# AN APPRAISAL ON THE STATUS OF COLLECTIVE AGREEMENT IN THE NIGERIAN LABOUR AND INDUSTRIAL LAW

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**Abstract**
*The relationship between the employer and the employee is primarily governed by the individual contract of employment and by the terms of any collective agreement reached between management as employer's representatives and union as workers representatives. Collective agreement refers to an agreement reached between workers union and their employers, as a result of collective bargaining between the union and the employers. The aim of this paper is to appraise the Nigerian law and practice as it relates to the status and enforceability of collective agreements with a critical examination of available international and regional human rights instruments as well as showcase the gaps under Nigerian legislation. In achieving this aim, the researcher adopted doctrinal research method relying on primary and secondary sources of law. The work found that collective agreements are generally not justiciable and devoid of sanction as there is no intention to create legal relations by the parties, hence it is perceived as a gentleman's agreement, a product of trade union pressure. It is recommended that the Nigerian labour and industrial relations laws be reviewed to align with international best labour practices by clearly providing for the interpretation and justiciability of a collective agreement.*

**Keywords:** Collective Agreement, Collective Bargaining, Nigerian Labour Law, Nigerian Industrial Law

## 1. INTRODUCTION

The relationship between the employer and his employee constituted by the individual contract of employment is appreciated as the basic or primary aspect of industrial relations.[1] Employment contracts are agreements which contain terms and conditions which ordinarily regulate the relationship between the employer and the employee whether they are express or implied. Prior to the advent of trade unionization in the labour sector, bargaining on the terms and conditions of employment was reached solely between the employer and employee. The negotiation of the terms of employment was presumed to have been voluntarily negotiated on an equal level basis, between the parties to it, based on the doctrine of freedom of contract. Contrary to this presumption, the fact remains that at the negotiating table, the employer and the employee are not on the same pedestal. They have different bargaining powers and so bargain from different backgrounds, the

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[1] S Erugo, *Introduction to Nigerian Labour Law* (2nd edn Princeton Publishing Limited 2019) 311.

employer having an upper hand, thereby making the doctrine of freedom of contract more or less illusory[2].

The existence of these unequal bargaining power and divergent interests in the workplace, most times results in conflicts. It is the unsatisfactory nature of these relations based on contract that led to the development of other aspects of industrial and labour relations like collective bargains.[3] This is because in order to have a balance at the bargaining table, the employer/employee unions had to evolve ways of engaging themselves with a view to resolving these diverse issues of interest through voluntary negotiation. In Nigeria, the provision of section 25 of the Trade Union Act which provides that an employer must recognize a trade union upon registration, where persons in the employment of the employer are members of a trade union provided a sort of legal backing for collective bargaining. It created a ground for the union to engage the employer on behalf of their members. Collective bargaining is therefore considered a useful panacea in the workplace for industrial peace.[4] Collective Bargaining as the name goes is made of two words "Collective" and "Bargaining" collective which means a 'group action' through representation, and 'bargaining' which means negotiating.[5] This process involves proposals and counter offers, before any decision is reached. The decision reached is what is known as a collective agreement under labour and industrial law.

This work is aimed at determining the status of the said decision (collective agreement) reached from this rigorous deliberation and negotiation in the Nigerian labour and Industrial Law. Whether justiciable or not? Whether the individual employee for whose benefit the agreement was reached can claim a right under it? Whether the essence of collective bargaining is met? What are the challenges encountered by the employee's union and the employees on the issue of enforcement? What is the position of our labour and industrial law on this issue? And the effect the Third Alteration to the Constitution and the enormous power given to the National Industrial Court can make in this area. Recommendations will be preferred to better the legal status of these collective agreements

## 2. COLLECTIVE BARGAINING

Collective Bargaining involves a process of negotiation between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits.[6] It is a process of collective discussions and negotiation between the workers union or its representative or between an employer and the representative of a worker's union on issues relating to their work situation with a view to arriving at a collective agreement, aimed at regulating working conditions. It ensures that the employers

[2] V Iwunze, 'The General Unenforceability of Collective Agreements under Nigerian Labour Jurisprudence: The Paradox of Agreement without Agreement' (2013) Vol. 4 No 4 International Journal of Advanced Legal Studies and Governance 1.

[3] A A Adeogun, 'The Legal Framework of Industrial Relations in Nigeria',(1969) 3 NLJ 33

[4] R M Olulu and U S Alor, 'The Principle of Collective Bargaining in Nigeria and the International Labour Organization (ILO) Standards', (2018) Vol. 11 Issue 2 International Journal of Research and Innovation in social Standard (CIJRISS) 63.

[5] ibid.

[6] B A Garner, Black's Law Dictionary (8th edn Thomson West 1999) 280.

and workers have close to what can be deemed as an equal voice in negotiation. It is essential to note that it is collective in the sense that the outcome of the process usually affects persons organized in groupings. However, nothing seems to prevent a single employer from engaging a trade union of workers in collective bargaining.

