Are there exorbitant clauses in administrative contracts?*

Existem cláusulas exorbitantes nos contratos administrativos?

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ABSTRACT

This work questions the understanding that Brazilian statutory law would set forth privilege clauses favoring Public Administration in public contracts, which would be unparalleled in common civil contracts. The conclusion presented is that the so-called privilege clauses are in practice not exceptional as statutory law suggests since they do not convey extraordinary powers to Public Administration as contracting party.

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These powers conveyed to Public Administration by statutory legislation regarding public contract are indeed similar to powers set in some contracts executed between private parties.

KEYWORDS

Public contracts — privilege clauses — unilateral modification — termination for convenience — government procurement and public contracts act

RESUMO

O estudo questiona a narrativa segundo a qual, no direito positivo brasileiro, existiria um regime jurídico de exorbitância a favorecer a posição da administração pública em seus contratos, algo sem paralelo no direito contratual comum. A conclusão apresentada é a de que as chamadas cláusulas exorbitantes dos contratos administrativos, na prática, não são excepcionais, como sugere sua previsão em lei, de modo que não conferem poderes extraordinários à administração pública contratante. As prerrogativas conferidas à administração pela lei de contratações públicas são semelhantes à posição normal dos contratantes nas relações contratuais estabelecidas exclusivamente entre particulares.

PALAVRAS-CHAVE

Contrato administrativo — cláusulas exorbitantes — alteração unilateral — rescisão unilateral por interesse público — lei de licitações e contratos administrativos

1. Introduction

Administrative law institutes are built through an opposition narrative with similar ones in private law. To characterize this branch of law, it has not been enough to highlight the subjective identification criterion, something that would refer the definition of the discipline to the presence of legal relations which the public administration was part of. Looking for something that, in essence, removes the rules and themes of administrative law from those of private law. We perceive this in the theoretical effort to highlight particularities

of the administrative act in comparison with the common legal acts, of the Patrimonial Special Appealonsibility (civil) of the State in comparison with that of the private, of the public goods in relation to the private goods, and of the administrative contracts in comparison with the contracts signed between private parties.[1]

This method of building an autonomous legal discipline, however, promotes a distortion of the normative reality in certain matters. The pre-established goal as a true building method of everything that concerns administrative law is to differentiate it from private law. It seems that, in order to admit the existence of administrative law as an autonomous discipline, it is necessary to identify major differences of legal regimes in relation to similar matters in private law.

On the subject of public contracts, this narrative was taken over by the legislation itself, which points to a series of prerogatives, which would be typical of the legal regime for administrative contracts (Article 58 of Law No. 8,666 of 1993). It is common to designate such prerogatives as reproducing the so-called "exorbitant clauses" of administrative contracts; something that, once so exceptional, would not be allowed in private contract law.

The purpose of this essay is to question the correctness of this narrative. The objective is not to deny the existence of the rules included in the aforementioned legal provision, but only to verify whether the legal regime provided therein represents, in fact, an exorbitance in relation to the contractual bonds concluded between private parties.

To achieve this purpose, this essay adopts the theoretical investigation technique known as the normative technique, focusing on the legal-normative study based on positive Brazilian law and comparative law, accompanied by comments from the legal literature on the analyzed topics.

The conclusion obtained from this comparison is that, contrarily to what is normally stated, the legal regime envisaged for administrative contracts does not differ in substance from the common legal regime, especially regarding the existing asymmetry between contracting and hire.

The study uses the term "administrative contract" to refer to all the agreement of which the public administration is a party, regardless of the legal regime applicable.[2] Although there is a wide theoretical debate about

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1 DI PIETRO, Maria Sylvia Zanella. *Direito administrativo*. 29. ed. São Paulo: Atlas, 2016. p. 5

2 This terminological choice follows the line adopted in NOHARA, Irene Patrícia; ARRUDA CÂMARA, Jacintho. Licitação e contratos administrativos. In: DI PIETRO, Maria Sylvia

the legal concept of administrative contract, the choice for such term, which has a broader character, considers both the positive law, especially the wording of Article 2, sole paragraph, of Law No. 8,666 of 1993,[3] and the recurrent mention of this terminology in Brazilian jurisprudential texts. In the opportunities in which we deal with the special prerogatives in favor of the public administration present in the administrative contracts, we use the term "exorbitant clauses" or "extraordinary prerogatives".

In the second part, this study presents how the Brazilian works of theoretical profile and widespread tend to address the theme of exorbitant clauses. The third part is dedicated to demonstrating the position of some authors who question the real extent of the extraordinary prerogatives given to public administration. The fourth, fifth and sixth parts deal Special Appealectively with unilateral modification, termination for reasons of public interest and supervision and application of sanctions. The seventh part combines the points previously presented, organizing and then refuting the milestones of the idealization that surround the exorbitant clauses.

2. The exorbitant clauses of the administrative contract according to the Brazilian works of theoretical profile

In the Brazilian theoretical field, the exorbitant clauses of administrative contracts are repeatedly explained as a result of the administrative legal regime, which is guided, in this conception, by the combination of notions of exercising the administrative function, the supremacy of the public power and the search for satisfaction public interest.

In this sense, the bibliographic production in Brazil exposes that it is up to the State to protect the interest of the social group through the exercise of the administrative function, which includes duties and powers. To this end, the public administration would be given the position of authority in relation to private parties, with the purpose of managing public interests in conflict.[4]

Zanella (Coord.). *Tratado de direito administrativo*. 2. ed. São Paulo: Thomson Reuters Brasil, 2019. v. 6, p. 326.

