PRE-INCORPORATION CONTRACT: 
A COMPARATIVE ANALYSIS OF 
THE CANADIAN AND NIGERIAN 
CORPORATE LAW REGIMES

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Abstract

The question of how best to protect the interests of a promoter, a third party, and a company in pre-incorporation contracts is one that seems to have defied corporate law. Although this problem has its origin in common law, various countries have made efforts to address it through statutory reforms. The paper, therefore, examines the extent to which the Canadian and Nigerian legal regimes for the pre-incorporation contract have provided panaceas to the problem. This paper, through a comparative analysis, argues that although the legal regimes have made efforts to reform the common law rule on pre-incorporation contracts, they suffer patent defects. It also posits that notwithstanding the defects in the laws, the Canadian legal regimes offer more protection to parties to pre-incorporation contracts than Nigerian law. The paper suggests reforms in both regimes that would meet the reasonable expectations of the parties to a pre-incorporation contract.

Keywords: Pre-incorporation Contract, Promoter, Canada Business Corporation Act, Ontario Business Corporation Act, Companies and Allied Matters Act of Nigeria

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1. INTRODUCTION

Prior to the incorporation of a company, the company may wish to acquire or lease properties for its operations, purchase goods, employ workers or even obtain loans from financial institutions (Omar, 2005, p. 77) or individuals. In addition, the process of incorporating the company may require the engagement of solicitors or other professionals who will render and receive remuneration for their services (Nwafor, 2010, p. 66). Some of these activities are time-sensitive such that any procrastination may defeat the objects for which the proposed company is established. In corporate law, such contracts are called pre-incorporation contracts and they are often executed through a person called a “promoter”. Notwithstanding the fact that the rules on pre-incorporation contracts have been modified through statutory reforms in many jurisdictions, the application has suffered uncertainty in some of them (Courtney, 2007; Hambrook, 1982, p. 119; Ncube, 2009, p. 269). Canada and Nigeria are among the countries that have attempted to reform their laws on pre-incorporation contracts. This paper examines the laws of both countries to ascertain the efforts they have made to resolve the uncertainty in this area of corporate law. It is pertinent to note that the discourse on the pre-incorporation contract is recurring and critical in corporate law (MacPherson, 2012, p. 49) because in most cases, companies may wish to enter...
preliminary transactions before their actual incorporation. It is also important to note that to the best of the author's knowledge, no study has compared the legal regimes in both jurisdictions. At a didactic level, the choice of the legal regimes in Canada and Nigeria for this discourse is due to the common law origin of their corporate laws. As a caveat, the paper does not intend to analyze the laws of all the provinces in Canada. It chooses only the Canada Business Corporations Act (CBCA) and the Ontario Business Corporations Act (OBCA). The choice of these laws is informed by three factors. First, similar to the Companies and Allied Matters Act (CAMA) of Nigeria, the CBCA is Federal legislation that regulates company administration in Canada. Second, the provisions of the OBCA, with minor exceptions, are substantially similar to that of the CBCA. Third, Ontario is the biggest commercial province in Canada with robust jurisprudence on the topic.

This paper is divided into five sections. Section 2 explains the meaning and nature of a pre-incorporation contract. Section 3 examines how the concept of a pre-incorporation contract is applied in the common law. It also points out the problems of application of the common rule created for parties to such contract. Section 4 examines the legal regime of pre-incorporation contracts under the CBCA and the OBCA. Section 5 investigates the regulation of the contract under the Nigerian legal regime. Section 6 concludes the paper.

2. MEANING AND NATURE OF PRE-INCORPORATION CONTRACTS

By way of definition, a pre-incorporation contract is "a contract made by one party acting on behalf of a company (the agent) with another company (the contractor) where the company has not been formed at the time of the contracting" (Griffiths, 1993, pp. 241–242). In corporate law, pre-incorporation contracts remain significant because of the crucial role they play in the facilitation of business for companies prior to their incorporation at company registries. Such contracts not only enable companies to explore business opportunities and enter into profitable ventures before their actual registration (Qu, 2008), they also assist companies to actualize their aims in the memorandum (Nwafor, 2010, p. 66). Essentially, a pre-incorporation contract creates a tripartite agreement between a promoter (Old Dominion Copper, C. Co. v. Bigelow, 1909), a third party and a yet-to-be-formed company. A distinctive feature of a pre-incorporation contract is that the promoter, who is usually a human being, consummates a contract with a third party on behalf of a company that is not yet in existence and with the intention that the promoter or other parties would register after the execution of the contract (Rand, 2007, p. 2). The promoter and the third party usually act on the assumption that once the company comes into existence, it would assume the rights and liability under the contract.

Often, pre-registration contracts create a problem for courts. In large part, a problem arises where the company on whose behalf the contract is executed is never incorporated, or where it is incorporated, the company refuses to accept and honour its obligation under the contract on the ground that it was not in existence at the time of the contract and did not authorize the transaction. In such cases, courts struggle to find an appropriate balance in apportioning liability on the parties to the contract. Indeed, as a scholar notes "no area of corporate law has had a more tortuous, chequered and unfortunate history than liability under the pre-incorporation contract" (Estey, 2000, p. 3).

Also, Ehrlich and Bunzl (1929), commenting on the uniqueness and problems of pre-incorporation contracts, once noted: “The courts in interpreting and enforcing these agreements have made a sincere attempt to effect justice, and, at the same time, with rather disastrous results, to adapt contract law to the unusual situations involved. Since crystallized law has frequently no application, it is difficult to regard the decisions as precedents, for they seem predicated primarily on the facts, and secondarily on the law” (p. 1012).

The problems of pre-incorporation contracts are often compounded by the fictional status of companies and the age-long legal (Salomon v. Salomon, 1896) and theoretical view that companies are artificial persons whose legal status is conferred by law (Padfield, 2014, p. 332; Petrin, 2013, p. 6). Put another way, the fact that companies are not human beings who could be identified during and after negotiation of pre-incorporation transactions and the legal rule that prescribes that companies (Griffiths, 1993, p. 241) could not assume rights and obligations until they are recognized by law through the process of incorporation contribute greatly to the complications that characterize pre-incorporation contracts.

Beyond the factors stated above, a pre-incorporation contract has been termed as an "agency contract" (Ncube, 2009, p. 256) in which there is a principal (the company), an agent (the promoter), and a third party, and the promoter is expected to enter into a contract with the third party that would bind the company. While this phraseology is proper in view of the fact that the promoter often acts as the agent of the yet-to-be-

