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The termination of trade usages

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Summary

Glossary of abbreviations

Art.	Article
CA	Court of Appeal
Cass.	Court of Cassation
Civ.	Civil chamber of the Court of Cassation
Com.	Commercial chamber of the Court of Cassation
Ed.	Edition
JCP	La semaine juridique
Soc.	Social chamber of the Court of Cassation

Introduction

Contrary to what one might think, usages are not an old-fashioned concept. They prove their efficiency in the everyday business to business relationships, appearing in many different aspects, and are very present in topical sectors such as distribution, taxation, finance and banking, intellectual property, insurance, etc.

A. Brief history of usages

Usages have unconsciously emerged with the companies and markets' practices. Since the Antiquity, the Romans have developed practices in order to facilitate the trade ; they were valid either for a single activity or for a whole geographic region. But the real expansion started with the Middle-Age : as the corporations were emerging, specific rules for each professions were needed, and the "lex mercatoria" (or merchant's law) developed. Indeed, the usages started to multiply and the merchants could see them be enforced by specialized courts that had been created at the time in order to solve disputes between merchants, in a quick and efficient way.

Those usages have temporarily been relinquished since the Ancient Regime, as a movement of creation of royal law started, giving a more important place to the will of the Monarch. Then the creation of Codes under the Napoleon's reign both codified usages and gave them a place either within the Law and aside : they can now be referred to when Law provides that it is possible, when a Tribunal of commerce has to judge a dispute or in any case during business relationships.

B. Definition of usages

The usages have a major interest in business : indeed, their flexible nature and their capacity to evolve adapting to the needs of the commerce present a huge advantage for companies. Thus, usages have a central role in trade relations because they are easily adaptable to the business life that evolves rapidly, and because the business world implies habits between professionals[1].

1 Ouvrage collectif sous la direction du Professeur P. MOUSSERON, Les usages d'entreprise, Ed. LexisNexis, 2010

Moreover, in the international business relationships, they are even more useful, as the legal systems of the companies dealing together can differ a lot from one state to another, therefore usages can often offer a good compromise.

A usage is a behavior that acquires a legal force thanks to their repetitive, general, invocable and legitimate nature. Thus, two main elements draw the definition of a usage : a material element, which is the repetition of a practice, and a psychological element, which is the feeling for professionals from a same body or a same region that such a behavior is compulsory – the opinio necessatis. In the case any party or institution would want to voluntarily put an end to a usage, they will have to be careful about this psychological element in order not to freeze the business relations or to disturb them too much ; thus the termination of a usage may need to follow a particular procedure in order to respect the loyalty in the business' relations.

However, even if the legal texts provide when it is possible to use a trade usage, they never mention how to terminate it. Also, neither the case law nor the doctrine give any indication about the termination of a trade usage which is really surprising, as not knowing how to put an end to a usage could have a detrimental effect to business operations.

C. Scope of the termination of usages

The termination of the usage implies a voluntary end of the usage provoked unilaterally by one of the concerned parties. It is a specific term that is not to be confused with the release (*renonciation*), the null and void character (*caducité*), the disuse (*désuétude*) or the conversion of a usage. All those notions lead to the disappearance of the usage, but they do not answer the same requirements neither use the same procedure.

Indeed, the release of an usage is a technique in which the parties voluntary make the usage disappear through an agreement in which they will specify that it will not apply to their relationships. The Court of Cassation decided, in a case involving an arbitration convention, that the release of rights shall have the same form as its acceptance[2].

On the contrary, the other notions imply an involuntary disappearance of the usage.

The character null and void of a usage corresponds to the involuntary disappearance of a usage by the

2 Cass. Civ. 1ère, June 7th 2006

absence of use as a result of a negligence from one of the parties. The conversion of a usage into another rule means that the usage becomes a law or gets a contractual force because, for instance, it has been integrated within a contract (it has been the case in a decision of the Court of Cassation for an employment relationship[3]). The disuse of an usage implies that the absence of use of a usage will make it no longer applicable to the relations between the parties or in a profession.

D. Issue of the termination of usages

Labor law is the only field in which the termination of usages is provided for in French law. Indeed, in this sector, there is a specific procedure that implies three main conditions, that have been drawn by the Court of Cassation : an information to the Staff Representatives, an individual information to the employees, and a sufficient delay has to be respected[4]. Also, for the termination to be effective, the application of the so-called usage has to cease.

Conditions of the termination of labor usages :

The first condition requires the employer to inform the Staff Representatives of the future termination of the usage : he will have to inform the Works Council or otherwise the Workers' Representatives[5]. In the absence of Staff Representatives, this absence has to be legal (the number of employees is not sufficient or there has been an election, but there was no candidate).