[3] "For the purposes of this Law, any and all adjustments between public or private bodies or entities are considered to be a contract, in which there is an agreement of wills to form a bond and stipulate reciprocal obligations, whichever denomination used".

[4] BANDEIRA DE MELLO, Celso Antônio. *Curso de direito administrativo*. 34. ed. São Paulo: Malheiros, 2019. p. 71.

The exorbitant clauses are inserted in this scenario, being characterized as powers considered indispensable for the public interest,[5] especially so that the latter prevails over private interest[6] in public contracts.

These works clarify that the term exorbitant is used to differentiate administrative contracts from those agreements specific to civil law. The bilateral adjustments signed by the public administration are contracts qualified as administrative, since they leave the orbit of private law by prescribing clauses that make contractual parties asymmetrical, differently from what would happen in civil law. Such clauses would be "non-existent (…) in private law contracts, because they would mischaracterize them."[7]

Further dividing the reason why such clauses would not be allowed in private contracts, Maria Sylvia Zanella Di Pietro presents two different circumstances: clauses that, although lawful, are not usual in contracts governed by private law, and clauses that are illegal, whose prescription in contracts signed between private parties are prohibited. In the lawful but unusual clauses, there would be prescriptions that "assure one of the parties the power to unilaterally modify the adjustment or terminate it". The accountability of the hire without the need for the contracting party to resort to the Judiciary would represent an example of an illegal clause in the scope of private contracts.[8]

In addressing the issue of administrative contracts, the civilist Silvio de Salvo Venosa deals with the distinctive features of those kinds of adjustments in relation to private contracts, pointing out that the so-called exorbitant clauses are the fundamental criterion of this distinction. Often alluding to the most widespread writings in administrative lawr, the civilist refers to the powers of unilateral modification, unilateral termination, inspection and application of sanctions as powers marked "not only by allowing the Administration what

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5 Ibid., p. 655; MEDAUAR, Odete. *Direito administrativo moderno*. 21. ed. Belo Horizonte: Fórum, 2018. p. 218.

6 While the authors referred to in the previous footnote only mention the service of the public interest, Maria Sylvia Zanella Di Pietro especially highlights the *prevalence of the public interest over the private*: "When the Administration signs **administrative contracts**, the exorbitant clauses exist **implicitly, although not expressly provided for**; they are indispensable to ensure the government's supremacy position over the contractor and the prevalence of the public interest over the private" (Maria Sylvia Zanella Di Pietro, *Direito administrativo*, op. cit., p. 303).

7 CRETELLA JÚNIOR, José. As cláusulas "de privilégio" nos contratos administrativos. *Administrative Law Review*, São Paulo, v. 161, p. 7-28, July/September, 1985. p. 28.

8 Maria Sylvia Zanella Di Pietro, *Direito administrativo*, op. cit., p. 303.

the private person is prohibited of, but also for submitting the contracting administrator to a more or less wide-ranging business regime."[9]

The norms that emerged from the 1990s largely absorbed this theoretical position.[10] Arising in this scenario, Article 58 of Law No. 8,666 of 1993 lists prerogatives assured to the public administration, namely: (i) unilateral modification of contracts to better suit the purposes of public interest; (ii) unilateral termination; (ii) execution inspection of the agreement by the hire; (iv) application of penalties due to total or partial non-execution of the adjustment; and (v) occupation of movable goods, properties, personal and services related to the object of the contract in the case of essential services and in certain conjectures.

The legal writings classifies these prerogatives as exorbitant clauses, in addition to others, scattered throughout that law. Celso Antônio Bandeira de Mello[11] and Maria Sylvia Zanella Di Pietro[12] point out the limitation to the invocation of the *exceptio non adimpleti contractus* by the hire as an extraordinary prerogative of the public administration. The latter author also understands as exorbitant clauses the guarantee requirement to be provided by the hire and the exercise of self-protection to allow the annulment of an administrative contract (a prerogative that is not even mentioned in the law).[13]

In Brazil, with the advent of Law No. 8,666 of 1993 authors who defend the incidence of the so-called exorbitant clauses in all contracts signed by the public administration emerged.

This conclusion is based on Articles 58 and 62, Item 3, of Law No. 8,666 of 1993. Interpreted together, the provisions would indicate that the exorbitant clauses apply not only to contracts governed by public law, but also to agreements predominantly subject to private law rules.[14]

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9 VENOSA, Silvio de Salvo. *Direito civil*. Contratos. São Paulo: Atlas, 2019. p. 241.

10 See ALMEIDA, Fernando Dias Menezes. *Formação da teoria do direito administrativo no Brasil*. São Paulo: Quartier Latin, 2015. p. 347.

11 Celso Antônio Bandeira de Mello, *Curso de direito administrativo*, op. cit., p. 651.

12 Maria Sylvia Zanella Di Pietro, *Direito administrativo*, op. cit., p. 322.

13 Ibid., p. 314-320.

14 This is the perspective presented by Carlos Ari Sundfeld: "However, for the law, administrative contracts are not only those mentioned in Article 1. It reads in Article 62, Item 3: (…) The provisions to which the precept refers are precisely the definers of the prerogatives, including giving the Administration powers of modification and unilateral termination, of inspection, of sanctions, of cancellation, among others. They, by virtue of Article. 62, Item 3, apply to insurance, financing, rental contracts (already mentioned in Article 1) and 'to others, whose content is governed, predominantly, by private law rule'. The wording of the precept is teratological, as it ordered the full application of the public law regime to contracts governed 'predominantly' by the private sector; if now, under the law, they are subject to the

The narrative adopted by the most widespread Brazilian literature is not concerned with comparing the supposedly exceptional features of the public regime with the private contractual regime. The difference seems evident, even without a full demonstration of the discrepancy. In the following topics, we will demonstrate that the prerogatives attributed by law to the administration (the supposed exorbitant clauses) are not so different from the private law regime. There is a natural asymmetry between contracting and hire that is also observed in private contractual relations. What is called exorbitant clauses of administrative law, as it will be seen, is very similar to the position of the contracting in the hiring of private parties.