2 It is pertinent to note that Quebec is a French Territory. As a result, it practices the Civil law system.
3 Apart from Ontario, the other provinces in Canada are Quebec, Nova Scotia, British Columbia, Alberta, Prince Edward Island, Manitoba, New Brunswick, Saskatchewan, Newfoundland and Labrador.
4 Canada Business Corporations Act, R.S.C. 1985, c. 44 has been amended several times. The latest amendment is the CBCA S.C., c. C 8 (Consolidated Canadian Laws Act and Regulations, 2019).
5 Ontario Business Corporations Act, R.S.O. 1990, c. B. 16. It has been amended several times. The last amendment was the Business Corporation Act, R.S.O 2018, c. 12.
6 While the CBCA applies to only written pre-incorporation contracts, the OBCA applies to both oral and written pre-incorporation agreements (see sections 14(1) of the CBCA and 21(1) of the OBCA). According to an author, this creates the presumption that the where parties enter into an oral pre-incorporation contract under the CBCA, the common law rule would still apply (Gillen, 2014, p. 57). Also, unlike the OBCA, the CBCA does not contain a provision that allows the promoter to assign, amend, or terminate the contract prior to its adoption by the company (see section 21(2.1) of OBCA). It would seem that section 21(2.1) is a mere surplusage because under section 21(3) a promoter is bound by such contract before the company adopts it. This paper is not concerned with these provisions because they are not critical in the core area of analysis of the paper.
7 In Old Dominion Copper Co. v. Bigelow, 1909, the court noted the role that promoters play in formation law rule stating: “the corporation is in the hands of a promoter like clay in the hands of the potter”.
8 The concession theory of legal personality posits that the State, through laws, is the only means through which a company can acquire legal personality. By contrast, the realist theory claims that companies are actual entities and laws only acknowledge and confer validity to their existence.
9 Ncube (2009) noting, that the pre-incorporation contract in South African company law "creates a form of statutory agency" (p. 256).
incorporated company, it creates a serious challenge to pre-incorporation transactions (Rand, 2007, p. 2). This is largely due to the principle of agency law that a principal on whose behalf an agent acts must be in existence as at the material time the contract is consummated10. Indeed, as Flores (1990) asserted, “a principle is necessary for the agent’s legal existence. If an agent acts for a principal when, in fact, none exists, he is individually liable” (p. 408). This view leaves promoters and third parties in a state of uncertainty in pre-incorporation transactions. Regrettably, this principle of agency law and the rule of legal personality in corporate law heavily influenced the common law jurisprudence on pre-incorporation contracts. The next section would therefore examine the judicial approach to pre-incorporation transactions at common law.

3. THE COMMON LAW POSITION ON PRE-INCORPORATION CONTRACT

At common law, a party must have the legal capacity to do an act for which a party wants to do on its behalf (Okany, 2009, p. 458). This rule was extended to pre-incorporation contracts. Tersely put, at common law, a promoter who entered into a contract on behalf of a yet-to-be-incorporated company was held personally liable for the failure of the contract. In the seminal case of Kelner v. Baxter, 1866, the plaintiff signed a contract with the defendant for the supply of wine to a yet-to-be-formed company, Gravesend Royal Alexandria Hotel Company Limited. The defendant signed the contract on behalf of the company. Later, the company was incorporated and it attempted to ratify the contract. Prior to the company’s attempt to ratify the contract, the plaintiff had supplied some cartons of wine on credit to the company which was used for the company’s business. The company encountered challenges in running its business and as a result, it couldn’t pay the price for the wine that the plaintiff delivered to it. Later, the company declared insolvency and the plaintiff sued the defendant personally for the cost of the wine. The court held that the defendant was personally liable because the company did not exist at the time of the contract and the parties were aware of this fact. The basis of the court’s decision was that “there being no company, there could be no contract with it” (Omar, 2005, p. 79). Additionally, the court provided the impetus for its decision when it posited “the parties must have intended that someone was to be liable for payment for the goods delivered. It was not reasonable that the supplier had agreed that its entitlement to payment was to be contingent on the incorporation of a corporation” (Vanduzer, 2018, pp. 201–202).

The Kelner’s court extended the rule to cases where a company was not in existence at the time of the contract and it attempted to ratify the contract upon incorporation. Thus, Byles J. noted that:

“It is said that the contract was ratified by the company after it came into existence. There could, however, be no ratification. Omnis ratihabitio retrotrahitur et mandato priori aequiparatur: but the ratification must be by an existing person, on whose behalf the contract might have been made at the time. That could not be so here: a subsequent ratification by the company could only be with the consent of the plaintiff; and then it would be a new contract” (Kelner v. Baxter, 1866).

The above seminal decision was followed in Newborne v. Sensolid, 1954. Here, the plaintiff entered into a contract for the supply of canned ham to the defendant on behalf of the company, Leopold Newborne (London) Limited. Prior to the contract, the plaintiff had begun the process for the incorporation of the company which he intended to be a director and a majority stockholder. Under the attestation clause in the contract, the plaintiff signed his name beneath the name of the company. At the material time of the consummation of the contract, both parties believed that the incorporation process had been completed at the companies’ registry. Thereafter, the ham market collapsed and the defendant declined to accept the ham. Leopold Newborne (London) Limited instituted an action against the defendant for non-acceptance of the ham. The solicitor to Leopold Newborne (London) Limited realized that the company was not incorporated at the time of the contract and substituted the company’s name with Mr. Newborne’s name. The court found for the defendant and noted that:

“The contract purports to be a contract by the company; it does not purport to be a contract by Mr. Newborne. He does not purport to be selling his goods but to be selling the company’s goods. The only person who had any contract here was the company and Mr. Newborne’s signature merely confirms the company’s signature […]. In my opinion, unfortunate though it may be, as the company was not in existence at the time when the contract was signed, there was never a contract and Mr. Newborne cannot come forward and say, well it is my contract” (Newborne v. Sensolid, 1954)11.

From the above litany of common law jurisprudence, a third party could only enforce a pre-incorporation contract if he enters into a fresh contract with the company after its incorporation (Gillen, 2014, p. 57). The common law’s position could be linked to its unrestrained devotion to the corporate entity theory of corporate law which holds that a company is a legally recognized entity only upon incorporation, and it cannot confer any right to a person to act on its behalf until the process of incorporation is completed (Stanford Intramural Law Review, 1948, p. 120). While this approach has found favour in a long line of jurisprudence12, it ignores the enterprise entity theory which recognizes “the fact that there is an enterprise engaged in operations comparable to those of a corporate business unit” (Stanford Intramural Law Review, 1948, p. 120). It is on behalf of this enterprise entity that the promoter contracts in a pre-incorporation contract (Stanford Intramural Law Review, 1948, p. 120).

10 In the old case of Buffington v. Bardon, 1891, the court noted that “the law is that a corporation is liable for its own act only after it has legal existence. Until that time, no one whether a promoter or not can sustain to the corporation the relation of agent. Were this not so, we would have an agent without a principal, which is an absurdity”. Also, in Rover International Limited v. Cannon Film Sales Limited, 1967, Herman J. noted that “if somebody does not exist, they cannot contract”.

11 It must be noted that the court reached a contrary decision in the case of Black v. Smallwood, 1966, which facts are similar to Newborne’s case.

