THE LAW RELATING TO FOREIGN COMPANIES IN NIGERIA: AN ANALYSIS OF PART X OF COMPANIES DECREE 1968

LL.M. THESIS

BY

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DEDICATION

This thesis is dedicated to my father
Bezhiwa Idakula and my mother Keffi Bezhiwa
for the great interest they have shown in
my Education right from my childhood days.

DECLARATION

I hereby declare that this dissertation has been written by me and it is a record of my own research work. It has not been presented in any previous application for a higher degree. All quotations are indicated and the sources are fully acknowledged.

SUPERVISOR PROF. Q.K. GOEL

DEAN OF POST-GRADUATE SCHOOL

A C K N O W L E D G E M E N T S

My special thanks go to my Supervisor Prof. R.K. Goel: a great Scholar, a devout teacher and above all, a kind and a very sympathetic gentleman, without whose encouragement and couching, this work would not have seen the light of the day.

I also want to thank my wife Ruth and my Children Mbawuese and Angela who provided me with all the love and atmosphere needed for a work of this nature. Lastly but not the least I thank my Confidential Secretary Danjuma Yusufu for patiently and neatly typing the work.

ABSTRACT

The thesis attempts to do many things to many people. First, it attempts to provide for the first time a comprehensive legal literature on the Nigerian Company Law relating to foreign companies in Nigeria.

Secondly* it attempts to explain the current companies legislation -and other related laws relating to foreign companies in Nigeria and compares the position in Nigeria with that of other African countries and England. In some way therefore, the approach has been comparative in nature.

Lastly, the thesis seeks to show in what ways part X of the companies decree 1968 and other related legislations have attempted to check, control, and tackle the problems posed by the nefarious activities of subsidiaries of multinationals in Nigeria.

The thesis thus attempts to provide material for law students, law teachers and legal practitioners on the subject while at the same time it tries to educate the business-men and the laymen -about the things to look out for in ,heir various dealings with "Foreign" Companies in Nigeria.

The thesis itself has been divided into nine different chapters, each chapter dealing with a distinct and seperate topic on the subject-matter.

Chapter one which is the introductory chapter, introduces the problems posed by subsidiaries of foreign companies in Nigeria and shows how part X of companies Decree (among other legislations) was promulgated to alleviate some of these problems.

Chapter two which deals -with the status of foreign companies in England is aimed at showing, at the end, whether the Nigerian company law has fashioned our law relating to foreign companies after Britain or has departed in appreach from the English Law,

The third chapter explains the historical perspectives of the law under analysis and shows how the law has envolved from nothingness to a concrete and strict law.

Chapter four defines what in Nigeria is meant by the term "foreign company" while chapter five undertakes the business of explaining the requirement for some foreign companies to convert and then later incorporate as Nigerian companies - the two mandatory things to do if the foreign companies are to continue to do business in Nigeria, The consequences of non-ihcorporation by the foreign companies are also explained in the chapter.

Chapter six is novel. It explains-the law and the procedure for instituting legal proceedings against foreign companies in Nigeria as it relates to the jurisdiction of courts, service of process and venue.

Chapter seven discusses penalties against defaulting foreign companies which fail to abide by the obligations imposed upon them by Part X of the companies decree 1968 while Chapter eight tackles the issue of winding up of foreign companies in Nigeria.

The last chapter (Chapter nine) summarises the thesis and deals with proposals for reform. In concluding, the thesis shows that the Nigerian law relating to foreign companies was and is not fashioned after the law in England (as is customary for Nigeria to do) and that the NigeriaAlaw has evolved a unique approach in attempting to solve the problems posed by the subsidiaries of foreign multinationals in the country.

P R E F A C E

The rational of my choosing to write a thesis on this aspect of our company law is that no legal literature exists in a systematic form on this area of company law in Nigeria.

The thesis thus is the first attempt to comprehensively tackle this relegated but most -important Aspect of our law.

The thesis itself attempts to explain the current company legislation and other related laws relating to foreign companies in Nigeria and also attempts to compare the position in Nigeria with that of other African countries and England. Thus in some way the approach has been comparative.

It is my sincere hope that this thesis would go along way to balance the legal literature available on companies in Nigeria and that it would be of immense value to law students, law teachers and legal practitioners in the private practice.

If the thesis is able to achieve these objectives, then the purpose of writing it would have been worthwhile and justified.

M.B. IDAKULA
JUNE, 1984

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5. AFRICA

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Ethiopia Cement Corporation V Commercial Bank of Ethiopia Ingra & Yugoslav Bank of Foreign Trade (1967) 1 A.L.R. 298.

KEY TO CASE REFERENCES

ALL	N.L.R.	All Nigerian Law Reports
	F.C.H.	Federal High Court Law Reports
	N.C.L.R.	Nigeria Commercial Law Reports
	C.C.H.C.J.	Certified Copies of High Court Judgements
	W.N.L.R.	Western Nigeria Law Reports
	H.C.L.D.	High Court of Lagos Division (Certified copies)
	A.L.R.	African Law Reports
ALL	E.R.	All England Law Reports
	CH	Chancery Division
	K.B.	Kings Bench Division
	N.L.R.	Nigeria Law Reports
	Q.B.	Queens Bench Division
	K.L.R.	Kenyan Law Reports
	G.L.R.	Ghana Law Reports

CHAPTER ONE

I N T R O D U C T I O N

Part X of Companies Decree 1968 which is the focus of this thesis has only four sections! Few as these sections may be however, they constitute the COmpany Law dealing with the subject matter of foreign Companies in Nigeria.

And as far as we are aware, there is no single Nigerian Legal Literature dealing with this all important subject. No Nigerian writer on Company Law has dealt with the topic either exclusively or even partially in any book or journal. The few books on Company Law in Nigeria that have had to touch on the topic, have dealt with the subject in an extremely brief, sketchy and haphazard manner. The result has been that generally, the subject matter of foreign Companies in Nigeria has been treated with coetempt and has been completely relegated to the background!

Yet, we cannot afford to treat at this most important subject-matter shabily! For as at today, there exist well over 2,000[1] different types of "foreign"[2] Companies doing business in Nigeria. These foreign Companies which are engaged in all the major sectors[3] of the economy deal with lives of millions of Nigerians.

...2/

They do various businesses which affect not only Federal and the State Goverhments, but even the security of the nation. These Foreign Companies are the Multinationals!

A Multinational corporation has been defined[4] as a Company which has its parent headquarters in a developed country but has subsidiary operations in a number of other countries.[5] It is these corporations which are wealthy and have expertise in technology that control most of the meaningful economic activities in most developing countries. They are not only owned and wholly controlled by the Western bourgeois, but their system of operation are specifically geared to serve Western interests.[6] Thus their control and profits and other surpluses are firmly located in Western Europe and North America.

The control which these foreign multinational corporations have on the Economies of the developing countries gives them wide influence and jurisdiction to manipulate the Economic policies of their host countries. The fiscal and monetary policies of the developing countries can and are usually therefore seriously thwarted by the Economic powers of these corporations.

...3/

In many instances thus, these multinationals have brought political and Economic disruptions in their host countries.

The overthrow of Allende -in Chile, the frequent upheavals in Kenya and the middle-east and the political upheavals in Nicaragua and El Salvado (all in developing countries) have been attributed by and large to the powerful Machinations of the multinational corporations such as I.T.T., Lanrho, Shell and BP respectively.[7]

Apart from these political dangers which these foreign multinational companies pose, national economic policies of the developing countries which do not favour them are usually in danger of being sabotaged.[8] For example, economic policies such as tax and tarriffs etc by developing Governments, designed to enhance productivity and foster capital accummulation are more often than not seriously weakened by the manipulations of the multinationals. Thus one finds that tax and tarriffs lawa in the developing countries are usually seriously circumvented by the mal-practices of the multinationals or made completely ineffective.[9]

...4/

All these malpractices employed by the multinationals corporations to weaken the Governments of the developing countries have the same objective: that of maximising the corporations,[10] overall profits and ensuring the repatriation of the profits. And the net effect of their actions is that developing countries are deprived of their tax revenue and foreign exchange while their measures for arresting inflation are undermined.

Multinational corporations being foreign companies realise that they can only continue to enjoy their privileged position if they have - superior economic power and can control the economy and Government. They therefore strive to deprive the economy and the host country of the ability to independently order their Economy and organise un-aided, the production of Goods and Services!

Unfortunately however it is these activities of multinational corporations of which part X of the companies decree seeks to control, that has been the subject of relegation by Nigerian writers, authors and academicians. 'It is therefore to correct this position and fill the vacuum in this relatively unexplored area of the laws governing foreign companies in Nigeria that this Thesis has been undertaken.

...5/

Various Governments through laws, have reacted to the problems created for the indigeneous population by multinational corporations and other foreign investors, and have also designed policies to enable tbe indigeneous population play their rightful role in the Economy. In Nigeria, in order to check these nefarious activities of the foreign companies, Part X of the companies decree 1968 was specially promulgated. The indigenisation Decrees of 1972 and 1977 were also designed to check and control the obnoxious activities of these companies. Consequently today in Nigeria, some enterprises (as a result of the indigenisation decree) are specifically reserved for Nigerian citizens.[11] If therefore an alian company owned any of the enterprises reserved exclusively for Nigerians, it was required by law to sell or transfer the onwership of the enterprise to Nigerian citizens and associations.

The main objective and purpose of this study therefore is to show to what extent, the Nigerian company law has attempted to tackle the problems posed by the foreign multinationals in this country.[12] Secondly, it is designed to shed some light in this relatively dark region of our company law as no similar work of this nature has yet been undertaken

...6/

by any known foreign or Nigerian writer on this aspect of the Nigerian law relating to foreign companies.

In undertaking this study the writer has had to face alot of obstacles, chiefly amongst which is the dearth of materials. The case law which exists on this aspect of our company law is scanty and in some areas completely unavailable. We have therefore had to explain the position of the law in certain areas with the position of the case law in sister African countries that have similar legislation relating to foreign companies. Thus illustrations have been made with materials from Ghana, Kenya, Zambia and Ethiopia.

Furthermore the study has taken a comparative approach. It has attempted to compare the position of the Nigerian Law with that of the developed and other developing countries and has tried to show in which areas there has been some improvements.

