

The arbitration clause in administrative proceedings

La cláusula arbitral en los procesos administrativos

Nicolasa Genoveva Panchana Suárez*
Karen Vanessa Díaz Panchana*
Sandra Canalías Lamas*

ABSTRACT

In the review of research published in academic articles (including doctoral or undergraduate theses) an extensive bibliography is obtained covering concepts of administrative processes, public administration and Arbitration Agreement; this work defines the terms and describes the phases or stages of the administrative process. This article will serve as a tool for academic work and, therefore, should be integrated into the programs involved in educational tasks; here the text includes the efforts of the authors to give the reader a tool to develop a process of analysis and intellectual confrontation that allows you to achieve better results in your work, academic counseling, funding related to the knowledge of the administrative procedures .

Keywords: Arbitration - Agreement - public administration - procedures.

RESUMEN

En la revisión de investigaciones publicadas en artículos académicos (incluidas tesis de doctorados o de grado) se obtiene una bibliografía extensa que cubre conceptos de procesos administrativos, administración Pública y Convenio Arbitral; este trabajo define los términos y

* Lawyer of the Courts of the Republic of Ecuador. Magister. Doctor in Jurisprudence. nicolasapanchana@hotmail.com, <https://orcid.org/0000-0002-8079-0641>

*Lawyer of the Courts of the Republic of Ecuador. Magister. karendiaz_1004@gmail.com, <https://orcid.org/0000-0002-1162-229X>

*Lawyer of the Courts of the Republic of Ecuador. Magister. sandra_canalias@hotmail.com, <https://orcid.org/0000-0001-5440-798X>

JOURNAL OF BUSINESS
and entrepreneurial
studies

ISSN: 2576-0971



Atribución/Reconocimiento-NoComercial- CompartirIgual 4.0 Licencia Pública Internacional — CC

BY-NC-SA 4.0

<https://creativecommons.org/licenses/by-nc-sa/4.0/legalcode.es>

Journal of Business and entrepreneurial
January - March Vol. 7 - I - 2023
<http://journalbusinesses.com/index.php/revista>
e-ISSN: 2576-0971
journalbusinessentrepreneurial@gmail.com
Receipt: 22 May 2022
Approval: 11 November 2022
Page 56-71

describe las fases o etapas del proceso administrativo. El presente artículo servirá como herramienta de trabajo académico y, por tanto, se deberá integrarlo en los programas involucrados en tareas educativas; aquí el texto incluye los esfuerzos de los autores para dar al lector una herramienta para desarrollar un proceso de análisis y confrontación intelectual que te permite lograr mejores resultados en tu trabajo, asesoramiento académico, financiación relacionada con el conocimiento de los procedimientos administrativos.

Palabras clave: Arbitral – Convenio – administración pública – procedimientos.

INTRODUCTION

Administrative acts are generally unilateral manifestations of the highest authorities of the different entities of the public sector (Administration), within these wills we find the Administrative Contracts whose legal regime is special and is regulated by the Administrative Organic Code (COA), and in the Organic Law of the National Public Procurement System, its regulations and the resolutions of the National Public Procurement Service, when the different public procurement processes are carried out. Since the current Constitution of Ecuador of 2008, we find the alternative means of conflict resolution in its Article 190: It recognizes mediation and arbitration as mechanisms to resolve conflicts in negotiable matters, within the administrative law gives the possibility of submitting to arbitration in law, including those arising from public procurement processes.

The existence of the Arbitration Agreement, in case of conflicts, could be submitted to the designated arbitration centers, prior to initiating the different administrative contentious actions to which the parties that subscribed the administrative contracts believe they are assisted, with the purpose of providing a solution to the disagreements or conflicts within the execution of a contract in a more timely and expeditious manner, and on a voluntary basis.

The Arbitration Clause can be made in administrative procedures, so it is of great importance to develop the conceptualization of the same. The procedures are conceived from different angles and one of these is the competence angle, in reference to the competences granted to an entity for the regulation of the administrative procedure, considering the executive and judicial organ as the main ones with organizational competences, and even the judicial power, which is granted the attribution to dictate laws that regulate and guarantee the rights of the people before the administration. (Alejos, 2019)

The public administration is also granted powers to regulate its exercise and to adjust it to the normative principles of the organization. As for the judicial function, they are provided with powers before and after the respective rules. As for the Arbitration

Clause in relation to administrative proceedings, it is understood in the first place as the agreement between the contractual parties to submit their differences to the decision of an arbitrator, who will express his decision to be enforced by means of an arbitration award.

