Collective agreements and their Legal Status in Nigeria: The Current Trends.

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Abstract

Collective agreements in a work place are meant to foster industrial peace and harmony. They are usually concluded between an employer or employers' association on one hand and workers' organisation or organisations (trade union(s)) on the other hand. But what is the legal status of these collective agreements? Are they binding on the parties or they are binding in honour only? At common law, collective agreements are held to be gentlemen's agreements and therefore devoid of sanctions. This common law position has been upheld by the Supreme Court in Nigeria in a number of cases which are discussed in the body of the work. There have been statutory interventions to cushion this rigid common law position, albeit unsatisfactorily. This culminated in the Third Alteration to the 1999 Constitution which seems to have settled the issue of the enforceability of collective agreements. From the provisions of the 1999 Constitution, collective agreements are now no longer binding in honour only but are enforceable by the National Industrial Court (NIC) thereby making collective agreements to be binding on the parties concerned. This position by the NIC is indeed commendable and a welcome development. It is recommended that our appellate courts, particularly the Court of Appeal should uphold the position of the NIC thereby laying to rest the controversy surrounding the legal status of collective agreements in Nigeria.

Key Words: Collective Agreements; Legal Status; Current Trends.

1. Introduction

Collective agreements are products of collective bargainings. They are usually entered into between individual employers or employers' organisation on one hand and workers' organisation(s) on the other hand regarding the working conditions and terms of employment. They are meant to foster industrial peace and harmony. Having dissipated a lot of energy and time by the parties concerned

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in arriving at these collective agreements, the pertinent question is: what exactly is their legal status? Are they binding on the parties concerned or they are binding in honour only? In other words what is their status as far as enforceability is concerned?

Before the Third Alteration to the 1999 Constitution, most labour statutes in Nigeria had no express provisions regarding the enforceability or otherwise of collective agreements. Some statutes that provided for the enforceability of collective agreements were restrictive in scope of the types of collective agreements to be enforced. The Trade Disputes Act[1] for instance provides for the enforceability of collective agreements but only with regards to those agreements relating to the settlement of trade disputes. Even at this, these agreements are binding on the parties only after three copies of such agreements have been deposited with the Minister of Labour and he makes an order in that regard. The National Industrial Court Act[2] which was enacted in 2006 did not help matters either. It purportedly conferred exclusive jurisdiction on the National Industrial Court to only interpret collective agreements but was silent on whether such agreements were enforceable or not.

At common law, collective agreements are held not to be enforceable as they are regarded as gentlemen's agreements which the parties do not intend to be binding[3]. Owing to the lacunae created by the statutory provisions on the issue and towing the common law position on the issue, the Supreme Court made several pronouncements regarding the legal status of collective agreements. This is to the effect that collective agreements are binging in honour only as they are products of trade unionists' pressure, extra legal documents totally devoid of sactions and that for them to be binding, they must be incorporated into individual contracts of employment[4] . The above Supreme Court's position, reminiscence of the common law position was the position of law until the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 was enacted and took effect from March, 2011. Unlike the position under the National Industrial Court Act, 2006, the Constitution as amended conferred exclusive jurisdiction on the National Industrial Court, not

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1 Cap T8 LFN 2004 Section 3(1) & (3).

2 Cap N155 LFN 2004 as updated to 31st December, 2010. See Section 7(1)(c)(i)

3 See *Ardle & Anor v London Electricity Board* [1956] The Times of London 16th June, 1956

4 See Supreme Court's decisions in *Shuaibu v Nigeria-Arab Bank Ltd.* [1998] 4 SCNJ 109; *Osoh v Unity Bank Plc.* [2013] 9 NWLR (Pt 1538) 1; [2013] 18 MRSCJ 13.

only to interpret collective agreements but also to apply them[5]. With these constitutional provisions, can it be said that in as much as the NIC now has jurisdiction not only to interpret collective agreements but also to apply them, these agreements now assume higher status of enforceability? The National Industrial Court has, in several cases,[6] argued and pronounced in this vein thereby discarding the common law position endorsed by the previous decisions of the Supreme Court. It is this current position on the issue by the NIC that this paper seeks to analyse with a view to determining the current legal status of collective agreements as well as consider other sundry matters on the issue.

2. The Meaning of Collective Agreement

The term 'collective agreement' has been statutorily defined. An attempt will be made here to consider the various definitions given by the various statutes with a view to determining the adequacy or otherwise of those definitions.