The work itself has been divided into eight different chapters, each chapter dealing with a separate topic on foreign companies. Since Nigeria has over a period of time, fashioned most of its laws after the English laws, the status of foreign companies in England is explained in chapter two.

...7/

The aim of course is to see at the end, whether Nigerian company law has still fashioned the law relating to foreign companies after England, and if not, what departure or improvements have been made. The third chapter which deals with the Historical perspectives of the law relating to foreign companies in Nigeria tries to pick up the subject matter from the roots with the hope that the present positition of the law would be better understood.

Chapter four of the thesis begins the actual discussion of the law relating to foreign companies as per Part X of the companies Decree 1968. The discussion starts by defining what is meant by the term foreign company in Nigeria. Chapter five then deals with the requirement of the foreign company to convert to or incorporate as a Nigerian Company before undertaking any business activity in Nigeria, and explains the consequences of non-compliance. Legal proceedings against foreign companies in Nigeria is dealt with in chapter six. This is the chapter that explains the law relating to the -procedure, venue, jurisdiction of courts and service of processes on foreign companies.

...8/

Chapter seven discusses penalties against foreign companies that default to comply with the law, while chapter eight deals with winding up of foreign companies in Nigeria. The last but not the least chapter (chapter nine) deals with conclusion and proposals for reform.

A general word about Part X of the companies Decree. This part of the decree attempts to regulate and control the activities of foreign companies in Nigeria. And in doing so it has rejected in its entirety, the personal status of foreign companies and compelled them to seek Registration as Nigerian companies. The effect of this "Nationalisation" of these companies is that they are completely sublerged or ide to submit to the jurisdiction of Nigerian Courts. Also, they are forced to make all the required disclosures to the Nigerian people just like any Nigerian company would do before doing business. Furthermore, all the laws affecting Nigerian Companies as per the companies decree 1968 are by Part X of the decree to apply to any foreign company (not exempted) seeking to do business in Nigeria. The total effect of these controls is that they have gone along way in checking the nefarious activities perpetrated by foreign multinationals in Nigeria.

...9/

It is hoped therefore that as we go through this pioneering work it would serve the purpose of shedding some light on this dark region of our company law which hitherto has been left unexplored.

...10/

1. New Nigerian of Saturday 7th March, 1981 Page 10.

2. i.e. Foreign Companies turned Nigerian Companies.

3. Such as construction Industry, Banking Industry, distributive trade, oil drilling - Marketing and Manufacturing industries etc. etc.

4. Nwankwo Authurt A: Can Nigeria Survive? (1981) Enugu, fourth Dimension PP.55.

5. Examples of subsidiaries of Multinational Companies in Nigeria are: U.A.C. (Nig) Ltd., Union Bank (Nig) Ltd., Mobil Oil (Nig) Ltd., Julius Berger (Nig) Ltd., I.T.T. (Nig) Ltd., U.T.C. (Nig) Ltd., P.Z. etc (See PP.111-115 Ibid)

6. Usman Y.Bala: Transnational Companies and National Development in FOR THE LIBERATION OF NIGERIA (1979) LONDON, P.52.

7. Nwankwo A.A: Can Nigeria Survive? (1981) Enugu, Fourth Dimension PP.106.

8. In Nigeria, there is no official data available showing political & econoic sabotage that these subsidiaries of multinationals have committed.

9. In Nigeria Tax and Tarriff laws were usually circumvented through the loophole created by law in granting approved user scheme and granting of repatriation of profits and dividends to New foreign investments.

10. Goel R.K: Indigenisation: Corporate Control by Nigerians A Plea for Company Law Reform, In the Nigerian Journal of Public Affairs Vol.X No.11 OCT. 1981 Page 81.

11. S.4(1) of the Nigerian Enterprises Promotion Decree 1977.

12. See P.162 of the thesis for the analysis of the problems.

CHAPTER TWO

THE STATUS OF FOREIGN COMPANIES IN ENGLAND

Since the Nigerian company laws have over a period of time been modelled after the English company laws, it may not be out of place, to look at the position of foreign companies in England and see to what extent, if any, Nigerian company Law has made some improvements upon its English, counterpart.

DEFINITION

The term "foreign company" in England has been used to mean a company incorporated otherwise than in England.[1] This cannot be otherwise because although a company formed in England may change its residence to a foreign country, yet it nevertheless would remain an English company because its domicile is in England. If the foreign company is registered, then subject to the jurisdiction of English courts it will also be bound to comply with the provisions of the companies Acts as are applicable in England. A foreign company therefore is and can only be one which has been formed under the Law of another state (with a domicile other than England) but carries on business in England.

If such a company has no corporate personality however, it cannot carry on business in England, for under the English principles of company law, the company cannot be said to exist.

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On this principle therefore it has been held that in England, the use of the term foreign companies primarily denotes foreign associations that have corporate entities in their country of origin.[2]

If the company is a corporate entity and has established a place of business in England, it is required by law[3] to deliver to the Registrar of companies for registration the following:

(a) a certified copy of the instrument containing its constitution (if in foreign language, its certified translation thereof).

(b) a list of its Directors and Company Secretary showing the names, their residential addresses, their nationalities and business occupations etc.

(c) The name and address of one or more persons resident in England who is or are authorised by the company to accept service of documents on its behalf.

Curious enough,[4] failure by an Oversea company (i.e. foreign company) to deliver these documents to the Registrar of companies however does not render its corporate status being disregarded or render it incapable of acquiring or disposing of properties

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nor does it invalidate any contract or other transaction entered into by the company or prevent it from enforcing its right.[5]

If however, a foreign company delivers the documents to the companies Registrar, the Department of trade may cause the Registrar to serve a notice on the company that the Department considers it undesirable for the company to carry on busieess in England under its corporate name.[6] Once such a notice has been issued to a foreign company then the only thing left to it would be to change its corporate name agreeable to -the Trade Department or wind up business.

PERSONAL LAW OF FOREIGN COMPANIES AND THE LAW OF ENGLAND

The general rule concerning the personal law of foreign companies operating in England is that their existence and powers should be determined by the law of the country to which they were incorporated. And to find this out, one has to find out the statute of that country creating them. In other words, the powers of foreign companies are governed by the instruments establishing them and the law of the country where they are domiciled.[7]

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But as Gower (1969) has rightly pointed out[8] if the principle is carried to its logical extremes, it is bound to be abused. For instance promoters will be encouraged to incorporate their companies in the country having the laxiest corporations laws and then leave that country to operate in countries where harsher laws exist so they can be sheil**ded** by the cloak of their personal laws: a protection that will be denied the indigenous companies with whom they will be competing.

Clearly therefore those other countries in which these foreign companies operate should -and usually do in the interest of their citizens impose some limitations on the extent to which foreign companies can operate within their countries. In some countries this limitations has taken the form of absolute prohibitions of certain things by the foreign company, in some others, it has consisted largely of restricting trade by the foreign companies. Yet in others the personal law of incoporation of the foreign companies have been rejected outright in favour of the laws of the country where the foreign company is operating.[9]

... 15

But in England the story is abit different. This is because English rules of conflict of laws accord to the personal laws of foreign companies, the law of their domicile. Thus for instance, the question whether or not a foreign company exists as a corporate body or not depends according to English law on the law of the place where it was alledged incorporated.[10]

English law will therefore always recognise a foreign company as a corporate body if it was duly incorporated according to the laws of the foreign company. And if the foreign company has ceased to have any corporate existence according to its personal law, English law will accordingly also accept that it no longer exists.[11]

English law will also treat the question whether a foreign company's transaction is ultra=vires according to the law of the place of its incoporation. This is so because generally, the capacity of a company is limited by its constitution and the law governing the transaction in question. But as Gower has again rightly stated, English courts would not however, allow a foreign company to escape liability on an English contract by providing that its personal law recognises an even stricter ultra-vires doctrine than that of England,

because this will go against the protection of innocent third parties. Thus it has been said that English courts will not enforce a foreign law conflicting with English public policy.[12]

Also once a foreign company has changed its corporate name in England and it has been approved by the Department of trade, the Registration of Business Act 1916 will apply to it before it carries out any business in England in a name other than its corporate name.[13] The effect of this Act on the foreign company is that its new corporate name must be registered in England.

Furthermore, formerly a foreign company that had delivered the required particulars about itself to the Registrar of companies had the same power to hold land in England as if it had been incoporated under the companies Act 1948,[14] however the position has changed. Today a foreign company has no statutory power to hold land even if it has delivered the required particulars to the Registrar until its constitution or the law of the country in which it was incorporated so provide.[15]

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However the questions whether the human members of the foreign company are personally liable for the company's debts and what constitute its agents or organs with power to act for it are governed according to English Law -by the law of the country of incopora-tion of such foreign company.[16]

Finally, but not the least, all internal questions arising between the foreign company and its members are governed according to English law by the law of the place of its incorporation,[17] and the company's constitution.

Thus as will be noticed, it is only in little instances that English law interferes with foreign companies, or better still, it is only in a minority of cases that foreign companies' personal laws causes difficulty in England. This is so because of the nature of English rules of private International Law.

DISCLOSURE REQUIREMENTS BY FOREIGN COMPANIES IN ENGLAND

Disclosure requirements is one [18] of the areas that English company law interfares (or infact comes in) directly to make provisions regulating foreign companies operating in England. And this is done in-order to protect prospective investors from fraudulent activities of the foreign companies.

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This interference must therefore be seen more as a necessity rather than a deliberate conscious policy.

The philosophy here is that to be fore-warned is to be fore-armed, and that by and large it is believed that the best protector of the investor is the investor himself. Thus it is thought that if an investor has the opportunity of knowing almost every essential thing about a company, he can be in a better position to decide whether or not to invest in it.

It is on this basis that part X of the English companies Act 1948 makes it obligatory on foreign companies to make certain disclosures. Under section 407 of companies Act 1948 therefore, a foreign company that has established a place of business in England and is operating, is required to file with the Registrar of companies:-

(i) a copy of its instrument of incorporation. And if the copy is in a foreign language, a certified translated copy in English.

(ii) a list of Directors and Secretary of the company,

(iii) The names and addresses of one or more persons authorised to accept service on behalf of the foreign company in England.

