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Social Clauses in Air Services Agreements: Is Labour Protection Saving Fair Competition?

by Yuran Shi *

Abstract

In the comprehensive European Union-level air services agreements with Qatar, Ukraine and ASEAN, lawyers and policy-makers can find social clauses addressing labour and employment in the aviation sector. While ambiguity remains as to interpretation and regulation of these types of social clauses in air service agreements, relevant State practices can help supplement international labour standards and may result in less regulatory discrepancies between the European Union Member States and other jurisdictions.

1. Introduction

In October 2021, the European Union (EU) and Qatar signed Agreement on Air Transport between the European Union and its Member States, of the One Part, and the State of Qatar, of the Other Part (EU-Qatar ASA). This is a comprehensive air services agreement (ASA) upgrading rules and standards for flights between the EU and Qatar.[1] As the first comprehensive aviation agreement negotiated between the EU and a Gulf State, the EU-Qatar ASA sets its ambitions high by aiming to regulate matters beyond traffic rights.[2] According to the EU, the ASA provides a platform for future cooperation in areas such as safety, security and air traffic management while covering environmental matters and committing both Parties to improving labour policies. Social clauses attract the attention of lawyers and policymakers given the poor track record of Qatar when it comes to the legal protection of workers.[3] Article 20(1) defines the purpose of social clauses which is to create obligations incumbent on the Parties to cooperate on labour matters in relation to fundamental rights at work, working conditions, social protection, and social dialogue.

There are also social clauses in the Common Aviation Area Agreement between the EU and Ukraine (EU-Ukraine ASA), as well as the Comprehensive Air Transport Agreement between the EU and the Association of Southwest Asian Nations and the EU (EU-ASEAN). Social clauses in ASAs are related to the regulatory concerns around labour and working conditions, as well as the obligations derived from membership of the International Labour Organization (ILO), on the one hand, and the view that labour standards should not be undermined for purposes of competitive advantages, on the other.[4]

Despite the importance of labour clauses in ASAs, it is not automatically clear how provisions relating to labour and employment apply to the air transport industry. Any meaningful analysis of ASAs will invariably have to shift attention or criticism from the efforts of aviation labour protection to how to translate labour protection into meaningful and mandatory obligations. A number of questions arise: why the EU proactively includes labour and employment into ASAs with third countries; whether social clauses are compatible with the Convention on International Civil Aviation (the Chicago Convention (1944)); how social clauses of ASAs can contribute to the protection of aviation workers. This article seeks to discuss these questions by first providing a historical context in Section 2, looking at the role of labour cost in airline competition. Section 3 examines the legitimacy of including social clauses into ASAs, through a normative analysis of the

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1 European Commission, EU and Qatar Sign Landmark Aviation Agreement, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5344 (accessed 15 March 2023).

2 Jacomo Restellini, Labour Relations in Aviation, Kluwer Law International BV, 2022, at 77.

3 Andrea Trimarchi, The EU External Aviation Strategy at a Crossroads-The New Regulation (EU) No. 2019/712 on Safeguarding Competition in Air Transport, 68 ZLW 576 (2019).

4 Andrea Trimarchi, International Aviation Labour Law, Routledge, 2022, at 85.

Chicago Convention (1944). Section 4 examines the efficacy of social clauses in improving labour standards and preventing the abuse of tough working conditions to increase airlines' competitiveness. Social clauses create legal obligations relating to the ILO regime, and regional or national laws. The article then concludes with a summary of the answers to these issues and the related questions.

2. Fair Competition and Social Clauses in ASAs

2.1. Labour Cost and Airline Competitive Advantages

Airlines must address a variety of operating cost items, such as aircraft fuel, station expenses, administration expenses, and insurance charges.[5] Among these costs, labour accounts for a significant portion of an airline' total operating costs. Flight crew expenses represented a 10.9% cost share in 2019 according to an industry average statistic from the International Air Transport Association (IATA), behind only aircraft fuel costs of 17.9%, as well as depreciation and amortisation costs of 13.1%.[6] Unlike fuel costs, landing charges, and aircraft charges, however, labour costs are one of the few variable costs under direct and more immediate control of airline management.[7]