The second condition obligates the employer to give an individual notice of such a termination to the employees concerned or who would have potentially been concerned by the usage that was awarding them an advantage. The employer is the one who will have to provide the evidence of the information about the termination. The consent of the employees on the termination of the usage is not required. If the employer notices it too late or does not notice it at all, then the termination will not be opposable to the employees.

The third and last condition implies for the employer to respect a reasonable time period between the decision to terminate the usage and the effective disappearance of the usage. This period has not been

3 Cass. Soc. February 1st, 2012

4 Cass. Soc. February 25th, 1988

5 Cass. Soc. May 30th, 2001

precisely determined by the case law, but it has to be sufficient enough to allow the employees to be prepared for this change, and if necessary, in order to start negotiations[6]. The negotiations might be opened by the Staff Representatives, but the employer does not have an obligation to start them within this period[7]. Also, to reach an agreement within the delay is not compulsory and the employer cannot be blamed in this case[8]. The delay starts the day the employer makes the notification to the employees and the Staff Representatives.

The notice period has to be "reasonable". According to the case law, the employer will notably have to take into consideration the number of beneficiaries, the importance of the change for the employees, and the length within which the usage has been applied, meaning its periodicity[9]. Also, the notice period could be inspired by the one existing for the termination of a collective agreement, which is a three month delay, if there is no expressed specification[10]. After the notice period is over, the termination of the usage puts an immediate end to it, and this termination cannot have a retroactive effect[11].

Motivation of the termination of labor usages :

According to the case law, the employer will not have to justify the termination of a usage[12], because it is not provided for in the Labor Code. However, if it is proved that the motive followed by the employer was not legal, then the termination of the usage will be null and void.

Effects of the termination of labor usages :

For the termination to be effective, the employer will have to cease its application. If he does not, then the termination, even if it was legal, will be considered as having no effect and the employer will not

6 Cass. Soc. February 9th, 1994

7 Cass. Soc., March 16th, 1989

8 Cass. Soc., February 10th, 1998

9 Cass. Soc., March 3rd, 1993

10 Art. L.2261-9 Labor Code

11 Cass. Soc., May 27th, 1992

12 Cass. Soc., February 13th, 1996

have a chance to claim its application later on[13].

The sanction of the non-respect of the termination procedure is that the usage will remain applicable and the employees can still claim for the advantages until the termination is regularly pronounced or if it is inserted within a collective agreement[14].

It seems logical for the termination of usages in the sector of labor law to follow this procedure, as the employees feel like the advantage formerly given to them is a Right. Depriving them from this Right could be felt as an unfairness. As the employees are usually viewed as being a "weak party" when dealing with an employer, this praetorian procedure keeps the same logic of protection.

Labor law relationships are different to trade relationships, mainly because the parties dealing together are usually viewed as being equal, as they are both professionals having thorough knowledge allowing them to be on a similar level. Although, there is a distinction to make between the market usages and the private usages, for which the termination regime may alter. The private trade usages are those which are born from a relation between two private parties, meaning between two companies, while the market usages are born from a whole body of professionals and/or within a region.

This implies that it will be more difficult to define what would be the correct procedure in order to terminate trade usages than for labor usages.

As the termination of trade usages has not been dealt with within the French Law, the objective of this dissertation will be to try and find out what kind of procedure could be followed in order to terminate trade usages. Consequently, it will be necessary to see first under which conditions a trade usage could be terminated (I), and second what would the effects of such a termination be (II).

13 Cass. Soc., May 4th, 1988

14 Cass. Soc., October 13th, 2010

I. Conditions of the termination of trade usages

The Labor Law is the unique part of law that is providing for the procedure of the termination of the usages, so it will be a major inspiration in order to imagine a procedure of termination of trade usages (B). Indeed, the social chamber of the Court of Cassation provided for some precise conditions to be fulfilled in order for the termination to be valid. However, the specificity of the trade usages will have to be taken into consideration in order to determine the entities able to terminate them (A).

A. Determination of the entities able to terminate trade usages

The trade usages are going to have a different nature in comparison to the labor ones because the relation between the parties are not the same. Thus, there are two different kinds of usages : the market usages and the private usages (1). Also, the trade usages can have an international dimension, as historically the usages were created in order to do business with foreigners who were not submitted to the same law as the merchants (2).

1) Specificity of trade usages

a) *Entities potentially able to terminate market usages*

The market usages are practices that are going to be applied to a whole sector of activity (for example for the transport sector or for the distribution sector). Thus, for the termination of such usages, it might be necessary to refer to a competent authority, that is usually independent of the executive power. Indeed, as it does not concern a relation between two parties but a more general sector, the person who will give notice of such a termination shall not be an individual, but a regional or national authority. Thus, the logic leads to imagine that shall be competent to terminate a usage, the authorities that are competent to edict what are good practices in a specific sector (that can be assimilated to usages).

