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Administrative Contracts: Reflections on the limitations of exorbitant clauses

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Abstract: In view of the inherent prerogatives of the Public Power vis-à-vis private individuals in administrative contracts, this article aims to reflect on exorbitant clauses in administrative contracts, their use, their characteristics, their species and their limitations. Based on this analysis, the topic of certain rights and guarantees in the Constitution was explored, such as the supremacy of the public interest over the private interest and economic and financial equilibrium. In order to carry out this work, a study was carried out through bibliographical research, analysis of legal provisions and doctrinal teachings in the areas of constitutional and administrative law. In fact, due to these principles, the feasibility and possibility of restricting the indiscriminate and abusive use of exorbitant clauses by the Public Administration was verified, since the legitimate use of such prerogatives is not indiscriminate and can be mitigated.

Keywords: prerogatives; exorbitant clauses; mitigations; economic and financial balance

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1. Introduction

In the panorama of contractual relations, equality between the parties and contractual equilibrium prevail. As such, contractual relations between private individuals are governed by common law, regulated by Civil and Business Law. On the other hand, in contractual relations between the Public Administration and the private individual, the principle of the supremacy of the public interest over the private interest prevails. As a result of this principle, various prerogatives of the Public Administration arise, such as exorbitant clauses or privilege clauses, which give the Administration a position of superiority over private individuals in its administrative contracts.

It should be noted that contracts signed by the public administration are, as a rule, governed predominantly by the public law legal system. However, the administration may enter into contracts governed by private law, in which case it would be in a horizontal legal position with the third-party contractor. These contracts are called administration contracts and do not have the prerogatives of public law. They could not therefore make use of exorbitant clauses.

Exorbitant clauses are often used to demonstrate an advantage or prerogative that the Administration has over third parties. The list of exorbitant clauses can be found in art. 104 of law 14.133/2021, which grants the Administration the possibility of: unilateral alteration and termination of the contract, supervision of the execution of the contract, application of penalties, requirement of a guarantee, temporary occupation and restriction of the opposition of the unfulfilled contract.

In this sense, in administrative contracts, in which the Public Administration acts in its capacity as a public authority, equality between the contracting parties is not necessary. Due to the principle of the superiority of the public interest over the private interest, there is verticality in the relationship between the Administration and the private party, due to the existence of advantages granted to the Public Administration, which allow for the inclusion of exorbitant clauses in the contract. It is important to clarify that the term "exorbitant" is not synonymous with abusive. They are given this name because they differ from private contracts. In addition, they cannot be considered abusive, since they have legal provision in Law No. 14,133/2021.

Furthermore, it should be noted that exorbitant clauses cannot be used in private contracts. Marinela (2012), when conceptualizing exorbitant clauses, states that if "the clauses were present in contracts governed by private law, they would constitute abusive clauses". On the other hand, it should be noted that, with respect to the principle of economic and financial balance and due process of law, these prerogatives must be exercised to the extent necessary to satisfy the public interest.

Against this backdrop, this article aims to reflect on exorbitant clauses in administrative contracts, their use, characteristics, types and limitations.

In view of this, it can be seen that there is often discussion of possible excesses or not by the Public Administration with regard to the use of exorbitant clauses in administrative contracts, which has become a matter of debate for the doctrine and the judicial understanding. Therefore, this article used bibliographic research methodology such as the federal constitution, bidding law 14133/2021, doctrine, books by renowned authors.

In view of the aspects observed, the article aims to conclude that although the public interest overrides others, it cannot, in any case, restrict and suppress the fundamental rights of private individuals in order to fulfill its purposes using the pretext of the public interest to satisfy its purposes and to achieve its objectives.

