

Twenty-Five Years after Section 72 of Cama Amendments to Pre-Incorporation Contracts Law in Nigeria.

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Abstract

With the recent global economic downturn, International Oil Corporations (IOCs) are increasingly focused on exploring business opportunities in regions with significant projected growth opportunities such as Africa and Asia. Several IOCs have recently flocked to Nigeria, a prominent West African country, with the recent stable political climate, immense population (about 170 million), and projected double digit growth rate, and so the country has quickly become a destination of choice for small and large international companies, alike, seeking to take advantage of the perceived business opportunities therein. Thus, this paper evaluates the current state of common law and statutory amendments governing pre-incorporation contracts in Nigeria within the context of similar rules in the commonwealth countries around the world. It seeks to provide protection to the company, the promoters, the shareholders and the third parties who have entered into pre-incorporation contracts with the promoters prior to the formal incorporation of the company. In making recommendations for amending the current Nigerian statutory law on pre-incorporation contracts, the authors propose rules that must balance the privacy of the company's contracts while making sure fairness and equity are extended to all stakeholders. Most of the recommendations suggested take into consideration the peculiar economic environment that Nigerian businesses operate within, i.e., where there is paucity of information and where official facts are not almost readily available, hence, the recommendation for a notarized copy of the pre-contract stating its value in the objects and memorandum of association of the company, especially where the value of the pre-incorporation contract is equal or greater than the total value of the allotted shares of the company.

I. Introduction

The Nigerian Companies and Allied Matters Act, Cap 20, Laws of the Federation of Nigeria (LFN) of 1990, (now of 2004) ("CAMA")¹ does not expressly define a "pre-incorporation contract." Thus, we adopt the working definition provided under Section 71 of the South Africa's Companies Act 71 of 2008:²

A pre-incorporation contract is an agreement entered into before the incorporation of a company by a person who purports to act in the name of, or on behalf of, the company, with the intention or understanding that the company will be incorporated and will thereafter be bound by the agreement.³

From this definition, two (2) issues clearly arise: (1) the distinction in *Kelner v Baxter*,⁴ and *Newbourne vs Sensolid Ltd*,⁵ as to how the promoter signed the pre-incorporation contract is no more of relevance, i.e., whether the promoter was acting in the name of the company or on behalf of the company—he will always be an Agent of the Company; (2) Second, the focus is now on the *intention or understanding* that the company (a) will be incorporated and (b) will thereafter be bound by the agreement.

It is trite law that the goal of company law is to encourage entrepreneurship and enterprise efficiency, create flexibility and simplicity in the formation and maintenance of companies, and, to provide for the creation, role, and uses of companies in a manner that enhances economic welfare of the citizenry.⁶ Whether corporate

¹. CAMA refers to the current operative Companies/Corporations law legislation in Nigeria, known as the Companies and Allied Matters Act. This was formerly referred to as the Companies and Allied Matters Decree, 1990. However, by the consolidation of the Laws of the Federation of Nigeria in 1990, it was re-designated as the Companies and Allied Matters Act, Cap 59, Laws of the Federation of Nigeria, (LFN) 1990. This 1990 Act is now replaced and amended by the Companies and Allied Matters, Act Cap 20, Laws of the Federation of Nigeria (LFN), 2004. For ease of reference, it will be referred to as "CAMA" in this paper.

². South Africa's Companies Act 71 of 2008. The purpose of this Act in South Africa was to encourage entrepreneurship and enterprise efficiency, to create flexibility and simplicity in the formation and maintenance of companies, and to provide for the creation, role, and use of companies in a manner that enhances the economic welfare of South Africa. The South Africa Companies Act 2008 also introduced an extensive and renewed approach to the regulation of pre-incorporation contracts towards addressing the shortcomings in the South African company law jurisprudence. It was signed into law on April 8th, 2009 and has April 2011 as the proposed date of coming into effect.

³. See, Section 1 of the South Africa Companies Act, No 71 of 2008.

⁴. (1866) L.R.2CP 174.

⁵. (1954) 1 Q.B. 45.

⁶. See generally, MARYKE ALLETTA BOONZAIR, PRE-INCORPORATION CONTRACTS AND THE LIABILITY OF THE PROMOTERS, a Dissertation Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws

rules governing the status of pre-incorporation contract in Nigeria serve the above goals remain to be decided. Earlier on, the one hundred and fifty (150) years old rigid rule of *Kelner v. Baxter*, governed English Law, with most common law countries following this rule to the effect that no pre-incorporation contract¹ was binding upon a company, nor could the company adopt such contracts.² The old *Kelner v. Baxter* rule further stated that for the company to be bound by pre-incorporation contract, a new contract must be made between the newly incorporated company and the contracting party.³ Over time, that rigid *Kelner v. Baxter* rule was considered in most common law countries as “unsatisfactory and replete with serious difficulties for promoters, companies and the public at large.”⁴ Therefore, *Kelner vs Baxter* and its progeny of cases on this subject became “highly technical and inconvenient and it had become clearly desirable that they should be abrogated.”⁵

Most commonwealth countries commenced statutory amendments. For instance, in 1926, South Africa attempted statutory amendments in this regard.⁶ Nigeria also effected amendments in 1990 by the introduction of Section 72 of the CAMA. It is necessary, therefore, that, about twenty-five years after the statutory amendment, the advantages, disadvantages, and legal and economic consequences of Section 72 of CAMA which now makes statutory provisions for pre-incorporation contracts be evaluated to see how far the problems introduced by *Kelner vs Baxter* and its progeny of cases have been ameliorated in Nigeria and in other commonwealth countries.⁷ As Professor Gross had rightly warned:

*“We should bear in mind that most existing solutions are not satisfactory since they do not cover the various aspects of the subject. A comparative outlook might therefor[e] be of some help to the legislators who intend to codify this complicated aspect of company law.”*⁸

In carrying out a comparative assessment of the statutory interventions, this paper shall consider the historical context and development surrounding common law rules governing pre-incorporation contracts starting with *Kelner vs Baxter* and the interplay and influence of the rules common law of agency.⁹ It shall also carry out a comparative assessment and examination of current statutory laws governing pre-incorporation contracts in similar jurisdictions. It shall identify the impact, success, shortcomings and complications arising from the post 1990 CAMA introduction of section 72 amendments. Finally, using the *ut res magis valeat quam pereat* theory, suggestions are proffered for future amendments.

The usefulness of this work is undeniable since stakeholders, including promoters, shareholders, subscribers, stock allottees, creditors, suppliers and everyone who transacts businesses with newly formed corporations must apprise themselves of the rules discussed herein and the suggestions proffered due to existing latent traps for the unwary. The work also educates stakeholders towards safeguarding investors’ economic interest in pre-incorporation contracts. Finally, under Pareto-Hicks cost-benefit analysis, the work is important since litigation costs and expenses would further be reduced and/or avoided.

(LLM), in the Faculty of Law, University of Pretoria, South Africa, November 2010, at page iii. (Hereinafter “Maryke Boonzaier”).

¹. Some authors refer to pre-incorporation contracts as preliminary contracts. See, e.g., MICHAEL A. ADAMS, ESSENTIAL CORPORATE LAW 15-16 (1st ed.2002); M. J. Whincop, An Economic and Jurisprudential Genealogy of Corporate Law (Ashgate, Aldershot 2001) 59.

². Joseph H. Gross, *Liability on Pre-incorporation Contracts: A Comparative Review*, 18 McGill Law Journal 513 (1972). (“Gross”).

³. *Ibid.* Per Gross at 513.

⁴. *Ibid.* Per Gross at 513; See, also, Interim Report of the Select Committee on Company Law of Ontario (Lawrence Report), 1967 P. 10; Leon Getz, Pre-incorporation contracts: some proposals, (1967), U.B.C.L. Rev. 383; F.J. Nugan, Pre-incorporation Contracts in Studies in Canadian Company Law (ed. by Ziegel, S.S., 1967), at p. 197; Report of the Israel Committee on Company Law (Zeltner Committee), 1965, para. 2; Joseph H. Gross, The Problem of Pre-incorporation Contracts, (1964), 21 Hapraklit, at p. 38; Gower, Report on Company Law in Ghana, (1961), at p. 32; and Jenkins Committee 1962 (Cmnd. 1749), para. 44.

⁵. *Ibid.* Per Gross at 513.

⁶. See Maleka Femida Cassim, *Pre-Incorporation Contracts: The Reform of Section 35 of the Companies Act 2007*, 124 South Africa Law Journal (Vol. 2) 365; See, also, Caroline B. Ncube, *Pre-Incorporation Contracts: Statutory Reform*, 126 South Africa Law Journal (Vol. 2) 260.

⁷. In this discuss, via a comparative approach, we apprise the theoretical background, present state of the law, and the most probable future impact of Section 72 of CAMA which makes statutory provisions on pre-incorporation contracts in Nigeria.

⁸. See Gross, *supra* note 8, at 513.

⁹. See, Harry Rajak, Sourcebook of Company Law, 2nd Edition(1995) (Jordans); H.R. Hahlo and J.H.Farrar, Hahlo’s Case and Materials on Company Law, 3rd Edition(1987), 173 London Sweet and Maxwell; LS Sealy, Cases and Materials in Company Law, 7th Edition(2001), Butterworths; Robert R Pennington’s, Company Law, 7th Edition (1995), 108 Butterworths London Dublin and Edinburgh; Simon Gauldin, Company Law,2nd Edition(1999), Cavendish Publishing Ltd. London,Sydney.

The term, *ut res magis valeat quam pereat* is a latin term that mandates that courts must try to construe a law in a way to make sense, rather than voiding it, and that a law should be given effect rather than be destroyed.¹

*Another general rule in the construction of the charters is that such a presumption shall be made ‘ut res magis valeat quam pereat,’ that is, that the object of the grant shall be attained rather than defeated. It has even been said that nothing is to be inferred from usage to cripple the grant.*²

Therefore, in this short commentary, we shall: (a) examine the common law background to Section 72 of the Nigerian CAMA; (b) carry out a comparative study of the state of the law on pre-incorporation contracts in other common law and civil law countries; (c) critique and assess the effect and impact of statutory attempts to ameliorate and remove the obstacles posed by *Kelner vs Baxter* and its common law progeny; and, (d) finally, proffer suggestions for the future of company law, by examining how Nigerian courts can adopt the *ut res magis valeat quam pereat* rule, with the intent to establish a doctrinal approach for all courts to always decipher and construct statutes and agreements to be operative rather than inoperative and to decongest the court’s dockets of several redundant interlocutory and technical applications.

II. Origin of the Problems Associated With Pre-Incorporation Contracts

Prior to the registration/incorporation of a corporation, it is normal for the promoters of the proposed company to negotiate and enter into contracts on behalf of the proposed or future corporation,³ towards a smooth sailing into the corporate-hood.⁴

[L]ike a human being, a company does not drop from the sky. It is brought into legal existence through the activities and efforts of persons-called promoters, who take all the steps necessary for the establishment of the company.⁵

These transactional acts of the promoters are governed by principles of Agency Law⁶ along with Company Law statutes and case law.⁷ Since the purported company would require some services prior to its incorporation, such as acquisition of physical properties to be used as offices, recruitment of employees/key personnel to carry on the business activities (once incorporated), purchase of furniture and setting up of bank accounts and undertaking of the actual registration (e.g., lawyers, accountants and courier services). Business-wise, it is unwise and imprudent like for the company to wait till registration, before the lease, employment, engagement of professional services and/or banking activities could take place.⁸ This point was aptly stated by Nah Fuashi⁹ thus:

Companies, like human beings, must be conceived before they are born. The conception and the gestation period of Companies are managed by a category of persons technically known in company law as promoter. Before birth (incorporation) that is between conception and [its registration], promoters enter into contracts on behalf of the yet to be born company.¹⁰

This sets the background for the legal and philosophical issues arising from pre-incorporation contracts which can be contentious.¹¹ This is due to the *infiltration* of purely technical agency principles which mandate that for a

¹. See USLegal. Available at: <http://definitions.uslegal.com/u/ut-res-magis-valeat-quam-pereat/>. Last accessed on 10th October 2014.

². See, Holroyd J in *Rex v Cotterill* (1817) 1 B & Ald 81.

³. In this work, the terms “Company” and “Corporation”; and “Companies” and “Corporations,” shall be used interchangeably as referring to the business entity that is used to carry on business in Nigeria after registration with the Nigerian Corporate Affairs Commission (“CAC”).

⁴. Pre-incorporation contracts are inevitable features of every newly formed company. See, PAUL L. DAVIES, ed., in *GOWER’S PRINCIPLES OF MODERN COMPANY LAW* (1997) at page 144.

⁵. See C.K. Agomo, *The Status of Pre-incorporation Contracts*, in *ESSAYS ON COMPANY LAW* (E.O Akanki ed, University of Lagos Press, 1992) 77. (Hereinafter “Agomo”).

