A CONSTRAINT ON OR PROTECTION FROM THE EXERCISE OF CONTRACTUAL DISCRETIONS? BRAGANZA REVISITED

Sean Wilken KC

In 2015, the UK Supreme Court handed down the decision *Braganza v BP Shipping,*[1] a decision that has since repeatedly been relied on in the analysis of contractual discretions.[2] This paper therefore reconsiders the decision in *Braganza* some 11 years on and the ambit of its proper application. This paper does so with all due deference, given that two members of the Supreme Court appear to have differing views on the topic.[3]

The existence of so-called contractual discretions is long established and of common use and some would say easy to understand and to apply.[4] When, however, one considers whether an issue of judgement is one of discretion; whether a "yes/no" answer to an issue is a question of discretion; and whether those answers change due to the context and the contract and the parties, the "contractual discretion" waters become muddied – at best.[5] Further, any debate over *Braganza* inevitably raises the debate – often instinctual – as to which side of the contractual fence – certainty versus "what is just"[6] or linguistics versus purpose or black versus white letter – one falls. Finally, *Braganza* strays into the what is termed the public/private law divide or distinction involving, as it does, a discretion, albeit a contractual one. The views on that issue are again muddied by the lack of clarity in the case law and where one stands on a different variant of the certainty versus what is just debate.

Before descending into the debate, *Braganza* itself is worth examination.

Braganza

It is worth stressing from the outset that *Braganza* involved no public authorities, there was no statutory overlay and no possibility of the exercise of any public law rights or powers and their concomitant review or control by the courts on, put crudely, *CCSU* grounds.[7] The case concerned compensation as between an employee and employer where the employee died in service. There was no entitlement to compensation where, in the employer's opinion, the death was caused by suicide. The employer convened a panel to consider that issue and based on the panel's consideration and report, the employer decided that the death was caused by suicide and declined compensation. It was that decision that was challenged.

At first instance, the parties agreed that if the employer's decision (as based on the findings of the panel) was not "reasonable" in a *Wednesbury* sense[8] then the decision should fall. The Learned Judge found the decision was not reasonable and upheld the contractual claim.

---

[1] [2015] UKSC 17.

[2] Bailii.org has 61 references for 2025/2026.

[3] See Paul S Davies and Philip Sales "Controlling Contractual Discretions: Wednesbury Reasonableness, Good Faith and Proper Purposes" [2024] LQR 106 ("Davies & Sales"); Lord Leggatt *Tesco Stores Ltd v UDAW* [2024] UKSC 28 at [114 ff].

[4] So much so that my son – neither a lawyer nor a GCSE student (yet, in the latter case) said when he asked and was told what I was writing about, said "o, you mean the difference between 'may' and 'shall'".

[5] The nature of the discretion and the relationship with *Braganza* are discussed below.

[6] As von Hayek put it – see Davies & Sales *supra* at pp 113 - 4

[7] Illegality; irrationality and procedural impropriety – *CCSU v Minister for the Civil Service* [1985] AC 374.

[8] Ie so unreasonable that no reasonable employer properly directing themselves to the law and the facts could not reach that decision or *"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. … It applies to a decision which is so outrageous in its defiance of logic or of accepted moral*

By the Supreme Court, the difference between the parties was: Mrs Braganza contended that the decision had to be confined to the facts and matters that the employer had to consider and if it was not, the decision should fall. BP contended the decision could only be impugned if it was *Wednesbury* unreasonable. Both parties therefore accepted that a term should be implied[9] into the contract[10] and that the implied term interpolated some form of public law review by the courts which would be very familiar to any public lawyer. Where the parties disagreed was as to the type, intensity and formulation of that public law review. To emphasise, however, the starting point was that there would be an implied term which would interpolate some form of review by reference to a public law test.[11]

On those facts, Lady Hale with whom Lord Kerr agreed said:[12]

> *It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable – for example, a reasonable price or a reasonable term – the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the Wednesbury formulation in the rationality test. Indeed, I understand Lord Neuberger (at para 103 of his judgment) and I to be agreed as to the nature of the test.*

Lord Neuberger (with whom Lord Wilson agreed) did indeed agree with that test (albeit he disagreed with the outcome of the appeal) and Lord Hodge (with whom Lord Kerr also agreed) did likewise.[13]

By the reference to *Wednesbury*, the Supreme Court meant this:[14]

> *"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."*[15]
> *The first limb focusses on the decision-making process – whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former.*

---

standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." CCSU at 410 per Lord Diplock – *Braganza* – at [14].