> The Trade Disputes Act[7] defines a 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 hand.

The above definition given by the Trade Disputes Act as up dated to 31st December, 2010 seems to be confusing as regards parties to a collective agreement. It appears from the above

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5 See Section 254C(1)(j)(i) of the Constitution as amended

6 See for instance *Samson Akindoyin v UBN Plc* [2015] 62 NLLR (Pt 217) 259; *Valentine Chiazor v Union Bank of Nigeria Plc* [Unreported] Suit No NICN/LA/122/2014. Judgment of which was delivered on 12th July, 2016 p. 29; *C.E. Okeke & 3 Ors v Union Bank of Nigeria Plc* [Unreported] Suit No NICN/LA/09/2010. Judgment of which was delivered on 26th October, 2016 and *Benedicta Marchie v Union Bank of Nigeria Plc* [Unreported] Suit No NICN/LA/48/2014. Judgment of which was delivered on 30th March, 2017.

7 Cap T8 LFN, 2004 as updated to 31st December, 2010, Section 48.

definition that a collective agreement can be concluded between trade unions themselves i.e 'organisations representing workers on one hand and organisations representing workers on the other hand'. But if collective agreement is between workers' unions relating to the terms of employment and physical conditions of work, it is difficult to envisage how the said collective agreement may be enforceable against an employer who may not be a party thereto. This provision therefore appears bizarre. Before the 2004 Laws of the Federation, the Trade Disputes Act 1990[8] had defined a collective agreement thus:

> 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 one or more organisations representative of employer on the one hand, and;
> (b) One or more trade unions or organisation representing workers or the duly appointed representative of any body of workers on the other hand.

From the above provisions, it was not possible for a collective agreement to be concluded between workers' unions themselves. It could only be between an individual employer or employers' association on one hand and workers' union or unions on the other hand. This appeared more sensible.

According to the Labour Act[9]:

> Collective agreement means "an agreement in writing regarding working conditions and terms of employment concluded between-
> (a) an organisation of workers or an organisation representing workers (or an association of such organisations) of the one part; and
> (b) an organisation of employers or an organisation representing employers (or an association of such organisations) of the other part".

From the above definition given by the Labour Act, an individual employer cannot be a party to a collective agreement. It can only be

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8 Cap 432, LFN, 1990 Section 47(1)

9 Cap L1, LFN 2004 as updated to 31st December. 2010. Section 91

an employer's association or employers' associations. However, in practice, individual employers can be parties to a collective agreement.

The National Industrial Court Act[10] defines a collective agreement in a similar manner as defined by the Labour Act. According to NIC Act:

> Collective agreement means any agreement in writing regarding working conditions and terms of employment concluded between –
> (a) an organisation of employers or an organisation representing employers (or an association of such organisations) of the one part; and
> (b) an organisation of employees or an organisation representing employees (or an association of such organisations) of the other part".

Here too, the definition does not seem to recognise individual employer as a party to a collective agreement. However, in practice, collective agreements are concluded between individual employers or organisation of employers on one hand and an organisation or organisations of employees on the other hand.

Since collective agreements are products of collective bargainings, the parties to a collective bargaining should necessarily be parties to a collective agreement. It may therefore be necessary to look at what obtains at the international level. International Labour Organisation (ILO) Convention Concerning the Promotion of Collective Bargaining[11] in its article 2 defines Collective Bargaining thus:

> Collective Bargaining extends to all negotiations between an employer, a group of employers or one or more employers' organisations on one hand, and one or more workers' organisations on the other for:
> (a) determining working conditions and terms of employment and/or
> (b) regulating relations between employers and workers and/or
> (c) regulating relations between employers or their organisations and the workers' organisation or workers' organisations.

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10 Cap N 155 LFN, 2004 as updated to 31st December, 2010 Section 54(1)
11 No 154 of 1981

From the above definition, parties to a collective bargaining are: on the first part, an employer, a group of employers or employers' organisation or organisations while on the second part, workers' organisation or workers' organisations. As stated earlier, parties to a collective bargaining are necessarily parties to a collective agreement. One therefore finds it difficult to understand why at the local level and by the provisions of some of our domestic enactments i.e the Labour Act and the National Industrial Court Act, an individual employer cannot be a party to a collective agreement. Even the Trade Disputes Act as up dated, while providing for an individual employer to be a party to a collective agreement, makes it possible for a collective agreement to be concluded between workers' organisations themselves thereby producing results that may be bizarre. It is in the light of the above that I hereby recommend that our labour statutes should further be amended to provide for parties to a collective agreement in line with the provisions of the International Labour Organisation (ILO) Convention No 154 of 1981 discussed earlier.

