



COLLECTIVE AGREEMENTS AND THE ENFORCEABILITY CONUNDRUM IN NIGERIA*

Abstract

This paper x-rayed the different legal twists and turns that the lingering debate on the legal status of collective agreement has taken in Nigeria. It found that with the enactment of the Constitution (Third Alteration) Act, 2010 however, there is an apparent paradigm shift from the unenforceability regime of collective agreement bedevilled by the age-old Common Law principle of privity of contract to a much more progressive regime of enforceability now embraced by the National Industrial Court of Nigeria. Nevertheless, this paper strongly submits that in the light of the Supreme Court decisions in *Skye Bank v Iwu* and *Gbedu v Itie*, the last may not have been heard of the fate of collective agreements in Nigeria.

Keywords: Collective Agreements, Collective Bargaining, Condition of Employment, National Industrial Court

1. Introduction

The reasonable expectation of every worker under employment is that there should be a just condition of employment and indeed, a fair wage reasonable enough to ensure a stable and adequate existence compatible with their physical integrity and moral dignity.¹ But this legitimate expectation is ninety to ten percent of the time not attainable unless workers join forces, in union with each other, to legitimately exploit their right to act collectively. Predictably, this reality is no less so in Nigeria as in many other countries, given the asymmetrical economic power relations between the employer and individual employees which are perhaps mitigable only when employees unite against capital.²

Despite the seeming advantage for employees to band together or to consolidate their strength for the purpose of acting in concert to influence workplace decisions affecting their lives, there is ample evidence on the consensus; easily supported by legal frameworks, that employers of labour and employees must actively cooperate through voluntary negotiations, bargaining and collective efforts, if desirable industrial peace and harmony is to firmly replace incessant industrial conflicts.³ As a result, employers and employees or their trade unions are not only encouraged but statutorily bound to recognise their mutual coexistence,⁴ with a view to engaging themselves whenever the need arises in processes of arriving or attempting to arrive in good faith at collective agreements pertaining to working conditions and terms of employment.⁵

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¹ P Davies and M Freeland, *Kahn-Freund's Labour and the Law*

² O V C Okene, 'The Challenges of Collective Bargaining in Nigeria: Trade Unionism at the Cross-Roads' [2017] (1)(1) *Port Harcourt Law Journal*, 10-11; *Udoh v Orthopaedic Hospital Management Board* (1990) 4 NWLR (Pt.142) 53; A. Fox, *Beyond Contract, Work, Power and Trust Relations* (Faber and Faber, 1974), 191

³ *Rector, KwaraPoly v Adefila* (2007) 15 NWLR (Pt. 1056) 92 E-G; O V C Okene, *Ibid*, 12; S O Koyondo, 'Enforcement of Collective Agreements in Nigeria: Need for Legislative Intervention' [1999] (3)(2) *Nigerian Law and Practice Journal*, 38; S. Webb and B. Webb, *Industrial Democracy* (Longman, Green & Co.1897),286

⁴ Trade Union Act, Cap T14, LFN, 2004, s.25; Trade Union (Amendment) Act, 2005, s.5; ILO Digest of Decisions and Principles of the Freedom of Association Committee of the Governing body of the ILO, fifth revised ed., Geneva: International Labour Office, 2006, para, 935-939

⁵ Labour Act, Cap L1, LFN, 2004, s.91; ILO- Collective Bargaining Convention, 1981 (No. 154), Art. 2



Ordinarily, such agreements which are by-products of successful collective bargaining is not to be taken for granted, as considerable man-hour, material resources and in some cases feisty disputations are involved in the process of arriving at their conclusion. For the trade unions of employees or workers representatives', every minute, necessary disputations and manpower expended to conclude any collective agreement which will benefit and improve the terms and conditions of their members'(workers) employment individually and collectively is worth it. Consequently, for an innocent bystander made to observe the sometimes tedious process of negotiations and conclusion of collective agreements; or even for an uninformed trade unionist, there is no cogent reason why resources and efforts should be expended in a bargaining process between trade unions of employers and employees if the collective agreement arrived at is not intended to be contractually binding, and legally enforceable in the event of breach by either the trade unions themselves or the individual employees for whose ultimate benefits it was made.

Interestingly, it would appear that the Nigerian courts remain fully ensconced in the orthodoxy of the common law to the effect that collective agreements are not contracts in a legal sense and therefore generally not amenable to legal action.⁶ This is despite what is now touted as the constitutional shift towards conferring a legal status of enforcement for collective agreements in Nigeria under the 1999 Constitution (Third Alteration) Act, 2010; and indeed, the flickers of judicial activism of sorts on the part of the National Industrial Court (NICN) to entrench this nascent legal regime.

