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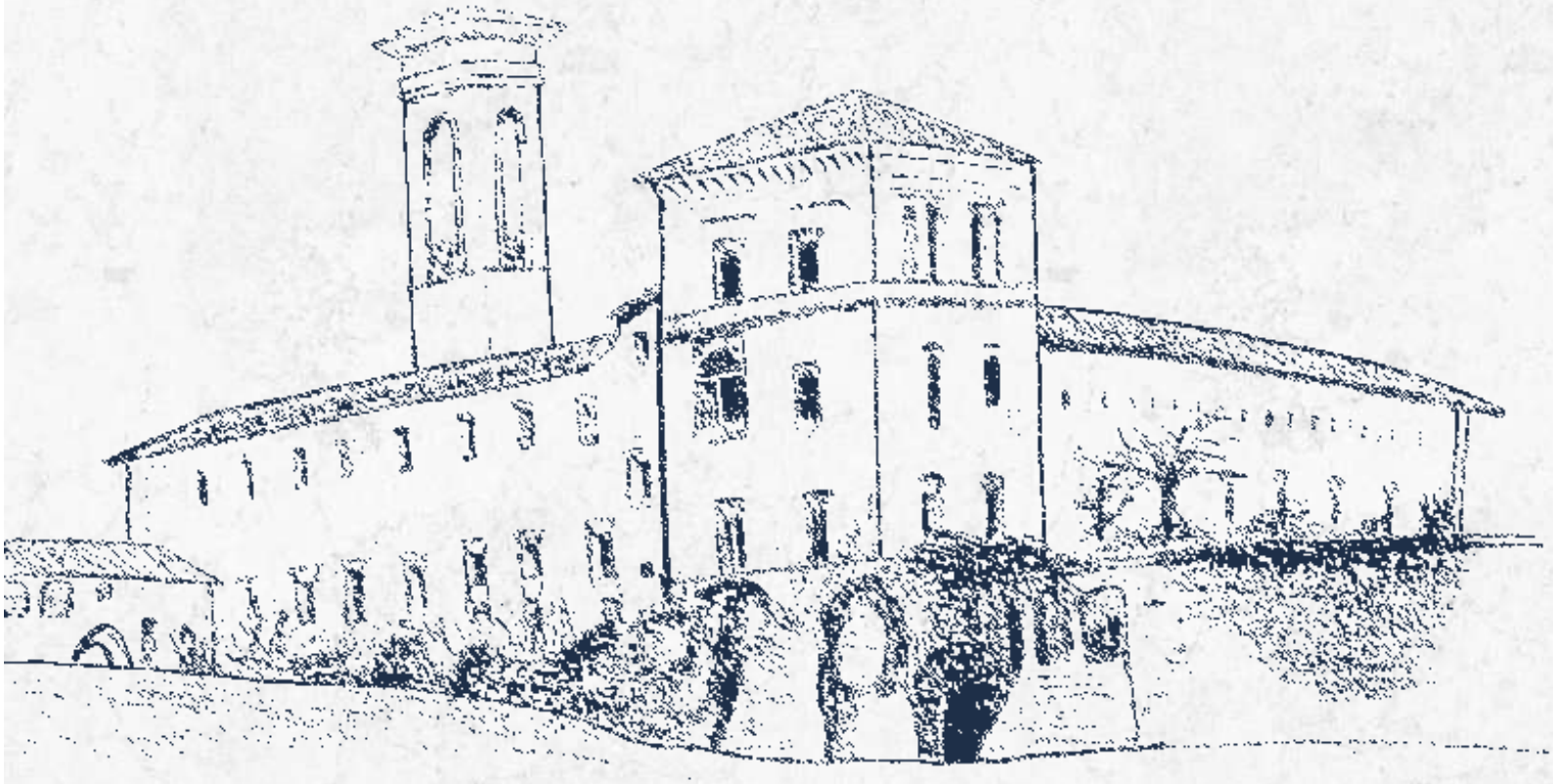

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Dialectics on the Principle of Enforcement of Collective Agreements in Nigeria: A Reappraisal

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Abstract

Collective agreement just like any other contract is bedevilled with enormous challenges. This paper examines the fate of Nigerian employees against the backdrop of the practice of statutory and common laws associated with the enforcement of duly concluded collective agreements in Nigeria. However, as this paper will reveal, a somewhat latitude to enforcing an ensuing collective agreement has evolved since the introduction of the National Industrial Court Act 2006 and the Constitution Federal Republic of Nigeria (Third Alteration) Act 2010. The findings expose several inconsistencies in the judicial approach, with the majority of its decisions being predicated upon the rule that collective agreements are not binding which is a relic of the antiquated common law principle that a collective agreement is merely a 'gentleman agreement'. This paper, in reflecting on the core labour standards of the International Labour Organisation (ILO), suggests policy reforms and positive change in judicial attitude as panacea to bridge the gap and pace up the lag behind international labour standards.

Keywords: *Collective Agreement, Nigeria, National Industrial Court Act, Constitution (Third Alteration) Act, Enforcement, International Labour Organization.*

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1. Introduction

It is rather safe to begin by stating that collective agreements have gained increased relevance in the 21st century.[1] The compelling nature of collective agreement is tied to the fact that there is no contract of employment that can possibly reduce all its terms in a single document, or envisage all the terms that should form part of the contract in the future.[2] This provides collective agreements with veritable basis in augmenting gaps and deficits arising from contracts of employment.[3] When it comes to the enforceability of collective agreement, its enforceability in Nigeria remains problematic, because the courts have taken the common law position that collective agreement is at best 'a gentleman agreement', which is merely 'binding in honour', save where it is incorporated into the contract of service, whether expressly or by implication. The courts have taken this position because of the doctrine of privity of contract, as most collective agreements are usually between the employers on one hand and trade unions on the other. An individual employee seeking to benefit from it is not regarded as a party to it.[4] Additionally, parties to a collective agreement are presumed not to intend that it is binding on them; hence it is unenforceable.[5] This practice has created untold hardship for the individual employee who seeks to enforce the collective agreement and also offends his constitutional right to freedom of association. A somewhat legal reprieve, however, has evolved. With the coming into effect of the National Industrial Court Act 2006 and more importantly, the elevated status of the National Industrial Court (herein after referred to as "NIC") and the consequential expansion of its jurisdiction in the Constitution (Third Alteration) Act 2010, the NIC can now assume jurisdiction over labour disputes, including disputes concerning the interpretation and application of collective agreements.[6] Plausible as it may seem, the extent of the enforceability of such agreement remains to be seen several years after, bearing in mind the recent tilt by the Supreme Court towards the antiquated common law position.