Arbitration, then, becomes a possibility to settle a conflict with the voluntariness of the parties, which is supported by the Constitution of the Republic of Ecuador as a legal institution that allows the agreement on the resolution of conflicts through the intervention of an arbitral tribunal. (Pulido, N., et al., 2021) according to:

Art. 190 CRE.- Arbitration, mediation and other alternative dispute resolution procedures are recognized. These procedures shall be applied subject to the law, in matters which by their nature may be settled. In public procurement, arbitration in law shall be applicable, prior favorable pronouncement of the State Attorney General's Office, in accordance with the conditions established by law. (Constitution of the Republic of Ecuador, 2008).

Arbitration is a figure that is permitted and developed in the Arbitration and Mediation Law, which establishes the obligation to submit the dispute to arbitration, which is understood as an obligation to do, an obligation that links two elements, on the one hand the subjective element, submitting the dispute to arbitration, and the objective element, which is the obligation between the creditor and the debtor.

In that sense, this article aims to provide the legal community with a working tool for understanding administrative process management practices, which has focused on developing a comprehensive approach.

Administration and its process in general.

In order to address what an administrative process is, it is important to be clear that administration by itself is a process that, with the correct use of its resources, achieves a high quality operation of the social organism, which contributes to the achievement of predetermined goals. Quality is achieved when the organization uses resources in an efficient, rational, and planned manner (Cano Plata, 2017).

According to (Briones, W., et al.). : "the structure that an organization must have to achieve efficiency starts from an organizational whole and its structure to ensure the efficiency of all parties involved." (2019, p. 3; Castañedo, A., 2018). The use of both internal and external resources is efficient if it achieves its mission by fulfilling its social, technological, scientific, political, religious, cultural, sports and academic purposes.

In this sense, the administrative process will mean every moment in which the management of the Administration is carried out, aimed at the fulfillment of the tasks and the achievement of the established goals, making the best use of the resources. It is worth mentioning the definition of administrative acts, "the declaration of will, judgment, knowledge or desire made by the Administration in the exercise of an administrative power other than the regulatory power" (García, E. & Fernández, 2001). (García, E. & Fernández, T., 2020, p. 591).

According to (Cano Plata, 2017) an administrative process includes different stages or phases that will allow the execution of the administrative practice and these are:

- **Planning:** Objectives, programs and strategies should be planned, as well as budgets and organizational diagnosis. The word "plan" together with the word "strategy" which is the key to make institutional decisions based on the diagnosis of the current situation. (Mero-Vélez, 2018).
- **Organization:** organization will be needed for the development of procedures, determination of tasks, organizational structure and authority. (Mero-Velez, 2018).
- **Management:** Management directs, influences and motivates employees to develop basic tasks and within the administrative process, "management focuses attention on how to delegate authority and coordinate activities" (Hernandez & Hernandez, 2019, p. 66). Thus, management will be indispensable for the exercise of teamwork, communication, motivation, leadership, change and conflict management.
- **Control:** With the control it will be possible to identify indicators of interest and implement focus plans that allow decision making in order to protect the organization. (Schmidt, Tennina, & Obiol, 2018).. And it can also be understood as:
[...] is the set of preparatory acts concatenated according to a chronological and functional order, to verify the existence of the public need to be satisfied and of the facts that create it, as well as to hear the possible affected parties and spokespersons of related interests, both public and private, especially the latter, in order to shape the decision in the way that best harmonizes them with the public purpose to be fulfilled. (Ortiz, 1981)

The administrative procedure from the legal point of view should be understood as: A mechanism that allows the Administration to acquire information about the existence, scope, nature and characteristics of the multiple interests that converge in the configuration of a given situation in order to, in this way, be able to reach the decision that best satisfies the public interest and that, at the same time, complies with the legal system. (Loo Gutiérrez, 2017, p. 171).

Authors such as (Alonso, 2013, p. 166) who exposes, argues and proposes what is necessary to innovate the fundamental administrative institutions: administrative organization, administrative procedures, public function, administrative contracts and regulatory strategies.

Addressing administrative law, which governs administrative processes; (Navarro González, 2017) expresses that the Administrative Sanctioning Law has demanded that the sanctioning act complies with high standards in terms of motivation, insofar as it will impose the restriction or loss of rights as a consequence of the commission of an administrative infraction; (Tirado) states that "the motivation of the act of initiation of the sanctioning procedure has attracted little attention to the extent that its qualification, as a procedural act, refers to the final act a good part of the questions that may be raised" (2021, p. 175).