2. Parallel Between Administrative Contracts and Government Contracts

With regard to the study of contracts entered into by public entities and bodies with private individuals, it is worth highlighting the concept of a contract in a broader sense. Examining the subject, Meirelles (2000) defines a contract as:

Any agreement of wills, freely signed by the parties, to create reciprocal obligations and rights. In principle, every contract is a bilateral and commutative legal transaction, i.e. between people who undertake to provide mutual and equivalent services in terms of charges and advantages. As a consensual pact, it presupposes the freedom and legal capacity of the parties to validly bind themselves; as a legal business, it requires a lawful object and a form prescribed or not prohibited by law. Thus, a contract can be seen as an agreement of wills between two or more capable people, with a lawful and possible object, aimed at generating mutual obligations between the contracting parties in order to acquire, protect, alter or extinguish rights, based on the concurrence of wills.

It should be noted that in order to draw a parallel between the two, it is necessary to have knowledge of the concept of administrative contracts, as these are contracts that have exorbitant clauses. According to Cunha Júnior (2012), an administrative contract "is the agreement that the Public Administration, acting with supremacy, enters into with the private party in order to achieve objectives in the public interest, under the conditions set by the Administration itself."

The Public Administration, like private individuals, also enters into contracts. Through them, the Administration acquires particular goods and services. Public bidding is the administrative process by which the administration selects the best proposal for a contract that best serves the public interest. Administrative contracts are governed by public law, the basic principle of which is the supremacy of the public interest over the private interest, characterized by the use of exorbitant clauses or privileges. On the other hand, as administration contracts are predominantly governed by private law, the contracting parties are on the same legal level. Thus, since in principle no advantage is conferred on the administration, the private party and the public administration are in a horizontal position. Examples of government contracts are purchase and sale, donation, insurance, financing or leasing.

2.1 Exorbitant Clauses

Concept and difference between exorbitant clauses and abusive clauses

Exorbitant clauses identify administrative contracts and differentiate them from private contracts, since they characterize the relationship of Supremacy between the Public Administration and the private individual. At first glance, it is worth noting that such clauses are only allowed in administrative contracts, and are inadmissible in contracts governed by private law. This is due to the great inequality between the contracting parties, in which one party would be in a position of supremacy over the other. Marinela (2012), when conceptualizing exorbitant clauses, states that:

Exorbitant clauses are those that go beyond, exceed and go beyond the common standard of contracts in general, in order to consign an advantage to the Public Administration. They refer to certain prerogatives of the Administration which place it in a situation of superiority in relation to the private contractor. If these clauses were provided for in a contract governed by private law, they would be abusive, unlawful and therefore unreadable.

Thus, if such clauses were present in contracts governed by private law, they would constitute unfair terms. It is important to clarify that the term "exorbitant" is not synonymous with abusive. In this sense, it is important to conceptualize that abusive clauses are those that put the consumer at a disadvantage in consumer contracts. In other words, they are those that are in the contract, but which can be null and void because they put the consumer at a disadvantage and do not find legal support.

From this, it can be seen that exorbitant clauses are given this name because they differ from private contracts. They are called exorbitant because they go beyond the clauses allowed under private law. In addition, they cannot be considered abusive, since they have legal provision in Law 8.666/93 and Law 14.133/2021.

Types of exorbitant clauses

On this subject, it is worth listing and clarifying the exorbitant clauses that are most used by the public administration in its administrative contracts.

We can find the public law prerogatives of the contracting administration, generally 104 of law 14.133/2021:

> Art. 104. The legal regime for contracts established by this Law confers the Administration, in relation to them, the prerogatives to:
> I. modify them, unilaterally, in order to better suit the purposes public interest, with due regard for the rights of the contractor;
> II. terminate them, unilaterally, in the cases specified in this Law; III - supervise their execution;
> III - supervise their execution; III - supervise their execution; III - supervise their execution; supervise their execution;
> III. apply sanctions for total or partial non-performance of the agreement;
> IV. provisionally occupy movable and immovable property and use personnel and services linked to the subject matter of the contract in the event of:
> a. risk to the provision of essential services;

> b. the need to safeguard the administrative investigation of the contractor's.
> c. risk to the provision of essential services; b. the need to safeguard the administrative investigation of contractual faults by the contractor, including after the contract has been terminated.
> § Paragraph 1 The economic-financial and monetary clauses of the contracts may not be altered without the prior agreement of the contractor.
> § Paragraph 2 In the event provided for in item I of the heading of this article, the economic and financial clauses of the contract must be financial clauses of the contract that must be reviewed in order to maintain balance.

