion involving an evaluative assessment or a choice from a range of options on the one hand, and a provision conferring a binary choice on the other, such that the latter should fall outside implied constraints.[58]

37 Hooley pressed the point further still.[59] He argued that the good faith requirement implicit in the contractual discretion cases should apply equally where a contracting party exercises a right to terminate for breach, whether that right arises at common law or under a termination clause. He accepted that this appears to cut against freedom of contract, party autonomy and commercial certainty, but saw no material distinction between the discretion cases and the termination cases. Doctrinal coherence demands that both be treated alike. The authors do not accept this position completely but agree with Hooley's argument that any line between discretions and rights needs to be defended. This defence is attempted below,[60] where it will be argued that the distinction is best drawn by asking whether the clause confers a power to determine the scope of another party's duty – a kind of power in the Hohfeldian sense – rather than a claim-right correlative to a duty that already exists.

38 Returning to Singapore law, the decision in *The "CHLOE V"* was an important effort to shed light on the boundary between discretions and rights. However, the governing law in that case was English law. While the court drew no distinction between the English and Singapore approaches to the duty, strictly speaking, it remains uncertain whether the English position – that the duty applies only to true contractual discretions and not to absolute rights – also holds in Singapore.

39 The substance of the court's reasoning illustrates the doctrinal difficulties a court faces in circumscribing the duty's application. As noted earlier, the court held the duty inapplicable for three reasons: the absence of any imbalance of power; the absence of any relevant conflict of interest; and the plaintiff's absolute freedom to decide whether to enter into

56 [2024] UKSC 28.
57 *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers* [2024] UKSC 28 at [116].
58 *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers* [2024] UKSC 28 at [116]–[117].
59 Richard Hooley, "Controlling Contractual Discretion" (2013) 72(1) *Cambridge Law Journal* 65.
60 See paras 96–124 below.

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a contractual relationship.[61] The third factor is not, in itself, controversial. The premise is presumably that freedom to enter contractual relations is as fundamental as freedom to terminate them, and so is an absolute right. In that respect, the reasoning would be consistent with *Dong Wei*.

40 More difficult is the relevance of the first two factors to the conclusion that the duty did not apply at all. Traditionally, these factors operate as considerations shaping the standard of review once the duty is engaged, not as threshold criteria for its application. It is unclear why these factors should determine the existence of the duty rather than its intensity. The court's reasoning therefore conflates two analytically distinct inquiries. The approach also appears more limiting than that in other Singapore cases, which have not extended the intensity factors to the question of applicability. It may, however, align more closely with the duty's public law underpinnings, which emphasise imbalances of power as a justification for intervention. This article offers its perspective on the decision in *The "CHLOE V"* below,[62] arguing that the court was right to treat these factors as relevant but that it is possible to have a more principled rationalisation of where each factor should do its work.

41 A second dimension to the question of the scope of the *Braganza* duty concerns the kinds of contractual discretions the *Braganza* duty applies to. Returning to *The "CHLOE V"*, the court held that even if the power to issue an LQE was a discretion, it was an "absolute" one to which the *Braganza* duty would not have applied. In context, this appears to mean that such a power was more properly characterised as an "unfettered choice or absolute right",[63] rather than a true contractual discretion of the kind to which the duty applies. Even so, the language invites confusion between contractual language conferring "absolute discretion" and the distinct concept of an absolute right. Although the court relied on *Rose Capital*, where the express grant of "absolute discretion" was central to the analysis, no such wording appeared in the contract in *The "CHLOE V"*. The terminology of "absolute discretion" is therefore unhelpful and apt to confuse.

42 The position on absolute discretions in Singapore law remains unsettled. On one hand, *The "CHLOE V"* is consistent with authorities such as *TYC Investment Pte Ltd*, where the court reflected a reluctance to impose broad restraints on contractual discretions, recognising that parties are free to expressly confer unfettered discretions even where

61 *The "CHLOE V"* [2026] 4 SLR 730 at [76].
62 See paras 96–124 below.
63 *The "CHLOE V"* [2026] 4 SLR 730 at [76].

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their exercise may adversely affect one or both parties.[64] This is consistent with the principle that no term may be implied where it contradicts an express term.[65]

43 On the other hand, the courts in other cases have accepted that even discretions framed in absolute terms must still be exercised within reasonable boundaries.[66] Indeed, the case law shows that discretions expressly designated as "sole" or "absolute" may nonetheless be subject to the *Braganza* duty. In *Center for Competency-Based Learning and Development*, the duty applied even though the contract vested "sole discretion" in one party to determine whether the other had committed gross moral turpitude. In *Deutsche Bank AG Singapore Branch*, the duty applied notwithstanding that the bank was entitled to value and prescribe collateral at its "sole" and "absolute discretion" respectively. Accordingly, it remains uncertain when an express, unqualified discretion will nonetheless be subject to the duty.

C. Relevance of context

44 Third, the Singapore courts have not yet expressly addressed the content of the implied *Braganza* term and, relatedly, the degree of judicial scrutiny applicable to the exercise of contractual discretion across different contexts, most notably employment and non-employment contexts.

45 In *Braganza* itself, as explained earlier, the UK Supreme Court emphasised that the content of any implied term depends on the terms and context of the particular contract. For example, employment contracts are of a distinct character from an ordinary commercial contract, as decision-making functions entrusted to an employer are constrained by an implied obligation of trust and confidence. This potentially justifies more intense scrutiny in employment cases than would be appropriate in ordinary commercial contracts.[67]

46 It would be too strong to say that the Singapore cases lack contextual sensitivity. The difficulty is rather that the courts have not expressly addressed the point. While there has been acknowledgment

64 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [209].

65 Ewan McKendrick, "Implied Terms" in *Chitty on Contracts* (Hugh Beale ed) (Sweet & Maxwell, 36th Ed, 2026) at paras 17-021 and 17-032.

66 *Maybank Singapore Ltd v Synergy Global Resources Pte Ltd* [2024] 3 SLR 1316 at [23]; see also *Faieta v ICAP Management Services Ltd* [2017] EWHC 2995 (QB).

67 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17 at [31]–[32]. See also Lord Hodge at [55], agreeing that the personal relationship which employment involves may justify more intense scrutiny of the employer's decision-making than would be appropriate in some commercial contracts.

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that the implied *Braganza* term may vary according to the terms of the contract and the context in which the decision-making power is given,[68] the cases have not squarely confronted whether the duty applies with equal force across employment and non-employment contracts. The question whether the content of the duty or the intensity of review should vary across different contractual settings has not yet been the subject of sustained discussion.