12 In E.T. & E.C. Nigeria Limited v. Nevico International Limited, 2004, the Court of Appeal noted that “where a person claims to have entered into a contract on behalf of a non-existent person the former is deemed to have done so personally”. See also, Urhobo v. J.S. Tarka & Anor, 1976.
It would seem that the position of common law on pre-incorporation contracts is aimed at protecting shareholders from fraudulent promoters. Essentially, in pre-incorporation contracts, shareholders of the company may not be aware of the contract. Under such circumstances, courts may not be favorably disposed to transfer liabilities arising from pre-incorporation contracts to the shareholders unless the company on whose behalf the contract is executed is formally incorporated (Stanford Intramural Law Review, 1948, p. 120). Notwithstanding the justification of the common law rule, it was rigid in many ways. First, from the shareholders' protection standpoint, the justification of the common law rule leaves much to be desired. This stems from the fact that it fails to take into cognizance that often, the promoters could be the shareholders in the company who would inherit the liability or benefits of the pre-incorporation contract. Second, the rule worked untold hardship on promoters because the company could not even ratify the contract after it has been incorporated. In other words, the promoter remained personally liable even if the company subsequently adopted the transaction (Puri, 2001, p. 1051). This rule is defective because it fails to consider the reasonable expectation of the promoter that the company on whose behalf he entered the contract would be liable under the contract. From the perspective of the third party, the common law position seemed to favour such party because it allowed him to get relief from the promoter if the transaction failed. This is based on the possibility that the “promoter who entered into such contracts is fully aware of the non-existence of the company, knowing that the third party may lack” (Nwafor, 2010, p. 71). Paradoxically, this benefit may be defeated where the intention of the third party is to contract with the company and not the promoter. Third, the common law rule foreclosed default rules in the contract which allow parties to vary or exclude obligations in a consensual manner (Qu, 2008, p. 798). Indeed, the common law rule utilized the technicality embedded in the corporate existence and personality rule to defeat the lawful and reasonable expectation of a third party who desired to contract with a party other than the promoter (Goetz, 1967, p. 402; Vanduzer, 2018, pp. 202-203). Fourth, from the perspective of the company, it could deprive the company of contracts that would have been beneficial to it upon incorporation and ratification. It is against these backgrounds that a scholar noted “the common law is not as successful in either facilitating transactions, or in meeting the reasonable expectation of the parties. The statutory approach is also more consistent with both the general law of contract, as well as corporate law” (MacPherson, 2012, p. 50). As a result of the untold hardship of the common law rule, most jurisdictions repealed the rule through their corporate statutes. Canada and Nigeria are among countries in the common law jurisdiction that have statutorily repealed this critical area of corporate law.

4. PRE-INCORPORATION CONTRACT LAW UNDER THE OBCA AND THE CBCA

Most of the provinces in Canada14 apply the common law rules on corporate law. As a result, most of them adopted the common law rule on pre-incorporation contracts (Wickberg v. Shatsky, 1969). Owing to the defects inherent in the law on pre-incorporation contracts at common law, the province of Ontario and the Federal Government of Canada made frantic efforts to reform the common law rule through a statutory scheme. The province of Ontario was the first to initiate a statutory scheme through the establishment of the Lawrence Committee in 1967 (Estey, 2000, p. 10). It must be noted that the general mandate of the Committee was to reform corporate laws of Ontario. Pursuant to this mandate, the Committee recognized the uncertainty and injustice inherent in Kelner v. Baxter's decision (Estey, 2000, p. 10). The deliberations and the report of the Committee led to the repeal of the common law rule. The Committee recommended that a company could adopt a pre-incorporation contract consummated on its behalf by a promoter. It could also take the benefits and incur liabilities under the contract (Estey, 2000, p. 11). The implication of this provision was that the promoter would be relieved from liability once the company adopts the contract. By parity of reasoning, where the company refuses to adopt the contract, the promoter would be personally liable (Puri, 2001, p. 1054) albeit it could enforce his rights against the company for any benefit that accrued to the company under the contract (Easson & Soberman, 1992, p. 438).

The Committee also recommended that the court should be allowed to exercise its equitable discretion by apportioning liability between the promoter and the company upon an application by the third party (Estey, 2000, p. 11). Following the recommendations of the Committee, the Ontario legislature passed the OBCA of 1970. Section 20 of the Act made sweeping reform of the rule in Kelner v. Baxter, 1866. It is important to note that OBCA has been amended in 1990 (Business Corporation Act, R.S.O. 1990, c. B. 16), 2006 (Business Corporation Act, S.O. 2006, c 34), 2015 (Business Corporation Act, R.S.O. 2015, c. 38), 2018 (Business Corporation Act, R.S.O. 2018, c. 12), and 2019 (Business Corporation Act, R.S.O. 2019, c. 7). However, the amendments retain the provisions of section 20 (now section 21).

At the federal level, the government established the Dickerson Committee almost during the same period that the OBCA came into effect and the Committee recommended that the common law rule on pre-incorporation should be reviewed (Estey, 2000, p. 11). The Committee adopted the provision in section 20 of the OBCA which exempted the promoter from liability once the company adopted the contract (Puri, 2001, p. 1054). Further, the Committee recommended that the promoter could insert a clause in the contract that would expressly waive his liability and courts should uphold such clause (Puri, 2001, p. 1054). Similar to the provision of the OBCA, the Committee proposed that courts should be to exercise their discretion in apportioning liability between the corporation and the promoter upon an application by the third party

13 Vanduzer (2018) noted that “the inability of the corporation to adopt contracts made for its benefits was often manifestly inconsistent with what the parties, in fact, intended” (pp. 202-203).

14 As noted earlier, Quebec applies the Civil Code.

For analytical purposes, it is important to state the provisions of the CBCA and the OBCA. Section 14 of the CBCA provides that “subject to this section, a person who enters into, or purports to enter into a written contract in the name of or on behalf of a corporation before it comes into existence is personally bound by the contract and is entitled to its benefit” (Canada Business Corporations Act, S.C., c. C. 8, section 14(1)). Under section 14(2), a corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt a written contract made before it came into existence in its name. The corporation, upon such adoption, is bound by the contract and is entitled to the benefits of the contract as if the corporation had been in existence at the date of the contract and had been a party to it (Canada Business Corporations Act, S.C., c. C. 8, section 14(2)(a)). The Act also provides that subject to subsection 3, a person who purported to act in the name of or on behalf of the corporation ceases to be bound by or entitled to the benefits of the contract upon the adoption of the contract by the corporation.

Further, section 14(3) provides that subject to section 14(4), whether or not a written contract made before the coming into existence of the corporation is adopted by the corporation, a party to the contract may apply to a court for an order respecting the nature and extent of the obligations and liability under the contract of the corporation and the person who entered into or purported to enter into the contract in the name of or on behalf of the corporation. The court is to make any order that it thinks fits the circumstances. Finally, under section 14(4), the court may order the corporation to adopt the contract or entitled to the benefits arising from the contract if the contract expressly states so.

With respect to the OBCA, the provisions are similar to the CBCA. Specifically, the Act provides that “a person who enters into an oral or written contract in the name or on behalf of a corporation before it comes into existence is personally bound by the contract and is entitled to the benefits thereof” (Ontario Business Corporations Act, R.S.O. 1990, c. B. 16, section 21(1)). Under section 21(2), a corporation may adopt such oral or written contract within a reasonable time after its incorporation. It could do so by any action or conduct indicating its intention to be bound by the contract. Further, once the corporation adopts the contract, it would be bound by the contract and be entitled to the benefits accruing from the contract as if it had been in existence at the date of the contract and had been privy to it (Ontario Business Corporations Act, R.S.O. 1990, c. B. 16, section 21(1)(a)). Subject to subsection 3, the promoter would cease to be bound by the contract or entitled to the benefits of the contract if the company adopts the contract (Ontario Business Corporations Act, R.S.O. 1990, c. B. 16, section 21(1)(b)). Additionally, the OBCA empowers the court to make any order it thinks necessary in the circumstance of each case where a party applies to the court for an order fixing duties under the contract as joint or several or apportioning liability between the corporation and the person who purports to act in the name or on behalf of the corporation (Ontario Business Corporations Act, R.S.O. 1990, c. B. 16, section 21(3)). The application of this provision is, however, subject to the provision of section 21(4) which allows the oral or written contract to an expressly exempt promoter from liability or disentitle him to the benefits of the contract (Ontario Business Corporations Act, R.S.O. 1990, c. B. 16, section 21(4)).

