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A cláusula *solve et repete* como mecanismo de gestão dos riscos contratuais: contornos e limites no direito brasileiro*

The solve et clause repeats as a mechanism for managing contractual risks: contours and limits in brazilian law

La cláusula solve et repete como mecanismo de gestión de los riesgos contractuales: contornos y límites en el derecho brasineño

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Resumo

O presente ensaio é dedicado à cláusula *solve et repete,* que se constitui em mecanismo legítimo de alocação positiva dos riscos contratuais, por meio do qual se garante a exequibilidade imediata da prestação, ainda que existam razões jurídicas que justifiquem a possibilidade de não cumprimento ou o retardamento da prestação pelo devedor. Inserida no exercício legítimo da autonomia negocial dos contratantes, sujeita-se tal disposição a controle de legalidade e abusividade, do que se extrai a relevância de seu estudo, com base em seus contornos e limites no direito brasileiro, à luz da legalidade constitucional.

Palavras-chave: cláusula *solve et repete*; gestão positiva de riscos; contratos; autonomia privada.

Abstract

This essay is dedicated to the solve et repeat clause, which constitutes a legitimate mechanism for the positive allocation of contractual risks, through which the immediate feasibility of the performance is guaranteed, even if there are legal reasons that justify the possibility of non-compliance or delay in payment by the debtor. Inserted in the legitimate exercise of the negotiating autonomy of the contracting parties, this provision is subject to the control of legality and abusiveness, from which the relevance of its study is extracted, based on its contours and limits in Brazilian law, in light of constitutional legality.

Keywords: *solve et repete clause; positive risk management; contracts; private autonomy.*

Resumen

El presente ensayo es dedicado a la cláusula solve et repete, que se constituye en mecanismo legítimo de destinación positiva de los riesgos contractuales, por medio de lo cual se garantiza la viabilidad inmediata de la parcela, aunque existan razones jurídicas que justifiquen la posibilidad de no cumplimiento o el retraso del pago por el deudor. Inserida en el ejercicio legítimo de la autonomía negocial de los contratantes, se sujeta tal disposición al control de legalidad y de exceso, de lo que se extrae la relevancia de su estudio, con base en sus contornos y límites en el derecho brasileño, a la luz de la legalidad constitucional.

Palabras clave: *cláusula solve et repete; gestión positiva de riesgos; contratos; autonomía privada.*

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1 Introduction

Nowadays, the Age of Risk *is often alluded to*, in the context of which the contract emerges as the legal instrument made available to private autonomy to discipline the foreseeable economic risks related to business operations, especially the continuing ones, which are protracted over time. Such predictable economic risks, which materialize with the natural oscillations of the business economy, have repercussions on the contractual installments and, therefore, must be managed by the contract, which will allocate these risks to the contracting parties.

In this scenario, the so-called clauses, *solve et repete* ("*pay first, argue later*" or, in the vernacular, "pay and then claim"), gain more and more prominence, through which the contracting parties, pressured by the requirements of speed and efficiency of certain economic sectors, provide for the unenforceability of certain exceptions by the debtor when triggered by the creditor. It is a negotiating provision that determines the debtor's subjection to the immediate fulfillment of the obligation incumbent on him, without being able to invoke defense matters that would allow him to refuse compliance, were it not for the negotiation agreement.

Increasingly frequent in business traffic, the detailed study of the *solve et repete* clause in Brazilian law is justified as it constitutes an important risk management instrument available to the contracting parties. Thus, based on freedom to negotiate, this provision is in line with the principles of private autonomy, economic balance and the obligation of pacts, which is why the objective is to scrutinize its main peculiarities and form of operationalization, given its growing relevance in contractual practice.

In spite of the fact that it is a useful mechanism for managing contractual risks, it is discussed, as will be seen below, about its validity and effectiveness in certain business relationships, depending on the nature of the right in question and the function of the regulation of interests in which it is inserted. From this perspective, the objective is to identify the functional profile of the *solve et repete* clause, highlighting its main contours and limits in constitutional legality.

2 The contract as a risk allocation mechanism

Hiring is *taking risks*: there is no contract without risk. When contracting, the parties, precisely because of the uncertainty regarding the implementation of the risk, do not know the final economic result of the business, do not know whether they will profit or lose economically; whether the business is good or bad. Risk is present in any type of business, whether it is a random contract – thus qualified by the identification of the legal law as an integral element of its cause, in addition

to the normal law – or a commutative contract – characterized by the subjection exclusively to the normal law – and is therefore the object of management by the contracting parties[1]. Hence the recurring question, in vulgar language, in the face of a given contract, of *what is the business risk* assumed by the parties. In terms of business risk, the distribution of risks carried out by private autonomy in the specific regulation of interests is thus important in importance, which may result from the positive or negative management of the normal area.

In this perspective, the contract is understood, therefore, as a mechanism that uses private autonomy to manage the economic risks pertinent to a given operation that it aims to carry out. In fact, the legal transactions carried out by private parties, notably business contracts, have the purpose of sharing the risks of a given economic operation among the contracting parties, in order to establish the respective responsibilities[2].

In other words, the regulation of interests assigns to the contractor the responsibility for the consequences triggered by the implementation of a certain foreseeable supervening fact, the occurrence of which, at the time of contracting, was uncertain (*rectius,* risk). The verification of the risk will thus have repercussions on the legal sphere of the contracting parties, triggering the responsibilities defined in the contract, with an impact on the contractual relationship and the economy of the parties.

The Economic Liberties Law, Law No. 13,874, of September 20, 2019, introduced article 421-A into the Civil Code, which, in its item II[3], highlights the importance of respecting the allocation of risks defined by the contracting parties in equal relationships, with informational symmetry, as it expresses the economic purpose pursued by the parties with the finalization of the deal[4]. In a word, compliance with the allocation of risks established by the contracting parties is in line with the principles of private autonomy, economic balance and the obligation of pacts (Tepedino; Flag; Konder, 2024, p. 173). On an exceptional basis, the revision of the contract is admitted, with a change in the original risk distribution (article 421-A, III,[5] of the Civil Code), provided that the legal requirements established by arts. 478 et seq.[6]

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[1] On the classification of random contracts from the legal field, cf. BANDEIRA, Paula Greco. **Random Contracts in Brazilian Law.** Rio de Janeiro: Renovar, 2009.

[2] Such contractual relationships are characterized by symmetry between the parties. In this sense, Statement No. 21 of the First Conference on Commercial Law of the Federal Justice Council (CJF) establishes that "in business contracts, contractual dirigisme must be mitigated, in view of the natural symmetry of business relations".

[3] "Article 421-A. Civil and business contracts are presumed to be equal and symmetrical until the presence of concrete elements that justify the removal of this presumption, except for the legal regimes provided for in special laws, also ensuring that: (...) II – the allocation of risks defined by the parties must be respected and observed".