3. The exorbitant clauses seen from the effectiveness perspective: extraordinary prerogatives that do not have the extent they appear to have

The assertion that the administrative contracts are marked by the presence of exorbitant clauses suggests the idea of an intense subjection of hired private parties to the decisions of the contracting public administration. The word "exorbitant" itself gives the interpreter the notion of abuse, excess and even injustice. There is, therefore, not only a negative meaning, but also, and especially, of strength.

Those who are introduced, for the first time, to the exorbitant clauses of the administrative contracts tend to conclude that public administration, on the one hand, has intense and absolute extraordinary prerogatives and the hire, on the other hand, is subject to such powers without any counterpart. This initial impression is naturally mitigated when it is observed that the hire has certain guarantees, such as the right to economic-financial balance of the contract.

However, even so, the abstract statement of the exorbitant clauses reflects the idea of intense subjection of the hire to the public administration in a regime of strong prerogatives and in complete contrast to what occurs in

administrative regime (which in the law means: to the prerogative regime), they obviously are no longer subject predominantly to private law. In any case, the rule is clear: Management contracts, listed or not in Articles 1 and 62, Item 3 were subject to the typical regime of the administrative contract in the strict sense" (SUNDFELD, Carlos Ari. *Licitação e contrato administrativo de acordo com as leis 8.666/93 e 8.883/94*. Malheiros: São Paulo, 1994. p. 206-207).

the private contractual scope. This supposed asymmetry between one legal regime and another is more illusory than real.[15]

When analyzing the content and the effects of such extraordinary prerogatives, it appears that they are not so extravagant.

Other authors have already defended the relativization of this supposed exception regime of the administrative contracts. Caio Tácito, after presenting the unilateral mutability rule of the administrative contract, states that "this theoretical position, usually accepted in the doctrine, does not have the extension that it appears to have". He proceeds in the following sense: "The Administration does not freely enjoy the prerogative of varying the provision, which would completely exclude the bilateral nature and the consensual formation of the contract".[16]

José Guilherme Giacomuzzi, in a comparative study on public contracts in the United States, France and Brazil, alludes to Article 78, XII, of Federal Law No. 8,666 of1993, highlighting that the normative text innovated the previous legal regime regarding the unilateral termination for public interest by adding qualifications to the expression "reasons of public interest". As mentioned by the author, the law thus started to demand that the termination occurs in the hypotheses of public interest of "high relevance and broad knowledge", properly justified "by the highest authority of the administrative sphere to which the contracting is subordinate", within the scope of administrative process regarding the contract to be terminated.

Once such qualifications represent a limitation to the extraordinary State's prerogative of unilateral termination of the contract by public interest, the aforementioned jurist sees in them a more liberal, less State connotation, different from that which mainly affected the formation and development of administrative law in Brazil. He considers, however, that this circumstance, if isolated, is not enough to denote "that the Brazilian Law has become less 'exorbitant' or more favorable to the private interest; nor does this indicate that the State's power to terminate contracts has in practice diminished."[17]

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[15] There are those who consider the invocation of the so-called exorbitant clauses in Brazilian law a myth. See ARRUDA CÂMARA, Jacintho. O mito das cláusulas exorbitantes. *Jota*, São Paulo, October 22, 2019. Available at: <www.jota.info/opiniao-e-analise/colunas/publicistas/o-mito-dasclausulas-exorbitantes-22102019>. Accessed on: October 29, 2019.

[16] TÁCITO, Caio. *Direito administrativo*. São Paulo: Saraiva, 1975. p. 292.

[17] We highlight the entire passage extracted from the work of José Guilherme Giacomuzzi: "Although the French influence on the legal text is clear, it is also indisputable that the Brazilian legislator wanted to restrict the State's power to unilaterally terminate contracts. (…) The qualifications that follow the expression 'reasons of public interest' reveal a subtle and

Jacintho Arruda Câmara sustains that the prerogative of unilateral modification of the contract by the contracting public administration *"is much more discreet in positive Brazilian law than its abstract statement suggests"*.[18] As for the extraordinary prerogative of unilateral termination, considered in the light of the case law's understanding, it provides for that "the prerogative of terminating contracts for reasons of public interest in Brazilian Law is, to a certain extent, mitigated, as it is similar to the existing solutions in the field of private contracts".[19]

Thiago Marrara states that the "exorbitance of many clauses provided, for example, in Article 58 of the Bidding Law, is extremely low when compared to the private law". As an example, he mentions that it is common, in private contracts, clauses that discipline the inspection by one of the contractual parties and that establish penal clauses. Hence it concludes that the exorbitance in the public contracts does not lie in the content of the clauses that convey extraordinary prerogatives to the contracting public administration, but in "its mandatory contractual prevision".[20]

