STUDIES AND COMMENTS

Scope and limits of the administrative act arbitrability

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Abstract

The material scope of arbitration in administrative matters has recently been considerably enlarged, especially in regards to the administrative act. It was recognized that the Arbitral Tribunal has the power to appreciate the legality of an administrative act. Traditionally, the legality of administrative acts was reserved for state courts. However, the legal incongruity was notorious. Article 180 (1) (c) of the Code of Procedure of the Administrative Courts (CPTA), 2002, provided that arbitral tribunals could enounce "matters relating to administrative acts that could be revoked without grounds for invalidity". We could diagnose two types of legal failures. First, within Administrative Law, it was incomprehensibly admissible to arbitrate the legality of administrative acts pertaining to the contractual sphere and exclude all others from the control of arbitration law. The other flaw suffered by the regime of arbitrability of administrative acts related to the possibility of arbitrability of tax acts[3] *and the imposition of strong limitations on the control of the legality of administrative acts in Administrative Law. The revision of the CPTA in 2015 implied a change in the legislative paradigm in the matter of administrative arbitration, providing for the possibility by the arbitral tribunals of assessing the legality of the administrative act, thus putting an end to a doctrinal dispute about the admissibility of the same. However, a literal interpretation of the precept would lead us to subsume within the jurisdiction of the arbitral tribunals the assessment of the legality of any administrative act. Considering the legislative scope of the legal prediction enunciated, the present work will have as its objective to answer three key questions. The first is to assess to what extent the arbitral tribunals may rule on the merit and legality of the administrative act. The second is to determine whether all administrative acts are arbitrable. The third concerns the search for a criterion of arbitrability of the administrative act, especially in matters related to legality.*

Keywords: *administrative act; arbitral tribunals; arbitrability; administrative law.*

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1. Cronological review

In order to understand the legislative option regarding arbitration of the administrative act, it is necessary to clear the tracks that have been traversed, from their origin to the present day.

Administrative Arbitration in Portugal goes back to the beginning of the XX century. It arose, essentially, as a way of settling disputes arising from administrative contracts.

Currently, arbitration covers almost all areas of administrative activity.

In a first phase, comprised between the XIX and XX centuries, arbitration was not an admissible way of settling disputes in the context of administrative litigation. In a second one, between the decades of 50 and 80 of last century, the arbitration was admitted, only to settle disputes from administrative contracts.

From the early 1980's to the reform of administrative litigation, in 2004, more precisely with the entry into force of the Procedure Law of Administrative Tribunals (LPTA) - appear the first arbitration regimes, both arbitration in general and, specifically, administrative arbitration. We refer specifically to the Statute of the Administrative and Tax Courts of 1984 (ETAF), the Voluntary Arbitration Act of 1986 (LAV) and the Code of Administrative Procedure of 1991 (CPA).

The admissibility of arbitration in the context of administrative contracts and civil liability of the State for acts of public management was thus consensual.

No longer the administrative acts (vg. article. 2, paragraph 2 of ETAF and, subsequently, article 188 of CPA) presupposed a clear division, with obvious consequences for the arbitrability of conflicts in administrative law, "between two spheres of the administration's action: parity regulation (private law and administrative double law: contracts and civil liability, under the" administrative litigation by assignment') and regulation of the administrative law of authority (corresponding to the so-called 'administrative litigation by nature'). The dispute arising in the sphere of administrative law of authority was outside the area of public administration availability. It was understood that it had no power to rule on the content of administrative acts or on judicial review of legality".[4]

Although the scope of administrative arbitrability was defined, with the express reference to litigation arising from administrative contracts and facts that gave rise to the administration's non-contractual liability, the possibility of arbitration in relation to disputes arising from the execution of those relations was not fully clarified when concerned to contractual arrangements. It was necessary to search for a criterion of arbitrability, for a more rigorous definition of arbitrary subjects.

In 1986, the Voluntary Arbitration Law came to discipline the arbitration, establishing, in its article 1 (4) the subjective scope of administrative arbitration. Arbitration agreements may be concluded between the State and other legal persons

[4] Pedro Gonçalves, *Administração Pública e arbitragem – em especial, o princípio geral da irrecorribilidade de sentenças arbitrais* in *Estudos em homenagem a António Barbosa de Melo*, Almedina (2003), 574-575.

of public law, as long as they are authorized by law, or as long as the conventions have their disputes object concerning private law relationships.

CPTA 2004 in its article 180 provided for a list of matters that could be subject to administrative arbitration.