47 In *Leiman*, the High Court emphasised that, as in *Braganza*, the case concerned contractual discretion within an employment relationship[69] and therefore that the *Braganza* duty squarely applied. In other cases, such as *Maybank Singapore Ltd v Synergy Global Resources Pte Ltd*[70] and *Center for Competency-Based Learning and Development*, the courts applied the duty in commercial contexts without considering whether its application should differ at arm's length – in particular, whether the intensity of scrutiny ought to be lower than in employment cases.[71] Thus, while the results in these cases may well be defensible on their facts, the reasoning does not articulate why the duty should operate in the same way across such different contractual settings.

48 Even so, some support for a more context-sensitive approach may be found in *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd*.[72] Although the decision did not refer expressly to *Braganza*, the court justified its reluctance to intervene on the basis that the clause afforded the bank latitude to act swiftly to close out its position and minimise losses. The reasoning indirectly suggests a more deferential standard in certain commercial contexts.[73] *The "CHLOE V"* is similar: the court recognised that factors such as significant imbalances of power – most notably in employment relationships – may justify more intensive scrutiny.[74]

49 A close reading of the cases also suggests that the formulations of the duty are not uniform. *Leiman* framed it by reference to the employment relationship and the implied obligation of mutual trust and confidence. *Deutsche Bank AG Singapore Branch* framed it as a default term implied in law to restrain the abuse of a bank's powers of valuation

68 See, *eg, Leiman, Ricardo v Noble Resources Ltd* [2018] SGHC 166 at [112].
69 *Leiman, Ricardo v Noble Resources Ltd* [2018] SGHC 166 at [112].
70 [2024] 3 SLR 1316.
71 *Maybank Singapore Ltd v Synergy Global Resources Pte Ltd* [2024] 3 SLR 1316; *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481.
72 [2016] 1 SLR 186.
73 *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186.
74 Although, as observed earlier, the court applied those factors to whether the duty applied at all, rather than to the intensity of review once engaged.

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and margining. *The "CHLOE V"* framed it by reference to conflict of interest, the decision-maker's role in the ongoing performance of the contract, and imbalance of power. These are not the same formulation, and the differences track the contexts in which the duty was invoked. The materials for a context-sensitive doctrine are therefore already present. What is missing is an express rationalisation of the tension between a general principle and its situation-specific application.

50 This missing rationalisation gives rise to a further series of doctrinal questions. Does the *Braganza* duty apply with the same content and intensity across different contractual contexts? Does its application in Singapore preserve the contextual sensitivity articulated in *Braganza*, or has the duty come to operate in a more undifferentiated manner? Also, should Singapore law follow *The "CHLOE V"* in treating such contextual factors as relevant not only to the intensity of review but also to the anterior question of applicability?

D. Justification for Braganza *duty*

51 There are thus unresolved questions in Singapore law regarding the juridical basis, scope and relevance of context for the *Braganza* duty. This article argues that these are symptoms of a deeper problem: the nature of the duty's justification.

52 In *Braganza* itself, the UK Supreme Court held that the implication of the duty was justified on the basis of abuse of power, and that there was a parallel between preventing the abuse of contractual discretion and the abuse of public power.[75] This justified applying rules developed to prevent the abuse of public power, such as *Wednesbury* unreasonableness, in the contractual context.

53 The duty was thus justified primarily by a parallel between public power and contractual discretion. However, does that justification hold? This article will argue later that there is an inherent tension between a public law justification and the contractual context in which the duty applies. This tension has contributed to the law's ambiguity on issues such as whether the duty is implied in fact or in law. If the duty is justified on public law grounds, it is implied on the basis of broader policy considerations rather than an analysis of the parties' intentions. It should then be clear that the duty is implied in law. The courts' continued reference to the parties' intentions therefore perhaps reflects unease about applying public law values to contract law. Analogies to public

75 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17 at [19].

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law provide familiar conceptual tools, but risk obscuring the distinct normative commitments of contract law.

54 Indeed, there is judicial support in Singapore for the position that the *Braganza* duty should not be justified by reference to public law. In *Shipworks Engineering*, the Appellate Division declined to adopt *Wednesbury* unreasonableness as the standard governing the defendants' contractual discretion, notwithstanding authority suggesting that the two standards may be broadly similar in content. *Wednesbury* unreasonableness, the court held, "operates in the distinct context of administrative law as a restraint on the exercise of statutory powers or discretion and is not directly applicable to the present context of a contractual discretion".[76] The basis for implying a term that contractual discretion must be exercised in good faith and not arbitrarily or capriciously was instead "rooted in contract law and does not depend on any transposition of administrative law principles".[77] Whether their substantive content is in fact the same was a question that the court expressly declined to resolve.

55 What *Shipworks Engineering* does not do is explain what then the contractual basis for the duty is. In the rest of this article, a two-part argument is made to complete that work. First, it will argue, in agreement with the Appellate Division, that it is not appropriate to refer to public law in order to understand the *Braganza* duty. Such references are apt to confuse rather than clarify. Second, it will argue that the *Braganza* duty should instead be based on an independent doctrine of non-arbitrariness in contract law. Doing so helps to address the unresolved questions that have been identified thus far.

IV. Distancing from public law

56 In this part the article argues that at least three major differences make a reference to public law inappropriate: differences in rationale, remedies, and relationships between key actors. It then responds to arguments that the reference is appropriate. In the next part,[78] the article elaborates on non-arbitrariness and argues that the *Braganza* duty fits well with that justification.

76 *Shipworks Engineering Pte Ltd v Sembcorp Marine Integrated Yard Pte Ltd* [2026] SGHC(A) 22 at [228].

77 *Shipworks Engineering Pte Ltd v Sembcorp Marine Integrated Yard Pte Ltd* [2026] SGHC(A) 22 at [228].

78 See paras 84–124 below.

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57 It is important to be precise about the target of this argument. This article does not argue that contract law has nothing to learn from public law, nor take issue with the substantive content of doctrines public law has developed for its own purposes. Its target is the justification of the *Braganza* duty: the practice of explaining and grounding it by reference to a parallel with public power. Its objection has two limbs. First, a justification borrowed from public law cannot do the work asked of it, for the reasons set out below. Second, once the parallel is accepted as a justification rather than a loose analogy, it is difficult to confine: it opens the door to other public law doctrines, such as legitimate expectations, whose fit with contract law is far more doubtful.