On the other hand, administrative justice is a substantive and procedural concept, which establishes that the activity of the public administration should be oriented to the realization or satisfaction of specific public interests, with full respect for public rights and interests; and seeks the resolution of disputes arising between it and the administered (individuals), between two public entities, or between the State and a smaller public entity. (Rojas, 2011)

Administrative Process Ecuador

Currently, administrative processes have acquired great value and are used as one of the main tools to achieve the proper development of public administration with the aim of increasing efficiency, effectiveness, quality of public services, but above all the correct application of the rights enshrined in the Constitution, which begin with the right to petition.

Article 173 of the Constitution of the Republic establishes that administrative acts may be challenged administratively through an administrative proceeding and judicially through an administrative litigation process:

Art. 173.- Administrative acts of any State authority may be challenged, both administratively and before the corresponding bodies of the Judiciary. (Constitution of the Republic of Ecuador, 2008)

Administrative claims, controversies that individuals may bring before public administrations and the activity of the public administration for which a specific procedure is not foreseen, will be substantiated in an administrative procedure. Thus, Article 134 of the Organic Administrative Code establishes the general and supplementary nature of the administrative procedure it regulates:

Article 134.- Proceedings. The rules contained in this Title apply to administrative proceedings, special proceedings and proceedings for the provision of public goods and services, insofar as they do not affect the special rules governing their provision. They shall not apply to procedures derived from the control of public resources. (Código Orgánico Administrativo, 2017)

(Núñez, 2019, p. 164) expresses that: "The administrative procedure of the COA contemplates three stages: initiation, evidence, termination and execution; although in some cases it is appropriate to carry out previous acts. These stages, with slight nuances, coincide with those indicated by the doctrine for the first generation administrative procedure."

In that sense, administrative procedures could be seen as a major problem for the State seeking the best use of resources; it believes that integrating, articulating and using these resources leads to improvement and positive change when done in the best possible way. Therefore, being part of administrative processes can become a serious problem. (Timaná, L., 2022)

Currently, when defining the word administration, it refers to the phenomenon of constant changes and innovations that require the application and development of tools to systematize and integrate administrative processes in order to effectively visualize

what companies actually do. Therefore, management processes and organizational development leading companies to adapt to new legal trends. (Solís Sierra, 2018).

Administrative law is defined by several authors such as. (Gordillo, 2017) In order to establish the existence of this discipline, two conditions must be met, the first is that there is a sufficiently developed public administration and that, in addition, the principle is accepted according to which this administration is subject to the legal system. The legal system in turn is composed of principles, which are norms that order something to be carried out to the greatest extent possible, in accordance with the factual and legal possibilities. Therefore, principles are optimization mandates. (Vintimilla, 2013)

However, it is suggested that they should not be vague or ambiguous, since this could lead to arbitrary interpretations by the public administration and the infringement of rights. (Petoft, 2020) Therefore, "Administrative Law is the discipline whose purpose is to study the regulation of the administrative function. The Constitution, as a founding rule of a State, contains a set of statements that regulate the administrative function, so it is one of the rules that includes principles of Administrative Law in its content". (Haro, M. & Villacrés, M., 2021).

The public administrations exclusively invoke principles of Administrative Law contemplated in the laws and do not observe the principles that, without being positivized, allow to keep coherence with the essence of the principle. (Moreta, 2019)

Procedure is a general legal system, whose basic types are legislative, judicial and administrative procedures. This study is dedicated to the latter and its projections in Ecuadorian law. The reasons are many, including the amazing development of administrative procedures and new patterns of administrative behavior in the context of globalization; however, since modern legislation does not reflect this reality, the Administrative Organic Code (COA) (2017) of Ecuador published on June 20, cannot avoid this situation.

The Constitution of the Republic of Ecuador lays the foundation for the establishment of general administrative procedures, as it defines the basic principles and rights that govern it and must be interpreted based on it. (Paraguacuto, D., et al., 2014)

Thus, Article 1 of the constitutional text defines, p. Ecuador as a constitutional state of rights and social justice; Article 61, rights of participation; Article 66.23 provides for the consideration of individual and collective complaints and referrals to institutions and obtaining attention or the right to a positive response, as well as the duty of the executive branch to hear these cases; among others.

These principles and rights are guarantees in favor of the company and are enshrined in the Administrative Organic Code (2017) (COA) of June 20. The rule, which entered into force, is a real breakthrough in Ecuadorian administrative law, because after many years of legal fragmentation, it has managed to create a single rule in terms of principles, stages, subjective and objective elements. Administrative actions in a single rule. Its entry into force allows enforcers to interpret them in the same way, based on uniform standards and filling gaps in the law. The regulation eliminates several provisions of its

predecessor, the Ley de Modernización del Estado (LME), as well as lower qualifications (Núñez Torres, 2019).