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[1] E.E. Uvieghara, *Labour Law in Nigeria,* Malthouse Press Limited, Lagos, 2001, 29.
[2] M. Zechariah, *New Frontiers on Legal Enforceability of Collective Agreements in Nigeria, in Current Jos Law Journal,* 2013, vol. 6, n. 1, 294.
[3] O.O. Ogbole, P.A. Okoro, *Critique of Ministerial Interference in Enforceability of Collective Agreements, in OAU Journal of Public Law,* 2020, vol. 1, n. 1,114.
[4] *Union Bank v Edet* (1993) 4 N.W.L.R. (Pt. 287) 288.
[5] *Union Bank v Edet op. cit.*
[6] National Industrial Court Act section 7(1)(c) & (6); Constitution (Third Alteration) Act section 254C(1)(j).

Against this backdrop, the objective of this paper is to reappraise the existential legislative and judicial attitude in Nigeria towards the enforcement of collective agreement; juxtaposing same with ILO's standard prescriptions on collective agreement with a view to identifying the loopholes, and suggesting panacea capable of bridging the gaps for enhanced effectiveness in labour dispute resolution. In achieving this, the paper is divided into parts. Part I is introductory. Part II focuses on the definition of collective agreement, negotiable issues to be included in a collective agreement and the regulatory framework for collective agreement under Nigerian labour jurisprudence. Part III scrutinises the inherent conflict of the dual application of statutory and common law interpretation and enforcement of collective agreement in Nigeria. In so doing, this part also critically analysed certain recognised, albeit limited circumstances under which collective agreements would be enforceable by the courts. The novel provisions on the enforceability of collective agreements arising from the Constitution (Third Alteration) Act and the powers conferred on the National Industrial Court were also discussed under this part. Part IV examines the standard prescriptions of ILO on collective agreements and the extent to which the Nigerian court can rely on it in its decisions. Part VI provides a conclusion to the study highlighting the gaps and laying to bare the deplorable Nigerian legislative and judicial attitude towards the enforceability of collective agreement when placed on the pedestal of international labour standards. This part further suggests recommendations in securing the enforcement of collective agreement in Nigeria.

2. Collective Agreement under Nigerian Labour and Industrial Law

Basically, collective agreement is the by-product of collective bargaining which has been defined as "a voluntary negotiation between employers or employers' organisations and workers' organisations with a view to the regulation of the terms and conditions of employment – which ends in a collective agreement".[7] Without collective bargaining, there can be no collective agreement.[8]

[7] ILO, The Right to Organize and Collective Bargaining Convention (No. 98) 1949, Article 4.

[8] Although the right to collective bargaining is a core labor standard as defined by the International Labor Organization, workers in Nigeria continue to lack this basic right. Neither the Constitution nor the Labour Act is characterised with the recognition of the statutory duty to bargain. The legal draftsmen have opted for a paradigm which allows the social partners through the exercise of power to resolve their own arrangements. The

Under the Nigerian Labour and Industrial Law, the following laws define collective agreement; the Labour Act,[9] the Trade Dispute Act[10] and the National Industrial Court Act[11]. Collective agreement under the Labour Act is defined as "an agreement in writing regarding working conditions and terms of employment concluded between an organisation of employers or an organisation representing employers (or an association of such organisation), of the one part, and an organisation of employees or an organisation representing employees (or an association of such organisation), of the other part".[12] The provision talks about working conditions and terms of employment of workers, and is analogous to the definition of collective agreement under the National Industrial Court Act,[13] unlike the definition under the Trade Dispute Act,[14] which relates it to "settlement of disputes on terms of employment and physical conditions of work". From the definitions provided under these Acts, the central motif is on terms of employment and conditions of work. The poser here becomes: What is the nature of issues to be included in a collective agreement as constituting the terms of employment and conditions of work? Without prejudice to the fluidity and dynamics of the collective bargaining process in Nigeria, we can examine the nature of issues to be included in a collective agreement under the following four broad categories, namely:

1. **Wage Related issues** – These include issues like how basic wage rates are determined, cost of living adjustments, wage differentials, overtime rates, wage adjustments and so on.
2. **Supplementary Economic Benefits** – These include issues as pension plans, paid vacations, paid holidays, health insurance plans, dismissal plans, supplementary unemployment benefits and so on.

power play is given legal impetus by the provisions on condition of employment vis-à-vis the protected right to freedom of association and the recognition of trade unions. See section 9(6) of the Labour Act 1974, section 40 of the Constitution Federal Republic of Nigeria and section 25 of the Trade Unions Act 1973; See also S.F. Obiora, *Collective Bargaining Trends in Nigeria – Living up to the International Labour Organisation Standards?, in Cambridge Law Review,* vol. 7, n. 1,123.

[9] Labour Act, Cap L1, Laws of the Federation of Nigeria 2004.

[10] Trade Disputes Act, Cap T8, Laws of the Federation of Nigeria 2004.

[11] National Industrial Court Act 2006.

[12] Labour Act section 91.

[13] National Industrial Court Act section 54.

[14] Trade Disputes Act section 48.

