Labour protection and civil pilots in China: training cost in the legal swamp

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In China, termination of pilot employment has raised many arguments revolving around the training repayment. When pilots resign from their jobs or are fired, airlines generally claim compensation for the training cost. Questions arising in lawsuits can generally be divided into several categories: repayment window, repayment amount, statutory exemptions, and unfair discharge. The incoherent interpretation of the Chinese Labour Contract Law and the Pilot Movement Directive has led to controversies in civil proceedings. Furthermore, training repayment by pilots contributes to regulatory concerns about aviation safety, fair competition, the right to quit, and contractual unconscionability. This article addresses to what extent current Chinese law recognizes training repayment by civil pilots. Through the case study of Chinese judicial decisions and the comparative study of practices in the United States and the European Union, this article concludes with discussions on a viable way forward.

Keywords: China, labour protection, civil pilots, training cost, repayment obligation

1 INTRODUCTION

Chinese[1] courts have usually, but not always, upheld training repayment by civil pilots. For example, in *Shi Xin v. China Eastern Airline*, the pilot served under an open-ended employment contract.[2] When he resigned, the airline claimed compensation for training cost. The Court favoured the airline in upholding CNY 2,030,000[3] training repayment.[4]

Professionalism of pilots requires initial and recurrent training throughout the career.[5] The Chinese pilot training system has witnessed failed trials of the self-financing

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1 With no specific mention, when the article refers to China, it focuses on legislature and case decisions of the Mainland China.

2 *Shi Xin v. China Eastern Airline*, (2016) Hu 01 Min Zhong No. 2355. All cases cited in this article can be found on China Judgment Online, https://wenshu.court.gov.cn/ (origin in Chinese, accessed 31 May 2022).

3 For the reference, CNY 1 is equivalent to EUR 0.1401 on 31 May 2022. *See* European Central Bank, *Euro Foreign Exchange Reference Rates*, https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-cny.en.html (accessed 31 May 2022).

4 *See supra* n. 2.

5 Pilot training can be divided into the development of two skill-sets, *to wit*, technical side dealing with hardcore skills (e.g., safety manipulating and flying a modern aircraft platform), and non-technical side focusing on aviator's soft skills (e.g., time management and airmanship facilitation). As analysed in

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model over the past few decades.[6] Chinese airlines now bear the bulk of costs of workforce training. When pilots resign from their jobs or are fired, airlines generally sue pilots to repay the cost for either initial or recurrent training or both. Such an obligation on employees is often referred to as the training repayment.[7]

Two factors can explain the resort to training repayment in the Chinese aviation industry. Firstly, training cost for pilots is commonly advanced by airlines. If pilots change their jobs, airlines cannot fully realize any profit from the investment and are financially disadvantaged. However, recouping cost is not the only reason. Another account, with at least comparable prominence, is employee immobility. Chinese airlines have been struggling with a shortage of pilots for years. The expanding aviation market only aggregates the problem.[8] Many airlines choose to employ foreign workforce to alleviate the problem of high demand and short supply of pilots.[9] However, foreign pilots, who only constitute a small part of the whole group in China,[10] cannot repair the strained labour market. Airlines resort to training repayment by offering open-ended contracts or contracts with specified repayment windows to pilots. Their intention to use repayment obligations to retain pilots has manifested in the dilatory tactics in civil proceedings,[11] long repayment window, and the exorbitant initial repayment amount.[12]

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s. 2.1 *infra*, current Chinese law only recognizes the training repayment for the technical sets. Thus, this article focuses on technical training of civil pilots. *See* the International Federation of Air Line Pilots' Associations, *IFALPA Pilot Training Standards Manual* (2012), https://www.ifalpa.org/publications/library/ifalpa-pilot-training-standards-manual–1571 (accessed 31 May 2022).

6 Chinese Government Website, *Solutions to Pilot Training: The Graduation of Self-Financed Pilots* (2009), http://www.gov.cn/jrzg/2009-10/22/content_1446841.htm (origin in Chinese, accessed 31 May 2022).

7 *See* Anthony Kraus, *Employee Agreements for Repayment of Training Cost: The Emerging Case Law*, 59 Lab. L.J. 213 (2008).

8 *See* International Air Transport Association, *Annual Review 2019*, https://www.iata.org/en/publications/annual-review/ (accessed 31 May 2022); International Air Transport Association, *Airline Financial Monitor: December 2021-January 2022*, https://www.iata.org/en/iata-repository/publications/economic-reports/airlines-financial-monitor-december-2021—january-2022/ (accessed 31 May 2022).

9 Civil Aviation Administration of China, *China Civil Airmen Statistics 2021*, https://pilot.caac.gov.cn/jsp/airmanNews/airmanNewsDetail.jsp?uuid=abbc4b8e-1d42-4aaa-a0b4-6ab4ef2eb1df&code=Statistical_info (origin in Chinese, accessed 31 May 2022); Civil Aviation Administration of China, *Statistical Bulletin of Civil Aviation Industry Development 2021,* http://www.caac.gov.cn/XXGK/XXGK/TJSJ/202205/P020220518569126412044.pdf (origin in Chinese, accessed 31 May 2022); Civil Aviation Administration of China, *Statistical Bulletin of Civil Aviation Industry Development 2017-2020*, http://www.caac.gov.cn/en/HYYJ/NDBG/ (English translation, accessed 31 May 2022).

10 From 2012 to 2021, foreign pilots took the highest percentage of 8.50% and lowest percentage of 3.00% of the pilots serving in China. *See Civil Airmen Statistics 2021, supra* n. 9.

11 In many cases, airlines resorted to the appellate courts or even the courts of retrial. *See Tianju General Aviation v. Wei Hua* (2021) Shan Min Shen No. 3130.

12 Whilst the initial repayment amount claimed by airlines could reach more than CNY 10,000,000, they could get compensation at around CNY 2,000,000 in arbitration or court decisions. *See Cui Xiao v. Xinjiang Branch of China Southern Airlines* (2021) Xin 01 Min Zhong No. 6004.

The argument is nonsensical that training repayment is only used to recoup training cost.[13]

In China, the repayment obligation of pilots for technical training is recognized in the Chinese Labour Contract Law (CLCL)[14] and the Pilot Movement Directive (PMD).[15] The issue in judicial practices lies in the fact that courts present different attitudes about the training repayment by civil pilots[16] The case study shows that judges may not adopt coherent interpretation and implementation of statutory rules.

This article addresses whether and to what extent training repayment by pilots can be recognized under current Chinese law. After a general introduction in this section, section 2 traces the legislation and case law governing training repayment in China. Section 3 elaborates on multifarious concerns raised by training repayment in aviation. The analysis also explores practices in the United States (US) and the European Union (EU). The comparative study can help exemplify how such legal principles as the right to quit and the doctrine of unconscionability cast a shadow over training repayment. Section 4 explores a future regulatory framework of training repayment. This article concludes by contemplating a different model for pilot training.