The ILO Convention on collective bargaining[7] defines collective bargaining as extending to all negotiations which take place between an employer, a group of employers or one or more employers' organizations on the one hand, and one or more workers' organizations, on the other hand, for determining working conditions and terms of employment, and/or regulating relations between employers and workers, and/or regulating relations between employers or their organizations and a workers' organization or workers' organizations. The principal purpose of collective bargaining is to reach an agreement, settling the terms and conditions of employment.[8] According to Okene,[9] the improvement in the terms and conditions of workers' employment is the chief task of trade unions, and collective bargaining is the major means whereby trade unions can ensure that the terms and conditions of employment given to their members are adequate.[10] It has also been noted in many decided cases, that one of the main purposes for the existence of trade unions is primarily for the improvement of the terms and conditions of employment of workers.[11] Therefore, the relevance of trade unions in industrial relations is purely in the framework of collective bargaining.[12]

Negotiation in collective bargaining should be conducted with the aim of reaching an agreement[13] or else the essence is defeated and it becomes a mere exercise in futility. That is why the various definitions of collective bargaining including the Nigerian Labour Act[14] see it as a means to a collective agreement.

One of the challenges faced by collective bargaining is the indirect attempt by the Trade Dispute Act to deny workers the right to strike, once the procedures laid down under the TDA is activated.[15] The threat of collective bargaining is not likely to succeed without the threat of a strike.[16]The threat of strike helps force employers or their unions to implement the agreement reached during collective bargaining.

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[7] Collective Bargaining Convention (1981 No 154).
[8] A Emiola, *Nigerian Labour Law* (Emiola Publishers Limited 2008) 459.
[9] O V C Okene, *Labour Law in Nigeria* (Claxton and Derrick 2012) 205.
[10] ibid at 207.
[11] See Udoh v Orthopedic Hospitals Management Board (1990) 4 NWLR (pt. 142) 53 where Lord Donovan held that it is of course true that the main purpose of Trade Unions of employees is the improvement of wages and conditions.
[12] S Erugo (n 1) 334.
[13] F C Nwoke, 'Rethinking the Enforceability of Collective Agreements in Nigeria' (2000) Vol 4 (4) Modern Practice Journal of Finance and Investment Law 372.
[14] Cap L1 Laws of federation of Nigeria 2004, Section 91 defines collective bargaining as the process of arriving or attempting to arrive at a collective agreement.
[15] Sections 4, 6, 8, 9, 13(3), 14(1) and 18.
[16] In Union Bank PLC v Edet (1993) 4 NWLR (Pt. 287)288, where Justice Uwaifo stated thus "it appears that whenever an employee ignores or breaches a term of that agreement resort could only be had, if at all to negotiations between the union and the employer and ultimately to a strike action should the need arise and it be appropriate."

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## 3. COLLECTIVE AGREEMENT

A collective agreement has been described as a contract between an employer and a labour union regulating employment conditions, wages benefits, and grievances.[17] It is seen as a product of 'a voluntary negotiation between employers or employers' organizations and workers' organizations with a view to the regulation of the terms and conditions of employment.'[18] It represents the agreements reached during the process of bargaining which has been reduced into writing. It is therefore a product of collective bargaining. It also sets rules on how workers should be treated, to ensure that management decisions concerning workers meet the demands of justice and fairness.[19] A collective agreement is intended to protect the socially weaker party against the socially stronger party to a contract.[20]

A collective agreement is of two forms: the procedural and the substantive agreement. The procedural agreement deals with the procedure for reaching the substantive agreement; that is the basic rules and procedure that enable smooth negotiation of the substantive issue that constitute substantive agreement; while the substantive agreements on the other hand are concerned with the substantive subject matter for bargaining and pertain to terms and conditions of employment. Parties to a collective agreement are guided by their respective interests, which are always conflicting because while the employer primarily pushes for an efficient, productive workforce and increased profits, the employees and their representatives usually push for better terms and conditions of employment. The implication is that a collective agreement depicts a natural instinct of defense inherent in human, whereby people either demand satisfaction or promotion of the interest of one another.[21] This important instinct has driven industrial relations between employers and employees' organization in trade disputes mediation, negotiations and awards in Nigeria, in particular, and other countries of the world.[22] The kinds of terms and conditions covered by a collective agreement typically include wages and benefits, as well as terms and conditions of employment that relate to job posting, obligations and responsibilities of the employer, the employee and the union; and a dispute resolution process (usually a grievance and arbitration procedure).[23]

The concept of collective agreement which is arrived at from collective bargaining started at different times in different countries of the world. Its practice was and is not universal both in form and substance. In some jurisdictions, the phenomenon is regulated by common law while in some others; it is governed by statutory law. Also, in others, it is both the practice of statutory and common laws that regulate collective agreement.