As earlier noted, the provisions of section 21(1) of the OBCA and section 14(1) of the CBCA impose liability on the promoter prior to the adoption of the contract by the company. These provisions are commendable. Indeed, the provisions recognize the fact “that as a matter of business reality, the promoter, unlike a third party, is normally in control of the pre-incorporation contract and immediate post-incorporation process and is able to protect himself” (Dickerson, Howard, & Getz, 1971, p. 23). This rule informed the decision in 1080409 Ontario Inc. v. Hunter, 2000. Here, the plaintiff agreed to sell land to Furama Investment Ltd. Hunter, who entered the contract in trust for Furama Investment Ltd., knew the company had not been incorporated but he concealed this fact from the plaintiff, the broker, and the solicitor to the transaction (1080409 Ontario Inc. v. Hunter, 2000, para. 7). He intended to resuscitate a company in Alberta whose certificate was revoked in 1985 through a fresh registration in Ontario. The name of the company in Alberta was Furama Investment Company Limited but Hunter erroneously thought that the name was Furama Investment Ltd. (1080409 Ontario Inc. v. Hunter, 2000). The plaintiff entered into the contract on the assumption that the company existed and that it could close the transaction. The transaction, however, collapsed (1080409 Ontario Inc. v. Hunter, 2000, para. 11). Prior to the fall of the transaction, the promoter incorporated a company in Ontario but the company refused to adopt the contract (1080409 Ontario Inc. v. Hunter, 2000, para. 13). The plaintiff instituted an action claiming that Hunter should be held personally liable. The court held that Hunter was personally liable under section 21(1) of the OBCA and it was immaterial that the plaintiff had assumed that the corporation was in existence (1080409 Ontario Inc. v. Hunter, 2000, para. 35). This decision clearly shows that the predominant consideration of the court is to protect the third party from any shenanigan act of the promoter and that “the knowledge and intent of the parties is no longer a relevant consideration to the application of s. 21(1)” (Brule, Nosko, Sequeira, & Stratton, 2005)\(^{15}\).

\(^{15}\) This decision is in tandem with the decision in Szecket v. Huang, 1998, where the court reversed the decision in Westcom Radio Group v. MacIsaac, 1992, holding that even if there was a contract at common law, and second, whether it was the intention of the parties that the promoter should be personally liable before it would apply the provisions of section 21. The Szecket’s court held that the aim of the new section 21 is to change the position at common law. See also, Le Gall (1992), noting that “knowledge of the fact of incorporation, and the intention of the contracting parties now appear to be irrelevant to the issue of personal liability” (p. 425).
The provisions in both laws which empower the court to apportion liability between the promoter and the corporation upon application of the third party are distinct and remarkable. The provisions, to a great extent, foreclose the possibility of a promoter to avoid liability by using a fraudulent or shell company that has little or no asset to adopt the contract (Maloney, 1985, p. 430; Dickerson et al., 1971, p. 23). They also allow the third party to choose the party whom he feels should pay restitution or who has the capacity to remedy the wrongful act. More fundamentally, these provisions would protect the third party from situations “where the corporation has adopted the contract at the promoter’s instigation and has then gone on to breach it” (Perrel, 2002, p. 303).

On the flip side, the promoter could mitigate his liability under the contract by pleading with the provisions where he has performed his obligations and the corporation, upon incorporation, fraudulently or without a reasonable cause attempts or evades its obligations under the contract (Perrel, 2002, p. 304)16.

Earlier, under the provision of both laws17, the contract could expressly exempt the promoter from liability or disentitle him to the benefits of the contract. The court emphasized the need for express exemption of the promoter from liability under the contract in the case of Szecket v. Huang, 1998. The plaintiffs innovated and held patents of technology for binding different metals. Huang met the plaintiffs and requested them to develop the technology in Taiwan. Under the arrangement, Huang agreed that the plaintiffs would execute a licence agreement with a yet-to-be-incorporated company in Taiwan that would use the plaintiffs’ technology to produce goods (Szecket v. Huang, 1998, para. 403). He proposed to the plaintiffs that they would move to Taiwan and be paid the sum of $2,600 per week for three years. Additionally, Huang told the plaintiffs that he together with his associates would source the land to a purchaser who was described as “Raymond Stern in trust for a company to be incorporated and not in his personal capacity” (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 2). Before the close of the transaction, the defendant terminated the agreement. Raymond Stern accepted the termination but expressed his intention to claim damages for the breach of the agreement by the defendant (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 2). Thereafter, the company (the plaintiff) in which Raymond Stern acted as a trustee in the transaction was incorporated and Raymond Stern assigned his rights to the company (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 2). The company brought an action against the defendant for breach of contract (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 2). The defendant brought a motion for dismissal of the suit on the grounds that the company lacked the right to institute or proceed with the suit because the contract had been terminated and as such, the company could not adopt or enforce it under section 21 of the Act (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 17). The Court rejected the argument of the defendant and held that the plaintiff could adopt and enforce the contract because, from the terms of the contract, Raymond Stern had nothing to assign because he was never intended to be a party to the contract. Instead, the actual party was the plaintiff (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 15).

More so, there was an express disclaimer of liability by Raymond Stern which entitled the corporation to adopt the contract and initiate a suit to enforce it (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 21).

By contrast to the decision in Huang’s case, in 1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, the defendant entered into a contract for the sale of land to a purchaser who was described as “Raymond Stern in trust for a company to be incorporated and not in his personal capacity” (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 2). Before the close of the transaction, the defendant terminated the agreement. Raymond Stern accepted the termination but expressed his intention to claim damages for the breach of the agreement by the defendant (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 2). Thereafter, the company (the plaintiff) in which Raymond Stern acted as a trustee in the transaction was incorporated and Raymond Stern assigned his rights to the company (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 2). The company brought an action against the defendant for breach of contract (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 2). The defendant brought a motion for dismissal of the suit on the grounds that the company lacked the right to institute or proceed with the suit because the contract had been terminated and as such, the company could not adopt or enforce it under section 21 of the Act (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 17). The Court rejected the argument of the defendant and held that the plaintiff could adopt and enforce the contract because, from the terms of the contract, Raymond Stern had nothing to assign because he was never intended to be a party to the contract. Instead, the actual party was the plaintiff (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 15).

16 Perrel (2002) noted that “this risk is mitigated by the prospect that the promoter may be able to obtain an order under section 21(3) shifting liability with the promoter” (p. 304).