A couple of examples might help to understand better : "*l'Autorité des Marchés Financiers*" (AMF), which has been created in order to reinforce the visibility and efficiency of the French financial sector's regulation, punctually elaborates Codes of conduct and thus could be competent to terminate usages

that are no longer considered as suitable, by expressing a recommendation that could have a compulsory force toward the concerned entities.

Another example would be the one of the distribution's sector : indeed, "*l'Autorité de la Concurrence*" has lately created Guides of good conduct and is also competent to render recommendations. Thus, this authority could be competent in order to terminate usages in the sector of distribution through compulsory recommendation if it deems that they should no longer be applicable.

Guides of good conduct can sometimes be elaborated directly by a Ministry : for example "the Charter of good practices governing the relations between clients and suppliers" has been elaborated by the Ministry of the economy, finance and industry and signed in January 2012 by many important actors of the commercial sector in France. The question arises then of the opportunity for the government to terminate trade usages. They might suffer of a lack of legitimacy, because indeed, the usages arise from the practice of the actors of commerce and are used effectively by them in their everyday business relationships. The fact that those texts emanate from the government could also have the effect of a lack of impartiality, since the institution is submitted to politics, up to changes and fluctuation after each political elections.

As for institution dependent on a Ministry, the solution shall be the same. For example, "*la Commission d'examen des pratiques commerciales*" is an institution dependent on the Ministry of Economy, Finance and Industry, which role is notably to give opinions and recommendations on practices concerning commercial relationships between producers, suppliers and retailers within its scope of action. This institution is also able to elaborate recommendation about questions linked to good practices in trade. However, the submission to this Commission to a Ministry leads to the same effect concerning a lack of impartiality and legitimacy.

The fact that usages emanate from professionals is precisely the reason why public powers should not intervene within their relations, as they probably cannot understand the needs of the quotidian trade as much as the commerce actors themselves.

b) *Persons able to terminate usages in business to business relationships*

The usages can be the result of a private practice which has become a long-term habit between two companies. For example, it could be the usual day of delivery, the choice for two parties to insert an arbitration clause systematically in their contracts, or to conclude their contracts orally, ect. Those usages are specific to a relation, so it will be easier here to identify the person who could initiate the termination.

The definition of "termination" itself gives the answer : it is a voluntary end of the usage provoked by one of the concerned parties. Then it implies a unilateral decision that will necessarily be taken by one of the parties, excluding de facto a person who would be a stranger in regard to the trade relation. Indeed, contrary to the market usages, a third-person shall not be able to intervene within the commercial relationship and terminate the usage because it would not have any legitimacy.

It is noticeable that here, any of the parties of the relation could be able to put an end to the usage, which is absolutely logical as the actors are considered as being on an equal footing. It is different from the labor usages as long as the employer is the only person that can initiate the termination of a usage that has been established between themselves and the employees. The latter could not, in any case, have the power to put an end to a usage.

The principle of loyalty in the commercial relations[15] has to be respected and will command to the party who decides to terminate the usage, to pay attention over the disruption that could cause such a termination in regard to the relations between the parties.

2) International dimension of trade usages

a) *Difficulties to terminate usages in relation with their internationality*

Trade usages are particularly relevant in the international relations of companies. They can be useful in order to fill a legal vacuum, and they are more legitimate than any law which could advantage just one of the parties who knows their rights better. Indeed, they present the advantage of neutrality in the relations, which makes it more comfortable for both the parties.

15 See below – I - B.1.a)

The Art. 1.9 of the Unidroit principles provides that : "*The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable*". It gives a compulsory force to international usages and moreover, this underlines the importance of such usages in transnational relations.

Furthermore, as it is possible to have recourse to the international trade usages as a palliative to a legal vacuum, it would cause some difficulties if they were to be terminated. Indeed, it would imply some legal uncertainty, so the actors who decide to put an end to a usage should make sure that another text or practice will replace the previous one.

This raises the question concerning the persons who could be in charge to terminate usages in international relations.

b) *Potentially legitimate authorities able to terminate usages*

If the usage at issue is international but still private (meaning that it emanates from the practice of two or more commercial actors and is applied specifically to them), then the solution would be the same as above-mentioned : indeed, only the concerned parties will be able to terminate a usage, excluding the third parties.

If the usage at stake is a market usage, which means that it applies to a whole region and/or sector of activity, then it will be more difficult to determine who should initiate the termination. Indeed, a national authority would not be legitimate enough to put an end to a usage which has an international scope. Thus, only an international institution or authority would have the power to do such an action.

It is relevant here that to make a difference between the usages that apply to European relations only, and those that apply to all international relations in a larger sense.

