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Towards the Enforceability of Collective Agreements in Nigerian Law

Emuobo Emudainohwo ¹

Abstract

This paper examines the enforceability of collective agreements in Nigerian law. It argues that the common law position that held collective agreements not binding unless incorporated into the individual worker's contract of employment should no longer remain because it causes hardship to workers. It suggests a possible way of circumventing the position of the common law and enforcing such agreements. Section 254C (1) and (2) of the Constitution has conferred exclusive jurisdiction on labour matters on the National Industrial Court of Nigeria (NICN). Since Nigeria has ratified International Labour Organisation's (ILO) Convention 98 (concerning Right to Organise and Collective Bargaining) and the Constitution allows application of labour treaties that have been ratified, this becomes a possible way through which the NICN can enforce collective agreements in Nigeria.

Keywords – *Collective Agreement, Enforceability, Labour law, Industrial court, Nigeria.*

1. Introduction

In Nigeria over the years, the courts have taken the common law position that collective agreements are not binding. The courts have taken this position because of the doctrine of privity of contract,² as most collective agreements are usually between the employers on one hand and trade

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² *Union Bank v Edet* (1993) 4 NWLR (Pt 287), 288.

unions on the other. An individual employee seeking to benefit from it is regarded as not a party to it.³ This has created hardship for the individual employee who seeks to enforce the collective agreement (which usually is between the trade union and the employer). Common law principles and rules have been known to influence and control the enforcement of collective agreements and many aspects of the employment relationship.⁴ In this regard, Wedderburn argued that labour law should work to counteract the inequality in the employment relationship.⁵ He further argued that the common law approaches to the employment relationship based on the 'contract law' are conceptually inappropriate.⁶ This Paper examines the enforceability of collective agreements in Nigeria, suggesting a possible way of enforcing collective agreements and circumventing the current common law position. The paper is divided into several sections. Section I is introductory. The concepts, collective bargaining, and collective agreements are analysed in section 2. The focus of section 3 is the legal framework for collective bargaining and collective agreement. Section 4 examines the common law interpretation and enforcement of collective agreement and suggests a possible way of enforcing collective agreements. Section 5 is the Conclusion.

2. Concepts: Collective Bargaining and Collective Agreements

International standards on freedom of association for workers are comprised of the right to organise, the right to bargain collectively, and the right to strike.⁷ The focus herein is collective bargaining/collective agreement:

a) *Collective bargaining*: Collective bargaining can be explained to be a negotiation or process or activity which ends up or leads to collective agreement.⁸ Section 91 of the Labour Act⁹ defines "collective bargaining"

³ *Union Bank v Edett op.cit.*

⁴ K. W. Wedderburn, *Labour Law: From Here to Autonomy?* in *Industrial law Journal*, 1987, vol. 16, 1-29.

⁵ K. W. Wedderburn, *op. cit.*

⁶ K.W Wedderburn, *op.cit.* see also M. Moore, *The Role of Specialist Courts- an Australian perspective Lawasia Journal*, 2000-2001, 139-154.

⁷ L.A Compa, *Workers' Freedom of Association in the United States: The Gap Between Ideals and Practice*, Cornell University ILR School New York, United States, 2003 pages, <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1377&context=articles> accessed 22 July 2020.

⁸ B Gernigon, A. Odero, H, Guido, *ILO Principles Concerning Collective bargaining in International Labour Law Review* 2000, vol. 139 n.1, 33-53.

as: “the process of attempting to arrive or arriving at a collective agreement;” Article 2 of the Collective Bargaining Convention, 1981 (No. 154) regards “collective bargaining” as negotiations between an employer or group of employers and one or more employees concerning working conditions or regulating employer /employee relationship or regulating employer /employee organization’s relationship.

b) Collective agreement: Section 91 of the Labour Act¹⁰ defines “collective agreement” as: “collective agreement” means an agreement in writing regarding working conditions and terms of employment concluded between:

- (a) workers' organization or an organization acting for workers of the one part; and
- (b) employers' organization or an organization acting for employers of the other part;

Also, section 48 of the Trade Dispute Act, 1976 defines “collective agreement” as: any 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 organisations representing workers, or the duly appointed representative of any body of workers, on the one hand; and
- (b) one or more trade unions or organisations representing workers, or the duly appointed representative of any body of workers on the other.