[9] Whether implication was in fact or law is unclear. It would seem more likely that the implication was a matter of law.

[10] An employment contract has an implied term as to trust and confidence which is implied as a matter of law – see *Malik v BCCI* [1998] AC 20. Therefore, implying a further term along similar lines was not conceptually complicated or novel.

[11] In other words, the two critical elements of *Braganza* were common ground and therefore constituted the starting point of any analysis.

[12] At [30].

[13] At [53].

[14] At [24].

[15] *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 233-234 per Lord Greene MR.

The *ratio* of *Braganza* therefore was that in a purely private law case a term could be implied into a contract interpolating both the procedural (limb 1) and rationality limbs (limb 2) of *Wednesbury* – that is, purely public law concepts. To expand, judicial review on procedural grounds looks at the means by which the decision was reached and can expand to include the requirements of natural justice, a fair procedure and bias as well as what matters were or were not taken into account. Rationality looks at the substantive outcome and tests it not by whether the decision reached was "reasonable" (that is, whether it falls within the bounds of reasonableness[16]) but by whether, substantively, the decision is one which no reasonable person could reach. Rationality therefore involves substantive review by the courts.[17]

There is a further issue: *Braganza* must entail public law based review in a private law context. So doing raises considerable conceptual and practical complications.[18]

Thus, *Braganza* places a constraint or fetter[19] on contractual action to which the parties have otherwise agreed.

This is where *Braganza* has given rise to debate within the case law; extra-judicially and academically.

Discretions in public and private law

Before entering into that debate, it falls to consider the complicated topic of the public/private law divide and its fellow traveller – procedural exclusivity.[20] If one were to ask the hypothetical commercial lawyer who had never studied public law or had not done so recently, the word discretion would connote the "may"/"shall" linguistic distinction[21] and little else. Similarly if one were to ask the hypothetical public lawyer the same question, the word discretion would connote a decision maker considering the facts and coming to an outcome and little else.[22] The first would be a closed, private law exercise. The second would be a more open, public law exercise.

Under English law as a matter of theory, public law and private law are divided.[23] The words "in theory" are used because the legal position is unclear and complicated at best. As Mr Justice Fordham puts it, extra-judicially, "*The public/private distinction, and the public law/private law distinction can be difficult to delineate and apply.*"[24] In exceptionally crude terms, public law functions, powers, duties and errors ultimately derive from the exercise of Crown powers – by prerogative, statute, statutory instrument and policies and decisions flowing from those. These are, save for the decisions at issue, independent of the parties – as are the public law norms. Contract law is derived from the language and conduct of the parties as it relates to case law and commercial norms also derived from the conduct of parties – albeit previous parties.

[16] A test which a contract lawyer or any person on the Clapham Omnibus should find familiar.
[17] As discussed below, one can see the merit of a substantive review power in the face of irrationality (properly viewed as such in its narrow form). The limb 1 procedural safeguards are more difficult to justify.
[18] See the discussion on discretions below.
[19] The words are used interchangeably below – for ease.
[20] Both are very convoluted and complicated and could and have spawned multiple articles and books. The following therefore is a necessarily crude summary.
[21] That is "X may to Y" (discretionary) and "X shall do Y" (no discretion).
[22] That is "here are a series of facts which you are to consider. Here are the options laid down by government and/or statute and/or statutory instrument and/or policy, please reach a decision as to which or whether to do nothing".
[23] See Fordham *Judicial Review Handbook* Hart 8th Ed ("Fordham") at 34.5
[24] See Fordham at 27.1.

This distinction is important and despite criticism of the complexity it creates[25] remains.[26] It governs two things. First, what is or is not reviewable in public law as a matter of law.[27] Second, what procedure is to be adopted. This is the concept of "procedural exclusivity".[28] A claim which involves public concepts and standards should be brought before the Administrative Court or the Upper Tier Tribunal and do to otherwise can be an abuse of process.[29] This has been the case since *O'Reilly v Mackman*.[30]

Where contracts are concerned, those two concepts have resulted in an outline principle that judicial review and therefore public law do not, in theory, have any role to play in contractual disputes.[31]

Returning to our two hypothetical lawyers, the term "contractual discretion" would mean two very different things to each of them – one would focus on the word "contractual" and one on the word "discretion". This is where the problem lies. If one were to approach the term through pure construction of the language (that is a law of contract lens) one moves closer to the "may/shall" closed approach. If one approaches the term through a public law lens one ends up with the very different open question covering a range of issues. This is unsurprising because, as indicated above, when one reads the contract as a whole a contractual discretion may cover several things, be blurred and not capable of a clear definitional answer.