However, it is important to consider that the Organic Administrative Code does not provide for the conceptualization of the administrative process, therefore, in order to determine to which stage of generation it belongs, it is necessary to characterize it by its rules. The administrative requirements, the controversies to be submitted to the state administration and the activities not foreseen in the established procedure will be approved by the state administration administratively. (Martin, 2018)

Contentious-Administrative Proceedings governed by the General Organic Code of Proceedings

Ecuador as a constitutional state of rights and justice through the General Organic Code of Proceedings, which is the norm in charge of regulating the fulfillment of obligations. (Alvarado, 2022). When studying the Positive Law of each country, reference should be made to the regulation of institutes closely related to the central theme of the work, such as the scope of judicial control of the administrative activity exercised on the basis of discretionary powers, as well as the protection against the material activity and inactivity of the Administration as expressed by (Torrealba, 2017).

The (GENERAL ORGANIC CODE OF PROCEDURE [COGEP], 2015 (Ecuador)), in Session III Contentious Administrative Proceedings in Article 326 determines:

Article 326.- Actions in the contentious administrative proceeding. The following actions shall be processed in contentious administrative proceedings;

1. The action of full or subjective jurisdiction that protects a subjective right of the plaintiff, allegedly denied, unknown or not recognized totally or partially by facts or administrative acts that produce direct legal effects. This action may also be brought against normative acts that violate subjective rights.
2. The objective annulment or excess of power that protects the compliance with the objective legal rule, of administrative nature and can be proposed by whoever has direct interest to deduce the action, requesting the nullity of the challenged act for having a legal defect.
3. That of detrimental effect, which seeks to revoke an administrative act that generates a subjective right in favor of the administered party and that harms the public interest.
4. The specials of:
 - a) Administrative silence.
 - b) Payment by consignment when the consignor or consignee is the public sector covered by the Constitution of the Republic.
 - c) The strict liability of the State.
 - d) The nullity of a contract proposed by the State Attorney General in accordance with the law.
 - e) Disputes in public procurement matters.
 - f) Any others specified by law (p. 76).

Here it is worth mentioning that, with the publication of the COA, the special administrative contentious act of administrative silence contained in Article 326 of the COGEP is suppressed and in its place, it includes Article 370 of the (CODIGO ORGANICO GENERAL DE PROCESOS [COGEP], 2015 (Ecuador)), which expresses the following:

"Art. 370A.- Execution by administrative silence: In the case of the execution of a presumed administrative act, the judge shall convene a hearing in which the parties shall be heard. It is up to the claimant to demonstrate that the expiration of the legal term for the administration to resolve his petition has occurred, by means of a declaration under oath in the request for enforcement that he has not been notified with an express resolution within the legal term, and he shall also attach the original of the petition in which the acknowledgement of receipt appears". (p. 88).

This reform was made in accordance with article 207 of the Administrative Organic Code (COA), where the possible administrative actions derived from silence will be considered as executive actions in judicial proceedings. It is worth mentioning that the Jurisdiction within the administrative contentious matter, lies in the administrative contentious courts according to the domicile of the plaintiff, and the competence to hear the actions of administrative silence is regulated in articles 299, 300, 326.4.e) and 370-A of the General Organic Code of Processes (COGEP) and 217 of the Organic Code of the Judicial Function.

Prior exceptions

The exception is procedurally very important, because it is decided by the defendant, the taxpayer is faced with the right of the participant to request to receive the objections of the defendant through the legal-procedural relations, and the defendant treats it as an exception, so it is called assistance in procedural legal relations. (Lopez, 2020).

The (GENERAL ORGANIC CODE OF PROCEDURE [COGEP], 2015 (Ecuador)), in Chapter II Answer and Counterclaim, in Article 153 states:

Article 153 - Preliminary Objections. Only the following exceptions may be raised as preliminary objections:

1. Incompetence of the judge.
2. Incapacity of the plaintiff or his representative.
3. Lack of legal standing of the plaintiff or the defendant, when it manifestly arises from the terms of the claim.
4. Error in the form of proposing the claim, inadequacy of the procedure or improper joinder of claims.
5. Lis pendens.
6. Prescription.
7. Expiration.
8. Judgment.
9. Transaction.

10. Existence of an agreement, arbitration agreement or mediation agreement (p. 38).

Now, in order to better understand the preliminary objections, each one of them will be addressed according to (López, 2020):

Incompetence of the judge: If the judge is incompetent in the cause, the process will be null and void, so the judge is responsible as established in articles 9 to 11 of the pact. It is important for us, because the judge is disqualified not only by competence, but also by jurisdiction, and will not be able to know the exception presented and will not be able to receive that exception.

