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STABILITY OF THE WORK AND SUBROGATION OF THE CONTRACT FOR NON-COMPLIANCE IN STATE CONTRACTING

工作稳定性和因不遵守国家承包合同而导致的合同代位

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Abstract

This article analyses of the contingent actions that the public administration can execute to guarantee the stability of the work in the face of subrogation events of the contractor derived from its non-compliance. based on the development of key issues such as the stability and quality of the work, which concerns insurance contracts and topics articulated as protections, contract assignment, exclusions, proportionality clause, the implications of the contract assignment versus the imposition of fines, subrogation and its nature. Using the method of analysis of legal texts with which the authors will bring up points such as regulation on guarantees in the construction contract, the effects against guarantees in the construction contract when the declaration of expiration or breach of contract is presented. The indivisibility of the guarantee, subrogation in guarantee issues, and the effectiveness of the guarantee, since the stability of the work against subrogation events of the contractor derived from breach is an issue that is analyzed from many perspectives, being among those the fiscal stability of the State, as well as the legal stability of the contracts that directly suffer from said breach. The new results allow us to permeate the discipline of state contracting to establish the actions available to the public administration when adverse events of non-compliance by the contractor occur, which affect the administration and the beneficiaries of the work.

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Keywords: Stability of the work, state contracting, contractor, insurance, policy, non-compliance.

摘要 本文分析了公共行政部门可以采取哪些应急措施来保证工程的稳定性，以应对承包商因违约而发生的代位求偿事件。分析基于工程稳定性和质量等关键问题的发展，这些问题涉及保险合同，并涉及保护、合同转让、排除、比例条款、合同转让与罚款的影响、代位求偿及其性质等主题。作者将使用法律文本分析方法，提出诸如建筑合同担保规定、到期或违约声明对建筑合同担保的影响等观点。担保的不可分割性、担保中的代位求偿问题以及担保的有效性，因为工程的稳定性可以抵御因违约而发生的承包商代位求偿事件，这是一个需要从多个角度进行分析的问题，其中包括国家的财政稳定性以及直接受到上述违约影响的合同的法律稳定性。新的结果使我们能够渗透到国家承包的纪律中，以确定当承包商不遵守规定的不利事件发生时公共行政部门可采取的行动，这些事件会影响到政府和工作的受益人

关键词： 工作稳定性、国家承包、承包商、保险、政策、不合规

I. INTRODUCTION

The fact that state contracts are intended to satisfy common or general needs is sufficient reason for them to have guarantees of compliance before, during, and even after execution, thus having what is known as guarantees in public contracting matters. This figure is the instrument that covers some common risks in contractual processes, and it is by virtue of said instruments that the State Entity in the planning of the contracting process has the duty to identify those guarantees that it must request from the contractor in accordance with the object, value, nature, and obligations of the contract.

The problem raised in the project that gave rise to this article focuses on identifying the contingent actions that the public administration can execute to guarantee the stability of the work, in the face of events of subrogation of the contractor derived from non-compliance, in events such as, for example, when the term of the contract expires and a small percentage is missing for the contractor to complete the work and be able to deliver it, from there arises the question of whether in the event that this unfinished work is not delivered to satisfaction, what would happen with the guarantee of that finished percentage if the state administration decides to complete under another contract and other policies the percentage that was missing to finish the complete work in accordance with the contract? If such a question were to materialize in a state contract, the guarantee of the stability and quality of the work would operate on that finished part, that is, that protection that covers the contractor (State Entity) from the damages caused by any type of damage or deterioration attributable to the contractor that the work may suffer once it is delivered to satisfaction [1].

New questions then arise that give life to this article: Would the new insurer be willing to take over in the event of such an event? Who is responsible for the event that the work completed by the first contractor later suffers considerable deterioration that affects its proper functioning? Would the contract be terminated or would this not be the ideal option to preserve the guarantees of the percentage of work that was actually executed? with the intention of carrying out a literature review in Colombia and in comparative law [2], because with this a comparison is made between what is stated by the jurisprudence, the doctrine and the Colombian legal system, against other legal systems, especially those that have as a source of their administrative law, French law [3] allowing this to delimit the problem object of study and research in this project, specifying to highlight that the contribution that this research makes to the academy and to the lawyers who in the world of life [4] and focus on the approach of State Contracting [5] is important because the conclusions that are drawn against these contingent actions focus on how the administration in Colombia, can execute the contractor to guarantee the stability of the work, when it is on its part the breach with respect to the total execution of the contract, giving rise to this situation that the general well-being of the benefited community is put at risk, since there is no guarantee against possible damages that it suffers as a consequence of any damage or deterioration that the delivered work presents, for reasons attributable to the contractor.