2 CURRENT LAW ON TRAINING REPAYMENT BY PILOTS

2.1 Chinese regulatory framework of training repayment

Chinese aviation labour protection policy finds its origin in the Chinese Labour Law, which covers working time, union representation, employment contracts and social security benefits.[17] However, much more relevant for the issue of training repayment is the CLCL, which refines the Chinese Labour Law provisions on employment contracts. The legal basis of training repayment is set out in Article 22 of the CLCL:

> where an employer pays training expenses for the special technical training of his employees, the employer may enter an agreement with his employees to specify their repayment window. If an employee violates the stipulation regarding the repayment window, the individual shall pay the employer a penalty for breach of contract … the penalty for breach

[13] Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72(4) Ala. L. Rev. 755 (2021).
[14] Labour Contract Law of the People's Republic of China came into effect on 1 Jan. 2008.
[15] CAAC, Directive on the Pilot Movement, CAAC Decree (2005) No. 104, published on 25 May 2005.
[16] Courts upheld the training repayment in *Sun Chuxiao v. XiamenAir* (2020) Min Min Shen No. 4956; *Cui Xiao v. Xinjiang Branch of China Southern Airlines*, *supra* n. 12. Courts dismissed the training repayment in *China Southern Airlines v. Zhang Xiao* (2016) Sui Yun Min Shen No.6 08/609; *Liaoning Fly General Aviation v. Li Jiaxu* (2020) Liao 04 Min Zhong No. 509.
[17] Labour Law of the People's Republic of China came into effect on 1 Jan. 1995.

> of a contract in which the employer requires the employee to pay shall not exceed the training expenses attributable to the service period that is unfulfilled.[18]

The training repayment is conditioned on the technical set of training and predetermined repayment window. The repayment obligation does not necessitate explicit *ex ante* agreement on training cost.

In addition, the Civil Aviation Administration of China (CAAC) addressed the labour market of civil pilots in the PMD as early as 2005. Article 1 stipulates that:

> when air carriers recruit pilots from other carriers … the poaching carrier shall make a payment to the former carrier in the amount ranging from CNY 700,000 to CNY 2,100,000 … when pilots unilaterally terminate employment relations and there is predetermined liquidated damage in their contracts, the pilots shall be liable based on the agreement.[19]

Though this provision does not mention the training cost, courts frequently used it as a justification for training repayment. As a departmental rule, the PMD is inferior to the CLCL and is mainly used by courts to decide the repayment amount.[20] Judicial practices have exposed two problems of the implementation of the directive.

Firstly, the PMD shall be treated with some caution in implementation since it was put into force before the introduction of the CLCL. Furthermore, CAAC abolished the benchmark of CNY 700,000 ~ 2,100,000 in 2017.[21] The dilemma was the disguised reference to the defunct standards. For example, in *Peng Gang v. Nanshan Jet*, the court of first instance decided on the repayment amount based on the benchmark.[22] Though the pilot challenged it in the appeal, the appellate court took the view that abolishment of the benchmark did not negate the whole document and upheld the ruling.[23]

A second problem is the expansive interpretation of calculation standards in the PMD. According to the text, when pilots unilaterally terminate employment contracts or are fired, the predetermined liquidated damage shall be the ground for courts to adjudicate relevant labour disputes. When pilots are poached by other employers, poaching airlines rather than pilots shall be liable for the compensation. What contributes to the complexity, however, is a working paper issued by the Supreme People's Court[24] on the PMD in 2005.[25] This working paper does not

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18 Article 22 of the CLCL.
19 Article 1 of the PMD.
20 *See* the Law on Legislation of the People's Republic of China came into effect on 1 Jul. 2000.
21 CAAC, Abolishment of Payment Benchmark in the Directive on the Managing Movement of Pilots, CAAC Decree (2017) No. 10.
22 *Peng Gang v. Nanshan Jet* (2021) Jing 03 Min Zhong No. 12113.
23 *Ibid*.
24 The Supreme People's Court of the People's Republic of China.
25 The Supreme People's Court, Working Paper on Pilot Movement Directive.

distinguish the poaching from other causes of termination. Some courts have exploited the vague language of the working paper and referred to the CNY 700,000 ~ 2,100,000 standard in cases where pilots have unilaterally terminated the contracts.[26] A proper way to apply the PMD can be found in *Tan Kaishen v. China Southern Airlines*.[27] The Court refused to enforce the benchmark and ruled that the former airline could file another lawsuit if another airline employed the pilot later.

In sum, the CLCL and the PMD establish the basis for adjudicating pilots' training repayment. The following section reviews relevant cases, from which it is possible to identify some patterns in the treatment of training repayment.

2.2 Case study

2.2[a] *Repayment Window*

A growing number of airlines require workers to sign what is also known as 'conditional training contracts'.[28] Training repayment agreements are one species thereof. Airlines advance the training cost, in exchange of which they offer employment with specified repayment window or in the form of open-ended contracts to pilots.[29] According to Article 22 of the CLCL, when pilots violate the repayment window, they are liable for liquidated damage with reference to training cost. In *Li Chuanlong v. Shenzhen Airlines*, the employment contract contained the training repayment clause stating that 'if the pilot resigns, or is fired with cause, within 20 years from the date of signing the employment contract, he shall pay compensation of CNY 2,000,000 as the liquidated damage'.[30] In this case, the pilot resigned after a 3.5-year service in breach of the twenty-year repayment window.[31] The Court upheld compensation in the amount of CNY 2,000,000 as the training repayment.[32]

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[26] *See Wei Zhenhong v. China United Airlines* (2013) Er Zhong Min Zhong Zi No. 14994. In this case, the Court noted that 'the Supreme People's Court acknowledged the reference to legal principles and calculation standards in the PMD and the Implementation Directive in all cases pertaining to termination of pilots' employment contracts'.

[27] *Tan Kaishen v. China Southern Airlines* (2015) Sui Yun Fa Min Yi Chu Zi No. 476.

[28] *See* Harris, *supra* n. 13.

[29] A variation of repayment agreement manifests as voluntary loans. *See Ding Liang v. Jinggong General Aviation* (2021) Shan 05 Min Zhong No. 2938. In this case, the parties concluded a pilot training contract, Art. 7 of which stipulated that 'the pilot shall pay for the training. With the written consent of the pilot, the airline will make the payment for the training as a loan to the pilot. After the pilot meets the requirements and receives the certification, he or she will work with a repayment obligation for the training cost in the agreed period of time'. The Court recognized it as a training repayment agreement.

[30] *Li Chuanlong v. Shenzhen Airlines* (2021) Yue 03 Min Zhong No. 23027.

[31] *Ibid.*

[32] *Ibid.*

The interpretation of repayment window leaves space for discretionary power of judges, especially in cases where the employment contracts are open-ended.[33] Many pilots challenged the assertation that the length of the contract was analogous to repayment window, but few of them found success.[34] Courts generally acknowledged that pilots were under repayment obligations if they worked for an indeterminate period. A controversial decision was in *China Flying Dragon v. Jia Yunlong*.[35] In this case, the pilot resigned outside the repayment window, but the Court upheld the training repayment without providing plausible statutory grounds.

2.2[b] *Repayment Amount*

Recognition of training repayment does not necessitate *ex ante* agreement on the amount. As noted by the Court in the *Meng Lingzhi v. Air China Cargo* case, 'to achieve equity and fairness, the repayment amount could be decided according to general conditions of aviation market'.[36]

Article 22 of the CLCL recognizes amortization of repayment amount.[37] The amortization can be colloquially described as the principle that repayment amount decreases over the time employed. Just as importantly, CAAC introduced the Implementation Directive[38] which contains amortization of the repayment benchmark of the PMD. After the abolishment of the PMD standards in 2017,[39] judicial proceedings were divided between decisions which held compensation for all training cost,[40] those which amortized training repayment based on the Implementation Directive,[41] those which decided repayment amount based on

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33 This article has a discussion on open-ended employment contracts. *See* s. 2.2[b] *infra*.