[4] See, among others, LÔBO, Paulo. **Civil law:** Contracts. 7. ed. São Paulo: Saraiva, 2021. On this point, see also. AGUIRRE, João Ricardo Brandão. Reflections on the social function of the contract and private autonomy, after the declaration of the rights of economic freedom. **Brazilian Journal of Contract Law**, Porto Alegre, v. 1, n. 2, p. 5-21, jan./mar. 2020.

[5] "Article 421-A. Civil and business contracts are presumed to be equal and symmetrical until the presence of concrete elements that justify the removal of this presumption, except for the legal regimes provided for in special laws, also ensuring that: (...) III – the contractual review will only occur in an exceptional and limited manner".

[6] On the importance of respecting the allocation of risks, cf. interesting precedent that, despite the Covid-19 pandemic scenario, determined compliance with the content agreed upon in the energy purchase and sale

In fact, based on the allocation of risks established by the parties, the contractual synagma is defined, that is, the commutativity or co-respectivity between the services, which reveals the economic rationality of the business. The economic equation underlying the contract translates its intrinsic balance, desired by the contracting parties, which, for this very reason, must be pursued in respect for the principles of contractual balance[7], private autonomy and the obligation of pacts.

It should be noted that the concept of contractual risk is directly related to that of equilibrium, taking into account that the parties negotiate the distribution of risks as a way of defining the balance of the adjustment (Bessone, 1969, p. 2). When inquiring about the allocation of risks established by the contracting parties, according to the declared will, the interpreter must pay attention to the practical-social function or to the cause of the concrete business (Perlingieri, 2002, p. 116-117). In this regard, it must observe whether it is a typical or atypical contract. Each type of contract has risk sharing criteria previously established by law. However, the parties may model the risk allocation of the business, inserting in its cause specific and unusual risk allocation to a certain type of business, giving life to atypical businesses.

In addition to the cause or practical-social function of the business, the interpreter, for the purpose of identifying the allocation of risks and the respective responsibilities, must consider the quality of the parties, investigating the activity normally practiced by the contracting parties in the light of business uses, which are added to the regulation of interests[8]. By way of illustration, it is considered reasonable to attribute greater risk to entrepreneurs than to individuals who are not *experts* in a given theme or sector (Bessone, 1969, p. 39). Or, even, impute responsibility to the contractor for the risk inherent to the economic activity regularly

agreement entered into in the Free Contracting Environment: "Interlocutory Appeal. Injunctive relief requested on a prior basis. Aggravated decision that grants an injunction for the Aggravating Circumstance to charge half of the minimum amount of electricity consumption bills until the closure of the mall, now Aggravated, as a result of the pandemic (Covid-19). Reform. "*Contract for the acquisition of electricity signed between the parties in the 'Free Contracting Environment (ACL)', in which the contracting legal entities are on equal terms, and it is not an adhesion contract, regulated by the rules of Consumer Law. Financial contract that brings to the adherent the risks of contracting and variation in the price of energy in the market (Difference Settlement Price - PLD), depending on whether there are surpluses or deficits at a given time, and it is not reasonable to set aside a freely agreed contractual clause and completely disregard the allocation of risks provided for in the instrument*. Granting of the appeal" (TJRJ, Ag Inst 0033074- 45.2020.8.19.0000, Rel. Des. Luciano Saboia Rinaldi de Carvalho, 7th CC, judge. 20.10.2020; emphasis added). You also. TJSP, Ap. Cív. 1006216-86.2015.8.26.0566, Rel. Des. Cesar Ciampolini, 1st C. D. Priv, judge. 04.10.2017.

[7] The idea of contractual balance is close to the notion of functional synagma to which the doctrine refers. Cf., in the Italian doctrine, BIANCA, Massimo. Diritto civile: il contratto, Milano: Giuffrè, 1987. v. 3. p. 488

[8] Business uses consist of a source of integration of contracts. On this point, cf. Judith Martins-Costa: "The characteristics mentioned so far justify the peculiar and very complex role of the uses of commerce ('uses of trafficking'), an expression now used broadly, as well as the practices of the parties in the business activity. In addition to being creators of contractual forms and modes of business behavior and communication, uses are considered, in the strictly hermeneutic plan, a source of normative heterointegration" (Martins-Costa, 2015, p. 288-289). See also Paula Forgioni's summary: "The repeated practice of agreements with the same economic function leads to security and predictability in relation to the behavior of the other party, because it creates a market pattern that becomes the expected conduct of the merchant (legitimate expectation)" (Forgioni, 2010, p. 524-531).

developed by him. On the other hand, it is necessary to observe whether there is a clause limiting or excluding liability, as well as to identify the system of responsibilities that arise from the systematic and teleological interpretation of contractual clauses[9].

The allocation of economic risks must be identified, therefore, in the specific case, according to the specific regulation of interests. In this way, it is possible to extend the liability of the contracting parties, attributing to them a greater risk than that commonly assumed in a certain type of contract; or even reduce its spectrum. Imagine, for example, a construction contract, in which the parties attribute to the contractor the responsibility for abundant rains that delay the schedule of the work, even if, repeatedly, the rains constitute fortuitous or force majeure, capable in theory of removing the debtor's liability.

In parity relationships, in which there is no asymmetry of information, the economic equation established by the contracting parties through the allocation of risks must be observed throughout the contractual life, in line with the principles of private autonomy and the obligation of pacts. After all, the distribution of risks will translate the purpose sought by the contracting parties with the concrete business, which seeks to satisfy their interests through that specific allocation of risks.

The allocation of risks in the contract reveals, it should be repeated once again, the economic balance of the business pursued by the contracting parties and through which the parties aim to achieve their economic objectives. Such risk sharing is thus part of the cause of the contract, that is, of the essential effects that the business intends to achieve, or, in other words, in its *economic-individual function* or *practical-social function*, which expresses the rationality desired by the contracting parties, their interests pursued *in concreto,* based on which the business is interpreted and qualified, in a single and inseparable procedure. As observed by the Italian doctrine, the contractual balance is expressed not in objective terms of values, but corresponds to the purpose sought by the contracting parties or to the interest they intend to achieve with the synagma or the correlation between the services[10].

In the Brazilian legal system, there are two forms of risk management in contracts: positive management and negative management. Obviously, the risks that will be managed by private parties must be predictable, so that the effects of their verification can be attributed to one or another contractor. When shared among the contracting parties, the foreseeable risk becomes part of the normal area of the contract, understood as the risk external to the

[9] On the subject, see ALPA, Guido. Rischio. *In fashion:* **Enciclopedia del diritto**, Milano: Giuffrè, 1989, v. 40, p. 1158, in which the author reviews criteria that should guide the judge in the distribution of risks, including the examination of the quality of the parties; the provision (fungible, non-fungible, etc.); and the economic function of the business.