It is clear that if there is a breach by the contractor and another contract is made to be able to finish that work, neither the contractor nor the insurer will have the will to guarantee the stability of what has already been built [6], which is the dense point of this investigation, which requires analysis and documentary review. Therefore, this project is articulated with the National Development Plan (PDN) specifically at the point of citizen convergence [7], since, by addressing and studying this type of legal problem, institutional strengthening is sought as a driver of change to regain the confidence of citizens and to strengthen the close link between citizens and the state, the latter being the provider of goods and services in society [8].

The investigation, by revolving around state contracting, a mechanism used by the state to crystallize essential purposes and guarantee the general good [9], allows us to affirm that it directly contributes to the SDG called the end of poverty, which seeks to reduce inequalities. There is no doubt that by celebrating and executing contracts, the state seeks to improve the quality of life of all its associates [10].

The investigation is also in line with the Integrated Agenda of Competitiveness, Science, Technology and Innovation of the department of Bolívar in Colombia in the understanding that, if there is an adequate public contract, there will also be infrastructure, education, financial and even environmental sustainability [11] being these issues proper to that great integrated agenda. It should be noted that the project has two variables that are non-compliance by the contractor [12] and social inequality, since if there is no proper contractual execution then there will not be satisfaction of general needs, causing more gaps and social asymmetries [13].

II. METHODS/MATERIALS

It is important to highlight in these lines that the research that supports it is of a purely legal nature for the law [14] and of a qualitative scientific nature [15] and The collection of information was done under bibliographical cards that allowed the collection of information from the primary source verified in the documentary review in an exhaustive manner, under the theory based on the review of legal literature studying what has been said in the Colombian nation about the problem object of study and analysis in this research compared with other countries that under the influence of French administrative law built the theory of public administration [16]. Thus, we sought to systematize the specific objectives of the project.

• Analyze the incident as a key element to guarantee the stability of work.

• Explain the subrogation of insurance matters and its origin, despite events that occurred in the execution of public work.

• Identify the actions that the administration has faced in non-compliance with the public work contract to guarantee the stability of the work.

This article presents partial results of the ongoing research, which translates into the analysis of the current legal-scientific literature [17] on key issues such as the stability of the work in the face of events of subrogation of the contractor derived from non-compliance, guarantees of the work, requirements for the provenance of the guarantees of the same [19], and all the data obtained from the bibliographical sweep that has been carried out to date to answer the problem question that guides the research and systematization of the objectives of the project.

III. RESULTS

The results of this investigation are focused on the analysis of contingent actions that public administration in Colombia can execute to guarantee the stability of the work despite events of subrogation of the contractor derived from non-compliance.

The following lines have the objective of addressing the contingent actions that the public administration can execute [19] to guarantee the stability of the work in the face of events of subrogation of the contractor derived from noncompliance. For this purpose, key topics will be developed, such as the stability and quality of the work, which concerns insurance contracts [20], and articulated topics such as protections, contract assignment, exclusions, proportionality clauses, and the implications of the contract assignment in the face of the imposition of fines.

This item also brings up points such as regulation of guarantees in the construction contract, the effects on guarantees in the construction contract when the declaration of expiration or breach of contract is presented, the indivisibility of the guarantee, subrogation in matters of guarantees, and the effectiveness of the guarantee [21]. Likewise, the concept of authorized voices about study will be known, so that the work can be concluded, what are those contingent actions that were referred to at the beginning of these lines, and in the event of not concluding them, to make evident the need for a regulation on the referenced matter.

To achieve contextualization and be able to enter into the subject, it is necessary to state the conceptual definition of a construction contract in

Colombian legislation, saying that numeral 1 of Article 32 of Law 80 of 1993 [22], defines the construction contract as that whose object is the construction, maintenance, installation, and, in general, the execution of any other material work on real estate, regardless of the modality of execution and payment [23].