3. **Institutional Issues** – These consists of rights and duties of employers, employees and unions, including union security, check off procedures, hour of work, quality of work-life program and so on.
4. **Administrative Issues** – These include issues such as seniority, employee discipline and discharge procedure, employee health and safety, technological changes, work rules, job security and training, attendance, leave and so on.[15]

Collective agreement in Nigeria is regulated by the dual application of the practice of statutory and common laws. The term has common features both in statutory and common laws' definitions. The difficulty, however, lies in the enforceability of collective agreement. Under common law, collective agreement is regarded as a gentleman agreement only binding in honour.[16] Statutorily, however, the phenomenon is subjected to the act of a third party before it could become enforceable at law as between the employer and employee.[17] This paper, therefore, contends that the orthodox application of statutory and common laws on collective agreement does not allow for a thriving employment and industrial relations. The reason is not far-fetched. Collective agreements are outcome of painstaking deliberation between employers of labour and their employees or employees' representative,[18] yet they are not considered as a binding document. As a prerequisite for enforceability, the hapless employees are placed at the mercy of an unwilling third-party, the Minister or Commissioner of Labour as the case may be,[19]to make an order upon the deposit of at least three copies of such agreement within 30 days of its execution.[20]

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[15] International Training Center of ILO, Bureau for Workers' Activities (Actrav) Course on Issues of Collective Bargaining, http://actrav-courses.itcilo.org/en/a3-02571/a3-02571-resources/collective-bargaining-reading-materials/chapter-3/at_download/file, accessed 15 September 2021.

[16] *Ford Motor Co. Ltd. v Amalgamated Union of Engineering and Foundary Workers* (1969) 1 WLR 339.

[17] Trade Disputes Act section 3(1).

[18] I. Okwara, C. Aniekwe, I. Oraegbunam, *The Status of Collective Agreement in Nigerian Labour and Industrial Law: An Appraisal, in International Review of Law and Jurisprudence,* 2021, vol. 3, n. 2, 39.

[19] Section 39(1) & (3) of the Trade Disputes Act authorises the Minister in charge of Labour Matters to delegate his power under the Act with regard to collective agreement obligations to the appropriate State Commissioner charged with the welfare of labour.

[20] Trade Disputes Act section 3(1).

3. Enforceability of Collective Agreement in Nigeria: A Confused Approach?

After all the impetus given to the process of collective bargaining both in law and in practice, it is pertinent to ask this question: Is collective agreement in Nigeria enforceable in a court of law? Ordinarily, under the Nigerian labour law, there is no presumption of intention as to the binding force of a collective agreement between the parties. The nearest it has gone in attaching legal enforceability to a collective agreement is the provision of section 3(1) of the Trade Disputes Act which stipulates expressly that parties to a collective agreement are expected to deposit with the minister of labour and productivity at least three copies of the agreement within 30 days of its execution, and when such deposit is made the minister may by order make the agreement or part thereof binding on the parties to whom it relates. The effect of this provision is that for a collective agreement to be binding it will need the approval of the minister, who may in the latitude of his discretion decide otherwise or on the part he seems fit. The posers here become: Why does the Act in attaching legal enforceability to a collective agreement subjects it to a confirmation order by the minister? Does not this condition precedent to the enforceability of collective agreement constitute an affront to the right to freedom of association;[21] if citizens given the right to associate are ruled out from enforcing agreement they entered into? Will it be sustainable for a law in derogation of this constitutional prerogative to usurp that power and hand it over to someone else? Undoubtedly, this conservative legislative approach has the adverse effect of impinging the voluntariness of collective bargaining and its prestige as a reconciliatory tool for trade disputes in Nigeria.

At this juncture, an issue which needs to be examined is what is the faith of any such collective agreement, if the minister does not make an order under the Act confirming the agreement? In answering this question, it appears that recourse will be made to the common law rules. It is the principle of common law that a contract of employment, as any other contract, is strictly the affairs of the employer and the worker. Under the doctrine of privity of contract the trade unions which, incidentally, are the principal negotiators on behalf of the workers are, therefore, regarded as interloper, since they are never parties to the original contract of

[21] Constitution Federal Republic of Nigeria section 40.

employment between the worker and employer.[22] In the same token, an individual employee cannot seek a benefit under a collective agreement since most collective agreements are usually between the employer and representatives of the workers.[23] The probing question here becomes: Whether the individual employees who are members of the union are in the strict sense strangers to an agreement they donated powers to their representatives to reach on their behalf? This general attitude and reliance by the court on the doctrine of privity crystallised into the common law principle that collective agreements were and are not enforceable at law between the parties thereto.

If collective agreements are not enforceable and are generally "binding in honour", of what purpose is the process of collective bargaining? The answer is not far-fetched. Although a contract of employment is not compulsorily subject to the terms of collective accord, the agreement has its own special utility. In the first place, employers and workers do, in the majority of cases, honour their "gentleman's agreement" which is driven by the fact that neither of the parties wish the sanction to apply to their agreement. But, more importantly, collective terms are, in fact, usually incorporated into the contract of employment.[24] As aforesaid, a collective agreement based on the doctrine of privity does not translate to an employment contract, neither does it create one. An individual employee who intends to rely on such agreement in claim of a right or to derive a benefit must show that it has been incorporated into his contract of employment.[25] Quite often, this is done by express terms although they may be incorporated by reference. Where this is the case, the terms are automatically transmitted from collective down to individual level.[26] Once the collective agreement is incorporated into the contract of employment, by the act of the parties, then it becomes binging on them and enforceable.[27]

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[22] It is still possible for a trade union which has reached an agreement with an employer or employers' association to be able to present credentials acceptable in law to show that it is a true agent of its members for whom it purported to have acted. The principle of agency is, however, a difficult principle to apply in relation to trade unions vis-à-vis their members.

[23] *Spring v National Amalgamated Stevedores and Dockers Society* (1965) 2 All ER 221.

[24] A. Emiola, *Nigerian Labour Law (4th ed.),* Emiola Publishers, Lagos, 2008, 500.

[25] *African Continental Bank v Benedict Nbisike* (1995) 8 NWLR (Pt. 416) 725; *Ben Chukwumah v Shell Petroleum Development Co*. (1993) 4 NWLR (Pt. 289) 512, 543; *Union Bank of Nigeria Ltd v. Edet op. cit.*

[26] *National Coal Board v Galley* (1958) 1 All E.R. 91; (1958) 1 W.L.R. 16.