The notion of competitive advantage is by no means a novelty. Michael E. Porter defined it as the value an entity can create for its buyers that exceeds the entity's cost of creating it.[8] Airlines find two types of competitive strategies which can contribute to an advantage over their competitors, namely, cost leadership and differentiation.[9] The extent to which airlines might differentiate themselves from their competitors is an important element in the aviation market. Since deregulation and liberalisation of the United States (US) and EU aviation markets, the structure of the air transport sector has undergone significant changes.[10] Airlines are now able to manoeuvre successfully within or along the edge of competition rules to achieve efficiencies.[11] There are all kinds of elements impacting on airline services, including: tangible elements such as seat selection and inflight food and drink service; reliability elements such as reservation service and transit service; empathy elements such as family seat requests and frequent flyer programs; responsiveness elements such as responses to flight delays.[12] All these differences in service quality impact consumer perception which, in turn, impacts consumer choice, something which is especially important in the competition between legacy carriers and low-cost carriers.[13]

2.2. The EU External Aviation Policy

The European Transport Workers' Federation pointed out that every airline surveyed cites unfair competition to justify tougher working condition and impose more flexibility, wage cuts or a weakening of the welfare of its workers, such as use of unsafe working practices, which increase risks of industrial accidents.[14] In 2012, the EU Commission published the report titled '*The EU's External Aviation Policy - Addressing Future Challenges*' which highlighted that:

5 John F. O'Connell, The Rise of the Arabian Gulf Carriers: An Insight Into the Business Model of Emirates Airline, 38 Journal of Air Transport Management 43 (2011).
6 IATA, Shares of Major Cost Components in Total Costs, Difference between 2020 and 2019 (Industry Average), https://www.iata.org/en/iata-repository/publications/economic-reports/shares-of-key-cost-items-changed-during-the-crisis_/ (accessed 15 March 2023).
7 Natia Jiniuzashvili, Jurisdiction of Courts and Applicable Law in Aircrew Employment Disputes: Special Reference to Ryanair Employment Disputes, 45(4) Air and Space Law 485 (2020); see also Peter Turnbull, Paul Blyton & Geraint Harvey, Cleared for Take-off? Management-Labour Partnership in the European Civil Aviation Industry, 10(3) European Journal of Industrial Relations 287 (2004).
8 Michael E. P., Competitive Advantage: Creating and Sustaining Superior Performance, The Free Press, 1998, at 3.
9 Ibid.
10 See Juhwan Lim and Hyun Cheol Lee, Comparisons of Service Quality Perceptions between Full Service Carriers and Low Cost Carriers in Airline Travel, 23(10) Current Issues in Tourism 1261(2020).
11 See Steven Truxal, Competition and Regulation in the Airline Industry: Puppets in Chaos, Routledge, 2012, at 2.
12 See Juhwan Lim and Hyun Cheol Lee, Comparisons of Service Quality Perceptions between Full Service Carriers and Low Cost Carriers in Airline Travel, 23(10) Current Issues in Tourism 1261(2020).
13 Fabio Domanico, The European Airline Industry: Law and Economics of Low Cost Carriers, 23 European Journal of Law and Economics 203 (2007).
14 European Transport Workers' Federation (ETF), Social Dumping in Civil Aviation (2014).

> *"Labour costs related to high labour standards and well developed social protection systems are also higher in Europe than in most other world regions as are costs related to compensation for passengers' rights and the cost of carbon emissions. Some of these additional economic burdens and costs for flights to and from Europe compared to the situation in other regions may prevail, at least for some time, while others may, to some extent, be offset by innovation, earlier deployment of new technology in Europe or productivity gains or may be addressed in negotiations with partner countries aiming to create a level playing field, e.g. by respect for international labour and environmental standards."*[15]