The aim of this paper therefore is to soberly pore over the extant state of affairs appertaining to the justiciability or non-justiciability of collective agreements in Nigeria. To this end, this paper shall methodically examine the theoretical and legal frameworks of collective agreement in Nigeria; and the binding effect or otherwise of collective agreement on an employee's contract of employment under the hegemonic common law regime vis-à-vis the nascent objectives of the 1999 Constitution (Third Alteration) Act, 2010. This is with a view to appreciating whether the full application of the 1999 Constitution (Third Alteration) Act, 2010 regarding justiciability and/or enforcement of collective agreement is officially the beginning of the end of common law hegemony in this area of law. Or whether in the light of the recent Supreme Court decisions in *Skye Bank v Iwu*⁷ and *Gbedu v Itie*⁸, the effervescent commentaries and recent audacious decisions of the NICN evincing a shift from the common law position to a new regime under the 1999 Constitution (Third Alteration) Act, 2010 is a mere storm in the teacup.

2. Common Law Underpinnings for Enforcement of Collective Agreement in Nigeria

The perennial application of common law principles *ad nauseam* has not been more palpable in any area of Nigeria's legal jurisprudence as it is in the enforcement of collective agreement. It would appear that neither the enactments and re-enactments of industrial relations legislation, the third constitutional alteration in 2010, the existence of international labour standards to which Nigeria has ratified, nor the notable legal developments in

⁶ *Young v Canadian Northern Railway Co.* (1931) A.C. 83T(PC); *Union Bank of Nigeria Ltd. v Edet* (1993) 4 NWLR, 299; Historically, there was a climate of opinion in England that parties to a collective agreement do not intend to create any more that a manifesto of labour relations which is not justiciable.

⁷ (2017)16 NWLR (Pt 1590) 24

⁸ (2020) 3 NWLR (Pt. 1710) 104 S.C



England in the recent past have quite whittle down the love story between the Nigerian courts and the common principles of privity of contract regarding the enforcement of collective agreements.

As a cursory look at the jurisprudence of Nigeria's industrial law reveals, the contented embracement by the Nigerian courts of the old common law tradition that collective agreements concluded between an employer, a group of employers or employers' organisation and one or more workers organisations for the purpose of determining working conditions and terms of employment are not open to construction and legal enforcement is indisputable. According to a litany of cases⁹ drawing support from the earlier decision in *Union Bank of Nigeria Ltd. v Edet*,¹⁰ neither the trade unions who entered into the agreement nor the beneficiary-employee for whom the benefits of the terms and conditions in the agreement should accrue, have the "right to litigate over an alleged breach of their terms as may be conceived by them to have affected their interest".¹¹

The above common law position is literally founded on two separate reasons. The first being that the trade unions who are actual parties to such agreements enter them with no intention to be bound by them. But with the intention and preference to treat such agreements as mere industrial relations codes or as captured in *Edet's* case, 'a manifesto for labour relations' or better still, a 'gentleman agreement' that should be binding in honour only.¹² The second is that by the common law doctrine of privity of contract, the beneficiary-employee, who is not a party to the agreement, cannot sue, be sued or enforce it, even when the collective agreement was made for his/her benefit.¹³ This point was quite succinctly restated in *Osoh v Unity Bank Plc*¹⁴ where the Supreme Court stated ex cathedra that "it is on the principle of want of privity of contract that the courts have showed great reluctance to enforcing collective agreements between collective parties, at the instance of an employee(s) ...". The purport of this view, by all intents and purposes, is that an employee(s) on whose behalf and benefit a collective agreement is essentially made, but himself not being a party/signatory is nonetheless regarded as a stranger and an interloper if he attempts to enforce the agreement.¹⁵

Commenting on whether collective agreement is synonymous with contract, the Supreme Court in *Osoh v Unity Bank Plc*¹⁶ stated that:

⁹ *Chukwumah v S.P.D.C.N Ltd.* (1993) 4 NWLR (289) 512; *Shuaibu v Nigeria Arab Bank Ltd* (1998) 5 NWLR (551) 582; *ACB v Nbisike* (1995) 8 NWLR (Pt. 416) 725; *Nwajagu v B.A.I.C.O (Nig) Ltd.* (2000) 6 NWLR (687) 356

¹⁰ (1993) 4 NWLR, (Pt. 287) 288

¹¹ *Nigerian Society of Engineers v Ozah* (2015) 6 NWLR (Pt. 1454) 76 at 94 B-D (CA); *Texaco (Nig.) Plc v Kehinde* (2001) 6 NWLR (Pt. 708) 244; *Rector, KwaraPoly v Adefila* (2007) 15 NWLR (Pt. 1056) 86 H- A

¹² *Ford Motor Co. Ltd v Amalgamated Union of Engineering and Foundary Workers* (1969) 2 All E.R 481; *Nigeria Arab Bank Ltd v Shuaibu* (1991) 4 NWLR (186) 450; *Nwajagu v B.A.I.C.O (Nig) Ltd.* (2000) 6 NWLR (687) 356; *ACB v Nbisike* (1995) 8 NWLR (Pt. 416) 725

¹³ *Ikpeazu v African Continental Bank Limited* (1965) NMLR 374 at 379; *Price v Easton* (1833) 4 B & Ad; *Tweddle v Atkinson* (1861) 1 B & S 392; *Union Bank of Nigeria Ltd. v Edet* (1993) 4 NWLR, 298, G-H; *Osoh v Unity Bank Plc* (2013) 9 NWLR (Pt. 1358) 1 SC; *NNB v Egun* (2001) 7 NWLR (Pt. 711) 1

¹⁴ (2013) 9 NWLR (Pt. 1358) 1 at 31 C-D

¹⁵ S O Koyonda, (no.3), 40

¹⁶ *Osoh v Unity Bank Plc* (2013) 9 NWLR (Pt. 1358) 1 at 29



... collective agreements ... are known to cover many different kinds of agreements on topics and matters that are not really amenable to be described as contracts, as they are not legally binding, not having created legal relations. So the phrase collective agreement is not in every case synonymous with the word contract.