For the European companies trading together, a legitimate authority that could put an end to a usage could be the European Commission. One notable aim of the Commission is the obligation to ensure that the European law is well applied within the European Union. Also, the Commission has a specific delegation which is specialized in trade, and that could possibly be able to terminate usages through publications for example.

For international trade usages in their larger acceptation, the International Chamber of Commerce could be competent in order to terminate usages ; indeed, as this entity is notable for its codification of usages or creation of Codes of good practices and model contracts, it could have a legitimate role in terminating those usages.

In any case, no matter if the usage is national or international, if it is a business to business practice or a more general one, the entity initiating the termination will have to follow a specific procedure, in order not to abruptly disrupt the trade relations.

B. Elements of the procedure of termination of trade usages

In Labor Law, there are three main conditions in order to terminate a usage as seen above : an obligation to inform the Staff Representatives, an obligation to inform the employees and an obligation to respect a notice period. It is relevant here to maintain those obligations for the termination of the trade usages, as they are part of the general principle of loyalty (1). In order for this termination to be effective, the party who initiated it will have to cease its application : this obligation can also be transposed to trade usages (2).

1) Notification of the termination

a) *Obligation of information*

There is a general obligation existing that implies for the parties of a contract to respect loyalty in their relations, meaning they have to be in good faith. This is noticeable in the French Civil Code in its Art. 1134§3 which provides that "[the contract legally concluded] has to be performed in good faith".

But this obligation is going beyond the contractual relations : indeed, it has been included within the Unidroit principles[16] for the international relations : "the parties have to comply with the good faith requirements in the international trade, they cannot exclude this obligation, neither limit its scope". There is no reference to a contract here, which means that there is a general obligation of loyalty in the commercial relations that have a reciprocal character. Also, it emerges from some articles of the Commercial Code, notably in the Art. 442-6, that there is an obligation to comply with the good faith principle : indeed, this article provides that a party who wants to break a relation with another one must give notice to the other party within a reasonable time period.

The obligation of information derives from this obligation of loyalty, thus, as it is not especially attached to a contract, it can be transposed to the use of usages and for their termination. Indeed, as when two parties are invoking usages, they have to do it in good faith, so if one of them wants to terminate it, there is going to be an obligation for the initiating party to warn the other one that it wishes to do so. This obligation of information to the other party thus has to be precised.

16 Art. 1:7, Unidroit principles

Therefore, the questions arising are : who shall give this notice ? To whom shall the information be given ? And how should this information be given ?

As for the regime, there is a distinction to make between the market usages and the private usages.

For the private usages, the termination is going to be initiated by one of the concerned parties. This party shall ensure to inform directly their trade partners that the usage will be terminated, by sending them an individual notice through a register letter with acknowledgment of receipt. The notice should give precise information about the usage at stake (determine it precisely) and the day of which the usage shall cease to be effective.

For the market usages, the termination is going to be made by the above-mentioned authorities : for example for the financial usages, it will be the AMF, and for the distribution usages, it would be the Competition Authority. The conditions of information will be more difficult here. Indeed, an individual notice given to all of the concerned companies does not seem as a feasible solution in practice. Thus, the competent authority could, for example, make a press release or render a compulsory recommendation about the termination, determining precisely the usage at stake and stating clearly when this usage should disappear.

b) *Notice period*

The notice period shall be noted in the register letter in the case of a private usage, or in the recommendation or press release for market usages, in order to make sure that the information is complete and loyal.

The idea here is to allow a time frame to pass between the day the decision to put an end to the usage has been made and the day when the usage will effectively disappear. This condition is required for the termination of labor usages, but it may also be applicable to the trade usages as it emerges from the obligation to be in good faith.

This period will have to be reasonable in order for the party suffering the termination to start negotiations or to allow a sufficient time to reorganize the business relations if necessary. This term of reasonable, as being vague, needs to be precised : this character should be inspired from the one that arises from the Art. 442-6 of the French Commercial Code. Indeed, according to this article, in order to stop business relationships in a loyal way, the other party needs to take some parameters into account

according to usages, for instance, the duration of the the time period for which the parties have been dealing together will be important.

Thus, for the termination of usages, should be taken into consideration the time for which the usage has been applied to the parties, the number of persons that may be concerned, and the significance of the disruption of the termination of the usages over the business. These criteria should make the notice period vary.

A trend is emerging from the case law for the notice period in the frame of the breakup of commercial relations, and it could be a line of conduct for the notice period that should be adopted in order to terminate trade usages in a loyal way. Indeed, both situations have a mutual interest : the most important criterion to take into consideration for the notice period to be loyal is the time period during which the relationship / the usage has lasted. Indeed, for the brutal breakup of a commercial relationship, the Art. 442-6-5° of the Commercial Code mentions that the relationship has to be "established", meaning it has to be stable, habitual and regular[17]. Concerning the usages, the character established is completely inherent in the definition of the usage itself, as long as it has been a long-term repetitive practice, lasting sufficiently long enough to be considered a usage.