19 Corporate Law & Governance Review/ Volume 3, Issue 1, 2021
The court also reasoned that if it had adopted the defendant’s argument, it would create a situation where no one would sue or be sued and could even deny the company the benefits of a contract made on its behalf before it came into existence and which it had adopted (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002, para. 25). The provisions that allow the promoter to expressly exempt himself from liability are important because they give both actual and constructive notice to the third party about the nature of the transaction that he wishes to enter into (Dickerson et al., 1971, p.23). Thus, where a third party is aware of this fact, the principle of volenti non fit injuria (voluntary assumption of risk) will apply. In Bank of Nova Scotia v. Williams et al., 1977, Mr. and Mrs. Aikins owned a company called Even-Temp Radiant Heating Limited. In 1973, the company had grave financial problems. When the creditors of the company started mounting pressure on Mr. Aikins to repay their loans, Mr. Aikins decided to register a new company so that he would not lose all that he had acquired through the company. Thereafter, Mr. Aikins entered into an agreement with Mr. Williams for that purpose. Under the agreement, Mr. Aikins would provide the fund for the business while Mr. Williams would incorporate the new company. Pursuant to the arrangement, Mr. Williams incorporated the new company called H. Williams Mechanical Contractors Limited. At the request of Mr. Aikins, Mrs. Aikins took a $15,000 mortgage on the family’s property with an interest of 13% (Bank of Nova Scotia v. Williams et al., 1977, para. 2). She delivered the proceeds of the mortgage to her husband via a cheque and on the assumption that he would use the money to commence a business in a new company or use it for any other purpose, he thought fit (Bank of Nova Scotia v. Williams et al., 1977, para. 3). Later, the company delivered a promissory note to Mrs. Aikins in the sum of $15,000 and with an interest of 13% for the purpose of repaying the money she gave the company. However, there was no resolution on the company’s book for the promissory note but the note was signed by Mr. Williams and his wife in their capacity as directors of the company (Bank of Nova Scotia v. Williams et al., 1977, para. 3). H. Williams Mechanical Contractors Limited was created in such a way that Mr. Williams was not allowed to guarantee the loans of the company (Bank of Nova Scotia v. Williams et al., 1977, para. 3). In 1975, Mrs. Aikins’s house, which she had a mortgage arrangement with the plaintiff, was sold. She assigned all the debts that she claimed that Mr. Williams or H. Williams Mechanical Contractors Limited were owing to her in return for a release of all other claims of the plaintiff against her (Bank of Nova Scotia v. Williams et al., 1977, para. 4). When H. Williams Mechanical Contractors Limited had financial challenges, the plaintiff instituted an action against Mr. Williams claiming that he was the promoter of H. Williams Mechanical Contractors Limited and should be personally liable for the sum and interest due under the promissory note under the rule of apportionment of liability in section 21(4) (Bank of Nova Scotia v. Williams et al., 1977, para. 5). The court refused to apply the provision. Van Camp J. held that:

"I am asked to exercise a discretion thereunder to apportion liability for the debt between Harvey Williams and H. Williams Contractors Ltd. [...] However, in the situation before me, Mrs. Aikins was not misled as to which party she was advancing the money to, nor did any action of Mr. Williams or the company misled her as to who would be assuming responsibility for payment. Consequently, I am not exercising any discretion under that section to apportion the liability of the company between Mr. Williams" (Bank of Nova Scotia v. Williams et al., 1977, para. 5).

Although the above decision of the court seems to be right in the sense that was no misrepresentation of facts to Mrs. Aikins with respect to the party or parties to the contract, it could be argued that the provisions of sections 14(4) of the CBCA and 21(4) of the OBCA may pose a serious challenge for third parties. Indeed, these provisions would only work well and the just and where there is a pre-incorporation contract and the company adopts the contract. However, where the contract has the liability exemption clause for the promoter and there is no company that adopts the contract, the implication is that both the third party and the company would lack the locus standi to sue themselves or request the court to impose liability on the promoter or the company pursuant to section 21(3) (Perrel, 2002, p. 305). This has prompted the court to describe such contract “as nascent [...] its enforceability being suspended” (1394918 Ontario Ltd. v. 1310210 Ontario Inc., 2002; Vanduzer, 2018, p. 208).

As noted earlier, under the CBCA and the OBCA, a corporation may adopt a pre-incorporation contract within a reasonable time after its incorporation through any action or conduct signifying its intention to be bound by the contract. It could be argued that the provisions seek to protect the company. Indeed, the provisions will allow the company the opportunity to evaluate and determine the extent to which the contract would be beneficial to it. However, the provisions will work a hardship on a third party and the promoter because they fail to provide the time frame within which the company should be incorporated. A company may take advantage of the provisions against the third party or even the promoter through late registration (Easson & Soberman, 1992, p. 457). The implication of this is that where time is of the essence in the transaction, a third party or the promoter would incur losses. This defect also applies to the principle of adoption within a reasonable time. The use of the phrase “may” in the statute is permissive and not mandatory. A company could exercise discretion in such a manner that would harm a third party and a promoter. For instance, the provision would not augur well for a third party and a promoter where the subject matter of the contract is a perishable item (Hambrook, 1982, p. 13113) or involves a financial transaction that accrues interest rates against a third party or a promoter.

13 Hambrook (1982) stated that “a contract for perishables would, for example, presumably have to be ratified almost immediately” (p. 131).
5. PRE-INCORPORATION CONTRACT LAW: THE NIGERIAN LEGAL REGIME

Similar to Canada\(^{20}\), Nigeria was a former British colony\(^{21}\). During the period of colonization, the British applied the Company Ordinance of 1912 in Lagos State which was mainly derived from the English Companies (Consolidation) Act of 1908 (Obayemi & Alaka, 2014, p. 100). The 1912 Ordinance was repealed by the Companies (Amendment and Extension) Ordinance of 1917 which expanded the territorial application of the 1912 Ordinance to the entire country (Orojo, 2008, p. 16). In 1922, the British repealed the 1917 Ordinance through the enactment of the Companies Ordinance of 1922 (Orojo, 2008, p. 17). The 1922 Ordinance was later repealed by the Companies (Amendment) Ordinance of 1941 and the Companies (Amendment) Ordinance of 1954 respectively (Orojo, 2008, p. 17). Through the Designation of Ordinance Act of 1963, the 1953 Ordinance has renamed the Companies Act and the Act regulated companies in Nigeria until 1968 when the Companies Act of 1968 was passed (Orojo, 2008, p. 17).

With respect to pre-incorporation contracts, apart from Article 80 of Table A in Schedule L, which made rules for companies that adopted the content of the table, 1968, similar to the previous laws, did not contain any express provision regulating such transactions (Obayemi & Alaka, 2014, p. 120). As a result, pre-incorporation contracts were largely regulated through the common law rule. The case of Caligara v. Giovanni Sartori and Co. Ltd., 1961 reflected the application of the common law rule to pre-incorporation contracts in Nigeria. In the case, a promoter took a credit facility in the name of the defendant, a company that was not incorporated at the material time of the transaction. The cheque for the loan was payable to the defendant. The plaintiff never knew that the defendant was yet to be incorporated. The defendant was incorporated shortly after the promoter cashed the cheque. The plaintiff instituted an action against the defendant to recover both the principal and the interest on the loan on the grounds that the defendant had adopted and ratified the contract. The court rejected the contention and held that since the company was not in existence at the time of the contract, it could not validly authorize the promoter to transact on its behalf (Caligara v. Giovanni Sartori and Co. Ltd., 1961, para. 535).