[10] In the same vein, it could be adduced, also in the Brazilian legal system, "the legislator, therefore, refrained from considering the validity of the contract based on quantitative valuations of the synagma, having, on the contrary, shifted its own valuation to the teleological function of co-respectivity, which is the one intended to satisfy the interests of both parties, who are only responsible for establishing which economic values to attribute to the services that satisfy their interests" (Camilletti, 2004, p. 44).

business, which, although not part of its cause, maintains *a relationship of relevance with it,* as it represents the foreseeable economic risk assumed by the contracting parties when choosing a certain type or contractual arrangement. The definition of normal law will operate in the concrete regulation of interests, showing that it is possible that a certain foreseeable event is not included in the normal area and, therefore, does not appear as a foreseen fact, subject to management by the parties. On the other hand, the parties may extend the normal range, including in risk management foreseeable events that are not ordinarily associated with a certain type of business (and which, therefore, in the common case, would be considered extraordinary facts).

In this way, the parties, by distributing the foreseeable economic risks from the contractual clauses, proceed to the *positive management of the normal law*. Such allocation of risks, which will be identified based on the will declared[11] by the contracting parties, establishes the economic balance of the business. Such an economic equation, which underlies the synagma or the correlation between the installments, must be observed in the course of the contractual relationship, in observance of the principles of the obligation of the pacts and the balance of the contracts.

In addition to the positive management of normal law, contractors may choose to negatively manage foreseeable economic risks. The figure of the incomplete contract then arises, which consists, in general terms, of a legal transaction that adopts the technique of negative management of normal law. In fact, in the incomplete contract, the parties deliberately choose to leave blank certain elements of the contractual relationship, as a way of managing the supervening economic risk, which will be determined, at a future time, by the action of one or both parties, by a third party or by external factors, according to the procedure contractually provided for the integration of the gap. Care is taken of the non-voluntary allocation of economic risk, in which the parties leave blank a certain element of the legal transaction (voluntary gap), which would be directly affected by the implementation of the risk. After the risk is realized, the parties will distribute the economic gains and losses, as follows: means of integrating the gaps, according to the procedure originally provided for in the contract[12]. The mode of risk allocation employed by the contracting parties will be identified based on the interpretation of the declared will of the parties, which may be express or implicit, extracted from the systematic and teleological interpretation of the contractual clauses.

Therefore, there are, in the Brazilian legal system, two voluntary ways of managing

[11] On the theory of declaration, originating in the century. In full force in contemporary contractual theory, V. Vincenzo Roppo points out: "in the contract, it is important not only the *effective individual will*, in how it is formed in the subject's psychic sphere, but also its *external social projection,* and, in particular, the way in which the will of the parties is perceived by the counterparty. This perception is essentially determined by the way in which the will, objectively, is manifested externally; hence the objective content of the declaration of will" (Roppo, 2001, p. 38-39).
[12] On the subject, it is consented to refer to BANDEIRA, Paula Greco. **Incomplete contract.** Rio de Janeiro: Atlas, 2015.

the normal area of contracts: (i) *positive management*, through the allocation of foreseeable economic risks according to the contractual clauses; and (ii) *negative management*, through incomplete contracts, in which, voluntarily, the parties do not allocate *ex ante* the supervening economic risk, of a predictable nature, whose losses and economic gains will be distributed, therefore, later, in the face of the occurrence of a certain event, by filling the contractual gap, according to the criteria defined *ex ante.* In this sense, the incomplete contract, as it allows the *ex post management* of the risks of supervenience, meets the imperatives of legal certainty and flexibility, and may appear, in the specific case, as an option that best fulfills the interests of the parties.

On the other hand, the risks that are beyond the sphere of predictability of the contracting parties will consist of unpredictable economic risks, which is why they cannot be managed by the parties (non-involuntary allocation of risk), constituting an extraordinary fact. In this case, given the other assumptions, the theory of excessive burdensomeness provided for in arts. 478 et seq. of the Civil Code, always on an exceptional basis. As a result, the foreseeable risk, which falls within the normal scope of the contract, may be allocated by the contracting parties, through positive or negative management, which will be identified from the examination of the contractual clauses and the *cause in concreto.* The *solve et repete clause*, as will be seen, consists of a mechanism for positive management of the risks of contractual default, presenting itself as a means of ensuring the fulfillment of the purpose of the specific regulation of interests.

3 The *solve et repete clause*: structure and function

An expression of negotiating autonomy, the *solve et repete* clause has assumed, in various legal systems, significant relevance in the protection of business interests in contracts of various orders (Sicari, 2008, p. 21-23)[13]. For example, in tax matters, its function is to impose on the taxpayer the immediate payment of the tax credit, preventing its delay or the refusal to comply with the obligation in the face of the allegation of any defense matters (Sicari, 2008, p. 25-34).

From a technical point of view, the *solve et repete clause,* also called *exceptio*

[13] By the way, in that system, the Italian Civil Code of 1942 absorbed the practice and expressly provided, in its article 1,462, the possibility of agreeing on a clause limiting the enforceability of exceptions. See the content of the provision: "Art. 1.462. *(Clausola limitativa della proponibilita' di eccezioni). La clausola con cui si stabilisce che una delle parti non puo'opporre eccezioni al fine di evitare o ritardare la prestazione dovuta, non ha effetto per le eccezioni di nullita', di annullabilita' e di rescissione del contratto. Nei casi in cui la clausola è efficace, il giudice, se riconosce che concorrono gravi motivi, puo' tuttavia sospendere la condanna, imponendo, se del caso, una cauzione*". Free translation: "Art. 1.462. (Clause limiting the proposition of exceptions). The clause that establishes that one of the parties may not oppose exceptions in order to avoid or delay the due performance has no effect on the exceptions of nullity, voidability and injury to the contract. In cases where the clause is effective, as pointed out, the judge, if he finds that there are serious reasons, may suspend the conviction, imposing, if necessary, the bail".

solutionis, is understood as the agreement through which it is established that one of the parties may not exempt itself from performing or delay the performance that is due to it, opposing exceptions that, in theory, would allow it to be denied or delayed, were it not for the clause (Gomes, 1984, p. 276). In other words, it translates into a limitation, instituted by the will of the parties, "of the right to oppose an exception such as the *exceptio non adimpletis contractus* or the retention exception accepted by one of the contracting parties, as a result of which the other contracting party can act in court without facing an obstacle in the eventual opposition of exceptions, such as the termination of the contract" (Gomes, 1984, p. 276-277)[14]. It thus functions as an impediment to the contractually excluded exception, acquiring the character of a preventive waiver[15]. In this regard, it can be stated that the *solve et repete clause* has the function of ensuring the immediate enforceability of the performance by the debtor, even if there were legal reasons that justified, were it not for the express agreement of the parties, the possibility of non-compliance or its delay.