It must be understood that the contracting party corresponds to a state entity, in accordance with Articles 1 and 2 of the Law. In this regard, the Council of State, in its Judgment of the Third Section Subsection B [24], pointed out that the object of the contracts entered by public entities pursues the fulfillment of state purposes [25], such as the continuous and efficient provision of public services and the effectiveness of the rights and interests of the administered parties that collaborate with them in the achievement of said purposes. In other words, the reason for this state contract is the satisfaction of collective needs and of general interest, contributing to the achievement of those who contract with the administration [23], and who undoubtedly intend to obtain an initially calculated economic benefit with its execution [26]. This consideration leads the collaborating private parties to be obliged to supply the goods and services that are the object of the contract, thus contributing to the fulfillment of the purposes of the contract, which is calculated and foreseen at the time of proposing and contracting the contractual link.

The fact that state contracts are intended to satisfy common or general needs is sufficient reason for them to have guarantees of compliance before, during, and even after execution, thus having what is known as guarantees in public contracting matters. This figure is the instrument that covers some common risks in contractual processes; by virtue of this instrument, the State Entity in the planning of the contracting process has the duty to identify those guarantees that it must request in accordance with the object, value, nature, and obligations of the contract [27]. Consequently, contractors to guarantee compliance with the obligations acquired, in front of State Entities in Contracting Processes, can establish any of these guarantees: insurance contracts, commercial trust guarantees, bank guarantees, or stand letters of credit.

It is appropriate to clarify that in modalities other than direct contracting and minimum amount, guarantees of the seriousness of the offer and compliance become mandatory. In any case, in the modalities indicated, the entity must justify the need to require or not the constitution of guarantees, and in the contracts of works and in those in which, due to their object or nature, the State Entity considers it pertinent, the guarantee of non-contractual civil liability is obligatory. In this order of ideas, there are some risks in covering matters of public contracting, as follows [28]:

Selection: Here, the guarantee of the seriousness of the offer applies, which covers various events, such as

- No extension of the validity of the guarantee when the term for the award or subscription of the contract is extended, provided that this extension does not exceed three (3) months.
- Failure to guarantee compliance with the contract by a successful bidder.
- No subscription of the contract without a mere cause for the successful bidder.
- The withdrawal of the offer after the deadline for its presentation expired.

Contracting and execution: Here, the risks that are a consequence of breach of contract are covered, since the conditions of the object of the contract are key to determining what the guarantee covers, having the following events in this phase:

- Payment of salaries, legal social benefits, and labor compensation.
- Return of advanced payments.
- Good management and appropriate investment in advance.
- Compliance with the contract.

Furthermore, when dealing with contracts that involve a risk of damage to third parties, the State Entity has the discretion to request noncontractual civil liability insurance.

Obligations after execution: This phase deals with covering the risks that arise after the termination of the contract, having the following protections:

- Quality of service.

Stability and quality of work.

- Quality and correct functioning of goods.

With regard to the construction contract, which is the contract developed in this document, it must be noted that the guarantees provided under this contract are governed by commercial regulations (Articles 1036, 1037, and 1083 of the commercial code), which leads to saying that insurance is understood as a contract by which the policyholder acting on his own or another's behalf transfers to an insured those risks that at some point may affect elements of the insured assets. In this sense, the insurer assumes risk due to the contract, being obliged to the respective compensation if the risk materializes by virtue of an unforeseeable loss.

This leads us to say that, although it is true that the applicable rules are commercial, it is also true that the rules of the General Statute of Administrative Contracting operate to safeguard

public assets under the ownership of the contracting state entity, who is ultimately the creditor and insured.

To put things into context, the issue of stability and quality of the work will be addressed, which is part of the sole guarantee of compliance that aims to protect the entity against damages caused by damage or deterioration presented by the delivered work, provided that these are attributable to the contractor. In this regard, it is important to note that the insured value is established by the state entity, considering factors such as obligations, amount, nature, and purpose, as stated in Decree 1082 of 2015 [29].

In any case, this insurance value must be valid for a minimum of five years. If the term is less than indicated, there must be a prior opinion by an expert justifying this decision.