⁶. J.H. Gross, *PreIncorporation Contracts*, (1971) 87 LQR 367. (Hereinafter “Gross II”).

⁷. See J. OLAKUNLE OROJO, *COMPANY LAW ANMD PRACTICE IN NIGERIA*, 3rd ed. (Lagos: Mbeyi and Associates, 1992), at 99 (Hereinafter “Orojo”).

⁸. YVES GUYON, *DROIT DES AFFAIRES TOME 1*, (1996) at pages 165-166. (Hereinafter “Guyon”).

⁹. See NAH Thomas FUASHI, *Pre-Incorporation Contracts and the Impossibility of Ratification Under Common Law- The Salutary Jettison of a Stifling Principle by the Civil Inspired Uniform Act Relating to Commercial Companies and Economic Interest Groups Enacted by OHADA in UNIVERSITÉ DE DSCHANG, ANNALES DE LA FACULTÉ DES SCIENCES JURIDIQUES ET POLITIQUES*, (Presses Universitaires d’Afrique ed. Tome 6, 2002) at 69. (Hereinafter “Fuashi”).

¹⁰. *Ibid.* Per Fuashi, at pages 69-70.

¹¹. Oserheimen Osunbor, *Critique of the Subtle Distinction in Pre-Incorporation Contracts*, (1985) 4 J.P.P.L 9-15. (Hereinafter “Osunbor I”).

Principal to ratify an Agent's acts undertaken on the Principal's behalf, the Principal, at the time of the act was performed, must have been in existence either as a natural person or as a juristic person.¹ As Fuashi had stated:

...Common law is reticent to accept the takeover of pre-incorporation contracts by the company because of the operation of the rules governing ratification.²

Nigeria, a common law jurisdiction, was not the only common law jurisdiction that was troubled with the uncertain status of the pre-incorporation contracts based on the state of the statutory and case law on business transactions as received from the old colonial rulers in *Kelner v Baxter* and *Newbourne vs Sensolid Ltd*, and their progeny of cases.³ The same legal uncertainty also existed in the Francophone countries of West Africa until the enactment of the Uniform Act Relating to Commercial Companies and Economic Interest Groups on January 1st, 1998⁴ as promulgated by the OHADA⁵ (i.e., the "UARCCC").⁶ South Africa has also attempted, at least three (3) statutory amendments towards ameliorating the obstacles posed by *Kelner vs Baxter* and its common law progeny to efficient running of corporations.⁷

It is the problems posed by the interface between Agency Law rules and company law that forms the fulcrum of this thesis, within the context of statutory amendments.

III. The Promoter and His Role in Formation of Companies And The Interplay Between Pre-incorporation Contracts and the Law of Agency Rules.

Pre-incorporation contracts are agreements entered into by a company promoter on behalf of the company being promoted prior to the incorporation of the proposed company,⁸ so it follows that legal issues surrounding a pre-incorporation contract will be incomplete without a definition of the identity and roles of the promoter who actually executes the contract. Lord Justice Lindley in *Lidney & Wigpool Iron Ore Company v. Bird*,⁹ had defined the promoter thus:

"Although not an agent for the company or a trustee for it before its formation, the old familiar principles of law of agency and of trusteeship have been extended and very properly extended to meet such cases. It is perfectly well settled that a promoter of a company is accountable to it for all monies secretly obtained by him from it just as the relationship of the principle and agent or the trustee and *cestui que* between him and company when the money was obtained."

Statutorily, in Nigeria, a promoter is defined by Section 61 of the CAMA as:

Any person who undertakes to take part in forming a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose, or who, with regard to a proposed or newly formed company, undertakes a part in raising capital for it, shall *prima facie* be deemed a promoter of the company: Provided that a person acting in a professional capacity for persons engaged in procuring the formation of the company shall not thereby be deemed to be promoter.¹⁰

¹. See, Fuashi *supra* note 24, at 71; See, also, See, generally, G.H.L. FRIDMAN, THE LAW OF AGENCY (1983 ed.) at page 166. ("Fridman").

². *Ibid.* Per Fuashi, at 71.

³. See, generally, *Urhobo vs Tarka* (1976) 1 FNR 208; *Shonibare National Investment properties Co. vs Manour*, (1963) LLR 1; *Moukarim Metal Wood Factory Ltd., vs Durojaiye*, (1976) 1 ALR Comm. 264; *Stephen vs Build Co. Nigeria Limited*, (1968) 1 All NLR 183; *Spiller vs. Paris Skating Rink Co.*, (1878) 7 Ch.D. 368; *Natal Land and Colonization Co. Ltd v Pauline Colliery and Development Syndicate* [1904] AC 12; *Re National Mail-Coach Co. Ltd., Clinton's Claim*, [1908] 2 Ch. 515; *Re Heresford and South Wales Waggon and Engineering Co.*, (1876) 2 Ch.D 621; *Re Empress Engineering Co.*, (1880) 16 Ch.D. 125; *Rover International Ltd. vs Cannon Film Sales Ltd., (No. 3)*, [1989] 3 All E.R. 432; *McCullogh vs Fernwood Estate Ltd.*, (1920) AD 204, at 207-208; *Sentrale Kusnsmis Korp (Edms) Bpk vs. NKP Kusnsmisverspreiders (Edms) Bpk*, (1970) 3 SA 342, at page 345.

⁴. The UARCCC is the business law governing business organizations within the Francophone Zone in Africa, which became operative on 1st of January 1998.

⁵. OHADA is the acronym for the Organization for the Harmonization of Business Law in Africa, comprising Sixteen (16) countries such as Benin, Burkina Faso, Cameroon, Central Africa Republic, the Comores, Republic of Congo (Brazzaville), Côte d'Ivoire, Gabon, Republic of Guinea, Republic of Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. The OHADA is known in French as Organisation pour l'Harmonisation en Afrique du Droit des Affaires, instituted under 17th October 1993 Treaty of Port-Louis.

⁶. See Fuashi, *supra* note 24, at 69.

⁷. See, Maryke Boonzaier, *supra* note 6, at pages 12-33.

⁸. M. J. Whincop, "Of Dragons and Horses: Filling Gaps in Pre-incorporation Contracts" (1998) 12 JCL 223-225.

⁹. *Lidney & Wigpool Iron Ore Company v. Bird* [1866] 33 Ch. D 85

¹⁰. See also *MacAura vs Northern Assurance Company Ltd.*, [1925] AC 619; *Twycross vs Grant*, (1877) 2CPD 469; *Adeniji*

Similarly, under Section 423 of the South African Companies Act No. 61 of 1973, a promoter is defined as any person who has taken part in the formation or promotion of a company. On the other hand, in the United States, Section 2(a) of the Investment Company Act of 1940, a promoter is defined thus:

“Promoter” of a company or a proposed company means a person who, acting alone or in concert with other persons, is initiating or directing, or has within one year initiated or directed, the organization of such company.”¹

Thus, a corporate promoter (also referred to as a "projector") is a person who solicits people to invest money into a corporation, usually when it is being formed. While an investment banker, an underwriter, or a stock promoter may, wholly or in part, perform the role of a promoter, promoters generally owe a duty of utmost good faith, so as to not mislead any potential investors, and disclose all material facts about the company's business. He is a person who does the preliminary work incidental to the formation of company.²

Legal consequences resulting from a promoter's dealings with third parties on behalf of a future corporation are significant,³ because, it is very clear from the point of promoter that he is not the agent of the company nor is he doing any authorized work, yet, he is entering into a contract with a third party on behalf of non existing principal.⁴

The position of a promoter becomes very ambiguous, especially, when the corporation refuses to adopt the pre incorporation contract.⁵ In Nigeria, the status of the pre-incorporation contracts is stated under Section 72(1)&(2) of the CAMA thus:

72. (1) Any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereto.

(2) Prior to ratification by the company, the person who purported to act in the name of or on behalf of the company shall, in the absence of express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof.

From the above, sub-section (1) of section 72 evinces the following:⁶

(1) it gives the new company the *discretion* of deciding whether to ratify and accept a pre-incorporation contract;

(2) it also expunges the distinction in *Kelner v Baxter* and *Newbourne vs Sensolid Ltd*, as to how a promoter signs a pre-incorporation contract (**which is now of no relevance**);

(3) it applies to all contracts and transactions executed prior to formation of the company; and

(4) the benefits and liabilities on the pre-incorporation contract fall on the new company after ratification.⁷

In addition, sub-section (2) of section 72 also literally shows that:

(1) it seeks to protect a *bona fide* third party who was not aware of the promoter's lack of authority, by providing remedy for the injured third party, who may recoup under the contract from the promoter if, after incorporation, the company does not ratify the contract;

vs Starcola (Nigeria) Ltd., (Suit No. M. 135/70, Unreported High Court, Lagos.), 1 (1972) All N.L.R 52/2 (1972) 1 S.C. 140.

¹. INVESTMENT COMPANY ACT OF 1940 [AS AMENDED THROUGH P.L. 112-90, APPROVED JANUARY 3, 2012]; See, also, Section 30 15 U.S. Code § 80a-2.

². *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218

³. See, Prasad Raj Singh, Promoter & Pre incorporation contract, 1. Electronic copy available at: <http://ssrn.com/abstract=1938065>. Last accessed 13 October 2014.

⁴. *Ibid.* Prasad Raj Singh.

⁵. *Ibid.* Prasad Raj Singh.

⁶. See Agomo, *supra* note 20 at page 83.

⁷. Curiously, the phrase "adoption" was not used in the legislation. This was the word used in the Nigerian seminal case of in *Edokpolo vs Sem-Edo Wire Industries Ltd.* (1984) N.S.C.C. 553

(2) the injured party can also recoup under the contract from the promoter if the company eventually does not come into existence; and

(3) it also requires the consent of the third party to any later post-incorporation agreement or resolution by the new company, not to ratify which also seeks to absolve the agent from liability.¹

As stated earlier, section 72 CAMA arose from the practical obstacles encountered under the old common law rule governing pre-incorporation contracts. According to Maryke Boonzaier,² common law of agency placed an obstacle ahead of businessmen who tried to contract with promoters (Agents), and also where the promoters tried to contract on behalf of a Principal (the new Company) that does not yet exist in an attempt to obtain benefits for that Principal:

The common law principles from the understanding that a company—prior to incorporation—is not yet a legal entity and can therefore not perform juristic acts such as the conclusion of contracts. In the same vein, no person has the authority to act as an Agent of a company that has not yet been established. Where an Agent proceeds to contract on behalf of a non-existing Principal, with the expectation that the Principal will ratify the transaction upon incorporation, the common law rules of agency will preclude the ratification. These rules determine that a Principal, not yet in existence at the time of the transaction, is not competent to ratify and hence there can be no representation of such a person. Ratification has a retrospective effect and for this reason a person cannot act on behalf of a Principal that does not exist. A company can thus not acquire rights nor incur liabilities in this manner.³

The original rationale behind this common law obstacle was based on the strict Law of Agency which demanded that the Principal and Agent must have agreed that an agency relationship existed *prior* to the Agent acting for the Principal.⁴ Thus, in situations where the Agent had acted, on behalf of the Principal, but without authority, common law required that the Principal on being made aware of *ultra vires* acts, must have *ratified, adopted* and *accepted* the unauthorized conduct of the Agent. Further, such ratification gives validity to the agent's acts *from the date of ratification* and the act of ratification is also *antedated* so as to take effect from the time of the Agent's unauthorized conduct.⁵

IV. The Position of the Law on Pre-Incorporation Contracts in Nigeria Prior to 1990.

Prior to 1963, the Nigerian legal system was fashioned after the English case and statutory laws, and so, the Nigerian company law, like all other laws, was originally inherited in the aftermath of the late 19th century European colonization of Africa. Nigeria was colonized by the Great Britain, and it followed that English statutory and case laws were imported into Nigeria.⁶ As Orojo stated:

“[Modern statutory company law is] foreign to the customary and indigenous system of laws in Nigeria and its history is part of the received English law which has become incorporated into the Nigerian legal system.”⁷

First, there was the Joint Stock Companies Act of 1856 that introduced the limited liability company and the deed of settlement systems as practiced in the United Kingdom.⁸ What the British did was to enact several company ordinances between 1912 and 1960, when Nigeria regained its independence from colonial rule.⁹ In 1912, the Companies Ordinance that was only applicable to Lagos State, was enacted. The 1912 Companies Ordinance was largely based on the English Companies (Consolidation) Act of 1908, and this 1912 Ordinance was extended to the rest of the country in 1917 after the amalgamation of the Northern and Southern protectorates of Nigeria in 1914.¹⁰ Its objects were:

¹. See Agomo, *supra* note 20 at page 83.

². See Maryke Boonzaier, *supra* note 6, at 1.