Regarding the legal prediction that established the objective scope of the arbitration, it was tried to find a normative criterion of arbitrability.

LAV 1986 provided, in its article 1 (5), as the criterion delimiting arbitrary subjects, the availability of rights.

For a long time, it was understood that the criterion set forth in article 180 (c) CPTA would also be that of availability (of rights and powers), which severely restricted the subject matter of arbitration.

The Public Administration, when practicing an administrative act, would act in its robes of authority - which would be enough for it to be, as a rule, an unavailable situation. In the part in which it exerted powers of authority, the Administration would be, by definition, holder of situations not susceptible of arbitration.

Differently, in the context of the conclusion of an administrative contract, a situation of availability would exist at the outset: "When it is foreseen that the Public Administration contracts with the private individual, it is even allowed to influence the design of the content of the legal relationship".[5]

In a contractual venue, the Administration would enjoy a margin of freedom to negotiate and, therefore, of disposition or availability, and here the power of the Administration to derogate from the rule of jurisdiction of the state administrative courts is indisputable.

The criterion of availability, as an individualizing criterion of arbitrary subjects, did not merit our condescension. Let us not forget that in the contractual field and administrative responsibility, the Administration does not enjoy the same autonomy as individuals. In all its fields of activity, the Administration is circumscribed by the principle of legality.

Even in the use of discretionary powers, the Administration is not in the availability domain. Let us not forget that the only purpose that the Administration can legitimately pursue is the public interest. In addition, there is a web of principles relating to administrative activity which restrict the discretion of the public administration.

It is imperative to understand that availability would only be an arbitrary assumption. In the context of arbitrary administrative forum matters, the Administration did not transfer the exercise of this availability to the arbitrators. As true judges who are, from a functional point of view, they are only entrusted with the arduous task of applying the law to the concrete case.

The application of this criterion would lead to an incongruity. It should be noted that the previous wording of article 180 (1) (a) CPTA allowed arbitration tribunals to assess acts of execution of contracts and pre-contractual acts.

The criterion of availability proved to be useless in defining the range of arbitrary matters.

[5] Gonçalves (2003) p. 43.

Other criteria were coming up, even trying to match some of them.[6] However, none was able to determine, per se, the objective scope of administrative arbitration.

We came to the conclusion that all criteria should yield to the legal-positive criterion: to put it simply, would be arbitrary matters all those listed by the legislator, and only those.

2. Merits of the administrative act assessment

It was understood that the previous drafting of article 180 (1) (c), under which the arbitral tribunal could examine issues relating to administrative acts that could be revoked without grounds for its invalidity, was intended to introduce a merit arbitration into the legal-administrative order.

Control of the merits of an administrative act means the susceptibility of ascertaining the merits, convenience or opportunity of the act practiced by the Public Administration.

It should be understood that the Constitution gives the Administration a limited margin of autonomy based on the principle of legality. The courts may not interfere with the margin of public autonomy conferred on the administration, otherwise the principle of separation of powers may be infringed.

According to Paulo Otero, "public autonomy constitutes a "reserve of decision" of administrative power, conferred by law and exempt from judicial control".[7]

However, there were those who argued that the arbitral tribunals could assess the merits of administrative acts. This position was covered in article 180 (1) (c) of CPTA, defending this doctrinal statement that said legal provision did not only determine the arbitrable administrative acts, but also the jurisdiction of the arbitral tribunal, as regards the matters described there.[8/9]

For this understanding also contributed article 1 (4) of NLAV, which allows for the arbitrability of "questions that are not contentious in the strict sense", which could lead to the understanding that the arbitral tribunals could assess the merits, the convenience and the opportunity of the administrative action.

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[6] José Manuel Sérvulo Correia, *A arbitragem voluntária no domínio dos contratos adminiostrativos*, in *Estudos em Memória do Professor Doutor João Castro Mende*s, Lisboa, (1995), p. 235, footnote 10.

[7] Paulo Otero, *Conceito e Fundamento da Hierarquia Administrativa*, Coimbra: Coimbra Editora, (1992) p. 196.

[8] Luís Cabral de Moncada, *A arbitragem no Direito Administrativo, uma Justiça Alternativa,* „Revista da Faculdade de Direito da Universidade do Porto", VII, (2010); João Caupers, *A arbitragem na nova justiça administrativa,* „Cadernos de Justiça Administrativa" nº 34 (2002), 65-68 and Paulo Otero, *Admissibilidade e limites da arbitragem voluntária nos contratos públicos e nos atos administrativos*, in II Congresso do Centro de Arbitragem da Câmara de Comércio e Indústria Portuguesa, (2009), pp. 88-89.