[27] Recently, the courts have begun to jettison the strict application of the privity rule in interpretation of collective agreement. They now hold that an employee can seek a

Failure to expressly incorporate some term of collective agreement does not, however, rule out the possibility of its being so incorporated as an implied term of the contract. But the possibility that the parties intend it to form part of the contract of employment must be very high; it must be of such a nature that, in the words of Lord Wright, "it can be predicted that it goes without saying; some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended....The implication must arise inevitably to give effect to the intention of the parties."[28] Thus in *Batisen v John Holt & Co.,*[29] which contained no express incorporation, the court said that the agreement would be deemed to have been incorporated where the parties have been acting on its terms. A systematic glance from the passage just quoted would reveal that the knowledge of the parties is a relevant factor in determining the question whether or not a term is to be presumed incorporated into a contract of employment. In the Nigerian case of *Daniels v Shell B.P. Petroleum Development Co.,*[30] it was decided that a custom or trade practice may be presumed to have been incorporated into the terms of employment where no express provisions are agreed. And as it were, most of the customs and practices in a trade today are often a direct result of collective agreements. The decision of the Court of Appeal in *Sagar v Ridehalg & Sons Ltd.*,[31] indicates that a worker may be subject to a term of collective agreement although he might have known nothing about it.

Going forward, the enforceability of incorporated collective agreement in Nigeria was given judicial flavour by the Supreme Court in 2020, in the recent case of *B.P.E. v Dangote Cement Plc.*[32] Here, the appellant (BPE) supervised the privatization scheme which saw the sale of the Benue Cement Company Plc by the government to Dangote Industries Ltd. As a prelude to the sale, the majority of the employees of Benue Cement Company Plc were laid off and paid their terminal benefits. However, in the course of the privatization, the employees of Benue Cement Company Plc., who were sacked due to the privatization scheme, sued the appellant and the Benue Cement Company Plc., challenging the amount paid to

benefit under a collective agreement. The employee must, however, first provide evidence and convincing prove of his membership. See Onuorah v Access Bank Plc (2015) N.L.L.R. (Pt. 186), where it was held that "actual proof of membership is the key to recovery under a collective agreement".

[28] *Luxor (Eastbourne) Ltd. v Cooper* (1941) A.C. 108, 137; (1941) 1 All E.R. 33.

[29] (1973) 8 CCHCJ/61.

[30] (1962) 1 All N.L.R. 19.

[31] (1930) All E.R. 228; (1931) 1 Ch. 310.

[32] (2020) 5 NWLR (Pt. 1717) 322.

them as terminal benefits, on the grounds that the computation of the benefits ought to be based on the Staff Handbook of Benue Cement Company Plc and not based on the allegedly fraudulent letters of 26th and 27th October 2004. They contended that the appellant gave them blank forms (i.e., the letters referred to above) to sign after which it proceeded to insert bloated figures in the documents as the employees' terminal benefits. On appeal, the Supreme Court, *per* Galumje (JSC), pointedly held as follows:

> Any collective agreements, except where they have been adopted as forming part of the terms of employment are not enforceable. The enforcement of such agreement is by negotiation between the parties to the agreement. In the instant case, there is no evidence that the exhibits referred to as entitling them to certain payment were adopted as forming part of the employment of the respondents....The exhibits are therefore not enforceable. See UBN Ltd v. Edet (1993) 4 NWLR (Pt. 287) 288. The failure to act in strict compliance with the exhibits is non justiciable. The order directing the appellant to pay balance of the terminal benefit by the lower court is totally wrong and it is hereby set aside.

From the above decision of the Supreme Court, specifically on the issue of collective agreements, three points can be deduced, namely: (1) That a collective agreement is not enforceable unless it has been incorporated by the parties; (2) that the enforcement of a collective agreement is by way of negotiation; and (3) that the failure to act in strict compliance with a collective agreement is not justiciable.[33]

Despite Nigeria's dire collective labour outlook, it may be argued that the provision regarding enforceability of collective agreement under the Act is unequivocal and to all intents and purposes, the common law position is utterly usurped and statutorily precluded in Nigeria. Undoubtedly, it is the intention of the Act that once the Minister or Commissioner makes an order on the status of an agreement, then the agreement becomes enforceable at law as between the parties thereto. This contention appears to be a truism when considered in the light of the elevated status and expansive jurisdiction of the NIC under the law. By virtue of section 7(1) of the National Industrial Court Act, the NIC is vested with exclusive jurisdiction in civil causes and matters relating *inter alia* to labour,

[33] The above points were similarly the position of the Court of Appeal in *UBN vEdet, op. cit,* which the apex court referred to in the case at hand; See also V. Chukwuma, *B.P.E. v Dangote Cement Plc: The Enforceability of Unincorporated Collective Agreement in Nigeria, in University of Lagos Law Review,* 2021, vol. 4, n. 2, 257.

including trade unions and industrial relations. The court's jurisdiction is expanded under paragraph (c) of section 7(1) to include the "interpretation of collective agreements, trade union constitution as well as its own award or judgment".

In addition, there is an improvement on the jurisdiction of the NIC due to the amendment of the Constitution. The advent of the Constitution (Third Alteration) Act 2010 introduced a new dispensation in the Nigerian labour jurisprudence where labour disputes can be resolved with inflexibility and this includes the relaxation of the operation of common law rules where necessary. His lordship, Akaahs (JSC) aptly noted this point when he held as follows:

> … the constitution was amended by the Third Alteration to the 1999 Constitution which recognized the court as a specialised court and provided in section 254C the exclusive jurisdiction of the court over all labour and employment issues. Specialised courts of limited and exclusive jurisdiction are seen as fulfilling a growing need for expertise in increasingly complex areas of law. The resolution of labour and employment disputes is guided by informality, simplicity, flexibility and speed. Specialised business courts will no doubt play an important role in the economic development of the country.[34]

On the issue of jurisdiction of the court to enforce collective agreement, section 254C(1)(j)of the Constitution(Third Alteration) Act 2010 empowers the NIC to not only "interpret", but also to "apply" collective agreement. Section 254C(1)(j) states that the NIC shall have and exercise jurisdiction to the exclusion of other courts in civil cases and matters relating to the determination of any question as to the interpretation and application of any collective agreement. This suggests that parties to a collective agreement no longer have to incorporate its terms in contract of employment before it can be enforceable. This is a breakthrough from the common law position and the NIC have been applying the law. In *Valentine Ikechukwu Chiazor v Union Bank of Nigeria,*[35] the NIC had suggested that this improvement is the basis for the recognition of collective agreement under the law. The NIC held that the implication of this provision is that since the court has the power to apply collective agreements, it follows that they are enforceable and binding. The NIC

[34] *Skye Bank Plc v Victor Anaemem Inwu*(2017) 16 NWLR, at 162-163, paras. G-H, A-B, respectively.