A. Difference in rationale

58 *Braganza* justified the implication of the duty on the basis of abuse of power. As Lady Hale held, the courts had implied terms restricting contractual discretion in order to prevent abuses of power *in situ*ations where there was a significant imbalance of power between contracting parties.[79]

59 This is not objectionable *per se*. Contractual discretion can be abused, and it is important to regulate it. As Liang argued, large companies can wield so much power that their influence over people can rival that of governments.[80] Indeed, Oliver pointed out that the principle of preventing abuse of power is shared across public and private law.[81]

60 Our objection is not to contract law's concern with abuse of power. Rather, our objection is to the idea that contract law should refer to public law to understand the *Braganza* duty because of the shared concern for preventing abuse of power. This is apparent in *Braganza* itself. Immediately after explaining the rationale of preventing abuse of power, Lady Hale held that:[82]

> There is an obvious parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute (or the royal prerogative) assigns a decision-making function to a public authority.

61 The implication is clear: the parallel holds because in both situations the law is similarly concerned about abuse of power.

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79 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17 at [18].

80 Calvin Liang, "The Application of Administrative Law Principles in Private Law: The Case for Convergence" (2020) Sing JLS 427.

81 Dawn Oliver, *Common Values and the Public-Private Divide* (Cambridge University Press, 1999) ch 8.

82 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17 at [19].

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62 However, does abuse of power mean the same thing in public law and contract law? Not necessarily. Abuse of power in contract law must be understood in the light of freedom of contract and party autonomy. This suggests that parties should be able to agree to accept decisions which may in other contexts be considered to be abuses of power. As Beatson argued, abuse of power in contract law runs up against a fundamental principle of contract law: that self-interest is permissible.[83] If so, the law should incline towards permitting a greater scope for the exercise of contractual discretion.

63 In public law, the opposite is true. The starting point is that the discretion of a public body must be regulated. This is the *raison d'être* of public law. As the Court of Appeal stated in *Chng Suan Tze v Minister for Home Affairs*,[84] "[a]ll power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power".[85] As such, even if Parliament expressly provides that a public body's discretionary power is unfettered, the courts will view this with scepticism. Indeed, the Court of Appeal held in *Nagaenthran a/l K Dharmalingam v Public Prosecutor*[86] that a clause ousting review of the legality of a decision would be "constitutionally suspect".[87]

64 One might argue that this reveals an important similarity: in both fields, intention plays a key role in how courts regulate the exercise of discretion. Courts look to Parliament's intent to determine the scope of a public body's power, and to the parties' intention to determine the permissible scope of a contractual discretion. However, the similarity is superficial. For one, the nature of the inquiry into intention differs. In public law, limits on discretion are shaped by Parliament's intention, which is imposed top-down. In contract law, they are shaped by what the parties mutually agreed. More importantly, the weight of intention differs. In contract law, intention is the starting point of analysis. Giving effect to parties' bargains is paramount. In public law, Parliament's intent remains crucial in determining the scope of a discretionary power. However, courts there take into account more fundamental constitutional principles which qualify that intent, such as the rule of law and the separation of powers.[88]

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83 Jack Beatson, "Public Law Influences in Contract Law" in *Good Faith and Fault in Contract Law* (Jack Beatson & Daniel Friedmann eds) (Oxford University Press, 1995).

84 [1988] 2 SLR(R) 525.

85 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

86 [2019] 2 SLR 216.

87 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [73]–[74].

88 This may be more contentious in jurisdictions such as the UK which accept parliamentary sovereignty, but it clearly applies to Singapore, since Singapore

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65 The starting points of contract law and public law in understanding abuse of power are therefore fundamentally different. This affects what counts as an "abuse". In public law, there is no question whether the affected person consented to the manner in which power was exercised, or whether the "abuse" is part of a bargain. If a decision is *Wednesbury* unreasonable, that suffices for unlawfulness. Likewise, if a decision unfairly frustrates a legitimate expectation amounting to an abuse of power, that is the end of the matter. Even if the grounds of judicial review are justified by reference to abuse of power, they were developed without regard to how they must be balanced against fundamental principles of contract law like the freedom of contract. It is therefore not obvious why grounds developed in public law should apply equally in contract law.

66 An example underscores the practical importance of this point. Consider termination clauses. They grant a party the right to terminate upon the satisfaction of certain conditions. As observed earlier, the right to terminate is generally regarded as an absolute right and the courts have held that rules regulating contractual discretion do not apply to termination clauses. This position is echoed in the literature. Bridge, *eg,* argues for a carve-out for termination clauses.[89] The usual controls on discretion would compromise contractual certainty and freedom of contract. Public lawyers, however, are likely to see such clauses differently. To a public lawyer, a termination clause confers a consequential discretionary power that is capable of being abused. A carve-out for such clauses would look odd to a public lawyer.

67 A further example can be raised. If the ostensibly shared rationale of preventing abuse of power justifies importing rules like *Wednesbury* unreasonableness into contract law, other public law doctrines grounded in that value should also be imported. A prominent example is the legitimate expectations doctrine. In *R v North and East Devon Health Authority, ex parte Coughlan*,[90] the English Court of Appeal explained that this doctrine was grounded in the rationale of preventing abuses of power. A public body may not unlawfully frustrate a legitimate expectation arising from its own promises or conduct. However, imported into contract law, the doctrine would run counter to certainty of contract.[91] It would suggest that a promise as to how a party

accepts the principle of constitutional supremacy. Even in the UK, such principles shape how courts interpret Parliament's intent – consider the principle of legality.

89 Michael G Bridge, "The Exercise of Contractual Discretion" (2019) 135(2) *Law Quarterly Review* 227.

90 [2001] QB 213.

91 Michael G Bridge, "The Exercise of Contractual Discretion" (2019) 135(2) *Law Quarterly Review* 227.

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would exercise its discretion could be substantively enforced even absent reliance. The doctrine works in public law because encouraging public bodies to keep their promises facilitates good administration. It is less clear that it makes sense in contract law.

68 This casts doubt on the usefulness of drawing on public law rules to regulate contractual discretion. Such rules were developed in a very different context and cannot take into account foundational principles of contract law without modification – and if modification is necessary, why draw on public law at all? An independent doctrine would better cohere with the purposes of contract law.

B. Difference in remedies

69 A second reason for caution is that public law rules have developed in a very different remedial context. Damages are available as of right for breach of contract. A party alleging breach of the *Braganza* duty may therefore claim damages as well as seek to set aside the decision. However, damages are not available in public law. There, an unlawful decision is typically quashed, denying it legal effect.