The position then becomes compounded if one of the parties is a public body. Here, on the case law, it is more likely that the public standards will apply and judicial review may be available.[32]

It is in this uneasy space that *Braganza* sits. The position in *Braganza* was, however, more complicated. There were no public bodies involved, no statute and the dispute was about payments due under a contract of employment. Although not remuneration strictly speaking, the dispute was far closer to one about remuneration than, say, the deployment of regulatory powers by a party to a contract. Remuneration disputes are not amenable to judicial review or to public law review.[33]

The Braganza follow on

Principled difficulties

Braganza has been most often deployed in argument on these so-called contractual discretions. There are five immediate oddities with that.

First, at issue in *Braganza* was the employer's decision (or rather the Panel's) as whether the death in service was caused by suicide based on the facts as they stood. That is a fact based decision. A discretion on the other hand is usually the decision whether to do X or Y based on the facts. *Braganza* was therefore *a priori* to any discretionary issue which in fact did not arise. Once the factual decision "was the death caused by suicide?" was answered "yes", there was no discretion.[34]

---

[25] See Fordham at 27.1.5.
[26] See Fordham at 27.1.4.
[27] See Fordham at 34.5 esp 34.5.1 – 34.5.4 where the position in relation to contracts is discussed.
[28] As described in headline terms at Fordham 27.3 – the case law is set out in detail in the following subsections.
[29] See Fordham at 27.3.4 ff.
[30] [1983] 2 AC 237 at 285E.
[31] See *R v Disciplinary Committee of the Jockey Club, ex p. The Aga Khan* [1992] EWCA Civ 7 for the classic exposition of this. See also Fordham at 34.5.3 for further examples.
[32] See case law at Fordham 27.2.6 and 34.5.2.
[33] See *Swann v AG of the Turks & Caicos Islands* [2009] UKPC at [13 – 14].
[34] But see *UK Acorn Finance Ltd v Markel (UK) Ltd* [2020] EWHC 922 where there was a *Braganza*-type constraint on a similar fact finding power.

Second, the deployment in relation to contractual discretions frequently begs the question – what is or is not a contractual discretion? It is easy to see that where, on an agreed set of facts, party A, the party making the decision, can choose one of a number of equally applicable and valid contractual options then that is the exercise of a discretion. As can be seen from the above, in my view, the decision as to what are those facts is not discretionary – nor would a decision as between non-equally applicable and valid options. Further, where one has a decision, say, to exercise a contractual option further to bind the parties – is that discretionary in the *Braganza* sense, open to challenge and presumably a claim for damages?[35]

Third, as set out above, public law functions, powers, rights and duties and their concomitant review are not the same as private law obligations. *Braganza* elides that distinction.

Fourth, there are well established controls on the ability to exercise powers and discretions in public law – see *CCSU* referred to above. By contrast, there is also a long line of well recognised authority that a contractual discretion vested in party A is a right to decide whether to do X or Y at A's discretion. As Lord Reid put it in *White & Carter (Councils) Ltd v McGregor*:[36] "*It has never been the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that a court will not support an attempt to enforce them in an unreasonable way…*".[37]

Fifth, as will be seen, there are a number of possible types of public law review that could be interpolated by *Braganza*. By contrast, an implied term has to pass the test of contractual certainty. An implied term that within itself contains several options would not normally pass that test.

The Supreme Court debate

As indicated above, there is a difference between Lord Leggatt and Lord Sales on this issue.