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important change. (…) It is clear that the qualifiers 'of high relevance' and 'broad knowledge', which by the current law were linked to the expression 'reasons of public interest' do not themselves mean that Brazilian law has become less 'exorbitant' or more favorable to the private interest; nor does this indicate that the State's power to terminate contracts has in practice diminished, or that the courts have begun to exercise finer scrutiny than the State claims to be a 'public interest' capable of terminating contracts in specific cases. (…) It seems to me, however, that the inclusion of these qualifiers for 'reasons of public interest' reveals a new and unexplored philosophy behind the law — which should not be negligible. (...) When seen in a historical perspective, however, the change seems to suggest not only a rhetorical change, but in the philosophy applicable to administrative contracts: as it is not possible to abandon the language— revealing a worldview—of the public interest, the 'liberal idea' was inserted in the text of the law through the qualifiers 'of high relevance and wide knowledge'. Without going into the stormy terrain of the dogmatic study of the control of administrative discretion (which would yield other work), it is possible to see in the commented alteration a reflection of the Anglo-American anti-state view—a view that is not applauded herein, but suggests that it has become involved in the spirit of the law" (GIACOMUZZI, José Guilherme. *Estado e contrato.* Supremacia do interesse público "versus" igualdade: um estudo comparado sobre a exorbitância no contrato administrativo. São Paulo: Malheiros, 2011. p. 353-354).

18 Irene Patrícia Nohara and Jacintho Arruda Câmara, *Licitação e contratos administrativos*, op. cit., p. 339.

19 Ibid., p. 391.

20 Check out: "In addition, it should be noted, also in a systematic interpretation, that the exorbitance of many clauses provided for, for example, in Article 58 of the Bidding Law, is extremely low when compared to private law. This is the case, for example, of the powers of inspection and the application of fines for non-compliance with the administrative contract. Obligations to support inspection and to pay a fine or even standardized preliminary reparations (through a penal clause) are common in private law. What happens in administrative law is basically the determination that such clauses affect all contracts, while in private law the choice depends on private negotiation. In other words, the exorbitance is not exactly in the content of the power, but in its mandatory contractual prevision—which, by the way, does not even imply that the

Therefore, there are authors who, from the analysis of positive law and Brazilian case law, put into perspective the exorbitance of the prerogatives granted to public administration in their contracts. Next, this study will address two of the most representative prerogatives: that of unilateral modification of the contracts and that of unilateral termination by the public interest, precisely to demonstrate that they are similar to what is observed in contractual relationships between private parties.

4. Unilateral modification

Brazilian positive law prescribes the hypotheses of unilateral modification of the agreement by the public administration. Law grants this prerogative, but the latter is also limited by the former, insofar as the law imposes material conditions and sometimes requires the agreement of the hire.

Article 58, I, of Law No. 8,666 of 1993 authorizes the unilateral modification to "better suit the purposes of public interest, respecting the hire's rights". Therefore, the modification always aims at a specific purpose, even if expressed by a very open concept. In addition, the aforementioned norm requires that the hire party's rights are guaranteed. Although the legal provision does not mention what such rights would be, its second paragraph[21] refers to the right to maintain contractual balance. Only in these two mentioned provisions there are two clear legal limitations to the prerogative of unilateral modification: compliance with a specific purpose prescribed by law and respect of hire's rights.

The Law No. 8,666 of 1993 goes further: according to the first paragraph of the referred article, the economic-financial and monetary clauses are only altered if there is the hire agrees to it.[22] Therefore, for the intended modification of the contract that requires changing the agreed economic-financial conditions—which will not always happen—, it is necessary that (i) this change aims to better adapt the contract to the purposes of public interest,

administrator will necessarily use it in the concrete case" (MARRARA, Thiago. As cláusulas exorbitantes diante da contratualização administrativa. *Revista de Contratos Públicos — RCP*, Belo Horizonte, yr. 3, No. 3, p. 237-255, March/August, 2013).

[21] Item 2. In the event of subitem I of this article, the economic-financial clauses of the contract shall be revised in order to maintain the contractual balance.

[22] Item 1. The economic-financial and monetary clauses of the administrative contracts cannot be changed without the prior agreement of the contractor.

as previously seen; (ii) the hire agrees; and (iii) the economic-financial equation is renegotiated.

In more detail, Law No. 8,666 of 1993 prescribes that the contracting public administration will unilaterally change the agreement to promote consistent qualitative changes "in the modification of the project or specifications" (Article 65, I, "a") and, also, quantitative changes that correspond to the addition and suppression of the object initially agreed (Article 65, I,"b").

In the event that the addition or deletion applies to items with predefined unit prices, the hire will support this modification imposed unilaterally up to the limits prescribed in Article 65, Items 1st and 2nd, II, that is: 25% of the initial updated value of the contract, in the case of works, services and purchases, and in the percentage of 50%, in the case of building or equipment renovation. If the unit prices have not been defined in the contracts, in addition to observing the mentioned limits, it will be up to the parties to fix such values "by agreement".

In other cases, the amendment to the contract is necessarily always agreed on a bilateral basis, namely: (a) replacement of the performance guarantee (Article 65, II, "a"); (b) modification of the execution regime of the work or service and the mode of "supply, in view of the technical verification of the inapplicability of the original contractual terms" (Article 65, II, "b"); (c) change in the form of payment (Article 65, II, "c"); (d) rebalancing the economic-financial equation (Article 65, II, "d"); and (e) deletions in the contractual object above the percentage 25% of the initial updated value of the contract, in the case of works, services and purchases, and in the percentage of 50%, in the event of building or equipment renovation (Article 65, Items 1 and 2, II).

