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# THE LIMITS TO CONTRACTUAL DISCRETION

In modern contracts, it has become increasingly common to find terms purporting to confer discretionary powers upon one of the parties. In such situations, should the exercise of those powers be unfettered? If not, what ought to be the limits? This article argues that limits ought to be imposed on the exercise of contractual discretions. In particular, it is proposed that the limits to contractual discretions can, should, and have been (rightly) discerned by reference to the power-holder's decision-making process, and that contract law may draw lessons from administrative law in that regard.

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## I. Introduction

1 Consider the following hypothetical. Sam is a user of a mobile payment service, EZpay. One of the ways though which individuals may use the service is by purchasing EZpay Credits, which may be used at selected vendors. If payment is made by said Credits, the user is entitled to earn EZpay Points, which may then be used to redeem certain rewards, such as e-vouchers and gifts. Under the terms of use, however, EZpay has the discretion to refuse to refund any Credits and/or reject a user's request to redeem her Points. The relevant clauses are as follows:

> **12. Withdrawal of EZpay Credits**
>
> EZpay Credits are not refundable except at our absolute discretion.
>
> …
>
> **26. EZpay Points**
>
> The Company may at its sole and absolute discretion reject your request to redeem Points for any reason whatsoever.

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Given her extensive use of EZpay, Sam had accumulated a substantial amount of Points. Subsequently, Sam sought to redeem a portion of those Points for some Brandy Wills vouchers said to be available on the reward catalogue. However, EZpay rejected Sam's redemption request. Dissatisfied with the service, Sam sought a refund of her EZpay Credits. EZpay also refused the refund.

2 The question that arises is this: Does EZpay have complete freedom to decide whether or not to refund any EZpay Credits and/or reject a user's request to redeem her Points? What if there was evidence that EZpay had rejected Sam's request for no reason other than that she had long hair? Or that, in so doing, EZpay's purpose was to vex Sam?

3 Thus far, the law has sought to address these questions by taking as a baseline that contractual discretions are not to be exercised arbitrarily, capriciously or irrationally.[2] Notwithstanding its acceptance by the highest courts, however, the principle remains highly contentious,[3] not least due to concerns that judicial intervention in this area might undermine the freedom of contract. Further complexities arise due to the unsatisfactory treatment of the issue in the courts, albeit largely owing to how the cases have been pleaded, and the lack of clarity over its scope, especially as to the relevance of public law principles.[4] To these, one might

2 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [20]–[22], [52] and [102]–[103]; *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [120].

3 See, *eg*, Hugh Collins, "Discretionary Powers in Contracts" in *Implicit Dimensions of Contract* (David Campbell, Hugh Collins & John Wightman eds) (Hart Publishing, 2003) at pp 219–254; Jonathan Morgan, "Against Judicial Review of Discretionary Contractual Powers" [2008] *Lloyd's Maritime and Commercial Law Quarterly* 230; Jeannie Paterson, "Implied Fetters on the Exercise of Discretionary Contractual Powers" (2009) 35(1) *Monash University Law Review* 45; Richard Hooley, "Controlling Contractual Discretion" (2013) 72(1) *Cambridge Law Journal* 65; Jonathan Morgan, "Resisting Judicial Review of Discretionary Contractual Powers" [2015] *Lloyd's Maritime and Commercial Law Quarterly* 483; and Michael Bridge, "The Exercise of Contractual Discretion" (2019) 135 *Law Quarterly Review* 227. See also *The Law of Contract* (Michael Furmston gen ed) (LexisNexis, 6th Ed, 2017) at p 258.

4 See, *eg*, Jack Beatson, "Public Law Influences in Contract Law" in *Good Faith and Fault in Contract Law* (Jack Beatson & Daniel Friedmann eds) (Oxford University Publishing, 1995) at pp 263–288; Terence Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68(4) *Modern Law Review* 554; Ewan McKendrick, "Judicial Control of Contractual Discretion" in *The Public Law / Private Law Divide* (Mark Freeland & Jean-Bernard Auby eds) (Hart Publishing, 2006) at pp 195–214; Stephen Kós, "Constraints on the Exercise of Contractual Powers" [2011] 42(1) *Victoria University of Wellington Law Review* 17; Mark Elliot & Jason Varuhas, *Administrative Law: Text and Materials* (Oxford University Press, 5th Ed, 2017) at pp 143–145; Chris Himsworth, "Transplanting Irrationality from Public to Private Law: *Braganza v BP Shipping Ltd*" (2019) 23(1) *Edinburgh Law*

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add, parenthetically, that contractual discretions have not been explored in the leading authorities.[5]

4 Given that discretionary power is increasingly commonplace in contractual arrangements,[6] greater clarity and attention must be brought to this area of law. This article is directed at the position in Singapore law and will make a proposal as to how the local courts may think about the limits to contractual discretions, through a critical engagement with both local and UK case law.

5 This article argues that the limits to contractual discretions can, should and have been (rightly) discerned by reference to the power-holder's decision-making process, in particular, the reasons for and against its exercise. To this end, this article seeks to canvass four main issues, *viz*:

(a) whether limits should be imposed on contractual discretions;

(b) if so, how such limits ought to be imposed;

(c) whether public law can inform private law in controlling contractual discretions; and

(d) if so, whether public law should inform private law in this area.

6 Part II[7] examines the first issue by weighing the reasons for and against the control of contractual discretions while Part III[8] tackles the second issue by surveying the ways through which limits have been sought to be imposed on contractual discretions. This article argues that limits should be imposed on contractual discretions and that an implication of terms in law offers the more certain, clear and principled approach to do so. Part IV[9] explores the third issue by reviewing the existing case law in this area, before Part V[10] addresses the fourth issue by responding to

*Review* 1; and Philip Sales, "Use of Powers for Proper Purposes in Private Law" (2020) 136 *Law Quarterly Review* 384.

5 The issue is not discussed in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012). While a few "contractual discretion" cases are cited and summarised in *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) at paras 1-054–1-054A, there is no discussion on them.

6 For a discussion of the types of contractual discretions, see David Foxton, "Controlling Contractual Discretions", talk to the Attorney General's Chambers (9 January 2018) at paras 11–26.

7 See paras 7–21.

8 See paras 22–44.

9 See paras 45–68.

10 See paras 69–81.

the calls for a strict maintenance of the public/private divide and making arguments as to why lessons should indeed be drawn from public law. Finally, Part VI[11] concludes by setting out how a power-holder's exercise of contractual discretion may be broadly analysed.

## II. Whether limits should be imposed on contractual discretions

7 The justification for imposing limits on contractual discretions is a simple, yet fundamental, one: to ensure that such contractual powers are not abused.[12]

8 As a starting point, the use of powers generally attracts the law's attention "because they postpone to a different time, and allocate to a single party, the distribution of private benefits".[13] The law would hence ordinarily be cautious of, for instance, a mobile payment service provider who has discretionary power to, at a time *subsequent* to a user's agreeing to its term of use, *unilaterally* decide the grounds upon which it may reject that user's request to redeem her points. Added to this, however, is that, in the contractual context, the power-holder will usually find itself in a position of conflict of interest, since it is charged with making decisions which affect the rights and obligations of both parties.[14] So, in the case of a service provider who is conferred the discretion to refuse to make refunds, it may be that such a refusal will be *to the provider's benefit* ***but*** *to the user's detriment*. This is because the user would effectively be compelled to continue using a service that she might not otherwise have continued to use, with the result that the provider would earn commissions from the associated transactions which might not otherwise have occurred. Accordingly, the law has seen fit to intervene so as to prevent the power-holder from exploiting the other party.[15]

9 Indeed, judicial intervention premised on the prevention of an abuse of powers has also been accepted in other areas of private law. For instance, in company law, a director's power is circumscribed by the

11 See para 82.

12 See, *eg*, *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [18] and *Leiman, Ricardo v Noble Resources Ltd* [2018] SGHC 166 at [112].

13 Stephen Kós, "Constraints on the Exercise of Contractual Powers" (2011) 42(1) *Victoria University of Wellington Law Review* 17 at 18.

14 Stephen Kós, "Constraints on the Exercise of Contractual Powers" (2011) 42(1) *Victoria University of Wellington Law Review* 17 at 18.

15 Ernest Lim & Cora Chan, "Problems with Wednesbury Unreasonableness in Contract Law: Lessons from Public Law" (2019) 135 *Law Quarterly Review* 88 at 100.

concept of directors' duties[16] while majority rule is safeguarded by the law on minority oppression.[17] Likewise, in trust law, a trustee's power in respect of the administration of the trust is regulated by certain prescribed considerations.[18]

10 At this juncture, it bears mention that the fact that the parties may have equal bargaining powers does not necessarily mean there exists no concern over an abuse of powers. While the relative position of the parties may be relevant to the circumstances in which a discretion is *conferred*, it is generally irrelevant to the circumstances in which the discretion is *exercised*. This is because, when it is agreed that one of the parties will have a discretion in a given situation, once that situation arises, the power-holder is free to decide what should be done, without the consent of the other. Even if any equality between the parties might make it unlikely for the power-holder to abuse its power, it is not necessarily the case that such abuse will not actually result. Much will depend on the prevailing circumstances, but the risks cannot be discounted. As such, while the equality of bargaining power may be a relevant factor that the court ought to take into account in determining whether the limits to contractual discretions have been crossed,[19] it should not be conclusive against the import of judicial controls.

11 Apart from giving effect to the imperative against an abuse of powers, the imposition of limits on contractual discretions is also favourable for two further reasons. Firstly, such limits may be said to serve the same values that are served by the rule of law, since they both guard against arbitrary power.[20] And secondly, in providing for the prospect of judicial intervention, commerce may be facilitated to the extent that power-holders will likely conduct themselves in a more commercially sensible manner to avoid the courts' intervention. The hypothetical mobile payment service provider might, for example, thus

16 Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 09.001.

17 Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at paras 1.007–1.009.

18 Graham Virgo, *The Principles of Equity & Trusts* (Oxford University Press, 3rd Ed, 2018) at pp 365–372.

19 See also para 63 below.

20 See also William Lucy, "The Rule of Law and Private Law" in *Private Law and the Rule of Law* (Lisa Austin & Dennis Klimchuk eds) (Oxford University Press, 2014) at pp 41 *ff*, where it is observed that "private law protects against arbitrariness in much the same way as does the rule of law … and … that the values served by the rule of law are also to some extent served by private law". Even if it be taken that contract law is founded on a different understanding of what "rule of law" requires, preferring conceptions that espouse certainty and party autonomy, as will be seen below, such limits also possess those desired virtues.

strive to ensure the redeemability of offered rewards, as opposed to simply rejecting a redemption request for unavailability.