³. *Ibid.* Per Maryke Boonzaier at pages 1-2.

⁴ See, Fridman *supra* note 27, at page 73-96; See, also, Agomo, *supra* note 20, at page 80.

⁵. *Ibid* Fridman, at 73-96.

⁶. See Orojo, *supra* note 22, at 16.

⁷. *Ibid.*

⁸. See Bukola Akinola, A Critical Appraisal of the Doctrine of Corporate personality Under the Nigerian Company Law, NLII Workshop Paper No. 002; See also, Orojo, *supra* note 7, at 17.

⁹. See, *generally*, BONIFACE U. AHUNWAN, CONTEXTUALISING COMPANY LAWS: A COMPARISON OF THE NIGERIAN AND CANADIAN SHAREHOLDERS' REMEDIES, a Thesis Submitted to the Faculty of Graduate Studies and Research, University of Alberta, Edmonton, Alberta in Partial Fulfilment of the Requirements of the Degree of Master of Laws, Fall 1998, at Page 3. (Hereinafter "Ahunwan").

¹⁰. See, Orojo *supra* note 22, at pages 18.

To provide for the formation of limited companies within the Colony and Protectorate. It is hoped thereby to foster the principles of cooperative trading and effort in the country.¹

Another Companies Ordinance, which was based on the United Kingdom Companies Ordinance of 1922, was enacted in 1929, repealing the 1912 Ordinance.² This continued in force until 1968, when, after independence, the Companies Decree of 1968 was promulgated by the then Military Regime of General Yakubu Gowon.³ This 1968 Companies Decree was fashioned after the British Companies Act of 1948, and it was wholly based on the recommendations of The Jenkins Committee.⁴ In 1977, the regime of General Olusegun Obasanjo had embarked on indigenization promotion, pursuant to which Nigerian ownership in businesses were promoted, and this led to the promulgation of the Nigerian Enterprises Promotion Decree 1977. (Hereinafter referred to as “NIPC”).⁵

Both 1968 Companies Act and the NIPC contained provisions that specified enlarged accountability and duties of corporate directors and officers. In particular, Part X of the 1968 legislation contained regulations that limited the scope of actions that could be taken by the corporate managers. After the end of the military rule in 1979, the Companies Act of 1968 became redundant and unsuitable for the Nigerian business terrain, principally, because of the foreign flavour contained in the 1968 Companies Decree. The serious defects in the 1968 Companies Decree, especially, as concerning the corporate contracts, third parties and minority shareholders’ rights were echoed by Dr. Boniface Ahunwan thus:

The 1968 Act did nothing other than re-enact the British Companies Act 1948. Consequently, the Act was faulty because it was not enacted within the context of the Nigerian environment. It was therefore unable to match the country’s level of development and its aspirations for greater economic growth. In Nigeria, because the corporate concept was novel, combined with the unsophisticated nature of the shareholders, there has always been the need to give ample protection to these shareholders. This is to encourage the growth of the corporation and also the national economy. It is also to encourage the inflow of foreign capital which in modern times is indispensable to economic development. Although other variables affect business and the attraction of foreign shareholders, such as political stability and enforcement of law and order, the protection afforded to shareholders is also a major factor.⁶

Thus, in 1987, the National Workshop on Reform of Nigeria Company Law was set up, under the leadership of Honourable Justice Olakunle Orojo (Retired), to fashion a workable legislation for the Nigerian business community.⁷ The result was the Companies and Allied Matters Act, of 1990 (CAMA),⁸ which came into effect in 1990, as an outcome of a National Workshop on Reform of Nigeria Company Law in 1990. The Workshop highlighted, among other things, the ineffective minority protection provisions in the 1968 Companies Act. In effect, the CAMA’s provisions:

[E]mphasized greater protection for shareholders by the provision of wider shareholders’ remedies. Even though structurally, the Act remains the British memorandum and articles model, it also adopted the Canadian approach to shareholders’ remedies by making provision for the derivative action, a liberal oppression and unfair prejudice remedies and other personal remedies.⁹

¹. See, the Southern Nigeria Gazette Extraordinary No. 8, Vol. 7 of February 5 & 7 1912, page (xii).

². See, generally, Orojo *supra* note 22, at pages 18-19.

³. A Decree that was promulgated by fiat by the General Yakubu Gowon’s military junta. However, after the return to the Civilian rule in October 1979, it was re-designated as Companies Act 1968, S.I. 1980, No. 13.

⁴. See, the Preamble to the Companies Act of 1968; See, *also*, The JENKINS COMMITTEE ON COMPANY LAW. This was a Company Law Committee, chaired by Lord Jenkins and formed under the tenure of John Rodgers (Parliamentary Secretary to the Board of Trade). It was formed in November 1959 with terms of reference To review and report upon the provisions and workings of: the Companies Act 1948; the Prevention of Fraud (Investments) Act 1958 and Registration of Business Names Act 1916. The Report released is known as the JENKINS COMMITTEE ON COMPANY LAW, Journal of the Institute of Actuaries (1886-1994) Vol. 89, No. 2 (SEPTEMBER 1963), pp. 105-124 Published by: Cambridge University Press.

⁵. Now, known as the Nigerian Enterprises Promotion Act, Cap N117, Laws of the Federation of Nigeria (2004). (Hereinafter “NIPC”).

⁶. See Ahunwan, *supra* note 52, at page 4.

⁷. THE NIGERIAN LAW REFORM COMMISSION, Working Papers on the Reform of Nigerian Company Law (Vol. 1: Review and Recommendations) (Lagos NLRC. 1989). (Hereinafter “NLRC”).

⁸. See, note 1, *supra*.

⁹. See Ahunwan, *supra* note 52, at pages 4-5.

It must be noted that prior to the CAMA, the 1968 Companies Act did not specifically make any provisions regarding pre-incorporation contracts, except in its Article 80 of Table A Schedule I, which contains provisions regarding companies which adopted Table A.¹

The 1990 CAMA faced issues arising from pre-incorporation contracts especially where the company is never incorporated and the third party wishes to enforce the contract on which he has expended time, energy, effort and money against the corporation,² or the company is incorporated but the directors do not wish to be encumbered with the pre-incorporation contracts allegedly entered into on its behalf by the promoter. Further, in this regard, Professor Agomo also identified cases where the company may even resolve to accept liability on the pre-incorporation contract, but is unable to perform due to lack of funds or being in liquidation process.³

V. **Applicable Pre-1990 English Common Law and Nigerian Judicial Decisions on Pre-Incorporation Contracts**

At this juncture, it is apposite to extrapolate on the annals of case law that previously governed the status of pre-incorporation contracts as existing prior to 1990 CAMA. The first case that dealt with pre-incorporation contracts was *Kelner v Baxter*,⁴ where Earle, CJ, held that the promoters who had purchased wine prior to the incorporation of the corporation would be personally liable as the corporation lacked personality prior to its registration. In *Kelner v Baxter*, three promoters purchased wine from Kelner as agents of the company. The company was formed but went into bankruptcy prior to payment for the wine, and in a lawsuit for the cost of its winery, Lord Earle held thus:

If the company had been in existence, the defendant would have agreed as agents, but since the company was not in existence, the documents in which the agreement was set out would be inoperative unless it was a contract between the plaintiff and the defendant. If there is no existing principal, such a contract binds the person professing to be agents.⁵

In addition, Willes, J, opined that:

Ratification can only be...by a person in existence either actually or in contemplation of law.⁶

Further, the common law attempted to distinguish between situations (a) where the promoters signed as “for and on behalf of” the future corporation and (b) where the promoter wrote his own name without indicating that he was an agent as occurred in *Newbourne vs Sensolid Ltd.*⁷ Unlike *Kelner v Baxter*, where the agent had signed for a disclosed principal and so caught by the Warranty of Authority rule, the court in *Newbourne vs Sensolid Ltd*, held that the contract was a nullity which was not capable of being ratified because Newbourne did not disclose any principal and that the party that Seller intended to contract with the purported corporation only, and never with the promoters.⁸ The rule in *Newbourne* is that since the intent of the third party was to contract *solely* with the corporation, albeit nonexistent, and that the intention was not to contract with the agent, the contract was a nullity since there was no meeting of the minds. There was no offeree to the consideration offered by the third party, and in addition, there was no consideration by the nonexistent company, i.e., there was a total unilateral mistake of facts leading to a null and void contract. In the words of Windeyer, J, in *Black vs Smallwood*,⁹

In many cases courts have had to decide whether an agent had, in the particular case, incurred a personal liability on a contract in writing made by him on behalf of a principal. And these decisions have sometimes turned upon narrow differences in wording.¹⁰

Thus, in the Nigerian case of *Caligara vs Giovanni Sartori & Co Ltd.*,¹¹ the Court followed the ruling in *Newbourne vs Sensolid Ltd.*¹² In December 1956, Giovanni had obtained a loan of £800.00 from Caligara by a cheque cashed on 24th January 1957, but Giovanni had obtained the loan in the name of the proposed

¹. See Agomo, *supra* note 20, at page 83.

². H.M. Oglivie, *Company Law-Contract-Liability of Persons Purporting to Contract as Agent for Unformed Company: Phonogram v. Lane*, (1983) UBC Law Rev. 321; See, also, *Stephen vs Build Co. Nigeria Limited*, (1968) 1 All NLR 183.

³. See Agomo, *supra* note 20, at pages 79-80.

⁴. (1866) L.R.2CP 174

⁵. *Ibid.* Per Lord Earle, CJ at page 183.

⁶. *Ibid.* 184.

⁷. (1954) 1 Q.B. 45.

⁸. See Agomo, *supra* note 20, at page 80.

⁹. (1967-68) 11 CLR 52.

¹⁰. *Ibid.* at 61-62.

¹¹. (1961) 1 All N.L.R. 555.

¹². (1954) 1 Q.B. 45.

corporation. Honourable Justice Sowemimo, relying on Paragraph 824, Page 425 of Volume 6 of the Halsbury's Laws of England, (3rd edition), held that the loan transaction was a nullity and so rejected the argument that the later corporation was liable since Mr. Sartori had not acted as an agent. Further, the court also held that the corporation could not ratify the loan, since it had no legal capacity to confer any authority on the borrower:

As I earlier mentioned at the time the cheque was cashed, the defendant company was not in existence and it could not be said to have taken the benefit of this contract. In the result, the Plaintiff's claim must fail. He has his remedy which he can enforce against the proper person.¹

The same view was advocated by Honourable Justice Nnamani, JSC in *Edokpolo vs Sem-Edo Wire Industries Ltd.*,² that:

It is now a well settled principle of Company Law that a company is not bound by a pre-incorporation contract being a contract entered into by parties when it was not in existence. No one can contract as agent of such a proposed company there being no Principal in existence to bind.³

As to whether there can be a novation⁴ by which the company, *after* its registration can then enter into a new contract, on the same terms as the old contract, the pre-1990 judicial opinions appear to be divergent. In *In Re Empress Engineering Company*,⁵ Lord Jessel, MR had held thus:

The contract between the promoters and the so-called agent for the company of course was not a contract binding upon the company, for the company had then no existence nor could it become binding on the company by ratification, because it has been decided and as it appears to me well decided that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made because the ratifier was not then in existence...it does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one, but that stands on a different principle.⁶

In Nigeria, in *Enahoro vs Bank of West Africa Ltd.*,⁷ plaintiff bank had lent money to the principal shareholder. *Prior* to the incorporation of the company, the loan was transferred to the company, and after formation, a resolution was passed authorizing the transfer of indebtedness to the new company. Also, after incorporation, the shareholder as the principal officer obtained a second loan on behalf of the company. Honourable Justice Lewis, while holding the company liable for the 2nd loan, however, held that the 1st loan cannot be enforced against the new company because a subsequent ratification by a company of an agreement purporting to be made on its behalf prior to its formation can only be with the assent of the third party to the agreement, and in effect, will be a new agreement:

We do not see that the liability incurred by the second defendant prior to the coming into existence of the first defendant, albeit transferred to the loan accounts of the first defendant...and no novation was in our view pleaded by the plaintiff, so that the plaintiff cannot now rely upon novation...⁸

Thus, in Nigeria, novation could not be unilaterally effected by the new corporation all by itself, the third party must also give his assent until the decision in *Edokpolo vs Sem-Edo Wire Industries Ltd.*⁹ Therein, on 27th October 1975, Edokpolo had executed a pre-incorporation agreement with SEM Nigerian Holding GHBH and Company Hamburg, (a German company) to create Sem-Edo Wire, i.e., that Edokpolo and the German Company would own 40% and 60%, respectively in the new Sem-Edo Wire company. The agreement was incorporated into the memorandum of the new company. The company was incorporated on 5th December 1975. On 27th February 1976, in breach, the new company after formation, allotted part of Edokpolo's 40% to the chairman and the solicitor, despite a post-incorporation adoption of the share allotment agreement by Sem-Edo Wire's Board of Directors, i.e., that a new contract had been created between Edokpolo and Sem-Edo Wire after

¹. Per Honourable Sowemimo, J., in *Caligara vs Giovanni Sartori & Co Ltd.* (1961) 1 All N.L.R. 555, at page 556

². (1984) N.S.C.C. 553.