The wide range of diverging labour standards between the EU carriers and their non-EU competitors was identified as one of main reasons for the lack of competitiveness of the EU aviation sector.[16] For example, the absence of income tax might readily be regarded as a significant competitive advantage of Emirates Airlines, based in the United Arab Emirates, resulting in labour costs comprising a lower percentage of its total operating costs.[17] The European Commission adopted an Aviation Strategy for Europe in 2015[18] which underscored the need to have an effective and efficient regulatory framework so as to give the aviation industry more flexibility to thrive and remain competitive globally.[19] The Commission would reinforce social dialogue and employment conditions in aviation.[20]

On 17 April 2019, the European Parliament and the Council of the EU adopted Regulation (EU) No. 2019/712 on safeguarding competition in air transport and repealing Regulation (EC) No. 868/2004. Welcomed by the entire aviation community, the new Regulation included some relevant developments such as the identification of, and protection against, distortive practices carried out by non-EU States to the detriment of the EU air transport market.[21] Recital 7 of Regulation (EU) No. 2019/712 reads that:

> *"Fair competition between air carriers should preferably be addressed in the context of air transport or air services agreements with third countries. However, most air transport or air services agreements concluded between the Union or its Member States, or both, on the one hand, and third countries on the other do not so far provide for adequate rules for fair competition. Efforts should therefore be strengthened to negotiate the inclusion of fair competition clauses in existing and future air transport or air services agreements with third countries."*[22]

The fine balance between, on the one hand, the relevance of ASAs in the field of subsidies and fair competition and on the other hand, the will of the EU to unilaterally control market distorting behaviour, is one of main focuses of Regulation (EU) No. 2019/712.[23] Remarkably, Article 14(3) confirms two types of redressive measures, including financial measures, and operational measures such as suspension of concessions and air services. According to Article 14(5), the adoption of operational measures shall not result in a violation of international obligation. To this end, Regulation (EU) No. 2019/712 prohibits the Parties to suspend or limit traffic granted under an ASA. Operational measures could potentially lead to a violation of an ASA, as distortive or anticompetitive practices do not usually constitute a cause for unilateral termination

15 European Cockpit Association, The Case for Fair Competition in Europe's Aviation – Why Action is Needed to Safeguard Our Aviation's Future (2014).
16 See European Commission, The EU'S External Aviation Policy – Addressing Future Challenge, COM(2012) 556 final (2012).
17 Jaap G de Wit, Unlevel Playing Field? Ah Yes, You Mean Protectionism, 41 Journal of Air Transport Management 23(2014).
18 See European Commission, An Aviation Strategy for Europe, SWD(2015) 261 final (2015).
19 Ibid.
20 Ibid.
21 See Trimarchi, supra note 3, at 576.
22 Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004.
23 See Trimarchi, supra note 3, at 576.

of ASAs.[24] Should any uncertainty remain, the design and enforcement of redressive measures can only be answered on a case-by-case basis in light of all relevant circumstances, including any possible consequences for compliance with labour protection requirements as envisaged by social clauses in ASAs.

2.3. Social Aspects in ASAs

The continuous evolution of ASAs has determined a significant expansion in their scope.[25] As early as 2009, the ASA between the EU and Canada (EU-Canada ASA) included a specific clause concerning labour. Article 19 of the EU-Canada ASA noted that the Parties recognised the impact of the ASA on labour, employment and working conditions, and provided for either Party a right to request a meeting of the Joint Committee in order to discuss labour matters in the context of implementation of the EU-Canada ASA. This provision represented a unique example in the regulatory arena of international aviation relations, at least until 2021, when the EU-Qatar ASA expanded upon the social aspects of air transport. Article 19 of the EU-Canada ASA, to the best of my knowledge, contributed to few discussions during its implementation.

Negotiations between the EU and Qatar commenced in 2016 as a result of the authorisation granted to the European Commission to conduct bilateral talks to negotiate comprehensive EU-level air transport agreements with a number of States, including Saudi Arabia, Bahrain, Mexico, Armenia and others.[26] In the EU-Qatar ASA, Article 20 provides for three obligations related to labour and employment that: (1) the Parties recognise the right of each Party to establish its own level of domestic labour protection as it deems appropriate, and to adopt or modify relevant laws and policies accordingly, in a manner consistent with its international obligations; (2) the Parties ensure that rights and principles contained in their respective laws and regulations are not undermined but effectively enforced. The violation of fundamental principles and rights at work cannot be used in order to obtain a comparative advantage and labour standards should not be sued for protectionist purposes; and (3) the Parties reaffirm their commitment and obligations pertaining to the ILO regime. All of this said, the EU-Qatar ASA does not provide remedies other than for either Party to request a meeting of the Joint Committee to address labour issues.