[17] Garner (n 6).
[18] ILO Right to Organise a Collective Bargaining Convention, (Convention 98 1949) article 4.
[19] P C Weiler, *Governing the Workplace: The future of labour and Employment Law* (Harvard 1990) 181.
[20] Kahn-Freund O, 'Collective Agreements' (1940) Modern Law Review, 225.
[21] M J D Akpan, 'Nature of Collective Agreements in Nigeria: A Panoramic Analysis of Inherent Implementation Challenges' (2017) Vol.5, No.6 Global Journal of Politics and Law Research 19-28.
[22] ibid.
[23] Human Resources, Frequently Asked Questions August 2011 https://www.uoguelph.ca/hr/system/files/Labour%20Relations%20FAQs.pdf accessed 28/03/2021.

### 3.1 Collective Agreement under Common Law

Under the common law, collective agreements are considered non-justiciable, even though they are the outcome of painstaking deliberations between employers of labour and their employees. They are considered a gentleman's agreement which is binding only in honour.[24] The argument always canvassed to back this submission, is that there is no inherent intention to create legal relations, and no contract is legally enforceable unless there is inherent in it, an intention to create legal relations. Stressing the essentiality of an intention to enter into legal relations for the enforceability of a contract, Lord Stowell states that enforceable contracts "must not be '...mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatsoever".[25] The English case of *Ford Motor Co. Ltd. v Amalgamated Union of Engineering and Foundary Workers*[26] is very apt as regards the position of common law on the unenforceability of collective agreements. Here, the plaintiff in 1955 negotiated an agreement with 19 trade unions which provided that "at each stage of the procedure, set out in this agreement, every attempt will be made to resolve issues raised and until such procedure has been carried through, there shall be no stoppage of work or other unconstitutional action". In 1968 an application for injunction was brought to restrain two major industrial unions from calling an official strike contrary to the 1955 collective agreement. The main issue in the application was whether the parties intended the agreement to be a legally binding arrangement. It was held that there was no intention that the agreement would be legally binding on the parties. According to Geoffrey Lane J, there was at the time, "a climate of opinion adverse to enforceability"[27] of collective agreements.

The issue of privity of contract is another argument canvassed for the non-enforceability of collective agreements at common law. The argument is that the privity existing is, between employers or employers' associations on the one hand and workers' union on the other hand, and not between an individual employee. The implication is that the individual employee not being privy to the agreement is prevented at common law from enforcing it, even though it was entered for his benefit. The judgement of Lord Haldane in *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge Ltd.*,[28] also clearly represents the principles that only a person who is a party to a contract can sue on it, and the England law knows nothing of a *jus quaesitiumtertia*[29] arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right in personam to enforce the contract.[30] The question is, are these individual employees really third parties here, for all intent and purposes? These employees are actually the unions that have delegated powers to some of the members to represent them in a bargaining table and those representatives are merely their mouthpiece and confer what the members want. No decision is made without the members agreeing to it. How then can it be comfortably said that they are third parties? No wonder some jurisdictions have moved away from this stand. The privity rule is no longer in operation in many jurisdictions around the world. Some

[24] Ford v A.U.E.F. (1969) 1 WLR 339.
[25] Dalrymble v Dalrymble (1811) 2 Hag Con 5 at 105.
[26] (1969) 1 WLR 339; See also Nigerian Arab Bank v Shuiabu (1991) 4 NWLR (Pt. 186) 450.
[27] ibid at 355.
[28] 10 (1915) A. C. 847.
[29] It means rights on account of third parties.
[30] ibid at 853.

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jurisdictions have enacted statutes to even allow a stranger to an agreement the right to enforce a term intended to benefit him.[31]

It is essential to note that although common law recognizes some exceptions to the doctrine of privity of contract,[32] the right of an individual employee to enforce a collective agreement entered between a trade union of which he is a member and his employer for his benefit is not one of them.

### 3.2 Collective Agreement under Nigerian Labour and Industrial Law

A collective agreement under the Nigerian labour and industrial law is defined and regulated by the Labour Act,[33] Trade Dispute Act,[34] National Industrial Court Act[35] and importantly the Common Law. Collective Agreement under the Labour Act is defined as an agreement in writing regarding working conditions and terms of employment concluded between an organization of workers or an organization representing workers (or an association of such organizations of the one part, and an organization of employers or an organization representing employers (or an association of such organizations) of the other part. This clearly talks about working conditions and terms of employment of workers, and is similar to the definition of collective agreement under the National Industrial Court Act (NICA),[36]unlike the definition in the Trade Dispute Act[37], which relates it to settlement of disputes on terms of employment and conditions of work, the National Industrial Court Act only mentioned the terms of employment and conditions of work.

Nigeria is a common law country and its courts have consistently followed the common law principle that collective agreements are binding only in honour and also not enforceable/non justiciable due to the absence of privity. Nigerian courts have, in several cases declined to enforce them as a matter of course when relied upon by an individual employee. In the case of *Osoh &Ors v Unity Bank Plc*,[38] the appellants' employments were terminated by the respondents on the ground that the appellants' services were no longer needed. The appellants contended that the termination of their employments was wrong because under a collective agreement between the appellants' trade union and the Nigerian Employers Association of Banks, Insurance and Allied Institutions (of which the respondent was a member), the respondent could only determine the appellants' employment on the ground of redundancy. The appellants also argued that under the same

[31] See the English Contract (Rights of Third Parties) Act 1999, for a discussion of the Act, See P Kincaid , 'Privity Reform in England' (1999)116 Law Quarterly Review,43 cited in E Chianu, "*Employment law*" (Ondo: Bemicov Publishers, 2006) 78.