Lord Leggatt has been clearly uncomfortable with the concept of unfettered contractual discretions. In *Tesco Stores Ltd v UDAW,*[38] he said this:[39]

> *Tesco also relies on Lomas v JFB Firth Rixson Inc [2012] EWCA Civ 419; [2012] 2 All ER (Comm) 1076, para 46, where the Court of Appeal characterised as "hopeless" an argument (abandoned during the appeal) that the power of the Non-Defaulting Party under the ISDA Master Agreement to bring the agreement to an end upon the occurrence of an Event of Default was subject to a good faith restriction. Longmore LJ said:*
>
> > *"The right to terminate is no more an exercise of discretion, which is not to be exercised in an arbitrary or capricious (or perhaps unreasonable) manner, than the right to accept repudiatory conduct as a repudiation of a contract. ... no one would suggest that there could be any impediment to accepting repudiatory conduct as a termination of the contract based on the fact that the innocent party can elect between termination and leaving the contract on foot. The same applies to elective termination."*

[35] That would come very close to the court forcing a party to enter into a contract which is, subject to very limited exceptions, entirely heterodox.
[36] [1962] AC 413.
[37] At 430.
[38] [2024] UKSC 28.
[39] At [118]

> *This statement was made, however, with regard to an Event of Default which is treated contractually as a repudiatory breach of the contract. Such a breach has the effect of releasing the innocent party from any obligation to continue to perform the contract. There is in that event no justification for implying any restriction on the freedom of the innocent party to treat the parties' obligations of further performance as at an end. It does not follow that the same is true when there is no repudiatory breach or similar failure or refusal to perform by the party whose contractual rights are being terminated.*

That, I would respectfully suggest, is entirely correct. Questions do, however, arise as to Lord Leggatt's following statements:[40]

> *A more substantial argument is that the rationale for recognising a good faith restriction does not extend to a decision whether to terminate the contract. The gist of this argument is that, although contracting parties may reasonably expect each other to act in good faith and in a spirit of cooperation in carrying out the contract - particularly where the contract is a relational one such as a contract of employment (see eg Braganza, paras 54 and 61, per Lord Hodge) - this does not apply when it comes to ending the relationship. At this point, it is suggested, the parties "are no longer engaged in what may be characterised as a joint endeavour, but considering whether that joint endeavour should continue" and must be expected in making that decision to have regard solely to their own self-interest: see Monk v Largo Foods Ltd [2016] EWHC 1837 (Comm), para 87(ii); Monde Petroleum, para 272; and David Foxton, "A Good Faith Goodbye? Good Faith Obligations and Contractual Termination Rights" [2017] LMCLQ 360, 381-383.*
>
> *For my part, I find it difficult to see why the expectation that the employer will not abuse its contractual powers should be supposed to evaporate when the decision in contemplation is whether to terminate an individual's employment. Such a decision is made at a time when the employment relationship is still subsisting and subject to a mutual duty of trust and confidence. The fact that in deciding whether to end the relationship the employer must be expected to have regard solely to its own business interests does not mean that the employer must be free to exercise a contractual power of termination on the basis of its "uninhibited whim" (to adopt the phrase used by Leggatt LJ in Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star)(No 2) [1993] 1 Lloyd's Rep 397, 404).*

Thus, *Braganza* is used as an *ex post facto* restriction on contractual abuse by way of termination. It is also noticeable that the *Wednesbury* test articulated in *Braganza* has become synonymous with good faith.[41]

Lord Sales, on the other hand, is resistant to *Braganza* and the uses to which *Braganza* has been put.[42] In a joint article[43] with Paul S Davies,[44] numerous arguments are raised as to the conceptual difficulties associated with the use of *Braganza* in general and the interpolation of *Wednesbury* in particular.[45]

---

[40] At [119 – 120].
[41] This is how many of the academic texts approach this issue – see articles and works listed in Davies & Sales *supra* at fn 36; 43; 62; 67; and 90
[42] See Davies & Sales *supra.*
[43] See Davies & Sales *supra.*
[44] Professor of Commercial Law at UCL, London.
[45] Davies and Sales contend that if a public law analogy is to be used it should be one of examining the purpose for which the contractual discretion was conferred as per *Padfield v MAFF* [1968] AC 997.

Further, a significant portion of the reasoning is devoted as to why the power to terminate a contract should not be subject to *Braganza* limitations.[46]

As stated above, considering those approaches with all due deference, I consider first the various work arounds that have been adopted to the issues raised by *Braganza*; specific problems associated with *Braganza* and the uses to which *Braganza* could be put.

The work arounds

In *Braganza*, the interpolation of public law review grounds was achieved by an implied term. In other words, public law norms and standards and the associated review were grounded in a purely private law concept. There is nothing difficult about that approach *per se* but difficulties emerge where the detail is considered.

Tritely, terms are implied in fact and in law. *Braganza* is used to justify both implication in fact and in law. In both cases again where *Braganza* is concerned, there is a considerable but nebulous overlap with the itself-nebulous concept of "good faith".[47]

Apart from it being nebulous, there are three conceptual and practical problems with the reliance on good faith.