... 19

It has been rightly argued[19] that the requirement on the foreign companies to submit to the companies Registrar the name or names of person(s) authorised by the company to receive service in England on its behalf trancends mere disclosure ofinformation about the company, because in addition to that, it corpels the foreign company to submit to the jurisdiction of the English Courts.

Furthermore, it has been contended[20] and rightly so, that the registration of the company's Instrument (i.e. its constitution) and the submission of the particulars of Directors and Secretary imply a limitation on the foreign company on the general English principle that it is the law of incorporation which determines the company's organs. For a foreign company may well not have had a director or a Secretary as one of its officers or organs of operation and this infact might not have been a requirement by the personal laws of the company, yet with this provision, a foreign company is compelled to have Directors and a Secretary.

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Furthermore, a foreign company must exhibit its name and the name of the country where it was incorporated outside every place of its business. If the liability of its members is limited it must also exhibit a notice to that effect outside every place of its business.[21] These same information must also be given in its letters, notices and business publications if the company decides to have them.

Also a foreign company must prepare an annual balance sheet and profit and loss account and it must deliver copies of such accounts to the Registrar of companies. The only exception here is that unlike companies incorporated in England, it is permissible for a foreign company in matters concerning accounts, to omit certain information in relation to the turnover, taxation and the companies holdings: subsidiary and associated companies. Also the accounts need not be accompanied by a director's, or Auditor's report.

Trade catalogues, trade circulars, show cards and business letters of foreign companies must also state the names and nationalities of its directors.[23]

... 21

A foreign company which has established a place of business in England and which has created a charge on a property or acquired such property already subject to a charge, must register the charge with the Registrar of companies and the Register of charges must be kept by the company itself as if it were an English company.[24] Failure to register the charge entails the same consequences as if the foreign company were also an English company.[25]

Furthermore, prospectuses issued by foreign companies (or by other persons on their behalf) in connection with the issue, sale or placing of their shares or debentures are regulated by provisions which are practically identical to those relating to the issuances of prospectuses of English companies. And these regulations apply whether the foreign company has established a place of business in England or not.[26]

In addition to the information[27] required to be inserted in any prospectus, the prospectus of a foreign company must contain particulars of the company's instrument (i.e. its constitution) and the enactment under which it was incorporated.

... 22

It must also offer for public inspection copies of its constitution and that enactment must also in the prospectus, name the country where the company was incorporated and the address of its principal office in England.[28]

Finally, but not the least, the provisions of the companies Acts 1948 to 1976 which empower the Department of trade to investigate the affairs of companies by requiring the production of company's books and papers and to take remedial proceedings as a result, also apply to foreign companies which carry on business in England.[29]

WINDING UP OF FOREIGN COMPANIES IN ENGLAND

The other aspect where English laws apply to foreign companies operating in England relates to winding up of the companies. By and large, the winding up of foreign companies is governed by the same rules as the winding up of an unregistered English Company.[30] Thus the mere fact that the foreign company has already ceased to exist under its personal law is no bar to an English winding-up order.

... 23

Infact, that it has been dissolved, is one of the grounds on which an order may be made to wind up a foreign company. The other grounds for which a foreign company can be wound up in England are the inability of the foreign company to pay its debts; and that the winding-up is just and equitable.[31]

The amin purpose why English rules apply to interfare with the personal laws of foreign companies in the Area of Winding-up, is that by giving the English courts this winding-up jurisdiction, it helps to fill the gap in the wall created by the personal laws of the foreign companies for the protection of outsiders having dealings with the foreign companies.

This is because the registration and disclosure provisions of the English law governing foreign companies may prove to be inadequate, either because they may not be complied with at the time they should or because they may not apply where a foreign company has not established any place of business in England. In these circumstances therefore, those having dealings with the foreign companies may find it difficult in obtaining full information about the company. The provisions of winding up thus fills the gap in protecting both the investors and the creditors against any fraud that might have been committed by the foreign company.

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When a winding up order is made by the court as a result of the grounds earlier on enumerated, the assets which the liquidator may collect and dsitribute are those owned by the company at the commencement of the winding up. And if it had previously been dissolved in its country of incorporation, the assets owned by it at the date of its dissolution.[32]

If the foreign company had been dissolved in the country of its incorporation, its assets in England will be vested in the crown as bons vacantia,[33] but on the making of a winding up order the liquidator has power to take possession of all such assets and the court can vest the legal title to them in him.[34] In this case, the company is treated for the purpose of winding up as though it still exists notwithstanding its dissolution in its country. Thus the liquidator may bring actions in its name to enforce causes of action which acrued before or since its dissolution.[35]

Generally, also, with leave of the court, actions may be brought against - the company by creditors.[36]

Furthermore, contracts which were terminated or broken by or in consequence of the company being wound up are treated as terminated or broken when the winding up order is made in England, not when the company was dissolved in its own country.[37]

Generally, winding up orders against foreign companies are by and large brought by creditors, and after their debts have been paid, the crown claims the residue of the assets as bona vacantia if the company had already been dissolved under the law of the country where it was formed.[38] It is suggested however that the better view should be that if a person can prove his right to a share of the company's residual assets either as a member or in succession to a member, the crown should concede that share to him.

A winding up order may also be made on a foreign company even though the company has never had a place of business in England provided as Evershed Mr.R. has said, there are assets in England to administer and there are persons subject to the jurisdiction of English courts who are interested in the assets.

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Finally, for the purpose of invoking the winding up jurisdiction, it is irrelevant that a foreign company is incorporated or not. This is because under English company law the same provisions that apply to unregistered companies apply to foreign companies in relation to winding up.

CONCLUSION

From the foregoing therefore, the following conclusions can be deduced as regards foreign companies in England:

1. First, that English law recognises that the place of incoporation determines a company's personal law.
2. Secondly, that because of the inherent dangers in such recognition, English law affords three forms of protection to the creditors viz;
   (a) That English private international law allows the foreign personal law only a little say in regulating the company's relations with outsiders.

(b) That foreign companies which establish a place of business in England are forced to comply with the provisions of English rules regarding disclosures of material information.

3. Thirdly, that foreign companies may be wound up in England according to English rules though they have no place of business in England or have even ceased to exist in their country.

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FOOT NOTES

1. See Page 668, Principles of Modern/Law by company L.C.B. Gower for more analysis.

2. This view is expressed by L.C.B. Gower in his book above. But see Bateman V. Service (1818) 6 pp case 386 where it was held interalia that a company formed in a country outside Great Britain whether incorporated by the law of that country or not may carry on business in Great Britain without being incorporated under the companies Act 1948 however large or small its membership may be.

3. S.407(1) Companies Act 1948.

4. There is no where in the Act where consequences are provided against overseas companies for non-delivery of the documents.

5. Curragh Investments Ltd. Vs. Cook (1974) 3 all E.R. 658

6. S.31(1) & (2) Companies Act 1976.

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7. In Gasque V I.R.C. (1940)2 K.B. 80 it was held interalia, that in private International law, the legal effect of the formation of a Company and the rights, powers and duties of its members and directors are determined by the law of its domicile. See also PP.197-8 private International law by Cheshire 9th Ediction.

8. L.C.B. Gower: Principles of Modern Company law PP.669.

9. An example of a country in such category is Nigeria. See Sections 369 & 390 companies Decree 1968.

10. Russian and English Bank V Barring Bros. & Co. (1936) 1 all E.R. PP.406 - 505.

11. This is however subject to statutory resurrection for the purpose of winding up the company in England. In this respect, the dissolved company is revived and its English assets vested in the crown.

12. PP.671 (Footnote 19) Principles of Modern Company Law by L.C.B. Gower.

13. S.32(1) Companies Act 1976.

14. S.408 Companies Act 1948

15. This is the position since the repeal of the legislation relating to Martmain by the Charities Act. 1960.

16. See the case of General Stream Navigation Vs Guillou (1943) 11 M & W. O. 877.

17. Spillor Vs Turner (1897) Ch.911.

18. The other area is the winding up of foreign companies in England.

19. PP.673 L.C.B. Gower, Principles of Modern Company Law.

20. Ibid

21. SS.406 & 411 Companies Act 1948

22. English Oversea Companies (Accounts (Exceptions) order 1968

23. S.201 (1) (2) Companies Act 1948

24. S.106 Companies Act 1948

25. S.95(1) Companies Act 1948

26. S.417-423 Companies Act 1948.

27. Such as the name of the company; Names of Directors and their addresses; objects of the company, profit & loss account etc.

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28. S.417 (1) Companies Act 1948.

29. S.165 - 171 Companies Act 1948.

30. In England, under its jurisdiction to wind up unregistered companies, the court may wind up companies formed or incorporated outside Great Britain whether or not they have been wound up or dissolved in their own countries, provided the Company has assets in England which the court can administer.

31. S.399(5) Companies Act 1948 provides that winding up could be just and Equitable if there is oppression of the minority by the majority shareholders.

32. See again, Russian and English Bank Vs Barring & Co. (1936) 1 all CR.518.

33. Re Azzoff - Don Commercial Bank (1954) Ch.315

34. S.244 Companies Act 1948

35. Russian & English Bank Case (Supra)

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36. S.231 Companies Act 1948

37. This was held in Re Russian Commercial and Industrial Bank (1955) 1 Ch. 148.

38. This Principle has however been challenged in the case of Re Banque des Merchands de Moscow (1958) Ch.182 where it was held on the contrary that the crowns claim to the assets are completely extinguished by the winding up order so the residual assets of the Company are only distributable among its members in accordance with the system of law which goverhed the company before its dissolution.

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CHAPTER THREE

HISTORICAL EVDLUTION OF COMPANY LEGISLATION RELATING TO FOREIGN COMPANIES IN NIGERIA

The subject-matter of foreign companies in Nigeria can only be properly understood by understanding the historical development of company law in Nigeria. This cannot be otherwise, because prior to the advent of Europeans in Nigeria, little or nothing was known about companies.

The History of company law in Nigeria was thus occasioned by the history of foreign companies. Without foreign companies the development of company legislation in Nigeria would perhaps not have attained the present stage.