In the words of the court:

“A company is not bound by contracts purporting to be entered on its behalf by its promoters or other persons before its incorporation. The company cannot, after incorporation, ratify or adopt any such contract, because there is in such case no agency and the contract is that of the parties making it” (Caligara v. Giovanni Sartori and Co. Ltd., 1961, para. 535).

Similarly, in Edokpolo v. Sem-Edo Wire Industries Limited & Ors, 1984, the Supreme Court of Nigeria held that:

"It is now a well-settled principle of 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 an agent of such a proposed company there being no principle in existence to bind. It is also settled that after incorporation, a company cannot ratify such a contract purported to be made on its behalf before incorporation" (Edokpolo v. Sem-Edo Wire Industries Limited & Ors, 1984, para. 555)\(^{22}\).

The above decisions in Nigerian jurisprudence created the same challenges that companies, promoters, and third parties faced under the Canadian jurisprudence before the statutory reforms. From an economic development standpoint, it was considered that the rule in Keiller v. Baxter, 1866 was affecting investments in the country because it created a state of uncertainty for promoters and third parties (Orojo, 2008, p. 105)\(^{23}\). As part of the efforts of the government to reform the company law in Nigeria, which was largely based on the British Company laws, the government established the Reform of Nigerian Company Law Committee led by Justice Oluwakemi Orojo to review the 1968 Act to meet with the changing needs of Nigeria’s corporate environment (Obayemi & Alaka, 2014, p. 101).

The outcome of the report of the Committee led to the enactment of the Companies and Allied Matters Act of 1990 which repealed the 1968 Act (Orojo, 2008, p. 17)\(^{24}\). Under the 1990 Act, the pre-incorporation contract was part of the provisions that were repealed. In 2020, the Federal Government passed the Companies and Allied Matters Act of 2020 which repealed the 1990 Act. The 2020 Act, however, retained the provision on pre-incorporation contracts under the 1990 Act.

It is pertinent to note that only two sections repeal the common law rule on pre-incorporation contracts. For the purpose of analysis, it is important to state the provisions. Specifically, section 96(1) of the 2020 Act provides that a company may ratify a pre-incorporation contract after its formation. Upon ratification, the company shall become bound by and entitled to the benefit of the contract as if it has been in existence at the date of such contract and had been a party to it. Under subsection 2, before the ratification of the contract, the promoter would be personally bound and entitled to the benefits of the contract in the absence of any express provision to the contrary.

The provision of section 96(1) of the Act is similar to the provisions of the CBCA and the OBCA because it allows the company to ratify, be bound, or take the benefits of a pre-incorporation contract after its incorporation. The provision is also substantially the same as the provisions of the CBCA and the OBCA in that it recognizes the principle of retroactivity of the existence of the company as at the date of the contract. In marked contrast, \(^{22}\) In Ipswich v. A.C.B., 1965, the court noted that “generally, a contract cannot be enforced by a person who is not a party to it, even if the contract is made for his benefits and purports to give him the right to sue upon it”. See also Urhobo v. J.S. Tarka & Anor, 1976, where the court held that a corporation is not bound by a pre-incorporation transaction.

\(^{23}\) Orojo (2008) noted that “these common law rules were a source of considerable inconvenience for the promotion of business” (p. 105).

\(^{24}\) It is pertinent to note that at the time of this writing, there is a bill to repeal the 1990 Act. The Bill is termed the Companies and Allied Matters Repeal and Re-enactment Bill 2018. However, the provisions (i.e., section 7(1) and (2)) of the new Bill are the same with the 1990 Act.
the provisions of the CBCA and the OBIA not only stipulate the capacity of the company to adopt and the principle of retroactivity of the existence of the company as at the date of the contract, but they also state that the company should adopt the contract within a reasonable time. Although the provisions do not state what amounts to a reasonable time, they are better than the provisions of section 96(1) of the Nigerian law because the provision of section 96(1) leaves more room for uncertainty. Framed differently, the provision of section 96(1) would give a company-wide latitude to determine when it ratifies a pre-incorporation contract. This may work a hardship on a third party because not only that the company will ratify the contract at its convenience, the third party will wait for sine die and the company will never ratify the contract (Ncube, 2009, p. 264). Also, the third party may in the circumstance, struggle to determine “to whom he is legally bound” (Estey, 2000, p. 3; Maloney, 1985, p. 145). It is pertinent to note that even if third parties elect to exercise their right to compel the company to ratify the contract through judicial processes, there is no guarantee that they would be victorious in the case (Ncube, 2009, p. 264). At this point, it is also important to point out that, unlike Nigeria, the Ontario Courts have provided judicial guidance on what should constitute a reasonable time. In TMD Investments Ltd. v. Fiddleheads Café Inc., 2007, the court held that where it took a company almost one after its incorporation to start making rental payments for a lease agreement which a promoter purportedly entered on its behalf, it could not be said that the company has, within a reasonable time after it came into existence, signified by some act or conduct its intention to be bound by the pre-incorporation contract. Accordingly, the court held that the promoter was personally bound by the contract.

From the standpoint of the promoter, the opacity of the statute in fixing a period within which a company should ratify the contract exposes the promoter to uncertainty and unnecessary liability. Indeed, a situation may arise where the proposed shareholders of the yet-to-be-incorporated company give the promoter the impression that the company would be incorporated and ratify the contract. The company may after incorporation refuses to ratify the contract. In such circumstances, the promoter would be personally liable to a third party. More so, the current regime in section 96(1) is unjust to the promoter because of the serious internal contradictions and the penchant command of the law with respect to a situation where the promoter breaches his duty to the company. Indeed, Nigerian law provides that no limitation of time shall apply to any proceedings by a company to enforce its rights. The provision only gives the court the discretion to relieve a promoter from liability if it deems it equitable to do so (Companies and Allied Matters Act, 2020, section 86(4)). It is, therefore, suggested that the laws should state with certainty the time period within which the company should adopt the contract and, if possible, be incorporated\(^2\). The laws should also state the effect of non-communication of the fact of rejection or adoption by the company after the stipulated period (Ncube, 2009, p. 265). The implications of these propositions are that they would not only protect the third from uncertainties or unruly behavior of companies, they would also make companies pursue pre-incorporation transactions diligently (Ncube, 2009, p. 265).