[32] The exceptions to the doctrine include agency, assignment of contractual obligations, novation, contracts running with the land, contracts of insurance, charter parties and trust. See G. H. Treitel, *Law of Contract* (9th edn. London: Sweet & Maxwell, 1995) at 576-587; Itse Sagay, *Nigerian Law of Contract*, (Spectrum Books 1993) 489.

[33] Section 91.

[34] Section 48.

[35] Section 54.

[36] ibid.

[37] Section 48 of the Trade Disputes Act defined Collective agreement as "an agreement in writing for the settlement of disputes and relating to terms of employment and physical conditions of work concluded between a) an employer, a group of employers or organizations representing workers, or the duly appointed representative of any body of workers, on the other hand; and b) On or more trade unions or organizations representing workers or the duly appointed representative of any body of workers on the other hand".

[38] (2013) 9 NWLR (pt.1358) 1.

agreement, the respondent had wrongly computed their terminal benefits. The Supreme Court held that there was want of privity of contract between the appellants and the respondents and as such the appellants could not enforce the collective agreement against the respondents. The Apex Court further to distinguished a collective agreement from a contract by stating thus:

> Even though the forgoing provisions of subsection 1 of section 47 of the Trade Disputes Act are plain and unambiguous and have talked of "any agreements" nonetheless these provisions have nowhere referred to the phrase "any agreements" as used in the Act as coterminous with "contracts" in the strict sense of the word. The reason is quite simple and obvious as collective agreements (even in this case construed from the backdrop of the instant agreements as contained in these exhibits) 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 that the phrase "collective agreement" is not in every case synonymous with the word "contract". Not having appreciated this distinction is the bane of the appellants' erroneous contention in this appeal by equating the instant agreements as per the said exhibits as legal contracts between the parties.[39]

In *Gbadegesim v Wema Bank PLC*,[40] the National Industrial Court in interpreting who can sue for breach of collective agreement held that a party can take the benefit of a collective agreement only when it is a party to it; but as regards individual employees who are members of a union, they can take the benefit only through their unions of it, if the union is not minded to sue on their behalf, then they must show evidence of membership of the union in question.

The above cases show the position of the Nigerian Court with regards to justiciability of collective agreements and on who can derive benefit from it. It is disturbing that despite the developments in that area of labour and industrial law, the Courts in Nigeria still allow common law principle which has been long buried in Britain, which colonized Nigeria to be operable in the Courts and their decisions against the extant law on the issue at hand. It is also saddening to note that, while the principle of privity of contract was being used to deny an employee the benefit of an agreement entered on his/her behalf, the provision of the Trade Dispute Act was busy bestowing power on a person/ body not a Court and not privy to the collective agreement in most cases to determine its effect. The Trade Dispute Act 2004 stipulates the obligation of parties to a collective agreement to drop at least three copies of the agreement with the Minister of Labour within a specified period. After which, the Minister is expected to make an order upon receipt of the copies of the agreement authorizing that any part or all of such agreement shall be binding on the employer and employees concerned.[41] The above by implication brings the collective agreement under the scrutiny and discretional power of a third party who is an appointee of the State with likelihood of bias and red-tapism, although, the section applies to collective agreement relating to the settlement of trade disputes.

[39] ibid at 29.
[40] (2012) 28 N.L.L.R (Pt 80) 304.
[41] Cap T8 Laws of Federation of Nigeria 2004, Section 3 (1) and (3).

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## 4. ENFORCEABILITY OF COLLECTIVE AGREEMENT IN NIGERIA

A collective agreement as already noted under the Nigeria Labour and Industrial Law is unfortunately not regarded as a binding document. It is generally considered as gentlemen's agreement only binding in honour.[42]The argument backing the assertion as earlier stated, is that collective agreements do not have the essential ingredient of 'intention to enter into a legal relationship', and therefore not enforceable. An argument which the writer considers unsubstantiated considering the efforts put into the bargaining which metamorphosed into the collective agreement. It is different if the agreement clearly states that it is not justiciable. Additionally, where an agreement is made in a commercial context, the law raises a presumption that the parties do intend to create legal relations by the agreement. Intention is implied by the fact that it is not expressly denied. If expressly denied (as in a so-called gentlemen's agreement) it could then be argued that the contract may not be enforceable. *In Rose & Frank Co. v J. R. Crompton & Bros. Ltd.* [1923]2 K.B. 261[43], Scrutton L.J. said at page 288 thus:

> Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow.