Rather strangely, the courts as instantiated in *Union Bank of Nigeria Ltd. v Edet*,¹⁷ have held the opinion that enforcement of the terms of a collective agreement by employees union only lies “if at all, to the negotiation between the union and employer, and alternatively to strike action, should the need arise and it be appropriate.” Thus, in the event of an employer failing to act in strict compliance or totally ignoring the terms of a collective agreement, the employees’ remedies rest on industrial and political actions and not before a court of law.¹⁸ This common law hurdle can hardly be circumvented even by the manifest and expressed intentions of parties in a collective agreement that the agreement be legally binding on them.¹⁹ In any event, as have been suggested by a learned author²⁰ it is highly improbable that such resultant collective agreement would extend to afford individual employees a right to enforce it terms because of the doctrine of privity of contract.²¹ In other words, not even the express provision in the agreement that it shall be legally binding on the parties to it, will cure or avail a right to the individual employee to sue on it.

Nevertheless, the courts, under the common law regime, formulated conditions that must be fulfilled to enable an individual employee acquire the *locus standi* to claim against an employer who fails to comply with the terms a collective agreement. These conditions are generally guided and expounded by what are by now widely known as (a) theory of incorporation and (b) the expressed intention theory approach – otherwise described as ‘implied incorporation’. The theory of incorporation posits that the document which perfunctorily regulates the relationship between an employer and individual employee is the personal contract of service or service agreement and not a collective agreement. And therefore, for a collective agreement or clause thereof to be a binding document on an employer and individual employee, it must first be expressly incorporated into or adopted as part of the employee’s personal contract or conditions of service either by reference or by interpolation.²² The implication of this is that a collective agreement entered between an employer and trade union purportedly on an employee’s behalf can neither supplement nor supplant his/her contract of employment unless it is incorporated or adopted as forming part of the terms of the employment.²³ Consequently, as Koyonda makes clear:

¹⁷ (1993) 4 NWLR, (Pt. 287) 288 at 298

¹⁸ *Afribank (Nig.) Plc v Osisanyo* (2000) 1 NWLR (Pt. 642) 598 at 613, para D-E

¹⁹ It is important to note that there is hardly any known judicial authority or statutory support on this view found during the course of writing this present paper

²⁰ E.E Uvieghara, *Labour Law in Nigeria* (Malthouse Press Ltd, 2001), 30

²¹ *ibid*

²² *ACB Plc v Nwodika* (1996) 4 NWLR (Pt.443) 487-488; *U.B.N Plc v Soares* (2012)11 NWLR (Pt. 1312) 550 at 568; *Abalogu v SPDC (Nig.) Ltd.* (1999) 8 NWLR (Pt.613) 12 at 20;; *Daodu UBA Plc* 2004 9 NWLR Pt. 878 276 at 293

²³ *Nigerian Society of Engineers v Ozah* (no.10) 76 at 93-94; *Gbedu v Itie* (2020) 3 NWLR (Pt.1710) 104 at 126



[A]ny individual employee seeking to enforce the terms of collective agreement must show that such a term arose out of his contract of employment as opposed to the collective agreement. By so doing, such employee may have incorporated some terms of the collective agreement to his contract.²⁴

On the other hand, the expressed intention theory approach, otherwise known as implied incorporation contemplates cases where although no clause or terms of a collective agreement have been directly or expressly incorporated into an individual contract of employment, the courts are nevertheless minded to find and hold a collective agreement as having been incorporated and binding on the parties by existential implication. To do this, the court may have to look at one of two things; that is, either at the parties expressed intention outside of the collective agreement or the conducts of the parties that tends to give effect to the intention of the parties. The import of this approach can easily be deduced from the dictum of the court in *Unity Bank Plc v Owie*²⁵ when in clarifying the legal nexus between the conditions of service and the terms of a collective agreement stated thusly:

The legal nexus is the incorporation of the relevant terms of the collective agreement into the conditions of service of employee. In the absence of clear language of incorporation, the courts have been enjoined to search for the real intention of the parties.

This approach has been accorded some minute judicial recognition in Nigeria. In the case *Rector, KwaraPoly v Adefila*²⁶, the Court of Appeal reached a decision, after considering the abundant evidence before it, that a collective agreement between the Appellants and trade unions of the Respondents increasing the retirement age of academic staff of tertiary institutions in Kwara State from 60 to 65 years had been adopted by the Appellants, and thus impliedly incorporated into the employment contracts of the Respondents, even though no such express incorporation by reference or interpolation existed. In the case of *C.C.B v Okonkwo*²⁷ the court asserted that an employer who had invoked a clause in a collective agreement to dismiss an employee had by its conduct impliedly accepted that the collective agreement governs the employee's terms and conditions of employment. Similarly, the Supreme Court in *Olarewaju v Afribank (Nig) Plc*²⁸ held that parties to a suit that pleaded and tendered in evidence the same collective agreement, had clearly expressed their intention to be bound by it. In all, it may be argued that these cases highlighted here are undoubtedly an audacious minority from the sea of Nigerian cases that evinces an unflinching disdain for the theory of implied incorporation in the enforcement of collective agreements not explicitly incorporated into an individual contract of employment.

