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Research on the Identification Dilemma and Normative Path of Trade Usage in Air Transport

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Abstract. Air transport contracts possess significant particularities, and statutory rules have inherent limitations; consequently, trade usage plays a supplementary normative role in this field. However, in judicial practice, the identification of trade usage in air transport has long faced numerous challenges, including ambiguous factual determination standards, conflicting legal review criteria, and the absence of a systematic identification mechanism. This paper adopts an analytical framework based on the factual and legal standards of trade usage, utilizing case study, normative analysis, and comparative law methods to systematically examine the identification of trade usage in air transport. The study concludes that the constitutive elements of trade usage in air transport are repeated application and general recognition. Objectification is achieved through vehicles such as international customs, industry association-recommended practices, and general conditions of carriage; subjective recognition is attained via mechanisms of conspicuous notice by the carrier and implied consent by the passenger. Furthermore, usage is subject to dual scrutiny regarding legality, public order and good morals, and core industry values. On this basis, this paper proposes a normative path characterized by the concretization of factual determination standards, the multi-layered application of legal review criteria, and the systematization of identification mechanisms. Theoretically, this clarifies the intrinsic logic of the transformation of air transport trade usage from commercial practice to legal norm. Practically, it provides operable standards for judicial organs to identify and apply such usage, thereby reducing transaction costs, enhancing the predictability of adjudication, and promoting a positive interaction between air transport industry self-regulation and state mandatory norms.

Keywords: Air Transport Contract, Trade Usage, International Custom, Montreal Convention

1. Introduction

Air transport contracts are characterized by a high degree of technical specialization, internationality, and standardization. Purely statutory rules often struggle to cover the rapidly changing operational details of the industry. Therefore, trade usage undertakes a significant supplementary normative function in the field of air transport. Existing research predominantly focuses on the interpretation of international conventions regarding carrier liability systems or

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concentrates on the legal nature of specific industry practices such as overbooking and no-fly lists. Systematic analysis positioning the identification of trade usage as an independent theoretical and practical proposition remains conspicuously absent. Notably, significant research gaps persist with respect to the concretization of factual constitutive elements such as "repeated application" and "general recognition," the construction of legal review standards, and the procedural design of identification mechanisms.

This paper primarily addresses the following three issues: First, how should the factual determination standards for trade usage in air transport be concretized to overcome the uncertainty inherent in reliance on intuitive judgment in judicial practice? Second, how does the legal review of trade usage balance the conflict between industry efficiency values and mandatory norms or public order and good morals? Third, what kind of systematic identification mechanism should be established to facilitate the transformation from commercial practice to a source of law? Methodologically, this paper adopts an integrated approach that combines case study, normative analysis, and comparative law methods. It utilizes typical domestic and international jurisprudence as a point of departure to analyze the specific manifestations of the identification dilemma. It explores the jurisprudential positioning and application conditions of trade usage based on normative sources such as the Civil Code and the Montreal Convention. Concurrently, it draws upon the soft law instruments of organizations like the International Institute for the Unification of Private Law (UNIDROIT) and the International Air Transport Association (IATA) to extract comparative experiences of referential value.

2. Theoretical and normative foundations

2.1. Characteristics of the Air transport industry and the generation mechanism of trade usage

The air transport industry is marked by strong technical expertise, a high degree of internationalization, and a complex operational environment. Its operational logic is centered on the primacy of safety while simultaneously balancing efficiency and economic considerations. Due to the industry's particularities, pure statutory rules find it difficult to encompass the myriad detailed variations arising during operations, thereby giving rise to a substantial body of trade usage. In terms of its generation mechanism, trade usage in air transport typically manifests as a process wherein commercial practices gradually evolve into industry consensus and are subsequently solidified through forms of rules [1].

Initially, such usages often constitute spontaneous commercial innovations adopted by carriers to address operational risks or optimize resource allocation, such as the mechanism of flight overbooking developed to mitigate seat wastage and the institution of no-fly lists to maintain cabin order [2]. Subsequently, through the recommended practices of organizations such as the International Air Transport Association (IATA) and the General Conditions of Carriage (GCC) as formulated by airlines, these practices are given written form, thereby reducing the evidentiary burden associated with proving repeated application.