[35] NICN/LA/122/2014, the judgment of which was delivered on 12 July 2016.

further held that the old position which treated collective agreements as binding in honour only is a common law principle which the NIC is empowered to relax by virtue of sections 13 and 15 of the National Industrial Court Act, where the principle appears to be in conflict with the rules of equity. Therefore, based on the above points, the NIC is fully empowered to apply a collective agreement once it is established that the parties are bound by the agreement. It is immaterial that it was not incorporated into the contract of employment. Similarly, citing *Valentines' case,* the NIC in the case of *Lijoka v First Franchise Service Limited,*[36] held as follows:

> The defendant's counsel had contended that the current state of law on collective agreements as espoused by the Supreme Court in Akauve Moses Osoh & Ors v. Unity Bank Plc (2013) 9 NWLR (Pt. 1358) 1 at 29 is that collective agreements are not legally binding and cannot create legal obligations unless the collective agreement has been incorporated into the employee's contract of employment. This argument of the defendant's counsel reveals the uncritical citation and application of case law authorities out of context. The point I seek to make here is that the cause of action in Osoh arose in 1994, when the action was filed at the High Court of Edo State, Benin long before the Third Alteration to the 1999 Constitution came into being...As at 1994, when the cause of action arose in Osoh, there was no provision of law that permits the interpretation and application of collective agreements as we have under section 254C(1) of the 1999 Constitution. Whatever it was in 1994, section 254C(1) of the 1999 Constitution as inserted by the Third Alteration to the 1999 Constitution has altered that position.[37]

It appears from the above-mentioned cases (*Valentine* and *Lijoka*) that the NIC in appropriating the latitude of interpretation and application of collective agreement provided for under the new labour dispensation is not disposed to accepting arguments that tends to bring back the old common law principle as regards the unenforceability of collective agreements generally. It is apposite to assert that argument reminiscent of the old common law rule where a collective agreement is, at best, treated as a gentleman agreement may not fly.[38]

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[36] NICN/LA/527/2013, the judgment of which was delivered on 6 February, 2019.
[37] Per Hon. Justice B.B. Kanyip, at para. 84.
[38] See *PENGASSAN v MRS Oil Nigeria Plc & 4 Ors,* NICN/LA/595/2012, delivered on 27 May 2020, para. 50.

Paradoxically, the trend and current posture of the NIC would have been simple but for the epileptic situation where the Nigerian courts still allow common law principles which has been buried in the United Kingdom,[39] which colonised Nigeria for its ghost to rare its ugly head in the courts and their decisions against the extant law on the issue at hand as evinced in the cases of *Osho & Ors v Unity Bank Plc*[40] and *B.P.E v Dangote Cement Plc.*[41]Although traces of progress and divergence can be seen under the Third Alteration Act, 2010, however, the judicial emancipation of Nigerian laws from these vestiges of common law has been sluggish and their traces and influence are still very much evident in the jurisprudence of our labour and industrial relations.[42]

Clearly, the above practice of the Nigerian Court appears to be a revolution and negation of the positive nature of Nigeria's legal system. This is especially so when a statute called in aid or issue is not in conflict with any provision of the Constitution or any other existing law. Nevertheless, the courts are enjoined to follow statutory law validly passed and to whittle down any conflicting provisions with the Constitution and other existing laws in specific cases during interpretation and exercise of judicial review powers, in order to arrive at a just decision. Equally, the legislature in appropriate cases may codify or modify decisions of the court to meet changing social, economic and political exigencies.[43] Therefore, if this proposition is eternally correct, legally speaking, then the cardinal rule of engagement in adjudication, interpretation and supervision by the courts and the corresponding enactment, repeal, re-enactment or amendment of laws by the legislature guided by the principle of separation of powers, should apply.[44] In this wise, the courts in Nigeria should therefore be obliged to apply the

[39] Today in the United Kingdom, the doctrine of privity of contract no longer weighs down collective agreements and such agreements become automatically enforceable between the parties if they are reduced into writing and are stipulated to be legally binding. See Contracts (Right of Third Parties) Act 1999 and Trade Union and Labour Relations (Consolidation) Act, 1992.

[40] (2013) 9 N.W.L.R. (Pt. 1358) 1 SC.

[41] *B.P.E. v Dangote Cement Plc, op. cit.*

[42] S.F. Obiora, *op. cit* 151.

[43] For instance, in Nigeria, the legislature at the National Assembly has in recent past intervened and enacted laws to adopt or vary certain courts' decisions like the case of *Mr. Cyriacus Njoku v Dr. Goodlock Jonathan & Ors*. (2015) LPER 24496 (CA), on the issue of the constitutionalism of a Vice President or Deputy Governor, as the case may be, to complete the remaining tenure of office of a deceased President or Governor while in office and the qualification of the said persons to run for another two terms of four years each on the merit.

[44] M. Akpan, *op. cit* 21.

provisions of every validly enacted laws and to *suo motu* raise issues of law relevant to any case at hand and invite counsel to the parties before the court concerned to address the court on such issue(s) notwithstanding that such issue(s) was/were not pleaded.[45] The crux of this ostensibly act of "descending into the arena" by the judge is to enable substantial justice to be done to the parties and to interpret the extant law of the land under the general powers of the court, although as a caution, it need be stated that insofar as a seemingly balanced judgment may be produced, the same might not remedy the judicial unfairness occasioned by the overly interventionist role in the proceedings.[46]