Article 14 of the EU-Ukraine ASA presents a different set of obligations when compared with the ones laid down in Article 20 of the EU-Qatar ASA. The former agreement highlights labour obligations relating to the respective laws and policies of the Parties, including: (1) the Parties are to act in accordance with their respective laws concerning the requirements and standards relating to social aspects specified in Annex I, Part E to the Agreement. Part E includes references to Council Directive 89/391/EEC on the safety and health of workers at work,[27] Directive 2003/88/EC on the organisation of working time,[28] and Council Directive 2000/79/EC on the organisation of working time of mobile workers in civil aviation[29]; (2) Ukraine is required to adopt the necessary measures to incorporate in its legislation and implement requirements and standards referred to in (1) above; (3) the Parties agree to cooperate so as to ensure the implementation of legislation incorporating requirements and standards referred to in (1) above. Article 14 of the EU-Ukraine ASA provides for transitional periods for the parties to implement relevant legislation as required under the ASA; however, the EU-Ukraine ASA does not provide for any form of mechanism to address possible labour issues which arise under or related to the agreement.

24 Ulrich Schulte-Strathaus, Is the European Commission Fulfilling its Ambitious Aviation Strategy?, 42(6) Air & Space Law 528 (2017).
25 See Trimarchi, supra note 4, at 50.
26 Magdalena Kućko, The EU-Qatar Air Transport Agreement: Bound to Succeed?, 45(3) Air & Space Law 231 (2020).
27 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.
28 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.
29 Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA).

The EU-ASEAN ASA has the privilege of being the first bloc-to-bloc air transport agreement in the world.[30] The Parties concluded it in order to provide a foundation for closer cooperation between the EU and the ASEAN in areas of fair competition, aviation safety, air traffic management, consumer protection, environmental, as well as social matters.[31] Article 22 on social aspects, borrowed verbatim from Article 20 of the EU-Qatar ASA, attempts to ensure compliance with international labour law principles, and to ensure adequate protection for aviation workers who fall within the scope of the EU-ASEAN ASA.

3. Compatibility of Social Clauses in ASAs with the Chicago Convention (1944)

3.1. Articles 1 and 6: The Role of Bilateralism

The Chicago Convention (1944), which is widely regarded amongst aviation lawyers as the *Magna Carta* of international civil aviation, provides for a foundational legal framework for international aviation.[32] Article 1 confirms the sovereignty of States over their airspace. In this connection, Article 6 of the Chicago Convention (1944) states that special permission must be granted for the operation of scheduled international air services, which is the corollary to the principle of sovereignty in the air. ASAs are designed to open the airspace of signatory States to the operators of air services in other signatory States which would otherwise be closed for such services.[33] ASAs are the traditional vehicle that States have used to negotiate and exchange air traffic rights and afford aviation market access to other States.[34] Having developed as early as shortly after the entering into force of the Chicago Convention (1944), ASAs have significantly evolved, both numerically and qualitatively.[35]

Article 6 of the Chicago Convention (1944), together with the ASAs regime, remain the starting point for the operation and successful functioning of scheduled international air services. One of the main reasons why bilateral ASAs have become so important in this regard is the flexibility and adaptability of contents.[36] States can include clauses into ASAs addressing varieties of matters more than opening up national air service markets to airlines of other States. Over the years, bilateral agreements have changed their main focus from technical aspects of overflight to the regulation of certain commercial elements of air transport, such as competition and, eventually, labour conditions.[37] For example, a handful of ASAs, most notably the 2007 EU-US ASA, contain open-ended provisions calling for cooperation on competition issues, although what that means in practice is hazy.[38]