The final point that should be stressed as far as the meaning of collective agreement is concerned is the fact that for an agreement to amount to a collective agreement in order to create an entitlement therefrom, such agreement must be reduced in writing, properly couched and signed by the parties concerned. Thus minutes of meetings and communiqué of meetings cannot amount to a collective agreement to create an entitlement therefrom. In *PENGASSAN v Mobil Nig Unlimited,*[12] the National Industrial Court stated: "…How minutes and communiqué of meetings can amount to collective agreement beats our imagination". And in *Mohammed Dungus v ENL Consortium Ltd.,*[13] the NIC again stated: "In the instant case, therefore, I repeat, minutes of meetings cannot create entitlements in the manner canvassed by the claimants in this suit". The Supreme Court in *Osoh & Ors v Unity Bank Plc*[14] quoted with approval the Court of Appeal pronouncement to the following effect: "Can Exhibit D which is in the main minutes of the meeting it recorded be referred to as a legally binding and enforceable agreement? The answer is in the negative. It seems to me therefore that the learned

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12 [2013] 32 NLLR (Pt 92) 243 NIC

13 [Unreported] Suit No NIC/LA/193/2014 the judgment of which was delivered on 5th May, 2015 p. 18

14 [2013] 18 MRSCJ 13 at 36

trial judge made a grave error in law when she held at page 204 of the record that Exhibit D is a binding agreement and justiciable".

3. Capacities in which workers' Organisations (Trade Unions) Negotiate

One of the parties to a collective agreement is workers' organisation (popularly referred to as a trade union) as opposed to individual workers. A trade union therefore negotiates on behalf of its members i.e individual employees. But the question is, in what capacity do workers' organisations negotiate? Do they negotiate as Principals or as Agents of their members? The courts are not unanimous on this point. In *Holland v London Society of Compositors,*[15] the court held that the union must be regarded as acting for their own interest (as Principal) and not those of individual members, thereby rejecting the agency principle. This position was supported subsequently by the case of *Rookes v Bernard*[16]. But the problem with the 'Principal' principle is the privity of contract principle whereby collective agreements will be enforced only by the union and not individual members who are not privy to the collective agreement except by express incorporation into individual contracts. However, in *Burton Corporation Ltd v Smith,*[17] Arnold, J held that there was no reason why 'agency' would not be implied thereby subscribing to the agency principle. The difficulty with the agency principle is the position of the new entrants who were not in the undertaking and so not trade union members at the time the collective agreement was concluded as there cannot be a principal for a non-existent agent thereby negating the agency principle. The difficulty of the 'Principal' principle may be remedied by incorporating the terms of collective agreements into individual contracts of employment through the appropriate incorporation clauses in contracts of employment.

In practice however, the National Industrial Court has done away with the position that for a collective agreement to be binding, it must be incorporated into a contract of employment as there is no privity of contract where trade unions enter into such agreements on behalf of their members[18]. Therefore, the arguments whether trade

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15 [1924] 40 TLR 440

16 [1953] 1 QB 623

17 [1977] IRLR 351 at 353

18 See the following cases – *Samson Akindoyin v UBN Plc* [2015] 62 NLLR (Pt 217) 259; *Valentine Chiazor v Union Bank of Nig. Plc* [Unreported] Suit No. NICN/LA/122/2014 the judgment of which was delivered on 12th July, 2016 p.

unions negotiate as principals or as agents and the difficulties associated with each position remain mere academic exercise as what is required now is that in order to benefit from a collective agreement, all that is required of a staff is to plead and prove by concrete evidence membership of the trade union in issue. (This issue will be discussed in detail later).

4. Collective Agreement at Common Law

At common law, collective agreements are not intended to create any legal relations giving rise to any contractual obligations, and are therefore not justiciable; except where the terms of the agreement have been incorporated expressly or by necessary implication into the contracts of employment of the employees[19]. In *Shuaibu v Nigeria Arab Bank Ltd*,[20] the Supreme Court per Wali, JSC held interalia that "Exhibit C, the Collective Agreement of Association of Banks, Insurance and Allied Institutions etc is at best, a gentlemen's agreement, an extra legal document totally devoid of sanctions. It is a product of Trade Unionists' Pressure"[21]. This position was again reiterated by the Supreme Court in *Akauve Osoh v Unity Bank Plc*[22]. Chukwuma-Eneh, JSC delivering the lead judgment held at p.37:

> From the above authorities, I have no doubt in my mind that Exhibits D, F, J1-J5, N and P1 are minutes of meetings held or at best, they, like Exhibit G, are gentlemen's agreements, a product of trade unionists' pressure, totally devoid of sanctions and that failure to act in strict compliance with any of them is not justiciable.