70 This raises two problems. First, the difference in remedial context means that public law offers little guidance on how these rules should apply elsewhere. Since *Wednesbury* unreasonableness does not lead to damages in public law, it says nothing about how damages for breach of the *Braganza* duty should be quantified. As Varuhas pointed out, the usual measure in contract law is the expectation measure. However, this is unhelpful here. What could a claimant be taken to have expected, given the many reasonable ways a discretion may be exercised?[92]

71 The facts of *Braganza* itself illustrate the difficulty. BP's decision was impugned because it failed to take into account the inherent improbability of suicide and it rested on inadequate evidence. However, a defective process does not establish what conclusion BP would, or should, have reached had it approached the question properly. On an expectation measure, Mrs Braganza's damages would be assessed by reference to the benefit she would have received had the contract been performed. Yet the contract entitled BP to form an opinion. It did not entitle Mrs Braganza to a particular outcome. Quantifying her loss therefore requires the court either to assume that a proper process would have produced a decision in her favour, which does not follow, or to evaluate the chance that it would have, which is not what the implied term

92 Jason Varuhas, "Three Issues in the Law of Contractual Discretion" (2022) 42(3) *Oxford Journal of Legal Studies* 787.

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promises. *Wednesbury* unreasonableness, developed where damages are not in issue, assists with neither.

72 Second, public law rules would have to be applied in a manner that would be objectionable in public law. A court granting damages for breach of the duty would do so on the basis that a party acted in a *Wednesbury* unreasonable manner. To award such damages on an expectation measure, the court would have to stand in the decision-maker's shoes and determine how the power should properly have been exercised.[93] However, in addressing public law issues, courts actively avoid doing so in order to preserve the distinction between appellate and supervisory jurisdiction. Judicial review is supervisory in nature and does not permit substitution of the court's decision for the decision-maker's.

73 In addition, awarding damages for a *Wednesbury* unreasonable decision grants the claimant the substantive benefit sought.[94] While there are exceptions to this rule, public law generally avoids doing so.[95] This preserves the legality-merits distinction, which confines courts to the lawfulness of decisions rather than their wrongness. The usual remedy is a quashing order, requiring the decision-maker to decide afresh. Public law does not ordinarily grant a mandatory order compelling a decision-maker to decide as the applicant wishes.[96] Yet damages for *Wednesbury* unreasonableness would deliver precisely that substantive benefit.

74 If importing public law principles means applying them in ways objectionable in their original context, it is doubtful whether the exercise clarifies rather than confuses. If a court responds to a breach by awarding damages, public law has little to say about quantification, for the reasons given. If instead it orders the decision-maker to revisit the decision – the natural public law response – it does violence to the contractual paradigm. Orders of that kind are not ordinarily made for breach of an implied term. Contract law's response to breach is compensation, not remission of the decision to the party in breach. Either route leaves an unresolved tension between contract law and public law principles.

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93 Jason Varuhas, "Three Issues in the Law of Contractual Discretion" (2022) 42(3) *Oxford Journal of Legal Studies* 787.

94 Michael G Bridge, "The Exercise of Contractual Discretion" (2019) 135(2) *Law Quarterly Review* 227.

95 A notable exception is where the substantive legitimate expectations doctrine applies to grant an applicant the substantive remedy he has asked for.

96 *CBB v Law Society of Singapore* [2021] 1 SLR 977; see also *R (Imam) v London Borough of Croydon* [2025] AC 335.

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C. Difference in relationships

75 The final reason for caution is that the relationships between the key actors differ across the two areas. In contract law, the key actors are the claimant and defendant bound by a contract, and the courts which regulate that relationship. Public law is more complicated. A public body has a legal power, often granted by Parliament, which it exercises in a manner affecting an applicant. The courts then supervise that exercise.

76 This reveals a fundamental difference between contract law and public law: the role of the court. When courts review a public body's decision, an inescapable background consideration is that Parliament gave the body that power. Parliament carries a democratic legitimacy that courts do not possess. Public bodies also often have technical expertise which courts lack. Courts therefore avoid intervening too heavily, in order to preserve the separation of powers, and have constructed grounds of review and a framework of deference accordingly.[97]

77 These concerns do not feature in contract law. As Daintith pointed out, "there is no basis for claiming that the primary role in the control of contract discretion belongs elsewhere than in the courts".[98] Indeed, even while identifying the structural similarity between public and private scenarios in which a power-holder wields discretion over a vulnerable party, Daintith stressed that the two settings have travelled very different historical trajectories and rest on different underlying considerations: administrative power on the one hand, and freedom of contract on the other. Exercises of public power can be called to account politically – a possibility some regard as the most appropriate control on public power – but that route does not exist for contractual discretion. The court's role therefore differs. Courts indisputably have authority to review exercises of contractual discretion. They are not always best placed to review exercises of public power, and must sometimes defer.

78 One might question whether the court's role is really so different. Contract law requires close attention to the parties' intentions. If parties agree to permit exercises of discretion which might otherwise be problematic, courts should give effect to that bargain. Deference, it might be said, occurs in both fields. However, the similarity is superficial. First, deference in public law goes to the courts' authority to review. "Deference" in contract law does not touch that authority, which undoubtedly rests in

97 See, *eg*, Cora Chan, *Deference in Human Rights Adjudication* (Oxford University Press, 2024).

98 Terence Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68(4) *The Modern Law Review* 554.

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the courts. Second, a court does not defer to a contracting party as it does to a public body. Deference requires the court to give a public body's decision more credit than it otherwise would. That does not happen with contractual discretion. The court asks only whether the decision falls within the scope of discretion the parties intended. As Daintith argued, the regulation of discretion in public law requires the navigation of the dynamics of competence, control and trust, unlike in contract law.[99]

79 These differences matter. Giving additional credit to a public body's decision stems from constitutional considerations embedded in the structure of judicial review. Rules such as *Wednesbury* unreasonableness build that deference into their content: the threshold is set very high and incorporates a sliding scale of review precisely to reflect that interest. If those considerations do not exist in contract law, it is questionable whether public law rules are suitable for transplantation.

D. Responding to arguments in favour of referring to public law

80 Differences in rationale, remedies, and relationships thus cast doubt on whether public law rules are apt for importation. Some commentators nevertheless argue for it. Oliver, *eg*, argued in favour of a more substantive connection between private and public law. Surveying several areas of public and private law, she argued that principles of considerate decision-making apply across the law's regulation of all discretion.[100] However, we are less optimistic that the two are founded on the same ideas. The differences between the two areas of law go to their foundational structure.