Collective agreements reached by employer's union and employees union or employee are agreements reached with regard to business masters, as such the implication is that, even if not expressly stated, the intention to create legal relation is implied into it. This ordinarily should be the position of our labour law on collective agreement. Most unfortunately this is not the case. Intention to create legal relation simply means the intention to be bound and nothing more, there is therefore no known reason why collective agreements should not be binding, except where specifically stated, which is in most cases unlikely. Some jurisdictions have provided that for it to be legally binding it has to be stated in the agreement that it is legally enforceable.[44] The question is why is it not the other way round? Why should it not be clearly stated that it is not intended to create legal relation, in view of the implied position on the enforceability of commercial transaction. However, it is better than the generalized view of unenforceability. The issue of unenforceability should have been in obvious cases of undue influence, unequal bargaining power or when it has to do with collective agreements reached contrary to public policy or an existing law amongst others, so as not to enslave a party to it.

The Nigerian case law and statutes recognizes certain circumstances under which collective agreements would be enforceable by the Courts. These circumstances are:

a. where the collective agreement is incorporated into an individual employee's contract of employment,

[42] African Continental Bank PLC v Benedict Nbisike (1995) 8 NWLR (Pt 416) 725.
[43] Cited in Esso Petroleum v Commissioners of Customs & Excise [1976] 1 WLR 1.
[44]English Trade Union and Labour relations (Consolidation) Act, 1992, section 179(1) and (2).

b. where under the Trade Disputes Act[45] the Minister orders that a collective agreement or any part thereof be enforceable between employers and employees,
c. where a party to the collective agreement has already relied on and claimed a right under it or it has become a custom or industry practice.
d. and recently by virtue of the provision of Section 7 (1) (c) (i) and 7(6) of the National Industrial Court Act[46]

### 4.1 By Incorporation of the Collective Agreement into the Contract of Employment

The principle behind this is that a collective agreement does not translate to an employment contract neither does it create one. This principle is based on the doctrine of privity of contract, for an individual employee to rely on a collective agreement in claim of a right, that collective agreement must be incorporated into the contract of employment of that individual employee, otherwise the claim cannot stand. The argument for this as enunciated in several case laws is that the individual employee not being a party to the agreement is not allowed to enforce its content, even though the agreement was made for his benefit. However once the latter is incorporated into a contract of employment, by the act of the parties, then it becomes binding on them and therefore enforceable. In *Anaja v UBA Plc,*[47] the Court of Appeal held thus;

> A collective agreement on its own does not give an individual employee the right of action in respect of any breach of its terms unless it is accepted to form part of the terms of employment. This is because, the agreement is not between the employer and his employee and as such, a nonparty cannot (legally) enforce a contract even if it was made for his benefit. Thus, a collective agreement is at best a gentleman's agreement, an extra-legal document totally devoid of sanctions.

This position of the law was also aptly illustrated in the case of *Union Bank of Nigeria v Edet*[48] where the Respondent's employment was terminated with one month's notice. He contended that under a collective agreement between his union and the appellant he was supposed to be given three written warnings before his employment could be terminated and that the requirement of the agreement was not complied with by the appellant. The Court of Appeal in dismissing that contention held per Uwaifo J.C.A., that:

> Collective agreements except where they have been adopted as forming part of the terms of employment, are not intended to give, or capable of giving individual employees a right to litigate over an alleged breach of their terms as may be conceived by them to have affected their interest nor are they meant to supplant or even supplement their contract of service.[49]

Iwunze[50] has submitted that the Nigerian position that the collective agreement is not enforceable by an individual employee unless it is incorporated into his individual contract of employment

[45] Cap T8, Laws of the Federation, 2004.
[46] 2006.
[47] (2011) 15 NWLR (Pt 1270) 377.
[48] 18 (1993) 4 NWLR (Pt 287) 288.
[49] ibid at 291.
[50] Iwunze (n 2) 5.

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creates a rather impossible situation. This impossibility is to be found in situations where a collective agreement postdates the employee's contract of employment. In such situation, it is impossible for the collective agreement to form part and parcel of the employee's contract of employment, except there is a review to incorporate same. This situation arose in *Texaco (Nig.) PLC v Kehinde*,[51] where the employee's contract of employment commenced in 1981, however, the employee sought to claim under a collective agreement between the employer and his union entered much later after his employment had commenced. It was held that the claim was not maintainable because the collective agreement was not incorporated into the employee's contract of employment. Another burning issue is in determining at what stage incorporation takes effect for the purposes of knowing the terms of employment at every point.

In incorporating a collective agreement into a contract of employment, it must be in clear terms and devoid of any ambiguity, failure of which, might be held to be unclear whether there is an intention to incorporate same into the employment contract, except where it can operate as an implied term even when the contract of employment is silent on it.