²⁴ S.O. Koyonda, (no.3), 43

²⁵ (2011) 5NWLR (Pt.1240) 273

²⁶ (2007) 15 NWLR (Pt. 1056)

²⁷ (2001) 15 MWLR (Pt. 735) 114

²⁸ (2001) 13 NWLR (Pt. 731) 691



From the foregoing, it can be stated that no matter how unsettling the effects of common law is on employees/parties seeking to enforce collective agreements in Nigeria, the position of common law is without a doubt settled that collective agreements are generally unenforceable. Firstly, because as between trade unions of employers and employees, collective agreements are not intended to create a legal relations, and secondly as between the employer and the individual employees, there is no privity of contract.²⁹

3. The Effects of Statutory and Constitutional Interpolations in Nigeria

Prior to the constitutional amendment christened ‘Constitution (Third Alteration) Act 2010, Nigeria made several legislative efforts at attenuating the effects of the common law position on the enforceability of collective agreement.³⁰ But the extent and impact of these legislations to cause real changes is doubtful as operating side by side with common law they, loosely speaking, appeared to have accorded with the conservative position of the common law on enforcement of collective agreement.

Under the statutory dispensation, the Labour Act³¹, the Trade Disputes Act³² (TDA) and the National Industrial Court Act³³ (NICA) defined collective agreement in almost similar wordings to mean, any written agreement between an organisation(s) of workers or an association of workers organisations on one hand and on the other, an organisation(s) of employers or an association of employers s organisations that basically deals with the subject matter of working conditions and terms of employment. However, the TDA in its own language placed emphasis on and indeed appears to focus only on the variant of collective agreements which are products of trade dispute settlement. To that end, TDA in s.3(1)(2) and (3) provided for certain conditions which must be fulfilled before a collective agreement for the settlement of trade dispute will be binding on the parties. According to s.3(1)(3) of the TDA, at least three copies of any agreement covering terms of settlement of a trade dispute entered into by collective parties, must be deposited with the Minister of Labour within fourteen days of its execution. And the Minister upon receipt of same has the discretion not to make or to make an order to the effect that all or part of the contents of such agreement becomes binding on the collective parties to whom it relates.

Some learned authors³⁴ have submitted that having by its own phraseology in s.3(1) limited itself to collective agreements made for the settlement of trade disputes, the provision is therefore not intended to cover all collective agreements. Moreover, when most of the collective agreements that have appeared before the courts were not made for settlement of disputes and so has no need for the order or approval of the Minister for them to be binding. Nonetheless, one thing that clearly emerges from the provisions under review is that collective agreements, whether for the settlement of trade disputes or not, are on their own

²⁹ O V C Okene and G G Otuturu, ‘The Enforcement of Collective Agreements in Nigeria Under the Constitution (Third Alteration) Act 2010’ [2018](7)(2) *Port Harcourt Law Journal*, 3-4

³⁰ B A Adejumo, ‘The National Industrial Court of Nigeria: Past, Present and Future’, A paper delivered March 24, 2011 National Judicial Institute, Abuja

³¹ Labour Act, Cap L1, LFN, 2004, s.91;

³² Trade Disputes Act, Cap T8, LFN, 2004, s.48

³³ National Industrial Court Act, 2006, s.54

³⁴ G G Otuturu, ‘The Enforceability of Collective Agreements in Nigeria A New Approach’ [2006](4)(2) *Nigerian Bar Association Journal*, 65; F.C. Nwoko, ‘Rethinking the Enforceability of Collective Agreements in Nigeria A Collective’ [2000](4)(4) *Modern Practice Journal of Finance and Investment*, 353-354



not enforceable³⁵; unless, they receive the statutory endorsement of the Minister of labour commanded under the TDA in the case of the ones made for settlement of disputes, or enjoys what has been referred to as statutory incorporation³⁶ and in all other cases, are incorporated expressly or by implication into the contract of service of the employees it relates.

Yet another statutory provision of note is s.23(2)(d) of the Trade Union Act³⁷ which bans the courts from entertaining any legal proceeding instituted for the purpose of directly enforcing any agreement of which the parties are trade unions, a federation of trade unions or the central labour organisation. The obvious effect of this provision read together with ss. 30, 34 and s.1 of the same Act; which defines 'trade union' as any combination of workers and employers formed to regulate workers condition and terms of employment, leads to one inevitable inference. And that is that the common law position that collective agreement between trade unions is not binding and therefore not to be litigated upon is statutorily enconced in Nigeria.