Also, unlike the CBCA and the OBIA which provide that a company may adopt the contract by any act or conduct signifying its intention to be bound by the contract, section 96(1) of the Nigerian law is mute on how the company will ratify the contract. The provisions of the CBCA and the OBIA are more liberal and afford better protection for third parties because they accommodate formal, informal, written, or an unwritten minute or positive acts of a company which suggests to the third party that the company endorses the contract. For instance, in the case of Design Home Associations v. Raviv, 2004, the court was of the opinion that a request by a company that all correspondences of a lease transaction purportedly entered on its behalf to be sent to it, subsequent payment of the lease sum via a cheque in the company's name, and demand for assignment of the lease amounted to adoption. In Shoppers Drug Mart Inc. v. 6470360 Canada Inc., 2014, Shoppers Drug Mart executed an agreement with Energyshop Consulting Inc. to manage and pay its utility bills across Canada in October 2005. Under the contract, Mr. Beamish acted on behalf of Energyshop, which at the material time of the contract was not registered. After some weeks of the execution of the agreement, Beamish registered 6470360 Canada Inc. c.o.b. as Energyshop Consulting Inc./Powerhouse Energy Management Inc. (647) (Shoppers Drug Mart Inc. v. 6470360 Canada Inc., 2014, para. 5) Both Shoppers Drug Mart and 647 did not formally sign the 2005 contract but they consented that the agreement would be binding upon them and that they could comply with their obligations under the agreement (Shoppers Drug Mart Inc. v. 6470360 Canada Inc., 2014, para. 6). The contractual obligation of Shoppers Drug Mart was to direct utility firms to forward their bills to Energyshop. 647 collected and arranged the bill and occasionally forwarded to Shoppers Drug Mart the invoice of the gross utility fees it collected from firms and the cost it incurred in processing the bills (Shoppers Drug Mart Inc. v. 6470360 Canada Inc., 2014, para. 9). Thereafter, Shoppers Drug Mart would transmit the invoiced sum to a designated clearing account opened in the name of 647 and Mr. Beamish at TD Bank (Shoppers Drug Mart Inc. v. 6470360 Canada Inc., 2014, para. 10). Another operating account was opened in the names of 647 and Mr. Beamish through which 647 used the monies it got from Shoppers Drug Mart to pay Shoppers Drug Mart’s utility bill or 647’s operating expenditures (Shoppers Drug Mart Inc. v. 6470360 Canada Inc., 2014, para. 12). In August 2008, Shoppers Drug Mart got an anonymous telephone call and fax showing that the funds it had deposited in the clearing account for the purpose of offsetting its utility bills were not used for

\(^2\) Under section 123(7) of the Quebec Companies Act, the time for companies to adopt pre-incorporation contract is 90 days. See Estey (2000, p. 30) for similar suggestion on the time to incorporate.
the purpose. Instead, they were used for other purposes. Miffed by this, Shoppers Drug Mart terminated the contract with 647 (Shoppers Drug Mart Inc. v. 6470360 Canada Inc., 2014, para. 14). It also instituted an action against 647 and Mr. Beamish personally to recover the monies that were not used for the purpose for which they were given to 647 (Shoppers Drug Mart Inc. v. 6470360 Canada Inc., 2014, paras. 17–18). Shoppers Drug Mart, which thought that Energyshop was registered, only became aware that it was not incorporated after it instituted the action. Also, it was not aware of the existence of 647 until after it instituted the suit (Shoppers Drug Mart Inc. v. 6470360 Canada Inc., 2014, para. 8). On the issue of whether 647 adopted the contract, the court held that by its acts, it signified its intention to be bound by the contract and thereby affirmatively adopted the contract; and that no formal adoption was required to satisfy the provision of section 14(2) the CBCA (Shoppers Drug Mart Inc. v. 6470360 Canada Inc., 2014, para. 35).

In Sherwood Design Services Inc. v. 872935 Ontario Ltd., 1998, William King, William McCreary, and Alex Pelizarri, clients to a law firm, executed a contract with the plaintiff for the purchase of a property on behalf of a company that was yet to be incorporated at the cost $300,000. They also endorsed a promissory note to the tune of $45,000 payable on demand if the transaction failed (Sherwood Design Services Inc. v. 872935 Ontario Ltd., 1998, para. 4). They told the plaintiff to inform subsequent purchasers that they would close the deal. The plaintiff did so and as a result, other purchasers withdrew their interest from the transaction (Sherwood Design Services Inc. v. 872935 Ontario Ltd., 1998, para. 4). They instructed the law firm to draft the documents that would be used to perfect the transaction. Instead of incorporating the company on whose behalf the contract was executed, a lawyer in the law firm used a shelf company that was incorporated by his colleague in 1989 to perfect the contract. Thereafter, the lawyer executed documents that not only transferred the title of the shelf company to King but also stipulated that the shelf company would acquire the property. Specifically, the lawyer prepared a deed of transfer that transferred one share owned by his colleague to King, a resolution of shareholders nominating King as the only director of the company, a resolution of the director endorsing the contract, and legal advice that the transaction could be enforced against the shelf company. Thereafter, the lawyer delivered the documents to the lawyer to Sherwood for his “review and consideration” (Sherwood Design Services Inc. v. 872935 Ontario Ltd., 1998, para. 5). He also attached a letter which stated thus: “I wish to advise that 872935 Ontario Limited which was incorporated on December 15, 1989, has been assigned by [our law firm] as the corporation that will complete the asset purchase from Sherwood Design Services Inc.” (Sherwood Design Services Inc. v. 872935 Ontario Ltd., 1998, para. 5). The defendants refused to close the transaction on the ground that the purchase sum was exorbitant. After, the law firm transferred the share that King rejected to a law to another client for the purpose of acquisition of another property. The latter assignee of the shelf company commenced a lucrative business (Sherwood Design Services Inc. v. 872935 Ontario Ltd., 1998, para. 5). As a result of the failure to close the deal, the vendor commenced an action against the shelf company on the grounds that the shelf company had adopted the transaction through the letter and the supporting documents that were important to perfect the purchase which the lawyers to the shelf company sent to the vendor’s law firm in the latter letter. The defendants contended that there was no proof of the intention of the company to adopt the contract and as a result, they should be personally liable for the breach of the agreement (Sherwood Design Services Inc. v. 872935 Ontario Ltd., 1998, para. 5). The defendants also admitted in evidence that they did not sign the promissory note in their personal capacity but on behalf of the company that was yet to be registered (Sherwood Design Services Inc. v. 872935 Ontario Ltd., 1998, para. 5). The court held that the various documents and communications between the lawyer to the shelf company and the vendor’s lawyers were adequate proof of the shelf company’s intention to be bound by the contract (Sherwood Design Services Inc. v. 872935 Ontario Ltd., 1998, para. 7). More specifically, the court noted that the law was mute on the mode of adoption and there is no ground to hold that the law strictly requires a formal adoption of the contract (Sherwood Design Services Inc. v. 872935 Ontario Ltd., 1998, para. 6). Thus, a company satisfies the requirement of the law upon “a simple notification of intent” (Sherwood Design Services Inc. v. 872935 Ontario Ltd., 1998, as cited in Jonathan’s Aluminium & Steel Supply Inc. v. Retail Alloy Metal & Plastic Plus Ltd., 2015)26. The provision of section 96(1), by contrast, suggests that the company must pass a formal resolution adopting the contract. This formalistic approach will work a hardship on a third party because it may be difficult for the company to convene a meeting and obtain the necessary approval from the board or shareholders to adopt the contract. More so, a company may intentionally renege on calling such a meeting even when it has partly benefitted from the contract and cause the third party and the promoter to alter their position.