### 4.2 By Reliance under the Custom, Trade Practice and Usage in the Industry

A collective agreement where although not incorporated into a contract of employment, but has overtime become the practice of an industry may be implied into an employee contract of employment by virtue of custom and usage.[52] It will also be deemed to have been incorporated when the parties have been acting on the terms of the collective agreement. This would appear to be a progressive paradigm shift in judicial attitude on the issue of enforceability of collective agreements. In a couple of cases, the courts have also held that where the employer has placed reliance on the collective agreement, he would not be heard to say that the agreement upon which he has already relied on is unenforceable by the employee because it is not incorporated into his contract of employment. In *Cooperative and Commerce Bank (Nig.) Limited v Okonkwo*,[53] the employee was dismissed by the bank and the letter of dismissal alleged that the employee was dismissed for flouting a clause in a country-wide collective agreement. At trial, the employee sought to rely on the same collective agreement but the employer objected on the ground that the collective agreement was unenforceable. The Court of Appeal held that having relied on the collective agreement to dismiss the employee, the employer was estopped from urging that the agreement was unenforceable. In *African Continental Bank v Nwodika,*[54] Ubaezeonu J. C. A. made effort to move the law beyond the traditional question of whether the collective agreement was incorporated into the contract of employment. The learned justice held that the question whether or not a collective agreement would bind an employer in an individual employee's action should

[51] (2001) 6 NWLR (Pt 708) 224.

[52] In Daniels v Shell BP Petroleum (1962) 1 All NLR 19, it was held that a custom or trade practice may be presumed to have been incorporated into the terms of employment where no express provision is agreed.

[53] (2001) 15 NWLR (Pt 735) 114; Cf: African Continental Bank Plc v Nbisike (1995) 15 NWLR (Pt. 416) 725 where both parties relied on the same collective agreement and the Court of Appeal, per Edozie J.C.A. held that the contract was not enforceable. Also see African Nigeria Plc v Osisanya (2001) 1 NWLR (Pt 642) 598 where both the employer and the employee relied on the collective agreement but the court held that the dismissal procedure contained in the collective agreement was not binding on the employee as the collective agreement was not justiciable.

[54] (1996) 4 NWLR (Pt 443) 470.

depend on a variety of factors, namely: if it was incorporated into the contract of employment, if one exists, the state of the pleading; the evidence before the court; and the conduct of the parties.[55] By this multiple approach the court is not to consider only the question of incorporation of the collective agreement into the employee's contract of employment in isolation in the determination of whether the collective agreement is enforceable. It is only a factor among others to be considered by the court. Similarly, where the provisions of a collective agreement have been acted upon by management in the past in a manner that suggests that it is binding, such as taking benefit of it in the past against an employee, the agreement would be enforceable without the necessity of it being incorporated into an individual employee's contract of employment. In *Adegboyega v Barclays Bank of Nigeria*,[56]Akibo Savage, J held that where an employer had acted on a collective agreement in such a way as to give the impression that it is binding, the agreement would be taken to have been impliedly incorporated into an individual employee's contract of employment. This is because to allow it would mean that the court now allows a party to approbate and reprobate at the same time.[57]This could be seen as a form of estoppel.

### 4.3 By the Provision of Section 3 of the Trade Disputes Act[58]

Section 3 (1) of the Trade Disputes Act provides that where there is a collective agreement for the settlement of a trade dispute, at least three copies of the agreement are to be deposited by the parties thereto with the Minister, who has a discretion to make an order as to the enforceability of the agreement or a portion of it. The effect of this provision is that for an agreement reached from bargaining for the settlement of a trade dispute to become binding, it will need the consent/approval of the Minister, who may decide otherwise or on the part he deems fit. The implication is that before the Minister can make an order under section 3(3) of the Act, the collective agreement must also relate to the "settlement of a trade dispute"[59]. A collective agreement which or part of which does not relate to the settlement of a trade dispute will not come within the ambit of section 3 of the Act. The issue that arises with regards to this provision is, what if it had to do with a collective agreement reached with a government establishment, the minister been a government representative. In exercising his discretion, will justice be served? Will there not be a biased decision? It deserves pointing out that it is a view shared by many scholars, that given the numerous industrial crises that have occurred in Nigeria over the years in both the public and private sectors, and given thought to the doubtless inclination of government to the prevention of such crises, one could safely surmise that the Minister will not frequently order collective agreements or parts thereof to be binding between employers and workers.[60]The requirement that all collective agreements for the settlement of trade disputes need to be received and approved by the Minister of Labour and Employment, has whittled down the efficacy of collective bargaining as a tool for resolving matters arising from trade disputes in industrial relations in Nigeria and this should not be so.

[55] ibid at pp 473-474.
[56] (1977) 3 CCHCJ 497.
[57] Halsall v Brizell (1957) Ch. 197.
[58] Cap T8 Laws of the Federation of Nigeria 2004.
[59] ibid.
[60] Iwunze (n 2) 6.