However, the enactment of the Constitution (Third Alteration) Act, 2010; resulting to a more empowered National Industrial Court (NICN), has ushered in a new forward looking era in the enforcement collective agreement. This assertion can easily be gleaned from the paper delivered by Adejumo barely twenty days after the Bill amending the 1999 Constitution, and conferring the NICN with a fully-fledged status of a superior court of records was signed into law by the President.³⁸ According to him, regardless of the jurisdictional setbacks suffered by the NICN³⁹ prior to the presidential assent to the third alteration of the 1999 Constitution, it was already clear that "at the High Courts, collective agreements were only binding if incorporated into the condition of service of the employees, while at the NICN they were legally binding.⁴⁰ While this assertion is definitely indicative of the extant lack of consensus in respect of the status of collective agreement in Nigeria, it is reassuring that s.254C(1)(J)(i) of the 1999 Constitution has conferred exclusive jurisdiction in the NICN on matter relating the interpretation and application of collective agreement. Thus there exist a retinue of cases and decisions of the NICN that give credence to the assertion made by Adejumo.

In *Gbadegesin v Wema Bank Plc*⁴¹, the National Industrial Court opined that an employees union can sue to enforce the terms of a collective agreement it entered into for the benefit of its members. Alternatively, where the union is not minded to sue, an employee as member of the union can rely and take the benefit of such collective agreement entered

³⁵ *Anaja v UBA Plc* (2011) 15 NWLR (Pt.1270) 377

³⁶ See for example the Rule 8(1) of the Dock Labour (Registration and Control of Employment) Rules made pursuant to s.68 of the Labour Act, Cap L1, LFN, 2004

³⁷ Trade Union Act, Cap T14, LFN, 2004

³⁸ B A Adejumo, (n.28). Hon. Justice Adejumo was the then President of the NICN when he delivered this paper

³⁹ The NICN was first created under the Trade Disputes Act, 1976 with circumscribed powers. It was subsequently re-established and restructured under the National Industrial Court Act, 2006 with more far-reaching jurisdiction intended by the lawmakers to make it a superior court of records. But as it turned out, according to the Supreme Court in the *National Union of Electricity Employee v Bureau of Public Enterprise* (Unreported Suit No. Sc/62/2004), though created by these statutes as a superior court of records, in the eyes of the law, it remained a subordinate court to the High Court for reason of non-inclusion in the 1999 Constitution.

⁴⁰ *National Union of Civil Engineering Construction, Furniture and Wood Workers v Beten Bau Nigeria Ltd and Anor*, Unreported Suit No. NIC/8/2002

⁴¹ (2012) 28 NLLR (Pt. 80) 274



into on his behalf if in a proceeding before the Court he credibly proves his membership of the union. The NICN reiterated this position in *Onuorah v Access Bank Plc.*⁴² After holding that the Claimant failed to prove her membership of a union in order to have a collective agreement enforced in her favour, the court had this to say:

The rule that a party seeking to rely on a collective agreement must show evidence of membership of the trade union that entered into the collective agreement is one analogous to the privity rule in the general law of contract ... a person who refuses to join a trade union and does not pay check-off dues cannot in the end seek to rely on it for a benefit

A very latest decision of the NICN in *Enugu State Government v Odo & Anor*⁴³ is noteworthy. The facts of the case are that due to the refusal of Enugu State Government to implement a collective agreement stipulating payments of consequential increments of salaries based on the Minimum Wage Act, 2019 to primary school teachers in the public service of the State, the Nigerian Union of Teachers, Enugu State Wing, threatened and proceeded on strike after issuing a seven-day notice of warning strike. Consequent upon which the State Government took out an originating summons seeking declaratory and injunctive reliefs against the Defendants, sued as representatives of Nigerian Union of Teachers, Enugu State Wing, for threatening to embark on strike contrary to s.7(1)(b)(v) of the Trade Dispute (Essential Services) Act, Cap. T9 LFN, 2010 and s.31(6)(a) of the Trade Union Act, Cap. T14 LFN, 2004, as amended by the Trade Union (Amendment) Act, 2005 being persons engaged on essential services in the public service of the State. The issue for determination amongst others was whether the extant collective agreement can exempt the Defendants from prohibition on industrial action. In a considered judgment, the Court held, inter-alia that:

... Collective agreements are no longer gentlemen agreements, as in the past but now, enforceable agreement, which give impetus for the rights of workers to press for their implementations.

Reiterating its point, the Court in a slightly different phraseology further stated that “Collective agreements are now sacrosanct in Nigeria by virtue of s.254C(1)(J)(i) and (iv) of the Constitution (as altered) and the ILO⁴⁴ C98”.