There is a common limiter to all the hypotheses for amending the contract, whether unilateral or bilateral: the impossibility of changing the nature of the contractual object, whose identity shall always be preserved.[23]

As it can be seen, there are relevant legal limits to the unilateral modification of the contract, as the public administration can unilaterally modify the contract, but (a) it shall aim at *"the purposes of public interest"*; (b) it cannot change the nature of the contractual object; (c) it shall ensure the rights of hire, especially the right to maintain the economic-financial balance; (d) if the change reverberates in the economic-financial conditions

[23] In this sense, see SUNDFELD, Carlos Ari. Contratos administrativos — distinção entre acréscimo de valor estimado e ampliação do objeto: art. 65, § 1º, da Lei nº 8.666/93. *Fórum de Contratação e Gestão Pública — FCGP*, Belo Horizonte, yr. 4, No. 40, 2005.

agreed in the abstract, the hire's agreement will be needed; (e) shall respect the percentages imposed by law regarding the additions and deletions of the contractual object; (f) if items whose unit prices have not been previously defined have been added or deleted, an agreement shall be signed with the hire to fix such prices.

It appears, therefore, that the prerogative of unilateral modification of administrative contracts does not have the extension that it often appears to have.

Comparing with a contractual relationship between private parties, it is clear that there is no significant difference; nothing that can be called exorbitant. The private contracting of the work (contract of work) or service may, during the execution of the contract, determine to the hire changes in the object originally contracted. It is extracted from Article 619 of the Civil Code, which gives the contracting party the right to determine changes to the project submitted by the contractor, who, in return, may require an increase in the contracted price.[24]

Therefore, it is not because the turn-key contract has been signed based on a given project, for example, that the contracting party, even though that is a private party, is prevented from determining changes to the initial project. As the contracting party, he or she can determine changes to the project. To do so, obviously, he or she will have to renegotiate the price previously agreed. This is a condition similar to that which the public administration is obliged to meet. The public regime, as it can be seen, is close to the private one in this respect.

[24] See the provisions of the civilist legal writings: "Once the contractor is a specialist, it is assumed that he or she will have it calculated in the prevision of events, and this party cannot surprise the other with the demand for an amount greater than the adjusted price. In the absence of an express stipulation by the parties, the Code presumes the contract to work without readjustment (Civil Code, Article 619). This right to the price that the contracting party has is maintained even if changes are made in the approved project, unless these changes are made at the request of the developer, through written instructions, or if the contracting party has watched the changes and has not protested against them, in the event that they are visible and unequivocally imply an increase in the work cost (sole paragraph of Article 619)" (PEREIRA, Caio Mário da Silva. *Instituições de direito civil*. Volume III. Contratos. 23. ed. Rio de Janeiro: Forense, 2019. p. 281).

5. Unilateral termination in the public interest

Another important example is the termination of the contract for reasons of public interest by the contracting public administration. Under the terms of Article 79, I, of Federal Law No. 8,666 of 1993, the Public administration is authorized to terminate the agreement, by means of a unilateral act, in certain cases listed by law in which there is no fault of the contract.

In private law, the termination of the contract by mere manifestation of will by one of the parties without just cause is referred to as "unilateral termination". In this branch of law, this form of termination is not the rule, occurring only in certain contracts by virtue of the law or the terms agreed by the parties.[25] Once legally or contractually admitted and there has been unilateral termination, it is up to the party who resigned to indemnify the other for the losses and damages suffered.

This is the case, for example, of the turn-key contract prescribed by the Civil Code. According to Article 623 of this legal diploma, the contracting party (contracting) may terminate ("suspend", according to the wording of the legal provision) the contract "as long as the party pays the contractor the expenses and profits related to the services already made, plus reasonable compensation, calculated in function of what the party would have gained if the work was completed". Silvio Venosa points out that, although the legal text used the term "suspend it" (the work), the correct technical term would be "unilaterally terminate the contract", as stated in the Bill of Law No. 6,960 of 2002.[26] Still, the civilist corroborates the content of the aforementioned article when stating that the termination after the beginning of the work execution imposes the indemnity "of the expenses and the work done, as well as for the loss of profits calculated based on the conclusion of the work".[27]

Another example is the mandate contract: according to Article 682, I, of the Civil Code, in this contractual type, unilateral termination is applicable, which is called "revocation", a special feature of termination.

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[25] See: "Unilateral termination may result from the law or be established in the contractual instrument itself. Thus, only in the consensually foreseen hypotheses, or in which the law expressly or implicitly permits, the will manifestation of only one of the contractors can put an end to the effects of the deal." (TEPEDINO, Gustavo; KONDER, Carlos Nelson; BANDEIRA, Paula Greco. *Fundamentos do direito civil.* Volume 3. Contratos. Rio de Janeiro: Forense, 2020. p. 141).

[26] Silvio de Salvo Venosa, *Direito civil,* op. cit., p. 537.

[27] Ibid., p. 536.

Thus, there is legal authorization, within the scope of civil law, for the contracting party to terminate the agreement by its exclusive will, unilaterally and without any fault on the contrary party. In this specific aspect, public contracting is similar to private contracting in comment, hence the circumstance in which administrative law does not "go beyond" private law.

Fernando Dias Menezes de Almeida also uses the example of the turn-key governed by the Civil Code to demonstrate that the power of unilateral action exists not only in the public contractual sphere, but also in the private contractual sphere.[28]

The example of the turn-key governed by civil law demonstrates the existence of similarities between private contracting and administrative contract not only because of the aspect of the extraordinary prerogative of unilateral termination, but also, and especially, as to the extent of the indemnity due to the other party that did not terminate the agreement.

Item 2 and subitems I to III of Article 79 of Federal Law No. 8,666 of 1993 prescribe that the hire is entitled to "regularly proven losses that have been suffered", also assuring the return of the guarantee, payments due for the execution of the contract until the date of termination and payment demobilization cost.