34 In some cases, pilots asserted that the repayment window cannot be inferred from the length of employment contracts. Courts dismissed the claims. To the best of the author's knowledge, there is no court decision favouring such challenge. *See Cui Xiao v. Xinjiang Branch of China Southern Airlines, supra* n. 12; *Li Liangzheng v. Xinjiang Branch of China Southern Airlines* (2021) Xin 01 Min Zhong No. 2010; *Wang Shuai v. Air China Cargo* (2020) Jing 03 Min Zhong No. 4528.

35 *China Flying Dragon v. Jia Yunlong* (2019) Hei 01 Min Zhong No. 4519.

36 *Meng Lingzhi v. Air China Cargo* (2018) Jing 03 Min Zhong No. 13772.

37 Article 22 of the CLCL: 'the penalty for breach of a contract in which the employer requires the employee to pay shall not exceed the training expenses attributable to the service time period that is unfulfilled'.

38 The compensation amount shall be the sum of CNY 700,000 as of the starting training cost with, an addition of CNY 140,000 per year before pilot reaches forty-five years old, and a deduction of CNY 140,000 per year after pilot reaches forty-five years old, with a maximum of CNY 2,100,000. *See* CAAC, Directive on the Implementation of CAAC Decree (2005) No.104, CAAC Decree (2005) No. 109.

39 *See supra* n. 21.

40 *See Peng Gang v. Nanshan Jet*, *supra* n. 22.

41 *See Zhu Ning v. XiamenAir* (2018) Min Min Shen No. 1818.

employment contracts,[42] and others which addressed amortization according to market conditions without explicitly referring to any calculation method.[43]

The calculation of repayment amount gives rise to questions about training duration and open-ended employment contracts. In the first instance, the Court in *Sun Chuyao v. XiamenAir* pointed out that, as the pilot did not pass the training assessment and provided no service for XiamenAir, he was liable to compensate all training cost.[44] The training duration was excluded from service time.[45] Some judges presented different reasoning, especially in cases where there were employment contracts before pilots started the training. In *Wang Zuoqi v. XiamenAir*, the Court decided the service time referring to the starting date of employment contract and including the training duration.[46] In practice, a separate employment contract, which is concluded after pilots complete training, may leave less space for the discretionary interpretation of judges.

As to the open-ended employment contacts, while some judicial decisions held a repayment amount for all confirmed training cost,[47] it was still possible for pilots to compensate the part 'attributable to the service period that is unfulfilled'.[48] In the *Pan Jing v. Loong Air* case, the Court delivered a creative ruling.[49] In view of employment contract clauses, the Court determined that retirement of the pilot would put an end to the labour relation. It was possible to calculate the repayment window based on retirement age and starting date of employment. The Court addressed amortization of training repayment by reference to service time and putative length of the contract. It is noteworthy that Chinese labour regulations establish sixty-year-old and fifty-five-year-old retirement ages for males and females, respectively.[50] Thus, even in cases where the open-ended employment contracts do not explicitly address the retirement age of pilots, judges can at their discretion decide repayment window and then amortize the repayment amount.

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42 *See supra* n. 12.

43 *See Meng Lingzhi v. Air China Cargo*, *supra* n. 36.

44 *Sun Chuyao v. XiamenAir* (2020) Min Min Shen No. 4956.

45 The case concluded with an amortized repayment though, because that the appellate court wrongly ruled in this way and the airline did not apply for a retrial, *ibid*. In this article, 'service time' refers to the period for which the employee has served.

46 *Wang Zuoqi v. XiamenAir* (2017) Min 02 Min Zhong No. 4996.

47 *See Wang Shuai v. Air China Cargo, supra* n. 34.

48 *See Zhao Ke v. Air China Cargo* (2020) Jing 03 Min Zhong No. 1826.

49 *Pan Jing v. Loong Air* (2019) Zhe 0109 Min Chu No. 18629.

50 Article 1 of Provisional Measures Concerning the Retirement and Resignation of Workers. Furthermore, Art. 44 of the CLCL introduces statutory circumstances for the contract termination which includes the fact that the employee has begun to enjoy the basic benefits of his or her pension. Notably, the CAAC imposes a maximum age for pilots to operate civil flight operation as sixty-three years old. Since the latter CAAC standard is a technical requirement and does not contradict the retirement ages set out by labour regulations, aviation stakeholders refer to the sixty-year-old and fifty-five-year-old as the retirement ages. *See* CAAC, Operations Certification: Large Aeroplanes Air Carrier (1999), CCAR-121, at Art. 381(c).

The CLCL does not provide rules on reviewing the nexus between the training cost to the employer and the claimed repayment amount. Such failure reduces predictability and stability of judicial results. In civil proceedings, employers can provide training agreements, accounting documents and supplementary training records to justify the actual cost. It remains unclear to what extent airlines shall provide evidence of the training cost. For example, in the *Gu Wei v. Air China Cargo* case, the Court held that it was irrational to require the airline to provide certified invoices for all training cost and repayment amount could be decided based on general conditions of civil aviation market.[51] In *Wang Qi v. 9 Air*, however, the Court only recognized CNY 45,100 training cost out of CNY 67,000 claimed by the nine Air on account of insufficient invoice evidence for the residual part.[52]

2.2[c] *Compatibility of Training Repayment With Articles 25, 38 and 39 of the CLCL*

Moving beyond repayment window and amount, training repayment has raised questions about its compatibility with Articles 25, 38 and 39 of the CLCL which address additional liquidated damage, statutory exemptions, and unfair discharge respectively.

Firstly, courts have adjudicated the relation between training repayment and additional liquidated damages. In *China Postal Airlines v. Ge Xiongtao*, the employment contract contained the training repayment clause:

> if the pilot unilaterally terminates the contract, he shall be liable to China Postal Airlines for the compensation including: 1. Enrolment fee; 2. Training and retraining cost which is applicable until the pilot has worked at the position for 10 years; 3. All administrative fees which are related to certification and authorization of the pilot; 4. Liquidated damage in the amount of 30% of the sum of the above three financial items.[53]

In this case, the pilot resigned after a 4.4-year service in breach of the ten-year repayment window.[54] The Court upheld compensation in the amount of CNY 1,710,800 which included training cost and additional 30% as the liquidated damage.[55] However, caution is necessary in evaluating this case. Article 25 restricts the *ex ante* agreement on liquidated damage to situations of non-compete and training repayment.[56] It follows that airlines can build additional liquidated damage only on actual *ex post* loss caused by the breach of contract, rather than

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51 *Gu Wei v. Air China Cargo* (2018) Jing 03 Min Zhong No. 6927.
52 *Wang Qi v. 9 Air* (2019) Yue 01 Min Zhong No. 17315/17316.
53 *China Postal Airlines v. Ge Xiongtao* (2019) Su 01 Min Zhong No. 6798.
54 *Ibid.*
55 *Ibid.*
56 Articles 22, 23 and 25 of the CLCL.