And at pp.41-42, he continued:

29; *C.E Okeke & 3 Ors v Union Bank of Nig. Plc* [Unreported] Suit No NICN/LA/09/2010 judgent of which was on 26th October, 2016 and *Benedicta Marchie v Union Bank of Nig. Plc* [Unreported] Suit No NICN/LA/48/2014 judgment of which was delivered on 30th March, 2017.

19 See *Ardle & Anor v London Electricity Board* [1956] The Times of London 16th June, 1956.

20 [1998] 4 SCNJ 109. For a fuller discussion on this case see Kenen, E.A. "Collective Agreements, and the Supreme Courts' Decision in *Shuaib v Nigeria-Arab Bank*" [2003] 2 *Benue State University Law Journal 142-154*

21 At page 129. See also similar and earlier pronouncements of the Court of Appeal in *UBN v Edet* [1993] 4 NWLR (Pt 287) 288; *ACB v Nbisike* [1995] 8 NWLR (Pt 416) 75

22 [2013] 18 MRSCJ 13. See also *Union Bank of Nig Plc v Soares* [2012] 11 NWLR (Pt 1312) 550.

> What has further emerged from the definition with respect to many cases of collective agreements is that where they have created legal relations giving rise to contractual obligations between the parties, they are enforceable by the immediate collective parties (i.e between an employer or an employer's organisation and a trade union or unions) but as between the employers and the workers as the respondent and appellants here, it is only so where they have been incorporated into the contracts of employment of the employers (sic) so as to be actionable for any breaches arising therefrom at the suit of either party to the contractual relationship. Otherwise they are no more than mere vague inspirational terms which are bound to present practical problems of enforcement and the best method being to use political or trade union pressure to bring about their enforcement… In such situations unless and until the collective agreements having created legal relations are incorporated into the contract of employment of an employee, the said collective agreements cannot be enforced by the employee, indeed either party as in this matter for want of privity of contract. It is on the principle of want of privity of contract that the courts have showed great reluctance to enforcing collective agreements between collective parties at the instance of an employee(s) without the collective agreements having firstly been incorporated into his contract of employment.

The above common law position applied by the Supreme Court in a number of cases held sway until statutory interventions which seem to have modified or changed the common law position. I will now consider collective agreement under the statutes

5. Collective Agreements under Nigerian Statutes

An attempt will be made here to discuss the enforceability or otherwise of collective agreements under the Trade Disputes Act 2004, the National Industrial Court Act, 2006 and the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010.

5.1 Collective Agreements Under the Trade Disputes Act, 2004

Section 3 of the Act which deals with obligation to deposit collective agreements with the Minister provides:

(1) Where there exists any collective agreement for the settlement of a trade dispute, at least three copies of the said agreement shall be deposited by the parties thereto with the Minister –
   (a) in case of a collective agreement entered into on or after the date of commencement of this Act, within 30 days of that; and
   (b) in the case of a collective agreement entered into on or after the date of commencement of this Act, within fourteen days of the execution thereof,

   and any person who fails to deposit copies of the said agreement within the period prescribed in the foregoing provisions of this subsection, shall be guilty of an offence under this Act and shall, on conviction be liable to a fine of N100

(2) ……

(3) Subject to the provisions of this Act, the Minister may, upon receipt of copies of a collective agreement deposited in accordance with subsection (1) of this section, make an order, the terms of which may, in respect of the agreement specify that the provisions of the agreement or any part thereof as may be stated in the order shall, be binding on the employers and workers to whom they relate.

(4) If any person fails to comply with the terms of the said order, he shall be guilty of an offence and be liable on conviction to a fine of N100 or to imprisonment for a term of six months.