Incapacity of the plaintiff or his representative: Among them, any person can participate in a lawsuit, unless the law prohibits him to participate, for example: minors, incapacitated persons who cannot enforce their rights, because these persons cannot create obligations or rights. (Ortegon, 2022)

Lack of standing in the cause of the plaintiff or defendant, when it manifestly arises from the terms of the claim itself: If the plaintiff or plaintiff does not adequately demonstrate that the active or passive legality of the process must be foreseeable in law, it is null and void at trial.

Error in the manner of filing the lawsuit, inadequacy of the procedure or improper joinder of claims: If the case is improperly filed and the accumulation of said proceedings does not comply with the law, the judge will require that the cases be filed, therefore, if the judge intends to add the various proceedings, he will ensure that he is notified or it may be filed.

Lis pendens: In court, another group of people hangs by a thread, and they are the same person for the same case, for the same action. If this happens, the defendant can request a cumulative case.

Prescription: An act or right that determines when it is extinguished in writing, so that the person who wants or claims it will be obliged to claim it.

Expiration: The right of action is extinguished with time, which is a necessary condition for the existence of a claim, without this requirement the claim may be dismissed.

Res judicata: This means that certain proceedings are given a special quality, according to which the parties cannot reopen another proceeding based on the same proceeding and the same facts.

Transaction: A contract in which two parties avoid litigation and try to reach agreed terms.

Existence of agreement, arbitration commitment or mediation agreement: Arbitration or mediation functions seek that, before a trial begins, the plaintiff and defendant reach a voluntary agreement through a third party that attempts to resolve the conflict so that the cases do not recur.

Arbitration

The origin of an arbitration is based on the arbitration agreement, which is a fundamental part of the arbitration process. The arbitration agreement is a legal act that is made in

writing, the parties involved recognize the controversy itself, this is how, the characteristics of the proceedings are evidenced. (Dias, P. & Cruz, A. , 2020, p. 15) The President of Ecuador, Guillermo Lasso, on August 18, 2021, by means of Presidential Decree N. 165 enacted the Regulations of the Arbitration and Mediation Law. It is worth mentioning that prior to the proclamation, Ecuador did not have an arbitration statute, so several contradictory interpretations have misrepresented the Arbitration and Mediation Law. The rules apply mainly to arbitration, preventive measures, invalidity cases, public procurement, etc. (Castillo, 2018)

Regarding public procurement and arbitration, the regulations allow arbitration tribunals to agree with the State and public persons in public procurement (Espinosa, 2020). By:

- By signing the arbitration agreement before the dispute arises.
- After the dispute arises, enter into an arbitration agreement.
- As permitted by applicable law or International Agreements.

The arbitrator may rule on facts, conduct or administrative actions of his knowledge of the legal relationship, including termination, expiration or sanction. (Castillo, M., et al., 2019) The executive order requires contractors to enter into an arbitration agreement, and the latter have 30 days to respond. If this is not done, it means that the contract has been accepted. (Presidential Decree No. 165 - LAM Regulations [With Force of Law], 2021)..

Similarly, the decree establishes that, in administrative contracts binding on the state administration, the settlement of contractual disputes through arbitration is preferred and encouraged. (Toraya, 2022)

Arbitration Agreement

Conflicts and controversies arising from social relations have always been present since ancient times; at first they were resolved by force; as civilization evolved, they were resolved by an impartial third party, such as the chief of the tribe, the priest or the elder, as a natural and spontaneous means of settling disputes. In this sense, the history of mediation and arbitration is confused with the beginning of civilizations, preceding formal justice. (Córdova, K., et al., 2019, p. 288). According to the generalized doctrine, Latin American States have historically had two positions towards International Arbitration: a period of rejection (before 1980) and a period of adoption (since the 1980s). (Villalba, J. & Moscoso, R., 2008).

Currently, there is the legal figure of mediation that rather adapts to protocols of action or codes of conduct, with a minimum of formalities that support the procedural essence of the procedure, with the only limit of not contravening the figures typified in the ordinance corresponding to the place where the process is carried out or, if applicable, to the regulations chosen in the Mediation Agreement. (Castañedo, A., 2018)

Faced with a scenario with conflicts to be solved or settled, institutions and laws are created to adapt to these needs, one of the reasons why "Organic Law for Productive Promotion, Investment Attraction, Employment Generation, and Fiscal Stability and

Balance" is created as one of the signs of arbitration in Ecuador. (Paredes, 2018). And some other Treaties in the international scenario for more complex issues directed towards the tax area, although. (Nicaragua. Chamber of Commerce and Services.) expresses that:

The complexity of these Treaties and international business make it necessary that any disputes be resolved in short periods of time, with a guarantee of legal certainty and impartiality of the arbitral tribunal or mediator; for this reason, particularly International Arbitration is today the most demanded system of Commercial Dispute Resolution. (2017)

Article 190 of the Constitution of the Republic of Ecuador, recognizes arbitration as an alternative dispute resolution procedure, it is governed by the Arbitration and Mediation Law, which establishes provisions that empower the parties to, by mutual agreement, decide in an arbitration system, a third party called arbitrator who is the one who assumes the responsibility of resolving disputes. As we have seen, arbitration under Ecuadorian law is voluntary because it results from the express will of the parties. (Yepez-Almeida, 2019).