For a commercial relationship which length was inferior to ten years, the notice period has to be from six to twelve months[18], for a commercial relationship that lasted between ten and twenty years, the notice period has to be about one year[19], and for a relationship greater than twenty years, the notice period should be at least twelve months (see for a thirty-six-years relationship, the notice period recommended by the Court of Cassation was twenty months[20]).

It is of relevance here to transpose the case law trend about the breakup of a commercial relationship to the termination of private usages : indeed, the more the usage has been applied between two trade actors, the longer the notice period should be.

Although, it seems to be more difficult in practice to apply this case law to market usages, as they have a broader scope. Indeed, the notice period should ideally be greater as long as it concerns more trade

17 Cass., Annual report, 2008

18 CA Rennes, November 3rd, 2009
19 CA Versailles, 12th chamber, October 14th, 2004
20 Cass. com., October 4th, 2011

actors and as long as the notice could not be given personally to each company concerned by the termination of the usage.

Nonetheless, in order to be more precise, the commencement of the notice period should be specified. For the private trade usages, the theory of receipt could be chosen because it is easy to identify : indeed, it has been said earlier that the information had to be given through a register letter with an acknowledgment of receipt. Thus, the period will commence the day of which the opposition party receives the notice.

For the market usages, the theory of issuance seems to be more adequate, as the mode of notification is not made to a specific person but to all the persons potentially concerned by the termination. Therefore, as it is easier to identify the day when the information has been published, it should be the day when the period starts.

2) Motivation of the termination

The question arising here is to know if it would be expedient to oblige the party who took the initiative of the termination of the usage to justify this decision.

Even for the labor usages, the law is silent about this obligation. However, the Court of Cassation ruled on the problem in 1996[21] in a clear and simple way : "it is exact that the termination of a usage does not have to be motivated, nevertheless the termination is null if the motive that pushed the employer to make the decision was illicit". Consequently, there is no need for the employer to give a justification to the decision, but it is forbidden to make such a decision on the ground of an illicit motive (for example, the decision is taken in order to harm somebody).

This decision seems fair : indeed, it is not too restrictive for the party initiating the termination but is still protective of the interests of the party suffering the termination, limiting abuses.

Therefore, this solution should be transposed to the termination of trade usages because the motivation would be a too important constraint for the trade relations, allowing the party suffering the termination to file a suit quite easily against the other party, and preventing the trade actors to respond quickly and

21 Cass. Soc., February 13th, 1996 n° 92-42066

efficiently to the needs of their business. Moreover, the motivation is often imposed by the law in order to protect a party considered as weak, and yet, here it is not required for a relation between an employer and their employees concerning usages, although one of the party is clearly not equal to the other and the decision is unilaterally made by the employer, widening even more this inequality. Consequently, as long as the parties in a trade relation are supposed to be on an equal footing, there is no need to protect any of them from the termination of a usage, and the motivation shall not be a criterion to terminate the usages.

As for the illicit motive that could be a reason to declare void the procedure of termination, it also should be kept for the termination of trade usages, in a fairness perspective. Indeed, a decision of termination that would have been taken specifically to harm the other party could not reasonably be accepted. The nullity of the procedure is an appropriate consequence to such a maneuver, moreover, as the party is suffering a damage due to this will of the other party to be harmful, it shall have a right open to receive compensation on the ground of the Art. 1382 of the Civil Code

3) Effective cessation of the application of the usage

In order for the termination to be effective, the party who initiated it has to cease its application. Indeed, that is the only way for the termination to produce its effects[22]. If the party does not cease the application of the usage after the notice period has expired, the direct consequence is that the usage will continue to apply, no matter if the procedure of termination has been correctly applied. In practice, this amounts to saying that the usage was never terminated.

This solution, adopted for the termination of the labor usages[23], seems to be adequate for the termination of the trade usage, and seems fair toward the party who was supposed to suffer from the termination. As a consequence, the other party will still be able to invoke the existence of the usage, either before a tribunal or during a negotiation. Indeed, the absence of cessation of the usage could lead the other party to think in good faith that the will of the initiator of the termination was to continue to use the usage. The corollary of this assertion is the impossibility for the initiator of the termination of the usage to invoke the usage : indeed, they let the other party think that they did not want the usage to be terminated, acting in a way contrary to what was formerly provided for.