In practice, due to the consolidation of the case law understanding regarding the matter in question, the hire is given other guarantees, in addition to those provided for in the article.

The first of these guarantees constitutes the right to full defense and to the adversary system in the scope of administrative process that precede the edition of the unilateral act of termination, as prevision in Article 78, sole paragraph, of Federal Law No. 8,666 of 1993,[29] whose applicability in the

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[28] "Even in private contracts, that is, contracts signed between private persons, around private interests, there may be a legal regime of unilateral action prerogatives, which will not result from the fact that the interests are private or not, but rather the circumstances surrounding that particular contractual object—circumstances that make it known to be more subject to the need for changes, which therefore leads Law to understand as appropriate a more flexible regime as regards the way of interpreting and applying the *pact sunt servanda*. Several examples in this sense can be extracted, in Brazil, from the Civil Code. Thus, a contract that, due to the nature of its object, typically includes mutability rules in its regime is the turn-key one. The contracting party has the right to suspend it, paying the contractor for the services already done, as well as indemnifying the party for the gains that it would have if the work would have completed (Article 623), or even responding for losses and damages in a more comprehensive way if deprived of just cause the suspension (Article 624)" (ALMEIDA, Fernando Dias Menezes. *Contrato administrativo.* São Paulo: Quartier Latin, 2012. p. 333-334).

[29] Single paragraph. The cases of contractual termination will be formally motivated in the case file, ensuring the contradictory and broad defense.

event of unilateral termination by the public interest is corroborated by the understanding of the Superior Court of Justice.[30]

The second concerns the extent of financial compensation paid to the hire: alongside the expenses already incurred and the profit corresponding to what had already been executed until termination, the hire is guaranteed the payment of loss of profits. The duty to indemnify the frustrated expectation of profit, although not expressly indicated in the legislation, has been imposed on the public administration by the Judiciary, especially considering the uniformity of Superior Court of Justice's understanding.[31]

Herein, it is worth mentioning briefly that the majorly position was in the sense of the payment of loss of profits, while in the past there was divergence on the part of minister Herman Benjamin.[32] In the understanding then presented by the minister, the loss of profits would not be due, either because there was eloquent silence on the legislator part by not providing the indemnity for the frustrated expectation of profit, either because the private party, when contracting with the public administration and, thus, knowing the legal regime, does not have the expectation of perceiving loss of profits.[33]

Monocratic decision dated December 2018 reveals the observance, by the minister mentioned, of the Superior Court of Justice's case law that affirms that the losses resulting from the unilateral termination include the incidental damages and the loss of profits.[34] The adhesion of the one who

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[30] "This Superior Court understands that the unilateral termination of the administrative contract based on the public interest, provided for in Article 78, XII, of Law No. 8,666 of 93, does not exempt the Public Administration from duly motivating it, with the prior hearing of the contracted party, and it is not 'possible to justify the abrupt termination of the contract under the pallium just that it would be precarious'. (....) (BRASIL. Superior Court of Justice. Internal Interlocutory Appeal in Special Appeal No. 1650210. Reporting Minister: Min. Gurgel de Faria. First Panel of the Superior Court of Justice, Brasília, DF, May 21, 2019).

[31] See BRASIL. Superior Court of Justice. Internal Interlocutory Appeal in the Appeal in Writ of Mandamus No. 41.474. Referendary: minister Regina Helena Costa. First Panels of the Superior Court of Justice, Brasília, DF, 16 November 2018; BRASIL. Superior Court of Justice. Special Appeal No. 1240057. Reporting Minister: Min. Mauro Campbell Marques. Second Class of the Superior Court of Justice, Brasília, DF, 21 September 2011; BRASIL. Superior Court of Justice. Special Appeal No. 232571. Reporting Minister: Min.Mauro Campbell Marques. Second Panel of the Superior Court of Justice, Brasília, DF, March 31, 2011.

[32] Irene Patrícia Nohara and Jacintho Arruda Câmara, *Licitação e contratos administrativos*, op. cit., p. 390.

[33] In this sense is the divergent vote made by minister Herman Benjamin in BRASIL. Superior Court of Justice. Motion in Special Appeal No. 737.741/RJ. Reporting Minister: Min. Teori Albino Zavascki. First Panel of the Superior Court of Justice, Brasília, DF, August 21, 2009.

[34] "The Superior Court of Justice case lawe recognizes the right to compensation when the losses resulting from premature contractual termination by an act of the Administration are proven, including the resulting damages and loss of profits, when the contracted party does not give

disagreed with the majority position reflects the consolidation in the Court of the understanding that the duty to indemnify for loss of profits applies to the public administration.

Also addressing the indemnity for loss of profits due to the unilateral termination of Brazilian administrative contracts, José Guilherme Giacomuzzi questions what would be the real theoretical basis underlying the previously mentioned case law. It seems important to understand this point, as he understands that there are two different potential foundations, each one with different consequences on the theoretical plan. On the one hand, the understanding that the payment of loss of profits is due by virtue of the application, although supplementary, of rules of private law would give the "administrative contract a stronger commutative connotation, proper to private law". On the other hand, the indemnity for loss of profits based on the right to economic-financial balance would reinforce "a more distributive connotation, typical of public law relations".[35]

Regardless of the theoretical basis that supports the understanding of Brazilian courts in the sense previously reported, the mere practice of paying loss of profits in the event of unilateral termination by public administration is not a trivial fact. On the contrary, it is crucial for understanding the effectiveness perspective of the regime of exorbitant clauses in the Brazilian administrative contract.

This is especially so because, in foreign legal systems, unilateral termination is allowed without the need of any unlawful conduct on the part of the hire, however it is not given the party the right to the perception of frustrated profits.