³. *Ibid.* at 555.

⁴. *Howard vs Patent Ivory Manufacturing Co. Ltd.*, (1888) 38 Ch.D. 156.

⁵. 16 Ch.D 125.

⁶. Per Lord Jessel, MR at 16 Ch.D 125, page 128; See, also, Kay, J. in *Howard vs Patent Ivory Manufacturing Co. Ltd.*, (1888) 38 Ch.D. 156, at page 164; *Firgos (Nigeria) Ltd v Zettors (Nigeria) Pools Ltd.*, (1965) NLR 13.

⁷. (1971) 1 NCLR 180.

⁸. *Ibid.* Per Lewis, JSC at page 192.

⁹. (1984) N.S.C.C. 553.

incorporation on the same terms as the pre-incorporation contract. Upholding the novation, Justice Nnamani, JSC, held that there was nothing to prevent the new corporation from ratifying the pre-incorporation after its later registration:¹

But there is nothing preventing the company after incorporation from entering into a new contract to put into effect the terms of the pre-incorporation contract. This new contract can be in express terms or can be implied from the acts of the company after incorporation as well as from the minutes of its general meetings and board meetings.²

After examining the pleadings, Justice Nnamani further held that:

The implication of this is clearly that after incorporation the company...in its meetings entered into arrangements similar to those contained in the 1975 agreement.³

Arguably, in Nigeria, based on *Edokpolo vs Sem-Edo Wire Industries Ltd.*, the company by its own post-incorporation resolution may unilaterally ratify a pre-incorporation contract.

VI. The Demand For Statutory Intervention in Resolving the *Kelner v Baxter* Quagmire.

While the holding in *Edokpolo* was salutary, by late 20th century, public angst against the rule in *Kelner vs Baxter* and its progeny had become very loud.⁴ There were various calls for its abrogation and/or amendments since it worked injustice and, at the very least, impracticalities. As Yves Guyon had argued, it would be unwise and un-businesslike for the company to wait till registration, before the lease, employment, engagement of professional services and/or banking activities could take place.⁵ Further, according to J.H. Gross:

It is rare to hear of such widespread and common opposition against any aspect of English Company Law as that against the 100 year old rule in *Kelner vs Baxter*. It has long been seen that while there are many good reasons why one person ought not to be bound by the offices of another who acts without title or authority, there are no practical reasons why such acts should not be ratified.⁶

In addition, Professor Agomo's view was that:

[The rule in *Kelner vs Baxter*] has been understandably called one of the weakest points of English company law, and one which in one's opinion reduced judges to a sterile role and made an automation of them.⁷

To L.C.B. Gower, the rule is out of touch with reality and with modern requirements.⁸ Further, Professor Oserheimen Osunbor opined that there was need to avoid:

The unnecessary expenses incurred in resolving disputes connected with pre-incorporation contracts which no longer posed much difficulty in Ghana, England as well as many other commonwealth countries.⁹

It was based on these concerns that the Nigerian Law Reform Commission in its review of the Nigerian Company Law recommended a statutory modification of the common law position along the lines of Ghanaian Legislation, leading to Section 72 of CAMA.¹⁰

VII. The State of Pre-Incorporation Contracts Under Civil and Statutory Laws Existing in Francophone Countries of West-Africa.

¹. Per Nnamani, JSC in (1984) N.S.C.C. 553, at page 561, while relying on *Touche vs Metropolitan Railway Warehousing Co.*, (1871) 6 Ch.App. 671.

². Per Nnamani, JSC in (1984) N.S.C.C. 553, at page 561

³. *Ibid.* per Nnamani, JSC, at page 562; *See, also, Edwards vs Halliwell*, (1950) 2 All ER 1064; *Heyting vs Dupont*, (1964) 1 WLR 843; *Burland vs Earle*, [1902] AC 83 (PC).

⁴. *See, Osunbor 1, supra* note 26, at 9-15; *See, also, Honourable Justice Karibi-Whyte, JSC, Some Reflections on Company Law Reform*, Nigerian Business Law and Practice Journal, Vol. 1, No. 32 July/Dec. 1988.

⁵. *See, Guyon supra* note 23, at 165-166.

⁶. *See, Gross, supra* note 8.

⁷. *See Agomo, supra* note 20, at page 82.

⁸. L.C.B. Gower, *THE PRINCIPLES OF MODERN COMPANY LAW*, (6th ed.) at 282.

⁹. Oserheimen Osunbor, *Critique of the Subtle Distinction in Pre-Incorporation Contracts*, (1985) 4 J.P.P.L 9-15. (Hereinafter "Osunbor II").

¹⁰. *See Agomo, supra* note 20, at page 83.

Nigeria is surrounded by French-speaking African nations, known as Franco-phone and/or Franc Zone countries,¹ it is therefore necessary to consider the interrelationship of these countries' business laws with that of Nigeria. While Section 72 of the Nigerian CAMA uses the term "promoters," the UARCCC uses the term "Founder".²

In Cameroun, for instance, the part that occupy English section that once formed part of the protectorate assigned to the British after the First World War also inherited the rule in *Kelner v Baxter*.³ Generally, in Franco-phone and/or Franc Zone countries, under the Uniform Act Relating to Commercial Companies and Economic Interest Groups of January 1st, 1998 (UARCCC), there is a distinction between (a) companies that are merely formed and (b) companies that have been formed and incorporated.⁴ Thus, under Article 101 of UARCCC, a corporation is formed on the date the incorporators subscribe their signatures to the Articles of the company. Yet, such a company has no legal personality recognized by law,⁵ since Article 98 of UARCCC provides that a company acquires legal personality when it is registered in the Trade and personal Property Credit Register.⁶

Further, articles 106-110 of UARCCC state that for a company that has not been incorporated, promoters who have entered into pre-incorporation contracts which they intend to be taken over by the company after incorporation must inform the members of the company about the existence of such a contract.⁷ The disclosure of pre-incorporation contracts must be done either prior to the signing of the Articles of Association where the company must not make public calls for capital or during the statutory meeting of the company where the company is the one making the calls for public capital.⁸

Under Article 106(2), a *Statement of Acts Done and Commitments Made On Behalf of the Company Under Formation*, stating the pre-incorporation contracts and the potential liabilities of the new company must be provided. If the new company is entitled to a Statutory Meeting, a *Statement of Acts Done and Commitments Entered Into With Third Parties On Behalf of the Company*, shall be appended to the Articles and presented to the members. If, after this, the members decide to sign the articles and the Statement, the company is deemed to have taken over the pre-incorporation contracts and commitments from the date that company is registered in the Trade and Personal Property Credit Register.⁹

Further acts done and commitments entered into on behalf of the company during formation may also be taken over by the company after incorporation,¹⁰ once such are approved at the Annual General Meeting of shareholders under the conditions laid down by the UARCCC, unless there is a contrary provision in the articles.¹¹ The meeting shall be fully informed of the nature and scope of each of the acts and commitments being proposed for take-over by the company.¹² The persons who enter into such acts and commitments shall not vote and their votes shall not be taken into account in determining the quorum and majority.¹³

As to companies that are entitled to a statutory meeting, the take-over of pre-incorporation acts and commitments shall be the subject of a special resolution taken during the statutory meeting under the conditions laid down by the UARCCC.¹⁴ Thus, concerning the fate of contracts entered into on behalf of a Franco-phone/Franc Zone company before incorporation under UARCCC, pre-incorporation contract entered into on behalf of a company at this stage could be taken over by the company either through the operation of a contract of agency or by way of ratification.¹⁵ As stated by Fuashi, the application of the contract of agency rule expresses the creation of an agency relationship based on agreement generally before the agency is executed. Thus, from the date of signature on the Articles of Association, company management is taken over from

¹. During the 1880's scramble for Africa and as a result of the defeat of Germany after the 1st World War, Nigeria became enclosed by countries (Togo, Republic of Benin, Niger, Chad and Cameroon) that were previously colonized by France and the German-colonized nations (Togo and Upper-Cameroun) that were ceded to France by the League of Nations in 1919.

². See Articles 73 and 102 of UARCCC. To, Fuashi, this is a misnomer, because these promoters referred at founders may not subscribe to memorandum and articles of association of the corporation upon the registration of the company. See, Fuashi, *supra* note..., at page 69, fn 3.

³. Chapter 37, of the Laws of the Federation of Nigeria (1958).

⁴. See, Fuashi, *supra* note 24, at page 73.

⁵. *Ibid* per Fuashi, at pages 73-74.

⁶. See Uniform Act Relating to the General Commercial Law, Article 20, *et seq.*

⁷. See, UARCCC Article 106.

⁸. See, UARCCC Article 106; See, Fuashi, *supra* note..., at page 74.

⁹. See, UARCCC Article 107.

¹⁰. See, UARCCC Article 108.

¹¹ See, Fuashi, *supra* note 24, at pages 74-75.

¹². *Ibid* per Fuashi, at page 75.

¹³. *Ibid* per Fuashi.

¹⁴. See Article 410 of the UARCCC; See, also, Fuashi, *supra* note 24, at page 75.

¹⁵. *Ibid* per Fuashi

founders by company executives under the *Dirigeants sociaux* rule, designated by shareholders.¹ Shareholders may in the Articles of Association or in a separate instrument, grant powers to one or more of the company executives, depending on the case to enter into commitments on behalf of the company which though fully formed, has not yet been entered into the Trade and Personal Property Credit Register, provided that such commitments are defined and their scope are specified in the terms of reference.²

This creates a Contractual Agency relationship between the shareholders (Principal) and the Company Executives (Agents). Acts which fall within the terms of reference granted by the shareholders will bind the shareholders viz-a-viz the third parties and the takeover of their acts is by simple registration of the company in the Trade and Personal Property Credit Register.³

However, where the company executives involve themselves in acts that are beyond the scope of the terms of reference, Article 112 of the UARCCC also provides for the possibility of take-over by ratification.⁴ Thus, there can be take-over of pre-incorporation contracts by ratification, which occurs where acts that the company executives carry beyond the scope of their terms of reference or are unrelated to such terms may still be taken over by the company under Article 112 of the UARCCC. Yet, ratification can only take place where such has been approved by an ordinary meeting of shareholders under the conditions laid down by the UARCCC.⁵ In effect, the shareholders are thus the ratifying authority under the banner of the ordinary meeting.⁶ However, the shareholders involved in such acts shall not be taken into account for determining the quorum and the majority.⁷ The above statutory intervention in the Franco-phone countries is salutary and welcome:

With the possibility of take-over of pre-incorporation contracts provided for by the Uniform Act, once a contract has been taken over by a duly constituted and registered company, it is considered that the company itself entered into the contract from the origin. This discharges the promoter from any liability on the contract. The promoter will however be unlimitedly liable in situations where the company does not take-over the contract.

Given the indispensability of certain pre-incorporation contracts, the attitude of the Uniform Act towards these contracts can aptly be described as pragmatic, and goes a long way to encourage company floatation...

By allowing the company the possibility to choose those pre-incorporation contracts it can take-over and those to reject, the Uniform Act adopts a more pragmatic attitude towards promoters and these contracts. This is an area of the law in which the Common Law should jettison legal parochialism and embrace stance like that of the Uniform Act over same. In fact, it is one of the strong points of the Uniform Act, and undoubtedly can foster economic development by facilitating the creation of companies.⁸

In sum, under the UARRC, the shareholders, upon full disclosure, have the option of ratifying or to refuse the pre-incorporation contracts. However, in deciding whether to ratify or not, interested shareholders must not vote at the meeting

VIII. Pre-Incorporation Contracts Under Section 35(1) of Malaysia Companies Act 1965.

The legal position of pre-incorporation contracts is different in English common law from Malaysian company law statute, since under *Kelner vs Baxter* rule, pre-incorporation contracts are invalid and cannot be ratified and adopt the benefits of the contract which has been made on its behalf.⁹ However, statutory amendments under Malaysia Companies Act 1965 creates a *legal presumption* that the legal status of pre-incorporation contracts is that it is invalid, with the exception that it can be ratified by virtue of Section 35(1) of the Malaysia Companies Act 1965:

“Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of a company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to

¹. *Ibid* per Fuashi

². See Article 111 of the UARCCC; See, also, Fuashi, *supra* note 24, at page 75.

³. *Ibid* per Fuashi.

⁴. *Ibid* per Fuashi, at page 76.

⁵. *Ibid* per Fuashi.

⁶. *Ibid* per Fuashi.

⁷. *Ibid* per Fuashi.