Conceptually, as set out above, *Braganza* turned on the question of the interpolation of *Wednesbury.* That test is neither identical to nor synonymous with good faith. Thus, the question must be – how does one get from *Braganza* to a good faith duty?

Second, there is no general duty of good faith in English contract law (as yet). Nor do any of the canons applicable to the construction of contracts require reference to good faith.[48] Further, the concept of good faith should not be used to circumvent the principles of English contract law.[49]

Third, there is a good faith duty in equity relating to trust and trustees and fiduciaries. That does not extend to the law of contract – not least because equity follows the law but also because equity's impact on the law of contract is purely one of a limited set of remedies[50] available in a very limited set of circumstances. Thus, for there to be a good faith in the law of contract as derived from *Wednesbury* is therefore out of step with equity as well.

Practically, assuming one can overcome those conceptual issues, for any good faith duty to be implied the party contending for it will have to meet the required high threshold for the implication of such obligations.[51]

Turning to the issues over the implication of a term itself. A term is implied in fact as necessary to give effect to the intentions of the parties. That is also a high threshold to meet. Further, a term which is too imprecise or inchoate will not be implied. At this point, it is worth recalling that there are a number

---

[46] At pp 124 ff.

[47] See *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 at [83; 91] per Jackson LJ.

[48] The purposive references to business common sense or commercial rationality in numerous authorities do not equal or come close to a reference to good faith and the current focus of contractual construction from *Arnold v* Britton [2015] UKSC 36 is not purposive but linguistic.

[49] To paraphrase Coulson LJ in *Candey Ltd v Bosch* [2022] EWCA Civ 1103 at [32].

[50] For example specific performance and injunctions.

[51] See *Eastleigh BC v Town Quay Developments Ltd* [2010] P&CR 2 at [30].

of *Braganza*-type constraints which could be imposed: general, undefined public law constraints; procedural impropriety (limb 1 of *Wednesbury*); unreasonableness (limb 2 of *Wednesbury*) or a *Padfield* as per the purposes of the contract analysis (as Davies & Sales suggest).[52] That there are four possibilities suggests that the term being implied is imprecise and inchoate. Further, procedural impropriety is itself an open ended category and at one extreme can include the safeguards of natural justice which would be very difficult to introduce into a contract.[53]

Thus, the combined high threshold for implication and the deployment of good faith and the nebulous nature of the overlap and good faith itself mean that the cases in which a term will be implied in fact will be rare.

The implication of a term as a matter of fact is also, as per the nomenclature, fact sensitive. It is therefore difficult to draw out any principled rule from implication in fact – other than a *Braganza* fetter on discretion will not be implied where so to do would be contrary to the terms of the contract,[54] the limits set out above and the limited number of cases where, despite being argued, *Braganza* has been applied and has been determinative of the case.

All of the above leads Davies & Sales to hypothesise that a *Braganza*-type obligation could be imposed where there was a discretion and the grounds on which it could constrain the exercise of a discretion would be to reflect the purposes of the contract.[55] That is the sole example given.

Terms are implied in law into particular categories of contract – the most long standing being the contract of insurance. *Braganza* has fused with a further possible category of contract now very familiar to those involved in Private Finance Initiative ("PFI") contracts – the "relational contract". With its origins in economic theory,[56] the relational contract migrated into private law with *Bates v Post Office Ltd (No 3: Common Issues)* [2019] EWHC 606 and as a basis for argument in PFI contracts more generally.[57]

In *Bates*, Mr Justice Fraser (as he then was) identified nine factors which were non-exhaustive and could turn a contract into a relational contract. These were:[58]

> *1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.*
> *2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.*
> *3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.*

---

[52] *Supra* at p 110.
[53] It is, perhaps, for this reason that the Court of Appeal commented that judges were resistant to procedural challenges based on *Braganza* in commercial cases – see *Tonzip Maritime (Singapore) PTE Ltd v 2 Rivers PTE Ltd* [2026] EWCA Civ 641 at [77] per Foxton LJ.
[54] See *Mackie Motors (Brechin) Ltd v RCI Financial Services Ltd* [2023] EWCA Civ 476 at [56; 72].
[55] *Supra* at p 118.
[56] See Davies & Sales pp 120 – 121, fn 76 – 81.
[57] In *Braganza* itself, Lord Hodge categorised an employment contract as a relational contract at [54]; [61]; see also *Johnson v Unisys Ltd* [2001] UKHL 13 at [20]. The UKSC has referred to a "relational contract" three further times, each time *en passant*; *obiter* or by analogy – see *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 209; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] UKPC 50; *Pakistan International Airline Corp v Times Travel Td* [2021] UKSC 40. There has been no consideration of what a relational contract actually is.
[58] At [725].