From the foregoing provisions, under the Trade Disputes Act, collective agreements that are enforceable are those relating to the settlement of trade disputes only. Even at this, they are enforceable where copies have been deposited with the Minister of Labour in accordance with the provisions of the Act and the Minister makes an order specifying that the agreement or any part thereof be binding on the parties concerned. Once an order has been made, failure to comply with the said order becomes an offence punishable with a fine or imprisonment. It can be seen that collective agreements that are enforceable under the TDA are restrictive in scope, being restricted to only those relating to the settlement of trade disputes.

5.2 Collective Agreements Under the National Industrial Court Act, 2006

Section 7 of the Act which deals with jurisdiction of the court provides:

(1) The court shall have and exercise exclusive jurisdiction in civil causes and matters –
   (a) ……
   (b) ……
   (c) relating to the determination of any question as to the interpretation of –
      (i) any collective agreement.

From the above statutory provisions, can it be said that the NIC has jurisdiction to enforce collective agreements, thereby making them justiciable? The National Industrial Court in *National Union of Hotels and Personal Service Workers v Paliso Nig Ltd & Anor*[23] held that once an interpretation of a collective agreement by NIC has been made, it becomes binding on the parties and has the effect of automatic incorporation into individual contracts of employment. It further held that only parties to a collective agreement so interpreted can benefit or suffer from it. It is my submission, with the greatest respect to the court that section 7(1)(c)(i) of the NIC Act merely confers jurisdiction on NIC to only interpret collective agreements and not to apply them. Once a particular collective agreement is interpreted, the court becomes *functus officio* as it cannot make any further order as to its applicability or enforceability. The legal status of collective agreement under the NIC Act is therefore not different from that at common law. This perhaps explains why the provisions relating to collective agreement under the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 are radically different with a view to addressing the lacuna created under the NIC Act.

5.3 Collective Agreements Under the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010

Section 254C(1)(j)(i) of the Constitution as amended provides:

(1) Notwithstanding the provisions of sections 251, 257, 272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall

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23 [1976-2006] DJMC 547

have and exercise jurisdiction to the exclusion of any other court in civil causes and matters –

(j) relating to the determination of any question as to the interpretation and *application* of any –

(i) collective agreement. (emphasis supplied)

From the above constitutional provisions, the jurisdiction of the NIC with regards to collective agreement has been expanded. The NIC can now not only interpret collective agreements but also apply them. What does this additional jurisdiction of applying collective agreement by NIC portend with regards to the enforceability of collective agreement? Can it be said that given the power and jurisdiction of NIC to interpret and apply collective agreements under S.254C(j)(i) of the 1999 Constitution, collective agreements are now binding as against those they relate to? The NIC has answered this question in the affirmative. In *Enyinnaya Amugo v SkyBank Plc*[24], Kanyip, J (as he then was) in reiterating the position of the NIC that collective agreements are binding on the parties by virtue of the provisions of the Third Alteration to the 1999 Constitution stated the position quite succinctly. He held:

> I take the liberty to reiterate (repeat) the stance this court took in *Valentine*. In both cases (*Valentine and Osoh*), the cause of action arose long before the Third Alteration to the 1999 Constitution was promulgated. The state of the law under which these cases were decided is certainly different from that under which the instance case is to be decided. The law as to the applicability of collective agreements when these cases were filed is certainly not the same with the law in that regard today under the Third Alteration to the 1999 Constitution. Today, under section 254C(1)(j)(i), this court has jurisdiction in terms of the interpretation and application of any collective agreement. It is needless that a court has jurisdiction to interpret and apply a collective agreement if the intendment of the law maker is not that the collective agreement is to be binding as such. It should be noted that under section 7(1(c)(i) of the NIC Act 2006, the jurisdiction of this court was only in terms of interpretation of collective

[24] (Unreported) Suit No NICN/LA/258/2016 the judgment of which was delivered on 13th March, 2018 para 25

> agreement; the issue of application was not included therein. So when the Third Alteration to the 1999 Constitution added application of collective agreement to the fray, this must mean that the law maker deliberately intended collective agreements to be enforceable and binding. I so hold.

He continued on paragraph 26 of the same judgment thus:

> In any event, the rule (the orthodoxy, I dare say) which had collective agreements not to be binding or to be binding in honour only is a common law rule. There is no gain saying that this common law rule is not only rigid but harsh. Legal policy teaches that the rigidity and harshness of the common law is always ameliorated by the rules or principles of equity. In this regard, section 13 of the NIC Act permits this court to administer law and equity concurrently. But where there is any conflict or variance between the rules of equity and the rules of common law, the rules of equity shall prevail. See section 15 of the NIC Act, 2006. Incidently, in the instant case, this harsh common law rule is not even being ameliorated by the principles of equity but by the 1999 Constitution itself. This is the state of the law under which the instant case is to be decided. Accordingly, *Osoh* and cases like *Soares* are distinguishable from the instant case in terms of the state of the law under which the matter at hand calls for determination in this court.