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### 4.4 In line with Section 7 (1) (c) (i)[61] of the National Industrial Court Act[62] and the Third Alteration of the Constitution

The Third Alteration to the Constitution has brought modification to the applicability of a collective agreement to the benefit of an individual employee and to the extent to which an employee can rely on such agreement.[63] Under the provision of section 254 (1) (j) (i) of the Constitution, the National Industrial Court has been bestowed with the jurisdiction in terms of the interpretation and application of any collective agreement. The provision of Section 7(1) (c) (i) of the National Industrial Court Act (NICA) which provides that "The Court shall have and exercise exclusive jurisdiction in civil causes and matters – relating to the determination or any question as to the interpretation of any collective agreement" also gave jurisdiction to the Industrial Court to interpret collective agreements. The Court is required to carry out this jurisdiction, in line with the provision of section 7 (6) of NICA,[64] by considering good or international best practice in labour. This, the Court can do by borrowing a leaf from international instruments and steps taken by other countries in that area. For example in the United States, a collective agreement is seen as an enforceable agreement and the privity rule is circumvented by two ways; by custom and usage, where if an employee sues an employer for breach of the terms of a collective agreement, he is only saying that the terms of his employment, by custom and usage cannot be different from those contained in a collective agreement entered between his union and the employer. Secondly the agency theory, where the trade union acts as the agent of its principals who are members of the union so that whenever it bargains with the employer, it is in fact bargaining for the members.[65] Also in England, a third party can enforce a collective agreement, if it purports to confer a benefit on that third party.

It is encouraging to note that the Nigerian Industrial Court have in recent times begun to jettison the strict application of the privity rule in the interpretation of collective agreements. They now hold that an employee can seek a benefit under a collective agreement, however, the employee seeking to rely on a relevant collective agreement must first provide evidence and convincing proof of membership of the trade union.[66] The rule which now appears settled is analogous to the privity rule in the general law of contract. However, it is important to note that the approach of the Court is that mere evidence of deductions of check-off dues is not enough proof,[67] neither is the fact that membership was pleaded and not disputed by the other party enough evidence.[68]The stand taken by the Court is that proof required has to be by direct documentary evidence. This stand puts an

[61] It provides that a court shall have and exercise jurisdiction relating to the determination of any question as to interpretation of any collective agreement.

[62] Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010, Section 254(c) is also very instructive here.

[63] Onuorah v Access Bank Plc (2015) NLLR (Pt 186) 90-91 paras H-B.

[64] 2006, which provides that; "the court shall in exercising its jurisdiction or any of the powers conferred upon it by this Act or any other enactment or law, have due regard to good or international best practice in labour or industrial relations and what amounts to good or international best practice in labour or industrial relations shall be a question of fact."

[65] See C O Gregory, 'The Enforcement of Collective Agreements in the United states' (1968) Current Legal Problems 168; C. W Summers, 'Collective Agreements and the Law of Contract' (1969) 78 Yale Law Journal 525.

[66] Onuorah v Access Bank PLC (supra) where it was held that "actual proof of membership is key to recovery under a collective agreement."

[67] Habu v NUT Taraba State (2005) 4 FWLR (Pt 283) 646.

[68] ibid paras B-E.

unnecessary extra burden on the employer. Proof of direct deductions of check-off dues by employer and remittance to a trade union should ordinarily be sufficient evidence of membership of that trade union, without more.

With this shift, the provision of section 23 (2) (d) of the Trade Unions Act which prohibits the Court from entertaining any legal proceeding instituted for the purpose of directly enforcing "any agreement such that every party thereto is one or other of the following, that is to say a trade union, a federation of trade unions or the central labour organization", in the face of the provision of section 254 C of the Constitution on the jurisdiction of the National Industrial Court over collective agreements appears redundant. Ordinarily, a collective agreement between the workers union and an employer would not be caught up by this provision but this is not the case with an agreement between an employers and employees union, considering the interpretation of the trade union under section 1 of the Act except that provision will be interpreted as referring to workers only.[69] Section 16 (1) of the Trade Disputes Act also gives the National Industrial Court power to interpret any term or provision of a collective agreement and its decision final and conclusive. It is my view that there is still a lot of work to be done by the National Industrial Court with the enormous power given to them in changing the status of collective agreement in Nigeria.

## 5. EXCEPTIONS TO THE ENFORCEMENT RULES

Although it is advocated that where there is no clear intention of parties not to be bound, written or implied, collective agreements should be not enforceable, there are exceptions. Generally, agreements once it contains the essential ingredients of an enforceable contract are considered binding on the parties to it and therefore enforceable. The law is that the first duty of the Court when contracts are before it is to give construction to the effect of the agreement of the contracting parties[70]and this they are enjoined by the law of contract to do. This is based on the principle of capacity to contract and freedom of contract. The question then becomes whether possession of capacity and freedom to contract validates contracts of employment to enslave ones contracts of employment contrary to the provisions of existing statutes[71] and contracts of employment against public policy? The answer obviously is in the negative[72] as such a contract would have failed the test of legality of a contract. It is also the position of the law that the Court will also not enforce a contract of employment, the terms of which are so stringent that the employee is virtually treated as his employer's slave or chattel,[73] neither will the Court enforce a contract obviously tainted with undue influence. In such cases, the Court ordinarily will come to the rescue of the weaker party. Also, where it has to do with collective agreements, there is still the need for regard to be paid to the above-mentioned issues. To insist on the enforcement of a collective agreement tainted with the abovementioned issues will be making the party affected slave to an agreement that ordinarily should not be justiciable.

