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DUE PROCESS IN ARBITRATION

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ABSTRACT

Due process has had a historical evolution over the years. The discordance in its definition, applicability and development was compressed when it was established as a fundamental right in the different States of Law. The modern States established normative hierarchies in which the Constitution is the supreme norm, being the main source of protection of fundamental rights. However, the attempt to relate the guarantees of due process to the arbitral seat involved, once again, doctrinal clashes. This is because the essential characteristics of arbitration, such as autonomy and celerity, are found in arbitration. On the contrary, due process is characterized by guaranteeing the protection of constitutionally protected rights in the jurisdictional or administrative sphere. Indeed, the purpose of this article is to link due process to arbitration and, in addition, to demonstrate whether its scope of application is absolute or whether some restrictions are necessary because it is an autonomous and private matter.

Keywords: arbitration - fundamental rights - rule of law.

RESUMEN

El debido proceso ha tenido una evolución histórica a lo largo de los años. La discordancia sobre su definición, aplicabilidad y desenvolvimiento fue comprimida al establecerse como un derecho fundamental en diferentes Estados de Derecho. Los Estados modernos establecieron jerarquías normativas en las que la Constitución se encuentra como norma suprema, siendo la principal fuente de protección de derechos fundamentales. Ahora bien, el intento por relacionar las garantías del debido proceso a la sede arbitral supuso, nuevamente, enfrentamientos doctrinarios. Esto se debe a que en el arbitraje yacen características esenciales como la autonomía y celeridad. Y, por el contrario, el debido proceso se caracteriza por garantizar la protección de derechos constitucionalmente protegidos en el ámbito jurisdiccional o administrativo. En efecto, el presente artículo tiene como fin vincular al debido proceso con el arbitraje y, además, demostrar si su ámbito de aplicación es absoluto o son necesarias algunas restricciones por tratarse de una materia autónoma y privada.

Palabras clave: arbitraje – derechos fundamentales – Estado de derecho.

INTRODUCTION

Due process is a constitutional guarantee applicable to different jurisdictional and administrative orders and is legitimized in its regulation as a fundamental right in countries where Constitutions are the supreme norm (García, 2008).

Due process has been broadly understood as the correct application of rules based on the respect and guarantee of certain attributions that aim to avoid violations and arbitrariness during the

process. In other words, it tends to defend and impart justice and efficiency to those involved in a given procedure (Rincón, 2012). As for the Mexican doctrine, due process is understood as "the set of conditions and requirements of a legal and procedural nature that are necessary to be able to legally affect the rights of the governed (Lara, 2006; Chaname, 2006).

In the work of the German Oscar von Bülow, due process is defined as a legal relationship of public law. This definition shows how the process was defined, in principle, concerning state law and later came to be criticized due to the influence of the constitutionalization of procedural law (Marinoni, 2011). Furthermore, it should be noted that this explanation of due process and its legal relationship with public law has been successful in Latin American procedural legislation, in which the process is conceived and, on these, the consequent regulations were established only recently (Priori, 2019).

However, it is relevant to consider the different interpretations of due process based on international doctrines such as the American Convention on Human Rights, the Inter-American Court of Human Rights and different Latin American authors. The purpose of covering the term from different perspectives will help to maintain a broad vision of its applicability and development in the legal world. Likewise, it is appropriate to briefly outline the historical evolution of the process to relate its implications to arbitration.

The issue to be addressed in this article is how the common application of due process in the judicial venue has had an impact on due process considerations in the arbitral venue. Arbitration, broadly defined, is an alternative means of dispute resolution, which must comply with certain formal and substantive procedures. The purpose of this is to protect private interests and, consequently, fundamental rights.

However, there is a doctrinal discrepancy about the interference of due process in arbitration, since the essence of arbitration is based on the autonomy of the parties. This is because, on the one hand, due process has evolved normatively both nationally and internationally. Its importance lies in the fact that it is considered a fundamental right of every citizen and, therefore, its adaptation involves other constitutional guarantees such as effective judicial protection, the right to a competent judge, and the right to a reasonable time, among others. On the other hand, arbitration is conceived based on the autonomy of the parties and is characterized by its speed, flexibility and efficiency. As there are different doctrinal positions on the exact definition and development of arbitration, it has not been able to be concisely related to due process.