The above notwithstanding, the trial, lower and Supreme Courts in *Osoh & Ors. v Unity Bank Plc.,*[47] failed to adhere to the aforesaid proposition and principle, when neither of the three level of courts called on the parties in that case to address the court on the requirements contained in the Trade Disputes Acts 1990 and 2004. Sections 2 and 39(1) and (3) and 3 and 40(1) and (3), which provisions are in tandem and which require parties to any collective agreement to deposit three copies of such agreement with the Minister of Labour and Employment and/or Commissioner in charge of welfare of Labour at the State level, for an order before such collective agreement could become enforceable at law as between the employer and employees concerned. The decision in the said case certainly worked hardship both on the employer and employees as well as their representative unions concerned. For instance, the matter lasted needlessly for about eighteen years between the trial, lower and Supreme Court. Curiously, again, the three courts rather relied heavily on sections 19, 20 and 47 of the Act (1990), doctrine of privity of contract as well as common law principle – which sees collective agreements as between the parties only and as not binding and enforceable at law generally. This is seemingly an act of inchoate research on applicable law in the said case by these courts which obviously diminishes the right of the workers to belong to and be represented by a trade union as it affects trade disputes and collective bargaining in Nigeria.[48]

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[45] See *Nwigwe v Nwuge* (1999) 11 NWLR (Pt. 626) 314, *Usman v Garke* (1999) 1 NWLR (Pt. 587) 466; *Oshodi v Eyifunmi* (2000) 13 NWLR (Pt. 684) 298 and *Ukaegbu v Nwokolo* (2000) LPER – 3337 (SC).

[46] *Serafin v Malkiewicz & Ors* (2020) UKSC 23.

[47] *Osoh &Ors v Unity Bank Plc, op. cit.*

[48] Constitution of the Federal Republic of Nigeria 1999 section 40; Trade Unions Act section 1 (1).

There is no gainsaying the fact that the Supreme Court in *Osho & Ors v Unity Bank Plc*[49] and *B.P.E. v Dangote Cement Plc,*[50] given the recency of its recapitulation has reverted and further exhumed the coffin of the smothered common law approach where a collective agreement is, at best, treated as a gentleman's agreement. Far-reaching as the submission may seem, it need be stated that by the decision of the Supreme Court in *Skye Bank Plc v Victor Anaemem Iwu*,[51] all decisions of the NIC are now subject to the review of the Court of Appeal and by section 243(4) of the 1999 Constitution (as amended), the decisions of the Court of Appeal in respect of civil appeals from the NIC are final and cannot be further appealed to the Supreme Court. In the final analysis, a decision of the NIC can in appropriate cases be upturned by the Court of Appeal. The poser here becomes whether the Court of Appeal will likely be inclined towards the reasoning contained in the NIC judgments discussed above or rather opt to follow the Supreme Court's position in *Osho* and *BPE's case* in line with the doctrine of *stare* decisis? It will be interesting to see how this confusion will be dissipated in practice in the nearest future. How the court will exercise its inherent appellate jurisdiction in appropriating or derogating from these alternatives remains to be seen.[52] One can only hope that the Court of Appeal when confronted with the question of enforceability of unincorporated collective agreements will adopt the liberal approach of the NIC vis-à-vis the new labour dispensation introduced by the Constitution (Third Alteration) Act 2010. This liberalism in approach undoubtedly reinforces the actualization of the mandate of the NIC in counteracting all manifestations of social injustice and unfair labour practices in the Nigerian labour relations and to dissipate the operations of anachronistic common law principles that proliferates untold hardship for Nigerian worker.

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[49] *Osoh & Ors v Unity Bank Plc, op. cit.*

[50] *B.P.E. v Dangote Cement Plc, op. cit.*

[51] (2017) 16 NWLR 24.

[52] For reasons of space, it is not the place of this article to explore under this head the "pyramidal" or "architectural hierarchy" of Nigerian courts to determine if the courts are bound to follow the recent Supreme Court decisions, or to appraise the legal impetus for derogation from it; rather the paper in glossing over the issue of judicial precedent, seeks to justify the flexible approach of the NIC in the light of recent developments in international labour standards. It is however opined that, though the NIC being a lower court and bound by the apex court's decision in *B.P.E v Dangote Cement Plc*, may still distinguish the decision, being that cause of action in *BPE's case* emanated before the coming into force of the Third Alteration Act, 2010 and it will not be counted against the NIC as a disrespect or gross insubordination to the apex court.

4. Dissipating the Confusion: A Peep into the International Labour Organization Standards

The ILO is the supreme authority on international labour standards. The ILO provides the major human rights instrument that guarantees and advance organisation rights and has carried out an enormous amount of standard-setting work during the 80 years of its existence as it has sought to promote social justice, and one of its chief tasks has been to advance collective bargaining throughout the world.[53] This task was already laid down in the Declaration of Philadelphia, 1944, part of the ILO Constitution, which stated "the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve...the effective recognition of the right of collective bargaining". [54]

In the ILO's instruments,[55] collective bargaining is deemed to be the activity or process leading up to the conclusion of a collective agreement. In Recommendation No. 91,[56] Paragraph 2, collective agreements are defined as:

> all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.

[53] N. Valticos *The ILO: A retrospective and future view, in International Labour Review,* 1996, vol. 135, n. 3-4, 473. See also N. Valticos, *International labour standards and human rights: Approaching the year 2000, in International Labour Review,* 1998, vol. 137, n. 2, 135.

[54] ILO, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference,* 1998, 23-24.

[55] The ILO has adopted a number or instruments dealing directly or indirectly with collective bargaining and related issues: the Collective Agreements Recommendation, 1952 (No. 91), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), the Rural Workers' Organisations Recommendation, 1975 (No. 149), the Labour Relations (Public Service) Convention, 1978 (No. 151), the Labour Relations (Public Service) Recommendation, 1978 (No. 159), the Collective Bargaining Convention, 1981 (No. 154), and the Collective Bargaining Recommendation, 1981 (No. 163).

[56] Collective Agreements Recommendation (No. 91), 1951.