[9] João Pacheco de Amorim, *Legal Opinion: Arbitrabilidade de questões referentes a relações jurídico-administrativas emergentes de atos administrativos desfavoráveis aos particulares*, Porto, (2013). pp. 13-14.

Nevertheless, this rule is inapplicable in the matter of arbitration of an administrative act, in that it allows the arbitral tribunals to consider other matters that are not related to their legality.

Arbitral tribunals, like the judicial courts, can not judge the merits, convenience and timeliness of administrative acts, under penalty of unconstitutional interference by the courts in the administrative function. The courts are only entrusted with the exercise of the judicial function.

We subscribe to this last position, since Portuguese Constitution prevents judicial decisions taken under discretionary power, that is, based on merit, convenience and opportunity.

Such decisions are forbidden to the control of both state courts and arbitral tribunals. Arbitral tribunals, being real courts, can not hold more extensive powers than administrative courts.[10]

It is important to mention article 3 (1) of CPTA, which provides that "In compliance with the principle of separation and interdependence of powers, administrative courts shall judge compliance by the administration with the rules and legal principles that bind it and not with the convenience or opportunity of its performance."

Since the arbitral tribunal is a real court, which exercises the judicial function, it is also subject to the strict application of the law, and can not interfere with the powers of the Administration, under penalty of breach of the principle of separation of powers.

In addition, arbitral tribunals are also bound by the rules governing administrative disputes. The principle of the separation of powers requires respect for administrative decisions taken under the discretionary power.

An "arbitration of merit" should not be admitted but rather an "arbitration of juridicity". The arbitral tribunals, although they can not infer in the sphere of the discretionary action of the administration, can appreciate the compliance of the limits of the discretionary power, maxime, of the external limits by that one. We speak of the competence to assess the conformity of discretionary acts with the constitutional and legal principles that limit that power.

Beyond the external limits, others limit the margin of decision conferred to the Administration, the internal limits. These, consubstantiate themselves in norms that establish requirements and assumptions of validity to the administrative action. The aim to be pursued and competence are unequivocally defined in the law. The very intention of the Administration in the practice of the act should be free, under penalty of the act suffering a vice of will, and finally, the margin of decision must be provided in the law, in compliance with the principle of legality, in its dimension of precedence of law.

Today, in view of the current wording of article 180 (1) (c) of CPTA, there is no doubt that the arbitral tribunals will be able to rule on issues of strict legality

[10] Mário Aroso de Almeida, *Sobre o âmbito das matérias passiveis de arbitragem de direito administrativo em Portugal,* in *Estudos em Homenagem a Miguel Galvão Teles*, vol II, Coimbra, Almedina, (2012) p. 24.

that may arise with respect to the exercise of discretionary power by the Administration. If this were not understood, there would be an inadmissible amputation of its powers of control of the conformity of the administrative action with the rules and legal principles that apply to it.

In short, if an administrative act disrespects in its discretionary content the general principles of administrative activity, as well as any internal limit, the arbitral tribunal may rule on such question. What we can not conceive is the interference of the judicial power in the administrative function. It does not seem acceptable to us that the valuation criteria applied by the administrative body in the exercise of discretionary powers can be syndicated by the courts.

The difficult task of interpreting article 180 (1) (c) CPC, has been attenuated with the current wording of the precept. In our view, the legislator dispelled any kind of doubts about the admissibility of a "merits arbitration". The legislature refers only to the possibility of assessing the legality of administrative acts by arbitral tribunals

3. Assessment of the legality of the administrative act

3.1 Framework

The assessment of the legality of administrative acts by the arbitral tribunals is an issue that has long been debated. The legal regime was characterized by deep inconsistencies that did not make for a more flexible doctrinal understanding.

Article 180 of CPTA, in its previous wording, allowed only the judgment of the legality of administrative acts by the arbitral tribunal in the case of acts related to the execution of the contracts and pre-contractual acts, both subsumable in article 180 (1) (a) of CPTA.

It was inferred from the legal construction of that legislation, that the legislature only allowed the assessment of the legality of administrative acts that related to contracts, a solution that was not understood.

There was also a total logical inconsistency of the legislature by expressly allowing, in article 180 (1) (c) of CPTA the possibility of assessing administrative acts that could not be revoked on grounds of invalidity.

