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B.P.E v DANGOTE CEMENT PLC (2020) 5 NWLR (PT. 1717) 322: THE ENFORCEABILITY OF UNINCORPORATED COLLECTIVE AGREEMENTS IN NIGERIA

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B.P.E v *DANGOTE CEMENT PLC* (2020) 5 NWLR (PT. 1717) 322: THE ENFORCEABILITY OF UNINCORPORATED COLLECTIVE AGREEMENTS IN NIGERIA

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ABSTRACT

This paper briefly reviews part of the recent decision of the Supreme Court in B.P.E v Dangote Cement Plc[1] *wherein the apex court reiterated the old common law position to wit that a collective agreement is not enforceable except where it has been incorporated into the contract of employment by the parties. The aim of this paper therefore is to discuss the applicability or otherwise of this recapitulation by the supreme court on the lower courts especially in the light of the doctrine of judicial precedent vis-à-vis the current labour dispensation in Nigeria. Adopting a doctrinal and analogical approach, the researcher finally submits that the supreme court's decision particularly as it relates to collective agreements, is not binding on the lower courts and that, under the new labour dispensation, a collective agreement need not be incorporated into an employee's contract of employment before it can be enforced by the court.*

Keywords: Collective Agreements, Enforceability, Labour, National Industrial Court of Nigeria (NIC)

1.0. INTRODUCTION

A collective agreement is simply a written agreement between an employer or a group of employers and a trade union or a group of workers, concerning the conditions of work and terms of employment. It is usually a product of collective bargaining, that is, it stems from a negotiation between the employer's representatives and the workers' representatives.[2] The position at common law is that a collective agreement is not enforceable except where parties have adopted it into their terms of employment. A learned writer has also noted that the above common law position has since been the position

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[1] (2020) 5 NWLR (PT. 1717) 322.

[2] C.K. Agomo, *Nigerian Employment and Labour Relations Law and Practice* (Concept Publications Limited; Lagos, 2018), p. 292.

of law in Nigeria.[3] However, with the coming into force of the Third Alteration Act, 2010, the National Industrial Court of Nigeria (NIC), in a number of cases, has refused to follow the said common law principle, notwithstanding existing decisions of the Supreme Court and the Court of Appeal where the common law principle was applied. In the recent case of *BPE* v *Dangote Cement Plc,*[4] the supreme court reiterated the common law principle that collective agreements are not enforceable except where they have been incorporated by the parties. The likely effect of this decision is that many lawyers and scholars may seek to rely thereon to argue that the incorporation of a collective agreement into the terms of employment is a fundamental requirement without which its enforcement is not possible. It is therefore apposite to consider the effect of the above Supreme Court decision on the lower courts (that is, the Court of Appeal and National Industrial Court). Although the NIC has made its position clear through some of its decisions that it can enforce a collective agreement even in the absence of incorporation by the parties, there is need to ascertain the prospect of those decisions, especially in view of the fact that all decisions of the NIC are appealable to the Court of Appeal and may be upturned thereat. Will the Court of Appeal likely endorse the position of the NIC, or rather reiterate the old common law position in line with the Supreme Court's decision in *BPE's case?*

2.0. FACTS OF THE CASE

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 them as terminal benefits,

[3] V. Iwunze, "The General Unenforceability of Collective Agreements under Nigerian Labour Jurisprudence: The Paradox of Agreement Without Agreement" (2013) 4(3) *International Journal of Advanced Legal Studies and Governance*, p. 4.
[4] (2020) 5 NWLR (Pt. 1717) 322.

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. At the trial court, upon the order of the learned judge, Benue Cement Company Plc was substituted by Dangote Cement Plc; and Alhaji Aliko Dangote and Dangote Industries Ltd. were both joined as co-defendants in the suit. After hearing the parties, the learned trial judge agreed with the plaintiff/employees and ordered that since the appellant had made some payments to the plaintiff/employees, the remaining part of the terminal benefits, as calculated in line with the Staff Handbook of Benue Cement Company Plc, should be paid by the 3rd and 4th Defendants (i.e., Alhaji Aliko Dangote and Dangote Industries Ltd). Dissatisfied with the decision of the trial judge, the 3rd and 4th defendants appealed to the Court of Appeal where they argued that the evidence adduced at the trial court did not justify the placing of the burden of paying the balance of the terminal benefits on them. The appellant (BPE) also cross-appealed to the Court of Appeal where it asked the court to hold that it has paid all the terminal benefits due to the plaintiff/respondents and therefore reverse the judgment of the trial judge. The plaintiff/respondents also brought a respondents' notice wherein they argued that the statements of defence filed by the appellant and its co-defendants were incompetent and urged the court to hold that both the appellant and the cross-appellants were jointly liable. After hearing the parties, the Court of Appeal held that the statements of defence filed by the appellants and its co-defendants were incompetent since they were not signed by legal practitioners known to law. The court however set aside the order of the trial judge which placed liability of paying the remaining balance of the terminal benefits on the 3rd and 4th defendants, and in its stead ordered that only the appellant (BPE) shall bear the liability of paying the said remaining balance. The appellant therefore appealed to the supreme court and urged the court to reverse the decisions of the lower courts. In unanimously allowing the appeal, the Supreme Court held that the lower court was wrong in striking out the statements of