ILO Recommendation No. 91, Paragraph 2, also explained collective agreements as: “all agreements in writing regarding conditions of work and employment terms 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”.¹¹

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

¹⁰ Labour Act, *op.cit.*

¹¹ ILO Collective Agreements Recommendation, (No. 91) 1951.

3. Legal Framework for Collective Bargaining and Collective Agreements

Collective bargaining is one of the components of freedom of association,¹² and freedom of association (including the right to form or belong to a trade union) has been guaranteed as a fundamental human right in the various Constitutions of Nigeria since independence in 1960.¹³ In addition, labour legislations also provide for a right to associate. The labour legislations include: Labour Act 1971 (as amended),¹⁴ Trade Unions Act 1973 (as amended)¹⁵, Trade Disputes Act 1976, and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.¹⁶ ILO Conventions 87 and 98 also guarantee Freedom of Association. But ILO Convention 98 specifically covers collective bargaining.

The Constitution

Section 40 of the Constitution guarantees freedom of association (including the right to form and belong to a trade union) as a fundamental human right. It states that "Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any ...trade union for the protection of his interest." Even though the right to bargain collectively is not expressly provided in the Constitution, it may be implied from the guarantee of freedom of association by section 40 of the Constitution. This implication is so because it is generally understood that the right to negotiate collectively constitutes an essential element of freedom of association.¹⁷ Though the right to bargain collectively is not expressly provided in the Constitution, the latter has expressly conferred exclusive jurisdiction on the NICN to

¹² Lance A Compa, *op.cit.*

¹³ 1960 Constitution section 25(1) 1963 Constitution section 26(1), 1979 Constitution section 37, 1989 Constitution section 40 and 1999 Constitution section 40. It is important to note that only the 1999 Constitution that is in force has been repealed, and the mention of them is to trace history of freedom of association in the Constitutions.

¹⁴ Section 9(6).

¹⁵ Sections 1(i) and 2-9.

¹⁶ Section 10. The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is a domestication of the African (Banjul) Charter on Human and Peoples' Rights 1981.

¹⁷ ILO, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, (sixth edition) 2018 para.1232.

hear and determine any question as to the interpretation and application of any collective agreement.¹⁸ By that it can be said that the Constitution recognises the right to bargain collectively because the collective agreement is the end product of collective bargaining.

Labour Act

The Labour Act also protects freedom of association by making it unlawful for any employer to make it a condition of employment that a worker shall or shall not join a trade union or shall not relinquish membership of a trade union or cause a worker to be dismissed or in any way be prejudiced because of trade union membership or trade union activities.¹⁹

The Labour Act protects the union activities of a worker, and in this regard, section 9 (6) of the Labour Act provides that: no agreement or contract shall:

- a. have a term or condition of employment that an employee or worker will or will not join any trade union or will or will not resign membership or involvement with a trade union, or
- b. cause the dismissal or firing of, or otherwise prejudice an employee; or
 - i. by reason of involvement with trade union or
 - ii. because of activities relating to trade union outside working hours or, with the permission of the employers, during working hours or
- iii. by purposes of loss or deprived of trade union membership or was refused or unable to become, a trade union member.

Trade Union Act

The principle of collective bargaining is recognised in the Trade Union Act as amended by the Trade Union Amendment Act. Section 24 (1) stipulates that for the reason of collective bargaining, all unions that have been

¹⁸ Constitution 1999, section 254C(1)(f)(i).

¹⁹ Labour Act, section 9(6). See also C. Agomo, Legal protection of Workers' Human Rights in Nigeria: Regulatory Changes and Challenges in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* Hart Publishing Ltd, UK, 2001 242-265.

registered in an electoral college should choose members who will act for them in bargaining with the employer. Although parties are encouraged to bargain freely, they are required in section 3(1) of the Trade Unions Act (as amended) to deposit with the Minister of Labour and Productivity any collective agreement²⁰ reached. Any contravention is an offence punishable with a fine.²¹ The latter provision seems to evince a government intention to control or regulate collective agreements.