⁸. *Ibid* per Fuashi.

⁹. See, Mastura Hashim, *Pre-incorporation contract - Company Law*. Available at: https://www.academia.edu/3336504/Pre-incorporation_contract_-_Company_Law. Last accessed on 10th October, 2014.

the benefit thereof as if it had been in existence at the at date of the contract or other transaction and had been a party thereto.”

While outsiders may suffer total negative effects under English common law as such contracts cannot be ratified and are unenforceable before the courts,¹ under Malaysia company law, the outsiders are secured when they make contracts with a company in good faith, because pre-incorporation can be ratified, and after ratification by the Board of Directors,² the company becomes legally bound by the contract.³

So, outsiders can claim the price of the goods. In case of the contract not been approved by directors, outsiders have the right to sue the promoters for personal liability for breach of the contract.⁴

In the Malaysian case of *Cosmic Insurance Corpn. Ltd. v. Khoo Chiang Poh*,⁵ before the company's incorporation as a legal entity, Mr. Khoo Chiang Poh was appointed as the managing director to the company in August 1971 in a pre-incorporation contract between Poh and the remaining 11 promoters acting as agents for Cosmic. The appointment stated:

“Mr. Khoo Chiang Poh shall be the managing director for life unless he resigns, dies, or commit an offence under the Companies Act or is prohibited to become a director under the Companies Act for any offences.”

Thereafter, on 26th of September 1971, Cosmic was incorporated and there was a ratification of the appointment contract with a slight modification to include the following:

“Resolved that Mr. Khoo Chiang Poh be appointed Managing Director and hold office for life in accordance to the Articles and Memorandum of Association and is responsible to the Board of Director.”

The court upheld the ratification of the pre-incorporation contract because the subsequent modified ratification did not affect or invalidate the appointment of Koooh as a director. Further, Malaysian company law, allowed a pre-incorporation contract to be ratified and validated even the word or term in the ratification is different from the previous term.⁶

Also, in *Ahmad bin Salleh & Ors v. Rawang Hills Resort Sdn Bhd*,⁷ plaintiffs had entered into a contract to sell a piece of land to defendants, and part of the purchase price had been received by plaintiffs. Further, plaintiffs also granted irrevocable powers of attorney to defendants for the purpose of partitioning the said land representing the ownership between plaintiffs' and defendants'. The agreement mentioned that the process will be settled within six months from the date of the contract or the date the issuance of related document for partitioning process. During litigation, plaintiffs alleged that defendants had breached the agreement by, inter alia, not being incorporated when the sale and purchase agreement was entered into. The court dismissed plaintiffs' claim even though by the time the first sale and purchase agreement was executed, defendants were not in existence, however, the agreements were subsequently ratified under s 35 of Companies Acts 1965.⁸

It seems that the Nigerian case of *Edokpolo vs Sem-Edo Wire Industries Ltd.*, and the Malaysian case of *Cosmic Insurance Corpn. Ltd. v. Khoo Chiang Poh*, are on all fours, since the corporation is allowed to unilaterally ratify a modified pre-incorporation contract.

IX. Pre-Incorporation Contracts Under Section 47 of the Zimbabwean Companies Act (2006).⁹

Zimbabwe corporate law allows for two major exceptions to the common law rule in *Kelner vs Baxter*, i.e., the concept of the *stipulatio alteri* and Section 47 of the Companies Act. Thus, in *Watson v Gilson*

¹. *Ibid* per Hashim at 1.

². This is a opposed to the situation under the UARRC, where it is the shareholders that approve the pre-incorporation contract.

³. See, Hashim *supra* note 117, at 1.

⁴. *Ibid.* per Hashim at 1.

⁵. [1981] MLJ 61. (Privy Council before Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Searman, Lord Roskill & Sir Garfiel Barwick, on July 10th & October 15th, 1980 [Privy Council Appeal No. 13 of 1979]

⁶. This case was fully discussed by Mastura Hashim, *supra* note 117.

⁷. [1995] 3 MLJ 211 HIGH COURT (SHAH ALAM) – SUIT NO 22-140-94, before Honourable JAMES FOONG J on August 3rd, 1995.

⁸. Also, plaintiffs were estopped from raising the issue non-existence of the company because they had until just before the trial, accepted the defendants as a legal entity in the first sale and purchase agreement. See, also, Hashim *supra* note 117 at 11.

⁹. COMPANIES ACT, TITLE 24 Chapter 24:03 (2006)

Enterprises & Ors,¹ Honourable Justice Gillespie had to consider the rights of a person who contracts on behalf of a company not yet incorporated. Therein, the court also examined the position of the company both at common law and under the Zimbabwean Companies Act. Justice Gillespie stated thus:

“Thus where a person purports to contract as agent for a company which is not as yet formed, the company upon its incorporation cannot at common law (leaving aside for the moment the relevant provisions of the Companies Act) purport to ratify that contract. It could only enjoy the benefits of that contract were it to enter into a new contract itself with the other party.”²

Thus, applicable in Zimbabwe is the Roman Dutch law recognizing the concept of the *stipulatio alteri* by which

‘where the persons have entered into a contract for the benefit of a third, the latter may, before the promise has been revoked, accept it and thus acquire a right of action...’³

Under the concept of the *stipulatio alteri*, the third party may accept the benefit even if it did not exist when the promise was made, where such a third party, particularly a company not incorporated at the time of the agreement, purports to ratify or adopt the contract made for its benefit.

In addition, Section 47 of the 2006 Companies Act now provides as follows:

“Any contract made in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly registered as if it had been duly formed, incorporated and registered at the time when the contract was made if-

- (a) the memorandum on its registration contains as one of the objects of such company the adoption or ratification or the acquisition of rights and obligations in respect of such contract; and***
- (b) the contract or a certified copy thereof is delivered to the Registrar simultaneously with the delivery of the memorandum in terms of section twenty-one.”***

The statutory provisions in Section 47 have received attention from the learned authors: Jericho Nkala and Timothy Joseph Nyapadi,⁴ and the view of the learned authors is that, in Zimbabwe, a company can adopt contracts made on its behalf before incorporation provided that it (the company) meets the following five (5) conditions- viz;

- a. that the contract is in writing;
- b. the person making the contract on behalf of the company to be formed, irrespective of how he describes himself must at least profess to act as agent for the company;
- c. the memorandum and articles of association must contain at the time of incorporation the contract as one of its objects;
- d. the contract must be delivered to the registrar simultaneously with the memorandum and articles of association and
- e. the contract must be legally enforceable.⁵

It must be noted that Nkala & Nyapadi have similarly pointed out that the newly formed company may refuse to be bound by the contract.⁶

Yet, in *Gray v Registrar of Deeds*,⁷ on 2nd September 2007, Gray, a trustee for a company about to be formed entered into an agreement with one Marie Louise Morris in respect of the sale of an immovable property belonging to Morris. The sale was successfully concluded by the parties thereto. The purchaser of the property was not specifically identified and was referred to as Ian Spence Gray acting as trustee for a company about to be formed. The company was incorporated on 8th November 2007. On 19th March 2008, the company attempted

¹. 1997 (2) ZLR 318 (HH)

². 1997 (2) ZLR 318 (HH), at pp325F-326D.

³. Jericho Nkala and Timothy Joseph Nyapadi, Nkala & Nyapadi on Company Law in Zimbabwe, Zimbabwe Distance Education College (ZDECO) Publishing House, 1995, at 59-63. (Hereinafter “Nkala & Nyapadi”).

⁴. *Ibid.* Per Nkala & Nyapadi.

⁵. *Ibid.* Per Nkala & Nyapadi, at 59-63.

⁶. See *Gray and Another v Registrar of Deeds*, Judgment of 30th June, 2010, at page 6.

⁷. *Gray and Another v Registrar of Deeds, Case No: HC 2537/09 Media Neutral Citation: [2010] ZWHHC 114* (Judgment Date: 30 June 2010). Available at: <http://www.zimlil.org/zw/judgment/harare-high-court/2010/114>. Last accessed on 10th October 2014.

to register the documents of transfer, but the documents were returned with an instruction that the applicant comply with section 47 of the Zimbabwean Companies Act of 2006. The court in *Gray v Registrar of Deeds* first noted that Zimbabwean courts have accepted that at common law the promoters of a company prior to incorporation could individually enter into a contract for the benefit of such company by relying on *Graphics Africa (Zimbabwe) (Pvt) Ltd v Rank Xerox Ltd*,¹ where Honourable Justice Adam, had unequivocally stated that:

“At common law, it is clear that the promoters of a company prior to incorporation could individually enter into a contract for the benefit of such company to be formed and on its incorporation the newly formed company could adopt the contract. *Sentrale Kunssmis Korporasie (Edms) Bpk v NKP 1970 (3) SA 367*”²

The court in *Gray v Registrar of Deeds* therefore held that the documents were registrable based on *stipulatio alteri* rule, since the trustee had expressly acted for the interest of the future corporation which later adopted and ratified the purchase.

Further, the court *Gray v Registrar of Deeds* also recognized that Nyapadi and Nkala had stated that where the company has not complied with provisions of the Companies Act, the first alternative would be to invoke the common law rules in *Kelner vs Baxter* which they refer to as being very complicated.³ Therefore, the court further noted that Nkala & Nyapadi have accepted that the company can under the concept of a *stipulatio alteri* ratified the pre-incorporation contract.⁴ In sum, the court in *Gray v Registrar of Deeds*, held that:

This is not the situation in this case as the company is the prime mover for the acceptance and ratification of the contract concluded on its behalf. In casu the requirements of s 47 have not been complied and it falls for this court to decide if the contract is a stipulatio alteri and if so whether or not it can be adopted and ratified by the company. I did not understand the respondent to dispute the contention by the applicants that the contract negotiated by the first applicant was a stipulatio alteri. I take the view therefore that the nature of the contract has been accepted. In the premises I cannot find a reason why the first applicant cannot enforce the contract. This in my view includes the registration of title in the cause of the contract itself.⁵

VIII. Status of Pre-Incorporation Contracts Before and Under Section 21 of the South African Companies Act No 71 of 2008

In South Africa, pre-incorporation contracts are now governed by Section 21 of the South African Companies Act No 71 of 2008, which was signed into law on 8th April, 2009 but which came into operation in April 2011. Jettisoning the common law rule in *Kelner vs Baxter*, South Africa has introduced several major amendments as follows:

- (a) Section 71 of the Companies Act No. 46 of 1926,
- (b) Section 35 of the Companies Act No. 61 of 1973 and
- (c) Section 21 of the Companies Act, No. 71 of 2008.

A review of the very first South African statutory intervention, i.e., Section 71 of the 1926 South African Companies Act, appeared to have given a company the power to ratify preliminary contracts made by the promoter:

Any contract made in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly registered as if it had been duly formed, incorporated and registered, at the time when the contract was made, and such contract had been made without its authority.

Provided that the memorandum contains as one of the objects of such company the adoption or ratification of or the acquisition of rights and obligations in respect of such contract and that ... [a copy of such] contract has been lodged with the Registrar together with the application for registration of the company.

¹. 1989 (2) ZLR 292(H).

². 1989 (2) ZLR 292 (H), at 301F

³. See *Gray and Another v Registrar of Deeds*, Judgment of 30th June, 2010, at pages 5-6.

⁴. *Ibid.* at page 6.

⁵. *Ibid.*

Clearly, the 1926 amendment provided all the requirements for "adoption" of a preliminary contract, and nothing more was required than the strict compliance with its terms.¹ Thus, South African section radically altered the doctrine of *Kelner v. Baxter* in its bearing upon pre-incorporation contracts, by exonerating the promoter irrespective of whether the company was or was not in existence at the time of the contract, excluding warranty of authority if the other party knew at the time of the contract that he had no authority.²

In terms of Section 71 of the 1926 Act, a pre-incorporation contract can effectively be ratified/adopted by a company, after its incorporation, provided the following requirements are met:

- a. **the contract is in writing;**
- b. **the person who concluded the contract professed to act as agent or trustee for a company not yet incorporated;**
- c. **the memorandum of association of the company contained as an object of the company the adoption of or the acquisition of rights and obligations of such contract; and**
- d. **a copy of such contract has been lodged with the Registrar together with the application for registration of the company.**³

It appears that the most pertinent requirement appears to be that the memorandum of the company contain as one of the objects, the adoption or ratification of the contract by the company. According to Professor Ncube, this serves as an important protection to outsiders (potential creditors and investors) who may wish to extend credit to or invest in the company.⁴

Outsiders who intend to do business with a particular company can now determine its pre-incorporation commercial activities by examining the company's memorandum. Subsequently, this information will enable them to make informed decisions with regards to that specific company.⁵

Maryke Boonzaier, has submitted that section 71 raises an important questions:⁶

- a. *Whether it is necessary for the memorandum to contain the required object at the time of the company's registration, or would it be acceptable if the object is only absorbed into the memorandum after the registration of the company.*
- b. *Is it possible to remedy the defect by altering the company's object clause after its incorporation?*⁷

Yet, it appears according to the section 71's plain language, all that was required was that the memorandum must contain that object at the time of the ratification or adoption of the contract, which meant *after* the company's registration.⁸

Further the time and mode of ratification as conceived under Section 71 were also problematic because section 71 neither explicitly nor impliedly prescribed a specific time period during which the company would be compelled to ratify or adopt the contract. Also, it did not make provision for the manner of adoption of the contract. Thus, where a contract did not expressly stipulate the time and manner of ratification, there was a big lacuna.⁹

Finally, in attempting to shield the promoter from personal liability, section 71 appeared to leave the third party exposed to losses because section 71 did not make provision for the promoter's liability during the *interim* period—i.e., the time period between the time of execution of the pre-incorporation contract and the time of ratification of the contract by the company. Second, section 71 did not provide protection for the third party,

¹. See Gross, *supra* note 8, at 514.