The nature of the risk of stability of the work began with Decree Law 222 of 1983 [30], that is, in the previous statute of administrative contracting, in which, in Article 67, it contemplated that in "every contract, except those of loan, lease when the entity was a lessee and inter-administrative, in which this clause would not be mandatory, it was imperative to agree on the obligation of the contractor to guarantee the fulfillment of the contract, the good management and investment of the advance, the stability of the work, the quality of the service, the payment of salaries, benefits and compensation of the personnel used for the execution of the contract and the correct operation of the supplied and/or installed equipment" although the progress was not complete, since the risks covered by these guarantees were not defined, granting the responsibility of this regulation to the Comptroller General of the Republic, who through Resolution 10500 of 1984 [31] provided the obligation of the insurer to guarantee all obligations derived from the contract. of inter-administrative contracts with the contractual subjects that were stipulated at the time by Decree Law 222 of 1983, with the exception that there must be a master policy approved by the banking superintendence.

It should be noted that Resolution 10500 of 1984 dedicated Chapter II to the different types of guarantees, regulating Article 15, which refers to the stability of the work, under the following precept: By means of this guarantee, the contracting entities are protected from the event that, during a predetermined period of time, the work object of the contract, under normal conditions of use, will not suffer deterioration that impedes the use or the service for which it was executed, nor will it lose the characteristics of harmony, security, and firmness of its structure.

In response to this guarantee, Decree Law 222 of 1983 stated that the guarantee could not be less than 5% of the total value of public work, and that the term of this guarantee should be stipulated by the entity, taking into account the characteristics of the work; however, it could not be less than two years or more than five. In 1994, with regulatory decree 679, the scope of protection was established.

From that genesis, the quality and stability of the work, responsibility attributed to the contractor, is configured in scenarios where this guarantee is affected; for example, when construction deficiencies are presented that are the object of imputation to the state collaborator, that is, the contractor, even if these do not affect the firmness and normal use of the asset.

The Council of State in Sentence 27721 of 2014 [32] refers to the stability of the work, emphasizing the temporal competence of the administration to make this policy effective, stating that the contractual activity of the administration is linked to the principle of legality. In this area, its actions must also be subject to clear and precise competences that are attributed by law, public order regulations, and mandatory compliance, especially when it comes to the exercise of prerogatives held by the contracting state entity. Thus, the powers that, by legal attribution, state entities exercise when they relate to individuals, through contracting, require prior and express legal definition by law, since the law itself establishes the limits to the autonomy of the will.

In this section, it is necessary to distinguish between the quality and operation. On this point, the Council of State has repeatedly pointed out that the first refers to patrimonial damage resulting from the minimum requirements stipulated in the contract. On the other hand, the second, that is, the operation, is associated with damage to goods or services due to insufficiency in its operation.

In any case, the main guarantee in favor of the administration is that of compliance; however, its protections are different, which implies that the value of a protection cannot be taken to cover the loss covered by another risk, which is why the public administration must be thorough when establishing the configured risk and therefore the guarantee that would apply in the face of that event. The above allows us to state that the administration has the prerogative to declare the loss inherent to the execution of the state contract and to make effective the guarantee constituted in its favor, its power reaching the point of being able to quantify the damage through an administrative act subject to governmental and judicial control.

The aforementioned ruling stressed that, in matters of state contracting, the procedure provided for in Articles 1075 and 1077 of the Commercial Code, relative to the claim by the insured and the objection that the insurer may formulate, does not apply because the claim is met through the issuance of an administrative act by which the loss is declared unilaterally, ordering the effectiveness of the guarantees without the consent of the insurer.

By virtue of this, and as stated in Article 1081 of the Commercial Code, the administration has a term of two (2) years for the declaration of the loss and the effectiveness of the guarantee or from the date in which, in the opinion of the administration, it could have it. The procedure for claiming policies such as the stability of the work is contemplated in the commercial code and has been reiterated by the Council of State, stating that: what happens with the guarantees constituted in favor of state entities is that the claim procedure contemplated in the Commercial Code is inverted, since, in this case, the beneficiary and/or the insured must go to the insurance company to prove the occurrence of the incident and the damage - with its amount–when the state entity is the beneficiary of a policy, it is the insurance company that is responsible for going to the state-due process- to defend its position in relation to each of the aspects involved in the declaration of the incident, which no longer depends on the voluntary recognition made by the company, but rather it is up to the administration to decide whether or not a fact covered by the guarantee occurred. This possibility was reinforced by the issuance of Law 1150 of 2007, which reiterated this power in the hands of the administration [33].