defence of the appellants and its co-defendants since the plaintiff/respondents had acquiesced to the procedure at the trial court and therefore could not complain at the appellate stage. In all, the apex court found that the case of the plaintiff/respondents was not proved and therefore reversed the order directing the appellant to pay them the balance of the terminal benefits in line with the Staff Handbook of Benue Cement Company Plc. In support of its decision, 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 4th – 9th respondents *(that is, the plaintiffs/respondents)*.[5] The exhibits are therefore not enforceable. The failure to act in strict compliance with the exhibits is non justiciable. See UBN Ltd v. Edet (1993) 4 NWLR (Pt. 287) 288. 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.

The above part of the Supreme Court's decision constitutes the fulcrum of this paper. The apex court held that since the exhibits upon which the respondents/employees hinged their claim, were merely collective agreements, they cannot be enforced, in the absence of evidence of their incorporation into their terms of employment.

3.0. COMMENTS

From the above decision of the Supreme Court, particularly as it relates to collective agreements, three points can be deduced, namely: (1) that a collective agreement is not enforceable unless it has been adopted/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

[5] Emphasis mine

justiciable.[6] There is no gainsaying the fact that the Supreme Court adopted a common law approach when it arrived at the above points. Given the recency of this recapitulation by the apex court, it is arguable that we are back to the old common law rule where a collective agreement is, at best, treated as a gentleman's agreement. However, with the current posture of the NIC, it does not appear that such an argument may fly. In the recent case of *PENGASSAN* v *MRS Oil Nigeria Plc & 4 Ors.,*[7] the NIC, responding to an invitation by the defendant who had asked the court to hold that a collective agreement was only a gentleman's agreement and as thus not enforceable, held as follows:

> In coming to this decision, let me state that I am not oblivious of the argument of the learned Counsel to the 1st - 3rd Defendants that the 3 exhibits put up for interpretation and enforcement are at best gentleman agreement or collective agreements which remain for all intents and purposes unenforceable. The exhibits are no doubt evidence of voluntarily entered agreement creating rights and obligations. The rights and obligations created are not illegal and all the parties have capacity to enter into same. The parties to these agreements have not argued against their being parties to these agreements. The agreements are not inhibited by any vitiating elements. What then is to render them unenforceable? I see none. I am inclined to agree completely with the position of the law as aptly canvassed by learned Counsel to the Claimant that with the intervention of Section 254C, Constitution of the Federal Republic of Nigeria, 1999 (Third Alteration) Act, 2010 collective agreements are now enforceable. Indeed, if they are not to be enforceable the power conferred on this Court by the Constitution would have been of no meaning.

From the above decision, it is clear that the NIC is not disposed to accept arguments that tend to bring back the old common law principle as regards the unenforceability of collective agreements

[6] The above points were similarly the position of the Court of Appeal in *UBN* v *Edet (supra)* which the apex court referred to in the case at hand.
[7] NICN/LA/595/2012, delivered on 27 May 2020, para. 50.

generally. It is therefore pertinent to determine at this juncture, the impact of the Supreme Court's reiteration in *BPE's case*[8] of the common law position on the Nigerian labour jurisprudence. Are the lower courts bound to follow the recent Supreme Court's decision? By simple logic, under the architecture of hierarchy of courts, the Court of Appeal and the National Industrial Court, being lower in hierarchy than the Supreme Court, are automatically bound by the decisions of the Supreme Court.[9] In the case of *Osakwe* v *FCE (Tech) Asaba & Ors*,[10] the Supreme Court issued a stern warning against the refusal by lower courts to follow its decisions on a similar point or issue. The apex court described such attitude as "judicial impertinence" "gross insubordination" "undesirable" and "distasteful." On this note, it is arguable that the pronouncement of the apex court in *BPE's case,* as regards the unenforceability of unincorporated collective agreements, is binding on the lower courts. The refusal by a lower court to abide by the decision of a superior court where the facts are similar, is jurisprudentially frowned on under Nigerian law. This was aptly captured by Professor G.N. Okeke in the following words:

> A precedent is weighty in the Nigerian legal system. It has an overriding influence on judges and their decisions. Any arbitrary derogation from it by self-willed judges is costly because whatever decision or decisions such judges come up with might be upturned on appeal, thereby rendering their efforts at arriving at the decisions, exercises in futility; a waste of time, strength, money and other resources, an unwise adventure into legal foolishness and a willing exposure to unnecessary jeopardy.[11]

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[8] *Supra* n 4.

[9] *Alhaji Mohammed & Anor* v *Olawunmi & 9 Ors.* (1993) 4 NWLR (Pt. 287) 254; *Buhari* v *Obasanjo* (2005) 13 NWLR (Pt. 941) 1; *Savannah Bank* v *Ajilo* (1989) 1 NWLR (Pt. 97) 305.

[10] (2012) 27 NLLR (Pt. 76) 1.

[11] G.N. Okeke, "Judicial Precedent in the Nigerian Legal System and a Case for Its Application under International Law" (2010) 1 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, p. 112.

On the other hand, abiding by judicial precedent is in fact a choice to tow the path of honour. Some scholars have also pointed out the advantages of following past decisions in line with judicial precedent and these include: certainty and predictability of law, promotion of judicial efficiency, scientific development of the law, prevention of partiality or prejudice, delimitation of judicial function, reduction of error, etc.[12] It may therefore be argued on the strength of the above authorities, that the position of the Supreme Court as regards the unenforceability of collective agreements is binding on the lower courts. Notwithstanding the above argument, a careful perusal of some decisions of the NIC appears to lead to a different conclusion. In *Valentine Ikechukwu Chiazor* v *Union Bank of Nigeria*,[13] the NIC rejected the defendant's argument that the court was bound to follow the case of *Union Bank of Nigeria* v *Emmanuel*[14] based on the doctrine of judicial precedent. In *UBN's case*,[15] the Court of Appeal had held that a collective agreement was not enforceable except it has been incorporated into the workers terms of employment. In refusing the request of the defendant, the NIC explained that the cause of action in *UBN's case* arose before the coming into force of the Third Alteration Act, 2010 and that the decision therein was based on the old state of law regarding the enforceability of collective agreements. The NIC further explained the difference between section 7(1)(c)(i) of the National Industrial Court Act 2006 and section 254C(j) of the Constitution (Third Alteration Act, 2010). Section 7 of the NIC Act empowered the NIC to interpret collective agreements while section 254C(j) of the Constitution empowered the NIC to not only interpret, but also to apply collective agreements. 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 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

[12] E.A. Ikegbu, S.A. Duru, and D.U. Emmanuel, "The Rationality of Judicial Precedent in Nigeria's Jurisprudence" (2014) 4(5) *American International Journal of Contemporary Research*, p. 151-152.
[13] NICN/LA/122/2014, the judgment of which was delivered on 12 July 2016.
[14] (2012) 11 NWLR (Pt. 1312) 550.
[15] *Ibid*.

13 and 15 of the NIC 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*,[16] the NIC in the case of *Lijoka* v *First Franchise Service Limited*,[17] 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.[18]

Applying the above logic to the instant case (*BPE's case*), it is pertinent to consider when the cause of action arose. In the instant case, the cause of action arose in 2003 when the Federal Government of Nigeria decided to privatize the Benue Cement Company Plc – the respondent/employees' employer. In this connection, the brilliant logic contained in the above decisions of the NIC can also be applied mutatis

[16] Supra n 13.
[17] *Lijoka Olaniyi Dennis & 1677 Ors* v *First Franchise Service Ltd & Anor* (NICN/LA/527/2013 the judgment of which was delivered on 6 February, 2019)
[18] Per Hon. Justice B.B. Kanyip, at para. 84.

mutandis to the issue at hand. Therefore, the cause of action in *BPE's case,* having emanated before the coming into force of the Third Alteration Act, 2010, the decision of the Supreme Court therein to the extent that a collective agreement must be incorporated by parties before it could be enforced, belongs to the old state of law and therefore not binding under the new labour dispensation. Presently, it seems that to enforce a collective agreement, all that the Claimant needs to prove is that he is a member of the trade union that negotiated and signed the collective agreement and that the collective agreement applies to him. More so, the requirement of establishing that he is a member of the trade union only applies where the claimant is a senior staff of the defendant/employer[19] In the case of a junior staff, membership of trade unions is based on eligibility unless the staff in question is shown to have actually opted out individually and in writing.[20] Therefore, while a senior staff will be required to plead and prove by concrete evidence that he is a member of a trade union before he can enforce a collective agreement negotiated by the said trade union, a junior staff is automatically assumed to be a member of a trade union once he is eligible to be a member of the said trade union. In any case, whether by proof of membership or eligibility as the case may be, once the claimant/employee shows that the collective agreement applies to him and that the agreement is not tainted with any vitiating element, such agreement can be enforced even in the absence of evidence of its adoption into the terms of employment.