². *Ibid* per Gross, at 514 (1972); See, also, *Peak Lode Gold Mining Co. Ltd. v. Union Government* 1932 T.P.D. 48, at p. 51 (per Greenberg J.). Cf. *Semer v. Retief & Berman*, 1948 (1) S.A. 182. See: *Ex parte Vickerman*, 1935 C.P.D. 429; *Alberts v. Fick* (1935) S. Afr. L.J. 219.

³. See, Maryke Boonzaier, *supra* note 6, at page 13.

⁴. See, Ncube, *supra* note 12, at 260.

⁵. *Ibid*. Per Ncube, at 260.

⁶. See, Maryke Boonzaier, *supra* note 6, at page 14.

⁷. The Nigerian case of *Edokpolo vs Sem-Edo Wire Industries Ltd.*, and the Malaysian case of *Cosmic Insurance Corpn. Ltd. v. Khoo Chiang Poh*, allow the corporation to modify the contract after incorporation and to unilaterally ratify a modified pre-incorporation contract

⁸. See, Maryke Boonzaier, *supra* note 6, at page 14.

⁹. *Ibid* per Maryke Boonzaier, at pages 14-15.

either where the proposed company was never incorporated or where the new company did not ratify the contract after incorporation.¹

Between 1926 and 1973, the state of the law in South Africa was as follows:

(1) If the promoter acts only as an agent, he is not personally liable on the contract.

(2) Where it seems from the facts of the case that the promoter did not act merely as agent, but contracted personally, albeit as a trustee, or ostensibly for the benefit of the company, he is himself liable on the contract and can sue on it in his own name.² The promoter is released from his personal liability after the company has confirmed the preliminary contract.

(3) If the conditions of section 71 are complied with, the company may ratify pre-incorporation contracts.

(4) Even where the requirements of section 71 have not been complied with, it seems that the rules of Roman-Dutch law might still apply (despite the section), so that the company can adopt the preliminary contracts where the promoter contracted on its behalf.³

Earlier on, in *McCullough v Fernwood Estate*,⁴ the Appellate Division of South Africa, while upholding the applicability of *Kelner vs Baxter* rule in South Africa also upheld the *stipulatio alteri* rule as an exception. Thus, Roman-Dutch law rule that an agreement for the benefit of a third party allows the promoter to contract independently for the benefit of the future company, not necessarily in the capacity of an agent, and so, the contract when duly accepted by the company for whose benefit it was created becomes fully enforceable.⁵

Further, section 50 of the South Africa Companies Act No. 46 of 1952,⁶ made some amendments by adding the following words:

“...and that a copy of such contract, has been lodged with the Registrar together with the application for registration of the company.”

In addition, in 1963, section 9 of the South Africa Companies Act No. 14 of 1963,⁷ also made some amendments by adding the following words:

“...and that two copies of such contract, one of which shall be certified by a notary public or by a subscriber to the memorandum, have been lodged with the Registrar together with the application for registration of the company.”

Thus, according to Maryke Boonzaier,

In light of the experience gained since 1926 about the operation of Section 71, the legislature might have thought it essential that, before the adoption or ratification of such a contract by the company, a copy of it (and after 1963, a certified copy of it) should be made available in the Companies Registry for any interested person to inspect or obtain a copy. The registry would thus be an alternative place for inspection and place moreover where a copy of the contract could be obtained.⁸

In 1963, the South African government inaugurated the Van Wyk de Vries Commission to examine the 1926 Companies Act and to consolidate all the amendments and propose reforms. The Van Wyk de Vries recommendations and report⁹ were enacted as the 1973 Companies Act. The amended law in Section 35 of the 1973 Companies Act provided thus:

¹ *Ibid* per Maryke Boonzaier, at page 15.

² According to Gross, If the promoter wishes to bring an action on the contract, or set it aside before the company is formed, he must sue in his personal capacity, and not in his capacity as trustee. See, Gross *supra* note 8, at fn 13 (1972); See, also, *Ackerman v. Burland and Milunsky*, (1944), W.L.D. 172.

³ *Ibid* per Gross, at 515-516 (1972); *Ex parte Vickerman & Oth.*, 1935 C.P.D. 429; *Ex parte Bland Properties (Pty.) Ltd.* 1945 T.P.D. 37.

⁴ 1920 AD 204.

⁵ See, Maryke Boonzaier, *supra* note 6, at page 10.

⁶ South Africa Companies Act No. 46 of 1952,

⁷ South Africa Companies Act No. 14 of 1963

⁸ See, Maryke Boonzaier, *supra* note 6, at page 18.

⁹ Van Wyk de Vries recommendations and report are stated in SOTH AFRICA COMPANY LAW FOR THE 21ST CENTURY: GUIDELINES FOR CORPORATIONS LAW REFORM GN 1183 GG 26493 OF 23 JUNE 2004 (also referred to as “THE COMPANY LAW POLICY PAPER”) at 33

Any contract made in writing by a person professing to act as agent or trustee for a company not yet incorporated shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly incorporated as if it had been duly incorporated at the time when the contract was made and such contract had been made without its authority:

Provided that the memorandum on its registration contains as an object of such company the ratification or adoption of or the acquisition of rights and obligations in respect of such contract, and that two copies of such contract, one of which shall be certified by a notary public, have been lodged with the Registrar together with the lodgement for registration of the memorandum and articles of the company.

Despite this amendment, Maryke Boonzaier had noted that

It is evident that Section 35 does not reflect significant modifications made to its predecessor (Section 71 of the 1926-Act). Trivial changes such as the words ‘on its registration’ were inserted in section 35 of the 1973-Act,...These words were included in the section to prevent subsequent insertion of the object into the company’s memorandum after its registration. The question that arose in the *Sentrale Kunsmis* case with regards to the exact time when the object must be absorbed into the memorandum has therefore been remedied by Section 35.¹

The amendments in the Companies Act, No. 71 of 2008 started with a definition of a pre-incorporation contract in Section 1:

“an agreement entered into before the incorporation of a company by a person who purports to act in the name of, or on behalf of, the company, with the intention or understanding that the company will be incorporated, and will be thereafter be bound by the agreement.”

Section 21 of the Companies Act, No. 71 of 2008 dealing with Pre-incorporation contracts now provides thus:

21. Pre-incorporation contracts

(1) A person may enter into a written agreement in the name of, or purport to act in the name of, or on behalf of, an entity that is contemplated to be incorporated in terms of this Act, but does not yet exist at the time.

(2) A person who does anything contemplated in subsection (1) is jointly and severally liable with any other such person for liabilities created as provided for in the pre-incorporation contract while so acting, if-

(a) the contemplated entity is not subsequently incorporated; or

(b) after being incorporated, the company rejects any part of such an agreement or action.

(3) If, after its incorporation, a company enters into an agreement on the same terms as, or in substitution for, an agreement contemplated in subsection (1), the liability of a person under subsection (2) in respect of the substituted agreement is discharged.

(4) Within three months after the date on which a company was incorporated the board of that company may completely, partially or conditionally ratify or reject any pre-incorporation contract or other action purported to have been made or done in its name or on its behalf, as contemplated in subsection (1).

(5) If, within three months after the date on which a company was incorporated, the board has neither ratified nor rejected a particular pre-incorporation contract, or other action purported to have been made or done in the name of the company, or on its behalf, as contemplated in subsection (1), the company will be regarded to have ratified that agreement or action.

(6) To the extent that a pre-incorporation contract or action has been ratified or regarded to have been ratified in terms of subsection (5)-

(a) the agreement is as enforceable against the company as if the company had been a party to the agreement when it was made; and

(b) the liability of a person under subsection (2) in respect of the ratified agreement or action is discharged.

(7) If a company rejects an agreement or action contemplated in subsection (1), a person who bears any liability in terms of subsection (2) for that rejected agreement or action may assert a

¹. See, Maryke Boonzaier, *supra* note 6, at page 21.

claim against the company for any benefit it has received, or is entitled to receive, in terms of the agreement or action.

As can be seen above, the main criticisms of Section 35 of 1973 Companies Act were that (a) it failed to provide for promoter liability and (b) it also failed to provide sufficient third party protection.¹ Thus, Section 21 of 2008 Companies Act sought to address these issues by:

“...firstly inserting provisions that stipulates that any person who enters into a pre-incorporation contract, in the name of, or on behalf of an entity that is not yet incorporated, is jointly and severally liable for liabilities created in the pre-incorporation contract, if the contemplated entity is not subsequently incorporated or after being incorporated, the company rejects any part of that agreement. The promoter will therefore be personally liable in the above circumstances.”²

The 2008 amendment also made provision for the specific period within which the companies are to decide whether or not to ratify and adopt the pre-incorporation contract:

(4) Within three months after the date on which a company was incorporated the board of that company may completely, partially or conditionally ratify or reject any pre-incorporation contract or other action purported to have been made or done in its name or on its behalf, as contemplated in subsection (1).

In Maryke Boonzaier’s opinion,

This provision is in the interests of both third parties and companies. It affords the company a fair amount of time in which to apply its attention and reach a decision with regards to the pre-incorporation contract before liability is imposed on it. In the same vein, third parties will only have to wait a maximum of three months for the company’s decision in this regard.³

Further, section 21(5) provides for deemed/implied ratification after three months:

(5) If, within three months after the date on which a company was incorporated, the board has neither ratified nor rejected a particular pre-incorporation contract, or other action purported to have been made or done in the name of the company, or on its behalf, as contemplated in subsection (1), the company will be regarded to have ratified that agreement or action.

In addition, the old section 35 of the 1973 Companies Act that required the lodging of the pre-incorporation contract with the Registrar robs the company and its business partners of confidentiality. Section 21 of 2008 Act has abrogated this requirement:

The requirement to lodge copies of the pre-incorporation contract was...detrimental to companies, because it robbed companies and their contractual partners of confidentiality of their agreements, and possibly exposed them to unfair practices such as undercutting by competitors.⁴

The decision to remove the lodging of pre-incorporation requirement was necessary because the company’s privacy in its pre-incorporation contracts outweighs protection to third parties.⁵

Finally, if the company, after taking the benefit of the pre-incorporation contract, can be sued for the accrued benefit should it decide not to ratify the contract:

(7) If a company rejects an agreement or action contemplated in subsection (1), a person who bears any liability in terms of subsection (2) for that rejected agreement or action may assert a claim against the company for any benefit it has received, or is entitled to receive, in terms of the agreement or action.

IX. Reform of Pre-Incorporation Contracts Rule in Canada

Like all common law countries, the Canadian legal system also experienced the stringent effect of the rule in *Kelner vs Baxter*. Reforms of the corporation law commenced in Ontario, i.e., the commercial and business capital of Canada, when a Select Committee of the Legislative Assembly was appointed in June 1965

¹. *Ibid.* per Maryke Boonzaier, at page 30.

². *Ibid.*

³. *Ibid.* per Maryke Boonzaier, at page 31.

⁴. *Ibid.* per Maryke Boonzaier, at page 29.

⁵. See, Ncube *supra* note 12, at 260-261.