Furthermore, as air transport contracts predominantly utilize standard terms, the notice-and-consent mechanism inherent in their formation possesses certain particularities. Provided the carrier fulfills its duty of adequate disclosure and explanation, certain industry customs may be legally deemed matters the passenger "ought to know," thereby partially overcoming obstacles arising from information asymmetry and approximating a standard generally recognized by the public. Thus, driven by technical necessity, solidified through industry organizations, and ultimately confirmed via contractual notice —this constitutes the unique ecology of trade usage in air transport.

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2.2. Normative basis of trade usage

The normative legitimacy of trade usage in air transport is primarily rooted in the principle of private law autonomy and the institutional interfaces provided by the statutory legal framework. Article 10 of the Chinese Civil Code explicitly designates custom as a supplementary source of law, and several provisions within the Contract Part thereof reserve space for trade usage to exercise its normative function [3]. Within the framework of legal act theory, trade usage can serve as an auxiliary basis for interpreting declarations of intent, assisting judges in ascertaining the parties' true intentions or in constructing reasonable contractual content. Particularly with respect to gap-filling in contracts, Article 510 of the Civil Code accords trade usage priority in application over default (non-mandatory) statutory rules. This is because trade usage represents a spontaneous order formed through long-term bargaining within the industry, reflecting the demands of efficiency and expectations of fairness in specific transactional contexts more accurately than universally applicable default rules. This normative foundation entitles trade usage, provided that it does not contravene mandatory provisions or public order and good morals, to determine the timing of contract formation, to define the scope of ancillary duties, and to justify grounds for exemption from liability.

The codification of international air transport treaties further reinforces the legal formalization of trade usage. The modern private air law system, grounded in the Convention for the Unification of Certain Rules for International Carriage by Air (i.e., the Montreal Convention), while emphasizing the uniformity of the carrier liability regime, nevertheless retains within its textual structure a deference to and incorporation of industry practices. For instance, Article 27 of the Convention permits carriers to stipulate conditions of carriage not inconsistent with the Convention, thereby providing a basis in international law for transforming industry practices such as passenger no-fly lists into normative rules. Moreover, the identification logic established by Article 9 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) also exerts a profound influence on the air transport sector. This provision stipulates that parties are considered to have impliedly made applicable to their contract a usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved [4]. This normative channel, whereby factual custom is transformed into an implied term, constitutes the pathway in international private law for the conversion of trade usage from commercial practice into a source of legal obligation.

Soft law instruments formulated by industry organizations constitute the most direct vehicle for, and a detailed elaboration of, trade usage in air transport. Recommended practices and transport standards issued by bodies such as IATA are not mandatory prescriptions of state law. Nevertheless, through their repeated application on a global scale and widespread incorporation into airlines' General Conditions of Carriage, they gradually attain the status of generally accepted industry norms. Soft law rules have the function of translating highly specialized and technical operational details into language cognizable by law, thereby reducing the evidentiary difficulty associated with proving repeated application in judicial practice.

By incorporating the aforementioned norms into their General Conditions of Carriage and fulfilling their duty of notice and disclosure, carriers enable passengers to give implied consent at the time of contracting, thereby completing the transformation of such rules from commercial/technical standards into contractually binding norms. The soft law system generated spontaneously by the industry plays an indispensable supplementary normative role in compensating for the lag inherent in statutory law and in enhancing operational safety and efficiency.

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3. Practical dilemmas in identifying trade usage in air transport

3.1. Ambiguity of factual determination standards

According to the logic of the Chinese Civil Code and related judicial interpretations, the constitution of trade usage requires satisfaction of the dual elements of repeated application and general recognition. However, in the context of case-specific factual determination, both the frequency required for "repeated application" and the evidentiary standard for "general recognition" lack quantitative criteria [5]. Judicial practice often oscillates between treating trade usage as factual evidence (the minor premise in a judicial syllogism) and as a normative source of law (the major premise), leading to a conflation of the logical scrutiny applied to factual custom and normative usage [6]. This ambiguity affords adjudicators considerable discretion in determining whether a party ought to have known of a particular practice, particularly in the resolution of air passenger disputes, where there is a tendency to substitute lay experience for rigorous legal reasoning, thereby undermining the predictability of outcomes.