One of the forms of exorbitant clauses, as set out in the aforementioned article, is the unilateral modification of the contract; this prerogative is justified in order to protect the collective interest. This prerogative is justified in order to protect the collective interest. the contract in order to adapt it to what best benefits the administration. Unlike consensual modifications, in which the parties jointly agree, unilateral changes do not require the agreement of the contractor. Thus, during the duration of the contract, it may be modified, so that the rights of the private party may be restricted.

In this way, in order to ensure that the contractual amendment is not used excessively and does not restrict the rights of individuals too much, in order to maintain the economic and financial balance and financial balance of the beginning of the contract, art. 124 and 125 of law 14.133/2021 must be obeyed establish rules that adequately frame the use of this prerogative:

> Art. 124. The contracts governed by this Law may be amended, with the justification, in the following cases:
> I - Unilaterally by the Administration:
> a. when there is a modification to the project or specifications, in order to technical suitability for its objectives;
> b. when it is necessary to modify the contract value as a result of as a result of an increase or decrease in the quantity of its object, within the limits permitted by this Law;
> Art. 125. In the unilateral changes referred to in item I of the caput of Article 124(I) of this Law, the contractor shall be obliged to accept, under the same contractual the same contractual conditions, additions or deletions of up to 25% (twenty-five five percent) of the updated initial value of the contract that are made in the works, services or purchases, and, in the case of renovation of a building or equipment, the limit for additions will be 50% (fifty percent).(fifty percent).
> Art. 126. The unilateral changes referred to in item I of the main body of Article 124(I) of this Law may not transfigure the object of the contract.
> Art. 130. In the event of a unilateral amendment to the contract that increases or decreases the contractor's charges, the Administration must re-establish, in the same amendment, the initial economic and financial balance.

According to the articles cited above, the Administration must comply with the limits on and quantitative changes. These changes arise from new, supervening facts, that could not have been foreseen at the beginning of the contract, by pre-existing situations, but not known at the time of not known at the time of contracting and even due to poor planning. Quantitative changes concern the size of the object, its decreases and increases; qualitative changes provide for changes in the technique, quality and destination of the object. It is necessary to emphasize that contractual changes cannot be seen as a general rule, nor can they be seen as discretionary should be seen as an exception and, in order for them to be used, they must be duly justified reasons for the contractual amendment. Speaking about contract amendments in Administrative Law, Justen Filho (2008, p.539) teaches that:

> Administration, once the contract has been awarded, cannot impose changes to the agreement by simply invoking its discretionary powers. This discretion has already been exhausted because it was exercised at a time. STF Precedent No. 473 itself represents an obstacle to contractual amendments that refer only to administrative discretion. The Administration has to prove it, Therefore, the supervening of a reason justifying the amendment change. It must show that the solution found in the internal phase of the bidding process did not subsequently prove to be the most appropriate. It must indicate that subsequent events have altered the factual or legal situation and require a different treatment to the one adopted. This interpretation is reinforced by the provisions of art. 49, which reserves the right to revocation of the bid only in the event of "reasons of public interest arising from a supervening fact.

An exorbitant clause is also constituted by the possibility that the Public Administration Unilaterally terminates the contract, which occurs in cases of total or partial non-performance of the administrative contract by the private contractor. This prerogative is found in articles 137 to 139 of law 14.133/2021. According to article 137 of law 14.133/2021, the following are grounds for terminating the contract:

> Art. 137. The following shall constitute grounds for termination of the contract, which must be formally motivated in the case file, ensuring the following situations:
> I. non-compliance or irregular compliance with public bidding rules or contractual clauses, specifications, projects or deadlines;
> II. failure to comply with regular determinations issued by the authority designated to monitor and supervise its execution or by authority;
> III. social alteration or modification of the purpose or structure of the company that restricts its ability to complete the contract;
> IV. decree of bankruptcy or civil insolvency, dissolution of the company or dissolution or death of the contractor;