(hereinafter "the Lawrence Committee").¹ The Select Committee submitted its report in 1967² (hereinafter "the Lawrence Report"), and this formed the basis of the Ontario Business Corporations Act of 1968, which in turn was revised and modified as Ontario Business Corporations Act of 1970 (Hereinafter "the OBCA").³ On this development, Bruce Welling⁴ commented that:

The 1970s saw the most important and widespread wave of reform in Canadian corporate history. It all began when Ontario, Canada's most populous, most industrially and commercially active province completely reformed its corporate law. The ancient and out-moded letters patent was discarded. The English model, which was 125 years old by then, was rejected as being outdated as well. An entirely new type of corporate constitution was adopted, primarily drawn from the New York statute.⁵

The Lawrence Report clarified and simplified the common law position on pre-incorporation contracts.⁶ This, in turn, led to the reform of corporation laws in most Canadian Provinces.⁷ Further, in July 1973, following the apparent success of the OBCA, and further to the work of the Task Force on Corporate Law⁸ (hereinafter "the Dickerson Committee"), a report (hereinafter "the Dickerson Report") was released which led to the 1975 enactment of the Canada Business Corporation Act (hereinafter "the CBCA").⁹ Similarly in 1980, the Alberta Institute of Law Research and Reform's report¹⁰ on the reform of corporation law led to the enactment of the Alberta Business Corporations Act ("ABCA").¹¹

In 1967, the Lawrence Committee, after reviewing the Ontario Business Corporations Act (O.B.C.A.), recommended that a corporation should have the option to adopt pre-incorporation contracts, and that until the corporation adopts the contract, the promoter should be liable.¹² According to Lawrence Report

Section 5. Pre-incorporation Contracts.¹³

...The Committee recommends, however, that the so-called rule in *Kelner v. Baxter* should be repealed in that the Ontario Act should provide that a company may by its unilateral act, whether express or implied, be permitted to adopt and therefore take the benefit and assume the liabilities of a contract made in its name or on its behalf prior to incorporation.

The promoters should cease to be liable under any contract so adopted by a company. Pursuant to these rules it would follow that promoters would bear the risk of non-adoption of pre-incorporation contracts — a risk which is properly inherent in the role of promoter. Companies, on their part, would be free to assume the benefits of pre-incorporation contracts made on their behalf. The Act should provide that in cases where the contract is not adopted by the company, the company should be required to restore to the promoters, in specie or otherwise, any benefit acquired by the company under the pre-incorporation contract not adopted after incorporation.

1.5.8. These recommendations, however, do not fully resolve the difficulties arising in pre-incorporation contract situations. Circumstances could exist, it seemed to the Committee, in which a company should not be permitted, by non-adoption, to avoid obligations under pre-incorporation contracts made on its behalf and, conversely, the promoters should not, in some circumstances, be freed from liability because the company adopts the contract. For example, if the promoters in fact become the sole or dominant shareholders and directors of the company on

¹. Lawrence Committee's Interim Report of the Select Committee on Company Law, (Toronto: Ontario's Queen's Printer, 1967)

². *Ibid.*

³. Ontario Business Corporations Act. R. S.O. 1970, c. 53.

⁴. See Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 2nd. ed., (Toronto: Butterworths, 1995).

⁵. *Ibid.* Per Bruce Welling, at 47.

⁶. See Prasadh Raj Singh, *supra* note 39, at 4.

⁷. See Ivan R Feltham, Q.C. & William R. Rauenbusch, "Directors' and Officers' Liabilities in Canada" (1975-76) 1 *Can. Bus. L. J.* at 32 1-323.

⁸. R.W.V. Dickerson, J.L. Howard, & L. Getz, *Proposals for a New Business Corporations Law for Canada (the Dickerson Report)* (Ottawa: Information Canada, 1971).

⁹. The Canada Business Corporations Act, (the CBC A) R. S.C. 1 974-7 5-76 (Can), c. 3 3. (Now amended as the Canada Business Corporations Act, R.S.C. 1985 c. C-44.)

¹⁰. Alberta Institute of Law Research and Reform (now Alberta Law Reform Commission)'s *Proposals for a New Alberta Business Corporations Act Vol. 1* (Edmonton: ILRR, 1980).

¹¹. The Business Corporations Act, S.A., 198 1, c B- 1 5.

¹². See, Section 20 of the O.B.C.A.1970

¹³. See, Section 5 (Pre-incorporation Contracts) in Lawrence Report *supra* note 163.

whose behalf a pre-incorporation contract was entered into, should the contracting party not have the right to enforce contractual liability against either the company or the promoters as the contracting party may elect? We therefore recommend that the Act be amended to include a provision to the effect that a contracting party may make an application to a judge of the High Court of Ontario designated by the Chief Justice of the High Court for an order that the promoters and the company will be jointly and severally liable under a pre-incorporation contract if, under the circumstances, it is just and equitable in the interests of the contracting party for such liability to be imposed.

To a large extent, the Lawrence Committee adopted the holding of Justice Shaker in *Indianapolis Blueprint & Manufacturing Co. v. Kennedy et al*¹ thus:

"Manifestly no formal resolution of a board of directors is required to effect a ratification; yet something more is demanded than a mere acceptance of benefits which the corporation has no power to reject without uncreating itself. We believe the rule applicable may be more clearly stated as follows: A corporation may, in the absence of a charter or statutory provisions to the contrary, make a promoters' contract its own in the same manner that it might itself enter into a contract of a similar nature as one of the original contracting parties...This pre-supposes that there may be an implied ratification under some situations..."²

The Dickerson Committee, considered several law reform committees' reports globally,³ and thereafter drafted the 1975 amendments to the C.B.C.A., which improved upon the 1970 amendments to the O.B.C.A. First, it noted that:

17. We would include in this category incorporation by designating number. The idea is scarcely profound but it should be useful. The validity of pre-incorporation contracts is a simple and long-overdue reform which expedites corporate promotion and removes a trap into which the unwary often fall....⁴

The Dickerson Committee decided to introduce a new Section 2.10 into the OBCA

68. Section 2.10 is new, and is designed to change what is widely acknowledged to be the unsatisfactory state of the common law. Under existing common law rules, a corporation cannot ratify a contract purportedly entered into on its behalf before its incorporation *Kelner v. Baxter* (1866) LR 2 CP 174; *Repetti Ltd. v. Oliver-Lee Ltd.* (1922) 52 OLR 315. Nor can it adopt such a contract; to become bound it must renegotiate a fresh contract after incorporation: *Natal Land Co. v. Pauline Colliery Syndicate* [1904] AC 120.

69. At common law, a person dealing with a promoter can find that not only does he not have a contract with the corporation, but he has none with the promoter, either because the latter expressly disclaimed liability, as in *Dairy Supplies Ltd. v. Fuchs* (1959) 28 WWR 1, or because the court concluded that it was not the intention of the parties that the promoter should become liable, as in *Black v. Smallwood* (1966) Austr. Argus Reports 744. The theory in such cases seems to be that the person dealing with the promoter intended to look to the corporation as his debtor and he cannot later turn round and select a more suitable alternative. In practice, this means that a great deal may turn upon the form of a contract and minor differences in wording may be decisive of the rights and liabilities of the parties. And with oral contracts there are difficulties of proof and problems of conflicting testimony. Although the thirdparty may sometimes have other remedies against the promoter—see *Wickberg v. Shatsky* (1969) 4 DLR (3d) 540—these are not always adequate substitutes for contractual remedies.

¹. (1939) 215 Ind. 409, 19 N.E. 2d 554

². See also Ballantine, *On Corporations* (Rev. Ed. 1946) p. 103 et seq.; Lattin, *The Law of Corporations* (1959) p. 100 et seq.; and Lattin & Jennings, *Cases And Materials on Corporations* (3rd Ed. 1959) p. 236 et seq.; Baker & Carey, *Cases and Materials on Corporations* (3rd Ed. 1959) p. 71 et seq.

³. See, e.g., Cohen Report: Report of the Committee on Company Law Amendment, Cmd. 6659, United Kingdom, 1945; Ghana Report: Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana, 1961; and Jenkins Report: Report of the Company Law Committee, Cmd. 1749, United Kingdom, 1962, amongst others.

⁴. See Paragraph 17 of the Dickerson Report, *supra* note 170.

70. The general effect of s. 2.10 is to declare that the promoter is liable on a pre-incorporation contract unless he takes adequate steps to procure adoption by the corporation, or he makes an express disclaimer of liability, or a court makes an order relieving him of liability. The justification for this approach is that, as a matter of business reality, the promoter is usually in control of the pre-incorporation and immediate post-incorporation process and is able to protect himself.

71. If the promoter wishes to escape his obligations under the contract (and forfeit its benefits), he may, under subsection (2), procure the adoption of the contract by the corporation, if the contract is in writing.

The reason for the provision that only written contracts are susceptible of adoption is simply that this seems the only way of ensuring full disclosure of the terms of the contract, which is an essential protection for the corporation. The corporation will have to make a deliberate decision to adopt the contract—surely the least that the shareholders are entitled to expect—and the onus will be placed squarely on the promoter to ensure that this is done.

72. If the corporation does adopt the contract pursuant to subsection (2)(a) then, by subsection (2)(b), the promoter ceases to be bound by or entitled to the benefits of the contract. It is obvious, however, that a promoter can evade liability by procuring the adoption of the contract by a shell corporation with insufficient assets to meet its obligations under the contract. Section 2.10(3) accordingly permits a third party to apply to court for an order that, in effect, renders the purported adoption either wholly or partially ineffectual, and authorizes the court to impose liability upon the promoter notwithstanding the adoption of the contract by the corporation. Section 2.10(3) also permits imposition of liability upon a corporation that has not adopted the pre-incorporation contract. The effect of this may well be to give the third party a choice of debtors where ordinarily there would at best be only one. Nevertheless, we think it is desirable to confer a wide discretion upon the court to make adjustments. The courts will clearly not impose liability upon the corporation where the promoter has no effective control over it and the other party's sole basis for seeking an order is that he is stuck with an unsubstantial promoter. On the other hand, a fraudulent promoter should not be allowed to evade his obligations by hiding behind a corporation that he in fact dominates.

73. But s. 2.10(3) does not authorize the imposition of liability upon a promoter who has expressly and in writing disclaimed liability, whether or not the corporation has adopted the contract. The inclusion of an express written disclaimer should make the third party fully aware of the kind of arrangement he is getting himself into, and there seems no case for allowing the court to override the provisions of the disclaimer. On the other hand, a valid disclaimer will not prevent the court from imposing liability upon the corporation in an appropriate case, even if it has not adopted the contract.

It noted the "unsatisfactory state of the common law" of pre-incorporation contracts, and endorsed the recommendation of the Lawrence Committee that the promoter should be held liable until the corporation adopts the contract, but added that the promoter should be able to contract for an express waiver of liability, and that a court should have the power to order that the promoter be relieved of liability.¹ The rationale provided by the Dickerson Committee for promoter liability prior to adoption by the corporation was that

"as a matter of business reality, the promoter is usually in control of the pre-incorporation and immediate post-incorporation process and is able to protect himself."²

The Committee also recommended that a corporation should be able to validly adopt only written contracts because:

"this seems the only way of ensuring full disclosure of the terms of the contract, which is an essential protection for the corporation."³

¹. Poonam Puri, The Promise of certainty in the law of Pre-incorporation Contracts, Canadian Bar Review, Vol. 80, pp. 1051-1064, 2001.

². See Paragraph 17 of the Dickerson Report, *supra* note 170.

³. *Ibid.*

X. Pre-Incorporation Contracts in Sri Lanka and Nepal

Even in Sri Lanka section 23 of the Companies Act makes provisions for pre-incorporation contracts and ratification of pre-incorporation contract within specified period:

23. (1) For the purpose of this section and sections 24 and 25 of this Act, the expression “pre-incorporation contract” means —

(a) A contract purported to have been entered into by a company before its incorporation;

(b) A contract entered into by a person on behalf of a company before and in contemplation of its incorporation.

(2) Notwithstanding anything to the contrary in any law, a pre-incorporation contract may be ratified within such period as may be specified in the contract or if no such period is specified, within a reasonable time after the incorporation of such company, in the name of which or on behalf of which it has been entered into.

(3) A pre-incorporation contract that is ratified under subsection (2), shall be as valid and enforceable as if the company had been a party to the contract at the time it was entered into.

(4) A pre-incorporation contract may be ratified by a company in the same manner as a contract may be entered into on behalf of a company under section 19.¹

In Nepal also, section 17 of the Nepalese Companies Act defines a pre-incorporation contract thus:

Section 17 (1) A contract made prior to the incorporation of a company shall be a proposed contract only, and such contract shall not be binding on the company.

(2) If, prior to the incorporation of a company, any person carries on any transaction or borrows money on behalf of the company, such person shall be personally liable for any contract related with the transaction so carried on, subject to Sub-section (3).

(3) If, within the time mentioned in any transactions or within the reasonable time after the incorporation of a company, the company, through its act, action or conduct, accepts any act, action or conduct, accepts any act, action to borrowing done or made prior to the date of authorization to commence its transactions or endorses such act or action, that transaction shall be binding on the company and the other contracting party; and the person carrying out such act to action shall be released from the personal liability to be borne pursuant to Sub-section(2).