The stability policy begins with the termination of the contract and with the satisfactory receipt of work and is extended for the period stipulated in the insurance contract. Its objective is to cover the risk that may subsequently arise and that cannot be warned with the delivery of the work. This has been contemplated by the Council of State on various occasions, making it clear that the "stability of the work" is configured when the incident occurs after the delivery of the work, that is, after the state entity receives it in compliance. However, what is the stability policy of work cover? It covers those defects, technical deficiencies, or faults that could not be perceived or detected at the time of receiving the works and that are presented or discovered after the termination of the contract and that affect the fulfillment of the purposes that motivated the contract. The above is a sufficient reason for the policy to have coverage for a determined period, counted from the effective delivery of the acquired goods.

The declaration of the administrative act is subject to a due process that implies the motivation of this by the entity, as confirmed by the Council of State in its 2019 Judgment [34] by stating that this motivation must be supported by factual assumptions and evidence that proves the loss and the estimated compensation by the administration, as well as guaranteeing that the contractor and insurance company can exercise their right of contradiction and legitimate defense, something that is concluded from Article 1077 of the Commercial Code. In these events, the insured must prove the absence of liability.

This leads us to say that, in fact, the administration has special power by legal provision and consists of declaring the occurrence of the risk covered by the guarantees that have been granted in its favor; in the case that concerns these lines, it would be that of the stability of the work, a power that private individuals indisputably do not have in the development of their contractual activity, constituting this authentic prerogative of the public power, which is nothing more than a privilege enjoyed by the state entity that does not oblige them to go to the contract judge to declare the losses, since they have the power to do so unilaterally.

In any case, it is pertinent to bring up what was stated by the Council of State on the effects of validly issuing an administrative act for which the following conditions must be met:

- An administrative action prior to the adoption of the decision, in which evidentiary material is collected that supports, from a factual point of view, the determination to be made and that allows those who may be affected by it to exercise their rights to due process, contradiction, and defense.

The necessary and sufficient demonstrative elements are effectively collected to allow the administrative act to be duly supported by determining reasons or facts whose existence was verified prior to the issuance of the decision and that were duly assessed by the contracting state entity. Full compliance with the noted conditions has an impact on the burden of proof of the determining facts of the administrative decision within the judicial process, in which its legality is debated.

It should be noted that under figures such as the liquidation of the contract, the contractor is exempt from responding to the stability and quality of the work in response to which two theses have been raised, as mentioned by the Council of State:

- The contracting administration may not, after the liquidation, bring an action for damages against the contractor for the work that perishes or threatens to collapse, either due to defects in the construction or in the materials used or due to defects in the soil that it should have known about, because this liquidation purged any defect in the construction; in other words, after the liquidation, the contractor will not be responsible for the construction of the work.

The stability of the work and its good quality are not obligations arising from the contract because Article 2060 of the c.c., in its numerals 3 and 4, only operates in private law and for contracts between individuals.

In conclusion, the theses indicated in the light of doctrinal experts are unacceptable in the sense that contracts are entered into with the purpose of fulfilling under a general interest, which is inoperative to think that Article 2060 of the Colombian Commercial Code can only have significance between individuals.

IV. Discussion

The Council of State's statement on the stability and quality of work despite events such as the liquidation of the contract due to non-compliance by the contractor.

Analyzing the contingent actions available to the state when facing non-compliance by the contractor implies analyzing the liquidation of the contract, taking into account some considerations of the Council of State on this point, such as the following:

If it is true that the contractor of a public work, with the liquidation of the contract, is released from responsibility for the stability of the same and its good quality, two frankly unacceptable theses would have to be recognized. The first is that the contracting administration will not be able to institute, after the liquidation, an action for damages against the contractor for the work that perishes or threatens to collapse, either due to defects in the construction or in the materials used or due to defects in the soil that it should have known about, because that liquidation purged any defect in the construction; in other words, after the liquidation, the contractor will not be responsible for the construction of the work. Second, the stability of the work and its good quality are not obligations arising from the contract, because Article 2060 of the Civil Code, in its 3rd and 4th paragraphs, only operates in Private Law and for contracts between private parties.