22 See below "III – The effects of the termination of trade usages"

23 Cass. Soc., May 4th, 1988

To be more precise, the cessation of the usage will have to start after the notice period is complete. If it happens before, then the termination of the usage will not be considered as loyal. This could open a right to the party who suffered the lack of loyalty from the initiator of the termination of the usage to claim damages on the ground of the Art. 1382 of the Civil Code, that makes provision for a tort liability[24].

If all the elements of the procedure are fulfilled, then the termination will produce effects over time and parties, over the opposability and the invocability of the usage. Although, if one of the elements is missing or has not been performed correctly, then the usage will not be considered as terminated, and the effects will be totally different.

24 See below "III – The effects of the termination of trade usages"

II. Effects of the termination of trade usages

The effects of the termination of the trade usages will be different when the termination has been made legally, meaning that it followed the above-mentioned procedure (A) to when one of the element of the procedure has not been respected (B).

A. Effects of a valid termination

When the procedure of termination has been followed in all of its elements, it will disappear from the legal patrimony of the natural or legal person who formerly had the possibility to invoke it. This termination thus has a classical effect over time and parties (1). Also, the termination will have an effect over the invocability of the usage (2) and, in addition, it will be opposable to the concerned parties, but also to third parties (3).

1) Disappearance of the usage

a) *Effects over time*

As long as the procedure of termination of usages has been followed step by step by the party initiating it, the termination will make the usage disappear. The question arising is : from when ? What legal event will effectively make the usage disappear ?

Two solutions could be conceivable : the application of the usage stops directly after the information has been given to the concerned parties or the cessation of the usage could be delayed to a posterior date. As seen previously, there is a compulsory period of time, called the notice period[25], to take into consideration that it will vary notably according to the length during which the usage has been applied and to the number of persons that are concerned.

Indeed, in order to comply with the obligation of loyalty, the disappearance of the usage shall not happen directly after the information of termination has been given, but at the end of the notice period, the aim of which is to be respectful of the rights and habits of the parties.

25 II-1-b – The notice period

This solution has been the one chosen for the labor usages, indeed, the retroactivity of the termination has been judged impossible[26]: indeed, it does not seem logical to give retroactivity to a termination when a period notice has been established in order for it to be loyal. Consequently, this solution shall be transposed to the termination of a trade usage : a valid termination shall have an effect only for the future in order to avoid a too vital disruption of the commercial relations.

Nevertheless, there is a possibility for the employer to delay the effective cessation of the labor usage, which implies that it does not have to happen directly after the notice period is over[27]. The possibility to differ the effects of the termination is also an acceptable solution for the termination of trade usages, as long as it permits to the party initiating the termination to manage their commercial relations better with the other party.

In a conclusion, the effect of the trade usages' termination starts when the notice period is over, but still can be delayed if the party initiating the termination wishes it, but on no account could it have a retroactive effect. This solution could be indifferently applicable to market usages and private usages.

b) *Effects over the concerned persons*

Possibility to negotiate the consequences of the termination of usages :

The first effect to envisage, because it would be the first to happen, is the possibility to open a right for the parties to negotiate the consequences of the termination of the usage, notably about a rule that could replace the former usage, immediately after the notice of termination has been given.

This solution has been suggested by the case law for the termination of labor usages[28], however, the opening of negotiation is not compulsory in that sector, and there is no obligation for it to succeed.

For private trade usages, an obligation for the initiator of the termination to negotiate, that would be an obligation to use reasonable means in order to get the desired result and not an obligation to achieve a particular result, could be an appropriate solution. Indeed, as long as usages have an important place in commerce, and the habits of the parties are sometimes the basis of a sound commercial relationship, the termination of such a usage could incur an important disruption for the business, and it may be

26 Cass. Soc., July 13th, 1998

27 Cass. Soc., March 16th, 2004

28 Cass. Soc., February 11th,1997

important for the parties to open the negotiations about the consequences of the termination. The party who is suffering the termination should be free to decide not to negotiate only if it deems that the termination is fair or if the consequences of the termination do not have an important impact on the business relationship.

A violation of the obligation to open the negotiations by the party initiating the termination (that shall be expressly mentioned in the notice in order to prove it easily) shall open the right for the other party to get damages, on the ground of the Art. 1382 of the Civil Code.

For market trade usages, such an obligation seems to be difficult to carry out as long as the termination can only be made unilaterally by an authority that deems that the usage is no longer appropriate. Therefore, in this case, it could be a representative authority of a sector of activity that could act in the name of commercial actors in order to negotiate the consequences of a termination.

Inapplicability of the trade usage in the parties' relationships :

The second and most important effect of the termination of a trade usage is that it will be no longer applicable in the relation between the parties for a private usage, and in a specific sector of the commerce for a market usage. The parties suffering the termination could not pretend that the usage gave an advantage that could not disappear despite of a legal termination .