The decisions of the NICN in these cases, it is reasoned, generally accords with the stated constitutional intendment and mandate on the NICN by s.254C(1)(J)(i)(m) of the Constitution to specifically interpret and apply collective agreements in the resolution of labour disputes and by s.254C(1)(f)(h) and (2) to generally apply international best practices, treaties, conventions and protocols in industrial relation and labour ratified by Nigeria. On this score, the NICN has a sacred duty to apply the ILO–Right to Organise and Collective

⁴² (2015) 55 NLLR (Pt.186) 17

⁴³ <<https://icnadr.gov.ng/judement/details.php?id=6846>> accessed January 1, 2023

⁴⁴ ILO means International Labour Organisation. It is the international body on labour standards and has by conventions, recommendations and decisions and principles enunciated by expert committees provided international legal framework to guide member states in enacting domestic labour laws



Bargaining Convention, 1949 (No.98) which Nigeria ratified on October, 1960, as it did in *Enugu State Government v Odo & Anor*, - declaring it as having full effect in Nigeria in accordance with s.254C(1)(f)(h) and (2) of the Constitution (as amended). Convention No.98 (1949) when read together with the ILO–Collective Agreement Recommendation, 1951 (No.91) enjoins that collective agreements should be binding on signatories to it and those on whose behalf it is made.⁴⁵ This is further illuminated by the Freedom of Association Committee of the Governing Body of the ILO in its ruling that failure to implement a collective agreement, even on a temporary basis, violates the right to bargain collectively, as well as the principle of bargaining in good faith.⁴⁶ A fortiori, the Committee equally ruled that subjecting the validity of collective agreements to the consent and approval of the authorities, as is the case under the Trade Disputes Act⁴⁷, is contrary to the established principles of collective bargaining.⁴⁸ It goes without saying that a combination of these international labour standards as well as the observations, decisions and principles formulated over the years by the Governing Body of the ILO, to wit: the Freedom of Association Committee and the Committee of Experts on the Application of Conventions and Recommendations constitutes a veritable source for international best practices on labour and employment and industrial relations matters which the NICN cannot ignore.⁴⁹

Be that as it may, the NICN has by its bold disposition in the cases considered above departed from and/or jettisoned the common law rule of privity of contract and theory of incorporation which hitherto, to put it advisedly, determines the legal status of collective agreement in Nigeria. Alternatively however, the NICN has, as those cases equally reveal, formulated the ‘actual membership rule’ which requires a claimant (employee) seeking to take the benefits of a collective agreement to prove with material evidence that he is actually a member of the trade union that entered into the collective agreement.

Undoubtedly, these decisions of the NICN cited above are salutary and indeed should call for pomp and pageantry as representing the changing landscape on the legal status of collective agreement in Nigeria. But this proposition is all there is to it as attention is drawn to a recent NICN decision in *Sampson Nnosiri & Ors v Eastern Bulkcem Co. Ltd.*⁵⁰, delivered on the 13th of January 2016, about six years after the magisterial arrival of the 1999 Constitution (Third Alteration) Act, 2010. Surprisingly, the NICN in *Sampson Nnosiri* ‘s case clearly surrendered to the common law theory of incorporation when it held, thusly:

In this case, the claimants didn’t show any employment letter from the defendant adopting the collective agreement neither did they show that the Defendant adopted the provisions of the collective agreement as part of their condition of service in any other communication. In fact, the Claimants’ witnesses said the Defendant refused to comply with the content of the collective agreement. That is to say the Defendant

⁴⁵ ILO Collective Agreement Recommendation, 1951 (No.91), Art. 3(1)

⁴⁶ ILO: the Digest of Decisions and Principles of the Freedom of Association Committee fifth (revised edition), Geneva International labour office, 2006, paras, 939, 943

⁴⁷ Trade Disputes Act, Cap T8, LFN, 2004, s. s.3(1)(2) and (3)

⁴⁸ ILO: the Digest of Decisions and Principles (FAC) fifth (revised edition) para 1012,

⁴⁹ *Enugu State Government v Odo & Anor* (n.42); C.K. Agomo in O.V.C. Okene and G.G. Otuturu, (n27) 11

⁵⁰ Unreported, Suit No. NICN/PHC/69/2013 <<https://nicn.gov.ng/judgement?page=9>> accessed 2 January, 2023



did not, either expressly or impliedly, adopt it. It is thus obvious that the essentials that could give the right to the Claimants to litigate on the alleged breach of the terms of the collective agreement have not been shown. The collective agreement on its own does not serve any useful purpose in a claim to enforce its terms without relating it to the letter of employment or other documents containing conditions of service of employment.

In the light of the provisions of the 1999 Constitution (Third Alteration) Act, 2010, coupled with cases, such as *Gbadegehin v Wema Bank Plc*, *Onuorah v Access*, *Enugu State Government v Odo & Anor Bank Plc*, *Itodo & Ors v Chevron Texaco Nigeria*⁵¹, and the position papers coming out of the NICN, it is submitted, with respect, that the dictum in *Sampson Nnosiri's* case was made per incuriam. This is to the extent that it did not take proper cognizance of international best practices, treaties, ILO conventions and protocols in industrial relation and labour ratified by Nigeria; which by virtue of s.254C(1)(f)(h) and (2) of the Constitution (as amended), it is permitted and enjoined to do in arriving at decisions in matters before the NICN. Although this dictum is not the main reasoning upon which the judgement was delivered, it nevertheless gave impetus to the frightening thought that the common law ghost which at the High courts tormented and deprived many an employee from reaping the benefits of collective agreements made for them is still lurking around. However, it is hoped that this is a lone voice in the surfeit of voices out of the NICN determined to use its exclusive jurisdiction on labour related matters to positively extinguish the common law effect on the legal status of collective agreement in Nigeria.