> V. unforeseeable circumstances or force majeure, duly proven, preventing the performance of the contract;
> VI. delay in obtaining the environmental license, or impossibility of obtaining it, or
> VI. delay in obtaining the environmental license, or inability to obtain it, or substantial alteration to the preliminary project resulting therefrom, even if obtained within the prescribed period;
> VII. delay in releasing areas subject to expropriation, eviction or administrative eviction or administrative servitude, or the impossibility of release of these areas;
> VIII. reasons of public interest, justified by the highest authority of the authority of the contracting body or entity;
> IX. non-compliance with obligations relating to the reservation of positions provided for by law, as well as by other specific rules, for people with a person with a disability, a person with a Social Security disability or an apprentice.
> § Paragraph 1 Regulations may specify procedures and criteria for verification of the occurrence of the reasons provided for in the heading of this article.
> § Paragraph 2 The contractor shall have the right to terminate the contract in the following cases hypotheses:
> I. suppression, by the Administration, of works, services or purchases which leads to a change in the initial value of the contract beyond the limit allowed in art. 125 of this Law;
> II. suspension of performance of the contract, by written order of the Administration, for a period of more than 3 (three) months;
> III. repeated suspensions totaling 90 (ninety) working days, regardless of the mandatory payment of compensation for successive and contractually unforeseen demobilizations and mobilizations and others;
> IV. a delay of more than 2 (two) months from the issue of the invoice, payments or installments of payments due from the payments due from the Administration for works, services or supplies;
> V. failure by the Administration to release, within the contractual deadlines, the area, site or object, for the execution of the work, service or supply, and of sources of natural materials specified in the project, including due to delay or non-compliance with the obligations assigned by the contract to the expropriation, vacating public areas or environmental licensing.
> § Paragraph 3 The cases of extinction referred to in items II, III and IV of Paragraph 2 of this article shall comply with the following provisions:
> I. they shall not be admitted in the event of public calamity, serious disturbance of internal order or war, as well as when arising from an act or fact that the contractor has practiced, participated in or
> participated in or contributed to;
> II. ensure that the contractor has the right to opt for the suspension of obligations until the situation is normalized, the economic and financial balance of the contract may be re-established "d" of item II of the caput of art. 124 of this Law.
> § Paragraph 4 The issuers of the guarantees provided for in Article 96 of this Law must be notified by the contracting party of the initiation of administrative process to investigate non-compliance with contractual clauses.

It should be emphasized that any cases of contract termination must be duly motivated and the principles of adversarial proceedings and ample defense must be ensured. Thus, it can be seen that termination is an act bound by the hypotheses of art.137 and ss of law 14.133/2021.

In this sense, Meirelles (2000) teaches:

> Unilateral or administrative termination may occur both due to default of the contractor or by the public interest in the cessation of the normal performance of the contract, but in both cases just cause is required for the cause is required for the termination of the agreement, as it is not a discretionary act, but is linked to the reasons that the legal norm or the contractual clauses as grounds for this exceptional termination.

The Public Administration also has the prerogative to supervise the execution of contracts. According to this, in order to preserve the public interest, the Administration must supervise and monitor the performance of the contract. For this reason, the Administration may intervene in the contract, if necessary, in order to regulate the contract in a way that best suits the public interest.

This is the prerogative of the Public Administration, since if it is proven that there has been a lack of absence of supervision, the State may be liable for any damage caused by the company, including company, and may even be liable for labor obligations. In the words of Justen Filho (2008):

> It is up to the Administration to appoint an agent of its own to monitor the activity of the other contractor. The provision must be interpreted to mean that supervision by the Public Administration is not merely an option granted to it. It is a duty to be exercised in order to better fulfill fundamental interests.