3.2. Article 11: Non-Discrimination with Respect to Air Regulations

The fact that the Chicago Convention (1944) does not explicitly mention the use of ASAs as the mechanism to exchange of traffic rights does not mean that States have unlimited discretion over contents of ASAs. The principle of complete and exclusive State sovereignty has not prevented States from fulfilling their obligations under the Chicago Convention (1944). Article 11 of the Chicago Convention (1944) notes that air regulations of a contracting State shall be applied to the aircraft of all contracting States without distinction as to nationality. This provision established the principle of

30 The ASEAN consists of ten countries, namely Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.
31 See Restellini, supra 2, at 80.
32 Benjamyn I. Scott & Andrea Trimarchi, Fundamentals of International Aviation Law and Policy, Routledge, 2022, at 32.
33 Pablo Mendes de Leon & Erik Jaap Molenaar, Still a Mile Too Far? Intemational Law Implications of the Location of an Airport in the Sea, 14 Leiden Journal of International Law 234-245 (2001).
34 Bin Cheng, The Law of International Air Transport, Oceana, 1962, 300–321; see also, Pablo Mendes De Leon, Air Transport as a Service under the Chicago Convention, 19(2) Annals of Air and Space Law 523 (1994).
35 See Trimarchi, supra note 4, at 49.
36 Andrea Trimarchi, Airline Non-Commercial Advantages and Fair Competition, Jan Walulik ed, Harmonising Regulatory and Antitrust Regimes for International Air Transport, Routledge, 2019, at 151.
37 Brian F. Havel & Gabriel S. Sanchez, The Principles and Practice of International Aviation Law, Cambridge University Press, 2014.
38 Ibid.

non-discrimination with regards to applicability of a signatory State's air regulations. Labour and employment challenges in civil aviation such as atypical employment and pilot fatigue have negative effects on the safe completion of air transportation. It would thus not contradict the purpose of the Chicago Convention (1944) to identify regional or national labour standards as air regulations to the extent that labour conditions of aviation workers impact the safety and reliability of air navigation.[39] Such a way of interpretation can find evidence from State practices and aviation labour law discussions.

On the one hand, the liberalisation and deregulation of aviation markets and the emergence of new business models, especially low-cost carriers (LCCs), have given rise to numerous trends in contemporary employment relationships concluded in relation to pilots and cabin crew.[40] There is rising concern that application and usage of new types of employment contracts, such as zero-hour contracts, pay-to-fly schemes, self-employment, and fixed-term work may be subject to potential abuse, to the obvious detriment of pilots and cabin crew members concerned.[41] The mental and physical conditions of airline workers can impact their fitness for air transport operations.

On the other hand, discussions have examined the probability that a hypothetical Annex to the Chicago Convention (1944) to address aviation labour law which would fit particularly well in the current network of international technical specifications, *i.e.* Standards and Recommended Practices (SARPs). Article 12 of the Chicago Convention (1944) reaffirms the binding status of Standards laid down in SARPs, noting that *"[e]ach contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention*". The fact that SARPs address labour and employment in air transport would lead to the conclusion that, to the extent precarious working conditions exert pressure on the aviation safety, labour standards can also be air regulations.

Whereas an ASA only creates rights and obligations between the contracting Parties, social clauses therein might be incompatible with the principle of non-discrimination as recognised by Article 11. States can treat all other States equally during the negotiation and conclusion of social clauses in ASAs, so as to ensure that applicable national or regional aviation labour regulations are imposed upon foreign carriers without discrimination. The different obligations imposed by the EU-Qatar and the EU-Ukraine may lead to incompatibility with the Chicago Convention (1944). It remains to be seen whether and to what extent States would actually do this considering that the exchange of traffic rights and guarantee for labour standards can be used a negotiating leverage for States. Moreover, the success of the Chicago Convention (1944) and ICAO owe much to the focus on technical matters. It is not easy to picture how SARPs might bring States to harmonise their very fragmented and variegated social and labour policies.[42]

3.3. Preamble to the Chicago Convention (1944)

The Preamble to the Chicago Convection (1944) provides that "*international air transport services may be established on the basis of equality of opportunity and operated soundly and economically*". Despite the non-binding character of the Preamble, it permits consideration of the mission of the Chicago Convention (1944) in the interpretation and implementation of statutory clauses, as suggested by Article 31(2) of the Vienna Convention on the Laws of Treaties.[43] Where air

39 Atypical employment refers to all those contractual forms of employment other than open-ended employment contracts, which are increasingly used in the aviation industry, including fixed-term work, self-employment, pay-to-fly schemes and zero-hour contracts. See Yves Jorens et al, Atypical Forms of Employment in the Aviation Sector, European Commission (2005).