As Aroso de Almeida states "if the legislator is opposed to arbitration on administrative acts, it should exclude such possibility. But if it is not, then it is not clear why it should only be allowed in relation to the acts contemplated in paragraph 1 (c) of article 180 of CPTA".

Two types of incongruities were diagnosed. First of all, within the scope of Administrative Law, incomprehensibly, the legality of administrative acts relating to the contractual scope was arbitrarily admitted, and the control of the legality of all others was excluded from the sphere of competence of the arbitral tribunal.

The other inconsistency was the possibility of arbitrability of almost all tax acts and the imposition of strong restrictions on the control of the legality of administrative acts, under Administrative Law.

The legal context called for a profound change in what concerns administrative arbitration and its material scope.

We believe that, in view of the interests at stake, the legislature has been cautious, above all because of its mistrust of the arbitral tribunals, despite its jurisdictional nature.

3.2 The arbitral tribunals and the jurisdictional function

It is an unanimous opinion that the jurisdictional function is not exclusively reserved to the state courts, which may be outside the state judiciary.

It is also appropriate that the arbitral tribunals legitimately exercise the judicial function. The *iurisdictio* is not exclusive to judges, and certain litigations may be decided by arbitrators, by reason of an agreement entered into by current or future parties or litigants or by express legal provision.[11]

The admissibility / configuration of an extra-state jurisdiction presupposes a pluralistic view of "law and justice and on the principle that conflict resolution, through instruments of heterogeneous composition, can be" left "in the realm of private autonomy, social space "and not state."[12]

The existence of arbitral tribunals is now expressly guaranteed by article 209 (2) of the Constitution of the Portuguese Republic: since 1982, our fundamental law provides for them, including them in the category of courts. Accordingly, it refers to the aforementioned constitutional provision (the heading of which is "Categories of courts"), in paragraph 2, that "there may be maritime tribunals, arbitral tribunals and judges of peace".

Although the existence of arbitral tribunals is admitted by the Constitution, they should not be considered equal to the state courts: according to the legislature only the latter are true organs of sovereignty with competence to administer justice in the name of the people.

This affirmation of the legislator does not deny the qualification of real courts to those. Admittedly, the absence of a real systematic framework of arbitral tribunals in the national judicial system could be seen as an indication of the idea of a monopoly of the jurisdiction of the courts and tribunals; however, we understand that there is only an organic-functional split compared to the other organs of sovereignty.

The existence, together with the State, of other jurisdictions, based either on conventions of international law or on the law, is always peaceful, always "taking into account the spaces of internationality and legal pluralism (e.g. ecclesiastics courts, sports courts, professional courts)."

[11] Constitutional Court Awards 52/92 and 230/2013.
[12] Gonçalves, (2003), p. 779.

Accepting these alternative means of dispute resolution does not imply, in particular in the field of arbitration, the privatization of the judicial function, but rather a strategy of cooperation of the State with particular entities.[13]

We can not deny that the arbitral tribunals carry out the same mission entrusted to the courts of the state judiciary and assume they do so with equal level of commitment the fundamental desideratum committed to the second, that of the application of the law to the concrete case. The former are revealed as operative extensions of the latter which, in addition to other purposes, impress efficiency in the overall jurisdictional system of a country.

The arbitral tribunals do not form part of the state jurisdiction, since they do not form part of the State organization, but constitute a special, *sui generis*, "entirely private and consensual"[14] arbitral jurisdiction.[15]

It is considered, therefore, and in our view quite legitimately so, that there is a genuine jurisdiction. It should be noted that in the term jurisdiction much more exists beyond its formal component, the term assuming a meaning with particular importance. It should be noted in this regard that "the assertion of German *opinio communis doctorum* is that jurisdiction is not only the state function reserved for the state organs of the third power. Instead, a jurisdictional function or jurisdiction appears as an "*Oberbegriff",* which, in addition to the state, includes non-state jurisdiction and, in particular, jurisdiction outside the State."[16]

In addition, arbitral jurisdiction, characterized in its strict sense, as a private and conventional jurisdiction, is now, more than an exception to state jurisdiction, an alternative to the latter.[17]/[18]

The constitutional recognition of the arbitration jurisdiction, refers us to the idea that there is no absolute material reservation of the administrative jurisdiction in the Portuguese Legal System. Although the literal interpretation of article 212 (3) of Constitution could lead to a contrary understanding, we can not fail to attend to the systematic element of interpretation, combining the precept with article 209 of the Constitution, which recognizes the Arbitral Tribunals, consecrating its jurisdictional nature.[19]/[20]

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[13] Joaquim Gomes Canotilho, J. Gomes Canotilho et al., *Constituição da República Portuguiesa Anotada*, Vol. II (Articles 108-296), 4 Ed., Coimbra Editora (2010). p. 507.

