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Business Law and Customary Rights

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Business law does not only consist of legislation but also include unwritten rules such as oral agreements, implicit terms, principles and customs.

While distinctions can be made between customs, usages, usages of trade, we will not enter here into these subtleties.

In this presentation, we will understand « customs » as behaviors which create rules (hereinafter « customary rules »).

Customary rules lead to customary rights (or duties from the opposite perspective) which themselves may lead to sanctions, either judicial or social.

First, we will examine the justification (I) and second, the implementation (II) of customary business rights in the business life.

I The Justification of Customary Business Rights

Most of the time, customary rules just facilitate the implementation of statutory rules in contract matters (through rules of interpretation or definition of reasonable notice periods), tort or property matters. In public law schools dominated by the legislation, this effect is often referred to as the effect *secundum legem*; this leads to the indirect recognition of customary rights (A).

But, customary rules may play a role without explicit statutory references. This situation, is referred to as the effect *praeter legem*; this leads to the direct recognition of customary rights, particularly in business relationships (B).

A Customary Business Rights Granted Indirectly (through a statutory reference to usages or customs)

1 In the field of contracts

Article 1194 of the French Civil Code is not just a rule of interpretation of contracts. Those rules of interpretation that refer to usages exist. They used to be in the French civil Code until 2016. They are no longer in it but this formal abrogation is not analyzed as an abrogation but as a simplification.

Article 1194 is an invitation to create rights for the benefit of parties to contracts.

With respect to international sales contracts, Article 9 of the UN Convention for the International Sale of Goods also refers explicitly to usages and scholars have recently shown that these usages were distinct from the rules coming from soft law instruments[1].

2 In the food industry

Article 17-1 of Regulation 1169/2011 of October 5, 2011 relating to the information related to food stuff refers to usages: « *The name of the food shall be its legal name. In the absence of such a name, the name of the food shall be its customary name, or, if there is no customary name or the customary name is not used, a descriptive name of the food shall be provided*. »

This text is important as it amounts to a recognition of the legal power of usages at the highest level of the statutory hierarchy. It is particularly interesting these days as some producers try to extend the word of steak or even the one of meat to vegetarian products.

B Customary Business Rights Granted Directly (without a statutory reference to customs)

This is a much more debated question. May customary rights exist without a statutory reference to them ?

Some may say that the question is not necessary. Article 1194 is so broad that most customary rights could flow from an implicit reference made by Article 1194. But this is a way to escape. We guess that the answer depends on who will have to answer. Most State courts will not feel the courage to render a judgment based on customary rules only. A good example of this shyness is a ruling rendered in 2010 by the Court of Appeal of Grenoble[2]. In this case, the court validated an arbitral award which had forced a franchisor to transfer the share it owned in the capital of a former franchisee. This solution was unusual as the bylaws of the company of the franchisee did not contain any clause providing for a forced transfer. In order to justify this bold decision, the Court referred to the usages of distribution networks. However, feeling probably that this reference to usages would not be sufficient, the Court also referred to the implicit convention of the parties.

[1] E. Munoz, *Soft Law Instruments as Usages of Trade in CISG Contract and International Commercial Arbitration*, 2021, UCC Law Journal, Vol. 50, n°1

[2] CA Grenoble 16 septembre 2010, JCP éd. G, 273, note P. Mousseron.

With respect to international business disputes, the references to usages is not only more common but may also to some extent appear necessary. Article 1511, §2 of the French Code of Civil Procedure which only applies to international arbitration confirms it and provides : « *The arbitral tribunal solves the disputes in accordance with the legal rules which parties have chosen, or, in the absence of such choice , according to those which it will find appropriate ». It takes into account, in all cases, the usages of trade* »[3].

This provision calls for two remarks with respect to customary business rights:

- First, the expression « *In all cases* » is ambiguous. One may see it as an obligation for arbitrators to refer to usages. Most scholars are reluctant to create such an obligation on arbitrators and in any case do not see a reason to invalidate the award in the situations where arbitrators would have failed to consider usages[4].
- Second, this article refers to « *usages of trade* » This reference is restrictive as it seems to refer to those usages applicable in the industry in which the parties belong and not to the private usages that may exist between the parties. However, as these private usages are usually perceived as conventions, there is no use to invite arbitrators to refer to them.

II <u>The Implementation of Customary Business Rights</u>

A <u>The Indirect Implementation of Customary Rights</u>

1 Through Community Payment Clauses

Customary claims are more and more anticipated by business entities when they fear that some of their activities may be seen as a bow to the more or less well defined rights of social or tribal groups such as the image of local mythical animals such as the Dodo of Mauritius Island. In Canada, it is thus common practice, when inaugurating a building to have an official recognition of the rights of the First nations may have had on the land on which this building is erected.

[3] « *Le tribunal arbitral tranche le litige conformément aux règles de droit que les parties ont choisies ou, à défaut, conformément à celles qu'il estime appropriées.*
Il tient compte, dans tous les cas, des usages du commerce. ».
[4] J.B. Racine, *Les usages dans l'arbitrage commercial international : une place à géométrie variable*, Journal Sociétés, nov. 2011, p. 37.