predetermined amount or calculation methods. Most judgements dismissed airlines' claim for additional liquidated damage for assurances of non-repetition.[57] The exemption probably exists in compensation for transfer fees which airlines have paid before to counterparts to poach pilots, though judicial practices were inconsistent. Judges tended to take consistent attitudes towards transfer fees and training cost. If pilots successfully challenged the training repayment, courts identified transfer fees as human resource cost and dismissed airlines' claims.[58] Conversely, pilots can be liable to compensate for both training cost and transfer fees.[59]

Secondly, training repayment is not a standing price for pilots to resign. Article 38 of the CLCL elaborates such circumstances for employees to terminate labour relations as insufficient rest time,[60] delay in salary disbursement,[61] and airlines' failure to provide work opportunities.[62] Courts generally referred to this stipulation in the dismissal of training repayment. Turning to pilot training, however, incoherent judicial interpretation confined the application of Article 38 of the CLCL. In *Shi Mengyu v. Xilin Fengteng General Aviation*, there was delayed payment of salary and social security benefits to the pilot.[63] The Court pointed out that the employer made an investment in the pilot training and the pilot was entitled to compensation for delayed remuneration rather than the exemption from training repayment.[64]

Thirdly, there were different judicial decisions on training repayment obligations pertaining to pilots being fired. Article 39 of the CLCL stipulates circumstances based on which airlines can terminate pilots. If discharging reasons cannot pass the test of Article 39 of the CLCL, judges tended to favour pilots by waiving their burdens of training repayment.[65] Conversely, courts generally held repayment obligations when the airline fired the pilot with just cause. In *Tan Kaishen v.*

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[57] *See Liu Wei v. Air China Cargo* (2020) Jing 03 Min Zhong No. 1994. The Court contended that it was illegitimately repetitive to assert compensation for liquidated damage when the Court already upheld training repayment.

[58] *See Zhang Yong v. Nanshan Jet* (2020) Jing 03 Min Zhong No. 4525.

[59] *See Sichuan Tri-star General Aviation v. Wang Haolin* (2020) Chuan 01 Min Zhong No. 10442. The Court recognized the compensation for transfer fees as liquidated damage besides upholding training repayment.

[60] *See China Southern Airlines v. Zhang Xiao, supra* n. 16.

[61] *See Hunan Yuanfang General Aviation v. Shen Xiuhan* (2021) Xiang 01 Min Zhong No. 11556.

[62] *See Zhuang Xiaoting v. Joy Air* (2021) Yue 01 Min Zhong No. 2865.

[63] *Shi Mengyu v. Xilin Fengteng General Aviation* (2020) Chuan 06 Min Zhong No. 1075.

[64] In *Liaoning Fly General Aviation v. Li Jiaxu*, the Court held that 'where there was delayed payment of renumeration, the employee was entitled to terminate employment contract and alleviated from training repayment'. *See supra* n. 16.

[65] *See Yunan YingAn Airlines v. Xiaoyu* (2018) Yun 01 Min Zhong No. 7237. The Court determined that the employment contract contained no language requirement. The Yingan Airlines failed to justify the discharging when the pilot did not pass the English test. The claim for training repayment was dismissed.

China Southern Airlines, the pilot asserted that his physical conditions were not suitable for aircraft operations and refused to work.[66] He did not provide any medical reports as required by the airline. The Court ruled that the airline was entitled to discharge and claim compensation from the pilot.

3 PERCEIVED AREAS OF CONCERN PERTAINING TO TRAINING REPAYMENT

3.1 Aviation safety

The case study shows that judicial discretion on interpretation and implementation of applicable rules incidentally reduces the predictability of training repayment. It is rewarding to address air law with considerations of peculiarities of aviation market.

A key element of a thriving civil aviation industry is to ensure safety of flight operations, of which pilots constitute an integral part. In addition to the employee status within labour relations, pilots are commanders in the narrow community comprising cabin crews and passengers or cargoes in specific flights. They have authority and duty to obtain proper flight documents and cargo manifests, and to carry out pre-take-off checks, as laid down in Article 29 of the Convention on International Civil Aviation (Chicago Convention (1944)).[67] Pilots also have the authority to undertake all necessary measures to improve the safe completion of flights. It follows that aviation safety is under double-sided influences of the issue of training repayment by pilots.

On the one hand, airlines undertake the cost of pilot training. They expect to have effective control over employment contracts, out of concerns that competitors might freeride on their training undertaking and harvest training investment through poaching experienced pilots. Pilot training cost becomes an opportunity cost incurred by airlines. With ambiguous answers to the enforceability of training repayment comes a reduced incentive for airlines to offer no-cost training. This can negatively impact on aviation safety in the current absence of an alternative training model.

On the other hand, some pilots work with deplorable working conditions, such as excessively long flight hours, irregular work patterns and difficult night duties.[68] The right to quit can be a more effective bargaining power for pilots than being a 'whistle-blower' considering possible retaliation from airlines. Such a right can constrain airlines from adopting 'slave contracts'.[69] In reality, pilots find the expensive training repayment as a significant barrier to their mobility, even in cases

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66 *See Tan Kaishen v. China Southern Airlines*, *supra* n. 27.

67 Convention on International Civil Aviation signed at Chicago on 7 Dec. 1944.

68 *See China Southern Airlines v. Zhang Xiao* (2016) Yue Min Shen No. 608/609.

69 *See* Yves Jorens et al., *Atypical Forms of Employment in the Aviation Sector* (2015), https://www.eurocockpit.be/sites/default/files/2019-01/report_atypical_employment_in_aviation_15_0212_f.pdf (accessed 31 May 2022).

where airlines already do not guarantee enough rest time and adequate working conditions for the sake of aviation safety.[70] Moreover, free resignation can also be a passive protection of pilots when they refuse to work due to their physical disqualification of operating aircraft.[71] In this regard, the discretionary power of judges shall apply with caution. Excessively lenient holding of training repayment may otherwise compel sick and fatigued pilots to work.

Notwithstanding its potential, international air law fails to regulate training repayment through the leverage of aviation safety.[72] China is a party to the Chicago Convention (1944).[73] There are such provisions referring to aviation personnel as Articles 29, 32, 33, and provisions in Chapter 39, with additional technical conditions of personnel licensing contained in Annex 1.[74] Unfortunately, they do not provide provisions directly touching upon labour relations, let alone the question of training repayment. In China, the CLCL regulates air transport activities on matters such as nationality of aircraft, airports, passenger protection and surface damage.[75] Though it integrates technical regulations of personnel into the main text as Chapter 5, it does not address labour issues either.

3.2 Fair competition

Aviation stakeholders realize impacts of labour cost on fair competition. Airlines understandably apply various strategies to protect their investment on pilot training.[76] In 2014, China Air Transport Association worked with China Airline Pilot Association and industry groups to reach the Pilot Movement Consensus on the issue of pilot mobility between airlines.[77] They introduced a pilot movement

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70 *See China Southern Airlines v. Zhang Xiao, supra* n. 16.

71 A counter example was in *Tan Kaishen v. China Southern Airlines*. *See Tan Kaishen v. China Southern Airlines*, *supra* n. 27.

72 Available international legal instruments concerning aviation staff mostly focus on the technical aspects of training and licensing of personnel. *See* ICAO, *Aviation Training and Capacity-Building Roadmap for States* (2017), https://www.icao.int/training/Documents/ICAO%20Aviation%20Capacity-Building%20Roadmap_2107.pdf (accessed 31 May 2022).