In *The Management of Compagnie General De Geophhysique (Nig) Ltd v PENGASSAN*,[25] (a case on referral to NIC from IAP) the same NIC had earlier on held interalia:

> The argument that a collective agreement is a gentleman's agreement is true of the common law dispension which is no longer fashionable in the current disposition as section 254C of the 1999 Constitution as amended permits NIC to interpret and apply collective agreements. An agreement that can be interpreted and applied cannot thereby be just a

[25] [Unreported] Suit No NICN/ABJ172/2014 the judgment of which was delivered on 17th March, 2016 p.17

> gentleman's agreement. It does and commands higher status than being a gentleman's agreement to be tossed around. The Supreme Court's decision in *Osoh v Unity Bank Plc* [2013] 9 NWLR (Pt 1353) 1 was first filed at the High Court of Edo State, Benin in 1994; as such, it dealt with the law as at pre-1999 constitutional dispensation. In other words the cause of action arose prior to the enactments of the NIC Act, 2006 and the Third Alteration to the Constitution, 2010. Thus the issues were canvassed under the Trade Disputes Act, the law then in force. So the issues addressed in *Osoh's* case are no longer the prevailing issues in terms of the present constitutional dispensation.

I cannot agree more with the above pronouncements of the learned judge (as he then was) of the National Industrial Court on the current status of collective agreements under the 1999 Constitution as amended to wit that they are enforceable and binding on the parties concerned as opposed to 'binding in honour only'. This is a welcome development. Long before the NIC Act 2006 and the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 were enacted, I had argued elsewhere that the Supreme Court's position that collective agreements were mere gentlemen's agreements was in deed unfortunate and needed statutory intervention to the contrary[26]. Happily, respite has come by way of a constitutional amendment. This development has long been overdue. It is hoped that the appellate courts, particularly the Court of Appeal will uphold the position of the NIC with regards to the enforceability of collective agreements thereby laying to rest the controversy surrounding the legal status of collective agreements in Nigeria.

6. What must be shown by a Party seeking to Rely on a Collective Agreement

Since collective agreements are now binding and enforceable as against the parties concerned, what must a party seeking to rely on it prove? For an employee to successfully rely on a collective, he must prove membership of a particular trade union that entered into such collective agreement on his/her behalf. Proof of membership of a

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[26] See Kenen, E.A, "Collective Agreements and the Supreme Court's Decision in *Shuaibu v Nigeria-Arab Bank"* [2003] 2 *Benue State University Law Journal* 142-154 at 154.

trade union has to be by direct documentary evidence. In *Enyinnaya Amugo v Skye Bank Plc* (Supra), the NIC stated the position clearly when it held:

> The law regarding the applicability of a collective agreement to an employee, and indeed the extent to which an employee can rely on one have been declared by this court in *Aghata Onuorah v Access Bank Plc* [2015] 55 NLLR (Pt 186) 17 and *Samson Akindoyin v Union Bank of Nig Plc* Unreported Suit No NICN/LA/308/2013 the judgment of which was delivered on 15th April, 2015… In both *Agatha Onuorah v Access Bank Plc* and *Samson Akindoyin v Union Bank of Nig Plc,* this court stated the position of the law as to the applicability of a collective agreement to an employee and indeed the extent to which an employee can rely on one. For instance, actual proof of membership is the key to recovery under a collective agreement. Proof of that membership of a trade union has to be by direct documentary evidence. Here, *Habu v NUC Taraba State* [2005] 4 FWLR (Pt. 283) 646 held that the deduction from salaries and wages as check-off dues of a worker and the remittance of same to a trade union is an incidence of membership of the worker… membership of a trade union is not, and cannot be bestowed by an employer or through an admission in pleadings.