Within the framework of international air transport conventions, this ambiguity is further manifested in the aleatory nature and interpretive divergence concerning core terminology. Although the international cargo liability regime centered on the Montreal Convention strives for uniformity, disputes persist regarding the determination of factual elements such as the "event" causing damage in cargo claims [7]. The English High Court, in relevant jurisprudence, has held that the standard for identifying an "event" should not be conflated with the requirement of fortuity inherent in an "accident." However, the Convention does not explicitly define which operational fluctuations constitute a legally cognizable cause of damage [8]. Due to the high level of abstraction in the Convention's text, adjudicators must establish a factual nexus between specific route operating procedures and the Convention's principles. However, international customs themselves are inherently fragmented and may not command the unanimous assent of all transactional parties, thereby further compounding the difficulty of normative identification during the fact-finding process.

Furthermore, the logic of notice inherent in industry soft law rules and general conditions of carriage creates procedural obstacles to factual determination. While recommended practices formulated by organizations such as IATA provide operational details to the industry, the notice-and-consent mechanism involved in their transformation into trade usage is often perceived as a legal fiction predicated on standard form contracts. When identifying practices such as flight overbooking or passenger no-fly lists, the core of factual determination lies in proving whether the practice has transcended the threshold of professional knowledge to become something that the ordinary passenger is aware of. However, carriers generally fulfill their duty of notice unilaterally through their General Conditions of Carriage, without achieving substantive subjective conviction between the parties [5].

3.2. Conflict in legal review standards

Pursuant to the Chinese Civil Code and related doctrinal scholarship, the application of trade usage is predicated on its consistency with public policy (public order). Yet, in specific adjudications, judges often struggle to delineate whether highly specialized industry practices impinge upon the baseline of societal public interest. Commentary suggests that this conflict in normative values stems from a misalignment between subjective and objective theories in identification logic—namely, whether legal review should prioritize the fictional construct of party consent or the

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objective existence of an industry rule [4]. Furthermore, legal review standards are incompatible with models of economic efficiency. Amaruchkul and Sae-Lim, through research on overbooking models, have demonstrated that dynamic decision-making within the industry , which is based on revenue management logic, conflicts with the legal requirement for certainty of performance, leading adjudicators to face the technical risk of model misspecification when determining contractual validity [9].

This conflict is exacerbated at the level of interpreting international conventions. Divergent balancing of free competition and national transport interests across different jurisdictions leads to significant disparities in the evaluation of the legitimacy of the same industry practice in different countries [10]. For example, in Wealmoor v. KLM, the court's legal interpretation of "event" under the Convention diverged markedly from the aviation industry's technical understanding of operational fluctuations, forcing judicial review to strike a balance between the Convention's mandatory liability regime and the unilateral rules contained in the General Conditions of Carriage. Such uncertainty not only erodes the predictability of trade usage but may also, due to ambiguous admissibility standards, induce the identification of "false customs," thereby transforming what should be efficiency-enhancing commercial self-governance into an escape hatch for circumventing state mandatory norms [11].

3.3. Absence of a systematic identification mechanism

Although the principle of private law autonomy permits industry customs to serve as a reasonable supplement to contractual content, the absence of quantitative standards for the frequency of repeated application and the degree of subjective conviction means adjudication often relies on experiential judgment rather than empirical data. Due to the lack of an identification logic, commercial entities face high certainty and interpretation costs in transactions. When determining whether a party ought to have known of a particular specialized custom, the legal framework provides no standard allocation of the burden of proof, making it easy to mistake operational strategies adopted by individual carriers for universal industry practice [12].