73 *See* ICAO, *Current Lists of Parties to Multilateral Air Law Treaties*, https://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx (accessed 31 May 2022).

74 Articles 29 and 32 recognize the importance of personnel licences to keep aviation safety. Article 33 provides legal basis for mutual recognition of licences between the contracting states, and Ch. 39 introduces the endorsement of licences in the case of any person holding a licence but not satisfying in full conditions laid down in international standards related to the class of licence, namely the Annex 1 to the Chicago Convention (1944).

75 Civil Aviation Law of the People's Republic of China came into effect on 29 Dec. 2018.

76 Competition Policy International, *No-Poach* (2022), https://www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2022/spring-2022-may-volume-1/ (accessed 31 May 2022).

77 *See* China Civil Aviation News, *Pilot Movement Consensus* (2018), http://www.caacnews.com.cn/1/6/201812/t20181221_1263440.html (origin in Chinese, accessed 31 May 2022).

quota of 1% per year.[78] As an industry agreement, the consensus has no binding character. It rather reveals conservative attitudes of industry governing groups about free movement of pilots. Pilots who decide to resign from their jobs will be put into a waiting list.[79] It can take them more than one year to complete procedures.[80] Under these circumstances, airlines regard training repayment as one viable option to constrain pilots from circumventing the waiting list and, thus, maintain order in the pilot movement.[81]

There is no international treaty regulating aviation economics. Article 1 of the Chicago Convention (1944) confirms 'complete and exclusive' sovereignty over national air space.[82] In the economic field, the starting point is laid down in Article 6 which covers scheduled air services.[83] Bilateral and multilateral Air Services Agreements (ASAs) are concluded by states to solve security, safety and economic concerns in determination of who flies in their national airspace. Few ASAs, if any, contain clauses addressing labour relations of airline workers though they manifest considerable potentials on economic and even some labour sides.[84]

On the sphere of national law, Chinese Anti-Unfair Competition Law[85] and Chinese Anti-Monopoly Law[86] work together to maintain fair competition in the market. During labour disputes on training repayment, litigators hardly referred to these instruments. Three factors may serve to limit the application.

Firstly, employees are not entitled to file lawsuits against anti-competition or illegal monopoly practices. Article 17(2) of the Chinese Anti-Unfair Competition Law states that 'a business operator whose lawful rights and interests are infringed by an unfair competition act may file a lawsuit with a people's court'.[87] This endows competitor airlines with the right to initiate regulatory authorities' investigation, but leaves no space for pilots to invoke the law. An analogous clause can be found in Article 46 of the Chinese Anti-Monopoly Law.

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78 *Ibid.*
79 *Ibid.*
80 Xinhua News, *Pilot Resignation: 5 Million for 'Break-up'* (2016), http://www.xinhuanet.com/politics/2016-05/02/c_128949016.htm, (origin in Chinese, accessed 31 May 2022).
81 Another option is to detain the technical documents of pilots. *See* s. 4.2[b] *infra*; *see also infra* n. 142.
82 Article 1 of the Chicago Convention (1944).
83 *Ibid.*, Art. 6.
84 Andrea Trimarchi, *Airline Non-commercial Advantages and Fair Competition: The Issue of Labour Conditions*, in *Harmonising Regulatory and Antitrust Regimes for International Air Transport* 145 (Jan Walulik ed. 2019).
85 Anti-unfair Competition Law of The People's Republic of China came into effect on 1 Dec. 1993.
86 Anti-monopoly Law of the People's Republic of China came into effect on 1 Aug. 2008.
87 Article 17(2) of the Chinese Anti-Unfair Competition Law.

Secondly, legacy airlines that occupy large market share in China are still state-owned.[88] There might be additional challenges for regulatory authorities to investigate anti-competition or illegal monopoly labour practices in civil aviation than in other highly liberalized industries.

Thirdly, there is labour monopsony in the labour market of pilots. Airlines bear the cost of pilot training, and most trainee pilots have started their career under long-term or open-ended employment contracts.[89] The aviation labour market is not competitive but instead exhibits considerable market power enjoyed by airlines. These employers use the power to constrain pilot mobility. The analytic methods for evaluating labour market power in anti-competitive contexts are far less sophisticated than the legal rules used to judge the product market.[90] Though this article does not endeavour to conduct a fulsome analysis of the competition law in labour market, the labour monopsony could impinge on pilots in the context of training repayment.

3.3 The right to quit: Involuntary servitude and free movement of workers

3.3[a] *Comparative Study: The US*

In the US, some examples of training repayment may have constituted involuntary servitude or even the 'debt peonage' under section 2 of the Thirteen Amendment to the Constitution of the United States (US Constitution).[91] Maria Ontiveros has scrutinized the liquidated damage provisions in employment contracts and noted that:

> debt peonage focuses on the harms that arise when that inability to quit is linked to a requirement that the employee work for a specific person in exchange for payment of a debt. These harms occur even if the individual voluntarily entered into the arrangement and even if the debt is relatively small.[92]

According to this explanation, the voluntary arrangement of training repayment can constitute involuntary servitude. In *Heartland Sec. Corp. v. Gerstenblatt*, the

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88 China Southern Airlines is held by China Southern Air Holding Group of which the Chinese Government holds majority ownership. China Eastern is held by China Eastern Air Holding Co. with 61.64% which is a state-owned corporation. Air China is held by China National Aviation Holding Company with 40.4% and China National Aviation Corp Group with 11.27% which are both state-owned. *See* ICAO, *List of Government-Owned and Privatised Airlines (20)*, https://www.icao.int/sustainability/SiteAssets/Pages/Eap_ER_Databases/FINAL_Airlines%20Privatization.pdf (accessed 31 May 2022).

89 *See* s. 4.2[b] *infra*.

90 Suresh Naidu et al., *Antitrust Remedies for Labour Market Power*, 132(2) Harv. L. Rev. 536–601 (2018).

91 Thirteenth Amendment to the United States Constitution, proclaimed on 18 Dec. 1864.

92 Maria L. Ontiveros, *'Liquidated Damages' in Guest Worker Contracts: Involuntary Servitude, Debt Peonage or Valid Contract Clause?*, 19 Nev. L.J. 413 (2018).

Court likened the training repayment to indentured servitude.[93] The notion of involuntary servitude has not been widely used to prohibit employment arrangements in the US. However, it casts shadow over training repayment that precludes employee mobility and provides a reason to scrutinize repayment obligations more closely than the ones under ordinary contracts.[94]

3.3[b] *Comparative Study: The EU*

In the EU, the right to quit can be deciphered through the lens of the free movement of workers as guaranteed under Article 45 of the Treaty on the Functioning of the European Union.[95] The provision allows the restriction on free movement of workers on the grounds of public policy, public security or public health. It comes to the question of whether the pilot training constitutes an objective of general interest of the EU. The EU stakeholders have pointed to the broader debate on training cost. The Netherlands referred to the fact that:

> if employers can be sure that they will be able to benefit for a reasonable period from the services of employees whom they train, that is an incentive to provide training, which is also in the interests of the employees themselves.[96]

Such proposition provides the possibility to justify training repayment in restricting free movement of workers. According to the *Bosman* case, a simple non-discriminatory restriction of the free movement right of a worker needs to be justified and proportionate if it is to be compatible with EU law.[97] In the *Bosman* case, the Court of Justice of the European Union (CJEU) balanced the right to free movement against training repayment.[98] Besides the legacy in the status of the EU law and liberalization of sporting market,[99] this case specifically addressed a player's freedom of movement and training cost.[100] The CJEU noted that a system of training compensation in sports could be justified with reference to the objective of educating and training young

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93 State Supreme Court: *Heartland Sec. Corp. v. Gerstenblatt*, No. 99 CIV. 3694 WHP, 2000 WL 303274, para. 7 (S.D.N.Y.2000).