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cause to the termination" (BRASIL. Superior Court of Justice. Special Appeal No. 1714282. Reporting Minister: Min. Herman Benjamin. Superior Court of Justice, Brasília, DF, December 21, 2018).

35 "The difference in the basis for the indemnification of loss of profits is not academic. Knowing whether the foundation is in the Civil Code or whether it stems from the constitutional guarantee of the economic-financial balance of the administrative contract is relevant in order to determine the possibility of control of the issue by the Superior Court of Justice, which is not a small matter. But there is another reason, more important at the theoretical level: to base the indemnity on loss of profits on justified rules is to give the administrative contract a stronger commutative connotation, proper of the private law; on the contrary, if the foundation of the same duty to indemnify is the economic-financial balance of contracts—which, remember, has as its main idea the public principle of equality in the face of public burdens—the *ethos* that involves this relationship can gain a more distributive connotation, typical of the public law relations" (José Guilherme Giacomuzzi, *Estado e contrato*, op. cit., p. 357).

In Argentina, according to Augustín Gordillo, the contract is characterized as administrative when, among other hypotheses, the parties contract under the regime of exorbitant clauses, in which the indemnity of loss of profits is not due to the hire.[36]

In relation to the United States, José Guilherme Giacomuzzi reports that in the few cases in which the termination for convenience of government procurement is admitted by the State due to mere government's interest, it is not imputed to it the duty to indemnify the hire for his loss of profits.[37]

All these elements indicate, in short, that Brazilian administrative contracts in practice are very similar to contracts concluded between private parties regarding unilateral termination.

6. Other prerogatives: the supervision and application of sanctions

In addition to the unilateral modification and termination, Article 58 of Law No. 8,666, of 1993 establishes as prerogatives of the public administration the execution supervision of the agreement and the application of penalties in the face of the hire due to the total or partial non-execution of the adjustment.

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[36] *"También puede reconocerse carácter de 'contrato administrativo' al celebrado por la administración bajo 'cláusulas exorbitantes' al derecho común, esto es, cláusulas que están fuera de la órbita normal del derecho privado, sea porque no es usual convenirlas o porque serían antijurídicas a la luz de las normas privatísticas. Si la administración, en consecuencia, incluye en un contrato que celebra, cláusulas por las que puede aplicar ella misma y ejecutar también por sí ciertas penalidades (multas por retardo, pérdida de la fianza o del depósito de garantía, ejecución por terceros en caso de incumplimiento, etc.), por las que se exime de responsabilidad por falta de pago o por mora en los pagos, salvo el reconocimiento de reducidos intereses, por las que excluye la indemnización de lucro cesante si no cumple con el contrato, etc., entonces es obvio que el contrato ha quedado automáticamente sometido a un régimen de derecho público, siendo por lo tanto un contrato administrativo y no un contrato de derecho privado de la administración"* (GORDILLO, Augustín. *Tratado de derecho administrativo y obras selectas.* Tomo 9, primeros manuales. Buenos Aires: FDA, 2014. Available at: <www.gordillo.com/pdf_tomo9/libroi/capitulo16.pdf>. Accessed on: August 24, 2019).

[37] "In practice, the worst consequence or 'biggest impact' to the hire—and here, in short, lies exorbitance—when invoked termination for convenience is that he is not entitled to the profit he would have if the contract were fulfilled (anticipatory profit). While in private contracts of common law all the profit that would be perceived by the innocent party would be due in case of termination, in government procurement the compensation to the contractor is based on assumed costs plus a reasonable amount of profit on those costs. In other words, the contractor's reimbursement is limited to payments for the execution of the contract until the termination date, the costs previously incurred, the measured profit and the termination costs" (José Guilherme Giacomuzzi, *Estado e contrato*, op. cit., p. 330).

Further on, the legal text regulates each of these so-called prerogatives, establishing rules of action.

As for inspection, Article 67 of Law No. 8,666 of 1993, provides that the public administration will monitor and supervise contractual execution, represented either by a public agent or by a third party hired for this purpose. If defects and failures are found, it will determine what is necessary to regularize the execution.

This mode of inspection is in no way different from that adopted in private contracts. Using the example of the private turn-key contract again, it should be noted that "the contracting party always has the right to supervise its execution", as provided by Silvio de Salvo Venosa. According to the civilist, the contracting party, personally or by means of agent, "may impose an embargo on the work or take the necessary measures, should the contractor depart from the project, contract or technical standards acceptable for the hypothesis".[38] Such is the right of inspection assured to the contracting party that, according to the aforementioned author, this right is imposed even when the contract provides otherwise, that is, even when it expressly prohibits inspection.

Regarding the application of penalties, the Law No. 8,666 of 1993 provides for: in case of unjustified delay in the execution of the contractual object, the imposition of a default fine (Article 86); in the case of total or partial non— execution of the contract, four different penalties, among which the compensatory fine (Article 87, II).

In contracts signed between private parties, the prevision of a late payment fine and a compensatory fine is equally applicable and usual, designated by civil legislation as a "penal clause". According to the Article 408 and 409 of the Civil Code, "the penal clause may refer to: a) the complete non-execution of the obligation; b) that of any special clause; c) the default, simply (Civil Code 2002, Article 409). In the first two cases (letters a and b), it is called compensatory, and in the last (letter c), default fine".[39]

There is, therefore, a structural similarity between the penal clause governed by civil law, in its two types, and the fines predicted for in the aforementioned Articles 86 and 87 of Law No. 8,666 of 1993.