It appears however that the logic of the NIC in the above-mentioned cases (*Valentine and Lijoka*) has not been affirmed yet by the Court of Appeal. It is apposite to note that, by the decision of the Supreme Court in *Skye Bank Plc* v *Iwu*,[21] all decisions of the NIC are now subject to the review of the Court Of Appeal and by section 243(4) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as

[19] *Mrs. Bessie Udhedhe Ozughalu & Anor* v *Bureau Veritas Nigeria Limited* (NICN/LA/626/2014, the judgment of which was delivered on 20 March 2018).
[20] *Lijoka* v *First Franchise Service Ltd & Anor* (*supra* n 17, at para. 87); *NUPENG* v *MWUN* (2015) 61 NLLR (Pt. 214) 403 at 465; *Mr. Eyiaromi Oladele* v *AG Lagos State* NICN/LA/102/2013 (the judgment of which was delivered on the 6 June 2017); *Bethel Ezego* v *NUFBTE & Anor.* NICN/LA/221/2017 (the judgment of which was delivered on 16 July 2018).
[21] (2017) 16 NWLR p. 24.

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.[22] In other words, a decision of the NIC can in appropriate cases be upturned by the Court of Appeal. Thus, the question at this juncture is whether the Court of Appeal will likely adopt the reasoning contained in the NIC judgments discussed above or rather opt to follow the Supreme Court's position in *BPE's case* in line with the doctrine of judicial precedent. If the Court of Appeal opts to follow the position in *BPE's case*, the implication will be that the common law position, as regards the legal status of collective agreements, will still remain the extant law. However, it is submitted, with profound humility, that the reasoning of the NIC in *Valentine and Lijoka* is logical, cogent and plausible so that there is no doubt that the Court of Appeal will equally toe the line.

A fortiori, the provisions of law relied upon by the NIC in arriving at its position are clear and unambiguous.[23] The advent of the 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.[24]

[22] *Ibid*, per Nweze, JSC, at 101-102, paras. A-C.
[23] S. 7(1)(c), 13, and 15 NIC Act; S. 254C(j) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended).
[24] *Skye Bank Plc* v *Iwu* (*supra* n 21), at 162-163, paras. G-H, A-B, respectively.

In as much as the Third Alteration Act was apparently targeted at elevating and expanding the status and jurisdiction of the NIC, it is submitted that the Court of Appeal is not excluded from the far-reaching impact of the amendment. This is because, all decisions of the NIC are appealable to the Court of Appeal and by virtue of section 243(4) of the Constitution, the Court of Appeal is accorded a special status akin to that of the Supreme Court, in respect of civil appeals from the NIC. This was aptly captured by the Supreme Court, per Nweze JSC, as follows:

> …unlike the Federal High Court and other categories of High Courts, its (National Industrial Court) decisions are, deliberately, made appealable only to the lower court, the Court of Appeal; there being no further appeal beyond that court, section 243 (4). In fact, by the most thoughtful insertion of section 243 (4) supra, the draftsman achieved two things. Firstly, the apex court was insulated or shielded from the armada of appeals it would have, without this outer provision in section 243 (3) (supra), been inundated with having regard to the range of persons under the trial court's jurisdiction (*rationae personae*) and range and diversity of the subject matters over which it exercises jurisdiction … Secondly, the said section 243 (4) (supra) spares the litigants before the trial court the forensic drudgery and weariness associated with agitating matters from trial courts to the apex court, often decades…[25]

An arguable implication of the foregoing is that, apart from the NIC, the Court of Appeal also has a crucial role to play in the advancement of the new labour dispensation introduced by the Third Alteration Act 2010. This includes ensuring the actualization of the mandate of the NIC in preventing all forms of injustice and unfair labour practices in the Nigerian labour realm, and to displace the operation of archaic common law principles that work hardship for Nigerian workers. By the combined reading of Order 4 Rule 1 of the Court of Appeal Rules, 2016 and section 16 of the Court of Appeal Act,[26] in conjunction with

[25] *Ibid*, at 102-103, paras. G-H, A-B, respectively.
[26] Cap. C37, Laws of the Federation of Nigeria (LFN) 2004.

section 254C of the CFRN 1999 (as amended) and sections 7, 13 and 14 of the NIC Act, the Court of Appeal has all the powers and duties of the NIC when sitting on appeal over a decision of the NIC. It is therefore expected that when faced with the question of enforceability of unincorporated collective agreements, the Court of Appeal will adopt the flexible approach of the NIC as discussed earlier, in the spirit of the new labour dispensation.