94 *See* Harris, *supra* n. 13, at 765.

95 Treaty on the Functioning of the European Union, OJ C 202, 7 Jun. 2016.

96 Opinion AG Sharpston, *Bernard* (2010), para. 48, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CC0034&rid=1 (accessed 31 May 2022); *see also* Frank Hendrickx, *The Bernard-Case and Training Compensation in Professional Football*, 1(3) Eur. Lab. L.J. 380–397 (2010).

97 Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman*, ECLI:EU:C:1995:463.

98 *Ibid*.

99 *See* Richard Parrish, *The European Social Dialogue: A New Mode of Governance for European Football?*, in *The Legacy of Bosman: Revisiting the Relationship Between EU law and Sport* 188 (Antoine Duval & Ben Van Rompuy eds 2016).

100 *See supra* n. 97, para. 106.

players.[101] The CJEU looked at the proportionality of repayment scheme to the objective of encouraging the player training.[102] As the *Bosman* case addressed the professional football player with a contract to an end, a later *Bernard* case[103] concerned a trainee player with contractual obligations versus his club-employer. In sum, the *Bosman* and *Bernard* cases balanced the relationship between, on the one hand, development of young players and contract liability, and on the other, free movement of workers. The reasoning can be mirrored in reviewing repayment obligations of pilots, which requires the training repayment to be necessary and proportionate for the objective of pilot training and development of civil aviation.

3.3[c] *Employee Mobility in China*

It is not difficult to see impacts of training repayment on mobility of pilots. Article 38(2) of the CLCL endows employees the right to terminate contracts when 'they are forced to work by the employer through means of violence, threat or deprival of personal freedom in violation of law'.[104] If a pilot is unable to quit because the individual is unable to reimburse the airline for the training cost, the repayment obligation may have constituted the 'threat'. The comparative study of practices in the EU and the US reveals that the restrictions on employee mobility are only legitimate if they are imposed on the grounds of public interest, and in a proportionate and necessary manner. The inspiration can be found in the prohibition against involuntary servitude through the Thirteenth Amendment to the US Constitution, and the CJEU's reasoning in the *Bosman* and the *Bernard* cases.

Notably, non-compete employment contracts also put restrictions on employee mobility.[105] Article 24 of the CLCL elaborates such categories of workers on which employers can impose non-compete restrictions as senior managers, senior technicians, and other employees who have the obligation to keep secrets of employers. To date, airlines have rarely invoked the non-compete clauses to claim training repayment or other liquidated damage from pilots, and the few times that they have, the airlines lost the challenge. As noted by the *Sichuan Airlines v. Luo Jiakuan* case, the pilot only provided service in the form of operating aircraft and the employer provided no evidence to substantiate that the pilot got access to trade secrets.[106]

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101 *Ibid.*
102 *Ibid.*, para. 45.
103 Case C-325/08, *Olympique Lyonnais SASP v. Olivier Bernard, Newcastle United FC*, ECLI:EU:C:2010:143.
104 *See also* Art. 32 of the Chinese Labour Law.
105 *See* Harris, *supra* n. 13, at 733.
106 *Sichuan Airlines v. Luo Jiakuan* (2015) Shuangliu Min Chu Zi No.1799.

3.4 The doctrine of unconscionability

3.4[a] *Comparative Study: The US*

When courts examine the proportionality and necessity of training repayment, the doctrine of unconscionability may provide a viable option. A definition of the doctrine can be found in the US Restatement (Second) of Contracts:

> if a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.[107]

This doctrine has been invoked by the US Court to examine the training repayment obligation of the pilot in *Pittard v. Great Lakes Aviation*.[108] In this case, Great Lakes claimed compensation for training cost plus interest from Mr Pittart who resigned from his position after only thirty-seven days of service. They had concluded a pilot training agreement which provided that 'in the event Mr Pittard was hired by Great Lakes after completing the training but did not remain employed for at least fifteen months, he would be required to repay the $ 7,500 as the training cost plus interest at the rate of 9.5% per year'.[109]

The Court developed a two-element test, *to wit*, procedural and substantive unconscionability, each of which could lead to the unenforceability of the training repayment agreement.[110] Procedural unconscionability refers to the fact that a party with superior bargaining power prepares a contract and the other party lacks a meaningful choice in entering into the contract. Substantive unconscionability requires that the bargain contains terms unreasonably favourable to the more powerful party. In assessing the first perspective, the Court held that 'more is required from a party asserting economic duress than bald assertations that he or she was deprived of the exercise of free will, had no reasonable alternative and was coerced by another's wrongful act'.[111] The Court further looked at the substantive unconscionability and determined that:

> Mr Pittard presented no evidence showing that the provision requiring him to repay the $7,500 cost of training if he did not remain employed by Great Lakes for more than fifteen months unreasonably favoured Great Lakes over him. To the contrary, given that Great Lakes was agreeing to provide valuable training for free, it was not unreasonable for it to require repayment if the employment ended prematurely before it received the benefit of the trained pilot's service.[112]

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107 American Law Institute, *Restatement (Second) of Contracts* (1981), Art. 208.
108 State Supreme Court: *Pittard v. Great Lakes Aviation*, 2007 WY 64, 156 P.3d 964 (A.D.2007).
109 *Ibid*.
110 *See* Harris, *supra* n. 13, at 756.
111 *See supra* n. 108, para. 40.
112 *Ibid*., para. 35.

In this case, the claim of unconscionability by the pilot was dismissed. However, to hold that the unconscionability challenge is an invalid effort to revoke a contract term would go as far as to nullify the doctrine.

3.4[b] *Comparative Study: The EU*

In view that the doctrine of unconscionability aims to re-establish equity between the rights and obligations of contract parties, an analogous principle can be found in the EU context as the principle of 'protection of weaker party in contract law'.[113] Norbert Reich explained that:

> EU civil law has emerged not so much as a body of rules with an objective of enabling citizens to use their autonomy for purposes, whether economic or not, to be determined by themselves, but rather as a body of provisions that tries to protect the weaker party and to combat discrimination.[114]

This principle has at least manifested in the labour law and consumer law contexts. On the one hand, the consumers are typically weaker parties to contracts with business partners.[115] Article 38 of the Charter of Fundamental Rights of the European Union (EU Charter) recognizes that 'union policies shall ensure a high level of consumer protection'.[116] The CJEU has used the concept 'the consumer as the weaker party' to justify a specific protection type of the Unfair Terms Directive 93/13/EEC[117]:

> the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms … on account of that weaker position, Article 6(1) of the Directive provides that unfair terms are not binding on the consumer.[118]

This case law is seemingly concerned only with the Unfair Terms Directive 93/13/EEC, but can also be seen as the CJEU's general approach to the objectives of EU consumer law.[119]