There are two categorical positions on the applicability of due process in arbitration proceedings. One position defends the constitutionalization of due process in all areas related to the administration of justice since the limit of arbitral awards and their subsequent enforcement should be fundamental rights; while the other position points out that the constitutionalization of due process in arbitration would have a serious impact due to the nature of arbitration: the autonomy of will.

The dichotomy between public and private, in a way, has marked a milestone in the conception of the process. The fragmentation between the two took a radical turn in Latin America, where trends appeared that, without ignoring the public nature of the processes, recognized the autonomy of the parties, making it possible for procedural conventions to be made (Picó, 2012). Subsequently, once the constitutional states were established, the processes began to be set based on the dignity of the person and are considered the most important and central of the process (Tapia, 2010; Robledo, 2018). Thus, the rights that were part of procedural institutions were established as fundamental rights, as can be evidenced in national and international regulations through treaties.

Due process has been shaped as a source of norms to process rights legally. In a way, what is proposed is that the process is a means by which both the parties and the legitimacy of the judges can coexist as a motive and guarantee for each other. The institutional dimension it possesses is evidenced in the requirement to ensure procedures in a participatory and democratic way, in which a

normative framework is respected (Agudelo, 2004).

This requires a process that is structured and based on fundamental rights to provide for the satisfaction of the parties and their interests. In this sense, the close relationship between the concept of due process and the evolution of constitutional law cannot be ignored (Rey, 2013). Hence, judges have limited powers in fundamental rights, which is why the parties have the power to modify procedural rules when they consider that there is no protection of relevant legal situations (Cabral, 2016).

Now, in terms of definitions, arbitration is a private justice mechanism, in which it is an impartial third party, better known as an arbitrator, who is in charge of resolving the conflict through an arbitration award. This mechanism of justice is binding; however, it can be enforced with the assistance of the jurisdictional organs of the State (Bustamante, 2013). In other words, arbitration is the submission of a controversy of the parties before an impartial third party so that the latter is in charge of opting for a conclusive decision using an award (Law 446, 1998), the latter is characterized by being final and binding.

Another way of conceiving arbitration is as a process that is carried out with the prior agreement of the parties, who decide to settle their dispute alternatively to the judicial process. Therefore, the appointment of arbitrators and their functions can only be determined when expressly authorized by the individuals (Sequeira, 2016). Thus, the word arbitration indicates authority or jurisdiction that is acquired by arbitrators by compromise (Hernando, 2015). Then, when a legal dispute arises between private parties, the protagonists can choose between two dispute resolution routes. The first is the jurisdictional route and the second is to resort to alternative dispute resolution, internationally known as Alternative Dispute Resolution (ADR) (Ceballos, 2021).

Henri Motuslky points out that "arbitration is a private justice of normally conventional origin". This definition shows that arbitration is related to the idea that justice is conceived as the jurisdictional power of the arbitrator. Thus, arbitration is understood as a private activity considered a voluntary decision -by the parties- that cannot be binding. This premise is based on the fact that the arbitration procedure is based on the principle of voluntariness and influences the appointment of arbitrators and their functions in the Arbitration Centers.

Unlike other dispute resolution mechanisms and the same jurisdiction, arbitration is specialized, since it allows disputes to be resolved by the most suitable arbitrators due to their capacity or experience. Along the same lines, the American Arbitration Association (AAA) points out positive characteristics of arbitration, stating that it is an alternative to judicial litigation, which is faster and more economically profitable. In short, arbitration is specialized, fast and cost-effective.

Arbitration originated as societies became the first manifestations of organized societies, it could be said that law replaced the use of force. This is demonstrated, over time, in the need for individuals to have access to an impartial third party to resolve conflicts. In this sense, Judges who had power over the public power were invested with the authority of the judiciary.

The purpose of this article is to demonstrate the scope of application of due process in arbitration and whether, in case of an absolute application, it would affect the essence of arbitration. To this end, relevant concepts such as due process and the arbitration will be defined. Also, the origin and evolution of both will be presented and a relevant relationship will be established to meet the aforementioned objective.

MATERIALS AND METHODS

The purpose of the research was to link due process with arbitration and to demonstrate whether its scope of application is absolute or whether some restrictions are necessary because it is an autonomous and private matter.

It was a study framed within the qualitative approach (Valderrama, 2015), basic (Hernández et al., 2014). Due to its characteristics, it constitutes descriptive level research (Paragua et al., 2008), and the method used was the deductive

hypothetical method. The design used was non-experimental (Carrasco, 2009).