THE PERIOD BEFORE 1876

The earliest commercial corporations known in Nigeria were foreign corporations and companies, having been incorporated outside Nigeria. Examples of these companies were the Royal Niger Company and the United African Company. However, before the period 1876 - fifteen years after the British had colonized Lagos[1] and established a Lagos colony - there were absolutely no laws in Nigeria governing companies' operations, which were in any case all foreign.

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Thus foreign companies carried with them to Nigeria their foreign status and enjoyed the rights and privilages of their status as if they were operating in their countries of origin.[2] These rights and privilages enjoued by the foreign companies in Nigeria at that time, included for example, the limitation of liability which had already been achieved in England.

1876 - 1912

In 1876 however, the British Administration in Lagos promulgated a supreme court ordinance for the colony of Lagos. This ordinance provided for the establishment of a legal system in the colony and the reception of some existing English laws into the system. The received English laws were to be the common law, the doctrines of Equity and the status of Genral application which were in force in Egnland on the 24th of July 1874.[3]

After the 1900 proclamation of the Northern and Sothern protectorates, the British administration later enacted for each of the regions, a supreme court proclamation which provided that the common law, the doctrines of Equity and the statutes of General application which were in force in England on the 1st day of January 1960 should as far as applicable be in force in the protectorates.[4]

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And with the amalgamation of the whole country in 1914, these provisions were consolidated to the same effect and made applicable to the whole country.

The overall effect of these legislations with particular reference to company law, was that for the first time in Nigeria the basis was laid for the governance of foreign companies in Nigeria. The English common law and the doctrines of Equity in so far as they relate to companies, were applicable henceforth in Nigeria. These laws have since continued to form part of Nigerian company law and infact it was on this premise that foreign companies then, brought their status of incorporation with them and were fully recognised by Nigerian law as such. At this stage therefore, foreign companies and corporations could and infact did do business in Nigeria without any indigeneous rules and regulations governing them. Their personality, status and infact contractual obligations were to be regulated by the laws of their country and instruments establishing them.

1912 - 1922

In concrete terms, it was not until 1912 that the first companies ordinance was introduced in Nigeria.[5]

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The ordinance which originally applied in the colony of Lagos was later amended and extended to cover the whole country by the companies ordinance(amendment and extension) 1917. Although the statute drew very heavily from the English companies Act 1908, yet, it provided for the first time in Nigeria, a procedure for the incorporation of Nigerian companies.

With the rapid growth of Economic activities in Nigeria however, the companies ordinances of 1912 and 1917 became absolete and were therefore repealed. In their place, a new ordinace was introduced. This was the companies ordinace 1922.

The 1922 Orinance like its predecessors, was based on the English Company Acts of 1908 and 1917. However, unlike the previous ones, it applied throughout the country. Later in 1963, it was designated companies Act[6] but it continued to be the law governing companies in Nigeria until it was repealed in 1968. Among the new innovations introduced by the 1922 ordinace however were: the requirement of prospectus by foreign companies inviting subscription for shares etc.

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One of the criticism of companies Ordinance 1922 was that it continued for too long without catching up with the rapid Economic development of the country. Infact the Act remained largely static for a period of about 46 years while the English companies Acts 1908 and 1917 on which itwas based had been considerably modified as a result of the Economic and Social changes in England.

For Nigeria therefore, there had been an urgent need for a modern companies legislation because for the most part, the companies Act of 1922 had become inadequate and absolete to be able to cope with the rapid growth of Economic activities in the country. It was this need that brought about the promulgation by the military[7] of the companies Decree 1968[8].

1968 - TO DATE

The promulgation of this Decree was a result of four years treneous efforts to bring companies legislation in Nigeria up to date the modern commercial developments. This decree however was for the most part again, based on the English companies Act 1948.[9]

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However the most outstanding innovations introduced by the decree were the provision of comprehensive provisions for the publicity of the affairs of companies, provisions relating to company accounts[10] (which brought in all the provisions relating to accounts in the English Act 1948), and provisions relating to Auditing, Annual Returns, Directors and for the first time provisions relating to the remedies for minority shareholders in cases of oppression.[11]

THE PERIOD BEFORE NOVEMBER, 1968

Although the companies Decree 1968 came into force on October, 1968 no peculiar provisions were then made for foreign companies in Nigeria. It was not until November, 18th 1968 that Part X of the companies Decree dealing with foreign companies was promulgated. However prior to this date, one can ask: what was the position of foreign companies in Nigeria?

Prior to November,.18th 1968, if a company wanted to carry on business in Nigeria, all it needed to do was to get registered in Nigeria by filing with the Registrar of companies thefollowing documents:[12]

(i) a certified copy of its constitution and regulations

(ii) a list of the directors of the company, and

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(iii) the name and address of some person resident in Nigeria authorised to accept service of notices and processes on its behalf. Once these requirements were satisfied the Registrar of companies was bound to register the foreign company and the foreign company could then carry on business in Nigeria without qualms.

The period in which the foreign company had to file the documents was six weeks[13] from the time of its establishing a place of business in Nigeria.

In the case of

I.C.C. V. REGISTRAR OF COMPANIES [14]

Here a foreign company incorporated in the U.S.A. submitted the statutory documents for registration within the stipulated time. However, Registration was refused on the ground that the name of the company was identical with that of an existing company. The foreign company applied to the high court for an order of mandamus to compel the Registrar to register it. It was held that the provisions of S.10 of companies Act 1922 which dealt with the names of companies did not apply to foreign companies. That once the foreign company had satisfied the requirements under S.239, the Registrar was obliged to register it.

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During this period too, the status and powers of foreign companies in Nigeria was the same as was in England. Two main reasons acoounted for this:

(a) First, the Nigerian Companies Act 1922 was based solely on the English company Acts and these Acts did not interfare with the powers and personal status of foreign companies. Furthermore, Nigeria was obliged to apply all the laws of England as were in force on 1st January, 1900.[15]

(b) Secondly, most of the companies which came to operate or set up business in Nigeria during this period, were mainly English foreign companies. This was so because Nigeria had been a colony of Britain and so Britain being both our colonial overlords and the head of commonwealth, Nigeria, during this period could not have the opportunity of seeing much of other countries in terms of trade.

Thus, the personal law, status and powers of foreign companies operating in Nigeria during this period, was determined by the law of the country where they were incorporated. The question therefore, whether or not a foreign company was a corporate entity in Nigeria depended entirely on the law of the place it alleged it was incorporated.

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Also the question whether or not the transaction of a foreign company was Ultra-vires depended largely on the constitution of the company and the law of its country.

Furthermore, apart from filing the statutory documents mentioned earlier on, foreign companies were not required by any Nigerian legislation to further make any disclosure. The reason for this was because these foreign companies did not raise their capital from the Nigerian Public but were merely agents or subsidiaries of already existing multinational corporations abroad.

Finally, no provisions existed in Nigerian Company law, during that period for the winding up of foreign companies in Nigeria. Of course since their powers and status were only determinable by the law of the country incorporating them, it follows logically that their winding up (especially because they did not raise any money in Nigeria to do business) must be by the laws of their country of origin.

Thus, by and large, foreign companies operating in Nigeria during this period got away with almost everything. Little wonder then that there were various complains of tax evasion by foreign companies through various accounts manipulations.

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Also serious complaints of fraud were made against them as a result of non-disclosure.[16]

It was therefore this kind of position enjoyed by the foreign companies and these type of abuses made by them that the companies Decree 1968 sought to alter radically. In it, Government decided on a greated control on the operations of foreign companies in Nigeria.

PART X OF COMPANIES DECREE 1968

Provisions specifically related to foreign companies in Nigeria did not (as stated earlier) come into operation until the 18th of November, 1968. Part X of the Companies Decree 1968 (which deals with foreign companies) thererore was completely new bold and original[17] in the development of company legislation in Nigeria. The overall effect of this part of the decree was to check the abuses and the privilages enjoyed by foreign companies doing business in Nigeria. Thus right from the onset Part X of the decree "naturalised" most foreign companies incorporated outside Nigeria, and have established a place of business in Nigeria. How that is done and achieved is one of the main objects of this thesis and shall be explained hereinafter.

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Suffice it to say here that [18] the problem of how a country should deal with a company incorporated elsewhere but doing business in its territory is not an easy one. International conventions accept that the fact of incorporation should be recognised but that each country is entitled to lay down conditions which must be fulfilled before the company establishes a place of business in its territory. Generally these conditions require the filing of particulars and returns relating to the company so that, so far as possible, the same information is available to those dealing with the company as would be available in the case of a domestic company. This aim, however, is not easily accomplished if the country of incorporation has totally different requirements regarding, for example, annual accounts. Hence there is everything to be said for encouraging foreign concerns to incorporate a local subsidiary.

However, with the coming of Part X, the mode changed from persuation to compulsion. Thus no time was given to foreign companies already operating in Nigeria to form local subsidiaries. Every such foreign company in respect of its Nigerian operations was automatically converted into a Nigerian company.

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The foreign companies were thus hooked up immediately, whether they like it or not. As regards those foreign companies which will enter Nigeria in the future, they are required to form a local company for the purpose of establishing a place of business in Nigeria.

SUMMARY

From the foregoing therefore it can clearly be seen that the evolution of company law in Nigeria has had its roots in the story of foreign companies in Nigeria. And although today, by far the largest number of corporate bodies in Nigeria are those registered under the companies decree, yet the history of foreign companies in Nigeria has not ended. New regulations may yet come up one day.
Suffice it here to say that without foreign companies and corporations, perhaps there would not have been a history of company Law in Nigeria.

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FOOT NOTES

1. Lagos was colonized by Britain in 1861

2. See PP.1 Nigerian Company Law & Practice by J.O. Orojo, (1976) London Sweet & Maxwell.

3. S.14 Supreme Court Ordinance 1876

4. S.11 and S.13 of 1900 and 1902 supreme court proclamation of Southern and Northern Protectorates respectively.

5. The Companies Ordinance 1912

6. Designation of Ordinance Act 1963

7. The Military took over the reins of Government in Nigeria in 1966 by a coup.

8. The Decree came into force on October 1st 1968

9. For example compare Tables A & B of the Decree to the English Companies Act 1922

10. SS.140 - 151 of Companies Decree 1968

11. SS.117 - 201 Companies Decree 1968

12. S.239 Companies Act 1922

13. S.239 Companies Act 1958

14. (1964) 2 ALL NLR.130

15. S.14 of the Supreme Court Ordinance 1914 provided that "...the common law, the doctrines of Equity and the Statutes of General application in England on the 1st day of January, 1900 shall be in force (In Nigeria) ...".