Given the vocation of the aforementioned clause, it has been stated that such a provision would be very close to the logic observed in the so-called autonomous guarantee[16], that is, that accessory, fiduciary and atypical guarantee, created by private autonomy, with the purpose that the beneficiary is entitled to receive the amount contained in the guarantee, to be paid by the third party guarantor, regardless of disputes between creditor and debtor of the base legal relationship (Peçanha, 2023, p. 10). In this sense, the autonomous guarantee translates into a guarantee that is invulnerable to the means of defense related to the obligation relationship to which it is linked, the execution of which may dispense, as far as possible, with proof of default by the principal debtor. Despite the similarity, it *is not to be confused with the solve et repete clause, insofar as this expedient lacks the accessory nature of the autonomous guarantee*[17], which binds the assets of a third party (the guarantor) to the satisfaction of the

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[14] In the Italian experience: "*Il meccanismo oggi codificato nell'art. 1462 cod. civ., and tradizionalmente noto come solve et repete, consente alle parti di attribuire a un contraente il diritto di paralizzare la proponibilità di talune eccezioni della controparte, allo scopo di evitare che l'esecuzione degli obblighi contrattuali sia evitata o ritardata*" (Sicarini, 2008, p. 9). Free translation: "The mechanism now codified in article 1462 of the Code. Civ., and traditionally known as *solve et repete*, allows the parties to assign to a contracting party the right to paralyze the proposition of certain exceptions of the other party, in order to prevent the performance of contractual obligations from being avoided or delayed".

[15] "The impeding cause takes effect at a time logically prior to that in which the extinguishing cause takes effect. This is because it prevents the emergence of the right to the exception, instead of making it lapse. The waiver – including the solve et repete clause and the statute of limitations – is an impeding cause" (Gagliardi, 2010, p. 69-70).

[16] On the subject, TEPEDINO, Gustavo; PEÇANHA, Danielle Tavares. Contours of autonomous guarantees in Brazilian law. **Brazilian Journal of Civil Law**, v. 28, 2021, p. 275-290; and PEÇANHA, Danielle Tavares. Functional qualification, contours and limits of autonomous guarantees in Brazilian law. 2023. Dissertation (Master's Degree in Civil Law) – Faculty of Law, State University of Rio de Janeiro, Rio de Janeiro, 2023. See also WALD, Arnoldo. Guarantee to the first demand in comparative law. **Journal of Mercantil, Industrial, Economic and Financial Law**, São Paulo, v. 66, Apr./Jun., 1987, p. 5-12.

[17] In the direction of the text, Pietro Perlingieri argues that the clause *solve et repete* translates into "*pattuizione la quale ha lo scopo di assicurare al creditore una rapida realizzazione del suo interesse secondo modalità analoghe a quelle dei contratti autonomi di garanzia a prima richiesta: il fideiussore infatti deve adempiere immediatamente la sua obbligazione potendo far valere le proprie eccezioni soltanto dopo il pagamento in via di ripetizione (...) La*

interests of the creditor benefiting from the guarantee.

By the way, the waiver of the exercise of the right to oppose exceptions may originate not only from a contractual clause, by *solve et repete*, consensually established by the parties, but also from a unilateral act of one of them[18]. When inserted in the agreement of wills in a thoughtful and serious manner by the parties, by means of a contractual clause, it aims to rule out the possibility of suspension of the contract whose nature does not recommend such a stoppage as a result of the defense allegation handled by the debtor[19]. It is, in short, a means of self-protection, which aims to reinforce the chances of contractual performance, without the fulfillment of the provision being influenced by any discussions that could be prolonged in time, delaying or extirpating the receipt of the provision considered indispensable immediately, as soon as the term that imposes the fulfillment of the obligation has expired[20]. Although not expressly provided for in the Civil Code, the *solve and repeat* clause is widely recognized in Brazilian law, both in doctrinal and jurisprudential terms[21].

Among the possible exceptions that can be removed through the *solve et repete* clause are the compensation (Silva; Silva, 2020, p. 12-13)[22], possible duties to indemnify,

fideiussione con clausola solve et repete, pur simile alla garanzia autonoma a prima richiesta, ne rimane distinta perché in essa sopravvive la tipica accessorietà fideiussoria" (Perlingieri, 1997, p. 551-553). In free translation: "an agreement that aims to ensure the creditor the rapid realization of his interest according to a modality analogous to that of autonomous first-order guarantee contracts: in effect, the guarantor must immediately comply with his obligation, being able to assert his objections only after repeated payment. (...) The guarantee with *a clause resolves and repeats*, although similar to the autonomous guarantee of the first request, is distinguished from it because the typical accessory of the guarantee subsists".

[18] In the latter case, "the unilateral act of the party that, in the course of the contract, waives the exercise of the exception may be manifested expressly or by simple omission. The implicit waiver results from the non-exercise of the defense, when possible its argument; voluntary compliance with the provision; the delivery of the credit instrument; the remission of the debt, etc. The waiver can arise even after the exception is offered, with the withdrawal, and until the moment of the sentence" (Aguiar Júnior, 2011, p. 821-826).

[19] In these terms, "The clause inserted in the original agreement or in an addendum arises from the interest of the parties in not allowing the suspension of the performance of the contract, the nature of which does not recommend a stoppage while the merits of the dilatory defense are decided and corresponds to what is called the solve et repete clause" (Aguiar Júnior, 2011, p. 821-826).

[20] "*A volte al negozio fidiussorio si appone una clausola secondo la quale 'ogni eccezione di qualsiasi natura potrà essere fatta valere soltanto dopo l'integrale soddisfacimento della richiesta (da parte del creditore)'. (...) Tale patto riproduce lo schema della c.d. clausola limitativa della proponibilità di eccezioni, prevista in sede di disciplina generale del contrato, secondo la quale 'una delle parti non può opporre eccezioni al fine di evitare o ritardare la prestazione dovuta*'" (Perlingieri, 1997, p. 551-553). In free translation: "Sometimes a clause is affixed to the fiduciary transaction according to which 'any objection of any nature can only be raised after the request has been fully satisfied (by the creditor)'. (...) This pact reproduces the scheme of the so-called restrictive clause on the proposition of exceptions, provided for in the general discipline of the contract, according to which 'one of the parties may not raise exceptions to avoid or delay due performance'".

[21] In case law: "Civil appeal. Motion for a stay of execution. (...) Exception of unfulfilled contract. Impeding clause. Sentence upheld. (...) 2. According to article 476 of the Civil Code, it is not lawful for one of the contracting parties to demand from the other party the fulfillment of its obligation (payment) without having also fulfilled its part of the agreement. 3. If there is a contractual clause preventing the invocation of the exception of the unfulfilled contract, in relation to ancillary obligations, the judgment is correct by rejecting the allegation of unfulfilled contract. Appeal known and dismissed" (STJ, 4th T., AREsp 1.275.333/GO, Rel. Min. Ricardo Villas Bôas Cueva, judged on 4.23.2018).