81 A more radical version of this position would question the public-private distinction itself. Kennedy famously charted what he described as the stages of the decline of that distinction, arguing that it had been eroded to the point of collapse.[101] If that is right, there is no principled boundary to police, and no objection to grounding a contractual duty in a public law rationale. This article makes no claim about the long-term fate of the distinction. Indeed, its argument does not depend on it. Whatever the fate of the distinction in theory, drawing on public law in this specific context runs into concrete obstacles – of

99 Terence Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68(4) *The Modern Law Review* 554.

100 Dawn Oliver, *Common Values and the Public-Private Divide* (Cambridge University Press, 1999) ch 8.

101 Duncan Kennedy, "The Stages of the Decline of the Public/Private Distinction" (1982) 130 *University of Pennsylvania Law Review* 1349.

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rationale, remedies, and relationships – that are independent of the distinction's future. It is those obstacles that ground our objection.

82 Lim and Chan made a less ambitious argument than Oliver. They do not argue that public and private law should be merged, or that they share a rationale. Their argument is that there is enough convergence in techniques of controlling discretionary power to allow contract law to borrow technical devices from public law.[102] They proceed on this basis to offer a detailed study of how contract law can learn from public law's regulation of discretion. Their argument is, in an important respect, complementary to our own. Their care in delineating the rights concepts that underpin decisional standards reflects the same instinct that animates this paper: that the concepts doing the analytical work in contract law must ultimately be justified in contract law's own terms. This article would nonetheless go one step further, and would be cautious about the value of borrowing from public law even at the level of technical devices. Technical devices and specific doctrines are still shaped by the values underlying the law. If those values differ, a device apt for one area may be less apt for the other. Deference, discussed above, is a prominent example.

83 Finally, Ong offered an array of arguments in favour of public law having a role in regulating contractual discretion.[103] He argued that differences in remedies are no bar to borrowing from public law, pointing to contractual remedies which have an effect similar to quashing orders. However, this does not address the crucial difference in remedies – the availability of damages in contract law, as compared to public law. As Varuhas argued, that difference raises many questions when a public law ground of review is imported into the content of an implied term.[104] Ong also argued that differences in context should not be an absolute bar, since both areas ultimately serve common values. However, any such commonality may be superficial. As this article has argued, "abuse of power" means something different in each area of law.

V. An independent doctrine of non-arbitrariness

84 This article has thus far argued that there is a danger in drawing from public law to understand the *Braganza* duty. In this section,

102 Ernest Lim & Cora Chan, "Problems with Wednesbury Unreasonableness in Contract Law: Lessons from Public Law" (2019) 135 *Law Quarterly Review* 88.

103 Ong Ken Wei, "The Limits to Contractual Discretion" (2021) 33 SAcLJ 919.

104 Jason Varuhas, "Three Issues in the Law of Contractual Discretion" (2022) 42(3) *Oxford Journal of Legal Studies* 787.

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it offers an alternative: the duty should be understood as based on an independent doctrine of non-arbitrariness in contract law.

85 Basing the duty in an independent doctrine would avoid the transplantation problems described above. There is much to learn from how the legitimate expectations doctrine developed in public law. In English law, the doctrine was originally consciously based on the doctrine of estoppel in private law.[105] The High Court in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*[106] also drew a direct link to estoppel in accepting the doctrine in Singapore.[107] The parallels to estoppel are obvious – the legitimate expectations doctrine similarly gives binding effect to promises if certain conditions are met.

86 However, the courts have deliberately moved the doctrine away from contract law towards an independent foundation in public law. In *R (Reprotech (Pebsham) Ltd) v East Sussex County Council*,[108] Lord Hoffmann observed that there is an obvious analogy between legitimate expectations and estoppel. Yet he cautioned against relying on that analogy:[109] "it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote". He went on to hold that:[110]

> It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.

87 The doctrine has since developed in its own right. As mentioned earlier, while reliance remains a consideration, it is no longer a necessary requirement for the doctrine to apply.[111] That differs from estoppel. The courts have also moderated the consequences of an unlawfully frustrated legitimate expectation. An estoppel gives the claimant the substantive benefit of the promise. That is problematic in public law, where remedies do not generally compel a public body to confer a substantive benefit. The remedy has therefore evolved: courts

105 See, *eg, Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222.
106 [2014] 1 SLR 1047.
107 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [72]–[129].
108 [2003] 1 WLR 348.
109 *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348 at [34].
110 *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348 at [35].
111 See, *eg, R (Patel) v General Medical Council* [2013] 1 WLR 2801.

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quash the unlawful decision and require the public body to reconsider it in light of the legitimate expectation.[112]

88 The development of the legitimate expectations doctrine offers a useful lesson on the *Braganza* duty. The doctrine initially presented an issue of coherence with public law in so far as it remained tethered to private law estoppel. Those issues were resolved once it was recognised to have its own foundations in public law. The *Braganza* duty should similarly be untethered from public law and develop its own foundations in contract law.

89 This article proposes that this foundation is the value of non-arbitrariness. The subsequent sections will first explain what non-arbitrariness means, and then discuss how it can resolve the loose ends identified earlier, without any reference to public law.

A. Meaning of non-arbitrariness

90 Suppose an employer has the discretion to decide who should be promoted. Three employees are up for promotion, and all three submit detailed dossiers of their work in support. However, the employer is indifferent to the merits of each dossier, and tosses a coin.

91 There is something instinctively problematic here. The employer has exercised her power arbitrarily by being indifferent to the proper reasons for which she should use her power. Non-arbitrariness, understood thus, is directed at how power is exercised. A related but distinct case is a decision taken on grounds the law regards as impermissible – say, promotion decided by reference to race or sex. Such a decision is not unreasoned, but it is taken for reasons which are not the proper reasons for the exercise of the power, and is arbitrary in that sense. The point shows that non-arbitrariness is concerned with the quality of the reasons for which a power is exercised, and not merely with whether reasons are present at all. The relationship between non-arbitrariness and Singapore's developing statutory framework on workplace fairness raises distinct questions which are bracketed here.

92 Returning to the idea of non-arbitrariness, one can draw from legal theory to understand it in more detail. Raz's and Endicott's accounts are particularly useful. In "The Law's Own Virtue", Raz defined arbitrary government as "the use of power that is indifferent to the proper reasons for which power should be used".[113] Similarly, Endicott argued

112 See, *eg, R (Bibi) v Newham LBC* [2002] 1 WLR 237.
113 Joseph Raz, "The Law's Own Virtue" (2019) 39(1) *Oxford Journal of Legal Studies* 1.