[14] Canotilho (2010), p. 507.

[15] *Ibid*.

[16] Gonçalves (2003), p. 778.

[17] Charles Charrosson, *La Notion d'Arbitrage,* Paris: LGDJ (1987), p. 101.

[18] Rubellin-Devichi. *L'arbitrage, nature juridique*, LGDJ, 1965, pp 245 ss. *apud* Charles Charrosson (1987) pp. 101-102.

[19] Mário Aroso de Almeida, *Sobre o âmbito das matérias passiveis de arbitragem de direito administrativo em Portugal*, in *Estudos em Homenagem a Miguel Galvão Teles*, vol II, Coimbra: Almedina, (2012), p. 7; Jorge Miranda, *Manual de Direito Administrativo*, vol II, 10 ed. (reimpressão), Coimbra (1986) pp. 1285-1286.

[20] Paulo Otero, *Legalidade e Administração Pública – O sentido da vinculação Administrativa à Juridicidade*, Coimbra, Almedina, (2011), p. 1060 and Claudia Figueiras (2018) p. 364.

Other Courts, in addition to the Administrative Courts, may adjudicate on administrative matters, provided that the material nucleus characterizing the administrative courts is respected. [21]

However, this does not mean that the substantive competence of the State Courts for the arbitral tribunals can be fully transferred.

3.3 Arbitrability of the administrative act criteria - fundamentality of rights

In view of the current wording of article 188 (c) CPTA, it will be necessary to ascertain whether the arbitral tribunals can judge the legality of any administrative act or, if on the contrary, certain administrative acts should be subtracted from the arbitral award.

We can not forget that, under the Portuguese Constitution the State is obliged to defend the rights, freedoms and guarantees, in accordance with its article 9, paragraph b. In the context of the principle of the separation of powers, that guarantee is ensured by the judicial authority.

Although the arbitral tribunals constitute a judicial body, administrative tribunals can not resign from the task of administering justice, especially when it concerns the protection of those rights. [22]/[23]

In short, the control of the legality of administrative acts that contain rights, freedoms, guarantees and similar rights, can not fail to be within the sphere of state jurisdiction.[24]

It should be noted that "situations which, by contending with more relevant public interests or concern the unavailable interests of individuals in their relations with the Administration (*maxime* rights, freedoms and guarantees), should be recognized as being subject to a constitutional reservation of the jurisdiction of the State and, as such, prohibited to arbitration".[25]

We are of the understanding that it will not be up to the arbitral tribunals, the assessment of administrative acts of an aggressive nature of the legal sphere of the individual, which contain Rights, Freedoms, Guarantees and similar rights. Let us heed punitive and counter-order acts. In view of the importance of the underlying

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[21] José Carlos Vieira de Andrade, *Justiça Administrativa*, Coimbra, Almedina, 2015,14 Ed., p. 95 and Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada*, Tomo III, Coimbra Almedina, (2007), p. 149.

[22] José Carlos Vieira de Andrade, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 5ª Ed., Coimbra, Almedina (2012), p. 79.

[23] Joel Timóteo Ramos Pereira, *O futuro legislativo dos Julgados de Paz*, in I Convenção Resolução Alternativa de Litígios (RAL). Quinta conferência Meios Alternativos de Resolução de Lítigios. Segundo Encontro sobre Mediação no espaço dos Países de língua Portuguesa, ed. by Ministério da Justiça, Direção Geral da Administração Extrajudicial, 1 ed (Lisboa: Agora Comunicação, 2007), p. 65. Apud Claúdia Figueiras, *Justiça Tributária*, Coimbra, Almedina, *(*2018), onwards, p. 373.

[24] Margarida Olazabal Cabral, *A arbitragem no projeto de revisão do CPTA*, „Revista Julgar" 26, (2015), p. 106.