[22] In the case law, although understanding that the discussion was not of a public policy nature, the Special Court of the Superior Court of Justice examined *a solve et repete* clause that rejected the claim of compensation. See: "Thus, the allegations of the second defendant (PETROMEC INC.) when it states that foreign decisions would have

(Bandeira, 2022, p. 369-370) and the exception of unfulfilled contract (or *exceptio non adimpleti contractus*), according to which "the defendant refuses to perform it, on the grounds that the one who claims has not complied with what is due to him" (Pereira, 2019, p. 141), deriving from the "reciprocity of the services or their legal unity" (Monteiro, 2007, p. 28). Based on article 476 of the Civil Code[23], the mechanism, applicable to bilateral and synallagmatic contracts, intended for if it prevents the defaulting party from demanding from the other the satisfaction of its performance (Gomes, 2019, p. 91), before its obligation is fulfilled (Carvalho Santos, 1964, p. 237).

It should be noted that the *solve et repete clause does not have the power to extinguish the right to the corresponding performance of the person who is denied the handling of the exception, nor does it definitively extirpate the debtor's right to discuss issues that he deems pertinent*[24]. The right to discuss matters that may benefit him is only projected for a future moment, when the service that was due to him will have already been performed, under the terms contractually agreed, allowing the uninterruption of the contractual activity and prohibiting him from conditioning the payment to the fulfillment of the related service. That is to say, the contracting party is willing to fulfill its obligation regardless of the performance of the consideration, thus losing "the possibility of extending the performance until the bilateral nature of the relationship is fulfilled, accepting to provide without having received what is due to it" (Aguiar Júnior, 2011, p. 821-826)[25].

Thus, the *solve et repete clause,* which once again rules out the opposition of the exception of unfulfilled contract, does not prevent the triggering of the other effects arising from the breach of contract, but only refers to the impossibility of the defendant to deny or delay the performance of the performance, alleging the non-compliance with the corresponding performance. Despite not being able to allege the exception of unfulfilled contract, the party may discuss the default concomitantly or subsequently[26], using other coercive means aimed at the realization of its right to credit or even execute a guarantee provided in reinforcement of the

prohibited the possibility of offsetting and stipulated the solve *et repete principle are unfounded*, since, like the rule of the exception of the unfulfilled contract, this issue does not have the nature of public policy, which is why it escapes consideration in this way" (STJ, Special Court, SEC 3.932/GB, Judge Felix Fischer, judge. 6.4.2011).

[23] CC/2002, "Art. 476. In bilateral contracts, none of the contracting parties, before fulfilling their obligation, can demand the implementation of the other's".

[24] Thus, "once he has regularly fulfilled the obligation he has assumed, there is nothing to prevent him from investing against the other contracting party, still in default,
totally or partially, with the aim of obtaining the forced fulfillment of the obligation still pending" (Gagliardi, 2010, p. 69-70).

[25] "The waiver of the exception does not mean the waiver of the right to credit; The waiver retains all other rights and means of defense arising from his position, including that of promoting the enforcement of his credit, in the same deed, by means of a counterclaim, or in an autonomous proceeding. Only this indirect defense loses" (Aguiar Júnior, 2011, p. 821-826).

[26] In fact, "the failure to pay will not affect, in this case, the performance of the service by the other party, however, the interested party may seek resolution in court, demonstrating the seriousness of the default, and the consequent impossibility of continuing the legal transaction. This will not, however, prevent the contractual stipulation from being judicially examined in light of the necessary material equivalence of the obligations and duties inherent to objective good faith" (Miragem, 2021, p. 306).

fulfillment of that obligation, whether real, such as mortgage and pledge; be fiduciary, like a surety.

It should be emphasized that the provision of the *solve et repete* clause is only justified in certain business arrangements, which, by their nature, admit it with a view to finalizing its purpose. On the contrary, the *solve et repete clause* is intended to ensure the fulfillment of the contractual purpose and has its limit, evidently in the protection of objective good faith (article 113 of the Civil Code) and in the control of abusiveness of the exercise of rights (article 187 of the Civil Code). On the other hand, the provision embedded in the contract, unreasonably, to enshrine a mere whim of one of the parties, as well as not deserving protection in the underlying interests, does not seem to deserve safeguarding.

By way of example, it has been understood as valid a solve et repete clause in a contract for the supply of essential goods, whose suspension based on the exception of unfulfilled contract would cause serious and irreparable damage to the counterparty, proportionally greater than the fulfillment of the required provision (Aguiar Júnior, 2011, p. 821-826)[27], making it impossible to achieve the contractual purpose.

It is also worth mentioning the provision of the *solve et repete clause* in associative contracts, with communion of scope, whose non-compliance with the provision compromises the common purpose of the contracting parties. In these cases, the clause functions as a legitimate risk allocation mechanism agreed upon, precisely, in order to allow the achievement of the common scope, notwithstanding the possibility of discussing the default of the counterparty at another time. It is enough to think, for example, of the complex business relations adjusted for the exploration and production of oil[28], often regulated by two related contracts[29], which express, based on their unitary function, the common economic scope pursued by the contracting parties: the concession contract, which regulates the obligations of the concessionaire company towards the Federal Government, which holds, by constitutional determination, the monopoly of research and mining of oil and natural gas deposits in Brazilian territory, with intervention

ANP; and the consortium agreement, which, in turn, formalizes the meeting of companies that, together, promote the exploration and production of oil in the fields specified in the concession.

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[27] The author illustrates: "the telecommunications company that provides access to an indispensable service to millions of users, as is common today in virtual communication, may waive the right to allege in exception the non-payment of its credit. Once the validity of the clause by which it accepted the solve et repete clause is recognized, the supplier may be obliged to provide, without the possibility of offering the exception, because of this clause, but with the possibility of exercising all other rights arising from its credit" (Aguiar Júnior, 2011, p. 821-826).

[28] Cf., on such business arrangements: TEPEDINO, Gustavo; BANDEIRA, Paula Greco; MACHADO, Bruna Vilanova. The clause forfeiture in consortium contracts for oil exploration and production. In: TERRA, Aline de Miranda Valverde; NANNI, Giovanni Ettore; PIRES, Catarina Monteiro (ed.). Risks in Private Law and Arbitration. São Paulo: Editora Almedina, 2023. p. 187-208.

[29] On the subject, cf. KONDER, Carlos Nelson. Related contracts*:* groups of contracts, contract networks and related contracts. Rio de Janeiro: Renovar, 2006.

Because they embody related contracts, the vicissitudes of one contract can have repercussions on the other (Tepedino; Konder, Bandeira, 2024, p. 82)[30], in such a way that, in this case, the exception of unfulfilled contract, eventually invoked in the consortium contract, would jeopardize the achievement of the common economic purpose intended by the associative contracts, that is, the exploration of oil under a concession regime. In this regard, the *solve et repete* clause may be triggered in relation to capital contribution obligations, called *cash calls*, the satisfaction of which is essential to the exercise of the activity and, consequently, to the continuity of the concession. Such a mechanism is common in the international oil market[31]. In general, it is accompanied, in the same adjustment, by a clause that prevents the debtor, even considering the undue collection, from alleging any exception to justify the non-compliance with the capital contribution obligation, thus postponing any discussions to a later time[32].