Thus, it occurs in Peruvian law in Art. Article 14 of Decree No. 1071 arbitration considerations, according to (Perez, 2019):

Arbitration agreements apply to those who submit to arbitration in good faith based on their consent as determined by their participation and instrumentality in the negotiation, execution or termination of an agreement that includes an arbitration agreement or related agreement. It also includes those who seek to obtain rights or benefits from the contract in accordance with the terms of the contract (pp. 275-276).

Contrary to what the Peruvian legal system regulates, our Ecuadorian Arbitration and Mediation Law is not unequivocal and clearly states that: "In a contract, arbitration is a written agreement between the parties to decide to submit to arbitration [...]". In public law it is more difficult to follow the path of interpretation if the legal system does not clearly provide for it. (Pastor, 2020)

MATERIALS AND METHODS

In this research article we have opted for a documentary research, because it provides the bibliographical basis to explain what the arbitration agreement consists of; the level of research is descriptive, which has been selected to collect information that must be analyzed to relate to administrative processes, and the arbitration clause in administrative contracts; and finally, the applied method is the exegetical and historical, since it is one of the essential methods for a research that allows the development of the study and interpretation of the law on the Arbitration Agreement as a clause in the Administrative Processes in the Ecuadorian legal framework and in the international scenario throughout the years.

RESULTS

Arbitration, as a method of alternative dispute resolution, has developed until today, according to the historical and economic realities of the moment. The development has been dynamic and consistent with the needs of society. As a way of resolving conflicts, it has been formed by principles and regulations that have given life and solemn form to this legal institution, which has given legal references to its validity and effectiveness. On the other hand, as any other institution, it has its own principles and regulations, which are based, of course, on the autonomy of the will of the parties, as a guideline of its legal life. The contracting parties create, modify, develop and submit to the effects resulting from this figure. (Sequeira, B. I., 2020, p. 29).

However, as expressed by (Labbé, 2018): "the most relevant element of arbitration is the value recognized to the autonomy of will, as the cornerstone of the entire arbitration system".

The discussion revolves around the figure of "voluntariness" in cases arising in administrative litigation proceedings, because when they occur with contracts with the State, or in professional practice arbitration often imposes on the party concerned, such as the contractor clauses that can even be defined as abusive, because although there must be the voluntariness of the contractor in most cases administrative contracts are mandatory models, and does not have the option to negotiate a contract with the State, much less define the arbitration clause.

The State is the one who verifies and predetermines the arbitration agreements that will effectively be in favor of a unilateral party, opposing the true meaning of the arbitration agreement and the benefits of those who subscribe to it by causing disproportion or imbalance, and thus there are more and more conflicts between public entities and contractors, which is why it is necessary to generate mechanisms that regulate clauses in administrative procedures.

CONCLUSIONS

The arbitration agreement within the administrative contracts of the public sector only proceeds in law in accordance with the provisions of Art. 190 of the Constitution, in accordance with Art. 126 of the Organic Administrative Code, and in matters of Public Procurement shall be governed by the provisions of Articles 104 and 105 of the Organic Law of the National Public Procurement System; and, the arbitration clause must be included to produce the legal effects that bind the parties, excluding the ordinary jurisdiction, and that conflicts are solved under the power of the arbitrators who were appointed by the arbitration agreement. Similarly, in arbitration matters, it is necessary to consider the requirements contained in the Arbitration and Mediation Law, in order to ensure that the arbitration agreement is valid for the Ecuadorian legal system and its impact on administrative proceedings. Additionally, in order to make the recognition and exemption of the arbitration side, it will be fundamental to verify and comply with the determined requirements, since the internal legislation of each territory may not be so demanding in relation to the requirements that must be accredited.

The findings were obtained from the application of a documentary research that explained the conceptualization and scope of the arbitration agreement and arbitration; the descriptive level used allowed detailing the relationship between administrative processes and the arbitration agreement as a clause; in addition, the exegetical method was used to interpret the law to understand the Arbitration Agreement in the Administrative Processes both in the internal and external legal framework, as well as the historical method that provided information on the administrative procedures.