12 Nevertheless, any meaningful analysis must not neglect the existence of other institutional alternatives which could potentially curb exploitative behaviour. In this connection, it has been said that sufficient deterrent exists in the form of the non-adjudicatory market mechanism, since blatant misuse of contractual powers may damage the power-holder's reputation.[21] It is, however, generally accepted that the market is an imperfect regulator and is therefore not always a viable safeguard.[22] Indeed, suggestions to the contrary were rejected by the England and Wales Court of Appeal ("EWCA") in *Paragon Finance plc v Nash*[23] ("*Paragon Finance*"). In that case, the claimant mortgagee had a discretion to vary interest rates payable under the mortgage entered into by the defendant mortgagors.[24] Subsequently, there was a credit crunch, causing the claimant to adjust the interest upwards.[25] As a result of, or at least in large part due to, such adjustment, the defendants fell into arrears, and the plaintiff brought an action to recover possession.[26] The defendants counterclaimed, arguing that the claimant's raising of the interest rates constituted a breach of an implied term not to vary the interest arbitrarily, capriciously or unreasonably.[27] In response, counsel for the claimant submitted that the test for implication of terms was not satisfied as market forces already dictated that interest rates would be fixed sensibly.[28] Dyson LJ, with whom the rest of the court agreed, did not hesitate in rejecting the submission, noting that "the commercial considerations relied on by [counsel we]re not sufficient to exclude [the] implied term" as "commercial considerations of that kind will not necessarily deter a lender from acting improperly in all situations".[29]

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21 Jonathan Morgan, "Against Judicial Review of Discretionary Contractual Powers" [2008] *Lloyd's Maritime and Commercial Law Quarterly* 230 at 238; Hugh Collins, "Discretionary Powers in Contracts" in *Implicit Dimensions of Contract* (David Campbell, Hugh Collins & John Wightman eds) (Hart Publishing, 2003) at pp 227–228; Jonathan Morgan, "Resisting Judicial Review of Discretionary Contractual Powers" [2015] *Lloyd's Maritime and Commercial Law Quarterly* 483 at 486.

22 Ewan McKendrick, "Judicial Control of Contractual Discretion" in *The Public Law / Private Law Divide* (Mark Freeland & Jean-Bernard Auby eds) (Hart Publishing, 2006) at p 200; and Richard Hooley, "Controlling Contractual Discretion" (2013) 72(1) *Cambridge Law Journal* 65 at 68.

23 [2002] 1 WLR 685.

24 *Paragon Finance plc v Nash* [2002] 1 WLR 685 at [1] and [7]–[9].

25 *Paragon Finance plc v Nash* [2002] 1 WLR 685 at [2].

26 *Paragon Finance plc v Nash* [2002] 1 WLR 685 at [1], [4] and [6].

27 *Paragon Finance plc v Nash* [2002] 1 WLR 685 at [19]–[21].

28 *Paragon Finance plc v Nash* [2002] 1 WLR 685 at [28].

29 *Paragon Finance plc v Nash* [2002] 1 WLR 685 at [32]–[33].

13 To these views, it might be added that there is no indication that the possibility of such socio-economic sanctions has ever been taken as precluding judicial intervention where concerns over an abuse of powers are in play. For instance, it does not appear that the fact that an errant director is unlikely to be appointed onto other boards and/or that a self-serving trust company is unlikely to secure future engagements has had any bearing on the jurisprudence on the powers of directors and/or trustees.

14 For all the discussion above, however, the review of an exercise of discretion between private parties does have its detractors, whose central thesis is this: Inasmuch as the parties have voluntarily entered into an arrangement under which they agree that one of them is subject to the discretionary power of the other, the courts should not intervene in the exercise of that discretion, and the power-holder should be left with complete freedom to decide what to do.[30]

15 This article makes a simple response to those claims. It is submitted that the detractors would seem to have omitted to consider that, in the first place, the parties may well have been *ad idem* with the notion that there are to be limits to contractual discretions.[31] In this regard, it is highly improbable that a party subject to the discretionary power of another would have contemplated that the power could be exercised as the power-holder deemed fit, even if such exercise was, say, arbitrary, capricious or irrational.[32] On the contrary, as noted by Lord Sales, writing extra-judicially:[33]

> [W]here the parties stipulate that one of them is to have a discretion, the more natural inference is that they have resorted to this mechanism to allow for reasonable adjustment of their relationship in the face of future changes and that *they intend there to be some constraint on the exercise of that discretion*. [emphasis added]

And it is suggested here that there are at least three reasons why this may be the case.

30 See, *eg*, Terence Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68(4) *Modern Law Review* 554 at 565–566.

31 Ernest Lim & Cora Chan, "Problems with Wednesbury Unreasonableness in Contract Law: Lessons from Public Law" (2019) 135 *Law Quarterly Review* 88 at 100–103.

32 Ernest Lim & Cora Chan, "Problems with Wednesbury Unreasonableness in Contract Law: Lessons from Public Law" (2019) 135 *Law Quarterly Review* 88 at 100.

33 Philip Sales, "Use of Powers for Proper Purposes in Private Law" (2020) 136 *Law Quarterly Review* 384 at 387.

16 The first reason relates to the *function* of contract law. It has been argued that while claims that parties expect a degree of common sense and fairness to govern their transactions cannot exactly be proven, it is difficult to envisage the converse scenario.[34] This is because "for people to expect nonsense, unfairness and injustice in any branch of law is surely to stultify its purpose".[35] This argument applies *a fortiori* in contract law, which function is to provide an "effective and fair framework" for dealings between parties.[36]

17 The second reason relates to the *concept* of "discretion" and the circumstances in which it may be *conferred*. As observed by Dworkin, albeit in a slightly different context:[37]

> [T]he concept [of discretion] is out of place in all but very special contexts. For example, you would not say that I either do or do not have discretion to choose a house for my family. It is not true that I have 'no discretion' in making that choice, and yet it would be almost equally misleading to say that I do have discretion. *The concept of discretion is at home in only one sort of context: when someone is in general charged with making decisions* ***subject to standards*** *set by a particular authority. … Discretions, like the hole in a donut, does not exist except as an area left open by a surrounding belt of restriction.* It is therefore a relative concept. [emphasis added in italics and bold italics]

Indeed, if one was to think about why discretions exist, then one might arrive at the conclusion that the parties intended for its exercise to be constrained. For instance, a discretion may be conferred as a response to a lack of available information at the time of contract. In such situations, surely it is more likely than not that, had the uncertainty been known, the parties would have come to a reasonable agreement on the matter to which the discretion pertained. Suppose that the discretion to decide whether to reject a user's request to redeem her points was conferred on a mobile payment service provider to accommodate for the possibility that a particular reward may be made out-of-stock by a third-party merchant. If it was known at the time of contract that the rewards featured on the catalogue would always be available, would the parties not have, all else being equal, agreed that the service provider should not exercise that discretion? If so, such an outcome suggests that the parties had intended there be certain limits to the exercise of that discretion.

34 Colin Liew, "A Leap of Good Faith in Singapore Contract Law" [2012] *Singapore Journal of Legal Studies* 416 at 422.

35 Colin Liew, "A Leap of Good Faith in Singapore Contract Law" [2012] *Singapore Journal of Legal Studies* 416 at 422.

36 Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 *Law Quarterly Review* 433 at 434.

37 Ronald Dworkin, "The Model of Rules" (1967) 35 *University of Chicago Law Review* 14 at 32.

In this regard, while it may theoretically be possible for the parties to deal with such uncertainties by specifying with more particularity the circumstances in which the power-holder would be entitled to exercise its discretion, it is questionable whether it would be practically possible for them to contemplate each and every of those circumstances. This is especially so considering that discretions are only conferred in respect of non-essential terms, for otherwise the extensive and imprecise nature of the discretionary power would likely have had the effect of rendering the contract invalid for want of certainty and completeness.

18 Finally, the third reason relates to the circumstances in which the discretion may be *exercised*. As earlier observed, in exercising its contractual power, the power-holder tends to be in a position of conflict of interest and, in such situations, "it is [generally] presumed to be the reasonable expectation and therefore the common intention of the parties that there should be a genuine and rational, as opposed to an empty or irrational, exercise of discretion".[38]

19 In light of the above, it is perhaps unsurprising that the limits to contractual discretions have also been regarded as having the effect of protecting the "implicit dimensions" of the contract, that is, the economic interest of, and the relations of trust between, the parties.[39]

20 That leaves one final point of concern: will the recognition of such "hardly ever, but not never" powers of intervention cause great disruption and uncertainty?[40] In this connection, it has been said that the mere existence of such review, with its attendant ill-defined standards, provide occasion for opportunism.[41] The irony here, however, is that, as

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38 *Horkulak v Cantor Fitzgerald International* [2005] ICR 402 at [30].

39 Hugh Collins, "Discretionary Powers in Contracts" in *Implicit Dimensions of Contract* (David Campbell, Hugh Collins & John Wightman eds) (Hart Publishing, 2003) at pp 249–254. Collins has theorised that there are "three levels" to business transactions, all of which guide the behaviour of the parties. The first level is the written contract which provides a reference point for dealings between the parties, who may seek to justify their demands and excuses by the terms of the agreement. The second level is the economic relation between the parties which gives effect to the understanding that they each had entered into the contract to improve their respective economic positions. The third level is the social interactions between the parties which serves as a framework to preserve or enhance trust between themselves. Collins argues that while the second and third levels are not formally recorded in the contract, they are vital to both the existence and workability of the contract.

40 Jonathan Morgan, "Against Judicial Review of Discretionary Contractual Powers" [2008] *Lloyd's Maritime and Commercial Law Quarterly* 230 at 236–237; Jonathan Morgan, "Resisting Judicial Review of Discretionary Contractual Powers" [2015] *Lloyd's Maritime and Commercial Law Quarterly* 483 at 486.