[69] In the United Kingdom where the probation originated from, the employers' association no longer falls within the definition. See section 28 of UK Trade Union and Labour Relations Act, 1974 as amended.
[70] Lagos State, Government v. Toluwase [2013] 1 NWLR (Pt 1336) 571.
[71] Example is a 'Yellow Dog Contract', where an employee agrees, as a condition of employment, not to be a member of a labor union. Garner (n 6) 1647.
[72] See AFRILEC Ltd v Lee [2013] 6 NWLR (Pt 1349) 15.
[73] *Chitty on Contract* (24th edn Sweet and Maxwell 1980).539.

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## 6. CONCLUSION AND RECOMMENDATIONS

### 6.1 Conclusion

With the developmental and statutory changes in the status of collective agreement in other jurisdictions, the failure of Nigeria to take adequate steps to make collective agreement reached by virtue of a painstaking deliberation and negotiation between the concerned bodies, enforceable is most unfortunate. The continued use of the common law principle on the issue of collective agreement and the position of our labour statutes which looks more like a codification of the common law principle is a sign of an attempt to stifle the progress of the Nigerian Labour and Industrial law in that area. Why Nigeria should continue to dwell in the shadow of these common law principles with regard to collective agreement even when it has been buried since 1999 in the jurisdiction where it came from[74]is a question that begs for an answer. Consequent upon want of privity, individual employees lack *locus standi* to enforce collective agreements validly reached on their behalf by their unions and for a supposed absence of intention to create legal relations, unions are unable to enforce collective agreements reached with employers or employers' associations. The steps been taken of recent by the National Industrial Court in line with section 254 C of the Constitution and the provision of section 7(1)(c)(i) and section 7(6) of NICA for an employee to benefit from an agreement reached on his/her behalf is commendable and a much expected one, however there is the need for more to be done. There is indeed an urgent need for a jurisprudential shift to make a clear provision for the justiciability of collective agreement and make the enforcement of collective agreement more flexible.

### 6.2 Recommendations

There is the need for a legislative and statutory change in the Nigerian labour and industrial relations law. Thus, a reform of same to align with international best labour practices and global trends is recommended. One of the ways to achieve this is the enactment of a new labour law to be known as the Labour Relations and Employment Rights Act. The contents of this Act should be in line with international best labour practices and decent work agenda, putting into consideration global trends in international relations. The Act should amongst other things clearly provide for the interpretation and justiciability of collective agreement. It should also clearly provide for the right of parties to the agreement and the right of an individual member of the union to claim benefit under it. The change should also consider the right of a third party to whose benefit a right insures in a collective agreement to which he is not a party, to claim under the agreement. This should receive legislative imprimatur in Nigeria. This is the trend in the more advanced jurisdictions like England, United States of America, amongst others who have enacted legislations that have effectively nullified the common law doctrine of privity of contract so that in those jurisdictions, third parties could claim under such contracts which, though they are not parties to, some benefit insured in their favour. The legislature should also come up with an instrument where management (Government) shall be compelled to recognize employees and their union(s) in collective bargaining and to see the act of non recognition of employees union(s) as a criminal offence for peace and growth of the nation's economy.

[74] See United Kingdom Contracts (Right of Third Parties) Act 1999, Section 1.

Also, there should also be a review on the provisions on strike, as the present provision appears more like an attempt to frustrate the enforcement of collective agreement.

Furthermore, whilst we wait for a clear statutory legislation on the justiciability of collective agreements, the Court should in resolving cases, be able to improvise and apply the severance rule[75] in the general law of contract, such that provisions in a collective agreement which admit of immediate enforcement can be enforced while leaving out those that are merely aspirational and futuristic. The Court should also begin to apply *the doctrine of estoppel*, which has received statutory affirmation in our laws,[76] whereby a court may preclude or *estop* a person from going back on his word or alleging facts that are contrary to his promises or representation. The application of this principle in the interpretation of the collective agreement and the intention of the parties thereto ordinarily will make collective agreement justiciable and applicable to parties to it and individual employees who desires to claim a right under it. That will put an end to issue of it been a mere gentleman's agreement binding only in honour, with no intention to create legal relation. All the employee would need to show is that he believed the representation of the other party to be true and acted upon it.[77]

These steps if taken will help bring to an end the industrial disharmony and poor employer-employee relation in Nigeria leading to industrial actions and the hardship associated with same, due to the failure on the part of employers to abide by the terms of collective agreements voluntarily reached with workers' unions, especially in the public sector. The numerous cases involving the Academic Staff Union of Universities (ASUU) and the Academic Staff Union of Polytechnics (ASUP) on the one hand and the Federal Government of Nigeria on the other hand which usually disrupts tertiary education are instructive.

[75] Under the severance rule, where a contract has parts which are void and others which are not, the Court could excise the void part and enforce the other parts: Hopkins v Prescott (1847) 4 C. B. 578; Goodinson v Goodinson (1954) 2 Q. B. 118; Adesanya v Otuewu (1993) 1 NWLR (Pt. 270) 414.

[76] Evidence Act, No 18 2011, Section 169.

[77] Acting upon it could mean a lot, including the fact that the employee continued working in that establishment despite better offers from another establishment, etc.

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