40 Ibid.

41 See Jiniuzashvili, supra note 7, at 479.

42 See Trimarchi, supra note 4, at 148.

43 Article 31(2) of the Vienna Convention on the Laws of Treaties: The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

carrier advantages may derive from differences in national legislation concerning employment and work in the aviation industry, these legal discrepancies would result in comparative advantages having a direct impact on competition between airlines.[44] States shall pay attention to harmonisation of relevant domestic legal regimes. Furthermore, the Preamble underscores importance of economic development of international air transport services, allowing the possibility of reviewing effects of labour and employment issues on fair competition in global aviation market.

States have ASAs as the key legal basis for reciprocal market access with respect to air services and, although having treaty-law status related to Article 6 of the Chicago Convention (1944), having a peculiar and flexible contract-like form.[45] The shift from traditional bilateral ASAs of the Bermuda style to more liberal and progressive open skies agreement has possibly enlarged the scope of application. These agreements include new aspects worth of receiving reciprocal governmental approval, such as, for instance, fair competition and equality of opportunities clauses.[46] As noted in the Sixth Worldwide Air Transport Conference, "*liberalisation is a means and process, not an end*".[47] ASAs can help create a favourable environment in which international air transport may develop and flourish in an economical and sustainable manner, while respecting social and labour standards.[48] The social clauses provide an available option to address the concerns related to airline fair competition through the advocation of high labour standards.

4. Enforceability of Labour and Employment Obligations

4.1. International Labour Standards

4.1.1. Ratification of Fundamental ILO Conventions

International labour standards are legal instruments drawn up by the ILO's tripartite constituents, *to wit* governments, employers, and workers, setting out basic principles and rights work.[49] The ILO has established a system of international labour standards, including International Conventions and Commendations, covering all matters to work. In this connection, the EU-Qatar ASA and the EU-ASEAN ASA highlight obligations pertaining to the ILO regime.

Article 20(6) of the EU-Qatar ASA advocated that the Parties undertake to make best endeavours towards ratifying fundamental ILO Conventions. Article 22(6) of the EU-ASEAN ASA has the same set of obligations. While the EU Member States have ratified initial eight fundamental Conventions, the 110th Session of the International Labour Conference included safety and healthy working environment in the ILO's framework of fundamental principles and rights at work.[50] As a result, the ILO Declaration on Fundamental Principles and Rights at Work has been amended to the effect that the Protocol of 2014 to the Forced Labour Convention, the Occupational Safety and Health Convention (No. 155) and the Promotional Framework for Occupational Safety and Health Convention (No. 187) are now considered as fundamental Conventions.[51] The successful completion of the EU-Qatar ASA adds new pressure to the EU Member States that have not ratified all fundamental ILO Conventions.[52] In comparison, Qatar have ratified five fundamental ILO Conventions, with the latest ratification in 2007 of the Abolition of Forced Labour Convention (No.105).[53] The ASEAN States provide different performance of ratification of fundamental ILO Conventions. While Brunei has only ratified the Worst Forms of

44 *See* Trimarchi, *supra* note 36, at 152.
45 *Ibid*.
46 *See Truxal,* supra note 11.
47 ICAO, *Sixth Worldwide Air Transport Conference: Sustainability of Air Transport* (2013).
48 *Ibid*.
49 ILO, Rules of the Game: An Introduction to the Standards-Related Work of the International Labour Organization (2019).
50 ILO, Resolution on the Inclusion of a *Safe* and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work, ILC.110/Resolution I (2022).
51 ILO, Ratifications of Fundamental Instruments by Country, https://www.ilo.org/dyn/normlex/en/f?p=1000:10011:::NO:10011:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F (accessed 15 March 2023).
52 *Ibid*.
53 *Ibid*.