[25] Mário Aroso de Almeida, *Sobre o âmbito das matérias passiveis de arbitragem de direito administrativo em Portugal*, in *Estudos em Homenagem a Miguel Galvão Telles*, vol II, p. 26.

fundamental values, the legislator itself has given them greater importance, recognizing the constitutional status of procedural rights that concern them. The foregoing right of prior hearing in these situations, will correspond to the offense of the essential content of a Fundamental Right, under the terms of article 269 (3) of C.R.P. and article 161 (d) of CPA.

Also, the administrative acts that have been violated due to a violation of law, which is based on the violation of Rights, Freedoms, Guarantees and similar rights, should be excluded from the arbitration jurisdiction, for the same reasons already mentioned.

In the same vein, the assessment of the legality of null administrative acts, which represent an offense against the essential content of a Fundamental Right, should also constitute an absolute reservation of the State Judiciary.

In view of the essentiality of the matters *sub judice*, the assessment of the legality of administrative acts that contend with them, should be subtracted from the arbitral forum.

Let us look at some situations, in which the above is concretized.

Fundamental rights, the right to elect and to be elected, the right to vote, the right to political participation, among others, are at stake in the electoral litigation. All litigation will take place around the fundamental principle of the State of Democratic Right, whose guarantee is a task assigned constitutionally to the State. In accordance with article 9 (b) of the Criminal Code, State courts should be the custodians of the Constitution and Fundamental Rights, and it is not acceptable to waive the jurisdiction of the state courts in this matter.

The legality of questions relating to immigration, nationality and the right to asylum should also be excluded from the substantive jurisdiction of the arbitral tribunals. Its fundamentality results from article 16 of the Portuguese Constitution. which admits that "there may be other rights that, if they assume the same ethical and axiological significance of the rights formally embodied in the Constitution, should also be considered fundamentally protected fundamental rights".[26]

In the scope of the Right of asylum are concerned subjects with well-founded fear of persecution and serious offense of Rights, Freedoms and Guarantees, article 33 paragraph 8 of Constitution. In the event of refusal of the right of asylum, other fundamental rights are evidenced with that connection, children's right to state protection, right to protection of victims of certain crimes, prohibition of discrimination, right to freedom of expression, right to religious freedom and, ultimately, the Right to Life.[27]

The protection of Rights, Freedoms and Guarantees, can not fail to belong to the State Courts that "administer justice in the name of the people", and ultimately, the defense of the freedom and dignity of citizens.

The Constitution itself, in its article 20, paragraph 5, imposes "on the ordinary legislator a special duty to regulate judicial proceedings when the defense

[26] Ana Rita Gil, *Imigração e Direitos Humanos*, Lisboa, Petrony, (2017), pp. 584-585.
[27] Gil (2017), p. 530.

of personal rights, freedoms and guarantees is at stake".[28] Given the relevance and concern raised by the fundamental nature of certain rights, the Constitution created a special duty to regulate the judicial procedures with which they contend. We understand that the Basic Law only refers to the judicial procedures that run its proceedings in the state courts. In the arbitral forum there is no specific procedure for the defense of Rights, Freedoms and Guarantees. This task can not fail to be attributed to the State sphere, which will implement it through its Courts.

A further argument in favor of the imperative need to subtract certain fundamental matters from the assessment of the arbitral tribunal is related to the principle of irrecorribility of arbitration decisions applicable to ad hoc arbitrations. Article 39 (4) of LAV prescribes that arbitration decisions can only be appealed to the competent state court if the parties expressly provide for such possibility in the arbitration agreement and provided that the dispute has not been settled on the basis of equity or by amicable composition.

From a guarantee point of view, the impossibility of re-examining the arbitration decision could seriously jeopardize the protection of citizens' fundamental rights. This does not seem reasonable. The Universal Charter of Human Rights of December 10, 1948 establishes the right of access to the courts, when it provides in its article 8 that "everyone has the right to an effective appeal by the competent national courts against acts violating fundamental rights recognized by the Constitution or by law".

The implementation of this principle will necessarily require the restriction of administrative acts that contain fundamental rights to the jurisdiction of arbitral tribunals.

We conclude that the normative prediction of article 180 (c) of CPTA seems too broad. Its literal interpretation could lead to the understanding that any and all administrative acts are arbitrable. However, we can not ignore that some administrative acts focus on rights of essential and fundamental nature. The State can not resign from the task of safeguarding those rights, transferring that competence fully to the arbitral jurisdiction. It is not possible to conceive of the pursuit of the public interest and the protection of fundamental rights without the intervention of the State.

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[28] José Carlos Vieira de Andrade, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, Coimbra, Almedina. (2007), p. 369.

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