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that "[a] country is not ruled by law when it is ruled by the arbitrary caprice – by the sweet will and whims – of executive or legislative or judicial officials".[114] A decision is arbitrary when it is "not distinguished, by reasons in favour of it, from an unreasoned choice".[115]

93 These definitions tell us that non-arbitrariness is concerned with the exercise of power. Building on them, it is observed that non-arbitrariness requires a power-holder to be concerned about acting for the relevant reasons. Those reasons are the ones the law makes relevant. On Raz's account, the reasons for which power should be used are identified by law. For example, in the context of public power, "governments are constituted by law and, in creating them, the law, explicitly or implicitly, identifies their purposes".[116] Similarly, on Endicott's definition, the relevant reasons depend on the justifications the law demands.

94 Raz and Endicott drew on the context of public power to explain non-arbitrariness. Yet the value is not confined to that context. Scholars have applied these ideas to other kinds of power, such as the relationship between a master and a slave.[117] Its applicability elsewhere is clear from the terms of their definitions. If non-arbitrariness requires power-holders to act for the relevant reasons, that applies to all power-holders. For public power, the relevant reasons will often be defined by the power-granting statute. Elsewhere they come from other sources, *eg,* in the context of contractual discretion, they could come from the terms of the parties' bargain and their intentions.

95 In sum, this article has made two claims about the value of non-arbitrariness. First, it is concerned with how power is exercised. Second, it requires a power-holder to act for the relevant reasons for the use of power, which are those that the law makes relevant.

B. Non-arbitrariness as foundation for Braganza *duty*

96 Understood as such, non-arbitrariness is plainly relevant to the *Braganza* duty. The duty is implied to regulate the exercise of contractual discretion, out of a concern that such discretion may be exercised in

114 Timothy Endicott, "Arbitrariness" (2014) 27(1) *Canadian Journal of Law and Jurisprudence* 49 at 70.

115 Timothy Endicott, "Arbitrariness" (2014) 27(1) *Canadian Journal of Law and Jurisprudence* 49 at 70.

116 Joseph Raz, "The Law's Own Virtue" (2019) 39(1) *Oxford Journal of Legal Studies* 1.

117 See, *eg,* Philip Pettit, "Freedom as Non-domination" in *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012); Christopher McCammon, "Domination: A Rethinking" (2015) 125(4) *Ethics* 1028.

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a manner amounting to an abuse of power. Non-arbitrariness is precisely about how discretion is exercised. It also tells us what exactly an abuse of power is – it is when a power-holder is indifferent to the relevant reasons for the use of power.

97 It is worth clarifying what non-arbitrariness is, and is not, being asked to do. The focus of this article's argument is the normative foundation of the *Braganza* duty. What it objects to is the justificatory move of explaining the *Braganza* duty by reference to a parallel with public power. Non-arbitrariness is not a public law value. It is a general value concerning the exercise of power, which public law and contract law each engage in their own way and for their own reasons.

98 It follows that the normative basis, once identified, shapes but does not dictate the doctrinal content of the duty. The present formulations of the *Braganza* duty refer variously to good faith, rationality, capriciousness, arbitrariness, improper purpose, and the taking into account of relevant considerations. This article does not suggest that one of these should be selected and the rest discarded. Its claim is that they all reduce to a single underlying concern: that a power-holder should not be indifferent to the reasons for which the power was conferred. Each formulation is a way of identifying such indifference. Reading them in this way explains why the courts have used them more or less interchangeably. Judges should remain free to deploy whichever formulation works best in the contractual context before them. The crucial point is that the reference should not be to public law as such, but to the underlying idea of non-arbitrariness.

99 Hooley's analysis of these concepts supports this reading. He observed that no clear line can be drawn between irrationality, dishonesty, improper purpose, capriciousness and arbitrariness, that irrationality seems to embrace them all, and that fragmentation into separate concepts risks losing sight of the bigger issue, namely that discretion should not be abused. His own solution is to embrace a limited concept of good faith. This article agrees with the diagnosis but prefers a different remedy. Non-arbitrariness captures the same underlying concern without requiring English law to accept a general doctrine of good faith which it has repeatedly declined to adopt. Like good faith, it is oriented to the decision-maker's own reasons and to the bargain which the parties actually struck, rather than to an external standard of objective reasonableness. It also specifies the content of the duty more precisely than good faith does, because it directs attention to a particular question: What were the reasons for which this power was conferred, and was the decision-maker indifferent to them?

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100 Turning then to the pay-off of understanding the *Braganza* duty as based on the value of non-arbitrariness, this article argues that doing so will help to address the questions identified above,[118] beginning with the question about the scope of the duty – the boundary between absolute rights and contractual discretion, and the kinds of discretion to which it should apply.

101 The starting point is that non-arbitrariness is concerned with the exercise of discretionary power. If the *Braganza* duty is based on that idea, it should apply specifically to contractual terms providing for discretionary power. The first and most fundamental question therefore in deciding if the *Braganza* duty applies is whether, on a proper construction of the contract, the contractual term at hand provides for a true discretionary power. Accordingly, the courts are on to something important in their concern to distinguish between absolute rights (such as the right to terminate) and contractual discretions. Non-arbitrariness explains the courts' instincts in this regard.

102 How should a court determine whether a clause provides for a true discretionary power? One option is to say that a discretion (to which the duty applies) involves a choice within a broader range of options, while a right (to which it does not) involves a binary choice. As mentioned earlier, this reflects the approach of a line of English authorities.[119] On this view, the right to terminate would be a right, whereas the power to determine a compensation sum within an agreed range would be a discretion.

103 This basis for distinction is, however, unpersuasive. First, it is difficult to see why a choice between two options should differ so much in kind from a choice among a wider range of options as to warrant an entirely distinct legal approach. Second, it depends on how the power is framed. In *Braganza*, the UK Supreme Court characterised the employer's power as evaluative decision-making directed at forming an opinion on whether the employee's death resulted from his own wilful act. Yet, as Lord Leggatt observed in *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers*,[120] *Braganza* can equally be understood as involving a binary choice: either the employer was, or was not, of the opinion that Mr Braganza had committed suicide.[121] Such a binary choice, no less than

118 See paras 21–55 above.

119 *Mid Essex Hospital Services NHS Trust v Compass Group* [2013] EWCA Civ 200 at [83]; *MacDonald Hotels Ltd v Bank of Scotland Plc* [2025] EWHC 32 (Comm) at [152].

120 [2024] UKSC 28.

121 *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers* [2024] UKSC 28 at [117].

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a choice from a range of options, may involve evaluative judgment which must be exercised in good faith and not arbitrarily or capriciously. The same point may be made in Singapore. In *Center for Competency-Based Learning and Development*, the power to determine whether a party had committed gross moral turpitude was analysed as a discretion rather than an absolute right. Yet that, too, may be seen as a binary choice: either there was gross moral turpitude or there was not.