While this land recognitions practices are not common in France, we observe other practices that follow the same objective. Thus, it has become common practice for business entities to grant a percentage of the profits that they make from the image of social groups[5]. While these schemes clearly follow some marketing goals, lawyers also have an important role to play. First, they will first have to draft contract provisions between the consumers and the company but also between the company and the association representing the community whose rights are at stake; in this role, the lawyers will have to identify the organizations that will be the legitimate representatives or more adequately, the best guardians of these traditions. It will also be up to lawyers to set up the best structure from a tax and practical point of view.

2 Through Partnership Contracts

The CHANEL Culture Fund is an international programs initiated in 2020 by the French company of luxury goods Chanel. According to its own terms, it aims at fostering pluralism and opening new ways to see the world. Even if one may doubt the final intent of this fund, it is interesting to see that it reflects a need to take into account pluralism.

3 Through trusts

It is one (among many…) French Law claims of fame that trusts were created based on the French practice observed by lords who would leave their assets while they would go to the crusades. Today, French Law does not include legislation on trusts but has created the *fiducie*.[6]

Fiducies have advantages. For the beneficiaries and as opposed to contractual partnerships, trust related instruments garanty long term commitments from the settlers. No need of shareholders' meetings and the absence of impact of a possible bankruptcy of the settler of the *fiducie* are accessory advantages.

However, French *fiducies* have a weak side. Pursuant to Article 2013 of the French Civil Code they cannot be used if they rest on the intent to make a

[5] D. Cabaud, *Les clauses de paiement communautaire, in Valoriser les usages*, Collection Droit des usages 2020, p. 39.
[6] Article 2011 and following of the French civil code.

donation[7]. This restriction is crucial as trusts are often used in the USA with this type of intent[8].

4 Through Trademarks

Trademark rights may embody customary rights. This is the case with trademarks relating to nobility signs or more recently with respect to fish collected in the French Region of the Dombes according to customary rules[9].

B The Direct Implementation of Customary Rights

French courts have rendered decisions dealing with some customary claims. In a dispute between the French notaries and an association of real estate agents (the FNAIM order), it seemed to enforce such rights. In a more recent case (the YUCA order), it fixed a limit to this implementation.

1 The FNAIM Order

In an Ordinance of 2020, the President of the first instance civil court of Paris had to rule on a claim initiated by the Conseil Supérieur du Notariat against the FNAIM which is the main French association of real estate agents. This claim aimed at ordering the FNAIM from using the image of the goddess Vesta which it had started to use at the entrance of its agencies all around France. The problem was that notaries do not own the image of Juno or Vesta. In spite of the absence of any statutory property right, the President of the court enjoined the end of this practice. This order is interesting as it shows that community rights on signs can be enforced besides the classical statutory rights such as trademarks or copyrights[10].

[7] Article 2013 of The French Civil code states : « *Le contrat de fiducie est nul s'il procède d'une intention libérale au profit du bénéficiaire. Cette nullité est d'ordre public* ».
[8] For an example: The Stowe Land Trust: https://www.stowelandtrust.org/support/legacygiving
[9] Trademark : « *Poissonsdedombes* ».
[10] Ordonnance de référé du Président du Tribunal judiciaire de Paris 10 juillet 2020, *Conseil Supérieur du Notariat c. FNAIM, n°20/52941,* Alerte juillet 2020 : *Vesta c. Junon : la guerre des déesses de l'immobilier, Bibliothèque-des-usages.cde-montpellier.com.*

2 The YUKA Orders

Some recent decisions have been rendered in connection with the dispute between the Fédération Française des Industriels Charcutiers, Traiteurs, Transformateurs de Viande « (« FICT ») and the company YUKA which has developped an application inviting consumers to sign a petition for the ending of the use of nitrites in foodstuff.[11]

These YUKA cases illustrate the negative reaction of state courts on direct out-of-court implementation of customary claims. They recognize the possibility for a longtime established association to claim for damages for the harm suffered by the profession. Based on disparagement (*dénigrement*), these decisions limit the out-of-court implementation of customary rights. These claims are themselves corrected in some countries by statutes limiting Strategic Lawsuits Against Public Participation ("SLAP" statutes)

This rebirth of customary rights shares several similarities with the Heidelberg-Montpellier relationship:

- Legally speaking, it is based on a longstanding connection and on written and unwritten rules[12];
- More generally, it is here to last and we are motivated to develop it in the future.

[11] Tribunal de commerce de Paris 25 mai 2021, n°2021/00119. On September 13, 2021, the Commercial court of Aix-en-Provence sentenced Yuka to pay 25,000 Euros of damages to a charcuterie company which was alleging harm to its business reputation.

[12] The interest of our schools for the unwritten law was examined in particular during the 30th seminar which was entitled: "*Kultur, Tradition, eigenes KulturbewuBtesein und Europaisches Gemeinschaftsrecht/ Coutume et tradition- l'identité culturelle face au droit communautaire"*, Heidelberg 1999.