REFERENCES

- Vasquez Ponce, G. O., Parrales Pilozo, D. H., & Morales Chávez, V. E. (2021). Administrative process: determinant factor in the organizational development of MSMEs. *Revista Publicando*, 8(31), 258-278. doi:10.51528/rp.vol8.id2249
- Cano Plata, C. A. (2017). The administration and the administrative process. Bogotá. Retrieved from Com.mx: <https://ccie.com.mx/wp-content/uploads/2020/04/Proceso-Administrativo.pdf>
- O'Brien, E. C. (2019). THE ARBITRATION AGREEMENT. *Studies in Business Law ISSN 2346-9404*, 18. Retrieved from <https://revistas.unc.edu.ar/index.php/esdeem/article/view/24141>
- GENERAL ORGANIC CODE OF PROCEDURES [COGEP] (2015 (Ecuador)). In *Law No. 0 of 2016* (p. Article 326).
- Mero-Vélez, J. M. (2018). Company, administration and administrative process. *Revista Científica FIPCAEC (Fomento de la investigación y publicación en Ciencias Administrativas, Económicas y Contables)*, 3(8), 84-102. doi:10.23857/fipcaec.v3i8.59.
- Schmidt, M. A., Tennina, M. E., & Obiol, L. C. (2018). The control function in organizations. *Center for Management Studies*, 2(2), 4-6. Retrieved from <https://revistas.uns.edu.ar/cea/article/view/1349>
- Hernández, J., & Hernández, S. (2019). Stages of the Administrative Process. *Boletín Científico de la Escuela Superior de Atotonilco de Tula*, 6(11), 66-67. Retrieved from <https://repository.uaeh.edu.mx/revistas/index.php/atotonilco/article/download/3704/5878>
- Arzube, Z. R. (2017). Management and its relationship. *CE Contributions to Economics*, 5.
- Solís Sierra, M. (2018). Development of an administrative management model for the system of linkage with the community of the Instituto Tecnológico Superior Juan Bautista Aguirre del Cantón Daule. *Universidad y Sociedad*, 10.
- Núñez Torres, K. (2019). The evolution of administrative procedure and the COA in Ecuador. *Revista San Gregorio*, 1(33), 149-159. doi:10.36097/rsan.v1i33.1029.

- Icaza Ortiz (June 29, 2019). *Reforms to the COGEP and its application to the Contentious Administrative Procedure*. Retrieved from Icaza Ortiz Abogados: <https://icazaortiz.com/2019/06/28/reformas-al-cogep-y-su-aplicacion-al-procedimiento-contencioso-administrativo/>
- López, M. (2020). *Análisis de las excepciones previas del art. 153 numeral 4 del COGEP*. Universidad de Los Hemisferios, Quito. Retrieved from <http://dspace.uhemisferios.edu.ec:8080/xmlui/handle/123456789/832>
- Presidential Decree No. 165 - LAM Regulations [With force of law] (August 18, 2021). Retrieved from <https://corralrosales.com/decreto-presidencial-numero-165-reglamento-lam/>
- Yepez-Almeida, L. E. (2019). Arbitration agreement: doctrinal assumptions of pathology, principles and interpretation and its pro-arbitration approach in Ecuadorian law. *Master's thesis*. Universidad Internacional de La Rioja, Quito. Retrieved from <https://reunir.unir.net/handle/123456789/8168>
- Pérez, A. (2019). Arbitration in Ecuadorian public law. *Revista Ecuatoriana de Arbitraje*(10), 275-276. doi:10.36649/real1010.
- Briones, W., et al. (2019). Management of administrative processes in African palm extractors. . *Ciencias Holguín*, 1-14.
- Castañedo, A. (2018). *Arbitration and mediation. Their complementarity in the context of international trade*. Havana: University of Havana.
- García, E. & Fernández, T. (2020). *Curso de Derecho Administrativo. Volume I*. Madrid: Civitas.
- Loo Gutiérrez, M. (2017). The meaning of administrative procedure. . *Revista Derecho del Estado*. , 155-175.
- Alonso, L. (2013). Review "La necesaria innovación en las instituciones administrativas: organización, procedimiento, función pública, contratos administrativos y regulación" by Rivero Ortega, Ricardo. *RIPS. Revista de Investigaciones Políticas y Sociológicas*, 165-168.
- Navarro González, R. (2017). *La motivación de los actos administrativos*. Thomson Reuters: Aranzadi.
- Tirado, J. (2021). Notes on the act of initiation of the administrative sanctioning procedure. *Revista de Estudios de la Administración Local y Autonómica*, 173-189.
- Rojas, E. (2011). El debido procedimiento administrativo. *Derecho PUCP*, 177-188.
- Ortiz, E. (1981). Nullities of the administrative act in the general law of public administration. *Revista del Seminario Internacional de Derecho Administrativo*.