Indeed, the usage will no longer have a legal existence and this will undoubtly make the question of the invocability and opposability of a terminated usage arise.

2) Consequent non-invocability of a terminated usage

The legal consequences of the termination over the invocability of the legally terminated usage are simple to understand : the disappearance of a usage implies that it can no longer be invocable, either in the commercial relations of the parties, or during a posterior negotiation, or before a judge.

Firstly, during the commercial relations, a usage legally terminated shall not be invoked by the party who did not initiate the termination. Indeed, when the termination is legally made, the usage totally disappears, and the other party should have an obligation to comply to the new situation born from the

termination. Concerning the labor usages, since a termination has followed the legal procedure, an employee who would invoke a usage in order to avoid to comply to the changes coming from the termination of this usage could be sanctioned or even fired for gross misconduct[29].

Would it be relevant to transpose this solution to a commercial relationship? If a trade actor was to stop the relationship with the one who decided not to comply with the situation born from the termination, then it could suffer many legal repercussions. Indeed, it could be considered either as a brutal breakup of the established commercial relationship if it is not done in the conditions of the Art. 442-6-5°-I of the Commercial Code or as an abusive breakup of the commercial relationship on the ground of the Art. 1382 of the Civil Code, implying in both cases the payment of damages by the party responsible for the damage. Although, the non-respect of the new legal situation after the termination has been made seems to be a veritable motive in order to stop the relations with a commercial partner, as long as it could disrupt the business and as it would not be a loyal behavior. Thus, the party that initiated the termination should be given the right to end a relation on this ground, but respecting the above-mentioned conditions imposed by the law in order to comply with the obligation of good faith.

Secondly, after the usage has ceased to produce effects, the party who suffered the termination shall not invoke the terminated usage in order to gain advantages from the other party during posterior negotiations. Indeed, the usage does no longer exist after termination, so it cannot be brandished subsequently as a weapon of negotiation.

Thirdly, on the same reasoning, the party could not be allowed to invoke the legally terminated usage before a judge, as the termination has produced all its effects, implying the total disappearance of this usage.

3) Opposability of the termination

The question here is to know to whom the effects of the termination of a trade usage will be opposable? A parallel shall be made between the opposability of the usage itself and the opposability of its termination, and a comparison with the labor usages termination might help to target the solution better.

29 Cass. Soc., November 24th, 1998

Also, the common contract law may aid the understanding all of those elements.

In the common contract law, the Art. 1165 of the Civil Code provides for the privity of the contract : a contract usually has effects only between the parties, and the third-parties are not supposed to be concerned by it.

A usage is also a rule – even if it arises from a practice – that produces legal effects toward the parties : between two parties for a private usage and within a whole sector of activity for market usages. The effects are also restrictive and are not intended to concern third-parties that are out of this relation. Thus, as the effects of a usage are limited to the concerned party, its termination shall also be limited to the persons to which it formerly applied and as a consequence, be opposable to them only. The solution given by the case law for labor usages is that the termination of a labor usage made by an employer is opposable to all the concerned employees[30].

This raises the question : who are the "concerned parties" supposed to be, concerning trade usages? Are they only the current trade actors, or does the opposability extend to other persons ?

As for market usages, the termination will apply to the companies that were already born the day when the competent authority decided to terminate the usage. It would be relevant to extend the opposability to new companies breaking into the market after the termination and acting in the sector of activity in which the usage has been legally terminated, as long as the termination of a usage makes the usage disappear for the future. Also, a change in the board or direction of the company shall have no influence over the opposability of the termination to the company.

As for the private usages, the termination shall be opposable to the parties that are dealing together and to which the usage formerly applied. Even if the board of directors or the manager of the company which suffered the termination was to change, the termination shall be opposable to them anyway. The solution would be the same if the change came from the board of directors or the manager of the company which initiated the termination.

30 Cass. Soc., February 25th, 1988

B. Effects of a non-valid termination

When the termination has not followed the above-mentioned procedure, then the main principle is that it will not have any legal effect on the parties (1) but it will have a harmful effect over the business relationships (2).

1) Principle of the absence of effects

a) *Survival of the trade usage*

The termination will be valid only if all the aforementioned conditions concerning the obligation of information, the notice period and the cessation of the usage are effectively complete.

If the party who wants to terminate the usage does not give notice to the other party that it wishes to do so, and just ceases to apply the usage, then the usage is still living. Same situation if the notice period has not been respected, for example if the party initiating the termination ceases to apply the usage before the delay expired. If the party initiating the termination do not cease to apply the usage effectively, here again, the termination will not be considered as valid.

Consequently, the usage will remain applicable in the trade relationships ; thus, the effect of a non-valid termination is "no effect" – this is also the solution that is used concerning labor usages[31].