Trade Dispute Act

The Trade Dispute Act purports to recognise the principle of collective bargaining and voluntary settlement of trade disputes.²² However, in reality, it entrenches compulsory processes that leave little room for the disputing parties to engage in free collective bargaining.²³

African Charter

Article 10(1) and (2) of the African Charter (Ratification and Enforcement) Act²⁴ expressly guarantees both the right to associate and the right not to be forced to join an association. It states further that the Act shall be enforceable in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive, or judicial powers in Nigeria.²⁵

²⁰ Trade Unions Act section 3 (1).

²¹ Trade Unions Act section 3 (1) (b).

²² Trade Dispute Act sections 3, 4 and 5. Section 3 recognises at least three copies of any collective agreement for settlement of a trade dispute to be deposited with the Minister of Employment, Labour and Productivity. Section 4 makes it imperative for the parties to attempt to settle their disputes using any agreed means. However (by section 5), this is subject to the Minister's overriding discretion to prescribe a means of settlement once he or she apprehends a dispute. See Agomo *op.cit*

²³ Agomo *op.cit*.

²⁴ African Charter (Ratification and Enforcement) Act, cap 10, Laws of the Federation of Nigeria 1990.

²⁵ Preamble to African Charter (Ratification and Enforcement) Act.

ILO Conventions 87 and 98

The principles or goals of freedom of association stated in ILO Conventions 87 and 98 'are normally considered integrally²⁶ and have since been followed up by other ILO Conventions dealing with specific aspects of freedom of association.'²⁷ Although both Conventions cover freedom of association, Convention 98 specifically provides for collective bargaining.

ILO Convention 87

By Article 2 of Convention No. 87, employees and employers without discrimination have the right to form subject to the instruction of the organisation concerned, to join a union or organisations of their own choice.

ILO Convention 98

Article 4 of ILO Convention 98 stipulates that measures suitable to state conditions should be put in place to encourage or promote the development and operation of machinery for voluntary negotiation between employees and employers or employees' organisations and employers' organisations with the aim of regulating conditions of employment by procedure or instrument of collective agreements. According to the Governing Body of the ILO, collective bargaining is a 'fundamental aspect of the principles of freedom of association'.²⁸ Convention 98 supplements certain aspects of Convention No. 87 and has three main objectives:

²⁶ H. Dunning, *The Origins of Convention No. 87 on freedom of association and the right to organise International, Labour Review* 1998 vol. 137 n. 2, 149-163.

²⁷ It is also true that the Right of Association (Agriculture) Convention (No. 11) and the Right of Association (Non-Metropolitan Territories) Convention (No. 84) had been adopted in 1921 and 1947 respectively. Furthermore, over the past ten years the International Labour Conference has adopted four new Conventions in this field, namely the Workers Representatives Convention, 1971 (No. 135); the Rural Workers' Organisation Convention 1975 (No. 141); the Labour Relations (Public Service) Convention 1978 (No. 151); and the Collective Bargaining Convention, 1981 (No. 154). See A. J. Pouyat, *The ILO's freedom of association standards and machinery: a summing up, International Labour Review* 1982 vol.121 n.3, 287-290.

²⁸ ILO, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, (sixth edition) 2018 para. 1313.

- a) the promotion of collective bargaining,
- b) protection against acts of anti-union discrimination both at the time of taking up employment and in the course and termination of the employment relationship, and
- c) protection against any acts of interference in the internal affairs of workers' and employers' organisations.²⁹

4. Enforcement of Collective Agreements in Nigerian Law

The courts have held that collective agreements are binding in honour only and not enforceable.³⁰ In *Ford Motor Co. Ltd. v Amalgamated Union of Engineering and Foundry Workers*³¹ (an English case), the main issue was whether the parties intended the agreement to be a legally binding arrangement. The court held that there was no intention whatsoever that the collective agreement would be binding. In *Union Bank of Nigeria v Edet*,³² the employee's contention that her termination flouted the collective agreement was rejected. It was held 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 an individual employee the right to institute an action for breach of any collective agreement, nor is it intended to complement the employee's contract of service.³³ It was noted that:

Collective agreements are not intended 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. In other words, failure to act in strict compliance with collective labour agreement is not justiciable.³⁴

²⁹ ILO, (2012) Para 166.

³⁰ *Union Bank of Nigeria v Edet* (1993) 4 NWLR (Pt 287), 298-299, see also *Afribank (Nig) Plc v Osisanya* [2000] 1NWLR (Pt. 642) 598.