It is clear, therefore, from the characteristics and needs of such a market, that, in contracts related to the purpose of oil exploration, the *solve et repete clause* emerges as a legitimate mechanism for the allocation of contractual risks, as it ensures the achievement of the aforementioned purpose, and should, therefore, be deserving of protection.

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[30] On the other hand, Aline de Miranda Valverde Terra and Giovanni Ettore Nanni warn that "the mere breach of a contract that is connected to another does not authorize, by itself, abstractly, the exception of a contract that has not been fulfilled in relation to the agreement that has not been breached" (Terra; Nanni, 2021, p. 1-26), denoting that the non-compliance with a certain related contract will not always result in a chain of non-compliance with the other contracts that are related to it. In the same direction, it has been noted that "the existence of related contracts does not imply the verification of all the consequences of the contractual coalition, as well as the parties, within the scope of private autonomy, can rule out the effects related to the coalition" (Guilhardi, 2019, p. 170).

[31] It is worth checking the content of the *sove et repete clause* inserted in the core of the business relations adjusted for the exploration and production of oil, and placed within the scope of the consortium agreement, *in verbis*: "3.3. Ownership, Obligations and Liabilities (...) (C) Each Party shall pay when due, in accordance with the Accounting Procedure, its Participating Interest share of Joint Account expenses, including cash advances and interest, accrued pursuant to this Agreement and the Consortium Agreement. The Parties agree that time is of the essence for payments owing under this Agreement. *A Party's payment of any charge under this Agreement shall be without prejudice to its right to later contest the charge*" (emphasis added). In free translation: "Ownership, Obligations and Responsibilities (...) (C) Each Party shall pay at maturity, in accordance with the Accounting Procedure, its share of the Joint Account expenses, including cash advances and interest, accrued in accordance with this Agreement and the Consortium Agreement. *The Parties agree that time is of the essence for payments due under this Agreement. Payment by a Party of any charge under this Agreement shall not prejudice its right to subsequently contest the charge*."

[32] See: "8.6. No Right of Set Off. Each Party acknowledges and accepts that a fundamental principle of this Agreement is that each Party pays its Participating Interest share of all amounts due under this Agreement as and when required. Accordingly, any Party which becomes a Defaulting Party undertakes that, in respect of either any exercise by the non-defaulting Parties of any rights under or the application of any of the provisions of this Article 8, *such Party hereby waives any right to raise by way of set off or invoke as a defense, whether in law or equity, any failure by any other Party to pay amounts due and owing under this Agreement and the Consortium Agreement or any alleged claim that such Party may have against Operator or any Non-Operator, whether such claim arises under this Agreement or otherwise.* Each Party further agrees that the nature and the amount of the remedies granted to the non-defaulting Parties hereunder are reasonable and appropriate in the circumstances" (emphasis added). In free translation: "No right to compensation. Each Party acknowledges and accepts that a fundamental principle of this Agreement is that each Party pays its share of all amounts due under this Agreement as and when required. Accordingly, any Party that becomes a defaulting Party undertakes that, in respect of any exercise by the defaulting Parties of any rights or the enforcement of any of the provisions of this Article 8, *such Party waives any right to raise as a way of setting off or asserting as a defence, whether at law or in equity, any failure of any other Party to pay amounts due under this Agreement and the Syndicate Agreement or any alleged claim such Party may have against the Operator or any Non-Operator, whether such claim arises under this Agreement or otherwise*. Each Party further agrees that the nature and value of the remedies granted to the defaulting Parties are reasonable and appropriate in the circumstances."

4 The *solve et repete clause* as a mechanism for the positive management of contractual risks in Brazilian law

As we have seen, the *solve et repete clause* translates into a relevant mechanism for the positive management of contractual risks, insofar as it allocates to the contractor the risk of not making use of certain exceptions or means of defense in order to ensure the achievement of the contractual function or purpose. That is to say: the debtor assumes the risks of immediately complying with his performance even if he has defenses that authorize its non-compliance or its delay. Positive management is taken care of to the extent that the disposition is identified based on the will declared by the parties, and, as it is part of the contractual synagma, expressing the economic balance of the concrete regulation of interests (Camilletti, 2004, p. 44). Thus, the enforceability of exceptions – which would be the rule, were it not for the clause affixed to the contract – is removed by the express manifestation of the will of the parties, in the free exercise of their negotiating autonomy, who allocate the contractual risks, as a way of achieving their interests.

The allocation of risks in the contract by the stipulation of the *solve et repete clause* reveals the internal harmony of the business pursued by the contracting parties and through which the parties aim to achieve their economic objectives. Its examination of validity, however, will depend on the circumstances of the specific case, and may, in certain manifestations, prove to be invalid[33]. In this sense, attention should be paid to the repercussions that such a mechanism may have in the field of adhesion contracts and consumer contracts.

On the other hand, the indispensability of the specification by the parties of events not susceptible to opposition by the debtor is noted, when requested to perform the performance. As a rule, generic clauses that attribute to the debtor the duty to comply with the obligation in any circumstances, arbitrarily, are not allowed. In the case of positive risk management, those allocated to the debtor appear to be foreseeable to the contracting parties, and the cases in which the right to oppose specific matters of defense will be excluded must be indicated in the business, with well-defined contours. On the other hand, exceptions that have not been listed by the parties cannot be denied to the debtor.

It should also be noted that, although property rights, as a rule, are widely recognized as subject to waiver by their holder, it has been argued that there are certain exceptions, such as the allegation of invalidity and unconsummated prescription, which, by

[33] Miguel Maria de Serpa Lopes adds: "the aforementioned clause cannot be understood unlimitedly, but with certain reservations, especially with regard to the issue of nullity, voidability and primarily in relation to intent" (Lopes, 1959, p. 334).

their nature, could not be suppressed by agreement of the parties' will (Silva; Silva, 2020). In the first case, related to the allegation of invalidity of the transaction, it is argued in doctrine that "the existence of the *solve et repete clause* is ineffective when the invalidity of the contract is alleged due to one of the causes of nullity, voidability, injury or abuse" (Aguiar Júnior, 2011, p. 821-826). This is because, in the case of a defect that affects the validity of the transaction, it would not be possible for the parties to set aside the rules that extirpate the effects of the invalid transaction, and it is certain that, in the event of nullity, the judge may recognize it ex officio and any interested party may invoke it[34]. By the way, the *Italian Civil Code* expressly provides, in its article 1,462, the typicity of the *solve et repete clause*, except only for its ineffectiveness in cases of nullity, voidability and injury, in addition to providing for the possibility of the magistrate, in the face of serious reasons, in cases of effectiveness of the clause, to suspend the conviction, by requiring a bond[35].