For junior staff, membership of a trade union is assumed, thereby leading to the principle of 'opting out' for those who would not want to remain as members of a trade union. The reason for the 'opting out' principle applicable to junior staff is not far-fetched. The orthodox view is that labour law itself is meant to protect workers who are more vulnerable. Even at this, some workers are certainly more vulnerable than others. This is why the law has been couched in this way - presuming membership of trade unions for junior staff to enable them to be protected by the union thereby allowing them to 'opt out' for those who do not want to be members. Thus once a junior staff proves that he is eligible to be a member of a trade union, he is presumed to be a member unless there is evidence that he 'opts out' of the said union. It is therefore immaterial whether his check-off dues have been deducted and remitted to such union or not as

long as eligibility is proved[27]. The law regarding unionization of junior staff was succinctly put by the NIC in *Nest Oil Plc v NUPENG*[28]thus:

> …as far as our law is concerned, junior staff are deemed to be members of a union until they individually and in writing opt not to be… This means that if in truth the defendant is the proper union to unionize junior staff of the defendant, the question of them having to agree and express their interest before they can join the defendant's union will not arise. All that will be required of them is that if they do not want to be members, they can opt out. See generally the cases of *CAC v AUPCTRE* [2004] 1 NLLR (Pt.1); *Mix & Bake v NUFBTE* [2004] 1 NLLR (Pt. 2) 247; *TIB Plc v NUBIFIE* [2008] 10 NLLR (Pt. 27) 322 and *Mgt of Tuyil Nig. Ltd v NULFRIL & NMPE* [2009] 14 NLLR (Pt. 37) 109 which establish that the law is that registration is deemed, recognition automatic and deduction of check-off dues compulsory, being based on mere eligibility to be a member of the union in question…

Thus for junior staff, they can benefit from a collective agreement in the absence of evidence of 'opting out' of the union.

As for a senior staff, the law does not presume him/her to be a member of the trade union. He/she must therefore 'opt in' individually and in writing. He/she can also prove membership by showing evidence of deduction of check-off dues from his/her salaries/wages and the remittance of same to a trade union. A documentary evidence of his pay slip to this effect will suffice. The law regarding unionization of senior staff was succinctly put in *Aghata Onuorah v Access Bank Plc*[29] thus:

> As a senior staff, the law is (and the defendant cited a number of authorities in that regard) that the employee is not assumed to be a member of the trade union. He/she has to 'opt in' individually and in writing. The claimant in the instant case is a senior staff. She must show

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27 See *Aghata Onuorah v Access Bank Plc* [2015] 55 NLLR (Pt 186) 17 NIC cited with approval by Kanyip, J in *Otunba v Promasidor (Nig) Ltd* Suit No NICN/LA/602/2014 the judgment of which was delivered on17th January, 2017 para 19

28 [2012] 29 NLLR (Pt 82) 90

29 (Unreported) Suit No NICN/ABJ/30/2011 the judgment of which was delivered on 15th December, 2014 p.25

> membership of ASSBIFI in order to benefit from Exhibit E, the collective agreement. That the defendants made payment to her on the basis of Exhibit E does not mean that thereby she automatically became a member of ASSBIFI as to be entitled to have the benefits from Exhibit E enforced by this court. She still has to show membership of ASSBIFI in order to be so entitled. In other words payment under a collective agreement to one who is not a member of the trade union which signed the collective agreement does not and cannot thereby (and by that fact alone) legitimize the non-member as one who can benefit or enforce a benefit from the collective agreement. In fact, where the person in question does not show evidence of membership of the trade union in question, that the fact of unionism is pleaded and not denied is not sufficient to clothe the toga of membership of the trade union and hence entitlement to benefit from the collective agreement entered into by the trade union. In other words, a deemed admission or even a direct admission itself in pleadings does not and cannot confer membership of a trade union. This is because the party making or being deemed to make the admission is not competent to and so cannot bequeath membership of a trade union on an employee. The issue whether or not an employee is a member of a trade union is essentially one of law given the current state of our trade union law; and so, it cannot simply without more, be bestowed by a third party such as the defendant in this suit.

The court continued:

> The issue here is that for non-members of a trade union, the collective agreement in question is not enforceable against them. As such, a party or parties in a suit cannot, by admission make enforceable that which is unenforceable ab initio. In the eyes of the law, a non-member cannot enforce to his benefit a collective agreement entered into by a trade union that he is not a member of; neither can he have it enforced against him. Even an admission by a defendant as the claimant argues in the instant case cannot thereby give legitimacy to a non-member.