³¹ *Ford Motor Co. Ltd. v. Amalgamated Union of Engineering and Foundry Workers* (1969) 1 WLR 339.

³² *Union Bank v Edet op.cit*, see also *Afribank (Nig) Plc v Osisanya (op.cit)*.

³³ *Union Bank v Edet, t op.cit* 288, 291 per Uwaifo JCA as he then was.

³⁴ *Union Bank v Edet, op.cit* 298–299.

It can be argued that the courts' refusal to enforce collective agreements is based on the privity of contract,³⁵ as most collective agreements are usually between the employers on one part and trade unions on the other. An individual employee seeking to benefit from it is not party to it.³⁶ In *Afribank (Nig) Plc v Osisanya*³⁷ Amaizu JCA held that the dismissal procedure contained in the collective agreement was not binding on the employer as the agreement was not justiciable. In *ACB Plc v Nwodika*,³⁸ Ubaezonu JCA outlined factors which may determine whether a collective agreement is binding on individual employees and employers: namely: its incorporation in the contract of service, if any, the pleadings and evidence before the court or the parties' conduct.

In *Sampson Nnosiri & Ors v Eastern Bulkem Co. Ltd*³⁹ (a case decided by the NICN in 2016 after the constitutional amendment in 2010⁴⁰), the plaintiffs/claimants were former employees of Eastern Bulkem Company Limited (the defendants). They brought this action to claim their entitlements, allowances, and salaries in terms with a collective agreement entered into in November 2006 between their union (National Union of Chemical, Footwear, Rubber and Non-Metallic Products Employee) and the defendant's union (Chemical and Non-Metallic Products Employers' Federation). The NICN held that collective agreements between employers' associations and employees' unions are not capable of conferring the right on an individual employee to sue on an alleged breach of the collective agreement. The NICN further held that failure to comply with a collective agreement relating to employment and labour is not enforceable or justiciable, except when the terms of the collective agreement have been clearly incorporated either into the letter of employment or subsequent letters and communication before the employee can enforce it.⁴¹ Thus, consistent decisions of the courts,

³⁵ *Union Bank v Edet op.cit.*

³⁶ *Union Bank v Edet op.cit.*

³⁷ *Afribank (Nig) Plc v Osisanya op.cit.*

³⁸ *ACB Plc v Nwodika* {1996} 4 NWLR (Pt 443) 470, 485.

³⁹ *Sampson Nnosiri & Ors v Eastern Bulkem Co. Ltd*, unreported, Suit No: NICN/PHC/69/2013, delivered on 13 January 2016 by Justice O.Y. Anuwe (Owerri Judicial Division), <<http://nicn.gov.ng/>> accessed 16 July 2020.

⁴⁰ The Constitution was amended in 2010 vide the Constitution (Third Alteration) 2010. It empowered the NICN to apply treaties which have been ratified notwithstanding any provision of the Constitution requiring domestication.

⁴¹ See also *Rector, Kwara State Polytechnic v. Adefila* (2008) All FWLR (Pt. 431) 914 at 958-959; *Bank of the North Limited v Adegoke* (2008) All FWLR (Pt. 398) 263 at 289;

including the NICN,⁴² are that collective agreements are not binding in Nigerian law except incorporated into the individual worker's contract of employment as shown in the case law. One pertinent question is whether collective agreements could be enforced through section 254C(2) of the Constitution in view of the constitutional amendment in 2010 empowering the NICN to exclusively enforce labour treaties that have been ratified even though not domesticated. I think it is possible.

Possible Way of Enforcing Collective Agreements

It may be possible to enforce collective agreements in Nigeria under the Constitution. A new provision - section 254C (2) - was introduced into the Constitution in 2010 empowering the NICN⁴³ exclusively to apply any treaty which Nigeria has ratified relating to employment, labour industrial relations, workplace, and matters connected thereto notwithstanding any other provision of the Constitution requiring domestication of treaties before enforcement. It is important to note that Nigeria has ratified⁴⁴ ILO Convention 98 (concerning collective bargaining). The implication is that the NICN could enforce that collective agreement through section 254C (2) since Nigeria has ratified Convention 98⁴⁵. Domestication is not required before enforcement by the provision. It can be argued that NICN can now move away from the common law position, which held collective agreements not binding and enforces such agreements. It could rely on section 254C (2) of the Constitution and ILO's Convention 98 (and its interpretation by the ILO Freedom of Association Committee.)⁴⁶ to deviate from the common law position and enforce collective agreements in Nigeria. The ILO Freedom of Association Committee has said that

Oguejefor v Siemens Limited. (2008) All FWLR (Pt. 398) 378 at 390; Anaja v UBA (2011) All FWLR (Pt. 600) 1289 at 1300.