It was documentary legal research (Bernal, 2010), where reflection was generated on various documents and reference books in the field of law related to due process and arbitration, for which documentary analysis was used to generate reflections on the documents reviewed.

RESULTS

It is impossible to point out that arbitration is unrelated to fundamental rights. To the extent that, by affirming arbitration as a normative system, its rules are related to each other -in their complementarity, hierarchy, and coordination, among others (Bustamante, 2013). In addition to helping the law to fulfill its purpose, it is related to other legal institutions and -being a normative system similar to that of fundamental rights- they maintain normative relationships with each other.

The purpose of this article was to determine the relationship between due process and arbitration. The relevance of this topic lies in the fact that there are two positions regarding the application of due process guarantees in arbitration. On the one hand, a part of the doctrine maintains that the guarantees are applicable, although not completely, but only those that are possible to be applied based on the law. On the other hand, a minority part points out that arbitration -being an act of jurisdictional power- is controllable in its adjective and substantive sense. In other words, they defend the constitutionalization of the arbitration process. Undoubtedly, the most widely accepted position is that due process applies to arbitration to avoid infringements of fundamental rights and, in addition, to comply with the interests established by the parties.

Arbitration is subject to provisions established by the Constitution and the law. Namely, jurisprudence gives importance to arbitration, which is why its performance is constitutionally determinant. In other words, arbitration is characterized by its autonomy, but, at the same time, it is subordinated to a higher regulation. However, it is pertinent to review the guarantees that make up the constitutional content of due process to determine whether such guarantees are contemplated in arbitration and, if not, whether it entails a constitutional violation of the fundamental right to due process. The above, from a first perspective, appears incongruent about the uniqueness of arbitration.

Among the fundamental rights related to arbitration is due process. However, there are generic procedural guarantees of this right, which are practically those rules that govern the procedural activity. For this reason, the mistake should not be made of relating all the elements of due process to arbitration, since not all of them can be applied to all types of proceedings, much less to arbitration proceedings. Thus, some scenarios established by the doctrine are not applicable or inherent to arbitration, such as the constitutionalization, judicialization and proceduralization of arbitration.

When arbitration is considered by the Constitution as a private justice mechanism, an alternative to state jurisdiction, it could be mentioned that there is a right of access to arbitration as a conflict resolution mechanism. Therefore, it must be respected and protected.

Therefore, what is postulated is that the link between due process and arbitration has as its main focus that essential characteristics of due process are considered in arbitration, but only those that may be applicable. In other words, the process is a means by which the powers of the judge and the rights of the parties can coexist as a cause and guarantee for each other. By affirming this, respect for the autonomy of arbitration would be prevailing as its substantial character and, simultaneously, the basic characteristics of due process. This is because arbitration is a right of a limited nature and has been demarcated by the parties, who establish its content. Therefore, it is due to the functions it fulfills and the relationship it maintains with fundamental rights and legal property, that it is constitutionally protected.

It is prudent to note that, although the due process is involved in arbitration proceedings, it is not applicable, since it is a mechanism of private justice that responds to procedures different from judicial or administrative ones. In this regard, procedural criteria that are not related to its special

nature cannot be unduly applied. Based on this premise, it should be emphasized that many authors following different doctrines do not agree between arbitration and the relationship with constitutionalism. Because subordinating arbitration to constitutional considerations would imply a direct limitation of the autonomy of the will of the parties, which would distort the essence of arbitration in terms of its contractual or private nature.

As has been seen, arbitration and litigation have coexisted since their origins. Thus, they cannot be exempted from each other. Arbitration is considered an alternative dispute resolution mechanism to state justice and is related to a private sphere. Thus, arbitration is regulated differently from state regulations, so that due process is applied in an ancillary way to arbitration proceedings. The due process could not be applied from a constitutional point of view, much less absolute, as it would have a direct impact on the private nature of the arbitration. Therefore, although the protection of fundamental rights must be ensured as essential elements of the legal system, respect for national or international regulations of a private nature, such as arbitration, must also be provided for.

In terms of the guarantees that are not enforceable in arbitration, the guarantee of the plurality of instances can be taken as a reference. As already mentioned, arbitration has a single instance. This feature is related to procedural speed, which is part of the very essence of arbitration. This implies efficiency in the resolution of a given dispute and, consequently, the immediate protection of rights. It may also be considered important to regulate the single instance based on the specialization of the arbitrators, since, by knowing about specific issues, their final decision will be more accurate.