If the party that initiated the termination but failed to make it comply with the procedure, refuses to continue to apply the usage although it is still in force, then they shall be sanctioned on the grounds of Art. 1382 of the Civil Code, and damages should be awarded to the other party

b) *Invocability of the usage*

In all cases, the non-validity of the termination implies that it will not produce the effects over time and parties, and the usage will remain invocable by the party who did not initiate the termination, either during the business relationship, during new negotiations or before a judge. This is also the solution admitted by the case law about the non-valid termination of labor usage : the employees can still claim

31 Cass. Soc., February 13th, 1996

for its application[32].

The corollary of this situation is that the party who attempted to terminate the usage will not be able to cite this termination as grounds for a negotiation, or for a claim before a judge : it will not be invocable. The only remedy for them to invoke the termination is to comply with the procedure ; indeed, the usage remains in force only until the termination finally fulfills with all the conditions of the procedure.

c) *Non-opposability of the termination*

The solution adopted for the labor usages is that all the employees shall be allowed to benefit from the usages that were not correctly terminated, even those who were employed after the unsuccessful tentative of termination[33].

This can be transposed for the trade usages : indeed, the market usages will still be opposable to the companies that were already present on the market the day when the tentative of termination had been made, and also to new companies breaking into the market, as it is still in force.

The private usages will still be opposable to the parties usually doing business together as long as it did not disappear.

2) Potential effects on the business relationships

a) *Disturbances due to an illegal termination of market usages*

The effects that are going to be dealt with here are more practical effects. Indeed, there can be direct consequences over the relations of businesses due to an illegal termination. The disturbances caused by an illegal termination would be very important : indeed, the termination is supposed to concern dozen to thousands of commercial actors belonging to the same body of activity. Consequently, the risk to provoke a legal insecurity because of a termination that would not follow the procedure correctly is multiplied. It should be recommended to the competent authorities to make their intention clear about their will to terminate a usage or not, in order to avoid disruptions in the business relations.

32 Cass. Soc., May 5th, 2004

33 Cass. Soc., May 2nd, 2002

Even more impeding, it would probably be difficult for the trade actors to held the liability of the competent authorities that made a mistake during the procedure, even if it is clearly a tort from them ; this could be felt as an unfairness.

b) *Possible violation of the obligation of loyalty*

For private usages, the violation of the termination's procedure could be perceived as a breach of the principle of loyalty. Indeed, if the party initiating the termination decides to voluntarily skip the notice period because it does not deem it necessary and wants the usage to stops straight after they made the decision, the other party could feel like it is an infringement to their rights. This feeling could cause a loss of trust and then disrupt the business relations. The other party then might want to stop the business relations.

In any case, a procedure that has not been correctly followed could also provoke a legal disturbance and insecurity. Indeed, the situation could appear to be vague if one of the parties was to invoke the existence of a usage before a court or during a negotiation for example while the other party was thinking in good faith that the termination was correctly made. For instance, the initiator of the termination respected a notice period, but the other party deemed that it was insufficient to reorganize its activity, so it judges that the conditions of the termination were not fulfilled. Here again, if there is a lack of understanding between the parties, it could cause disasters at the organizational level and create a loss of trust in the commercial relation.

Conclusion

The termination of trade usages has been forgotten by the legislators and judges. This legal vacuum could imply many disturbances in the business relations as the actors do not have any indication about how to unilaterally end a usage.

There is a real need here to have a procedure with clearly defined borders, as it has already been done by the Court of Cassation for labor usages, in order to avoid litigation over the matter and to secure business relationships. The aforementioned conditions give, on the one hand, a good basis to protect both the parties from the abuses of the other – by imposing a compulsory information and a notice period – and on the other hand, the conditions are still soft, as long as the party initiating the termination do not have to motivate it.

The termination of usages is a good alternative to the release of the usage – defined as a voluntary way to put an end to the application of a usage, as long as the parties agree on it. Indeed, the unilateralism of the termination could facilitate an improved flexibility, increasing the quality and efficiency in the management of the commercial relationships.

Concerning usages in private relationships, a possibility to terminate usages unilaterally could give the opportunity to one of the actors of the relationship to stop the application of a usage which seems to no longer have its place in regard to their relations, avoiding any frustration from the other party as long as there has been a procedure in which the obligation of information has a large importance. The adaptation to the needs of the commercial relations is thus increased by such a procedure.

When market usages are at stake, a possibility given to a relevant entity to unilaterally end an usage in its sector could help to have a uniform application of usages on a precise territory and in a specific field, and then it would be possible to avoid legal uncertainties.

An intervention from the legislator or from the Courts would be very useful in order to have a better clarity on this point, and to have a procedure that would reassure the economic operators for which trade usages are daily applied.

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