⁴² The NICN has been conferred with exclusive jurisdiction by the Constitution to hear all employment and labour matters.

⁴³ The Constitution was amended in 2010 vide the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010. This introduced section 254C(2) into the Constitution.

⁴⁴ Both ILO Conventions 87 and 98 were ratified on 17 October 1960, <<http://www.ilo.org/dyn/normlex/en/>> accessed 16 July 2020.

⁴⁵ ILO Convention 98 was ratified by Nigeria in 1960.

⁴⁶ The Committee on Freedom of Association is a tripartite body set up in 1951 by the Governing Body of the ILO to deal with cases relating to freedom of association and collective bargaining. the Committee on Freedom of Association has built up a body of principles on freedom of association and collective bargaining, based on the provisions of the Constitution of the ILO and of the relevant Conventions.

failure to enforce a collective agreement is a breach of the right to collective bargaining and honest bargaining.⁴⁷

The Position in some African Countries

Labour statutes in some African countries contain comprehensive provisions regarding the enforceability of collective agreements. For instance, labour statutes in Ghana,⁴⁸ Kenya,⁴⁹ Zambia,⁵⁰ and South Africa⁵¹ (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. This conclusion is so because the provisions of a statute always prevail over the common law.

5. Conclusion

The paper examined the enforceability of collective agreements in Nigerian law. It argued that the common law position that held collective agreements not binding unless incorporated into the individual worker's contract of employment should no longer remain. The common law has

⁴⁷ ILO, Freedom of Association: Compilation of decisions of the Committee on Freedom of Association, (sixth edition) 2018 para.1340, see also paras. 1334-1336.

⁴⁸ For instance, section 105 (2) of the Ghanaian Labour Act (No. 651 of 2003) states that a collective agreement between employees and an employer is viewed as terms of the employment contract between each employee and his employer.

⁴⁹ In Kenya, section 59 (1) of the Labour Relations Act (No 14 of 2007) stipulates that every collective agreement relating to employment and labour binds all employees and their employers. Section 59 (3) also states that every collective agreement should be incorporated into the employment contract of an employee. Furthermore, section 59 (5) states that upon registration of the collective agreement, it becomes enforceable.

⁵⁰ Section 71(3) (c) of the Zambian Industrial and Labour Relations Act (No. 27 of 1993, Cap 269 of the Laws of Zambia) states that once a collective agreement has been accepted by the Minister, it becomes binding between the employer and employee or between the parties.

⁵¹ Section 23 of the South African Labour Relations Act⁵¹ (No. 66 of 1995) stipulates that every collective agreement relating to employment and labour binds not only the parties to it, but other persons to which the collective agreement applies. Also, section 199 states that an employment contract entered into before or after a collective agreement may not allow an employer to pay his workers remuneration less than what is stipulated in the collective agreement. It further provides that any contract that purports to waive any collective agreement is invalid.

been known to influence and control many aspects of the employment relationship, including collective agreements and in this regard, Wedderburn argued that labour law should work to counteract the inequality in the employment relationship.⁵² He further argued that the common law approaches to the employment relationship based on the 'contract of law' are conceptually inappropriate.⁵³ Therefore, one of the purposes of labour law is to deal in collective negotiation categories rather than of contract. In this regard, the paper has suggested a possible way of circumventing the common law position through the Constitution as amended which empowered the NICN exclusively to apply employment and labour treaties that have been ratified notwithstanding any contrary provision of the Constitution. ILO Convention 98 (Concerning Collective bargaining) has been ratified, and collective bargaining/collective agreements can be enforced through it. Also, the Committee of Freedom of Association⁵⁴ has said that failure to implement a collective agreement, even on a temporary basis, violates the right to bargain collectively, as well as the principle of bargaining in good faith.⁵⁵