41 Jonathan Morgan, "Against Judicial Review of Discretionary Contractual Powers" [2008] *Lloyd's Maritime and Commercial Law Quarterly* 230 at 236–237;

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earlier alluded to, it is precisely this possibility of recourse to the judicial safeguard which may, on the contrary, incentivise commercial sensibility. Further, such views are also problematic in so far as they do not seem to appreciate that what is actually needed in this area is greater clarity as to the expected standards of decision-making, which will only come with continued development of case law in this area. In any event, it should be recalled that the tension between a normatively sound result and certainty is a "perennial" one that must invariably see some sort of compromise and,[42] in cases involving an exercise of contractual discretion, it may well be that such compromise should be struck in favour of the fundamental principle that powers should not be abused.[43]

21 Accordingly, the better view is that the law should indeed impose limits on contractual discretions. Such limits do not only give effect to the imperative against an abuse of powers, but also do not amount to a judicial re-allocation of risks, for they are likely to be well within, or at least consistent with, parties' intentions. As to how those limits ought to be imposed, however, it is a question that is to be addressed in the section that follows.

## III. How ought the limits to contractual discretions be imposed

22 Broadly speaking, there are two main ways through which the courts have sought to impose limits on contractual discretions, namely, that of interpretation and implication.[44] The former refers to the process of ascertaining the meaning of express terms in the contract,[45] while the

Jonathan Morgan, "Resisting Judicial Review of Discretionary Contractual Powers" [2015] *Lloyd's Maritime and Commercial Law Quarterly* 483 at 486.

42 Ernest Lim & Cora Chan, "Problems with Wednesbury Unreasonableness in Contract Law: Lessons from Public Law" (2019) 135 *Law Quarterly Review* 88 at 106.

43 See also *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 at [38], where Lord Scott of Foscote opined that:

> … [c]ertainty is a desideratum and a very important one, particularly in commercial contracts. But it is not a principle and must give way to principle. Otherwise incoherence of principle is the likely result. The achievement of certainty in relation to commercial contracts depends, I would suggest, on firm and settled principles of the law of contract.

44 For judicial discussion on the relationship between the two concepts, see *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 at [27]–[43] and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [24]–[33] and [76]–[82].

45 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [27].

latter refers to the process of filling a gap in a contract to give effect to the parties' presumed intentions[46] and/or reasons of public policy.[47]

### *A. Interpretation*

23 In so far as interpretation is concerned, the courts have generally attempted to place limits on contractual discretions by adopting narrower interpretations of the clause from which the discretionary power is derived which may not otherwise have been warranted by its broad and general language (or, in more informal parlance, by "reading down" that clause).[48]

24 In *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd*[49] ("*ABN AMRO*"), the plaintiff bank had a "reasonable discretion" under a facility agreement to decide what to do in the event of a default.[50] Subsequently, an event of default arose and the plaintiff proceeded to exercise its right to liquidate the defendant's portfolio, so as to discharge all liabilities in the portfolio.[51] Upon closing of the defendant's trading positions, there were still net liabilities in its account.[52] The plaintiff thus commenced proceedings for the outstanding sums.[53] The defendant argued that it was not liable as the plaintiff's exercise of discretion was not objectively reasonable and therefore invalid.[54] The Singapore High Court rejected the defence and held that the plaintiff was entitled to take such liquidation actions as it *subjectively* considered reasonable.[55] What is interesting, however, is that George Wei J seemed to have nonetheless imposed limits on the plaintiff's subjective discretion, adding that the court would nevertheless have intervened if the bank had acted in an arbitrary, capricious, perverse and/or irrational manner.[56] That such limits were

46 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [29].
47 *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [90] and [92].
48 See also Ewan McKendrick, "Judicial Control of Contractual Discretion" in *The Public Law / Private Law Divide* (Mark Freeland & Jean-Bernard Auby eds) (Hart Publishing, 2006) at p 198.
49 [2016] 1 SLR 186.
50 *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [45]–[46].
51 *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [11]–[12].
52 *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [16].
53 *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [19].
54 *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [68] and [70].
55 *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [82].
56 *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [83] and [85].

imposed through the interpretive process may be gleaned from the fact that Wei J had earlier rejected recourse to an implied term analysis.[57]

25 A similar approach was taken by the EWCA in *Cantor Fitzgerald International v Horkulak*[58] ("*Horkulak*"). In that case, the claimant brought proceedings alleging that the behaviour of his supervisor towards him amounted to constructive dismissal.[59] At trial, the judge found in the claimant's favour and awarded damages in view of lost bonus payments that would have been made to him, had he served the full term of his employment.[60] On appeal, the defendant company argued that, since the employment contract provided that it had the "sole discretion" to determine the annual bonus payable to the claimant,[61] the bonus was wholly discretionary and that the trial judge had therefore erred in treating the existence of the bonus clause as entitling the claimant to an award of damages.[62] The court rejected the defendant's argument and held that, on a true interpretation of the relevant clause, the discretion was one that had to be exercised *bona fide* and rationally.[63] In reaching its decision, the court considered that, should the defendant's favoured interpretation be adopted, it would have stripped the provision of any value in respect of the employee whom it was designed to benefit and motivate.[64] Whilst the approach in *Horkulak* would thus appear to be narrower than that taken in *ABN AMRO*, what is most pertinent, for present purposes, is that both cases demonstrate how the courts have relied on the process of interpretation to place limits on contractual discretions.

26 Indeed, it has been observed that the emergence of the subject of contractual discretion appears to have coincided with the surge of case law on contractual interpretation.[65] While it might be tempting to thus conclude that limits on contractual discretions ought only to be imposed

57 Wei J found the cases in which the courts had imposed limits on the exercise of contractual discretions through an implication of terms unhelpful on the grounds that the relevant clauses in those cases were different from their counterpart before him: see *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [76].

58 [2005] ICR 402.

59 *Horkulak v Cantor Fitzgerald International* [2005] ICR 402 at [4].

60 *Horkulak v Cantor Fitzgerald International* [2005] ICR 402 at [2], [6]–[7] and [15]–[19].

61 *Horkulak v Cantor Fitzgerald International* [2005] ICR 402 at [2] and [11].

62 *Horkulak v Cantor Fitzgerald International* [2005] ICR 402 at [2], [20] and [22].

63 *Horkulak v Cantor Fitzgerald International* [2005] ICR 402 at [46].

64 The court had earlier found that, since the payment of discretionary bonuses made up a good part of the remuneration structure, the purpose of the bonus provision was likely to incentivise the employee to maximise the commission revenue of the business: see *Horkulak v Cantor Fitzgerald International* [2005] ICR 402 at [46]–[47].

65 Michael Bridge, "The Exercise of Contractual Discretion" (2019) 135 *Law Quarterly Review* 227 at 227 and 233.

via the process of interpretation, this article suggests that there is one major difficulty with that view, namely, that there are inherent limits to the process of interpretation. This is because it may not always be the case that the language used by the parties adequately conveys their intention, for it may well be the product of sloppy drafting that a discretion is phrased in terms of a "sole" and/or "absolute" discretion; yet, the meaning which courts may impute may only be those which the words are reasonably adequate to convey.[66] It is little wonder then that the courts have, on some occasions,[67] struggled to give effect to the intentions of the parties by simply construing out of the picture express discretionary power.[68] And it is perhaps for this reason that the courts have also resorted to the process of implication to impose limits on contractual discretions.

### *B. Implication*

27 In so far as implication is concerned, there would appear to be two types of implied terms through which limits have been sought to be imposed on the exercise of contractual discretion. The first is a term that the discretion will be exercised objectively reasonably while the second is a term that the discretion will not be exercised arbitrarily, capriciously or irrationally (or some variant of such a formulation).

28 As a preliminary point, given that the test for the implication of a term in fact in Singapore is different from that of other jurisdictions, it may be apposite to first set out the relevant framework. In *Sembcorp*

66 *Gibson v Minet* (1791) 1 H Bl 569 at 615; 126 ER 326 at 352. See also Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 6th Ed, 2015) at paras 1.03 and 2.08.

67 See, *eg*, *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918 at 923; *China Taiping Insurance (Singapore) Pte Ltd v Teoh Cheng Leong* [2012] 2 SLR 1 at [31]; and *Yeo Boong Hua v Turf City Auto Emporium Pte Ltd* [2015] SGHC 207 at [180]–[185].

68 As Assistant Professor Benjamin Joshua Ong observed to the author, the process of interpretation may not only be limited by the express wording of the contract, but also by the notion that it cannot lead to a result which was what the parties had specifically not intended. The author agrees. However, in the context of contractual discretions, as has been argued above, it would appear more likely than not that it would ordinarily have been within the reasonable expectations of the parties and/or consistent with their intentions that there are to be limits to the exercise of that discretion. It is only with this in mind that we may sense the way in which the process of interpretation is limited – the express wording of the contract may restrict the court from giving effect to the reasonable expectations and/or intentions of the parties. See also *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [73]–[76], where Wei J seemed to have thought that the process of interpretation would be comparatively less helpful where a "sole" and/or "absolute" discretion is expressly conferred upon one contracting party, in which case the process of implication would be more appropriate.

*Marine Ltd v PPL Holdings Pte Ltd*[69] ("*Sembcorp*"), the Court of Appeal held that a term will only be implied in fact if:[70]

> (a) there is a "true" gap in the contract;
>
> (b) it is necessary in the business or commercial sense to imply a term to fill that gap in order to give the contract efficacy; and
>
> (c) the term sought to be implied is one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the inclusion of the term been put to them at the time of contract.