On the other hand, an important element of EU social policy has been the protection of persons in dependent employment situations by guaranteeing fair and

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[113] Hannes Rösler, *Protection of the Weaker Party in European Contract Law: Standardised and Individual Inferiority in Multi-level Private Law*, 18(4) Eur. Rev. Priv. L. 729–756 (2010).
[114] Norbert Reich, *General Principles of EU Civil Law* 38 (Intersentia 2013).
[115] *Ibid*.
[116] Charter of Fundamental Rights of the European Union, OJ C 326, 26 Oct. 2012. *See also* Case C-12/11, *Denise McDonagh v. Ryanair Ltd*, ECLI:EU:C:2013:43.
[117] Council Directive 93/13/EEC of 5 Apr. 1993 on Unfair Terms in Consumer Contracts, OJ L 95, 21 Apr. 1993.
[118] Case C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*, ECLI:EU:C:2010:659, para. 46.
[119] *See* Reich, *supra* n. 114, at 47.

just working conditions.[120] Article 31 of the EU Charter includes the 'right to limitation of maximum hours, to daily and weekly rest periods and to an annual period of paid leave'.[121] Though the principle to protect weaker contractual party has not been used by the EU and the Member States to address training repayment agreements, it shows a way to review repayment obligations based on bargaining powers of parties.

3.4[c] *Contract Law Principles in the Chinese Civil Code (CCC)*

The CCC[122] also establishes the doctrine of unconscionability. The CCC came into effect in 2021 and, as a fundamental law, it enjoys normative priority over the CLCL.[123] As a corollary, courts shall interpret and implement the provisions of the latter instrument in a way not to contradict the CCC. According to Article 497 of the CCC, boilerplate terms shall be void if they unreasonably aggravate the liability of the party who receives the contract offer,[124] addressing the substantive unconscionability. The procedural perspective can refer to Articles 147 to 151 of the CCC which write that one party can challenge the contract term when there are misunderstanding, fraud, coercion and other situations probably leading to unfair benefit or detriment.[125]

Some litigators representing pilots have actually resorted to the doctrine of unconscionability to challenge training repayment. The case study has seen such arguments as an incorrect interpretation of repayment window,[126] that the duration of employment contracts was not equal to repayment window,[127] and that the airlines did not provide sufficient evidence confirming training cost.[128] These arguments could have been more persuasively organized under Article 497 of the CCC. There has been a case in which the pilot explicitly referred to the unconscionability, but the challenge was directed to the *ex post* compensation agreement rather than the *ex ante* training repayment agreement.[129]

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120 *See* Rösler, *supra* n. 113.
121 Article 31 of the EU Charter.
122 Civil Code of the People's Republic of China came into effect on 1 Jan. 2021.
123 *See supra* n. 20.
124 Article 497 of the CCC: Under any of the following circumstances, standard terms shall be void: (1) Under the voidness circumstances set forth in s. 3, Ch. VI, Book One of this Code and Art. 506 of this Code. (2) The party furnishing the standard terms unreasonably excludes or limits its liability, aggravates the liability of the other party, or restricts the main rights of the other party. (3) The party furnishing the standard terms excludes the main rights of the other party.
125 Articles 147 to 151 CCC.
126 *See supra* n. 29.
127 *See Cui Xiao v. Xinjiang Branch of China Southern Airlines, supra* n. 12.
128 *See Su Wendong v. Wuhan Branch of China Eastern Airlines* (2018) Yu 01 Min Zhong No. 2526.
129 *See Nanshan Aeronautical College v. Gao Lei* (2021) Lu 06 Min Zhong No. 1906. In this case, the pilot asserted that he was forced to sign the compensation agreement to get his technical documents

In determining how to formulate factors to adjudicate unconscionability, it is instructive to conduct investigation into the principle of contractual stability established in the CCC. The CLCL, which provides primary legal grounds to adjudicate training repayment disputes, is a translation of contract law rules contained in Chapter 3 of the CCC into the labour field. The training repayment agreement can find its basis in Article 585 of the CCC which states that courts may increase or reduce the amount of liquidated damages according to the actual losses at the request of a party.[130] This provision can ensure that employees receiving training are liable to pay a pro rata sum attributable to the service period that is unfulfilled. Furthermore, Article 580 of the CCC confirms that if one contractual party is relieved from obligations because of factual or legal impossibility of performance, the contractual party is still liable for liquidated damage.[131] The default position is, thus, that pilots are liable for training repayment when they cannot provide predetermined service.

In view of these stipulations, application of the doctrine of unconscionability to assess training repayment is not a straightforward work in China, but requires harmonization with the general contract law framework of the CCC.

4 A FUTURE FRAMEWORK OF TRAINING REPAYMENT

4.1 International prospect of aviation labour protection

Air transport is transboundary to a large extent. International development of aviation labour law increasingly manifests through international and multinational cooperation of states.[132] As for the training repayment, Chinese stakeholders should take care not to go too far in awaiting international solutions. International law, or more specifically, international air law, can exert pressure on aviation labour protection through international treaties, ASAs and regional regulations. Nonetheless, these instruments do not contribute to the credible prospect of regulating training repayment.

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transferred. The Court dismissed the assertation, contending that the pilot did not revoke the contract during the statutory period and there was no force or fraud to impact the validity of the compensation agreement.

130 Article 585 of the CCC.

131 Article 580 of the CCC.

132 *See* ICAO & International Labour organization (ILO): *Enhance Cooperation on Contributing to Sustainable Development and Gender Equality in Aviation Sector Labour* (2022), https://www.icao.int/Newsroom/Pages/ICAO-ILO-to-enhance-cooperation-on-contributing-to-sustainable-development-and-gender-equality-in-aviation-sector-labour.aspx (accessed 31 May 2022); ICAO, *ICAO, ILO and IMO: Issue Joint Call to World Governments on Need for 'Key Worker' Designations for Essential Air and Sea Personnel* (2020), https://www.icao.int/Newsroom/Pages/ICAO-ILO-and-IMO-issue-joint-call-to-world-governments-on-need-for-key-worker-designations-for-essential-air-and-sea-.aspx (accessed 31 May 2022).

Firstly, the introduction of international treaties on aviation labour protection is neither realistic nor efficient in the near future. On the one hand, states have economic conditions in the aviation market. There are difficulties in introducing universal regulations on labour rights. On the other hand, specialized aviation labour protection is insufficient to deal with perceived concerns exposed in practice. States have discretionary power of interpretation. The departure from national laws can contribute much difficulty to clarity and predictability of aviation labour disputes. For example, in *Pittard v. Great Lakes Aviation*, the Court upheld the interest of training cost at the rate of 9.5% per year,[133] which, however, may have contradicted the principle of amortization in the Chinese context under Article 22 of the CLCL and Article 585 of the CCC. Different national legislature entails divergent interpretations of the doctrine of unconscionability even on the basis of the same case facts.

Secondly, ASAs have changed their focus from technical aspects of overflight to regulation of certain commercial elements of air transport.[134] It is yet unclear to what extent states are willing to impose restrictions on labour conditions in their counterparts as a precondition to traffic rights benefits. The foregoing complexities of training repayment lawsuits show the possibility that airlines can adopt varieties of strategies to circumvent the *ex ante* restrictions by ASAs.