Brazilian law does not have a similar provision. In any case, it can be stated that the mere allegation of invalidity of the transaction by the debtor does not seem to be sufficient to remove the duty inserted in the *solve et repete clause*, provided that the removal of the exception is provided, under penalty of subverting the logic of the institute. After all, the alleged undue charge, for any cause (willful misconduct, bad faith or abuse), could only be verified at a later time, when the provision of immediate performance could have already been performed in order to meet the contractual purpose. Unless specific intent was demonstrated in its formulation, in which case it would have been agreed upon with the intention of causing unfair damage to the counterparty.

On the other hand, the *solve et repete clause that* would rule out the defense related to the unconsummated statute of limitations could not be admitted, taking into account the provisions of article 191 of the Civil Code[36], which expressly prohibits the early waiver of

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[34] CC/2002, "Art. 168. The nullities of the preceding articles may be alleged by any interested party, or by the Public Prosecutor's Office, when it is incumbent upon it to intervene. Sole Paragraph. Nullities must be pronounced by the judge, when he hears the legal transaction or its effects and finds them proven, and he is not allowed to suppress them, even at the request of the parties".

[35] Here is the content of the provision: "Article 1,462. *(Clausola limitativa della proponibilita' di eccezioni). La clausola con cui si stabilisce che una delle parti non puo'opporre eccezioni al fine di evitare o ritardare la prestazione dovuta, non ha effetto per le eccezioni di nullita', di annullabilita' e di rescissione del contratto. Nei casi in cui la clausola è efficace, il giudice, se riconosce che concorrono gravi motivi, puo' tuttavia sospendere la condanna, imponendo, se del caso, una cauzione*". Free translation: "Art. 1.462. (Clause limiting the proposition of exceptions). The clause that establishes that one of the parties may not oppose exceptions in order to avoid or delay the due performance has no effect on the exceptions of nullity, voidability and injury to the contract. In cases where the clause is effective, as pointed out, the judge, if he finds that there are serious reasons, may suspend the conviction, imposing, if necessary, the bail." On this agreement, in the light of the Italian provision, see LIVI, Maria Alessandra. Clausola attributiva del potere di sospendere l'esecuzione del contratto. In: Massimo Confortini. **Clausole negoziali:** profili teorici e applicativi di clausole tipiche e atipiche. Torino: Utet, 2019. p. 27-64.

[36] CC/2002, "Art. 191. The waiver of the statute of limitations may be express or tacit, and will only be valid, being made, without prejudice to a third party, after the statute of limitations has been consummated; tacit is the waiver when it is presumed to be facts of the interested party, incompatible with the statute of limitations". On the point: "Exceptions exist that are incapable of being waived except at a given moment after their appearance, and their early renunciation is inoperative. In this case, the waiver of the statute of limitations is waived, which depends on

the statute of limitations.

It is also controversial whether the *solve et repete clause in* adhesion contracts and in deals entered into within the scope of consumer relations would deserve safeguarding. Regarding adhesion contracts[37], marked by predisposition, unilaterality and rigidity (Monteiro, 2000, p. 6), the Civil Code establishes, in its article 424, that clauses that stipulate early waiver by the adherent of a right resulting from the nature of the business are null and void[38]. It is understood that, in addition to the essential rights of the contractual type analyzed, the provision also prevents the waiver of rights that constitute natural elements of the contract, or that arise from contractual uses in an economic sector or region (Tepedino; Konder; Bandeira, 2024, p. 82). Therefore, it is important to understand whether the waiver of the opposition of exceptions, stipulated by the *solve et repete clause,* constitutes a waiver of a right resulting from the nature of the transaction and, as such, whether it would be null and void *ex vi* of article 424 of the Civil Code. The majority doctrine rightly understands that the clause will only be valid when it is based on parity contracts[39], without any disparity in the formation of the agreement[40], since the exception is a remedy and a natural element of synallagmatic contracts[41].

It is also questioned whether the *solve et repete clause would be lawful* when inserted in a consumer contract, or, on the contrary, whether it should be considered abusive to the extent that it implies an early waiver of the consumer's right, presumably vulnerable.

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the following requirements: a) it must be manifested after the consummation of the statute of limitations; b) there is no harm to third parties" (Lopes, 1959, p. 329).

[37] On the concept of adhesion contracts, see, for all, Gomes, Orlando. **Contracts.** 27. ed. Rio de Janeiro: Forense, 2019, p. 107.

[38] CC/2002, "Art. 424. In adhesion contracts, clauses that stipulate the early waiver of the adherent to a right resulting from the nature of the business are null and void".

[39] "Although generally valid, this waiver can overflow into the field of illegality, when it violates precepts of greater social relevance. Its validity depends on the substantial equality between the parties and the existence of a minimum of freedom in the negotiation. In short, it must occur in parity contracts" (Gagliardi, 2010, p. 69-70). In the same direction: "When stipulated in adhesion contracts, the *solve et repete clause* will be considered invalid, as a rule, because, according to article 424 of the Civil Code, in this contractual category 'clauses that stipulate the early waiver of the adherent to a right resulting from the nature of the business are null and void'. And the invocation of the exceptio, being a general rule attributed by article 476 of the Civil Code to contracts with corresponding benefits, is unequivocally a 'right resulting from the nature of the business'" (Butruce, 2009, p. 159-162).

[40] Ruy Rosado de Aguiar Júnior points out: "the waiver of the right to offer an exception must always be seen as an extraordinary situation, only admissible if certain requirements are present. The first of them requires, for the validity of the clauses, that it be included in contracts in which equality between the parties has been guaranteed, good faith has been taken into account and the principles of public order have been respected. Therefore, in principle, it is unacceptable in adhesion contracts, to which the party adheres without being able to negotiate its clauses, submitting the adherent to the duty to comply without receiving the consideration" (Aguiar Júnior, 2011, p. 821-826).

[41] There are those who consider that the clause should not always be considered null and void, and it is possible to consider the removal of an exception that does not concern a right resulting from the nature of the transaction. For these authors, although it is recognized that the clause that removes the exception of unfulfilled contract tends to be considered null, because it is a remedy of the essence of synallagmatic contracts, when the *solve et repete clause* implies the removal of another exception, such as compensation, this could be considered valid, without violation of article 424 of the Civil Code. In this sense, SILVA, Rodrigo da Guia; SILVA, Jeniffer Gomes da. Solve *et repete clauses*: perspectives for the performance of private autonomy in the (de)limitation of exceptions enforceable by the debtor. **Revista Eletrônica da PGE-RJ,** Rio de Janeiro, v. 3, n. 1, p. 1-40, Jan./Apr. 2020.

Unlike other systems, such as the Italian one, in which there is an express prohibition on the affixing of *a solve et repete clause* in consumer contracts[42], in Brazilian law, although there is no similar provision, it is understood that, especially when predisposed by the supplier, the clause should be considered abusive[43], since it restricts the consumer's rights arising from the established relationship, as well as threatens the contractual balance[44]. The clause would be illegal, therefore, given that it violates the provisions of article 51, § 1, II, of the Consumer Protection Code[45], and places the supplier in a situation of extreme contractual advantage (Aguiar Júnior, 2011, p. 821-826), to violate a rule of public order.