The Administration may also impose penalties on the private parties contracted as a result of breach of the agreement. This is due to the need for the contracts to be executed and the public interest preserved. The bidding law itself in its article 115 stipulates that "the contract must be faithfully executed by the parties, in accordance with the clauses agreed and the rules of this Law, each party being responsible for the consequences of its total or partial consequences of its total or partial non-performance".

As already explained, the use of exorbitant clauses by the Administration must obey the principle of the unavailability of the public interest. According to this principle, the Public Administration cannot waive the exorbitant clauses, and has the power and duty to exercise them whenever convenient and opportune for the public interest. In this sense, Di Pietro (2012) states:

> Precisely because they cannot dispose of the public interests whose guardianship assigned to them by law, the powers attributed to the Administration are a duty; they are powers that it cannot fail to exercise, under penalty of exercise, under penalty of being held accountable for the omission. Thus, the authority cannot the exercise of the powers granted to it by law; it cannot fail to by law; it cannot fail to punish when it finds that an administrative offense has been administrative wrongdoing; it cannot fail to exercise its police powers to the exercise of individual rights in conflict with the well-being of the collective well-being; may not fail to exercise the powers deriving from the hierarchy; it cannot be liberal with public money. Every time it fails to exercise its powers, it is the public interest that is being harmed.

In this way, it is clear that the application of penalties by the public administration, as a result of non-compliance with the administrative contract, it must apply the sanctions set out in Article 156 of Law 14.133/2021, in verbis:

> Art. 156. The following sanctions will be applied to those responsible for the administrative provided for in this Law, the following sanctions will be applied
> I. warning;
> II. fine;
> III. impediment to bidding and contracting;
> IV. being declared ineligible to bid or contract.

However, it is important to emphasize that the administrative process for imposing penalties, as well as the use of any of the exorbitant clauses, to private individuals contracted by the Public Administration, the fundamental rights and guarantees present in the guarantees contained in the Constitution, such as due process of law, full defense and contradictory financial balance, under penalty of annulment of the act.

Limits to exorbitant clauses in administrative contracts

As explained above, due to the principle of the supremacy of the public interest over the private interest, the Public Administration can use exorbitant clauses in its administrative contracts. However, these prerogatives are not absolute.

Exorbitant clauses can be mitigated in specific cases. When there is a conflict between rights, it is up to the interpreter to check which interest will override the other. Thus, there are hypotheses in which even if the Public Administration acts with superiority over the private party, the exorbitant clauses may be restricted.

It should be noted that exorbitant clauses are not a discretionary act by the Public Administration, since their application must go beyond a mere judgment of convenience and opportunity. The validity of these clauses therefore requires a statement of the reasons behind them.

Examining the subject, Justen Filho (2008), clarifies that:

> The Administration has a duty to give reasons for its decision to modify the administrative contract. This is necessary in view of the guiding principles of administrative activity, and especially of the bidding process. Without motivation, the unilateral amendment of the administrative contract will be invalid. However, motivation cannot consist of simply invoking the need for some public interest, of indeterminate material content. The Administration must indicate the concrete, real and defined reason for the change. Furthermore, it must demonstrate that this reason did not exist at the time of the contract. It is also undeniable that the change made to the contract must be in proportion to the change in the underlying circumstances.

Furthermore, it should be emphasized that the public interest cannot override fundamental rights and guarantees to the point of extinguishing them. In the Democratic Rule of Law, it is unacceptable for the Public Administration to arbitrarily use its inherent prerogatives to limit these rights. Thus, it is in fundamental guarantees that exorbitant clauses can have their use limited.

Exorbitant clauses and the guarantee of the principle of economic and financial equilibrium

The right to economic and financial equilibrium is a guarantee enshrined in our legal system, with legal provision in the Federal Constitution and the Bidding Law. In this context, it is pertinent to conceptualize this principle. Meirelles (2000), examining the subject, noted that:

> The financial equilibrium or economic equilibrium, or economic equation, or even financial equation of the administrative contract is the relationship initially established by the parties between the contractor's charges and the Administration's retribution for the fair remuneration of the object of the agreement. This burden-remuneration relationship must be maintained throughout the execution of the contract, so that the contractor does not suffer an undue reduction in the normal profits of the enterprise.