Within the international air transport convention system, the absence of an identification mechanism primarily manifests as the failure of broad legal principles to adequately absorb micro-level operational and technical facts. While international instruments like the Montreal Convention establish a unified liability framework, they do not provide operational standards for how complex operational scenarios translate into legally cognizable "events." Consequently, when adjudicators are confronted with specialized issues such as temperature deviations or loading procedures, they lack an authoritative identification pathway to determine whether such facts constitute grounds for exoneration or fall within the regulatory scope of trade usage. Owing to the abstract nature of codified expression, the legal evaluation of the same custom can diverge significantly across different jurisdictions [13].

Moreover, the limitations of industry soft law rules regarding identification mechanisms are further compounded by information asymmetry and data opacity. Although bodies like IATA provide operational specifications, the unilateral formulation of General Conditions of Carriage and the highly confidential nature of industry data make it difficult for judicial practice to obtain sufficient empirical samples to verify the generality of a specific behavioral pattern. In the absence of a standardized, cross-entity data-sharing mechanism, the identification of custom remains trapped within an informational black box, thereby preventing the dynamic updating of a register of identified customs. Lacking external oversight and transparency, commercial self-governance intended to enhance efficiency may, due to the absence of identification procedures, instead become

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an outlet for dominant entities to circumvent state mandatory norms, thereby undermining the order of fair competition in the air transport market.

4. Normative path for the identification standards of trade usage

4.1. Concretization of factual determination standards

The concretization of factual determination standards for trade usage in air transport must be grounded in the technical foundations of industry practice, employing industry soft law and codified custom as auxiliary bases for identification. In the scrutiny of the "repeated application" element, IATA Recommended Practices and the General Conditions of Carriage widely adopted by airlines constitute core reference coordinates. These codified vehicles transform fragmented commercial practices into legally observable norms, thereby significantly reducing the evidentiary burden associated with proving specific behavioral patterns. Concurrently, the standard of regularity emphasized in international commercial law requires adjudicators to examine the objective foreseeability of specific conduct within particular routes or markets. This objectivized identification pathway helps mitigate the technical risk of adjudicators identifying "false customs" based on intuitive judgment.

Regarding the determination of the subjective element of "general recognition," the analysis should shift from pure fact-finding towards a logic of legal fiction. Through the carrier's fulfillment of its duties of public notice and explanation, highly specialized industry practices transcend the barrier of information asymmetry and are thereby transformed into legal facts that passengers "ought to know." This identification mechanism, predicated on notice and consent, essentially effects a normative transition from a unilateral business strategy to an implied contractual term.

The accuracy of factual determination further depends on a rigorous evaluation of evidentiary weight. Judicial practice should strictly distinguish between factual custom serving as evidence and normative custom serving as a basis for adjudication: the former should be subject to the standard of proof based on a balance of probabilities (i.e., a high degree of probability), allowing parties to rebut it with contrary evidence [6].

4.2. Multi-layered application of legal review standards

The legal review of trade usage in air transport should construct a multi-dimensional evaluative framework spanning contractual consent, industry efficacy, and public order. At the micro level, legal review should initially focus on the notice-and-consent mechanism within the context of private law autonomy. Where carriers provide express notice in their General Conditions of Carriage regarding industry practices such as flight overbooking or passenger no-fly lists, the core of review lies in whether such notice is sufficient to bridge the gap of specialized information asymmetry, thereby achieving implied consent between the parties at the level of legal construction. At this tier, identification emphasizes whether the industry custom has been transformed into an implied contractual term and whether such transformation conforms to the requirement of foreseeability under international commercial law.

Moving to the meso level of review, a dual assessment standard incorporating economic efficiency and operational safety should be introduced. The highly technical nature of air transport requires adjudicators, when reviewing a custom, to consider the substantive contribution of a specific behavioral pattern to maintaining the stability of the global aviation network and reducing transaction costs. When evaluating revenue management-driven overbooking models or embargo

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measures based on risk prevention, legal review should not remain confined to principles of formal fairness. Instead, it should incorporate a cost-benefit analytical framework to assess the dynamic equilibrium achieved between efficiency and safety, thereby avoiding the induction of systemic risk through excessive interference with the industry's technical logic [9].