104 This article proposes another way to draw a distinction between a right and a discretion. Contracts generally give rise to rights between the parties: rights to goods or services, to payment upon the provision of services, or to terminate. In a sense, all of these give a measure of discretion: a party with a right to payment can evaluate the circumstances and decide whether to enforce it.

105 If such limited decision-making power attracted the *Braganza* duty, the results would be odd. The duty would apply to virtually all contractual rights. A party seeking to enforce a right to payment would come under a duty not to do so unreasonably, and a right to terminate would be similarly fettered. That would undermine commercial certainty and intrude heavily on the parties' bargain. This perhaps underlies the courts' reluctance to extend the duty to a right to terminate.

106 Clauses conferring true discretionary powers, however, give rise to a different and more specific kind of right. Such clauses give a party the right to decide something beyond merely whether that right should be enforced. Put in Hohfeldian terms, the distinction is between a power and a claim-right. A clause conferring a true contractual discretion gives one party a specific kind of power: the ability, by its own act, to determine the scope of the other party's duty. A clause conferring a claim-right merely correlates with a duty which already exists and is fixed; the only decision left is whether to insist upon performance. The distinction is therefore one of substance rather than form. It turns neither on whether the clause uses the language of "discretion", nor on the breadth of options available, but on what the exercise of the clause does to the parties' legal relations.

107 Accordingly, clauses which give one party the power to determine the scope of the other party's duty are the crux of a true contractual discretion. This is the kind of clause to which the *Braganza* duty should apply. The duty arose in *Braganza* itself not because the clause provided for a choice among a range of options. Rather, it is because the relevant clause gave BP the power to decide, "in [its] opinion", whether an employee's death resulted from his own wilful act. The duty would not generally arise in relation to termination clauses, not because termination clauses provide for a binary choice, but rather because they only give

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rise to the right to decide whether the right should be enforced or not. Contrary to Hooley's argument that even a right to terminate confers a "discretion" which can therefore be subject to the *Braganza* duty, such rights do not confer true discretionary powers in the sense of deciding something beyond merely whether the right should be enforced.

108 Accordingly, whether a clause gives rise to a right or a discretion is a matter of interpretation. The court must ask whether the clause merely gives a right to decide whether it should be enforced, or a right to decide something beyond that. Much will depend on how a clause is framed. The decision in *Center for Competency-Based Learning and Development* is a useful case in point. While the clause in that case was a termination clause, it did give parties the right to decide whether something amounted to gross moral turpitude. This went beyond the right to decide whether to enforce the clause. It was therefore a true discretion to which the *Braganza* duty should apply, as the court eventually concluded.

109 This clarifies the distinction between a right and a discretion. The *Braganza* duty would therefore apply only to clauses providing for true discretionary power. This leads to the next question. Does it apply to all such clauses, or only some?

110 Here too, non-arbitrariness helps to clarify the issue. Not all discretionary power is problematic. Non-arbitrariness is concerned only with a certain kind.

111 McCammon's analysis helps here. He distinguished paradigm dominators from small-time power-holders. Paradigm dominators can "attach costs to noncooperation higher than the costs of cooperation for a very wide range of forms cooperation might take".[122] That is, they can impose serious consequences on a party who does not go along with their will, as a public body which has the power to deny immigration visas can. Not all power looks like this. The power of a swimming-pool operator to decide who may enter the pool carries a far less serious consequence for non-cooperation. Non-arbitrariness, McCammon argued, is concerned not with small-time power-holders but only with power wielded by paradigm dominators – "impositional power".[123]

112 Non-arbitrariness is thus concerned with a particular kind of power: one that is structurally imbalanced between the parties. The courts have already taken this into account – in *The "CHLOE V"*, one factor in determining whether the *Braganza* duty applied was whether

122 Christopher McCammon, "Domination: A Rethinking" (2015) 125(4) *Ethics* 1028.
123 Christopher McCammon, "Domination: A Rethinking" (2015) 125(4) *Ethics* 1028.

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there was an imbalance of power. This article suggests that this should become the central inquiry.

113 The employment context provides the classic example. Employees have much less bargaining power than employers, so there is a stronger justification for imposing the duty where an employer has a discretion to decide matters shaping employees' rights and duties. Contracts negotiated at arm's length between sophisticated commercial parties are less likely to involve such an imbalance, and there is correspondingly less justification for imposing the duty. Other contexts may qualify – a possible example would be contracting on one party's standard form terms, as in retail and consumer contracts, or even a commercial contract where one side possesses monopoly power that gives rise to a structural imbalance between parties.

114 Turning to another question raised above:[124] Should the content and intensity of the *Braganza* duty vary with context?

115 The answer is "yes". Non-arbitrariness requires decision-makers to act for the relevant reasons for the use of power, and those reasons are shaped by context. If a context constrains a decision-maker by obligations of trust and confidence, those obligations become considerations to be taken into account.[125] Such additional considerations naturally translate into a more intensive duty. Indeed, non-arbitrariness commits us neither to a grand theory which ignores contextual variation nor to the wholly context-specific approach Varuhas favours. It occupies the middle ground. It supplies a general reason why the content and intensity of the duty should vary with context – because the reasons relevant to the exercise of a power are themselves determined by the setting in which the power is conferred – and it identifies which features of the context matter, namely those which bear on what the power was given for.

116 The idea that non-arbitrariness requires a sensitivity to context can be translated easily into legal doctrine. In *The "CHLOE V"*, the other two factors the court took into account were the presence of a clear conflict of interest and the decision-maker's role in the ongoing performance of the contract. As observed earlier, these factors have usually shaped the standard of review rather than the duty's applicability. If applicability turns on an imbalance of power, as argued earlier, these other two factors should return to being used in the manner that the UK Supreme Court had in mind in *Braganza*, *ie*, as factors shaping the standard

124 See paras 21–55 above.

125 See, *eg, Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; [2015] UKSC 17 at [31]–[32] and [55].

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of review, rather than determining applicability. This would make the content and intensity of the duty sensitive to contextual nuance. It would also help to clarify how the *Rose Capital* factors should be applied, in the wake of the court's reasoning in *The "CHLOE V"*. While the court was right to have regard to these factors, the lens of non-arbitrariness clarifies where in the analysis each factor belongs.