Corroborating this understanding, Justen Filho (2008) mentions that:

> Once the economic and financial equilibrium has been broken, the private party must ask the Administration to take the appropriate measures. (...) The original situation at the time of submitting the bids and the subsequent situation must be examined. It will be checked whether the original relationship between charges and remuneration has been affected. If so, the contractor's remuneration must be altered in proportion to the change in charges.

In this way, it is possible to see the contractor's right to demand that the economic and financial balance of the contract be re-established if the contract is broken or becomes too onerous. Therefore, if the charges are increased, the initial situation will have changed.

Article 37, XXI of the Constitution guarantees those who contract with the Public Administration "a public bidding process that ensures equal conditions for all competitors, with clauses that establish payment obligations, maintaining the effective conditions of the proposal". It is clear here that the Administration has a duty to respect the conditions of the bidding process.

In addition to the Constitution, this principle also finds its basis in the Bidding Law. Reading this law, it is possible to see that in cases of extension of contractual terms and unilateral modification of the contract by the Administration, there is a guarantee of economic and financial equilibrium. Art. 124 of the Bidding Law provides for any contractual amendments.

> Art. 124. The contracts governed by this Law may be amended, with due justification, in the following cases:
> (...)
> II - by agreement of the parties:
> (...)
> d) to re-establish the initial economic and financial balance of the contract in the event of force majeure, unforeseeable circumstances or events of incalculable consequences, which make it impossible to perform the contract as agreed, respecting, in any case, the objective distribution of risk established in the contract.

This confirms that, in a specific case, any economic imbalance in the contract could limit or even inhibit the use of exorbitant clauses. Just as on the one hand there is the Administration's prerogative to unilaterally alter the contract, on the other hand there is the right to the principle of economic and financial balance between the parties.

> Finally, if the contract needs to be adapted to better serve the public interest, it will be up to the competent administrative authority to make a weighing-up judgment, according to Justen Filho (2009, p.476), "which does not allow the modification of the contract, even if agreed by mutual agreement between the parties, to imply a radical alteration or lead to frustration of the mandatory bidding process and the essence of the object of the contract in question".

3. Methodology

In order to study the limits to exorbitant clauses in administrative contracts, a qualitative study will be carried out, using exploratory and bibliographical research. Unlike quantitative research, qualitative research does not require the formulation of hypotheses, nor does it require numerical data to enumerate or measure the object under analysis.

The results of studies of this nature can support hypotheses for future work. These studies start from broader questions or focuses of interest, which are defined as the study is carried out. According to Jensen and Jankowski (1995), in recent years there has been greater interest in the use of qualitative methods in studies of social and cultural processes. Based on the classifications of research established by Antônio Carlos Gil (1987), in terms of level, the proposed study is of the exploratory type, advisable when the situation is little known and when the researcher's intention is to provide an overview of the subject, fulfilling objectives such as: contributing to knowledge of the subject; establishing possibilities for new research; and also opening up space for the creation of hypotheses that direct other studies.

This study will be carried out by means of bibliographical and exploratory research, i.e. it will be qualitative in nature, where there is no obligation to formulate hypotheses. Qualitative research seeks to understand a specific phenomenon in depth. It is descriptive because it works with comparisons, interpretations and attributions of meaning, rather than statistics, rules and other generalizations. When carrying out studies of this nature, the researcher gathers information, examines each case separately and tries to build a general theoretical framework, using the inductive method. In qualitative research, according to Teixeira (2002), the researcher tries to reduce the distance between theory and data, between context and action, using the logic of phenomenological analysis, i.e. understanding phenomena by describing and interpreting them.

4. Analysis and Discussion

The public administration aims to satisfy and achieve the public interest. To do this, it needs to contract goods and services in which it is not self-sufficient. Thus, we have administrative contracts, legal relationships established by the Public Power with a legal nature of Public Law and the private party, regulated by the rite of the bidding law and with the prerogative of exorbitant clauses.