The apex court added that not all gaps in a contract are "'true' gaps" in the sense that they could be remedied by the implication of a term.[71] While it may be appropriate for the court to fill a gap which arose because the parties did not contemplate the issue at all,[72] that may not be the case if the gap arose because the parties contemplated the issue but chose not to provide a term for it as they mistakenly thought that the express terms of the contract had addressed it and/or as they could not agree on a solution.[73]

*(1) Implication of a term that the discretion will be exercised objectively reasonably*

29 An attempt to imply a term of the first type is found in *Koh Kim Teck v Credit Suisse AG, Singapore Branch*[74] ("*Koh Kim Teck*"). In that case, the defendant bank had a "sole and absolute" discretion under a facility agreement to determine the length of time to be given for a collateral top-up as well as the right to close out the account should the borrower not be able to make the top-up.[75] Subsequently, there was a substantial collateral shortfall in the plaintiffs' account, pursuant to which the defendant informed the first plaintiff that he had four hours to procure the additional security.[76] As the first plaintiff failed to provide the top-up, the defendant proceeded to liquidate all the assets in the account.[77] The plaintiffs thus brought proceedings alleging that the defendant's management of the account was in breach of an implied term that the defendant would

69 [2013] 4 SLR 193.
70 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [101].
71 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [94].
72 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193at [95].
73 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [95]–[96].
74 [2019] SGHC 82.
75 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [38].
76 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [14]–[15].
77 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [16].

have given them a reasonable period of time to furnish the additional collateral.[78] The High Court declined to imply the term on the grounds that the first-step of the *Sembcorp* framework was not satisfied.[79] In reaching his decision, Aedit Abdullah J considered that there was no gap in the contract as the parties had clearly contemplated the period of time to be given to a borrower to furnish additional collateral – a time which was to be determined by the defendant, as opposed to a time which was objectively reasonable.[80]

30 At this point, it might be noted that the distinction between the two types of implied terms would appear to have had some bearing on the dispute. Had the plaintiffs argued instead for an implied term that the bank, in determining the length of time to be given, would not have acted arbitrarily, capriciously or irrationally, surely it could be said that a gap existed in the contract in so far as there was neither any indication that there were any terms purporting to govern the ways in which the defendant was to exercise its discretion nor that the parties had contemplated such an issue. In this regard, it seems that qualifiers such as "sole" and "absolute" will only be read as pertaining to the *scope* of a discretion, as opposed to the *manner* in which the discretion may be exercised.[81] The former is concerned with the terms in which the discretion is conferred while the latter is concerned with the considerations upon which its exercise is based. Understood in this sense, we may also better appreciate why the courts have not appeared to be troubled by the express conferment of "absolute" or "sole" discretions in their endeavours to impose limits on such discretions.[82]

*(2) Implication of a term that the discretion will not be exercised arbitrarily, capriciously or irrationally*

31 A helpful contrast to *Koh Kim Teck* is *TYC Investment Pte Ltd v Tay Yun Chwan Henry*[83] ("*TYC Investment*"). In that case, both defendant directors had a discretion under the first plaintiff company's articles of association to decide whether or not to approve payments made by the

78 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [18] and [36].
79 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [36]–[38].
80 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82 at [38].
81 See also Richard Hooley, "Controlling Contractual Discretion" (2013) 72(1) *Cambridge Law Journal* 65 at 71; and Terence Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68(4) *Modern Law Review* 554 at 567–568 and 576.
82 See, *eg*, *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61; and *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189.
83 [2014] 4 SLR 1149.

company.[84] Subsequently, the second defendant refused certain approvals for various reasons.[85] The first plaintiff thus commenced proceedings alleging that the second defendant's actions constituted a breach of an implied term that the power to approve payments could not be exercised dishonestly, for an improper purpose, capriciously or arbitrarily.[86] The High Court rejected the argument and held that such a term could not be implied as the second and third steps of the *Sembcorp* framework were not satisfied.[87]

32 Although Lee Kim Shin JC agreed with the first plaintiff's submission that there was a gap in the settlement agreement in so far as there was no term which provided for what should happen if either director paralysed the company by withholding approval to the company's making of payments,[88] he held that it would not have been necessary for the sake of efficacy to imply the term as the gap was ameliorated by the existence of directors' duties.[89] Had either director exercised the power to withhold approval of payments in a manner that was dishonest, for an improper purpose, capricious or arbitrary, that exercise of power would likely have constituted a breach of directors' duties.[90] On the contrary assumption that the implication of the term was necessary in order to give the contract efficacy, Lee JC added that the term sought to be implied would also not have been one which the parties would have responded "Oh, of course!" had they been asked about its inclusion.[91] This was because, if the implied term was indeed a subset of directors' duties and the existence of those duties were considered inadequate in remedying the gap, the directors would not have seen any additional benefit in including the implied term.[92] That said, what is significant is that Lee JC nonetheless acknowledged that, if he was wrong in that directors' duties did not mirror the implied term, the implied term *would have* passed muster under the *Sembcorp* framework.[93] In such circumstances, it would have been necessary to imply the term so as to "supplement the insufficiency left notwithstanding the existing directors' duties".[94] Although Lee JC did not proceed to explain why the implied term would

84 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [5] read with [13] and [197].
85 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [6].
86 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [156(a)].
87 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [157]–[220].
88 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [161]–[168].
89 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [179] and [185]–[188].
90 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [187].
91 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [220].
92 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [220].
93 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [217]–[218].
94 *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 at [217]–[218].

then be one which the parties would have responded "Oh, of course!" had they been asked about its inclusion, it likely boils down to the sense that it would probably have been intended by the parties that the discretion was not to be exercised dishonestly, for an improper purpose, capriciously or arbitrarily. As such, *TYC Investment* should not be read as having closed the door on the use of the process of implication to place limits on contractual discretions, but rather as support for the contrary.

33 Parenthetically, it is observed that in England, where the threshold for the implication of terms is arguably lower than that imposed by the *Sembcorp* framework, such a term would appear to be readily implied.[95] And this seems to be the case even where a party's exercise of its power might also be circumscribed by other rules, such as that of directors' duties. In *Watson v Watchfinder.co.uk Ltd*[96] ("*Watson*"), the defendant company's board of directors had a discretion under a share option agreement to decide whether or not to consent to an exercise of share options.[97] Subsequently, the claimants sought to exercise certain options, but the defendant wrote back to say that no shares would be issued because the requisite consent had not been obtained.[98] The claimants thus brought proceedings, seeking specific performance of the defendant's obligation to allot the shares.[99] The defendant argued that any consent was entirely within the discretion of the board.[100] The England and Wales High Court ("the EWHC") disagreed with the defendant and found that there was to be an implied term that the discretion could not be exercised arbitrarily, capriciously or irrationally.[101] To this end, Waksman QC (sitting as a High Court judge) considered that the implied term was clearly necessary for business efficacy as the board was in a position of conflict of interest, in so far as the directors might have been concerned that the grant of further shares would dilute their own holdings.[102]

34 Apart from being subject to an implication in fact, a term of the second type would also seem to have been implied in law into contracts where a discretion is conferred on a party. Support for this proposition may arguably be derived from the approach taken by the High Court

95 See, *eg*, *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299; *Paragon Finance plc v Nash* [2002] 1 WLR 685; and *Lymington Marina Ltd v Macnamara* [2007] 2 All ER (Comm) 825.

96 [2017] Bus LR 1309.

97 *Watson v Watchfinder.co.uk Ltd* [2017] Bus LR 1309 at [1]–[3].

98 *Watson v Watchfinder.co.uk Ltd* [2017] Bus LR 1309 at [1]–[3].

99 *Watson v Watchfinder.co.uk Ltd* [2017] Bus LR 1309 at [1] and [18].

100 *Watson v Watchfinder.co.uk Ltd* [2017] Bus LR 1309 at [19].

101 *Watson v Watchfinder.co.uk Ltd* [2017] Bus LR 1309 at [102] and [104].

102 *Watson v Watchfinder.co.uk Ltd* [2017] Bus LR 1309 at [102] and [104].

in *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd*[103] ("*MGA International*"). In that case, there was an arrangement between the parties under which the defendant was to provide financing for the plaintiff's trading activities.[104] While it was not disputed that the defendant would have been paid a commission for its services, the parties disagreed as to the amount of commission that was to be paid.[105] The defendant argued that it had an "absolute" discretion to decide its own renumeration.[106] While Belinda Ang Saw Ean J rejected the argument on the primary ground that it was not borne out by the evidence,[107] she nonetheless proceeded to hold in *obiter* that, even if the arrangement between the parties had contained such a discretionary commission term, any discretion could not be absolute.[108] This was because there was to be an implied term that the defendant could not exercise its discretion capriciously, arbitrarily or irrationally.[109] What is noteworthy here is that, instead of relying on the notion of business efficacy and the intentions of the parties,[110] Ang J relied on prior authority and policy concerns – an approach reminiscent of the implication of terms in law.[111] In reaching her decision, Ang J observed that:[112]

> 103 A contractual discretion is not usually as unfettered as [counsel for the defendant] would like this court to believe. *The authorities on contractual discretion recognise that there is a corresponding expectation that the discretion would be exercised fairly and rationally.* …
>
> …
>
> 105 … As Rix LJ observed in *Socimer*, *the concern is that the discretion is not abused*. Hence, the courts *will* impose an implied term that the

103 [2010] SGHC 319.

104 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [2].

105 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [9].

106 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [9].

107 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [88].

108 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [102].

109 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [105] and [107].

110 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [103]–[107].

111 Pearlie Koh & Andrew Phang Boon Leong, "Express and Implied Terms" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 06.066–06.069.

112 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [103]–[107].

> discretion should be exercised in good faith and not arbitrarily, capriciously or irrationally. …
>
> [emphasis added]

### *C. The preferable approach*

35 Having looked at four approaches through which limits may be imposed on contractual discretions, one might ask: is any of them more preferable than the others?

36 This article tackles that question in three parts, paying particular attention to the distinctions between (a) the process of interpretation and that of implication; (b) the standard of "reasonableness" and those of "arbitrariness, capriciousness and/or irrationality"; and (c) the implication of terms in fact and in law.

37 First and foremost, it is argued that resort is more appropriately had to the implication of terms than interpretation for two main reasons. The first is that such an approach would be in line with the trend emerging from the authorities,[113] while the second is that, as noted earlier, the process of interpretation may prove restrictive in some situations. In so far as the latter generally arises from the malleability of certain phrases, it persists whether or not judicial intervention serves the purpose of giving effect to the intentions of the parties and/or the wider policy concern of preventing abuse of power and might also give rise to one of two undesirable situations: (a) where the courts resort to interpretive gymnastics to arrive at a just result, generating further uncertainties in this area; or (b) where the courts are unduly handicapped, disabling them from giving effect to the parties' intentions and/or the imperative against an abuse of powers.

38 Second, it is suggested that, as opposed to a rule requiring "reasonableness", a rule against "arbitrariness, capriciousness and/or irrationality" is a better way to think about the limits to contractual discretions. In this regard, two points may be made. The first is that the norms of non-arbitrariness and the like are concerned with the minimum and likely only require that there be *some logical connection* between the evidence and the ostensible reasons for the decision.[114] This is in contrast to the concept of "reasonableness", which requires an assessment

113 Richard Hooley, "Controlling Contractual Discretion" (2013) 72(1) *Cambridge Law Journal* 65 at 70; Stephen Kós, "Constraints on the Exercise of Contractual Powers" (2011) 42(1) *Victoria University of Wellington Law Review* 17 at 27.