The preceding statements have no justification whatsoever, because they ignore the effects of contracts and the obligations arising from them, since contracts are entered into for their correct and complete fulfillment. In public works contracts, this fulfillment is of general interest, and the initial acceptance made by the owner of the same during the delivery process will not prevent him from demanding that the builder respond in the future for its stability and good quality of the materials used. Hence, if no one disputes this power in the field of private law in the face of public works, this requirement is more evident because, as was said, the general interest is involved in these.

In this sense, if the obligation of stability, legal rank, and supplementary to the will of the parties (Article 2060 cited above), operates between private individuals, it is not understood how its ineffectiveness can be alleged in the field of public works that interest the entire community. We speak of a supplementary rule because contracting parties may agree on different terms to demand this stability.

Given the void observed within the legal regime of state contracts, especially in that of public works, nothing prevents the application of Article 2060 in the field, except for a stipulation to the contrary, in which it is understood that the parties agreed on a stability period greater or less than the term of 10 years indicated in this rule. In this order of ideas, in relation to these works, it is necessary to specify the following:

a) As indicated in Resolution 10500 of 1984 of the Comptroller General of the Republic of Colombia, the guarantee of stability and conservation of public work must be granted for the term indicated by the contracting entity within the specifications, taking into account the characteristics of the work, a term that could not be less than two years or more than five and must be granted simultaneously with the receipt of the work. The resolution was issued based on Article 69 of Decree Law 222, 1983.

b) The foregoing means that once the guarantee expires, the contractor is released from its obligations of stability and good quality of work, because in such an eventuality, the will of the parties took effect over the legal provision, which, it is repeated, is supplementary to said will.

c) The obligations of stability and good conservation of the work have their indisputable source in the contract, and its guarantee does not make the insurance lose its character of accessory to the public works, to convert it into the main one, and as if those obligations did not emanate from the latter, but from the liquidation act.

From the above, it can be inferred that in the field of insurance, certain differences are observed that show how one is the treatment in the relations

between individuals and another, the one that occurs when that insurance guarantees obligations contracted by the contractors of the administration.

In the private field, the person whose favor an insurance is granted makes the claim to the insurer demonstrating the existence of the loss and the amount of the damages; in the face of said claim, the insurer can, within the term of 60 days, pay or reasonably object to said claim. If objections are not raised, the policy will provide executive merit against it. If it raises them, the insured person must go to the judge of the contract so that he can resolve whether the objections are founded (Arts. 1077 and 1080).

However, in the field of state contracting, before making its claim to the insurer, must issue a unilateral administrative act in which it will declare the incident to have occurred; in this case, both the insurer and the contractor may exhaust the administrative route and challenge it judicially (art. 68, ordinal 5 of the Administrative Litigation Code).

Thus, the debate is advanced regarding an act issued based on legal power, which, once executed or after the administrative and jurisdictional routes have failed, will provide executive merit against the insurer with the corresponding policy, which must pay the insurance under the agreed terms. Notwithstanding the above, it should be noted that this resolution of the occurrence of the risk cannot be considered as a unilateral declaration of non-compliance by the contractor, even if it apparently implies such a determination, because the administration lacked the exorbitant power with that scope, as explained above, only possible, at that time, to impose fines or declare the expiration due to serious non-compliance by the contractor during the term of the contract or to make the pecuniary penalty clause effective after its termination.

Statements by the Council of State regarding the competence and jurisdiction to hear disputes arising from state contracts and enforcement proceedings.

In Ruling 17244 of 2002, the Council of State of Colombia stated [35] that the competence to hear disputes arising from state contracts and enforcement proceedings is the contentious-administrative jurisdiction, as established in article 75 of Law 80 of 1993; and in the Order of November 22, 1994 [36], file S-414, the Plenary Court of the corporation explained the scope of this rule as follows:

From the transcribed rule, it is clearly inferred that Law 80 of 1883 assigned to the administrative litigation jurisdiction the competence to hear contractual disputes arising from all state contracts and from execution or compliance processes. In the latter case, it is a process of execution regarding obligations already defined by the will of the parties or by judicial decision. It observes that Law 80 of 1993 applies a principle according to which the judge of the action must be the same judge of the execution, reflecting what has been the dominant trend in modern law, of transferring matters that were the responsibility of the ordinary jurisdiction due to the subject matter to the administrative litigation jurisdiction, seeking criteria of continuity and unity in the judge, a position that, although not shared by all judges, is a legislative trend.