In view of this, the work was analyzed based on the research objectives of administrative contracts governed by administrative law, their exorbitant clauses and their mitigation. We used a compilation of bibliographical research as a reference for the study, based on doctrinal and legislative analysis.

To begin with, it should be noted that there has been controversy over the subject under study, due to the possibility or not that limiting exorbitant clauses will clash with the principle of the supremacy of the public interest over the private interest. Justen Filho (2008) states that the public administration must give reasons for contract changes and terminations, and cannot base them on simply invoking the need for some collective interest; in addition, the change made to the contract must be proportional and reasonable.

Based on this, the concept of administrative contracts was highlighted, which according to Meirelles (2016), is "the agreement of will that the Public Administration, acting in this capacity, signs with a private individual or other administrative entity to achieve objectives of public interest, under the conditions established by the Administration itself".

It can thus be seen that for administrative contracts to exist there must be a prior call for tenders, which will only be waived in the cases provided for by law, thus the figure of the Public Administration has supremacy of power, which can be seen from the imposition of the so-called privilege clauses.

In addition, it is worth noting that, to complement the study, exorbitant clauses were differentiated from abusive clauses, in that the latter put the consumer at a disadvantage in consumer contracts while the former are not abusive because they have legal provision in law 14.133/2021.

In this context, however, when signing an administrative contract, although the supremacy of the public interest prevails, the interests of the contractor must also be preserved, provided that this does not harm the community, as well as maintaining the economic and financial balance, which forms a relationship of apparent equality between the parties.

With regard to economic and financial equilibrium, Marinela (2017) explains that it is the "de facto relationship between the set of all the charges imposed on the private party and the corresponding remuneration", so it is necessary to maintain the charges and advantages set at the time of contracting. Therefore, if the economic-financial imbalance generated by an unforeseeable supervening event is flagrant, its occurrence cannot be blamed on either party.

Finally, it is therefore concluded that it is possible to review and limit the privilege clauses in order to maintain the economic and financial balance provided for in law 14.133/2021, as well as to protect the contracted party. In addition, Professor Justen Filho (2008, p.219) corroborates this understanding when he states that when an economic and financial imbalance is identified, the private party may provoke the Administration to adopt the appropriate measures, which must examine the situation and, if the burden is verified, change the values in proportion to them.

5. Conclusions

Analyzing the content covered in this paper, we see that the Public Administration, due to the principle of the supremacy of the public interest over the private interest, has prerogatives to the detriment of private individuals, such as the presence of exorbitant clauses. However, the use of these prerogatives is not indiscriminate and may be mitigated. In view of this, the prevailing understanding in the doctrine is that it is possible to mitigate the exorbitant clauses of the administrative contract, precisely because of the need to defend the right to respect the interests of the contracted party, in addition to the merits of the community. Thus, based on a more detailed analysis of the maintenance of the economic-financial balance, the research in question defended the thesis that it is possible to mitigate these clauses, without losing the objectivity of satisfying the collective interest. However, it is also necessary to consider the importance of defending the public interest, and even recognize the strength of this overriding principle of public administration. Despite this, it is also understood that there is no reason for the Government to act arbitrarily and, at times, overstepping, without zeal, the needs of the contracted party. Therefore, when collisions between rights occur in a specific case, the interpreter must check, based on constitutional principles, which right will override the other. Thus, in the same way that the Public Administration is guaranteed certain prerogatives, on the other hand, private individuals must also preserve fundamental rights and guarantees such as respect for the economic and financial balance of the contract. This research has shown that the mitigation of exorbitant clauses does not prevent the public interest from being realized; it only prevents the government from using exorbitant clauses to harm the private party, destabilizing a legal contractual relationship. Therefore, even if there are reasons of public interest that justify the use of exorbitant clauses, the Public Administration cannot indiscriminately exercise this right. All administrative acts and contracts must respect the guiding principles of the democratic rule of law. Failure to comply with any of these principles will result in the Public Administration having its clauses mitigated or even annulled, as well as the obligation to fully comply with the contract or pay damages.

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