117 Thus far, two of the doctrinal questions raised earlier have been addressed. The article now turns to the third question: the juridical basis of the duty. Non-arbitrariness answers whether the duty is implied in fact or in law. If the rationale for the term is preventing arbitrary exercises of discretion, this means that the reason for implying the term is not directly related to parties' intentions for the specific contract. The term is more appropriately characterised then as a term implied in law, as Varuhas argued.

118 Against this conclusion, one might argue that controls on discretion are better left to implication in fact, so that they can be tailored to the particular bargain and so that freedom of contract is not displaced by a default rule. However, this article argues that the *Braganza* duty should not be understood as a term implied in fact. The orthodox tests for implication in fact are business efficacy and obviousness. A contract conferring an unconstrained discretion is not inefficacious: it works, by allocating the decision to one party and leaving the other to bear the consequences. That was precisely the court's reasoning in *TYC Investment Pte Ltd*. Further, the consistency of the duty's content across a broad range of factual contexts suggests that something other than the presumed intention of particular parties is doing the work.

119 It is suggested that what is doing the work is a judgment that a contracting party should not be subject to the arbitrary whim of another. That judgment is one of policy, in the sense in which the implication of terms in law has always rested on reasonableness, fairness, and policy. Non-arbitrariness gives that policy a determinate content and, crucially, a contractual justification. It explains why the duty is imposed as a default incident of a defined class of contracts – those conferring a true discretionary power in a context of structural imbalance – rather than being derived from the intentions of the particular parties before the court. Indeed, reasonableness, fairness, and policy – rather than the parties' bargain – appear to have done the real work in *Shipworks Engineering*. The duty there is better understood as implied in law, despite the court's characterisation of it as implied in fact.

120 Understanding the *Braganza* duty as a term implied in law helps to address a question that is related to the scope of the duty: Should the *Braganza* duty apply to a discretion which parties expressly state is

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"absolute"? The starting point is that terms implied in law can be excluded if parties expressly do so.[126] However, simply stating that a discretion is "absolute" may not constitute sufficient evidence that parties intended to exclude this implied term. After all, the courts have subjected to the *Braganza* duty even discretions expressly designated to be "absolute".[127] An express statement of intention to exclude the term should therefore be required. Such a statement, as Hooley argued, should be expressed in clear and unmistakeable terms on the face of the contract. It would be contrary to public policy to permit a party to contract out of honesty and good faith in the exercise of discretion, so the bar should be set high. Non-arbitrariness points the same way. A clause permitting a party to exercise a power indifferently to the reasons for which it was conferred is, in substance, one under which the other agrees to be subject to its whim. Parties may in principle agree to that. However, the courts should require them to say so unmistakeably.

121 What difference would this framework make to the cases discussed above?[128] In many instances, none. This is a point in its favour, since an account which reversed the bulk of the decided cases would fail to fit the case law. In *Leiman*, the discretion was conferred within an employment relationship, the clause required the decision-maker to decide something beyond whether to enforce an existing right, and the imbalance of power was plain. The duty therefore applied with relatively high intensity. In *Deutsche Bank AG Singapore Branch*, the bank's power to value collateral and prescribe margin determined the extent of the client's obligations, and the labels "sole" and "absolute" did not amount to an unmistakeable exclusion of the *Braganza* duty. In *Center for Competency-Based Learning and Development*, the duty applied to the antecedent determination of whether gross moral turpitude had occurred, and therefore whether the right to terminate arose, but not to the subsequent exercise of that right.

122 *The "CHLOE V"* is where the framework would make a difference – not to the result, but to the route taken to it. Applying this article's suggested approach, the first question is whether the clause conferred a true discretionary power. If, as the court held on construction, the approval requirement did not extend to the issuance of an LQE at all, the analysis ends there and no duty arises. If the clause did extend that far, the question would be whether the power was one to determine

126 *Barton v Morris* [2023] AC 684.

127 See, *eg, Deutsche Bank AG Singapore Branch v ARJ Holding Ltd* [2025] SGHC 163 and *Center for Competency-Based Learning and Development Pte Ltd v SkillsFuture Singapore Agency* [2024] 5 SLR 481.

128 See paras 8–55 above.

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the scope of the shipowner's obligations, or merely a decision whether to enter into a fresh contractual relationship with a third party. Only in the former case would the clause confer a true discretionary power. The next question would then be whether the power arose in a context of structural imbalance. Since the parties were sophisticated commercial parties dealing at arm's length, it did not, and the duty would not apply. The absence of a conflict of interest would go to intensity rather than applicability. The result would very likely be the same, but the reasoning would be clearer and more principled.

123 This part can be concluded by discussing the most fundamental question: the justification for the *Braganza* duty. Non-arbitrariness provides the duty with an independent foundation that does not require reference to public law. It also squares with foundational principles of contract law: certainty and freedom of contract. It promotes certainty by discouraging exercises of discretion which are indifferent to the relevant reasons for the use of power and thereby cannot have been within parties' contemplation. Allowing arbitrary exercises of discretion would frustrate ordinary commercial expectations. It also prevents the undercutting of party autonomy by allowing one party to become subject to the arbitrary whim of the other.

124 At the same time, non-arbitrariness explains the instinctive appeal of references to public law to ground the *Braganza* duty. The analogy is instinctive because public law, which regulates the exercise of power by public bodies, is similarly concerned about arbitrariness. Yet, the value of non-arbitrariness is engaged in a distinct way in public law. Public law prevents arbitrary exercises of discretion because they are contrary to the rule of law. Contract law's interest in preventing arbitrary exercises of discretion rests, in contrast, on the grounds just explained. Its parallel relevance in public law explains why judges have instinctively thought that an analogy to public law is useful for understanding the *Braganza* duty.

VI. Conclusion

125 Non-arbitrariness thus provides answers for the loose ends surrounding the *Braganza* duty. In determining whether the duty applies, this article argues that the first question is whether the clause in question gives rise to a true discretionary power: a power to decide something beyond merely whether that right should be enforced. If so, the next question is whether that power arises in a context of imbalance. If both answers are "yes", the duty should be implied in law unless expressly excluded. The contractual context should shape the content and intensity of the duty.

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126 However, the crucial point is this. If the *Braganza* duty is grounded in an independent doctrine of non-arbitrariness in contract law, the law will be free to develop on its own feet. The rules on contractual discretion will no longer be confused by doctrines undergirded by a very different rationale, remedial context, and relationships between key actors. There are signs that the courts may be receptive to this point. In *Shipworks Engineering*, the Appellate Division insisted that the basis for implying a term controlling contractual discretion is rooted in contract law and does not depend on any transposition of administrative law principles. What that reasoning leaves open is what the contractual basis is. Non-arbitrariness is our answer.

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