16. Fore more on this See PP.27 Nigerian Company Law & Practice by Orojo (Supra)

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17. L.C.B. Gower: Nigeria and Companies in West Africa of November 2, 1968 PP.23

18. The discussion here is based on -the article above (Ibid) by Prof. L.C.B. Gower as cited.

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CHAPTER FOUR

DEFINITION OF FOREIGN COMPANIES IN NIGERIA

The term "foreign company" could simply be defined as a company incorporated otherwise than in Nigeria. It is a Company which has been formed under the laws of another country with a domicile or registered place outside Nigeria but carrying on business or is about to carry on business in Nigeria. It is therefore a foreign association that has a corporate entity in its country of origin.

S.368 of Part X of the companies Decree [1] 1968 defines and distinguishes two types of foreign companies in Nigeria namely:

(a) "a company which was incorporated outside Nigerian before the commencement of this part of the Decree (that is before 18th November, 1968[2]) and has an established place of business in Nigeria at that date, and

(b) a company which was incorporated outside Nigeria before or after the commencement of this Part of the Decree (i.e. 18th November, 1968) and having intention of carrying on business in Nigeria on or after that date".

One common feature of the two types of foreign companies defined by the Decree is that both are incorporated outside Nigeria. Thus a foreign company primarily denotes a foreign association with a different domicile[3] other than Nigeria.

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The distinction therefore only arises in the fact that one was incorporated outside Nigeria before the 18th November, 1968 and has established a place of business in Nigeria while the other was incorporated outside Nigeria, before or after the 18th November, 1968 and has NOT YET established a place of business in Nigeria but is intending to carry on business in Nigeria or or after the 18th November, 1968.

A foreign company in Nigeria by S.368 therefore is one which was incorporated outside Nigeria whether before or after the commencement of Part X of the Decree and whether it had or has established a place of business in Nigeria on or after the commencement date or whether it yet has intention to carry on business in Nigeria or not.[4]

Because foreign companies are not Nigerian companies it follows logically that certain legal incidents based on Nigerian principles of company law must follow their existence in Nigeria.

One of such legal incidents is that the existence and powers of foreign companies in Nigeria (before they become Nigerian companies) should be determined by/law of the country in which it was incorporated.

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In other words, the personal status of foreign companies in Nigeria should be governed by the instruments establishing them and the law of the country where they are domiciled. Thus the statute of the country creating them is in this regard significant. The position is perhaps best summed up by Hanworth M.R. in the case of:

DREFUS V INLAND REVENUE 5

> "If there has been a body established by Foreign law, the courts will recognise the juristic status of that body, and thus the court says that the principle of liability of members of a foreign corporation is to be referred to the law under which the corporation was established, and if the law shows that it was established as a separate entity then effect should be given to it ..."

Professor Gower (1969) has argued[6] that if this principle is carried to its logical extremes, it may be abused. He argues that, promoters would then be encouraged to incorporate companies in the countries having the laxiest corporation laws but operate in ccuntries where harsher laws exist so that they can be shelved by the cloak of their personal laws; a protection that will be denied indigeneous companies with whom they will be competing.

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In Nigeria, apart from the fact that the situation is different, the argument cannot hold water. This is because foreign companies in Nigeria are required to convert to be Nigerian companies if at all they are to do business in the country. And in those countries (U.S. and England for example) where such foreign companies might take such an advantage, there usually does exist some limitations on the extent to which foreign companies can operate. In those countries these limitations have taken the form of absolute prohibition of certain things by the foreign companies and in others restriction of trade. In Nigeria, the right answer to the critique would be that the personal law of foreign companies who want to do business in Nigeria has been rejected outright in favour of the laws regulating Nigerian companies.[7]

The other incident concerns the legal personality of the foreign companies. Is a foreign company in Nigeria a juristic person? In other words can a foreign company which was incorporated outside Nigeria sue and be sued in its name in Nigeria?

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The position of the law is that although foreign companies not incorporated in Nigeria are juristic persons by their country of incorporation, such companies lack the power to sue or be sued in their own name in Nigeria except they comply with Part X of the companies Decree 1968.

In the case of:

WEMA BANK LTD. V N.N. SHIPPING LINE LTD. (Owner of M/V Ikeja Palm 8

Here, the applicants, a West German Firm called Thysen applied to the court to be joined as a party to an action against the National Shipping Line Ltd.

The Plaintiff had sued the defendant for an order to compel the defendant to deliver certain goods to plaintiff and for an order to restrain defendant from re-shipping the said goods to applicants. The defendant, - the Nigerian Shipping Line, who were carriers for applicants, were acting on the instructions of applicants to re-ship the goods to applicants in Germany at applicants' expense as consignee had failed to pay for them.

The Plaintiffs contended that the applicants not being a juristic person, having not complied with the relevant provision of the companies Decree 1968 in particular and in accordance with Nigeria law, has no right of action and cannot be properly joined.

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The argument of the Plaintiff was based on the fact that the applicant company was a foreign company within S.368 of the companies Decree. It has not been incorporated in Nigeria since it has not complied with either the provisions of S.369 of the Decree nor with those of S.370(1) of the Decree. The cumulative effect of these omissions, plaintiff argued, is that the applicant company cannot sue in its name in this country nor exercise any of the powers of an incorporated company.

The issue before the court therefore was whether the applicant is a juristic person according to Nigerian law or the companies Decree. In other words, whether an overseas company which has not complied with the provisions of the companies Decree 1969 can apply to be joined in its own name?

The Court held inter alia that:

(i) Although foreign companies not incorporated are juristic persons by their country of incorporation such companies lack the power to sue or be sued in their own name having not complied with the provisions of the companies Decree 1968.

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(ii) A juristic person may be defined as a person or entity known by the law:

"The first question", said Phil-Ebosie P.J. who delivered the judgement of the court,

> "is I think, what is a juristic person? There are two cases in our case law of what is a juristic person. From both cases, a juristic person may be defined as a person or entity known by the law. Such a person can sue and be sued. Can it therefore be said that in Nigeria all foreign companies not incorporated in Nigeria are by our laws not legal persons? There is no doubt that they are, but before they can be vested with the powers of a company incorporated in Nigeria - one of which isto sue and be sued - such companies must be incorporated in Nigeria. This opinion is based on the ground that a company is a creature of the statute and until the provisions of the statute has been fully complied with, the company cannot be said to have come into existence. The companies Decree of 1968 laid down certain provisions to be complied with by a foreign company before it is recognised as registered in Nigeria and only after registration can the company sue and be sued in its own name, since it would then be recognised by the law of Nigeria as a legal person. Thysen is a foreign firm, it has not complied with the provisions laid down in the companies Decree and therefore could not claim to be a legal person with right to sue in its own name ...."

The third incident that comes to mind is the law that should regulate the transactions of foreign companies. What law should regulate foreign companies that enter into contracts in Nigeria?

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As has been explained before, where a company is constituted under foreign law, its actions should be regulated by that law and not by that of the country in which it chooses to operate. One exception to this broad principle of law however, is the issue of contractual obligations. It is humbly submitted that in case of contracts originating from or made and entered into in Nigeria, the proper law to governsuch transactions would be the Nigerian law. This should operate to the extent -that any advantage which the foreign company might have being able to obtain under its personal law will be ineffective.

WHAT AMOUNTS TO AN ESTABLISHED PLACE OF BUSINESS OR CARRYING ON BUSINESS IN N I G E R I A

A. ESTABLISHED PLACE OF BUSINESS IN NIGERIA

Section 368 of the companies Decree 1968 which defines foreign companies stipulates that for a company to be foreign it must have been incorporated outside Nigeria and having on the 18th day of November, 1968 AN ESTABLISHED PLACE OF BUSINESS IN NIGERIA or have the intention of CARRYING ON BUSINESS IN NIGERIA. But what precisely amounts to a foreign company having an established place of business or carrying on business in NIGERIA?

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The answer, it would appear, would depend upon the facts of any particular case, but it is submitted that it must be some specified or identifiable place, for example, an office at which the company carries on its activities. In other words, there must be a degree of performance as well as identifiability about the place of business, if it is to be regarded as established.

Thus it is not enough, for example, for a director of a foreign company to visit Nigeria each year for a few weeks or months, residing in one particular hotel throughout that period for the purpose of transacting business. The Hotel does not and will not become an established place of business[9]. Thus where a foreign company has no HABITAT in this country, but carries on all its business through agents simliciter etc., no established place of business will have been brought into existence.

In the case of:
DEVERALL V GRANT ADVERTISING INC.[10]

The contention here, that 36 Grosuenor Street constituted the defendant company's established place of business was rejected on the ground that no evidence was available to show either that there was "any visible

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sign or physical indication whatsoever that the premises were a place of business of the American company, or that the duly appointed European regional director of the American Conpany had by his attendance at the premises in his discharge of duties, created a close enough business connection to establish for the American company a place of business there ..."

The Ghana company's code[11] also seem to lend support to the above proposition. In Ghana the term established place of business means

"a branch, management, share transfer, registration office, factor, mine or other FIXED PLACE of business of a foreign company, but does not include an agency unless the agent has and HIBITUALLY exercises, a general authority to negotiate and conclude contracts on behalf of the body corporate or maintains a stock of merchandise belonging to that body corporate from which he regularly fills orders on its behalf".

Although it is possible to argue that Ghanian law at present extends a latitude to foreign companies which may be unique, all the same, certain words exist in the two definitions that are constant: FIXED AND HABITAT. It is therefore our submission that an established place of business must be a fixed habitat of the foreign company.

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IN the case of:

ALUMINIUM INDUSTRIES AKTIEN GESELLSCHAFT

V

FEDERAL BOARD OF INLAND REVENUE[12]

The appallant appealed to the supreme court against assessments to companies income tax by the respondent. The appallant company was registered and resident in a foreign country (Swiss). It was not resident in Nigeria and had no place of business in Nigeria. It however owned all the shares in a Nigerian manufacturing company and incurred expenditure outside Nigeria for the Nigerian company on a current account.