In that case, there would no longer be the need to appeal final judgments, since the arbitrators who resolve the conflicts would be experts in the subject matter and, from an even more positive point of view, they would be arbitrators who are specifically appointed by the parties. Some authors point out that the regulation of autonomy and speed in arbitration is linked to the due protection of fundamental rights (Caro, 2003). In other words, arbitration considered as fast and effective must also guarantee constitutional rights through control or regulation mechanisms related to what has been previously established by the parties.

The applicability of due process in arbitration must be applied without prejudice to due process. For this reason, arbitration must be evaluated from a flexible point of view and in line with fundamental rights and other legal assets with which it has a complementary relationship in the legal system (Soto and Bullard, 2011). In effect, the different processes conform to pre-existing rules of a State and these rules bind the process to public servants. However, arbitrators may resemble a public servants in terms of their authority to administer justice.

It is in this aspect where due process has implications in arbitration, but only the formal conditions of due process are applicable and enforceable, not the substantive ones (Castillo and Vásquez, 2006). The Colombian Court emphasizes that any type of action must be carried out based on what is legally permitted and under the attribution of the jurisdiction (Barona, 2006). Although it is a non-established procedure, the actions must be carried out following the aforementioned characteristics: legally permitted and by the attribution of competence (Santos, 2001). Therefore, it follows that during the arbitration process all the substantive and procedural conditions of the principle of due process must be observed, even if it has the status of jurisdiction.

The procedural guarantees of the due judicial process have variations in their application in certain cases, processes or legal persons, which are manifested in the suppression of certain formalities such as the case of the plurality of instances, which are applied in the arbitration process. However, it does not define which are or may be the formal procedural rules of due process that may be subject to the contravention. Even more so, in arbitration matters, thus leaving a void that leaves to the discretion of the legal operator its identification and evaluation.

Regarding the applicability of due process in arbitration, the guarantees of due process apply to it. However, it does not apply to its full extent

since it may have repercussions on the very essence of arbitration since it has a different nature and regulation than ordinary jurisdiction. However, there are no rules with precedent authority that recognize possible conjectures on the adjective content of due process in arbitration. The fact that there is no established precept leaves a vacuum for those in charge of reviewing arbitral awards or arbitral proceedings, since there are grounds for annulment of the award, but only in terms of form, not substance. Thus, there is no clear point where it is considered a violation of due process in arbitration.

In conclusion, two main results have been obtained during the development of this article. On the one hand, the principle of due process is presented as a constitutional guarantee applicable to any jurisdictional or administrative proceeding. It applies to arbitration proceedings since it assists with the development of the procedural characteristics of the respective procedural norm. However, not all guarantees related to due process apply to arbitration, since they must be applied as long as they comply with the nature of the arbitration itself and the provisions of the rules.

Among the guarantees, not applicable is the plurality of instances, as it is contrary to the single instance characteristic of arbitration, which is linked to the principle of speed. When considered as a single instance, the decisions of the arbitral awards are not challenged and it is related to the specialization of the arbitrators. In addition, arbitral awards have appeals based on their own arbitration rules in which the review, annulment and enforcement of the award can be requested.

From the foregoing, it should also be pointed out that this article is not fully completed if it is taken into account that the substantive content of due process is always being reevaluated in arbitration proceedings. For this reason, it can be considered that possible erroneous decisions of the arbitrator may be evaluated concerning fundamental rights of an unavailable nature. And the risk of constitutionalizing arbitration by authorizing the substantive content of due process in the arbitral seat and impacting the very nature of arbitration may be generated.

REFERENCES

[1] Agudelo Martín, (2004). 'El debido proceso' vol 4, N°07 *Revista opinión jurídica* < https://revistas.udem.edu.co/index.php/opinion/article/view/1307/1278> Acceso: 27 de febrero 2022

[2] Barona Silvia (2006). "Binomio, arbitraje y poder judicial en el siglo XXI: entre la pasión y el pensamiento". N°2 *Revista boliviana de derecho*, 2006 < https://www.redalyc.org/pdf/4275/427539902007.pdf>. Acceso 10 de febrero.

[3] Bernal, C. A. (2010). *Metodología de la Investigación* (3ra edición). Pearson Educación

[4] Bustamante Reynaldo, (2013). 'La constitucionalización del arbitraje en el Perú: algunas consideraciones en torno a la relación del arbitraje con la Constitución, los derechos fundamentales y el Estado de derecho" *Revista de la facultad de derecho* <https://revistas.pucp.edu.pe/index.php/derechopucp/article/view/8908> Acceso: 21 de febrero 2022.