4. The parties will be committed to collaborating with one another in the performance of the contract.
5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.
6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.
7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.
9. Exclusivity of the relationship may also be present.

(It can be seen how items 2 and 8 could be said to be indicative of PFI contracts.[59])

What is difficult about the nine factors are they are themselves nebulous and capable of creating an open ended category of relational contracts. An open ended category of contracts inviting special attention, whilst it may have retrospective use to reflect the merits, is not a concept that English law readily accepts – after all, to paraphrase Lord Diplock, it is the law of contract not contracts.

It follows, I would suggest, that dubbing a contract a relational contract is not without difficulty and then to add implication of terms by law onto that category only compounds the difficulty.

Specific problem 1 – termination of a contract
Lord Leggatt accepted in *Tesco*[60] that an election to terminate in response to breach could not be subject to any form of *Braganza* constraint. That, I respectfully suggest, must be correct. Election in response to breach is the right to say "the contract has come to an end". If the right is not exercised, then the right is lost.[61] That is a straightforward "yes" or "no" case. Further, to constrain the right to election by reference to *Braganza* would be to require the innocent party to persist with the contract. Though there is a somewhat controversial discussion in *White & Carter (Councils) v McGregor*[62] as to whether the innocent party could be forced to accept a repudiation in the face of a clear intention not to be bound, that is the reverse situation. Further, that position (namely that the innocent party is forced to accept the repudiation) was expressly not to apply where the contract required cooperation. A *Braganza* constraint on election would similarly run into difficulties where the contract requires cooperation.

Lord Leggatt then, however, went on to say[63] that an ability to terminate under the contract could be constrained by *Braganza* in its good faith manifestation. That forces one to ask, rhetorically, what is the conceptual difference between election (unfettered) and termination (potentially fettered). After all, both ultimately derive from the words of the contract and both can be barred by those words or by the words/actions of the party seeking to rely on them.[64]

[59] Items 3, 4, 6 and 7 may be less indicative – at least to some PFI relationships. Anyone who has read the Schedules to a PFI contract would doubt item 5 as well.
[60] At [118].
[61] See Wilken & Ghaly *The law of Waiver, Variation and Estoppel* OUP 3rd Ed Ch 6; see also Ch 3 – 5 *passim*.
[62] [1962] AC 413 discussed in Wilken & Ghaly *supra* at 6.15 ff.
[63] At [119 – 120].
[64] Put another way, either there is contractual freedom/party autonomy in relation to both or there is not.

There are further difficulties over *Braganza* constraining a right to terminate.[65]

First, termination is the decision to end any relationship between the parties. That is a decision that there will be no future performance of the contract. That is not the same, in any way, as decisions as to the manner in which continuing, future performance of the contract will occur. The two decisions fall into different categories. It is again difficult to see how a *Braganza*-type constraint can affect both.[66]

Second, if *Braganza* constrains the right to terminate then the contract will persist – despite one party's wishing to terminate. The party will therefore continue to be bound and to perform even though they have, under the language, the right to terminate. That would violate both the linguistic approach to construction and the principle that, absent specific performance, a party cannot be forced to perform a contract.[67]

Third, if *Braganza* impacts on the right to terminate the contract why should it not constrain any option to renew or any option to enter into a new contract on the same terms? Those options impact on the continuation of cooperation and performance in the same fashion as the decision to terminate.

Finally, there is a logical difficulty with categorising the right to terminate as properly "discretionary". The right is a "Yes/No" decision. Either there is a right to terminate or there is not. If the parties have agreed that a right to terminate exists and the requisite facts are there, then subject to the possibility of exercising the right incorrectly being a repudiatory breach, the party so entitled can terminate. If that be a discretion, it is a very narrow or pure one and it is very difficult to see what role *Braganza* could properly play in termination.[68]

Specific Problem 2 – PFI

There are further specific difficulties with PFI contracts. These can be broken down as follows.