114 See also *Hayes v Willoughby* [2013] 1 WLR 935 at [14].

against *objective* criteria.[115] The less stringent requirements are favourable in so far as adjudication in accordance with the "reasonableness" standard may effectively render much of the discretion nugatory. Indeed, if the parties had truly intended that the discretion was to be reasonable, they could simply have agreed that the matter that the discretion pertained to was to be "reasonable". So, the agreement in *Koh Kim Teck* could merely have provided that the bank had to give a "reasonable time" whenever a collateral top-up was sought. The second point is that those norms more adequately give effect to the rationale underlying the limits to contractual discretions. This is because reference to said norms have the effect of specifically directing the inquiry along the paths tracked by *established instances* of "abuses of power". For instance, while one might have some difficulty accepting that an unreasonable exercise of discretion necessarily involves a misuse or improper exercise of power, one would probably have no difficulty accepting the same in respect of an arbitrary, capricious or irrational exercise of discretion, such as where a decision was made for improper purposes or founded on prejudice or preference, without regard for the prevailing circumstances.

39 Finally, it is proposed that the implication of terms to the effect that contractual discretions are not to be exercised arbitrarily, capriciously or irrationally should be performed in law, as opposed to in fact. While the courts have cautioned against the implication of terms in law as it would result in that term being implied in the future for all contracts of that particular type,[116] such concerns must feature less strongly in this area of law because the courts already *routinely* imply such a term in contracts where a discretion is conferred in apparently unlimited terms on one of the parties.[117] As such, implying the term in law would lead to greater certainty and clarity since such an approach not only avoids any impediment that the *Sembcorp* framework may pose,[118] but also ensures that a review of an exercise of contractual discretion will be readily available. Accordingly, contracting parties can ordinarily be assured that the powers of the party who is conferred the discretion will be checked and that the interests of the party who is subject to the discretion will be protected, just as they would likely have intended.

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115 *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] Bus LR 1304 at [66].

116 *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [44], affirmed in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [89]; *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [38] and [46].

117 Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford University Press, 8th Ed, 2018) at p 368. See also Colin Liew, "A Leap of Good Faith in Singapore Contract Law" [2012] *Singapore Journal of Legal Studies* 416 at 436.

118 See paras 31–32 above.

40 This, however, does *not* mean that the courts would always be forced to imply such terms across-the-board regardless of the contracting parties' intentions. As noted by the Court of Appeal in *Ng Giap Hon v Westcomb Securities Pte Ltd*[119] ("*Ng Giap Hon*"), it is trite law that a term cannot be implied if it is inconsistent with an express term of the contract concerned.[120] Hence, if the parties reject the notion that contractual discretions are subject to limitations, they are free to expressly provide for the contrary, such as by including a term relating to the *manner* in which the discretion is to be exercised and/or a basis clause which has the effect of *preventing* an obligation from arising on the part of the power-holder. In such circumstances, the courts will not free either party of their bargain through an implication of terms. That such implication might otherwise have been performed in law, as opposed to in fact, does not change this, for implied terms in law operate only as default rules against which parties remain able to "exclude or modify them to limit [their] content".[121] Nonetheless, it is submitted that any express term provided by the parties would have to be sufficiently precise in the former situation and sufficiently particular in the latter situation, so as to, respectively, show that the parties clearly contemplated the ways in which the discretion ought or ought not to be exercised and assure the courts that the aims of regulating discretion are not frustrated.

41 Apart from having the merits of greater clarity and certainty, implying the term in law would also be principled since it is both supportable by the authorities and justifiable by the public policy concern over an abuse of powers. As has been suggested above, it would appear that the basis for the High Court's control of discretion in *MGA International* was actually that of a term implied in law. At the risk of repetition, the implication of the controlling term in that case was not premised on the presumed intention of the contracting parties as such, but rather on the ground that there existed a series of cases which established that such a term will be implied whenever a discretion is conferred on one party.[122] To this end, Ang J explained that that the necessity of implying such a term lay in the concern that the contractual discretion should not be abused.[123] This approach has since been followed by Tay Yong Kwang J (as he then was) in *Edwards Jason Glenn v Australia and New Zealand*

119 [2009] 3 SLR(R) 518.

120 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [31].

121 *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [59], citing *Johnstone v Bloomsbury Health Authority* [1992] QB 333 at 350.

122 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [103]–[106].

123 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [105].

*Banking Group Ltd*[124] ("*Edwards Jason Glenn*"), as well as by Kannan Ramesh J in *AL Shams Global Ltd v BNP Paribas*[125] ("*AL Shams*").[126] In this connection, it is noteworthy that the latter case was decided after *Sembcorp* and yet the High Court's explanation for why the defendant was right to concede that it had to exercise the contractual discretion properly was not one that was based on the now all too familiar framework for the implication of terms in fact, but rather on the understanding that such a position was "borne out by the decisions".[127]

42 If further support for the implication by law route is required, it may also be observed that the courts have on occasion alluded to the possibility of such a kind of term being implied in law. For instance, in *Ng Giap Hon*, the apex court said that it was arguable that the courts would imply a term in law to prevent extremely wrongful conduct by a contracting party,[128] while in *Leiman Ricardo v Noble Resources Ltd*,[129] the High Court considered that terms closely related to the concept of good faith may be implied by law in appropriate areas.[130] To the extent that a power-holder's misuse or improper exercise of its discretionary power is behaviour that must be prevented and/or might be regarded as being dishonest and infringing upon the accepted standards of fair dealing, the decision to imply a term in law to control contractual discretion is likely to require no leap in logic or faith. Such an implied term is also neither unfair nor unduly burdensome if one takes into account the nature of the relationship[131] and that proof of "arbitrariness", "capriciousness" or "irrationality" involves a "high threshold".[132]

43 For the avoidance of doubt, however, it is hereby stressed that the implied term should not be seen as having its basis in the doctrine of good faith.[133] This is because, unlike the doctrine, the term is not as far-reaching as a concept.[134] As has been noted above, and as will come to be seen in the section that follows, in determining whether an exercise of discretion falls afoul of the implied term, the court will only address

124 [2012] SGHC 61.
125 [2019] 3 SLR 1189.
126 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [44]–[46].
127 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [45].
128 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [97].
129 [2018] SGHC 166.
130 *Leiman, Ricardo v Noble Resources Ltd* [2018] SGHC 166 at [246].
131 See paras 8–11 and 15–19 above.
132 *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [96]. See also para 38 above.
133 *Cf* Jonathan Morgan, "Resisting Judicial Review of Discretionary Contractual Powers" [2015] *Lloyd's Maritime and Commercial Law Quarterly* 483 at 486–487.
134 See also *Leiman, Ricardo v Noble Resources Ltd* [2018] SGHC 166 at [246].

itself to the *quality* of its exercise[135] and, in so doing, will also be cognisant that it ought not to expect very high standards of decision-making.[136] Therefore, in asking *what* the hypothesised mobile payment service provider may or may not decide, the court might accept that the service provider may reject a user's request to redeem her points for any reason whatsoever, such as on the sole basis that the user had long hair. However, that conclusion does not preclude it from asking *how* the service provider had come to decide what it had decided, that is, the reasons for and against its exercise. In this sense, the review of an exercise of discretion between private parties may thus be thought of in similar fashion to administrative review.

44 With the above in mind, this article turns to consider the relevance of public law principles in the context of contractual discretions.

## IV. Whether public law can inform private law in controlling contractual discretions

45 Before proceeding on to the discussion of the extent to which public law *should* inform private law in this area, this article proposes first to show that the existing case law may be explained using the language of administrative law, so as to impress upon the reader that the theoretical underpinnings of the traditional grounds of review in administrative law are consistent with the normative grounds traversed by the baseline formulation, such that they *can* indeed guide the courts in their attempts to define the boundaries of an exercise of contractual discretion.

### *A. Illegality*

46 In administrative law, illegality is concerned with the decision-maker understanding correctly the law that regulates its power and giving effect to it.[137] In thinking about "illegality", the courts are generally concerned with two broad questions, namely, whether the authority was indeed empowered to make a decision and whether the authority has exceeded the limits of that power in making the decision.[138] For present

135 Terence Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68(4) *Modern Law Review* 554 at 567–568.

136 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [19] and [31].

137 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410; *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [79].

138 See also Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 5-005.

purposes, however, this article is mainly concerned with public law's treatment of the second question.[139]

*(1) Relevant/irrelevant considerations*

47 Under illegality review, an authority would be deemed to have exceeded the limits of its power when it fails to take into account relevant considerations and/or ignore irrelevant considerations.[140] That the review of a power-holder's exercise of a contractual discretion might be approached in a similar fashion may be seen from *Braganza v BP Shipping Ltd*[141] ("*Braganza*") and *Victory Place Management Co Ltd v Kuehn*[142] ("*Victory Place*"), the underlying idea being that such a failure would generally mean that the power-holder was likely acting pursuant to an "irrational" decision-making process.[143]

48 In *Braganza*, the claimant's husband, who was employed by the second defendant as chief engineer, disappeared aboard one of the first defendant's oil tankers.[144] Under the contract of employment, the second defendant had the right to deny compensation for death if it was the result of the employee's wilful act, default or misconduct.[145] For such purposes, the second defendant also had a discretion to determine the cause of death.[146] Subsequently, the second defendant, relying on a report prepared by the first defendant's inquiry team, concluded that the claimant's husband committed suicide by throwing himself overboard and, accordingly, refused to pay out death-in-service benefits.[147] The claimant thus brought proceedings for breach of contract.[148] The UK Supreme Court held, by a majority, that the claim should succeed. Although the court was divided as to the outcome of the appeal, it was nonetheless entirely in agreement with Lady Hale that the law would imply a term that the second defendant's discretion would be exercised

139 In the author's view, transposed to the contractual context, the first question may arguably be answered by determining whether or not the situation pursuant to which it was agreed that one of the parties will have a discretion had indeed arisen – an inquiry which may adequately be resolved by concepts in contract law unrelated to the implied term, such as that of an interpretation or construction of the relevant clause and/or a condition precedent analysis.

140 Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 5-130.

141 [2015] 1 WLR 1661.

142 [2018] HLR 26.

143 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [29]–[30], [53] and [103].

144 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [1].

145 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [1].

146 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [1].

147 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [8]–[11].