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[38] Silvio de Salvo Venosa, *Direito civil,* op. cit., p. 538.

[39] MONTEIRO, Washington de Barros. MALUF, Carlos Alberto Dabus. *Curso de direito civil*. Direito das obrigações. 1st part. 40. ed. São Paulo: Saraiva, 2015. p. 427.

In addition, civil law imposes a limit on the amount of the fine predicted for in the penal clause, establishing that this amount "cannot exceed that of the principal obligation", in observance to Article 412 of the Civil Code. There is no such disposition in the rules of administrative law. However, in the public hiring, in practice, the amount of fines is limited, either because the afore said rule of private law is applied, as provided by some authors,[40] or because the principle of proportionality applies to the application of such a penalty, which prevents the stipulation of exorbitant importance.

In addition, contracting, in particular, private companies can establish rules that prevent the hiring of suppliers who failed to partially or fully execute contracts previously signed or that do not meet certain rules of ethical conduct, for example. In fact, this has been an increasingly common practice, especially in companies that have established strict compliance rules, in the light of Article 42, III and XIII, of Decree No. 840 of March 18, 2015. In many cases, a code of conduct is presented to the hire supplier who, after agreeing with the rules therein, may be subject to the imposition of penalties, such as warnings, fines, suspension of purchase, services or supply, among other sanctions.

Such infractions and corresponding penalties in the private contractual environment are close to those provided for in Articles of Law No. 8,666 of 1993, which demonstrates that the application of sanctions is a prerogative of the contracting, whether public or private.

Glimpsing the aspects highlighted above, we note again that the exorbitant powers attributed to public administration, in fact, are very similar to the powers of contracting in general, whether public or private.

7. The idealization of exorbitant clauses

The wide Brazilian bibliographic production considers that the contracts qualify as administrative, once present clauses that come out of the orbit of private law and, thus, create a relationship of significant asymmetry between the parties. In this context, the hire would be subject

[40] See: "The fine as it is known has a pecuniary nature, representing an impact on the assets of the managed ones. For us, under no circumstances it can it exceed the amount of the obligation, following the same guidance given by the Brazilian Civil Code" (PESTANA, Marcio. *Licitações públicas no Brasil.* Exame Integrado das Leis 8.666/1993 e 10.520/2002. São Paulo: Atlas, 2013. p. 854).

to strong prerogatives of public administration, what would not exist in the field of contracting between private parties, either because it would be illegal, or simply because it would be unusual in the scope of adjustments governed by private law.

This conception is very widespread in theoretical works of administrative law, having sometimes even served as a basis for civilists to reproduce the same idea in a generic way and without considering a comparison with the rules of private law.

Yet, the administration's prerogatives are surrounded by several limitations, many of them imposed by the legal text and others deriving from reiterated case law. The public administration may unilaterally terminate a contract for reasons of public interest, but it must institute an administrative procedure, confer ample defense and contradictory and indemnify emerging damages and loss of profits; the public administration can change the contract, but, on certain occasions, it will Special Appealect certain objective limits and, on other occasions, it will need the agreement of the hire. Therefore, they are not as intense and imposing as they are usually stated.

This regime is not exorbitant compared to private law. In contracting between private parties is not uncommon, neither illicit, contractual prescriptions that confer, by agreement of wills, extraordinary prerogatives to one party not assured to the other, establishing, for example, the power of unilateral termination, in the cases where there is no legal rule in this sense, penal clauses and the power to inspect the service exclusively to a party. Taking these aspects into account, it seems that the prerogatives assured to the public administration are not exceptional, once there are powers equivalent to them in private contracts, so that both are, therefore, in the same orbit.

In practice, a large economic group of companies has more power to impose their wills on the other contractual party than the public administration. Firstly, because the hire who celebrates adjustment with the powerful party is subject to the conditions imposed by the contracting in order to maintain the contractual relationship that is interesting and advantageous to them, precisely because it is signed with a large client. Secondly, because the "private contracting" does not submit to the typical rules of control of the performance of the public administration. Thus, if the economic group of companies chooses to suppress part of the contractual object, it will adopt this measure without any limitation, imposing its will on

the hire that tends to accept it, even though reluctantly, as a way of preserving the commercial partnership, although the hire possibly possessed some right to compensation. However, if the administration intends to reduce the contractual object, unilaterally, it can only do so up to the percentage limit imposed by law, not having the same persuasion weapons as a private contracting, since its partners are chosen by bidding and the limits on the imposition of its will were predetermined by law. The private contractual relationship can, therefore, be as asymmetrical as much or even more than the public contractual relation.

Overcoming the milestones of idealization that surround the extraordinary contractual prerogatives of public administration demonstrates that close observance of reality, both legal and factual, matters. It is, therefore, essential for a more complete understanding of several themes that are often presented under a purely theoretical perspective, such as the exorbitant clauses of the administrative contract.

8. Conclusion

Brazilian positive law gives prerogatives to public administration in the context of administrative contracts. The existence of such prerogatives and the constant use of them by the public authorities are notorious, so that the present article was not liable to refute them. Nevertheless, in practice they are not exceptional as they appear.

This is due to different reasons. Public administration can invoke prerogatives, but they face limitations imposed by positive law and jurisprudence, and therefore do not have the strength often suggested in the description contained in Brazilian legal works of a more generalist profile. In the contracts signed by private parties, there are similar prerogatives exercised by the contracting. On certain occasions, the contracting public administration has even less powers than the "private contracting", since the latter is not subject to the bonds that the State has.

There is, therefore, a certain exaggeration in calling as exorbitant the prerogatives assured to public administration in the contracts it signs.

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