At the macro level of review, a constraining mechanism grounded in mandatory legal provisions and public order and good morals should be established. This multi-layered review pathway requires adjudicators to strictly delineate between custom as a behavioral norm and custom as an adjudicatory source, ensuring that the application of trade usage does not undermine the protective function of state law for vulnerable groups. Particularly when adjudicators are confronting disputes implicating the public service attributes of air transport, review standards should focus on evaluating whether the custom impairs overall social welfare or contravenes the foundational liability system established by international conventions.

4.3. Systematization of the identification mechanism

At the level of defining the object of identification, the core should consist of carriers' general conditions of carriage and industry organization-recommended practices, thereby transforming fragmented operational practices into predictable contractual elements and facilitating the sedimentation of trade usage from opaque conduct to codified rules. To enhance the objectivity of the identification process, empirical data should be introduced as an auxiliary tool, with computational techniques being utilized to analyze large-scale repetitive behaviors, thereby supporting the determination of the "repeated application" element by reference to statistical significance.

At the procedural operational level, notice and consent should be explicitly established as the constructive standard for subjective conviction. By fulfilling the carrier's duty of disclosure and explanation, an effective informational link is created between passengers and highly specialized industry rules, thereby effecting, within judicial review, the transition from unilateral business strategy to implied contractual term. At the level of coordinating normative hierarchies, a tripartite filtering model centered on contractual consent, economic efficiency, and public order should be constructed to ensure that, while trade usage supplements contractual gaps, it does not weaken the constraints imposed on carrier liability by mandatory law instruments such as the Montreal Convention.

Furthermore, exploration should be undertaken towards establishing a dynamically updated register of industry customs, bridging the tension between legal stability and the dynamic nature of industry technology through legislative guidance and judicial feedback. This systematic pathway not only reduces certainty costs in transactions and interpretation costs in judicial adjudication but also provides procedural support and a legitimacy foundation for the construction of a globally unified private air law order.

5. Conclusion

Grounded in the industry characteristics of air transport contracts—highly technical specialization, internationality, and standardization—and addressing the practical realities in which statutory rules struggle to comprehensively cover the industry's rapidly evolving operational details and where judicial practice has long faced dilemmas in identifying air transport trade usage due to ambiguous factual standards, conflicting legal review criteria, and absent identification mechanisms, this paper employs the factual and legal standards of trade usage as its core analytical framework. Through the

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integration of case study, normative analysis, and comparative law methods, it systematically elucidates the identification logic and normative pathway for trade usage in air transport.The study clarifies that the establishment of trade usage in air transport requires the core factual elements of "repeated application" and "general recognition." Objectification is achieved through reliance on codified vehicles such as international customs, industry association recommended practices, and general conditions of carriage. Subjective elements are satisfied through legal fiction, accomplished via the carrier's performance of its conspicuous notice obligation and the passenger's mechanism of implied consent, thereby effectively overcoming the identification challenges posed by professional barriers and information asymmetry. At the level of legal application, this paper constructs a multi-layered review system encompassing contractual consent, industry efficacy, and public order: the micro-level respects the core logic of private law autonomy and contractual notice-and-consent; the meso-level integrates a dual assessment of industry operational safety and economic efficiency; the macro-level adherence to the baseline constraints of mandatory legal provisions and public order and good morals thereby achieves a value equilibrium between the imperatives of industry self-regulation and state mandatory norms.

On this basis, the normative path proposed herein—characterized by the concretization of factual determination standards, the multi-layered application of legal review criteria, and the systematization of identification mechanisms—not only theoretically clarifies the intrinsic logic governing the transformation of air transport trade usage from commercial practice to legal norm, filling a gap in the systematic analysis of this proposition within existing scholarship, but also, at a practical level, furnishes judicial organs with operable standards for identification and application. This contributes to reducing transaction costs in the air transport market, enhancing the predictability of adjudicative outcomes, and ultimately fostering a constructive interaction between air transport industry self-regulation and state mandatory norms. Furthermore, it offers a localized theoretical reference and practical framework for the construction of a globally unified private air law order.

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