The Recommendation No. 91 goes on to state that collective agreements should bind the signatories and those on whose behalf the agreement is concluded[57] and that stipulations in such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement.[58] However, stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement.[59] It sets out the binding nature of collective agreements and their precedence over individual contracts of employment, while recognizing the stipulations of individual contracts of employment which are more favourable for workers.[60]

On several occasions, the Committee on Freedom of Association has expressed its preference for collective agreements over individual employment contracts, objecting to equal status being given to the latter or to their being used to the detriment of workers belonging to a union.[61] For its part, the Committee of Experts considers that granting primacy to individual agreements over collective agreements does not encourage and promote the effective recognition of the right to collective bargaining.[62] The framework within which collective bargaining must take place if it is to be viable and effective is based on the principle of the independence and autonomy of the parties and the free and voluntary nature of the negotiations; it requires the minimum possible level of interference by the public authorities in bipartite negotiations and gives primacy to employers and their organizations and workers' organizations as the parties to the bargaining.[63] This principle is embodied in the Right to Organise and Collective Bargaining Convention, No. 98, which was adopted in 1949, and which since has achieved near-universal acceptance: as of September

[57] Paragraph 3(1).
[58] Paragraph 3 (2).
[59] Paragraph 3 (3).
[60] The binding nature of collective agreements can be established either by legislative means or by the collective agreement itself, according to the method followed in each country. See paragraph 1(1) & (2).
[61] ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee,* (fourth edition) 1996 para.911. See also ILO, *306th Report of the Committee on Freedom of Association, in Official Bulletin*
1997, vol. 80, n. 1, paras.517-518.
[62] ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations, General report and observations concerning particular countries,* Report III (Part 1A), International Labour Conference, Geneva, 86th Session, 1998, 224.
[63] B. Gernigon, A. Odero, H. Guido, *ILO Principles Concerning Collective bargaining, in International Labour Law Review,* 2000, vol. 139 n.1, 34.

2020, the number of member States having ratified it stood at 168,[64] which demonstrates the force of the principles involved in the majority of countries. Convention No. 98 does not contain a definition of collective agreements, but outlines their fundamental aspects in Article 4:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

In the preparatory work for Convention No. 151 (1978) the interpretation of the term "negotiation" was accepted as being "any form of discussion, formal or informal, that was designed to reach agreement", the term "negotiation" being deemed preferable to "discussion", which did not emphasize the need to endeavour to secure agreement.[65]
On the issue of drafting and registration of collective agreement, the Committee on Freedom of Association has opined that intervention by the public authorities in the drafting of collective agreements is not compatible with the spirit of Article 4 of Convention No. 98, unless it consists exclusively of technical aid.[66] The Committee goes on to observe that any situation which requires prior approval of collective agreements by the authorities amounts to a violation of the principle of the autonomy of the parties to negotiation.[67] According to the supervisory bodies, refusal to approve a collective agreement is permitted only on grounds of errors of pure form or procedural flaws,[68] or where the collective agreement does not conform to the minimum standards laid down by general labour legislation.[69]

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[64] ILO, Ratification of Convention No. 98, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::p11300_instrument_id:312243, accessed 21 September 2021.
[65] ILO, *Record of Proceedings,* International Labour Conference, Geneva, 64th Session, 1978, paras. 64-65.
[66] ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association,* (fourth edition) 1996, para. 868.
[67] ILO, *Freedom of Association Digest,* 1996, *op. cit,* paras. 868-869.
[68] ILO, *Freedom of Association Digest,* 1996, *op. cit,* paras. 868.
[69] ILO, *Freedom of association and collective bargaining,* General Survey of the reports on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Report III (Part 4B), International Labour Conference, Geneva, 81st Session, 1994, paras. 251.

The Committee on Freedom of Association has stated that if the public authority considers that the terms of the imposed agreement are clearly contrary to the economic policy objectives recognized as being in the public interest, the case could be submitted for advice and recommendation to an appropriate consultative body, provided, however, that the final decision would rest with the parties[70]— the overall consideration being aimed at preserving the democratic and voluntary nature of the collective bargaining process. In this wise, the Committee on Freedom of Association has indicated that:

> Collective bargaining, if it is to be effective, must assume a voluntary quality and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining[71]

At this juncture, an issue which needs to be examined is whether the Nigerian Court, after five decades of its membership with ILO,[72] can establish jurisprudential principles based on ratified international labour standards? Can the court prefer any reasonable interpretation that is consistent with ILO's standard prescriptions when interpreting its labour statutes? Strictly speaking, section 254C (2) of the Constitution (Third Alteration) Act 2010 empowers the NIC exclusively to apply any ratified international treaty relating to labour and industrial relations. For clarity, section 254C (2) provides thus:

> Notwithstanding anything to the contrary in the Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.

In Nigeria, international agreements do not automatically have the force of law after ratification; there is a constitutional requirement for every international treaty to be domesticated before it can have the force of law.[73] However, by a curious irony, an exemption exists in terms of international labour treaty. The proviso in section 254C (2) of the same

[70] ILO, *Freedom of Association Digest,* 1996, *op. cit,* para. 872.
[71] ILO, *Freedom of Association Digest,* 1996, *op. cit,* para. 845.
[72] Nigeria is an ILO member since 1960.
[73] Constitution Federal Republic of Nigeria section 12(1); See also *Abacha v Fawehinmi* [2000] 6 NWLR 228.

Constitution which states *"Notwithstanding anything to the contrary in the Constitution"* appears to exclude international labour treaty and convention from the scope of its application. It may be apt to say that whereas Nigeria adopts a dualist approach in dealing with treaties, a monist-like approach is used for international labour treaty and convention. The implication is that the NIC could enforce collective agreement through section 254C (2) since Nigeria has ratified Convention No. 98. Domestication is not required before enforcement by the provision. This is buttressed by section 7(6) of the National Industrial Court Act which further provides a legal ground for the contention that non-domesticated treaties can be applied as examples of international best practices. The section 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 practices in labour or industrial relations shall be a question of fact.