148 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [12].

rationally, in good faith and consistently with its contractual purpose.[149] For the majority, that implied term was breached in so far as, in forming the opinion on the cause of death, the second defendant failed to take into account the relevant consideration that suicide was inherently improbable and cogent evidence would therefore have been required to support its decision (of which there was none).[150]

49 In *Victory Place*, the claimant had a discretion under certain leases to consent to the kinds of animals which may be kept at the property.[151] There was evidence that the claimant operated a strict "no pets" policy on the premise that it was the wishes of a majority of the lessees.[152] Having taken up an assignment of one of the leases, the defendants wrote to the claimant to seek its consent to keep a dog at their flat.[153] The claimant refused consent and later brought proceedings seeking a mandatory injunction requiring the defendants to remove their dog from the premises.[154] At trial, it was undisputed that the claimant's discretion was circumscribed by the obligation to only take into account matters that it ought to have taken into account and to ignore matters which ought not to have been taken into account.[155] The defendants, however, argued that the claimant had breached that obligation in so far as it had taken into account the views of the majority, when such views had either no place or only a very limited place in the decision-making process.[156] The EWHC rejected the argument and found that the claimant's discretion was properly exercised on the facts.[157] In reaching his decision, Sir Geoffrey Vos J considered that, since the board of the claimant was elected by, and could be removed by, the lessees, it was indeed entitled to take into account the views of the majority of the lessees.[158]

50 On a casual reading of *Braganza*, one cannot be faulted for thinking that the majority's approach towards subjecting the exercise of a contractual discretionary power to the principles of relevancy of considerations was more intrusive than that of Vos J's in *Victory Place*. Although the majority had expressed the view that the second defendant failed to take into account the relevant consideration that suicide was inherently improbable, that finding appears to be merely ancillary to

149 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [30], [53] and [103].
150 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [38]–[42] and [58]–[60].
151 *Victory Place Management Co Ltd v Kuehn* [2018] HLR 26 at [3]–[4].
152 *Victory Place Management Co Ltd v Kuehn* [2018] HLR 26 at [8] and [26].
153 *Victory Place Management Co Ltd v Kuehn* [2018] HLR 26 at [13].
154 *Victory Place Management Co Ltd v Kuehn* [2018] HLR 26 at [20].
155 *Victory Place Management Co Ltd v Kuehn* [2018] HLR 26 at [2].
156 *Victory Place Management Co Ltd v Kuehn* [2018] HLR 26 at [39].
157 *Victory Place Management Co Ltd v Kuehn* [2018] HLR 26 at [41].
158 *Victory Place Management Co Ltd v Kuehn* [2018] HLR 26 at [39].

their true difficulty with that case, that is, that they had thought that *more* cogent evidence was required to support the second defendant's determination that the claimant's husband had committed suicide. Such an approach seems less preferable if one considers that, even in administrative review, the courts do not ordinarily concern themselves with the *weight* placed on the relevant considerations.[159] All that is generally expected of the authority is for it to have indeed taken into account the consideration. Transposed to *Braganza*, it is arguable that the second defendant should only have been found to have breached the implied term if it had been shown that it had *not once* considered that the course of committing suicide might be regarded as being more unusual than that of an accident.

51 Indeed, on a close reading of *Braganza*, that seems to be what Lord Hodge sought to have done when his Lordship noted that "the investigation team and [the second defendant's general manager] appear *not to have considered* the real possibility of accident" and that he did "not detect *any* consideration of both the possibility of [the claimant's husband] having acted carelessly … and that there would in all probability be no evidence of such behaviour" [emphasis added].[160]

52 Hence, whilst it is certainly helpful to look at whether the power-holder had taken into account relevant considerations and/or ignored irrelevant considerations in the exercise of its contractual discretionary powers, it may be more desirable if a greater margin of appreciation is accorded to the power-holder. This ought especially to be the case where the considerations are not expressly or impliedly identified in the contract.

*(2) Improper purpose*

53 Under illegality review, an authority would also be deemed to have exceeded the limits of its powers where it exercises the power for an improper purpose.[161] That the review of a power-holder's exercise of a contractual discretion might also be approached in a similar fashion may be seen from *Paragon Finance* and *MGA International*, the underlying idea being that such an exercise would generally mean that the power-holder was acting "capriciously".[162]

159 *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037 at 1050; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 780.

160 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [58] and [60].

161 Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 05-090.

162 See also *Paragon Finance plc v Nash* [2002] 1 WLR 685.

54 The facts of *Paragon Finance* have been set out above. In that case, the EWCA held that, while the claimant's discretion to vary the interest rates were subject to an implied limitation, the claimant was not in breach of that limitation.[163] In this regard, the court's decision essentially turned on its finding that the claimant had not exercised its discretion for purposes other than to secure its legitimate commercial aims.[164] In reaching its decision, the court considered that, in taking its financial difficulties into account and adjusting the interest rates as commercially necessary, the claimant was neither acting for an improper purpose nor capriciously.[165]

55 Similarly, in *MGA International*, the facts of which have also been set out above, the High Court held that, even if the defendant had a discretion to determine its own commission, it was not entitled to charge 50% of the net profit accruing from the plaintiff's sale transactions because such a decision would be capricious, arbitrary or irrational.[166] Ang J was of the view that the commission could never be calculated on a participation basis as it was only meant to serve as a return for the defendant's financing, the parties having only intended for the defendant to play the role of a financier in the arrangement, as opposed to a co-investor.[167]

56 The subjection of an exercise of a contractual discretionary power to the principles of propriety of purpose would thus seem to be relatively uncontroversial. Indeed, where the contractual purpose and, more narrowly, why the discretion was conferred might be ascertained, it clearly only makes good sense to require that any exercise of that discretion be in accordance with such purposes.

### *B. Irrationality*

57 In administrative law, irrationality review is concerned with the decision-maker's justifications for a decision.[168] In this regard, an authority's decision would be impugned if it is one that no reasonable

163 *Paragon Finance plc v Nash* [2002] 1 WLR 685 at [41]–[42] and [48].
164 *Paragon Finance plc v Nash* [2002] 1 WLR 685 at [46]–[47].
165 *Paragon Finance plc v Nash* [2002] 1 WLR 685 at [46]–[47].
166 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [111] read with [105] and [107].
167 *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 at [86]–[87] and [108]–[111].
168 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410–411; *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [79]–[80] and [149].

authority could have arrived at.[169] That such an approach has also been adopted in respect of a power-holder's exercise of a contractual discretion might be seen in *Edwards Jason Glenn* and *AL Shams*, the underlying idea being that such a decision would generally mean that the power-holder was likely acting "arbitrarily" or "irrationally".[170]

58 In *Edwards Jason Glenn*, the defendant bank had an "absolute discretion" under a multi-currency facility agreement to require the borrower to make further deposits and/or provide additional securities in the event that the loan/security ratio exceeded the stipulated threshold and the outstanding loan amount was denominated in a currency different from the currency of the security pledged.[171] If the borrower failed to so do, the bank had the "absolute discretion" to immediately convert the relevant amount to any currency it deemed fit in order to eliminate its foreign exchange risks.[172] For the purposes of calculating said ratio, the defendant also had a discretion to assess the value of security pledged.[173] Subsequently, the threshold was crossed and the plaintiff borrower failed to make the necessary deposit, pursuant to which the defendant made two conversions.[174] The plaintiff thus commenced proceedings alleging that the valuations relied upon by the defendant in its making of the conversions were invalid.[175] The High Court rejected the argument and held that the defendant's exercise of its discretion to assess the value of the security was valid since it was neither arbitrary, capricious, perverse, irrational, dishonest nor riddled with bad faith.[176] In reaching his decision, Tay J essentially focused on identifying some justification for the valuation of the pledged security, and concluded that such valuation was "not necessarily wrong".[177] To this end, Tay J considered that the periods

169 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410–411; *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [79]–[80].

170 Richard Hooley, "Controlling Contractual Discretion" (2013) 72(1) *Cambridge Law Journal* 65 at 77.

171 *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [43].

172 *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [43].

173 *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [43].

174 *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [12]–[23].

175 *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [96].

176 *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [101]–[102].

177 *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [101].

that had elapsed between the valuations used by the defendants and the conversions were not unreasonably long such that they were outdated.[178]

59 In *AL Shams*, the defendant bank had the "sole discretion" to refuse to accept any deposit sought to be made into the plaintiff company's account.[179] Subsequently, a director of the plaintiff sold some shares in a company which he indirectly owned, pursuant to which it was provided that the proceeds were to be paid into the aforesaid account.[180] The defendant, however, required the plaintiff to provide certain documentation relating to the origin of the moneys.[181] While efforts were made to provide the defendant with the necessary information, they were eventually deemed to be insufficient.[182] As such, the defendant refused the deposits.[183] The plaintiff thus commenced proceedings alleging that the defendant's refusal amounted to an arbitrary and *mala fide* exercise of its discretion.[184] The High Court rejected the argument.[185] In reaching his decision, Ramesh J, appearing similarly concerned with the justifications for the defendant's decision, considered that any purported lack of documentation did not preclude the bank from "having other reasons" for refusing to accept the payment.[186] To this end, Ramesh J considered that, apart from the adequacy of the documentation requested, the bank may have been equally concerned about the relationship between the plaintiff and the company whose shares were sold (from which transaction the deposit moneys were derived).[187]

60 Although the courts would thus appear to be unfazed in their use of "irrationality" to delineate the limits to the exercise of contractual discretionary powers, that process has not been regarded as that straightforward for some, owing to two main difficulties. Firstly, given that a party is generally entitled to pursue its own interest, it has been said that it would be much harder to identify legal constraints based on the idea of rationality, since pursuit of self-interest in that context could be considered to be rational.[188] Secondly, in so far as the courts are not always

178 *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [101].
179 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [10] and [42].
180 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [13(a)]–[13(b)].
181 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [21]–[25].
182 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [26].
183 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [29].
184 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [34]–[35] read with [43].
185 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [43] and [48].
186 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [47].
187 *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 at [47].
188 Philip Sales, "Use of Powers for Proper Purposes in Private Law" (2020) 136 *Law Quarterly Review* 384 at 386.

well equipped to deal with matters of commercial judgments, it may be doubted whether their intervention in such matters is warranted.[189]

61 While the difficulties that may arise are considerable, they are by no means insurmountable. First and foremost, the suggestion that a contractual power-holder's pursuit of self-interest is likely to be "rational" suffers from three main weaknesses. The first is that the pursuit of self-interest clearly cannot always be regarded as such. This is because rationality is, after all, an objective standard, such that it is doubtful whether a "wholly unreasonable" pursuit of self-interest can ever be regarded as being rational, notwithstanding that the courts will be applying less stringent standards. The second is that it is premised on the power-holder's entitlement to act selfishly. Yet, for the reasons discussed above, the power-holder may not always be so entitled. The third weakness stems from its seeming omission to consider the distinction between the scope of a discretion and the manner in which the discretion may be exercised. Again, while the decision of a power-holder to "pursue its own interest" may be rational, it does not necessarily follow that the power-holder had been acting "rationally" in coming to that decision.