4. Has the Common Law Influence been Extinguished?

In the light of the audacious stance of the NICN and utilisation of its jurisdiction to the exclusion of the High courts over matters involving interpretation and application of collective agreement pursuant to s.254C(1)(2) of the Constitution (as amended), it should naturally be taken that the influence of the common law privity rule in general law of contract has been extinguished. But, this view may not hold sway for long when it is realised that the appellate jurisdiction of the Court Appeal over the NICN has not been extinguished. Pursuant to s.243(2) 1999 Constitution (as amended), appeals lie from the decisions of the NICN as of right to the Court of Appeal on questions of fundamental rights contained in Chapter IV of the Constitution in respect to matters upon which the NICN has jurisdiction. There is no gainsaying that collective bargaining is a component of the freedom of association guaranteed as fundamental right under Chapter IV of the 1999 Constitution,⁵² and that collective agreement is a natural outcome of a successful collective bargaining. Arguably therefore, the right to enforce a collective agreement arising from a collective bargaining is a fundamental human right matter seeking to protect the interest of a person belonging to a trade union. It is therefore submitted that a decision of the NICN relating to enforcement of collective agreement should be appealable to the Court of Appeal. Besides, it is now settled as

⁵¹ [2005] 2 NLLR (Pt.5) 200 NIC

⁵² Constitution of the Federal Republic of Nigeria, s.40



stated in the Supreme Court decision in *Skye Bank v Iwu*⁵³ that the jurisdiction of the Appeal Court to hear appeals against the decisions of the NICN is not restricted to questions of fundamental rights only, but extends over all matters by virtue of a holistic interpretation of s.240 and 243(1) of the 1999 Constitution (as Amended). In other words, regardless of the provisions of ss.254(5)(6) and 243(2) of the Constitution which appears to limit the right of appeal from the NICN to the Appeal Court to only two moments, all decisions of the NICN are appealable to the Court of Appeal with the leave of the Court.

From the plethora of case law, there is no doubt that the Court of Appeal is well accustomed to the common law climate of opinion that collective agreements are not meant to create legal relations and therefore cannot be enforced by anyone except when its terms are adopted by an employer into an employee's employment contract. In fact, there is a surfeit of decisions of the Court of Appeal delivered after the enactment of the 1999 Constitution (Third Alteration) Act, 2010 which followed the trajectory of sustaining the common law grip on the unenforceability of collective agreement against the intendment of that constitutional provisions. For instance, the decisions in the following Court of Appeal and Supreme Court cases of *U.B.N Plc v Soares* (2012 C.A); *Osoh v Unity Bank Plc* (2013 S.C); *Nigerian Society of Engineers v Ozah* (2013 C.A); and *Gbedu v Itie*⁵⁴ (2019 S.C) were all delivered after the constitutional alteration in 2010. But surprisingly, all of them averted their attention from or to state it more correctly in the positive, none of them adverted to the Constitution (Third Alteration) in reaching their conclusions. What is more, the decision in *Gbedu v Itie* delivered by the Supreme Court in 2019, almost ten year after the third alteration of the 1999 Constitution was made, emphatically sustained the common law refrain that collective agreements are only binding if incorporated into the contract of service of the employees. In other words, collective agreements do not supplement contracts of service unless they have been adopted as forming part of the terms of employment. This resurgence or sustenance of the age-old common law position on unenforceability of collective agreements almost a decade after the coming into existence of s.254C of the Constitution (as amended) presided over the highest court in Nigeria is very telling. This is particularly so in the knowledge of the important place of the doctrine of *stare decisis* (judicial precedent) in the legal system of Nigeria. Of course, unless it can be argued that the National Industrial of Nigeria, as a hybrid court⁵⁵, is immune from the principle of *stare decisis* and thus is not obliged to follow the decision of the Supreme Court. Apart from that, the concern raised here is palpable. And the dictum of the Court Appeal in *Gbedu v Itie*⁵⁶ is instructive in this respect:

Although we share the optimism expressed elsewhere that a new approach to this conundrum should be evolved ... there is a practical constraint eventuating from the impregnable doctrine of *stare decisis*. Thus until the apex court vacates its present posture on the question of the legal status of collective agreements, any lower court [and including this court] would be courting the wrath of that august and

⁵³ (2017)16 NWLR (Pt 1590) 24

⁵⁴ (2020) 3 NWLR (Pt.1710) 104 at 130

⁵⁵ *Enugu State Government v Odo & Anor* (n.42)

⁵⁶ (2010) 10 NWLR (Pt.1202) 228 at 282-283



distinguished final court in this land if its attempts to navigate out of its *rationes decidendi* on the ways in which a collective agreement may be incorporated into a contract of employment in such cases like: *U.B.N v Edet* (1993) 4 NWLR (Pt. 287) 288, 300; *Chukwumah v Shell Petroleum Development Corporation* (1993) 4 NWLR (Pt 289) 512, 543-544 ...