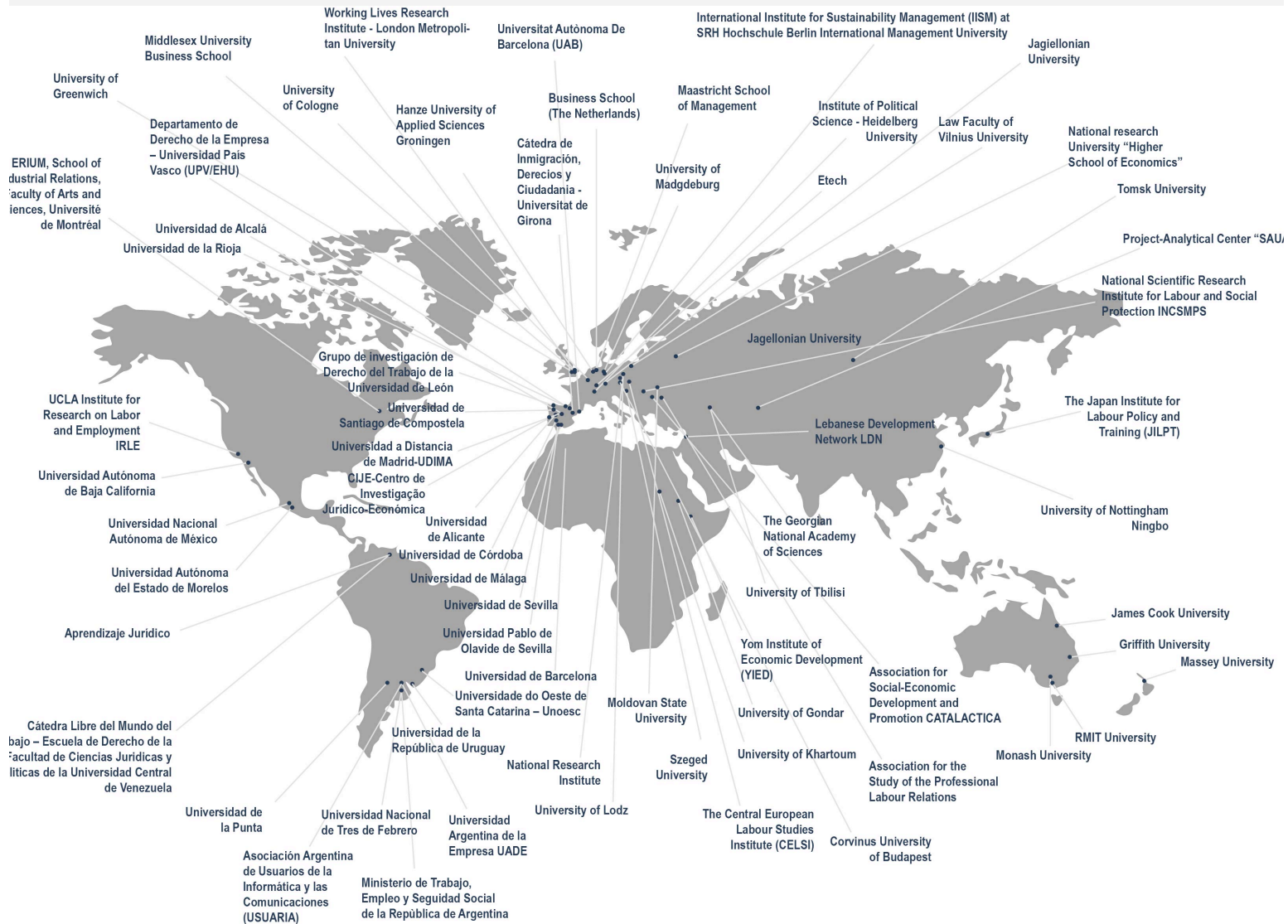
⁵² K. W. Wedderburn, *op.cit.*

⁵³ K W Wedderburn, *op.cit.* see also M. Moore, *op.cit*

⁵⁴ The Committee on Freedom of Association is a tripartite body set up in 1951 by the Governing Body of the ILO to deal with cases relating to freedom of association and collective bargaining. the Committee on Freedom of Association has built up a body of principles on freedom of association and collective bargaining, based on the provisions of the Constitution of the ILO and of the relevant Conventions.

⁵⁵ ILO, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, (sixth edition) 2018 para.1340, see also paras. 1334-1336.

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