Commenting on the effect of this section, Adejumo rightly observed that:

> By the provisions of section 7(6) of the National Industrial Court Act, the court is permitted and even enjoined to take into cognizance international best practices in industrial and labour relations in arriving at decisions in cases before the court. What amounts to international best practices in a particular instance is a question of fact to be proved by the person urging the court. This provision obviously permits the court to borrow from foreign jurisdiction in tandem with the present global village system. The various conventions of ILO which the member states are enjoined to apply come handy here; and the implication is that NIC will constantly have to take cognizance of these.[74]

It is submitted that a prohibitive and antagonistic interpretation of the Constitution should not be applied to cripple the implementation of Nigeria's voluntary membership and ratification of international agreements, especially as regards the Conventions and Recommendations of the ILO and any derogation from this constitutional prerogative by any court within Nigeria should constitute sufficient grounds for review and

[74] B.A. Adejumo, *The National Industrial Court of Nigeria: Past, Present and Future,* being a Paper Delivered at the Refresher Course Organized for Judicial Officers of between 3-5 years Post Appointment by the National Judicial Institute, Abuja, 24 March 2011, 5.

appeal. However, a remote problem that may likely arise in the application of ILO's Conventions and Recommendations is where such a prescription, though of international standards, is in conflict with an extant Nigerian statute or enactment: What will be the ramification of this in view of the supremacy of the Constitution?[75]

5. Conclusion and Recommendation

It is trite that when the outcome of a collective bargaining process is subject to restrictions manifested in various forms imposed by law or by decision of administrative authorities, labour relations are subverted with the proliferated loss of confidence on the viability of the trade union mechanism particularly when the intervention in contemplation obviates the democratic principle of "free" and "voluntary" negotiation of agreement, which on several occasions have been vehemently refuted by the Committee on Freedom of Association.[76]

From a detailed analysis of the central motif of this paper, it is clear that one of the challenges that plague the practice of collective bargaining in Nigeria is that of non-enforceability of collective agreement. Paradoxically, while it may be adduced that the issue of enforceability has statutory backing under section 3(2) of the Trade Disputes Act 2004, although not full-fledged in the true sense of ILO's standard prescriptions on "voluntarism" in negotiation, the issue of judicial recognition of such collective agreements has always become a revolving challenge in Nigeria. It seems lamentable that agreements wrapped up through collective bargaining cannot be readily enforced. This is because the Court in construing the law tilts unjustly towards the common law rule that collective agreements are generally unenforceable. This therefore has raised jurisprudential questions over the bindingness of Minister's order in Nigeria vis-à-vis the doctrine of *pacta sunt servanda* — that is, all agreements must be kept.[77]

In addition, there is no doubt that this interventionist policy under section 3 (2) of the Act wherein the Minister wields such wide discretionary powers is subject to abuse. The Minister may in dereliction of his duty or in the exercise of the latitude of his discretionary investitures under the Act refuse to make an order confirming the terms of a duly concluded

[75] Constitution Federal Republic of Nigeria section 1(1); See also the cases of *Danbaba v State* (2000) N.W.L.R. (Pt. 687) 396 at 410, per Suleiman Galadima, J.C.A., and *Abacha v Fawehinmi, op. cit.*, at 315-316, per Achike J.S.C.

[76] B. Gernigon, A. Odero, H. Guido, *op. cit* 46.

[77] M. Akpan, *op. cit* 22.

collective agreement. The Trade Disputes Act in vesting the Minister with a power so wide, failed in a cautious manner to provide a "closed-list" of permissible circumstances under which the Minister could derogate from making any such order as a check to the exercise of such discretionary powers, taking into cognisance the principle of "free" and "voluntary" negotiation. As Okene rightly points out, "the Minister will never make such an order especially where the interests of the government whom he represents will be affected by the order".[78] Without the enforceability of collective agreements collective bargaining is but a mere vain exercise and cannot be effective. As aforementioned, the Committee on Freedom of Association has ruled that all collective bargaining agreement should be binding on the parties. The Committee on Freedom of Association has also ruled that making the validity of collective agreements signed by the parties subject to the approval of these agreements by the authorities is contrary to the principles of collective bargaining and of Convention No. 98.

With the rising clamour for the adoption of a liberal judicial attitude towards the enforcement of collective agreement, and in line with international labour standards, it is the contention of the writer that the Nigerian labour law should be overhauled to accommodate provision for the automatic recognition and enforcement of collective agreements once concluded by the parties without further assurance.[79]The unfettered discretionary powers of the Minister as it relates to the procedural arrangement for the enforcement of collective agreement should be totally eroded to be line with global labour standard prescriptions which at the expense of compulsion and interference, gives primacy to voluntarism. Likewise, the Nigerian courts should in the spirit of judicial activism and in the light of liberalism of the new labour dispensation introduced by the Third Alteration Act 2010, embrace and adopt a flexible approach reflective of global labour standards towards the enforcement of collective agreement when the occasion arises, and as such, it is suggested that the

[78] O. Okene, *The Challenges of Collective Bargaining in Nigeria: Trade Unionism at the Cross Roads, in Labour Law Review,* 2010, vol. 4, n. 4, 97.

[79] For instance, labour regulatory frameworks in Ghana, Kenya, Zambia, and South Africa (which are of common law jurisdiction like Nigeria) expressly provide that collective agreements relating to employment and labour are binding and enforceable. The implication is that the courts in those countries will enforce any collective agreement concluded between an employer and his employees without considering the common law position. See Section 105(2) of the Ghanian Labour Act (No. 651 of 2003); Section 59(1) of the Kenyan Labour Relations Act (No. 14 of 2007); Section 71(3)(c) of the Zambian Industrial and Labour Relations Act (No. 27 of 1993) and Section 23 of the South African Labour Relations Act (No. 66 of 1995).

Court of Appeal, as the final court of arbiter in matters relating to labour and industrial relations, should in restoring sanity to the judicial practice, look beyond the issue of judicial precedents in upholding the voluntary nature of collective agreement. In this wise, Nwoke has argued that:

> Without collective agreements being justifiable, voluntary collective bargaining will be reduced to the rejected stone rather than the cornerstone of industrial relations....This is because the non-enforceability of such agreements which took time, money and human resources to conclude is inimical to public policy and industrial harmony.[80]

In a recent report, the ILO has queried the Nigerian practice of subjecting collective agreements to Ministerial approval before it can become binding on the parties.[81]

[80] F. Nwoke, *Rethinking the Enforceability of Collective Agreements in Nigeria, in Modern Practice Journal of Finance and Investment Law,* 2000, vol. 4, n. 4, 353.
[81] ILO: *Committee of Experts on the Application of Conventions and Recommendations (CEARC): Individual Observation concerning Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87),* Nigeria, 96th Session, 2007.

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