[5] Cabral, Antonio (2016). '*Convenciones de procedimiento'* Madrid: Siglo Veintiuno.

[6] Carrasco, S. (2009) *Metodología de la investigación científica*. Perú: Editorial San Marcos.

[7] Caro Dino, (2003). *'Las garantías constitucionales del proceso penal'*. Aranzadi Editorial.

[8] Castillo Mario y Vásquez Ricardo, (2006). 'Arbitraje: naturaleza y definición' (59) *Revista Derecho PUCP* <https://revistas.pucp.edu.pe/index.php/derechopucp/article/view/3068> Acceso: 12 de febrero.

[9] Chaname Orbe, R. (2006). *Diccionario Jurídico Moderno* (Cuarta edición ed.). Lima, Perú: Cultura Peruana.

[10] Natalia Ceballos, (2021). "Algunos antecedentes históricos del arbitraje" *Revista argentina de arbitraje* N°7 <https://ar.ijeditores.com/pop.php?option=articulo&Hash=4d2d7692950a6b35d0c27209850c4b5d>. Acceso 03 de marzo.

[11] García Toma, V. (2008). *Los Derechos Fundamentales en el Perú*. (J. editores, Ed.) Lima.

[12] Hernández, R., Fernández, C., & Baptista, P. (2014). *Metodología de la investigación* (6ta edición). McGraw-Hill Education.
[13] Hernando Camila, (2015). '*Arbitraje en línea y debido proceso'* (Memoria para optar el grado de licenciada en ciencias jurídicas y sociales, Universidad de Chile.
[14] Lara Gómez, (2006). 'El debido proceso como derecho humano' en Gonzales Nuria 'Estudios jurídicos en homenaje a Marta Morineau: Sistemas jurídicos contemporáneos. Derecho comparado. Temas diversos' (Instituto de Investigaciones jurídicas: *Serie Doctrina Jurídica*, primera edición, volumen 2.
[15] Ley 446 de 1998 de Colombia citada en Víctor Rincón (2012). '*Reflexiones sobre el debido proceso en el arbitraje independiente'*
[16] Luiz Marinoni (2011). *El proceso civil: problemas fundamentales*. Madrid: Siglo Veintiuno.
[17] Paragua, M., Paragua, C. A., & Paragua, M. G. (2008): *Investigación Educativa*. Edit. JTP. Huánuco-Perú.
[18] Picó I Junoy, (2012). 'El derecho procesal entre el garantismo y la eficacia: un debate mal planteado'. (38) *Revista derecho y sociedad* < https://revistas.pucp.edu.pe/index.php/derechoysociedad/article/view/13126> Accedido: 07 de marzo 2022.
[19] Priori Giovanni (2019). *El proceso y la tutela de los derechos*. primera edición, fondo editorial PUCP.
[20] Rey Pablo (2013). '*El arbitraje y los ordenamientos jurídicos en Latinoamérica: un estudio sobre formalización y judicialización*. Jurista Editores.
[21] Rincón Víctor (2012). '*Reflexiones sobre el debido proceso en el arbitraje independiente'*. Monografía para optar por el título de abogado, Pontificia Universidad Javeriana.
[22] Robledo Sarai (2018). *La garantía del debido proceso en el arbitraje'* (tesis para optar el título de abogada, Universidad de Piura. Perú
[23] Santos Héctor, (2001). 'La teoría general del proceso en el sistema del derecho procesal social' 1(1) *Boletín mexicano de derecho comparado* <https://revistas.juridicas.unam.mx/index.php/derecho-comparado/rt/printerFriendly/3684/4507> Acceso 05 de marzo.
[24] Sequeira, Byron (2016). '*Naturaleza jurídica del arbitraje'*. Jurista Editores.
[25] Soto Carlos y Bullard Alfredo, (2011). *Comentarios a la Ley Peruana de Arbitraje*, tomo I (primera edición, Instituto Peruano de Arbitraje, primera edición.
[26] Tapia Alvial Claudio (2010). "*Garantismo procesal: un debate ausente y una advertencia clara*" Lima: Rodhas.
[27] Valderrama, S. (2015). *Pasos para elaborar proyectos de investigación científica: Cuantitativa, cualitativa y mixta* (2da edición). San Marcos