There is no pretence that the limits of this present discussion can be exhausted here. Thus, the decision to take safety in the wisdom of: 'he who fights and runs away lives to fight another day'.

5. Conclusion and Recommendations

From the foregoing, the literature on the legal status of collective agreement clearly shows the different epochal transitions that its enforcement debate has undergone. The first period is the period of the unchallenged dominance of the common law rules not amenable to industrial peace and harmony. In this period, the mantra was that collective agreement is simply not enforceable. And the High courts of the various States, the Federal High court, the Court of Appeal and even the Supreme Court, in full embrace of judicial passivism, had no problems making this pronouncement case after case despite the obvious hardship it meted out on employee-litigants. The second, being an intervening period when statutes, such as the Trade Disputes Act and the National Industrial Court Act working side by side with common law created the National Industrial Court to adjudicate on labour matters pertaining to the determination of issues of the interpretation of collective agreement. Yet left grey areas that tended to circumscribe the powers of the National Industrial Court and in so doing, created room for the High courts to continue to operate alongside, and to gleefully continue to deny employees' the right to litigate over a breach of terms of collective agreements not incorporated into their individual condition of employments. The third and current period is the majestic reborn of the National Industrial Court under the 1999 Constitution (Third Alteration) Act, 2010 heralding a reappraisal and confrontation of the traditional thinking and orthodoxy of the common law principle of privity of contract with international best practices and applicability of international labour standards for the enforcements of collective agreements in Nigeria. This current period, as it is turning out from the preponderant case law examined here, is marked by a strong resolve of the National Industrial Court to give effect to the primacy of collective agreement ensconced in international labour standards over contract of service in the exercise of its jurisdiction.

This paper has painfully shown that despite the National Industrial Court's determination in this area of labour and industrial law, the law may not be said to be settled yet. And the reason for holding this opinion is due to the appellate jurisdiction of the Court of Appeal not just over decisions of the National Industrial Court on fundamental rights questions contained in Chapter IV of the Constitution arising from any matter within its jurisdiction, but in all civil matter that the NICN exercises jurisdiction. As submitted earlier however, collective bargaining is a fundamental aspect of the fundamental right of freedom of association provided under Chapter IV of the Constitution. Therefore, the determination of any question as to the interpretation and application of collective agreement, being a direct outcome of collective bargaining by the National Industrial Court, should in accordance with



s.9(2) of the National Industrial Court Act, 2006 be appealable as of right. As it were, it will only take an appeal over any such decision of the National Industrial Court concerning enforceability of collective agreement based on international labour standards to know the true state of the law. As recent decisions out of the Court of Appeal delivered long after the enactment of the 1999 Constitution (Third Alteration) Act, 2010 reveal, the common law hold on the enforcement of collective agreement in Nigeria is alive and well.

In the circumstances, it is posited here that contrary to the popular view calling for massive legislative reforms, the constitutional intervention under the 1999 Constitution (Third Alteration) Act, 2010 is far-reaching enough to enable the National Industrial Court guarantee in every case that both the benefit and burden of a collective agreement is observed by its signatories and ultimately can pass to those for whom it is made. It is however recommended that what should be done is to amend s.243 of the Constitution by inserting immediately after the existing subsection (3) a new subsection (4)⁵⁷ which shall enjoin the Court of Appeal to apply international best practices, treaties, conventions and protocols ratified by Nigeria in respect of all appeals, whether as of right or with leave, lying from the National Industrial Court.

In any case, a good measure of judicial activism in labour and industrial matters is needed if Nigeria's labour jurisprudence must move farther from the common law principles and practice diffident in the furtherance of industrial peace and harmony in a nation. Thus, as a court expected to take the need for industrial peace and harmony, and economic factors for the growth of the economy into consideration, the NICN and indeed the Court of Appeal must embrace the 'agency theory' adopted in other jurisdictions for the resolution of labour disputes. The theory presupposes that an agency relationship exist between a trade union and its members; making the members the principal and the union/union officials the agent in the eyes of the law. And therefore, any action taken by the union/union officials, including negotiations and agreements, is assumed to have been approved by the principal and therefore taken on his behalf and for his benefit. By this theory, a collective agreement which is the product of negotiation between the agent (union members) and a third party (employer) automatically inheres on the principal (members). Thankfully the agency theory in labour matters, though unpopular, is not completely strange to the courts in Nigeria; as it was audaciously applied in *Rector, Kwara Poly v Adefila*.⁵⁸ Affirming its usefulness in resolving the legal status of collective agreement, the court, by majority, had this to say: "After all, there is the presumption that parties to collective agreements act as agents for the parties to the individual contract."

This judicial authority is forthrightly commended to the courts as the constitutional intervention under the third alteration on its own may not be enough without a strong will on the part of the judiciary to rid itself of the timorous souls fixated on arresting the development of Nigeria's labour jurisprudence from catching up with the global trend of justice delivery.⁵⁹

⁵⁷ This should automatically cause the renumbering of the existing subsection (4) as subsection (5)

⁵⁸ (2007) 15 NWLR (Pt. 1056) 42 at 92 H-A

⁵⁹ *Candler v Crane Christmas & CO.*(1951) 2 KB 164