First, the Project Agreement is, tritely, an agreement with a public body. Therefore, the argument would run that there could be judicial review of its operation. The difficulty is these are purely commercial arrangements[69] where the contract is mainly concerned with operational and management issues.[70] Either of those factors would preclude judicial review. Further, it is usual (and

---

[65] For a decision where *Braganza* did not constrain the right to terminate see *AQA Bratani Ltd and others v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm)

[66] Davies & Sales solve this quandary by a) saying that *Braganza* does not apply to termination; and b) limiting *Braganza* to the *Padfield* approach reliant on the purpose of the contract as expressed by the language. That purpose must necessary include the termination of the contract where termination provisions are present. In other words once there are termination provisions, the purpose of the contract includes, absent very unusual facts, the unfettered termination of the contract.

[67] Again as per Lord Diplock, the primary obligation to perform can be discharged leaving the secondary obligation to pay damages if there is breach – see Wilken & Ghaly *supra* at 6.25 and cases cited at fn 104.

[68] For a discussion of a narrow versus a wide discretion and the role of *Braganza* and the authorities - see *Macdonald Hotels Ltd & Anor v Bank of Scotland PLC (Rev1)* [2025] EWHC 32 (Comm) at [147 ff; esp 155]. See also *Shurbanova v Forex Capital Markets Ltd* [2017] EWHC 2133 (QB). Varuhas in "Three Issues in the Law of Contractual Discretion" *Oxford Journal of Legal Studies*, Volume 42, Issue 3, Autumn 2022, Pages 787–817, https://doi.org/10.1093/ojls/gqac003 approaches this debate in a different way via a context-driven intensity of review lens contending that the commercial context means that there is far less scope for *Braganza*-type constraints.

[69] See eg *R (West) v Lloyds of London* [2004] EWCA Civ 506 at [31]; *R (Underwritten Warranty Co Ltd v FENSA* [2017] EWHC 2308 at [42].

[70] See *R (Tucker) v DG of the National Crime Squad* [2003] EWCA Civ 2 at [32].

best practice) for the Project Agreement to back-to-back with the Facilities Management Agreement – where the parties will undoubtedly by private bodies only. Is it to be said that public law norms and standards *a la Braganza* can be applied to the Project Agreement but not to the Facilities Management Agreement?

Second, if there is a theme to be discerned in the cases where judicial review and public law norms and standards do apply to contracts, it is where a function, power or duty is exercised outwith the contract which then impacts on the contract.[71] In PFI contracts, such decisions are brought solely within the extensive contractual structure.

Third, it can therefore be seen why the direct application of *Braganza* and public concepts is not without difficulty in PFI contracts. It is easy to understand why arguments under PFI contracts have recourse to the concept of the relational contract. As set out above, whilst the point is often raised in argument, there is some doubt as to whether PFI contracts can be properly categorised as relational contracts[72] and, if so and as set out above, what that in fact means.
Assuming the above can be overcome, PFI contracts usually contain detailed procedural provisions and detailed provisions relating to termination. A *Braganza*-type constraint could very well therefore run contrary to the express provisions of the contract. Further, it is very difficult to see what role a *Braganza*-type constraint could play in procedure or termination. If that be right, the utility of describing a PFI contract as relational disappears.

There are, therefore, I would suggest, ample grounds for scepticism as to use of *Braganza* in the PFI context absent exceptional facts.

Where Braganza may assist?
All of that said, there is no doubt that the imposition of a *Braganza* type constraint on contractual discretions can assist.

First, it is an obvious way retrospectively to reflect the merits of the case – as Lord Leggatt expressly stated with his reference to an abusive termination in *Tesco* being retrospectively barred by *Braganza*.[73] Allied to that, one can see how a completely unfettered contractual discretion can be forensically unattractive.

Second, whilst it has been long accepted that public authorities can and should contract, there are numerous issues with government of any kind being carried out by contract[74] – not least of which is