By an agreement made in the appallant's country, the companies agreed that part of the Nigerian company's indebtedness on the current account be transferred to an interest-bearing loan account in the appallant's country and that the loan was to be in the currency of that country and was to be repaid in that country.

The respondent assessed the appallant to tax on interest debited to the Nigerian company on the loan account. The appallant appealed against the assessment on the ground that the interest was not derived and could not be deemed to be derived from Nigeria because the appallant carried on no trade or business in Nigeria.

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The respondent on the other hand contended that interest is deemed to be derived from Nigeria if there is right of payment of interest in Nigeria.

The issue before the court was whether a foreign company which owns the share capital of a Nigerian company could be said to reside or carry on business in Nigeria. The Court allowed the appeal, saying that foreign companies do not reside or carry on business in Nigeria, by merely owning shares of a Nigerian Company:

> "It was also not disputed", remarked the justices of the supreme court, "that the appallant company was a Swiss Company and was non-resident in Nigeria. The fact that it was the beneficial owner of the share capital in Alluminium company did not make the Swiss Company carry on business here as Alumaco was a separate company from the appallant company."

The question -has also arisen as to whether transactions by a foreign company's forwarding agent in a jurisdiction, does not amount to transactions by the company through the forwarding agent for the purpose of establishing the company's presence or residence in that jurisdiction. Here, the attitude of the courts has been to treat transactions by a foreign company's forwarding agent in a jurisdiction, as not amounting to transactions by the company through the forwarding agent for the purpose of establishing a place of business or the company's presence or residence in the jurisdiction.

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Thus in the Case of:

RE LOWENTHAL AND AIR FRANCE[13]

The applicant - Air France, which was the defendant in Zambia - brought an application in Kenya to set aside registration of a decree of the high court of Zambia which was registered in Kenya under the foreign judgements enforcement Act. In a suit for damages for breach of a contract of tenancy, judgement had been given by the high court of the Zambia in the absence of the defendant company (Air France) in favour of the plaintiff. As the defendant company (Air France) had ceased to transact business in Zambia, notice of the proceedings in Zambia had been served on an employee (Miss Harter) OF AN INDEPENDENT COMPANY which represented the defendant commercially. The judgement was ordered to be registered in Kenya on an experte application. Notice of the registration (in Kenya) was served on the employee of the defendant company (Air France) who had no authority to receive it.

The issue before the court in Kenya was whether Air France (the defendant) was transacting business in Zambia so as to establish Air France's presence or residence in Zambia in order to make valid the service of a court process on Air France in Kenya through an an agent in Zambia.

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The court held that transactions by a foreign company's forwarding agent in a jurisdiction does not amount to transactions by the company through the forwarding agent for the purpose of establishing the company's presence (i.e. place of business) or residence in that jurisdiction and so service on Air France in Kenya through its forwarding agent in Zambia was held not to be proper service:

> "Turning to the merits", said judge Rudd, the judgement appears to have been made in a suit which was instituted in 1965. There is evidence that in 1964, Air France closed down all its estatlishments in Zambia and therefore had no authorised representative in Zambia. The position as to whether in 1965, Air France was still doing business in Zambia is not very clear. There is a letter from Miss Hurter, who says she was employed by an independent company which only represented Air France commercially in thesense that if Miss Hurter took a booking for Air France, she would still have to ask another company, Zambia Airways, to make the Booking. From this, it would appear that the sort of transaction which Miss Hurter and her company were transacting did not amount to more than the business of a forwarding agent who forwarded orders for confirmation or for acceptance or rejection. This does not amount in law to the transaction of business by Air France in Zambia through Miss Hurter for the purpose of establishing Air France's presence or residence in Zambia. Air France was served by substituted service. The substituted service must be accepted as good and sufficient service as far as proceedings in Zambia are concerned, but it was not in my opinion due service for the purpose of enforcing this judgement outside Zambia ...".

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Also in the Nigerian Case of:

IN RE GRESHAM LIFE ASSURANCE SOCIETY LTD.

V

O C H E F U[14]

It has been conclusively established that foreign companies carrying on business through an agent at his place of business has no established place of business in Nigeria.

In this case, the petitioner company petitioned for winding up under the supervision of the court. The petitioner was an insurance company incorporated outside Nigeria. The petitioner carried on business in Nigeria through the agency of another insurance company at a place of business occupied by the latter company. After the coming into force of the companies Decree in 1968, the petitioner informed the registrar of companies that it did not intend to carry on business in Nigeria again and so instituted the present proceedings for winding-up subject to the supervision of the court.

The petition was opposed.

The petitioner contended that it had an established place of business in Nigeria and was thus a foreign company within the meaning of S.368(a) of the Companies Decree 1968, so that a winding-up order was obligatory under S.369(3) of the Decree.

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The respondent on the other hand contended amongst other things that the petitioner had no established place of business in Nigeria and thus S.369(3) of the Decree did not apply. He contended that the offices at 5/7 Balogun Street Lagos which the petitioner company claims to be its branch office was occupied and used by the Guinea Insurance Company which does business for the company as agents only. The issue before the court was whether the petitioner company had an established place of business in Nigeria. The court held that the petitioner company: Gresham Life Assurance Society Ltd., had no established place of business in Nigeria although it was carrying on business by means of an agent in Nigeria;

> "I herefore have to decide", said George J. "whether Gresham Life Assurance Soceity Ltd. had an established place of business in Nigeria, or to use the words of the petitioner, whether the company "operated a branch office at 5/7 Balogun Street Lagos, Nigeria".

It is not difficult to reach a conclusion on this issue as the petition is supported by a varifying affidavit. In the affidavit, Thomas Cain, the General Manager of the Guinea Insurance Company Ltd. deposed as follows:-

(i) "that I am the General Manager of the Guinea Insurance Company Ltd., who are the principal resident representatives for Nigeria of the Gresham Life Assurance Society Ltd.,

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the petitioner in the above quoted matter, and I am duly authorised by the **said** petitioner to make this affidavit".

(ii) "That I have a power of attorney duly executed by the company to present a petition for the winding-up of the company...".

It is clear from this affidavit, that Guine**a** In-surance Company Ltd., have at all material times been acting as agents for the Gresham Life Assurance Ltd. I am fortified in this view by the power of Attorney. If this power of attorney is read with varifying affidavit of Thomas Cain, it becomes clear that Gresham Li**f**e Assurance Society Ltd had no place of business in Nigeria, although it was carrying on business by means of an agent in Nigeria. There is a great distinction between carrying on business and having an established place of business"

B. CARRYING ON BUSINESS

One can rightly ask, why a different expression has been used in defining a foreign company under S.368(b). Why is the expression ... "and has an established place of business in Nigeria ..." used in S.368(a) not used in sub-section (b) of the same section, but instead the expression "and having intention of carrying on business in Nigeria" used? Is it a mere accident or a deliberate act by the legislator to distinguish the two types of foreign companies.

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Of course, "carrying on business" is not the same thing as "having an established place of business". For one can carry on business without having an established place of business as illustrated in the cases above, but one cannot have an established place of business without carrying on business!

A possible explanation that one can aduce for the difference in the usage of the expressions in defining the same phrase "foreign company", could be in Timing i.e. as to when the foreign company came or is coming to Nigeria for business and perhaps for procedural matters based on the later.

Thus if a foreign company had an established place of business in Nigeria on 18th November, 1968 (Time) the procedure it would adopt to convert into a Nigerian Company as per section 369 of the companies Decree 1968 is slightly different from the procedure a foreign company having the intention of carrying on business in Nigeria would adopt if it comes.[15]

The other explanation for the difference in the usage of the expressions could be in the area of taxation. As we have seen from the cases illustrated above, a foreign company through manipulations can be carrying on business in Nigeria without necessarily having an established place of business.

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In such circumstances however, is the profits of such a company acruing in or derived in Nigeria not chargeable to tax? As we shall soon see, section 8 of the companies Income tax Act 1979 will charge to tax any .."profits of any company, acruing in, derived from, brought into or received in Nigeria in respect of any trade or business for whatever period of time such trade or business may have been on". In other words although a foreign company coming into Nigeria after 18 November 1968 will not be allowed to do business in Nigeria[16] if it does not incorporate a new, if however it carries on business in voilation of the law, it shall not escape taxation on its profits.

All these show therefore that the difference in the usage of the expressions is a deliberate act and not a coincidence by the legislature.

Now, what amounts to carrying on business by a foreign company in Nigeria? This has been enunciated by the only single case on the matter.

In the case of:

AZEBUBE V THOMAS APLIN & CO. LTD.[17]

It was held inter alia that

"a corporation is deemed to be resident in Nigeria when it is conducting its business or a material part of it at some fixed place in the country for a substantial period of time."

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> "It seems to me therefore", said Idigbe CJ, "that by the expression" carries on business", the legislature intends that that there should be much more than casual exercise by the company in its dealing with its customers remote and and away from its headquarters or head office. There must be something to show that the company really carries on business in the area".

Thus it is submitted that in Nigeria the phrase carrying on business conotes that the company is doing a serious business with its customers remote and away from its headquarters and that this business has been on for some time. We shall therefore examine the subject under two headings viz:

(1) TAXATION

For the purpose of Income Tax in Nigeria, a company is chargeable upon the profits accruing in, derived from, brought into or received in Nigeria.[18] An important factor in deciding for the purpose of taxation whether business or trade is being carried on or not is the frequency with which transactions of some kind are repeated.

In the case of:

ERICHSEN V LAST[20]

Cotton LJ amplified the point when he said:

> "when a person habitually does and contracts to do a thing capable of producing profit and for the purpose of producing profit, he carries on trade or business."

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Although it is essential that there should be continuity in the transaction, yet by this definition, the lack of it, does not prevent a single purchase or many sales from being a trade or business. Thus from this definition, a series of retail purchases followed by one bulk sale or a single purchase followed by a series of retail sales may well constitute a trade and therefore "Carrying on Business". It has also been held in several English cases[21] that for the purpose of corporation profits tax, if the objects of a company are business objects and are being carried out, then the company is carrying on business.