Statement made by the Council of States on the insurance contract and its characteristics. The high court argues that it is bilateral because it creates reciprocal obligations for the insurer and policyholder. It is onerous since it commits the former to pay the claim and the latter to recognize the value of the premium. This is random because of the contingency to which the parties are subject and because it is of successive execution due to its progressive fulfillment. This contract is perfected by the subscription of the policy, which constitutes the proof of the contract and includes the general conditions of the agreement. In addition, the document does not require additional documents for perfection.

Compared to state contracts, the insurance contract has the following characteristics:

a) Although the insurance contract is by nature private law, the guarantee clause incorporated in state contracts is of public order, since its purpose is the protection of public assets, and the administration cannot renounce it.

b) It is not a unilateral contract in the strict sense; rather, it ultimately affects both the contracting parties and beneficiary.

c) It is irrevocable by the contractor; therefore, the guarantee will not expire due to unilateral revocation. Even in the case of late payment of the premium, it will not expire either, and the insurance company will not be able to claim it as an exception before the state entity; on the contrary, it must recognize the insured amount.

d) Under the regime of Decree 222 of 1983, the guaranteed contracts formed an integral part of the one that was guaranteed; that is, Article 70 was concerned with indicating its accessory nature. This provision was repealed with the entry into force of Law 80; therefore, there is no positive support that ensures the said nature.

Now, under Law 80 of 1993, the insurance contract constitutes an autonomous contract, but it collaborates in the performance of the public function, given the nature of the assets it protects

and since the beneficiary is directly the administration.

Despite its autonomy, the state contract [37] constitutes the main reason that gives rise to the insurance contract and is linked in such a way that its fulfillment and execution depend on the first [38]. Although the insurance contract strict sensu is not a state contract, by virtue of being entered into between two individuals for the benefit of a third party, this third party is always the public administration [39], and the granting of the guarantee is justified in the interest of the state assets, which gives it a special treatment, different from contracts entered into between individuals, so much so that the constitution of the guarantee and its approval are indispensable requirements for the execution of the contract [40].

On the other hand, it should not be overlooked that the insurance contract is born and dies with the state contract [41] if the latter is developed normally and is prolonged over time only if the contractor fails to comply with the obligations arising from the contract. The above allows us to deduce that once the contractor's failure to comply with his obligations has been declared and the loss has been configured, the guarantee granted will be ordered to be made effective by means of an administrative act, which may be subject to appeals through the administrative route, but the execution may not be processed through the procedure of the coercive jurisdiction, but through the executive process before this jurisdiction. In this order of ideas, the Court concludes that the competence to hear the executive process derived from the policy granted by the contractor to guarantee the fulfillment of a state contract, as is the case in the present case, corresponds to the jurisdiction of administrative litigation.

V. Conclusion

The general conclusion of this article focuses on the existing regulatory vacuum regarding the guarantee of work in the event of non-compliance by the contractor, which means that it is necessary to resort to exorbitant clauses such as the expiration clause that does not provide security because it does not have key guarantees such as the stability of the work in relation to what has been executed, that is, in relation to that part of the work that was fully carried out by the contractor. By handing over the remaining part to be executed by another contractor, the insurer that issues this new policy will only be responsible for what will be carried out by the new contractor, and there is no subrogation by this new collaborator of the administration in charge of finishing the work that was not completed at the time.

The practical use of this inquiry is its exploratory nature, which undoubtedly forces the academy to be concerned about this issue and delve deeper into it. The academy is first in charge of issuing reflections and seeking solutions to problems that concern society and the common good.

Declarations

Author Contributions

Conceptualization, L.H.D. and A.T.H.B.; validation, G.L.C., B.V.Q.P., M.C.A., and S.R.A.; formal analysis, M.C.A. and S.R.A.; investigation, L.H.D., A.T.H.B., and S.R.A.; data curation, L.H.D., and P.J.S.B. writing—original draft preparation, all authors contributed equally; writing—review and editing, L.H.D. and A.T.H.B. All authors have read and agreed to the published version of the manuscript.

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The data presented in this study are available upon request from the corresponding author.

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Conflicts of Interest

The authors declare no conflict of interest.

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