---

[71] See Fordham at 34.5.3 – 34.5.4.
[72] There is Technology and Construction Court authority on this issue – see *Essex County Council v UBB Waste (Essex) Ltd (Rev 1)* [2020] EWHC 1581 at [112 – 113] per Pepperall J (a PFI contract was a relational contract); *contra Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC) at [85; 91 – 113] per Edwards-Stuart J (term implied as a matter of fact but not on the relational contract basis); *Birmingham City Council v Amey Birmingham Highways Ltd* [2018] EWHC 3915 at [92 – 3] per Stuart-Smith J (no decision on point as it was a "contentious" issue); *TC Development (South East) Limited, BUJ Architects LLP v Investin Quay House Limited, John Downer* [2019] EWHC 3727 at [18 – 19; 21] per Waksman J (a term was implied but submissions as to relational contract not accepted). In the Commercial Court, there is a considerable degree of scepticism in categorising non-PFI contracts as relational with the argument being bypassed; rejected; no term being implied or the case decided on other bases (with one exception *Virgin Enterprises Ltd v Brightline Holdings LLC* [2023] EWHC 2240 at [32] per HHJ Pelling KC (point accepted without debate)).
[73] To use a very contemporary and facetious analogy: like a red card being issued after the end of a match where one player has behaved exceptionally poorly to another but particularly after the final whistle.
[74] See Wilken "Government by Contract" at https://www.keatingchambers.com/resources/articles-and-publications/government-by-contract-issues-for-the-private-sector.

the potential ouster of the courts' judicial review jurisdiction by the existence of the contract.[75] There would also be a further wrinkle. A considerable volume of commercial contracts include arbitration clauses. Standard court proceedings are to be stayed on the application of the Defendant/Respondent[76] unless the Defendant/Respondent takes a step in the proceedings[77] or the arbitration clause is null, void, inoperative or incapable of performance.[78] Thus, there would be an argument that even if the numerous other hurdles to judicial review could be overcome, the application would be stayed to arbitration.[79]

In those circumstances, the simpler route would be the implication of a *Braganza* constraint in arbitration to avoid the above and to act as a safeguard against the possibly improper exercise of an otherwise unfettered contractual discretion. The review jurisdiction would be effectively reintroduced, as would a degree of protection. Neither public accountability nor transparency would, however, be maintained due to the confidentiality of any arbitral proceedings.[80]

Third, if one does not have a *Braganza*-type constraint, the grounds on which the exercise of a contractual discretion could be challenged would be very few. Mistake and misrepresentation are pre-contractual and very much constrained. Warranties must be expressly worded and, if relevant warranties are included, why not also interpolate *Braganza*-type duties by implication. An express wording as to the future exercise of discretion would be difficult to draft and would either be too convoluted or not precise enough – and so on. Faced with those difficulties, one could see why recourse to *Braganza* is an attractive route.

Returning to the debate

As set out above, this paper ends with a consideration of the views of Lord Leggatt and those expressed in Davies & Sales.

It can be seen from the above that, in my view, there are considerable conceptual difficulties with *Braganza* and subsequent authorities that do apply it. That would, without more and if *Braganza* remains part of the English law of contract, lead to *Braganza* only applying in exceptionally rare cases. There are greater difficulties, again in my view, in the translation of *Braganza* into good faith duties and with the category of relational contracts.

On the other hand, it can also be seen that *Braganza* offers protection against two possible vices. The first is the avoidance of review in carrying out public governance via contracts. The second is the abuse of an otherwise unfettered contractual discretion. In both those cases, there are no obvious alternate

[75] See discussion above. It could be said that the answer to this is to remove the *ex p Aga Khan* contractual exclusion but that, I would suggest, would only reintroduce *Braganza*-type problems by another route. That difficulty would be added to already complex and unclear law on the interface of judicial review and the law of contract as outlined above.

[76] Section 9(1) of the Arbitration Act 1996.

[77] Section 9(3) of the Arbitration Act 1996.

[78] Section 9(4) of the Arbitration Act 1996.

[79] This would raise the competing policy issues of ouster of judicial review (see Fordham P28 *passim*) versus the importance of arbitration.

[80] If an arbitration clause were present, this would mean the *Braganza*-exercise would be carried out in arbitration where public law type challenges (outside BIT arbitrations) can be rare. That might well affect the choice of the arbitrators to decide such disputes.

contractual contenders to offer protection and one can see the merit of a limited[81] but *Braganza* type constraint.[82]

[81] Unlike Davies & Sales, I would not argue that *Braganza* should be confined to the *Padfield*-type case. There is, it seems to me, an argument that in the face of pure irrationality, there should be a substantive review power. There is, however, greater difficulty with the procedural limb (limb 1) of *Wednesbury* due to the breadth and uncertainty of the constraints that could be imported. There are even more considerable difficulties with the interpolation of general public law principles.

[82] To use an older and also not entirely serious analogy – as Jack Aubrey would have said, *Braganza* would be the lesser of two weevils.