In this case, not only the *solve et repete clause* that stipulates waiver of the exercise of the *exceptio non adimpleti contractus is considered abusive*, but also the one that implies a waiver of the right to file an action for termination of the contract for default, restricting the consumer's right to defense (Nery Júnior, 2007, p. 577-578). In these cases, it is stated that "in a lawsuit filed by the supplier, the consumer may allege, in the defence, both the material objection of an unfulfilled contract and that of a contract that has been performed in a deficient manner, and the magistrate must deny effects, as abusive, to the contractual clause that prevents the consumer from deducting these exceptions" (Nery Júnior, 2007, p. 577-578).

In the Court of Appeals of the State of São Paulo, by the way, a *solve et repete* clause has already been understood to be unfair when inserted in a consumer relationship. In the case submitted to the Court, the feasibility of the clause that attributed to the insured consumer the duty to bear the expenses with *home care treatment was discussed*, without being able to raise exceptions, so that only after making such payment could he be reimbursed or promote discussions related to the obligation. It was stated, at the time: "the prescribed

[42] The 2005 Consumer Code establishes such a prohibition in article 33, 2, paragraphs r and t, see: "Article 33. Clausole vessatorie nel contratto tra professionista e consumatore. (...) 2. Si presumeno vessatorie fino a prova contraria le clausole che hanno per oggetto, o per effetto, di: (...) r) limitare o escludere l'opponibilità dell'eccezione d'inadempimento da parte del consumatore; (...) t) sancire a carico del consumatore decadenze, limitazioni della facoltà di opporre eccezioni, deroghe alla competenza dell'autorità giudiziaria, limitazioni all'adduzione di prove, inversioni o modificazioni dell'onere della prova, restrizioni alla libertà contrattuale nei rapporti con i terzi;". Free translation: "Art. 33. Unfair terms in the contract between professional and consumer. (...)
2. Terms that have as their object or effect: (...) r) Limit or exclude the enforceability of the objection of non-compliance by the consumer shall be presumed to be unfair until proven otherwise; (...) t) Sanctioning expirations, limitations on the right to raise exceptions, derogations from the competence of the judicial authority, limitations on the production of evidence, reversals or modifications of the burden of proof, restrictions on contractual freedom in relations with third parties;".

[43] "In the context of consumer relations, this clause, especially when predisposed by the supplier, ends up being considered abusive, as it implies an early waiver of the consumer's right, in addition to placing him in a situation of undeniable inferiority" (Gagliardi, 2010, p. 69-70).

[44] In this sense: "the affixing of *the solve et repete* in consumer relations is also subject to invalidation for abusiveness, in light of the provisions of article 51, § 1, II, of the CDC, which presumes exaggerated the will that 'restricts fundamental rights or obligations inherent to the nature of the contract, in such a way as to threaten its object or contractual balance'. In other words, the abusiveness of the solve et repete clause will be presumed when it is part of a consumer relationship, as it removes from the consumer a right that is in the nature of the contract entered into" (Butruce, 2009, p. 159-162).

[45] CDC, "Art. 51. Contractual clauses relating to the supply of products and services that: (...) § 1. It is presumed exaggerated, among other cases, the advantage that: (...) II – restricts fundamental rights or obligations inherent to the nature of the contract, in such a way as to threaten its object or contractual balance;"

treatment (*home care*) must be covered, considering an unfair contractual clause to the contrary. Otherwise, the consumer would be subjected to an excessively onerous situation to the detriment of his fundamental right, guaranteed by the contract, to effective health protection (art. 51, IV, § 1, II and III of the CDC)"[46]46.

It is understandable, therefore, that the examination of the validity of the *solve et repete clause* will depend on the nature of the legal relationship in which it is inserted and the intended contractual purpose, and it is certain that, in parity relationships and without informational asymmetry, the allocation of risks established by the negotiation autonomy must be preserved, with the principle of minimum intervention in contracts being applied.

5 Conclusion

The *solve et repete* clause constitutes a legitimate mechanism for the allocation of business risks, translating positive risk management, through which the debtor bears, at first, the risks of the other party's default, fulfilling its performance immediately, even if it has a means of defense that authorizes its non-compliance or delay. such as the exception of unfulfilled contract or compensation. The discussion regarding the validity and legitimacy of the collection is, therefore, postponed to a future moment.

This provision, inserted in the legitimate exercise of the negotiating autonomy of the contracting parties, has the function of ensuring the immediate feasibility of the provision, even if there are legal reasons that justify the possibility of non-compliance or delay of the provision.

The provision of the *solve et repete* clause is justified in certain business arrangements, which, by their nature, admit it with a view to finalizing its purpose. On the other hand, the *solve et repete clause* is intended to ensure the fulfillment of the contractual purpose.

On the other hand, the provision embedded in the contract unreasonably, to enshrine a mere whim of one of the parties, does not seem to deserve safeguarding. Its examination of

[46] TJSP, 2nd Chamber of Private Law, Ap. Cív. No. 0189768-19.2012.8.26.0100, Rel. Des. Guilherme Santini Teodoro, judge. 12.01.2015. From the full content, it is extracted: "The conclusion of the judgment regarding the abusiveness of the contractual obligation of the *solve et repete* procedure for high and substantial expenses such as those related to *home care treatment is correct*. The transfer of large risks was part of the legitimate expectation of the consumer at the time of adhesion to the contract, forming the objective basis of the business, which cannot be broken later, which would undeniably occur if the consumer first had to pay the expenses of the large risk and only then obtain reimbursement, creating a real obstacle to the faithful fulfillment of the contract by the operator". Likewise, the Court of Appeals of Rio de Janeiro has already understood that the collection of excessive charges in the monthly bill for public services constitutes valid grounds for refusal of payment until the concessionaire excludes the charge or demonstrates its legitimacy, signaling that, in the case of a consumer relationship, "the opposite understanding would imply obliging the consumer, under penalty of interruption of the service, to first bear the abusive charge and only then discuss its restitution, in an application of the odious formula "solve et repete"" (TJRJ, 27th C.C., Ap. Cív. 0269234-92.2014.8.19.0001, Rel. Marcos Alcino de Azevedo Torres, judge. 20.3.2019).

validity and effectiveness, therefore, will depend on the circumstances of the specific case, and may, in certain manifestations, prove to be invalid, as in the case of consumer contracts, in which the clause represents the consumer's waiver of his means of defense, placing the supplier in a position of extreme contractual advantage.

In summary, the *solve et repete clause* is subject to control of legality and abusiveness *in concreto*, so that the validity of its agreement and regularity of its exercise will depend on the nature of the legal relationship in which it is inserted and the intended contractual purpose, being certain that, in parity relationships and without informational asymmetry, the allocation of risks established by the negotiation autonomy must be preserved. identifying and preserving the interests deserving of protection in constitutional legality.

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