62 As for the concerns about the court's competence, they should not be overstated. This is because rationality in this context features simply as a rudimentary standard of criticism.[190] Taken in this sense, there must be less concern about whether the courts are well equipped to make the necessary decisions, since the standard of review is simply that of "some logical connection".[191]

63 Additionally, if any concerns still persist, it will also be open to the courts, as has been argued by Lim and Chan, to temper this ground of review by varying the standards of review.[192] In recent times, the courts have, in the realm of public law, appeared to adjust its intensity of review depending on the nature and gravity of the case.[193] Transposed to the contractual context, the adoption of such a mechanism will enable the courts to give effect to realities such as that contracts are often

189 See also Ernest Lim & Cora Chan, "Problems with *Wednesbury* Unreasonableness in Contract Law: Lessons from Public Law" (2019) 135 *Law Quarterly Review* 88 at 104.

190 Ronald Dworkin, "The Model of Rules" (1967) 35 *University of Chicago Law Review* 14 at 33–34.

191 See also para 38 above.

192 Ernest Lim & Cora Chan, "Problems with *Wednesbury* Unreasonableness in Contract Law: Lessons from Public Law" (2019) 135 *Law Quarterly Review* 88 at 106.

193 See Andrew Le Sueur, "The Rise and Ruin of Unreasonableness?" [2005] 10(1) *Judicial Review* 32 and Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at paras 11-087–11-103.

concluded in a variety of situations and between parties of different relative positions and that the courts may lack the necessary expertise. This would allow the courts to reach more appropriate determinations in accordance with the specific facts of each case. In this regard, the relevant, though non-exhaustive and overlapping, factors might include: (a) the relative bargaining positions of the parties – where the parties are of equal bargaining power, it might suggest that the discretion had truly been bargained for, in which case the courts may wish to employ a less intensive standard of review; (b) the precise relationship between the parties – where the nature of the relationship between the parties is strictly commercial, there will ordinarily be no need for the courts to afford the party subject to the discretionary power more protection, in which case the courts could employ a less intensive standard of review; and (c) the type of issue governed by the discretion – where the object of the discretion relates to matters of commercial judgment, it may be that the courts should be more cautious in scrutinising its exercise, in which case the courts may desire to employ a less intensive standard of review.[194]

64 Just as these factors can lead the courts to adopt lower levels of scrutiny, it may very well be, however, that they could also cause the courts to apply more demanding standards.[195] Nonetheless, it is submitted that the courts should always be slow to impose more external restraints, especially when existing protections are already afforded by the law. For instance, between an insurer and insured, the latter of whom might have a weaker bargaining position relative to the former, the duty of utmost good faith, which applies to both parties through the life of the contract of insurance,[196] may otherwise also operate to prevent the insurer from exercising its discretion in a way which may cause the insured loss or destroy the continuing contractual relationship.[197] Likewise, where a party contracts as a consumer or on the other's written standard terms of business, the Unfair Contract Terms Act[198] ("UCTA") may apply to prevent the power-holder from exercising its discretion so as to affect its own[199] obligations and claim that it is entitled to render a contractual

194 See also Ernest Lim & Cora Chan, "Problems with *Wednesbury* Unreasonableness in Contract Law: Lessons from Public Law" (2019) 135 *Law Quarterly Review* 88 at 108–109.

195 Ernest Lim & Cora Chan, "Problems with *Wednesbury* Unreasonableness in Contract Law: Lessons from Public Law" (2019) 135 *Law Quarterly Review* 88 at 108–109.

196 John Birds, *Birds' Modern Insurance Law* (Sweet & Maxwell, 9th Ed, 2013) at p 284.

197 See *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 at [52].

198 Cap 396, 1994 Rev Ed.

199 For the view that s 3(2)(*b*)(i) of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) has thus far been restrictively interpreted, see Sandra Booysen, "Twenty Years (and More) of Controlling Unfair Contract Terms in Singapore" [2016] *Singapore Journal of Legal Studies* 219 at 243. Whilst it may indeed be more meaningful for the provision to also apply where a contract term is invoked to affect the counterparty's

*(cont'd on the next page)*

performance substantially different from that which was reasonably expected of it[200] and/or to render no performance at all.[201] Where it comes to the UCTA, however, it should be said that the applicability of some of its provisions may not be as straightforward in this area. For example, determining what performance was "reasonably expected" of a party may not be an easy task in the face of a contractually conferred discretionary power. Such an inquiry may be contrasted with one that simply asks whether that party had acted arbitrarily, capriciously or irrationally in the exercise of its discretion – an inquiry which is far less demanding and which the courts are familiar with.

### *C. Procedural impropriety*

65 In administrative law, review for procedural impropriety is concerned with the integrity of a decision.[202] An authority's decision could thus be challenged for non-compliance with the relevant procedures, whether they are imposed by legislation or found in the common law rules of natural justice.[203] Unlike the concepts relating to illegality and irrationality, however, recourse to concepts relating to procedural fairness has been far less commonplace in contract law. At present, review of an exercise of discretion between private parties on the grounds of procedural impropriety has been confined to the realm of constitutive contracts.[204] As explained by Daintith, this state of affairs likely owes to the lack of an expectation in ordinary commercial relationships that the exercise of a contractual discretionary power should be made upon the power-holder first investigating some matter upon which the subject to the discretion ought in fairness to be heard.[205] This is because the "personal

obligations, it is worth noting that the focus of the legislation appears to be on the regulation of a party's ability to avoid its *own* liability. If this is right, a wider interpretation may not be as forthcoming, in which case the scope of application of the statute in dealing with a misuse or improper exercise of contractual discretion may remain fairly limited.

200 Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) s 3(2)(*b*)(i).

201 Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) s 3(2)(*b*)(ii).

202 Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 6-002.

203 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 411; Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 6-009.

204 Terence Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68(4) *Modern Law Review* 554 at 580. For a review of the relevant local cases, see *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [124]–[132].

205 Terence Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68(4) *Modern Law Review* 554 at 582.

circumstances" of the latter are not usually deemed to be relevant to the former's exercise of the discretion.[206]

66 Similar sentiments have also been expressed by the Court of Appeal. In the recent decision of *Leiman, Ricardo v Noble Resources Ltd*[207] ("*Leiman (CA)*"), the apex court held that:[208]

> There is no general requirement or expectation that a party purporting to exercise a particular contractual right, or to act in a particular way that might be prejudicial to the other party, has a general duty to act fairly, or a more specific duty to observe any particular requirements of natural justice.

However, it went on to say that:[209]

> This general proposition may, however, be displaced by the terms that the parties have agreed on, whether expressly or impliedly. The court's assessment of whether the exercise of a particular contractual right has been made subject to any duty of fairness or to the observance of any particular procedure will be a contextual one that duly considers the particular contractual right in question, the language of the provision setting out or conditioning the right, the consequences of any decision made under that provision and what, if anything, was contemplated by way of any procedural requirements.

67 With this qualification, the court did not thus close the door to the possibility of such procedural requirements being implied into contracts, such as by virtue of the baseline formulation in cases where a discretion is conferred on one of the parties.

68 If the law develops along these lines, then one could potentially expect concepts relating to procedural fairness to be applied similarly to how it was in *Watson*. In that case, the facts of which have been set out earlier, the EWHC held that the board's discretion was not properly exercised.[210] In reaching his decision, Waksman QC seemed particularly troubled by the fact that the board seemed not to have applied their mind to the matter.[211] To this end, it was considered that: (a) there was no credible evidence from any of the directors about any consultation; (b) the board were under the belief that they had no obligation to do so; and (c) in any event, any purported discussion of the matter was done very quickly in a difficult atmosphere and as the last item on the agenda.[212]

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206 Terence Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68(4) *Modern Law Review* 554 at 582.
207 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386.
208 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [133].
209 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [134].
210 *Watson v Watchfinder.co.uk Ltd* [2017] Bus LR 1309 at [116] and [124].
211 *Watson v Watchfinder.co.uk Ltd* [2017] Bus LR 1309 at [118]–[120].
212 *Watson v Watchfinder.co.uk Ltd* [2017] Bus LR 1309 at [118]–[120].

## V. Whether public law should inform private law in this area

69 Given the views presented in Part IV, it seems apparent that public law principles *can* inform private law in controlling contractual discretions. Why then do the courts not already think of the limits in administrative law terms? It is submitted that this likely has to do with the notion that the public/private divide should be strictly maintained. In this section, however, this article will seek to demonstrate not only how the calls for a strict maintenance of the divide have typically been overstated, but also why lessons should indeed be drawn from public law, at least where this area of law is concerned.

70 Firstly, it has been argued that if public law was to have an influence on contract law, it might lead to the belief that duties are being imposed on the parties from outside the contractual relationship.[213] This is because public law concerns limits on administrative action imposed on the actor but private law is only concerned with the obligations that the contracting parties have voluntarily assumed.[214] With respect, this view is misconceived, for it rests on the erroneous assumption that the contracting parties neither reasonably expected nor intended that there were to be limits to contractual discretions. As has been argued above, such is unlikely to be the case. Nevertheless, if the parties are agreed that the power-holder is free to exercise its discretion in contravention of the norms of non-arbitrariness and the like, they remain free to include a term to that effect, in which case the courts will not rewrite the bargain through an implication of terms and the questions about the relevance of public law do not arise. Absent such a term, however, any duties may well also be said to be consistent with parties' intentions.

71 Secondly, it has been thought that, given the developments in contract law, it is doubtful that administrative law should continue to be relevant.[215] The short answer to this is that there remain uncertainties in this area of law, some of which may be addressed by drawing from public law. An example consists in the question of how the limits to the exercise of contractual discretions should be thought of, to which this article has proposed that principles relating to the traditional grounds of review in administrative law can guide the courts in their attempts to define those limits. In any event, it is submitted that a recognition that there is a growing body of case law does not necessarily mean that resort

213 Michael Bridge, "The Exercise of Contractual Discretion" (2019) 135 *Law Quarterly Review* 227 at 227.

214 Michael Bridge, "The Exercise of Contractual Discretion" (2019) 135 *Law Quarterly Review* 227 at 227.

215 Michael Bridge, "The Exercise of Contractual Discretion" (2019) 135 *Law Quarterly Review* 227 at 247–248.

to administrative law cases is no longer helpful such that insights may never be gleaned from them.