The ratio contained in *Valentine and Lijoka* is also supported by a plethora of judicial authorities.[27] In *Obiuweubi* v *CBN*,[28] for instance, the Supreme Court, per Rhodes-Vivour (J.S.C) pointedly held as follows:

> The law in force, or existing at the time of action arose is the law applicable for determining the case. The law does not necessarily determine the jurisdiction of the court at the time that jurisdiction is invoked. That is to say the law in force at the time cause of action arose governs determination of the suit while the law in force at the time of trial based on the cause of action determines the court vested with jurisdiction to try the case.

Furthermore, in *Osakwe's case*[29] the Supreme Court held that notwithstanding the bindingness of its decisions on the lower courts, where the principle enumerated in its decision is not applicable to the case before the lower courts, the doctrine of judicial precedent will not apply.[30] In this connection, it is submitted that the common law principle which was reiterated by the Supreme Court in *BPE's case*, has been rendered inapplicable to all post-Third Alteration Act causes of action in labour law by virtue of the Third Alteration Act 2010. More so, the common law attitude to collective agreements is no longer fashionable all over the world, as countries such as the UK, USA,

[27] *Obiuweubi* v *CBN* (2011) 7 NWLR (Pt. 1247) 465 at 495; (2011) All FWLR (Pt. 575) 208 and *Keystone Bank Limited* v *Mr. Olukayode Abiodun Oyewale* (2014) LPELR-23612(CA).
[28] *Obiuweubi* v *CBN* (*ibid*), at 495, paras. C-D.
[29] *Supra* n 10.
[30] *Ibid*, at 40, paras. D-E.

Netherlands and many others now recognize the bindingness of collective agreements.[31]

4.0. CONCLUSION

The common law principle to the effect that collective agreement is only a gentleman's agreement which is not enforceable at law except where it has been incorporated into the contract of employment by the parties, is stringent and no longer fashionable. Although the Supreme Court of Nigeria in the recent case which was discussed in this paper, reiterated the said common law principle, it is implausible to argue that the decision has the effect of returning the Nigerian labour jurisprudence to the old common law era as regards the enforceability of collective agreements. In the words of a learned scholar:

> Choice of law needs to shed its past. The decision to apply one law over another should not be thought of as an arcane mystery, something that can only be attempted by the High Priests of the Temple Currie; nor should choice-of-law problems be treated as delicate political problems requiring the wisdom of Kissinger or the younger Pitt. The question of law application presents no difficult conceptual problem: The court identifies relevant policies and decides which should control on the facts before it. Grand theory is not needed, although common sense is.[32]

This research submits that the "cause of action" ratio applied by the NIC in the cases discussed in this work, is in line with common sense and is not tantamount to a departure from the doctrine of judicial precedent. The approach of the NIC to collective agreements, as seen in the cases highlighted in this paper, accords with international best labour practices as it reflects the intendment of the International Labour Organization (ILO). Article 3(1) of the ILO Recommendation No. 91 on collective agreements provides that collective agreements should be binding on the signatories thereto and those on whose

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[31] *Supra* n 3, at 7.

[32] W.L. Reynolds, "Legal Process and Choice of Law" (1997) 56 *Maryland Law Review*, p. 1410.

behalf the agreement is concluded and that employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement.[33] Although in *BPE's case,* the Supreme Court reiterated the common law principle, the decision was based on the old state of law which was applicable to the cause of action in that case. It is therefore submitted that the case will not pose a problem to the lower courts when dealing with the enforcement of unincorporated collective agreements in future cases. It is further recommended that once an employee shows that a collective agreement applies to him and that the agreement is not tainted with any vitiating element, such agreement should be enforceable notwithstanding that the collective agreement has not been incorporated into the employee's terms of employment.

[33] ILO Recommendation No. 91 on Collective Agreements, adopted in 1951 at the 34th ILC Session, Geneva.