From the totality of the above pronouncements, it can be summed up that for an employee to benefit or enforce a collective agreement, he/she must prove membership of the said trade union that entered into the collective agreement. Once membership of trade union is proved, he is thereby entitled to the enforcement of the collective agreement irrespective of the principle of privity of contract. For junior staff, membership of a trade union is presumed unless there is evidence of 'opting out' of the union while for senior staff, there is no such presumption of membership and therefore such staff has to 'opt in' and prove membership by direct documentary evidence. In each case i.e whether 'opting out' or 'opting in' it has to be done individually and in writing.

However, an employer who relies on a particular collective agreement in terminating an employee's appointment cannot deny such an employee from relying on same. In *Stephen Ayaogu v Mobil Producing Nig. Unltd*[30] the court held:

> By *CCB (Nig) Ltd v Okonkwo* [2001] 15 NWLR (Pt. 735) 114, an employer who dismisses his employee under the provisions of a collective agreement between itself and its employee's trade union cannot thereafter contend that the collective agreement does not contain the terms and conditions of employee's service. *A fortiori*, the 2nd defendant cannot pay the terminal benefits of the claimants under the collective bargaining agreement (CBA) and now turn around and say that the claimants cannot rely on same agreement to found their claim for redundancy.

The final issue that calls for consideration is whether collective agreement entered into after an employee ceases to be in the employment, such an employee can benefit therefrom. For instance, where an employee retires or his appointment terminated, can he rely on a collective agreement that was made subsequent to his retirement/termination to claim benefits there under? The position of law is that it is the conditions of service at the time of retirement/termination of appointment that determine the terminal rights and benefits of the employee in question and not the conditions of service made after the date of retirement or

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30 [Unreported] Suit No NIC/LA/38/2010 the judgment of which was delivered on 27th October, 2017 para 55

termination. In *Otunba Abijo v Promasidor (Nig) Ltd*,[31] an employee (the claimant) was disengaged from the services of the employer (the defendant) on 31/5/2009 and sought to rely on a collective agreement that was reached on 19/8/2010. The court held that the claimant (employee) could not rely on an instrument (collective agreement) that came about after he had ceased to be an employee. But where the conditions of service at the time of appointment had been amended before the retirement or termination of appointment, the relevant condition of service is the one that is applicable at the time of the termination of appointment. Thus in *ECWA v Dele*,[32] the court held that where the conditions of service applicable at the time of appointment had in the meantime been amended or replaced, the relevant conditions of service is the one that is applicable at the time of termination of appointment.

7. The Current Trends to Collective Agreements in Nigeria

From the foregoing analysis of the statutory provisions, especially the constitutional provisions on collective agreements and the various pronouncements of the courts on the issue, the following trends which invariably represent the current position of law on collective agreements emerge:

(a) Collective agreements are now binding and enforceable by the parties thereto. This is by virtue of the provision of section 254C(1)(j)(i) of the 1999 Constitution as amended. This has therefore done away with the old dispensation at common law where collective agreements were binding in honour only.

(b) For an employee to rely on a collective agreement, all he/she needs do is to prove that he/she is a member of the trade union that entered into such a collective agreement with the employer or employer's association. This is so irrespective of the principle of privity of contract rule and non-incorporation of the said collective agreement into individual contracts of employment.

(c) For junior staff, membership of a trade union is presumed, unless there is evidence that the staff has 'opted out' of the trade union concerned.

(d) For senior staff, there is no such presumption of membership and therefore such staff must prove membership by direct documentary evidence such as showing evidence of the

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31 [Unreported] Suit No NICN/LA/602/2014 the judgment of which was delivered on 7th January, 2017 para 21

32 [2004] 10 FWLR (Pt 230) 297

deduction of his check-off dues and remittance of same to such a trade union. Thus the principle of 'opting in' is applicable to senior staff.

8. Conclusion

An attempt has been made in this paper to discuss the legal status of collective agreements both at common law which is the old dispensation and under the Constitution of the Federal Republic of Nigeria 1999 as amended which represents the new/current dispensation. While at common law, collective agreements are regarded as mere gentlemen's agreements, products of trade unionists' pressure and totally devoid of sanctions, under the provisions of the 1999 Constitution, the NIC has held in several cases and quite rightly too that collective agreements are binding and therefore enforceable by or against the parties thereto. This position by the NIC is commendable and a welcome development. It is hoped that our appellate courts, particularly the Court of Appeal (as it is now the final court with regards to appeals lying from the decisions of the NIC in civil matters to it) will uphold the position of the NIC thereby laying to rest the issue of enforceability or otherwise of collective agreements in Nigeria.