72 Thirdly, it has been suggested that the disparity between the remedies available under public law and those under contract law militates against the influence of administrative law.[216] As a preliminary point, in so far as it relates to a logically posterior inquiry, it is not apparent why the issue of remedies should feature in this analysis. Nonetheless, whilst it might be right that "in matters of private contract law, there is no mechanism for quashing the discretionary decision of one of the contracting parties and directing it to think again",[217] it should also be pointed out that there are remedies which may, in substance, achieve the same effect, such as those of declarations and injunctions.[218] So, in *Leiman (CA)*, having found that the committee's exercise of its discretion to disentitle the first plaintiff of the share options and the other shares that were otherwise meant to vest in him was invalid, the Court of Appeal declared that the committee's decisions were null and void.[219] Interestingly, in opting not to direct the committee to reconsider the first plaintiff's entitlements, the apex court did not say that it could not do so, but merely that it would not have been appropriate to do so since (a) the time for any action was long passed; (b) the committee no longer existed; and (c) even if the committee could be reconstituted, it was impossible to consider how any proceedings could fairly be carried out, given the animosity between the parties.[220]

73 Apart from declarations and injunctions, a trial assessing the power-holder's exercise of its discretion may also, as has been acknowledged, be seen as the private law equivalent of directing an authority to think again.[221] This is because the justifications (if any) of a decision may be aired out and considered (again) in those proceedings. In this regard, a power-holder acting in good faith may also facilitate this process by offering to let the court decide based on certain parameters. For instance, in *Braganza*, the defendant conceded that if its determination was unreasonable, the death-in-service would be payable.[222] Absent such

216 Michael Bridge, "The Exercise of Contractual Discretion" (2019) 135 *Law Quarterly Review* 227 at 230.
217 Michael Bridge, "The Exercise of Contractual Discretion" (2019) 135 *Law Quarterly Review* 227 at 230.
218 Jack Beatson, "Public Law Influences in Contract Law" in *Good Faith and Fault in Contract Law* (Jack Beatson & Daniel Friedmann eds) (Oxford University Publishing, 1995) at p 271.
219 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [181].
220 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [183].
221 Michael Bridge, "The Exercise of Contractual Discretion" (2019) 135 *Law Quarterly Review* 227 at 240.
222 *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [14].

concession, it would seem that the courts will assess damages for a breach of the implied term to the amount of loss sustained as a consequence of the wrongful exercise of the contractual discretion. In *Leiman (CA)*, the Court of Appeal held that the first plaintiff was therefore entitled to damages assessed for the committee's improper forfeiture of his entitlements.[223] This should not, however, be taken to mean that the courts have stepped into the shoes of the power-holder, since it is merely restoring the parties to the position as if the discretion had not been exercised: in so doing, the courts are not seeking to put the parties in the respective positions that they would have been in had the discretion been exercised properly.

74 Lastly, it has been said that, given the differences across both areas of law, contract law must be especially cautious in borrowing from administrative law. In this connection, there are two main concerns. The first relates to the differences in the prevailing context – while public law is ordered on unilaterally imposed changes, contract law is ordered on the notion of consent.[224] The second relates to the differences in the decision-making capabilities of the actors.[225] While such caution should be heeded, it would be imprudent to treat the differences as an absolute bar against the borrowing of concepts. This is not only because the argument from difference may overlook the point that, as mentioned earlier, and as will be emphasised again shortly, both areas of law serve common values, but also because there are alternative ways to give effect to such concerns. In respect of the latter, one solution might lie in the tool of varying the standard of review adopted.

75 Against these calls for a strict maintenance of the public/private divide, it is submitted that there are at least three reasons why, in determining the limits to an exercise of contractual discretion, the courts should, on the contrary, seek to draw lessons from public law.

76 First and foremost, in so far as the court's primary concern is the same in both the review of a public authority's decision as well as a private party's discretion, that is, that power should not be abused,[226] it is suggested that that concern offers a principled basis for the courts'

223 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386 at [184].

224 Terence Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68(4) *Modern Law Review* 554 at 556.

225 See, *eg*, *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [31].

226 Sir John Laws, "Public Law and Employment Law: Abuse of Power" [1997] *Public Law* 455; Mark Elliot & Jason Varuhas, *Administrative Law: Text and Materials* (Oxford University Press, 5th Ed, 2017) at pp 143–144.

recourse to parallel forms of reasoning where available.[227] The fact that administrative law and contract law are very different branches of the law, while true, can be addressed by recognising that, unlike the issue of whether and how limits should be imposed on contractual discretions, the quest in this regard is not for a proper legal basis *per se*.[228] When it comes to thinking about those limits, the exercise is one *in principle*, where the imperative against the abuse of power comes to the forefront. The primacy of this principle has also been noted by Sir John Laws, whose words bear reproducing at some length:[229]

> … The principle [that] the common law will not permit abuse of power … is the basis of judicial review, and it reflects also the basis of all those private law doctrines where public policy has been held to restrain one man's hold over another. …
>
> …
>
> … [T]he concept of abuse of power … is a favoured soubriquet for the nature of the public law jurisdiction. *But the consequences of this uniformity of principle, standing as it does above our modern distinction between public and private law, have I think not been fully appreciated. It means that this distinction itself casts no or little light on the essential basis upon which the common law proceeds, whether in public or in private law, when it must confront abuse of power.* ***It proceeds upon a footing which is alike logically anterior to the public power of legislature and the private power of contract****. It does not depend on the source of a defendant's or a respondent's authority to affect the lives of others.* The cases unfold a moral principle for which only the common law can provide a sure protection.
>
> …
>
> The public law jurisprudence is the area where the idea of abuse of power is most developed, perhaps because the very language – abuse of power – is especially apt to reflect the dangers that arise in any situation where someone is placed in a position of official governance over others. And behind that lies the true difference between private and public law; whereas for the private individual everything that is permitted is not forbidden, for the public body, all its actions must be justified by positive law. ***Yet behind both the law's principle – that abuse of power is not to be tolerated – is the same.*** *It applies in different ways … But they are all instances of the way in which the law orders priorities between one man's freedom and another's.*
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

227 See also Chris Himsworth, "Transplanting Irrationality from Public to Private Law: *Braganza v BP Shipping Ltd*" (2019) 23(1) *Edinburgh Law Review* 1 at 15.

228 These issues have been discussed in Parts II and III above.

229 Sir John Laws, "Public Law and Employment Law: Abuse of Power" [1997] *Public Law* 455 at 464–466.

77 Indeed, given this overlapping goal of administrative law and contract law, as well as the fact that the common law courts are not generally divided into public and private systems, it is perhaps understandable that the courts will look to the public law for guidance. And this is especially since the public law jurisprudence on the matter is presently much more developed.

78 Second, since the courts have always employed similar techniques in controlling an exercise of discretion,[230] whether it be by a public authority or a private party, it would appear prudent for the courts to continue doing so.

79 Finally, inasmuch as the cases in public law set out basic standards of good decision-making,[231] allowing for recourse to those familiar principles would also be less disruptive to commercial certainty, as compared to a situation where everything is left up in the air.

80 Accordingly, public law concepts should have a role to play in controlling contractual discretions. In determining the limits to an exercise of contractual discretion, the courts ought to draw from, and have in mind, the administrative law principles relating to the traditional grounds of review. To be clear, the claim is not that there should be a wholesale importation of administrative law principles. All that is suggested is that an inquiry into whether a power-holder's exercise of discretion is arbitrary, capricious or irrational can and should be thought of in terms similar to those employed in an inquiry into whether an authority's decision is illegal, irrational or (potentially) procedurally improper. Both walk alone, but on the same path.

81 Hence, in the hypothetical postulated above, if EZpay had indeed denied Sam's requests for no reason other than that she had long hair, then EZpay may be found to have exercised its discretion arbitrarily or irrationally in so far as such a decision may be said to be in want of justification. If the intention behind EZpay's decision was to vex Sam, then EZpay may be deemed to have exercised its discretion capriciously to the extent that the discretion might have only been conferred for the purposes of serving as a response to future uncertainty.

230 See Part IV above. See also Jack Beatson, "Public Law Influences in Contract Law" in *Good Faith and Fault in Contract Law* (Jack Beatson & Daniel Friedmann eds) (Oxford University Publishing, 1995) at p 268.

231 Jeannie Paterson, "Implied Fetters on the Exercise of Discretionary Contractual Powers" (2009) 35(1) *Monash University Law Review* 45 at 47.

## VI. Proposed framework

82 In view of the discussion above, it is proposed that a dispute involving a power-holder's exercise of a contractual discretion may be broadly analysed as follows:

(a) Does a discretionary power exist? If the answer is "no", then the question of whether a purported exercise of discretion is wrongful simply does not arise.

(b) If the answer to (a) is "yes", is the discretion conferred in apparently unlimited terms?

(c) If the answer to (b) is "no", are the limits to the discretion expressly specified in the contract adequate to achieve the aims of regulating discretion? If the answer is "yes", then the exercise of discretion will be adjudged in accordance with the agreed upon terms, as opposed to any other term implied in law.

(d) If the answer to (b) is "yes" or the answer to (c) is "no", then the question is whether the term implied in law was breached, that is, is the exercise of discretion arbitrary, capricious or irrational? If the answer is "yes", then the exercise of discretion should be impugned; if the answer is "no", then it should not.

In determining the answer to (d), the courts may be guided by the administrative law principles relating to the traditional grounds of review. Further, the courts are also likely to keep in mind that: (i) it may not be appropriate to apply the same standards of decision-making to private parties as those applied to the State; (ii) the threshold required to invalidate an exercise of a contractual discretion is a very high one; and (iii) it should never seek to substitute its decision for that of the power-holder.

## VII. Conclusion

83 In many ways, this article has attempted to consolidate the views expressed in the cases and literature on contractual discretions. It thus owes a lot to them. Nonetheless, it has also sought to build on the foundations laid by those authorities and to be heard in the discussion. It has proposed that limits to contractual discretions ought to be readily recognised (in law) and that those limits can and should be thought of in terms similar to those of the familiar principles of administrative law. In

so doing, it is hoped that both attention and clarity will be brought to this increasingly important area of law.