XI. Evaluation of Section 72 of the CAMA

According to Kigho-Oyolo Maro,² the present legal position of pre-incorporation contracts is to the effect that a company may ratify such contracts on incorporation, and before such ratification, a promoter who had entered into such a contract shall be personally bound except where an express agreement to the contrary exists, i.e., that he would not be so bound. Second, and conversely, the benefits accruing from such a contract inures to the promoter, unless the corporation decides to ratify the contract.³

Interpreting Section 72(1) of CAMA, Agomo has stated that:

Sub-section (1) like Section 13(1) of Ghana Companies Code 1963 has abolished the rule in *Kelner vs. Baxter*. Ratification is now possible unlike the position at common law. But ratification is not automatic and it is not compulsory. It is entirely at the discretion of the company. Upon ratification, however, the company becomes subject to the liabilities and is entitled to the benefits, from the contract. This means that it can enforce its right by legal action and vice versa.⁴

According to Kiser D. Barnes,⁵ Section 72(1) has completely huddled the difficulties in legal theory disallowing a ratification of a contract made on behalf of the company prior to its incorporation. The injustice and unwarranted technicality of enabling a company to deny contractual liability when the directing minds who

¹. Law net Government of Sri Lanka, http://www.lawnet.lk/sec_process.php?chapterid=2007Y0V0C7A§ionno=23&title=Companies%20Act&path=7 (Accessed 13th October 2014).

². Kigho-Oyolo Maro, *Principles and Practice of Nigerian Corporate Law and Management*, (Comfort Hills Law Publishers, 2009) at 15-16. (Hereinafter “Maro”).

³. *Ibid.*

⁴. See Agomo, *supra* note 20, at page 84.

⁵. KISER D. BARNES, *CASES AND MATERIALS ON NIGERIAN COMPANY LAW*, (Obafemi Awolowo University Press Ltd 1992), (Hereinafter “Barnes”).

promoted and incorporated the company are still the ones who stand to benefit from the technicality, the statutory innovation were in accord with commercial reality.¹

Another feature of Section 72(1) of CAMA is the abolition of the distinction between *Kelner vs. Baxter* and *Newborne vs Sensolid*.² This is basically for the benefit of the third parties who may be unaware of the promoter's style of executing the agreement.³ Nevertheless, sub-section (1) of section 72 clearly changed the law by abolishing the distinction between *Kelner vs. Baxter* and *Newborne vs Sensolid* as well as the second arm of the rule in *Kelner vs. Baxter* by according the discretion on the new company to ratify the pre-incorporation contract.⁴

Yet, section 72(1) of CAMA has some significant problems. First, it does not contain specific provisions as to the time period for the ratification of the pre-incorporation contracts.⁵ Second, there are problems posed by the separate legal personality and limited liability characteristics of a company.⁶ For instance, while Section 37 of CAMA prescribes that a company acquires contractual capacity from the date of its incorporation, Section 72(1), in turn, gives the company power to ratify acts done before it had acquired the capacity to do the same thing.⁷ To Agomo, this conflict is not cured by the use of the phrase: "...as if it has been in existence at the date of such contract" in Section 72(1).⁸ Therefore, Professor Agomo submitted that the conflict could be resolved by the insertion of the additional words—"notwithstanding any other provision to the contrary in this or any other statute," between the words "and" and "thereupon" to read as follows:

72. (1) Any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon, *notwithstanding any other provision to the contrary in this or any other statute*, the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereto.⁹

With the above amendment, the lacunae will be neutralized—neutralizing both the legal personality obstacle and the doctrine of agency, and of privity of contracts to give the issue the special treatment it deserves. In addition, by making ratification discretionary, the common law objective of protecting the unformed company from unfair and unconscionable gains has been preserved.¹⁰

Finally, in practice, section 72(1) of CAMA when employed by an astute but unscrupulous promoter/incorporator may work disadvantage against third parties. The concept of separate legal personality expounded in *Salomon v. Salomon & Co. Ltd*,¹¹ will work to separate the promoter from the corporation. Where the third party would have been able to fully recoup his losses from the incorporator, but the less-buoyant company has ratified the pre-incorporation, with the effect that there can be no reversal on the ratification, the third party gets short-changed.¹² This has led commentators to suggest the requirement that the third party's consent be obtained prior to the ratification by the company.¹³ In Agomo's view:

A suggestion has been made that "a possible way of avoiding this absurdity is by seeking an order of apportionment from the court as obtains under Section 14(3) of the Canadian Business Corporations Act."¹⁴

The only snag is that the Nigerian CAMA does not contain similar provisions to Section 14(3) of the Canadian Business Corporations Act.¹⁵

Concerning sub-section (2) of Section 72, this was enacted to provide covering for the third party, so that the third part's contract will never be a nullity. In effect, the artificial distinction in *Newborne vs Sensolid* is

¹. *Ibid* per Barnes, at 58-59.

². See Orojo, *supra* note 22, at 98-99.

³. See Agomo, *supra* note 20, at page 85.

⁴. *Ibid*. Per Agomo, at page 87.

⁵. *Ibid*.

⁶. *Ibid*.

⁷. *Ibid*.

⁸. *Ibid*.

⁹. *Ibid*.

¹⁰. *Ibid*. Per Agomo, at pages 87-88.

¹¹. [1897] A. C. 22.

¹². See Oserheimen Osunbor, The Status of Pre-Incorporation Contracts, The Doctrine of Constructive Notice, the Ultra-Vires Doctrine and the Rule in Royal British Bank vs Turquand Under the Companies and Allied Matters Decree 1990, A Paper Presented at a Workshop on the Companies and Allied Matters Decree, 19-23 March 1990. (Hereinafter "Osunbor III")

¹³. See Agomo, *supra* note 20, at page 88.

¹⁴. See Osunbor III, *supra* note 199; See, also, Agomo, *supra* note 20, at page 88.

¹⁵. *Ibid*. Per Agomo, at page 88

now a historic relic. The third party may choose to go after the company, but, if the company decides not to ratify after registration, the third party may pursue the promoter to the fullest.

XII. Effectiveness rule (ut res magis valeat quam pereat)

It is a rule of law that the legislator intends the interpreter of an enactment to observe the maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void). He must thus construe the enactment in such a way as to implement, rather than defeat, the legislative purpose. As Dr Lushington put it in *The Beta*:¹

... if very serious consequences to the beneficial and reasonable operation of the Act necessarily follow from one construction, I apprehend that, unless the words imperatively require it, it is the duty of the court to prefer such a construction that res majis [sic] valeat, quam pereat.

The rule requires inconsistencies within an Act to be reconciled. Blackstone said:

'One part of the statute must be so construed by another, that the whole may, if possible, stand: *ut res magis valeat quam pereat*.'²

It also means that, if the obvious intention of the enactment gives rise to difficulties in implementation, the court must do its best to find ways of resolving these.

An important application of the rule is that an Act is taken to give the courts such jurisdiction and powers as are necessary for its implementation, even though not expressly conferred.³ It is therefore submitted that Nigerian judges should adopt the *ut res magis valeat quam pereat* rule, and, by so doing, decide cases involving pre-incorporation contracts by resorting back to the concept of the *stipulatio alteri* by which –

*'where the persons have entered into a contract for the benefit of a third, the latter may, before the promise has been revoked, accept it and thus acquire a right of action...'*⁴

To reiterate, under the concept of the *stipulatio alteri*, the third party may accept the benefit even if it did not exist when the promise was made, where such a third party, particularly a company not incorporated at the time of the agreement, purports to ratify or adopt the contract made for its benefit.

XIII. Conclusion

With the recent global economic downturn, International Oil Corporations (IOCs)⁵ are increasingly focused on exploring business opportunities in regions with significant projected growth opportunities such as Africa and Asia.⁶ Several IOCs have recently flocked to Nigeria, a prominent West African country, with the recent stable political climate, immense population (about 170 million), and projected double digit growth rate, and so the country has quickly become a destination of choice for small and large international companies, alike, seeking to take advantage of the perceived business opportunities therein.⁷ It therefore, necessarily follows that Nigeria must brace up its corporate laws to take advantage of the Foreign Direct Investment (FDI) that will help boost and sustain the Nigeria economy, and there is no other veritable means than providing sufficient and beneficial protections for the IOCs seeking to form and incorporate businesses in Nigeria.

It is possible to simply adopt common law rules of equity, without statutory intervention. For instance, as pointed out by Prashid Raj Singh⁸ in India, Section 15(h) of the Indian Specific Relief Act,⁹ allows the company to enforce the pre-incorporation contract against the thirds parties.

Further, similarly, under the provisions of section 19(e) of the Indian Specific Relief Act, specific performance may be enforced against a company where its promoters have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the term of incorporation of the company by inclusion in the article of association it is however necessary that the company in such a case must

¹. (1865) 3 Moo PCC NS 23, 25

². (Blackstone 1765, i 64)

³. *Buckley v Law Society (No 2)* [1984] 1 WLR 1101.

⁴. See, Nkala & Nyapadi *supra* note 129, at 59-63.

⁵. The term Corporations and companies are used interchangeably in this paper and they both refer to same thing—registered entity used by shareholders to carry on business with a separate personality aside from the business owners.

⁶. Akinbiyi Abudu, Taxation of Expatriates in Nigeria—Trap for the Unwary, in Ernst & Young: Our African Footprints. Tax focus News and updates across the African continent Issue 5, Vol. 51, 2011. Available at: http://emergingmarkets.ey.com/wp-content/uploads/downloads/2011/11/Tax_Focus_Vol_51.pdf.

⁷. See, Akinbiyi Abudu, *supra* note at 19.

⁸. See, Prashid Raj Singh, *supra* note 39, at 6.

⁹. Section 15(h) of the Indian Specific Relief Act, 1963.

have accepted the contract after its incorporation and communicated such acceptance to the other party to the contract.¹

We here make the following suggestions to bring Nigeria law at par with contemporary common law countries. First, Nigerian CAMA must make similar provisions to govern within which the company is to ratify or reject the pre-incorporation contracts so that the third party who has interest in the contract may look for other means to enforce the contract and protect his interest.

Second, the CAMA must make provisions for deemed ratification, i.e., if the corporation fails to ratify within a certain period, the third party should assume that the inaction of the new corporation is an implied ratification. In Nigeria, we suggest three (3) month grace period because of inflation. If the injure party were to wait for a longer time, the high rate of inflation would have made benefits of the contract nonsensical and valueless.

The CAMA should also make that the value of the pre-contract must be stated in the objects and memorandum of association of the company, especially where the value of the pre-incorporation contract is equal or greater than the total value of the allotted shares of the company. This is so that the third parties can apprise themselves of the value of the pre-incorporation contract towards enabling them to make informed decisions.

It is also suggested that where the value of the pre-incorporation contract is equal or greater than the total value of the allotted shares of the company, a notarized copy of the pre-incorporation contract must be lodged with the Corporate Affairs Commission (CAC).

It is also suggested that in meetings where the shareholders or the Board of Directors are deciding whether or not to ratify the pre-incorporation contract, interested members or directors shall not vote at such meetings.

In addition, we also suggest that where the company rejects the pre-incorporation contracts, the third party should be given rights to pursue both the promoter and the company, especially where the company has taken the benefits of the pre-incorporation contract.

In these days of sophistication, provisions must also be made for the promoter to waive his liability by expressly contracting out of liability imposed by statutes

Finally, it is also suggested that where a third party is stranded and cannot obtain relief under the statute, he should be permitted to fall back to common law rules. Thus, in his book, *The Law of Contract in South Africa* (3rd ed.), the eminent author R H Christie states thus:²

“There is ample authority for thus falling back on the common law, and it may well be correct to say that s 35 is not intended to apply to pre-incorporation contracts which qualify as contracts for the benefit of a third party, but it does not seem to matter which view is taken because as TROLLIP JA observed in *Sentrale Kunsmis Korp (Edms) Bpk v NKP Kunsmis-verspreiders (Edms) BKP 1970 (3) 367 (A) 398*, s 35 is usually invoked and complied with for safety’s sake even if it is not necessary, and if the attempt to comply with it fails no harm is done provided the contract qualifies under the common law. In the days before what is now s 35 the courts very properly applied the maxim *ut res magis valeat quam pereat* to interpret the promisee’s position as that of a principal rather than an agent in a doubtful case, but in *Peak Lode Gold Mining Co Ltd v Union Government 1932 TPD 48 51 GREENBERG J* thought the section made it no longer necessary to lean away from agency. There is no doubt so if the section has not been complied with, but if it has not the position remains unchanged.”³

As stated earlier, the goal of company law is to encourage entrepreneurship and enterprise efficiency, create flexibility and simplicity in the formation and maintenance of companies, and, to provide for the creation, role, and uses of companies in a manner that enhances economic welfare of the citizenry.⁴ Nigerian CAMA must stridently support these goals.

¹. Section 19(e) of the Indian Specific Relief Act, 1963.

². See, R.H. Christie, *The Law of Contract in South Africa* (3rd ed.) at p 293.

³. *Ibid.*

⁴. See, Maryke Boonzaier, *supra* note 6, at page iii.

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