Child Labour Convention (No.182) in 2008 and the Minimum Age Convention (No. 138) in 2011, Indonesia has ratified nine fundamental Conventions.[54]

Social clauses in ASAs have not witnessed legal disputes relating to ratification of fundamental ILO Conventions. Lessons could in particularly be drawn from national and international experiences in other types of bilateral or multilateral agreements containing social clauses. On 17 December 2018, the EU requested consultations with the Republic of Korea concerning certain measures, including provisions of the Trade Union and Labour Relations Adjustment Act.[55] The Panel of Experts found that:

> *"Article 13.4.3 imposes a legally binding obligation on the Parties to make 'continued and sustained efforts towards ratification' of the core ILO Conventions. This is an obligation of 'best endeavours': the standard against which the Parties are to be measured is higher than undertaking merely minimal steps or none at all, and lower than a requirement to explore and mobilise all measures available at all times."*[56]

Similarly, neither Article 20 of the EU-Qatar ASA nor Article 22 of the EU-ASEAN ASA provides a clear and transparent timeline for performing obligations related to ratification of fundamental ILO Conventions. Interpretation of '*best endeavours*' would be dependent on a case-by-case analysis, resulting in much legal ambiguity due to complex and domestic nature of States' relations with the ILO regime. Furthermore, these two ASAs mention that the Parties will also "*consider the ratification of other ILO Conventions*". The different usage of languages between '*undertakes*' and '*will also consider*' can contribute to interpretation of binding effects of obligations thereunder. The non-binding character of soft obligations favoured States which do not consider accelerating their progress of ratifying non-fundamental ILO Conventions.

4.1.2. Effective Implementation of the ILO Conventions

Article 20(6) of the EU-Qatar ASA and Article 22(6) of the EU-ASEAN ASA mention the obligation that the Parties shall consider effective implementation of ratified international labour standards in labour and social domain of relevance for civil aviation sector. Ratification is purely voluntary and sovereign act whereby a State undertakes to implement provisions of the ILO Conventions.[57] Most international labour standards have a specific technical content and often require an adaptation of domestic legislation and administrative arrangements. Others are programmatic in nature and tend to require that the State adopt a genuine policy in a given field rather than laws and policies.[58] In the ILO's practice, however, there have been increasingly poor rates of ratification, adherence, and compliance.[59] This is in part reflects the perception that the ILO is becoming less predominant as developing States compete to reduce their labour practices in a classic race to the bottom. As a result, it is not easy to ascertain whether the ILO Conventions would be effective in providing international legal protection in a number of social, labour and employment issues in the context of civil aviation.[60]

54 *Ibid*.
55 Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement, Report of the Panel of Experts, https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf (accessed 15 March 2023).
56 *Ibid*.
57 Jean-Michel Servais, *International Labour Law*, Kluwer Law International BV, 2022, at 58.
58 *Ibid*.
59 See Trimarchi, supra note 4, at 138.
60 *See* Yuran Shi, *Labour Protection and Civil Pilots in China: Training Cost in the Legal Swamp*, 47(4&5) Air & Space Law 467 (2022).

4.1.3. Non-Legally Binding ILO Instruments

The EU-Qatar ASA and the EU-ASEAN ASA also provide obligations relating to some important non-legally binding ILO instruments:

> *"The Parties reaffirm their commitment, in accordance with their obligations deriving from their membership of the International Labour Organization (ILO) and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, to respect, promote and effectively implement and apply the Fundamental Rights and Principles at Work."*[61]

These obligations are independent of ratification and implementation of the ILO Conventions. In other words, the Parties commit to respect and promote labour standards laid down in listed instruments even before they have not ratified corresponding ILO Conventions. Whereas legal effects of obligations arise from bilateral agreements, the non-binding nature of those ILO instruments does not impact implementation and supervision of the commitment.