Thirdly, while regionalism in international air transport indeed brings light to multinational regulation, China is under limited regional influences. The EU Member States advance regional integration through free movement of workers and free establishment of airlines. However, they do not provide much success in aviation labour protection. Atypical employment raises concerns in such matters as applicable law, transport union protection, safety concerns and lacking transparency.[135] Compared with the EU Member States, China has not acceded to any regional organization with comparable supranational regulatory power. Regional integration may not offer satisfactory answers to the issue of training repayment in the Chinese context.

4.2 The way forward

4.2[a] *Applying the Doctrine of Unconscionability to Training Repayment*

The issue of training repayment presents challenges to aviation labour protection in China. Judges have excessive discretion to examine the following factors: the overall repayment amount relative to the employee's salary; whether the

[133] *See supra* n. 108.
[134] *See* Trimarchi, *supra* n. 84, at 152.
[135] *See* Jorens et al., *supra* n. 69.

repayment amount shall be amortized; the overall length of the compulsory service; and whether a nexus exists between repayment amount and the cost to the employer.[136] The divergent judicial decisions precipitated problems of reduced predictability in current law.

Then it comes to the question of whether there is a need to establish an aviation labour law to deal with peculiarities of civil aviation. The case study fails to justify the necessity, at least where courts referred to the PMD and the CLCL to adjudicate the issue of training repayment. The doctrine of unconscionability can help assess the repayment obligations. Courts have already shown their openness to this doctrine in practice. Some of them took the cues from equity and fairness in evaluating repayment window and amount.[137] In *PAN Jing v. Loong Air*, the Court decided repayment window as the deduction of retirement age and the age when employment relation started.[138] The challenge now will be to convince courts to do what they have already been doing, but with explicit reference to Articles 147 to 151, and 497 of the CCC.[139] Litigators willing to use the doctrine of unconscionability will be essential to such progress.[140]

4.2[b] *Proposing a New Model for Pilot Training: A Robust Overhaul?*

Besides the doctrine of unconscionability, the issue of training repayment also calls for government intervention in advancing pilot training regime. Legal disputes on training repayment in China are attributable to expensive training cost and shortage of pilot supply. The unconscionability test will help, but pilot training regime requires a more robust overhaul to accommodate the needs of both pilots and airlines.[141] The courts may not have enough expertise to evaluate whether the training provided is valuable to the employee. Another challenge is to assess to what extent courts shall acknowledge the time spent for training as costs incurred by pilots and take it into the balance between repayment window and amount. To make things worse, the case study highlights the issues related to the transfer of pilots' technical documents.[142] Contract law will face limitations with respect to volatile aviation market and employment arrangements.

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136 *See* Harris, *supra* n. 13, at 755.
137 *See Li Liangzheng v. Xinjiang Branch of China Southern Airlines*, *supra* n. 34.
138 *See Pan Jing v. Loong Air*, *supra* n. 49.
139 *See* Harris, *supra* n. 13, at 764.
140 *Ibid.*, at 755.
141 *Ibid.*, at 755.
142 Chinese courts showed divergent attitudes towards jurisdiction on pilots' technical documents. In some cases, the courts determined that these documents were necessary ones for the employment of pilots. When labour relations were terminated, the airlines were obliged to transfer relevant technical documents. *See* CAAC, Response to issues about technical documents of pilots, Min Hang Zong Fa Han (2016) No. 89. *See also Zhong Wenju v. Air China Cargo* (2020) Jing 03 Min Zhong No. 4898.

The development of air law and competition law shall place attention on peculiarities of aviation labour protection. A new model for pilot training can help deal with problems from the beginning. By pulling strings through perspectives of aviation safety and fair competition, regulations can restrict exorbitant repayment amounts and excessively long repayment windows, with necessary, appropriate and proportionate impacts on incentives of airlines to invest in pilot training.

China Southern Airlines employed 100 self-financed pilots in 2007.[143] A trainee pilot paid for the training in the amount of CNY 700,000 in exchange for a fifteen-service-year employment contract.[144] Such contracts endowed employees with more freedom to terminate labour relations compared with the freedom offered by open-ended contracts to airline-financed pilots. The open-ended contracts can actually be colloquially referred to as lifetime contracts. However, the self-financing training model did not last long enough to become a viable substitution. Airlines rarely resort to it now and some self-financed trainee pilots have changed into airline-financed tracks.[145] On the contrary, airlines adopt various kinds of training repayment, and some even risked their reputation to delay the release of pilots under valid judgments.[146]

Aviation labour protection requires an alternative training model. Tripartite training partnership, comprising of employers, workers and governments, provides a possible answer to this dilemma and has proven track records in both the US and the EU, though outside the aviation market.[147] The initiation of a new regime still hinges on resolutions of regulatory authorities. Authorities shall promote social dialogue between pilots and airlines through which labour disputes can be potentially solved and avoided.[148] The participation and involvement of stakeholders may contribute to collective agreements with a specific consensus on training repayment, in which pilot unions have more bargaining than individual pilots.

Some courts decided that the technical documents were not within the jurisdiction of civil courts and dismissed the claim from pilots. *See He Cunde v. Xinjiang Branch of China Southern Airlines* (2020) Xin 01 Min Zhong No. 596.

143 *See* Chinese Government Website, *supra* n. 6.

144 *Ibid*.

145 *See Li Chuanlong v. Shenzhen Airlines*, *supra* n. 30.

146 Xinhua Daily, *Difficulty for Pilots Resigning from the Jobs Even After Lawsuits* (2019), http://www.xhby.net/tuijian/201907/t20190726_6277321.shtml (origin in Chinese, accessed 31 May 2022).

147 *See* Harris, *supra* n. 13, at 778–783.

148 *See* Parrish, *supra* n. 99; European Foundation for the Improvement of Living and Working Conditions, *Industrial Relations* (2022), https://www.eurofound.europa.eu/topic/industrial-relations (accessed 31 May 2022); Vilija Velyvyte, *The Right to Strike in the European Union After Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence*, 15(1) Hum. Rts. L. Rev. 73–100 (2015); Rebecca Zahn, *What Future for the European Social Model? the Relevance of Early Intellectual Concepts of Social Integration*, 7(2) JICL 351–369 (2020).

5 CONCLUSION

In the wake of pilot shortage calling for experienced pilots, Chinese airlines generally offer no-cost training with contractual strings attached to ensure return on their investment. Expensive training repayment and long repayment window lead to labour disputes between pilots and airlines. This article proposes that fragmental regulatory framework implies excessive discretion of courts in the interpretation of current law. Instability of judicial practices raises concerns as to aviation safety, fair competition, the right to quit and contractual unconscionability. In response to these concerns, judges and litigators can use the doctrine of unconscionability under Articles 147 to 151, and 497 of the CCC to examine repayment obligations. The peculiarities of pilots can be appropriately wedged into the confines of current regulations by addressing a balance between, on the one hand, contractual stability and training investment, and on the other, aviation safety, economic regulation and human rights needs of pilots. In China, in view of indefinite future of international law in regulating training repayment, combined with failed trials of self-financing training model, applying the doctrine of unconscionability can be a commendable step forward and an appropriate transitional strategy awaiting a viable overhaul. Eventually, the introduction of a new pilot training model depends on how regulatory authorities strike the excessively burdensome training repayment in a proportionate and appropriate way.