The provision of section 96(2) of the Nigerian law appears to be similar to the CBCA (Canada Business Corporations Act, R.S.C. 1985, C. 44, sections 14(1) and 14(4)) and the OBCA (Ontario Business Corporations Act, R.S.O. 1990, c. B. 16, sections 21(1) and 21(4)) provisions in the sense that they allow the parties to insert a clause in the contract that would exempt the promoter from personal liability or allow him to be entitled to

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26 In the case, the court stated the following facts to justify its holding that the new company adopted the contract and the promoter not personally liable:

a. The contract cleared out that the promoter is entitled to title to a company to be incorporated;

b. The company was incorporated within 8 days after the execution of the contract;

c. The company was incorporated within 8 days after the execution of the contract;

d. The plaintiff was immediately notified;

e. The plaintiff testified that he had knowledge of the fact that this was the defendants’ intention and he did not have any problem with it;

f. The plaintiff raised an invoice on January 4, 2012, the closing date in the contract of payment, in the amount of $929,827.88 to the new company and not to one of the defendant shareholders;

g. The sign at the business premises were changed in the name of the new company;

h. Business cards were produced in the new company’s name;

i. The lease contract was in the new company’s name;

j. The phone bill was in the new company’s name; (Jonathan’s Aluminium & Steel Supply Inc. v. Retail Alloy Metal & Plastic Plus Ltd., 2015, para. 50–53).
the benefits of the contract. However, a difference exists. Indeed, while section 96(1) imposes liability and allows the promoter to be entitled to the benefits of the contract in the absence of any express provision to the contrary, the provision only applies to the promoter before the ratification of the transaction by the company. In E. A. Garuba v. Kwara Investment Company Ltd. & Ors, 2005, the Supreme Court held that "before a company can become bound by any contract or transaction entered on its behalf before its formation, there must be evidence of ratification by the company upon its formation" (E. A. Garuba v. Kwara Investment Company Ltd. & Ors, 2005, para. 164). By contrast, the CBCA and the OBCA provisions apply before the incorporation of the company. The CBCA and the OBCA provisions seem to be more favourable to the promoter and third parties. They strongly attempt to resolve the uncertainty that prevailed at common law where promoters and third parties were locked in disputes whenever companies on whose behalf pre-incorporation contracts were entered into were not incorporated. Indeed, the provisions may incentivize the promoter to take reasonable steps to incorporate the company and avoid personal liability. This will meet the reasonable expectations of both the promoter and the third party under the transaction. On the flip side, however, a promoter could hide under the cloak of the provisions to frustrate the incorporation of the company so that he would take the benefits arising from a profitable transaction.

With respect to section 96(2) of the Nigerian provision, it could be argued that the provision is good in the sense that it allows the company to second-guess the transaction entered on its behalf prior to its incorporation. However, it may pose serious problems for promoters and third parties. Thus, the provision may impose an undue burden on the promoter to secure the adoption of the contract by the company. On a more fundamental plain, the provision may not favour third parties because it will be easier to incorporate a company than to adopt the contract. The interest of the shareholders may diverge at the point of adoption. This challenge is coupled with the fact that there is no stipulated time for ratification under the Act. In such circumstances, the promoter and third parties might incur liability which ordinarily they wouldn’t have incurred if the statutory liability of the company had started at the point of incorporation. To resolve this deficit in the provisions of the CBCA, the OBAs, and the CAMA, it is suggested that the provisions be reformed to provide for a "deemed warranty clause". Under this arrangement, a promoter would be deemed to warrant that the company would be incorporated and adopt the contract within a particular or a reasonable time. If thereafter, the company is not incorporated and fails to adopt the contract, the promoter would be ordered to pay damages to the third party for breach of the warranties27. The promoter could, in turn, seek relief against the company where the reasons for

Residences (St. Catherines) Inc., 2011, para. 39). He also established that the 1st defendant was the promoter of the 2nd and 3rd defendants which subsequently benefitted from its services and that the court should apportion liability among them pursuant to section 23(3) of the OBCA (MacNaughton Hermsen Briton Clarkson Planning Limited v. Royalton Retirement Residence Inc., The Royalton Retirement Residences (Peterborough) Inc., and the Royalton Retirement Residences (St. Catherines) Inc., 2011, para. 19). The 1st defendant claimed that the plaintiff did not have any contract with the 2nd and 3rd defendants and that all the invoices were given to the 1st defendant. It also claimed that the companies were separate from each other as the shareholders, directors, and secured creditors were not the same (MacNaughton Hermsen Briton Clarkson Planning Limited v. Royalton Retirement Residence Inc., The Royalton Retirement Residences (Peterborough) Inc., and the Royalton Retirement Residences (St. Catherines) Inc., 2011, para. 28). In a decision that dismissed the defendants’ motion for a reversal of a summary judgment apportioning liability against them, the court noted that the 2nd and 3rd defendants had not adduced sufficient “evidence to distance themselves from the benefits received by Royalton” (MacNaughton Hermsen Briton Clarkson Planning Limited v. Royalton Retirement Residence Inc., The Royalton Retirement Residences (Peterborough) Inc., and the Royalton Retirement Residences (St. Catherines) Inc., 2011, para. 37). According to the court, they failed to provide any evidence suggesting that they paid the plaintiff for a second time for the services (MacNaughton Hermsen Briton Clarkson Planning Limited v. Royalton Retirement Residence Inc., The Royalton Retirement Residences (Peterborough) Inc., and the Royalton Retirement Residences (St. Catherines) Inc., 2011, para. 37) or “any evidence to negate the strong inference from the evidence that Royalton was the promoter of the retirement home projects and was purporting to act on their behalf before their incorporation” (MacNaughton Hermsen Briton Clarkson Planning Limited v. Royalton Retirement Residence Inc., The Royalton Retirement Residences (Peterborough) Inc., and the Royalton Retirement Residences (St. Catherines) Inc., 2011, para. 37). It is on the strength of the discretionary powers granted to the court to determine how to apportion liability upon an application of a party that the provisions of the CBCA and the OBCA are better than the Nigerian law because, in such circumstance, they provide an opportunity for third parties to make “a choice of debtors” (Easson & Soberman, 1992, p. 460) or obligors through courts.

6. CONCLUSION

This paper has demonstrated that the inevitability and importance of the concept of pre-incorporation contracts in the commercial world cannot be over-emphasized. Such contracts allow companies to set vital transactions in motion before their actual incorporation. However, the concept suffered severe deficits and uncertainty under common law jurisprudence. The study has shown that although the provisions of the CBCA, the OBCA, and the Companies and Allied Matters Act of Nigeria have, through statutory reforms, attempted to address the challenges in the application of the rule at common law, they have not completely eradicated them. However, the provisions CBCA and the OBCA have achieved a greater milestone in the protection of the company, the promoter, and third parties than the Nigerian law through the principle of apportionment of liability, the rule on reasonable time for the adoption of the contract, and the liberal approach as to what amounts to adoption by a company. Notwithstanding the milestone achieved by the provisions of the CBCA and the OBCA, it is suggested that the laws should be reformed in the area of reasonable time for the adoption of pre-incorporation contracts. More specifically, the laws should state with certainty what amounts to reasonable time and the implication of the fact of non- adoption of the contract after the passage of the time. Further, the laws should also be reformed through the insertion of provisions that would require the companies on whose behalf promoters enter into pre-incorporation contracts to be incorporated within a reasonable time after the consummation of the contracts (Estey, 2000, p. 30). Finally, it is suggested that the Nigerian law should be expanded to reflect the extent CBCA and the OBCA provisions and incorporate the suggestions on the time for adoption of the contract. These reforms would not only ensure certainty in domestic pre-incorporation transactions but would also help foreign investors who wish to do business and engage in preliminary transactions before incorporation in both jurisdictions.

This is more imperative in Nigeria because of the provision of section 78(1) of the Companies and Allied Matters Act which mandates any foreign company which intends to carry on business in Nigeria to take all necessary steps to be registered in Nigeria as a separate company.
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