4.2. Laws and Policies of the Contracting Parties

Besides the commitment to meet requirements set out in international labour Conventions and in the ILO Declaration on Fundamental Principles and Rights at Work, as well as a commitment to ratify current and future relevant ILO Conventions, the ASAs may also include respect of domestic labour regulations. Article 20 of the EU-Qatar ASA and Article 22 of the EU-ASEAN ASA provide two types of obligations in the context of domestic laws. On the one hand, the Parties shall continue to improve laws and policies in a manner consistent with their international obligations and shall strive towards providing and encouraging high levels of labour protection in aviation sector. On the other hand, the Parties shall ensure that rights and principles contained in their respective laws and regulations are not undermined but effectively enforced. In particular, violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage. Labour standards should not be used for protectionist purposes. Social clauses in the EU-Qatar and the EU-ASEAN ASAs make it clear that there is the commitment to establish appropriate levels relating to labour standards and labour protection. The ASAs have had a promotional nature with regard to aviation industries in third countries. For example, there has been a lot of attention surrounding the decision of Qatar Airways to discontinue the practice of dismissing female aircrew members due to the fact that they were getting married or after communicating their pregnancy.[62]

Article 14 of the EU-Ukraine ASA established a different regime covering obligations related to domestic laws of Ukraine. This provision provides that "*Ukraine shall adopt the necessary measures to incorporate in its legislation and effectively implement the requirements and standards*" relating to social aspects. Article 14 lays down essence of this horizontal agreement, according to which Ukraine is requested to integrate the *acquis commuaurarie* in its domestic legislation.[63] According to transitional periods stipulated in Annex III to this agreement, the transition towards effective implementation of all provisions and conditions stemming from the EU-Ukraine ASA is subject to inclusion of the exclusive list of the EU standards into the legislation of Ukraine. What seemingly remains is a looming cloud of uncertainty on the lengthy of transitional periods and a lack of uniformity in approach on how the EU Member States, on the one hand, and Ukraine, on the other, deal with incorporation of requirements and standards as enshrined in the EU Directives referred to in Annex I, into their respective laws and policies.

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61 Article 20(4) of the EU-Qatar ASA and Article 22(4) of the EU-ASEAN ASA.

62 The Guardian, *Qatar Airways Will No Longer Sack Cabin Crew Who Become Pregnant or Marry,* https://www.theguardian.com/money/2015/aug/27/qatar-airways-will-no-longer-sack-cabin-crew-who-become-pregnant-or-marry (accessed 15 March 2023).

63 *See* Trimarchi, *supra* note 4 at 52.

5. Conclusion

There can be little doubt that ASAs have, more than any other instrument in aviation regulation, contributed to a progressive liberalisation and deregulation of air services. When negotiating comprehensive EU-level ASAs with third countries, the EU Commission seeks to ensure, amongst other things, that the respective policies and laws of the relevant counterparties support high levels of protection in the labour and social domains, and that opportunities created by the ASA do not weaken domestic labour legislation and standards as well as their enforcement. In this connection, the EU-Qatar ASA and the EU-ASEAN ASA include the same sets of labour and employment obligations relating to the ILO regime and their respective laws. The EU-Ukraine ASA provides obligations focusing more on the domestic regulations of Ukraine.

ASAs find their roots in the Chicago Convention (1944), although the Convention itself never expressly refers to ASAs or bilateralism. Flexibility and adaptability in ASAs have allowed the inclusion of labour clauses within the scope of more recently concluded agreements, so as to allow these ASAs to regulate challenges and regulatory concerns arising out of atypical employment, pilot fatigue, and labour cost. To ensure compatibility with the Chicago Convention (1944) imposes restrictions on the inclusion and interpretation of social clauses into ASAs. And, more importantly, the efficacy of social clauses to improve labour standards and the lack of mechanisms for the enforcement of labour clauses in ASAs, as well as the complexity of domestic labour conditions, could well result in uncertainty in the supervision and implementation of social clauses. To this end, given the importance of social clauses, caution is necessary in evaluating the effects of labour clauses in ASAs. Nevertheless, these ASAs should, in the author's view, be permitted to supplement prospective international labour standards, regional regulations, and national laws, especially if this would result in a more uniform and labour legislative regime. Lessons learned therefrom can also be utilised to address aviation labour issues at the international level.