In Nigeria, however, since tax is chargeable upon the profits of any company accruing, derived from, brought into or received in the country in respect of:-[22]

(a) Any trade or business for whatever period of time such trade or business may have been carried on,

(b) Dividends, interests, discounts, charges or annuities

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(c) Any income accruing or derived from the use in Nigeria of the asset of any foreign company ... etc, then it will follow that any foreign company doing or having any of the above things shall be carrying on business or trade in Nigeria and shall be chargeable to tax on its profits even though it has no established place of business in Nigeria or has not incorporated in Nigeria.

However certain businesses carried on by a foreign company are exempted from tax. Section 9 (1)(a) (6) (7) of the companies Income tax Act 1979 list the businesses as follows:

(1) "... where during any calander year commencing on or after 18th January 1971, any foreign loan of an amount which is not less than ₦150,000 is granted by a foreign company to any person carrying on any trade, business, profession or vacation in Nigeria for the purpose of that trade, business, profession or vocation, then any interest derived by the foreign company from that loan shall:

(a) If the loan is not repayable by the borrower until after the expiration of a period of less than 10 years, commencing from the date of which the loan is granted be exempted from tax.

(2) Interest payable on any foreign loan granted on or after 1st April, 1978 shall be exempted from tax.

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(3) Interest payable on any loan granted by a bank on or after 1st April 1978 for the purpose of an agricultural trade or business shall also be exempted from tax."

Section 8 (2) of the companies Income tax Act 1979 defines "interest" as one deemed to be derived from Nigeria if:

(a) There is a liability to payment of the interest by a Nigerian Company or a Company in Nigeria regardless of where or in what form the payment is made or

(b) the interest accrues to a foreign company or person from a Nigerian company or a company in Nigerian regardless of which way the interest may have accrued.

(ii) JURISDICTION

Just as for income tax, the test here is whether contracts are made in this country by or on behalf of foreign companies. If the answer is in the positive, then the foreign company is carrying on business in Nigeria and the court shall have jurisdiction.

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In the English Case of:
LA BOURGOGNE[23]

The defendants were a French shipping company, which leased an office in London where it had an agent paid by commission who made binding contracts for the company. The agent himself paid certain expenses for running the office where he also carried on his own business. It was argued that the company (French Shipping Company) was not itself carrying on business in England, but this plea was rejected and the court held that the company was carrying on business in England since its agent made binding contracts for the company and so the court had jurisdiction to entertain the case.

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FOOT NOTES

1. From 1980 - 1983 the Decree had become an Act by virtue of the Adaptation of Laws (Re-designation of Decrees etc) order 1980. However with the coming back of the Military on 30th December, 1983, it is presumed that the word Act would now be replaced with the original word and Title: Decree. As such it would continue to be referred to as a Decree.

2. S.398(2) Companies Decree 1968.

3. Place of Permanent Residence.

4. This definition includes foreign companies defined in S.368(a) & (b) of the Decree and foreign companies exempted by federal government from complying with S.369 & 370 as in Companies (Special Provisions) Decree 1973.

5. 14 Tax Cas (CA) 560

6. Principles of Modern Company Law by Prof. L.C. B.GOWER 3rd Ed. (1969) PP.669

7. SS. 369 & 370 Companies Decree 1968

8. 1976(2) F.H.C. P.62.

9. See Article on Foreign Companies in Great Britain by DIG Rice, in Combridge Law Journal Vol.83 1967 PP.95-115.

10. (1954) 3 ALL E.R. 389; 1955 CH.111 (C.A).

11. Provisions Applicable to non-Ghanian Companies 1963.

12. N.C.L.R. 1971 Vol.2 P.40

13. 1966 (2) K.L.R. PP.301

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14. N.C.L.R. Vol.2 1970 PP.78

15. See Chapter five of the thesis for a details explanation of the procedures.

16. S.370 companies Decree 1968

17. 1966 N.C.L.R. (2) 97

18. S.8(a) Companies Income Tax Act 1979

19. Ibid

20. 1 Q.B.D. (1881) 414

21. (i) Inland Revenue V Korean Syndicate Ltd. (1921)3KB. 2958

    (ii) Inland Revenue V Birmingham Theatre Ltd (1923) 12 Tax Cas 580

    (iii) Inland Revenue V The South Behar Railway Co. Ltd (1925) AC 476

    (iv) Inland Revenue V Westleight Estate Co. Ltd (1927) 1 KB. 390.

22. S.8(1) (a)'c) (g) of Companies Income tax Act

23. (1899) 1 KB. P. 56

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CHAPTER FIVE

CONVERSION AND INCORPORATION OF FOREIGN COMPANIES IN N I G E R I A

(1) CONVERSION OF FOREIGN COMPANIES ALREADY ESTATLISHED IN NIGERIA: THE "DEEMED" NIGERIAN COMPANIES

One of the effects of the distinction between a foreign company incorporated outside Nigeria BEFORE the commencement of part X of the Decree (i.e. before 18th November, 1968) and which already has an established place of business in Nigeria at that date and a foreign company incorporated outside Nigeria before or after the commencement of Part X and has the intention of carrying on business in Nigeria on or after that date is that, the foreign company having an established place of business in Nigeria on the 18th November, 1968 is "deemed" from that date to have become incorporated under the Decree as a separate entity from the company incorporated outside Nigeria. And it shall have as part of its name, the word "(Nigeria)".

In the words of S.369(1) of the companies Decree 1968:

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"Every foreign company within paragraph (a) of section 368 of the Decree shall, in respect of its operation in Nigeria, be "DEEMED" , to have become incorporated under this Decree as a separate entity from the company incorporated outside Nigeria in whose name a place of business in Nigeria was established, and the company so deemed to have become incorporated in Nigeria shall have as part of its name (unless already therein) the word "(Nigeria)"".

Section 369 of the Decree is one of the major areas that the Nigerian company law substantially interfares with or infact comes in directly to make provisions regulating foreign companies operating in Nigeria. This is done in order to protect prospective investors from the possible mischief that some of the foreign companies may want to undertake. The philosophy here is that since a foreign company is deemed Nigerian company and so is expected to comply with the provisions of Nigerian company law, the prospective investor would be able to see all the papers (i.e. prospectus etc.) of the company before deciding to invest in it.

Secondly, the section indirectly compels the foreign company to submit to the jurisdiction of Nigerian law and courts. Further more by deeming foreign companies to be Nigerian Companies, the Nigerian law is attempting to do away or reject the personal status of the foreign companies:

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that it is the law of incorporation that determines the companies' powers and organs. For instance, a foreign company may not have had a director or Secretary as one of its officers or organs of operation, and this infact might not have been a requirement by the personal laws of the company, however by this section (i.e. S.369) a foreign company is compelled by being deemed a Nigerian Company to have Directors and a Secretary.[1]

S.369(1) does not however have a retrospective effect. It only applies to foreign companies that had a place of business in Nigeria ON the 18th November, 1968. If the foreign company therefore had a place of business in Nigeria before the commencement date of Part X of the Decree and on the commencement date had no place of business, it cannot by S.369(1) be "deemed" to be a Nigerian Company if it comes back to do business in Nigeria today. Such companies would be governed by Section 370 of the Decree.

In the case of:

SWISS AIR TRANSPORT COMPANY LTD

V

AFRICAN CONTINENTAL BANK LTD.[2]

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The plaintiffs (now the defendants) brought an action in the high court of Lagos State against the defendants (now the appallants) for damages for breach of contract of international carriage by Air.

The defendants (now the appallants) were carriers by Air. They were a company incorporated outside Nigeria and had a place of business in the Federal Territory of Lagos in Nigeria before the commencement of the companies Decree (i.e. before 1st October, 1968). Now they were ordinarily resident, but had their principal place of business elsewhere than in Nigeria.

One of the issues on appeal that the court had to settle was the contention that the appallant company (with the coming into force of the companies Decree and Part X of the Decree) was deemed by sections 368 and 369 of the companies Decree to be incorporated in Nigeria thereby precluding the companies Article otherwise known as 1229 Warsaw convention, from governing the transaction.

The court refused this contention and held that the companies Decree 1968 especially Part X did not have a retrospective effect. In the words of Lewis J.S.C.

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> "We would only add that Mr. Sofola sought to argue that SS.368 and 369 of the companies Decree 1968 had the effect of deeming that the appallants were incorporated now in Nigeria -- however, the companies Decree 1968 did not deal specifically with existing actions and apply the changes to them, and it was not couched in a language clearly showing an intention that the statute should operate retrospectively and as it was not procedural, the presumption against it having retrospective effect must apply. The Companies Decree came into force on October 1st, 1968 so it was not in force on February 26th, 1968 when Adefarasin J. gave his ruling in the lower court, so that it cannot apply in respect of this present Appeal".

Thus foreign companies having established place of business in Nigeria before (and not before and on) the commencement date of Part X of the Decree are not deemed incorporated in Nigeria.

According to S.369, foreign companies converted to be Nigerian Companies shall also have:

(a) Part I of Table A (of the companies Decree 1968) in the case of public company, and Part II, in the case of a private company, apply to them with any necessary modification as if the company affected were limited by shares i.e. Table A of the Nigerian Decree automatically becomes its articles of association even though its regulations may be and often will be different.

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And since the Articles constitute a contract between the company and its members, the effect of this is to alter that contract without consultation with the contracting parties.

(b) It also provides that the constitution (or memorandum) of the foreign company shall have effect as if Table B (of the companies Decree which provides for memorandum) applied, with necessary modifications to bring it into conformity with that constitution. That is, its constitution is converted into a memorandum of association in the form of Table B eventhough it may have had nothing equivalent to an English-type memorandum.

These provisions (i.e. (a) and (b) above) it is submitted, are designed to provide a shock observer to the sudden conversion of the foreign company to a Nigerian company by way of providing immediately, regulations to govern its internal management, since the former ones have been thrown out. And in any case, sub-section 1(a) and (b) of section 369 make the adoption of Table 'A' and 'B' compulsory only during the interim period of three months.

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companies Act and not as may have been intended, its Nigerian assets and liabilities. But as Taiwo rightly replies,[4] it is most unlikely that accountants would agree with the interpretation given by Prof. Gower that this must relate to the whole of the company's global assets and liabilities. In that, he argues, a foreign company which has accumulated large capital and revenue reserves as a result of a boom in the Middle East, would now have all these assets absorbed in capital formation in Nigeria!