- National Assembly (2008). *Constitution of the Republic of Ecuador*. Quito: Registro Oficial.
- National Assembly (2017). *Código Orgánico Administrativo*. Quito: Registro Oficial.
- Núñez, K. (2019). The evolution of administrative procedure and the COA in Ecuador. *Independent researcher*, 159-168.
- Gordillo, A. (2017). *Tratado de Derecho Administrativo*. Buenos Aires: Fundación de Derecho Administrativo.
- Vintimilla, J. (2013). Principles and Rules as new sources of Justice in light of the Ecuadorian *ius Novus*. *Iuris Dictio*, 47-56.
- Petoft, A. (2020). The concept and instances of general principles of administrative law: Towards a global administrative law. *Constitutional Issues*, 309-335.
- Haro, M. & Villacrés, M. (2021). The principles of administrative law: its positivization. *Society & Technology Journal*, 61-75.
- Moreta, A. (2019). *PROCEDIMIENTO ADMINISTRATIVO Y SANCIONADOR EN EL COA*. Quito: Ediciones Continente.
- Alvarado, S. (2022). Legal and procedural importance of the transaction. *FIPCAEC*, 116-133.
- Torrealba, M. (2017). *Trends in the enforcement of judgments in the Ibero-American administrative process (With special reference to Spain, Peru, Costa Rica, Colombia and Venezuela)*. La Coruña: Universidade de A Coruña.
- Castillo, M. (2018). Evidence in arbitration. *LEX N° 21*, 199-416.
- Dias, P. & Cruz, A. (2020). International Commercial Arbitration. *Llamkasun*, 11-19.
- Castillo, M., et al. (2019). Subjects susceptible to arbitration. *LEX N° 23*, 187-2011.
- Toraya, J. (2022). Implementation of virtual arbitration in Mexico for the resolution of disputes arising in e-commerce. *Revista De Investigación Académica Sin Frontera: División De Ciencias Económicas Y Sociales*, 3-25.
- Pastor, F. (2020). SPANISH ARBITRATION IN THE TUAT QUESTION. *Illes i imperis*, 259-286.
- Córdova, K., et al. (2019). Some considerations on mediation and arbitration. *Revista Universidad y Sociedad*, 287-295.
- Villalba, J. & Moscoso, R. (2008). ORIGINS AND CURRENT PANORAMA OF ARBITRATION. *Prolegomena. Rights and Values*, 141-170.

- Paredes, F. (2018). Ecuador relaxes its international arbitration rules to attract investment. *CIAR GLOBAL. The Journal of Arbitration of the Ibero-American Community.*, 7-12.
- Nicaragua. Chamber of Commerce and Services (2017). *International Arbitration. CMA*. Retrieved from Centro de Mediación y Arbitraje.: <http://www.cmanicaragua.com.ni/index.php/nuestros-servicios/arbitrajeinternacional/>
- Sequeira, B. I. (2020). The principle of severability of the arbitration clause and its legal scope in the interpretation and modification of contracts. *Revista Ciencia Jurídica y Política*, 28-54.
- Labbé, J. P. (2018). The extension of the arbitration agreement to apparent third parties in International Commercial Arbitration: analysis of some theories. *Revista de derecho (Coquimbo)*, 201-236.
- Paraguacuto, D., et al. (2014). The interrelationship between the judge and the international arbitrator. A comparative study between France and Colombia. *Legal Mission*, 251 - 286.
- Martin, R. (2018). *Arbitration and due process*. In J.C. Morón & J. Danós (Coords.). *Estudios de derecho administrativo*. Lima: Gaceta Jurídica.
- Alejos, O. (2019). Unbalanced arbitration agreements in public contracts under the state contracting law. . *PUC Law*, 347-370.
- Pulido, N., et al. (August 04, 2021). *No todos los caminos conducen a Roma...La cláusula patológica: aproximaciones conceptuales y problemática actual*. Retrieved from Arbanza: <https://arbanza.com/?p=27286>
- Timaná, L. (June 06, 2022). *Statutory arbitration: A look at its importance*. Retrieved from *lus et iustitia*: <https://boletinsociedades.com/2022/06/06/el-arbitraje-estatutario-un-vistazo-a-su-importancia/>
- Ortegón, S. (2022). Subjective arbitrability in the trust contract in Colombia. *Estudios Socio-Jurídicos Journal*, 1-18.
- Espinosa, I. (April 2020). *The incidence of international public policy in international commercial arbitration*. Retrieved from REPOSITORIO COMILLAS: <https://repositorio.comillas.edu/xmlui/handle/11531/38579>