(d) The section goes on to stipulate that the register of shareholders (of the former foreign company) is to remain unchanged and that the shares are deemed to be held in the relative proportions as disclosed by the foreign company. This mandatory provision, it is submitted, is also designed to prevent or forestall any possible fraudulent activity that a foreign company might wish to engage in by quickly altering or changing the share ownership to favour peculiar interests.

Now, all that S.369(1) (a)(b)(c) and (d) (as enumerated above)are trying to do is to provide a temporary cr Adhoc solutionsto the immediate

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problems which the converted Nigerian companies would face. They therefore provide the transitional period between the sudden act of conversion of the foreign companies to the stabilisation of the companies as Nigerian companies. Provisions for permanent arrangements are made in the subsections (2)(3) and (6) of the section.

Thus after the foreign company would have been deemed incorporated under the Decree, and all the rest of the things made applicable viz: Part I or 2 (as the case may be): Table 'B', share capital fully subscribed, and register of shareholders remaining unchanged, S.369(2) and (3) goes on to provide that the principal officer[5] in Nigeria of the foreign company shall within 3 months after the date in which it is deemed incorporated --- inform the registrar[6] as to the future intentions of the foreign company in Nigeria:

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(1) If the foreign company intends to continue to carry on -business in Nigeria, that officer shall forthwith take all necessary steps to to incorporate the company in Nigeria[7]. Once the company is duly incorporated sub-section 2 of S.369 in so far as it imposes table 'A' and 'B' on the company shall cease to have effect.

(2) If however the foreign company informs the Registrar that the company does not intend to carry on business in Nigeria the principal officer will, within a reasonable time thereafter (i.e. after the 3 months), apply to the court to have the company wound up under the supervision of the court. If he fails to do so, the Registrar may so apply, and the court upon such application, shall make a winding up order accordingly.[8]

Again Cower[9] has asserted that if and when the principal officer of a foreign company in Nigeria decides to register the new company he must obtain Signatures of all shareholders of the foreign company since all members of the foreign company will already have become members of the Nigerian company.

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He says this would be difficult to do since some of the foreign banks have about 10,000 shareholders. However as Taiwo replies rightly,[10] the memorandum of Association does not normally contain the signatures of all shareholders. Once the memorandum is subscribed to by the minimum number of seven members, in the case of a public company, it has satisfied requirements.
Secondly, he submits, policy is decided by com= panies without receiving the signatures of all shareholders and indeed without receiving the consent of everybody.

A company may decide by a special resolution to form a subsidiary in a foreign territory and register that company locally. If the resolution is carried by the prescribed majority of three forths, it binds all members inter se. Thus a subsidiary company such as is contemplated in the decree can be formed without obtaining - the signature of some 10,000 shareholders.

An illustration however of what section S.369 (3) stands for can be found in the Case of:

IN RE GRESHAM LIFE ASSURANCE SOCIETY LTD.

V OCHEFU[11]

Where the petitioner company petitioned for winding-up under the supervision of the court persuant to S.369(3) of the companies Decree 1968. The petitioner was an Insurance company incorporated outside Nigeria. The petitioner carried on business in Nigeria through the agency of another insurance company at a place of business occupied by the latter company.

After the coming -into force of a companies Decree 1968 (especially Part X of the Decree), the petitioner informed the Registrar of companies that it did not intend to carry on business in Nigeria, and so instituted the present proceedings for winding up subject to the supervision of the court (as per S.369(3)).

The petition was opposed by Ochefu.

The petitioner contended that it had an established place of business in Nigeria and was thus a foreign company within the meaning of S.368(a) of the companies Decree 1968, so that a winding up was obligatory under S.369(3).

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Although the court held that the petitioner had no established place of business in Nigeria so that S.369(3) did not -apply, yet the case illustrates the procedure to be followed by foreign companies not intending to carry on business in Nigeria as per S.369(3) of the Decree.

Gower[12] however suggests that if the foreign company decides not to carry on business in Nigeria, it should be allowed to withdraw and repatriate its assets. But as Taiwo has again rightly answered,[13] Government will be shirking its responsibilities if a company is simply allowed to pack and go without ensuring that all creditors and those who may be interested in the company have just claims settled. The process would therefore have to be a winding up under the supervision of the Nigerian Courts.

Now, the question can be asked as to what amounts to a "reasonable time" within which the foreign company should apply to court for winding up after it has informed the registrar that it does not intend to carry on business in Nigeria?

Although the companies Decree 1968 does not define what in that context amounts to a reasonable time, it is reasoned that reasonable time after the 3 months does not mean indefinite time.

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"Reasonable time", it is conceded, would depend upon the facts of each case, but it should not be more than another 3 months[14] and anything more than that the courts would require reasonable explanation of the default which has occured before it can grant any relief sought.

In the Ghanian Case of:

WEST AFRICAN MAHOGANY CO. LTD. V. F.HILLS & SONS LTD[15]

The plaintiffs brought an action against the defendants to recover sums of money due under certain contracts. The plaintiffs and the defendants had entered into certain agreements in Ghana. The company was an external company within the meaning of the companies code and were in default in delivering accounts to the Registrar of companies for registration.

The plaintiff instituted the present proceedings to recover sums of money allegedly due under the agreements but the defendants applied for an order to strike out the suit. When the application was heard, the plaintiffs were in six years continuing default and had no reasonable explanation for the delay.

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The defendant contended that the plaintiff's right under the agreements were un-enforceable by the effect of the companies code S.313, which stipulated that:-

> "If there is any default in delivering to the registrar any document required to be delivered for registration persuant to the foregoing provisions of this Chapter, the rights of the external company concerned under or arising out of any contract made in Ghana during such time as the default continues shall not be enforceable by action or other legal proceedings".

The plaintiffs on the other hand, asked the court to order the filing of the accounts and grant relief under proviso (a) to S.313(2) which proviso, empowers the court on application to grant relief against the disability imposed by S.313(2) above on being satisfied that it is just and equitable to do so.

The court held that before it can be called upon to exercise its discretion under the proviso, there must be a reasonable expalantion of the default which has occured, and relief will not be granted unless the company can show it has acted with reasonable deligence, and since this has not been shown, the court refused to grant relief.

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In the words of Edusie J:

"In order that I may be able to exercise discretion in favour of the plaintiffs, there must be a reasonable explanation for the plaintiff's delay in filing their accounts for six long years. The reason for the delay as offered in paragraph 9 of the plaintiff's affidavit sworn by their local manager that the registrar of companies had never complained to them about it, is to my opinion, no reasonable explanation for six years delay and I echo with approval the great words of Lord Comden in Smith V Clay:

> "Nothing can call forth this court into activity, but conscience, good-faith and reasonable deligence; when these are wanting, the court is passive and does nothing".
>
> There is complete lack of reasonable deligence on the part of the plaintiffs; I must confess that I see no reasonable ground to justify the exercise of my discretion in their favour. The contention of the defendants is valid and I decide that the plaintiff cannot proceed against the defendants ...".

It is our opinion therefore that "reasonable time" also connotes acting within such time with reasonable deligence and goodfaith and that if the foreign company under S.369(3) refuses to apply to the court to have the company wound up within such time:

(i) First, it would cease to be a juristic person[16] for non=compliance,

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(ii) Secondly, it would be unable to maintain proceedings for the enforcement of its rights (as per the above Ghanian case), and

(iii) Thirdly, it shall be penalised -for non-compliance of the provision[17].

It is submitted therefore that six years would by any standard amount to unreasonable time, and that it is no defence for the foreign company to say that because the registrar of companies did not complain, it was therefore still within the sphere of "Reasonable time" to wound up the company.

Now, once a foreign company has been reconstituted as provided under S.369, subsection (5) of the section provides that the assets of the foreign company shall vest in the company subject to all equities, if any, affecting same.

Finally, S.369(6) provides that where it appears to the Registrar that a foreign company that has a place of business in Nigeria at the commencement of the Decree has ceased to exist in the country of incorporation before that date and the registrar is satisfied that it is expedient to wind up in Nigeria the affairs of the company reconstituted under the Decree and no action has been taken in that respect by any person

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(i.e. the principal officer of the company), the registrar may:

(i) refer the case to the attorney general (of the federation) for directions, and the registrar in proper case, may

(ii) petition the court for an order winding up the company under the supervision of the court.

As we have pointed out earlier on,[18] the personal law of foreign companies depends upon the statute incorporating them in their country of origin. If by that statute, a foreign company does not exist any more, the implication of it would be that the foreign company is trading illegally in Nigeria and this may have criminal implications, for, such a company should not by the principles of company law be a juristic person. It is in this light that subsection (6) of S.369 provides that the registrar should refer such cases to the attorney-general for possible criminal implications and prosecution.

If however, the foreign company did not do anything that amounted to an illegality in Nigeria after it had ceased to exist in its country of origin, the subsection provides that, the registrar, in such "proper case", should petition the court for an order to wind up the company, under the supervision of the court.

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In other words the fact that, a foreign company which has a place of business in Nigeria, has ceased to exist in its country of origin at the commencement date of Part X, does not by S.369(6) get exempted from being deemed to have become incorporated under the Decree. It shall still be considered a foreign company in Nigeria, and all the provisions of S.369(1) (a) (b) (c) and (d) shall apply to it except that at the end of the day it should be wound up. Again, the rational here is to protect Nigerian Creditors or investors that might have done business with the company, that is why the subsection says, such a company should be wound up "under the supervision of the court".

2. INCORPORATION OF FOREIGN COMPANIES AS DOMESTIC COMPANIES BEFORE COMMENCING BUSINESS IN NIGERIA

The second effect of the distinction (in S.368) of what amounts to a foreign company in Nigeria is to be found in S.370 of the Decree. As we have seen, foreign companies having an established place of business in Nigeria ON the 18th November, 1968 are dealt with in S.369. On the other hand, (and that is the distinction), those foreign companies incorporated outside Nigeria BEFORE OR AFTER the 18th November, 1968 and HAVING THE INTENTION of carrying

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on business in Nigeria ON or AFTER that date, are dealt with seperately in S.370 of the Decree.

In other words, the foreign companies that S.370 deals with are those that have not yet had an established place of business in Nigeria. On the 18th of November 1968 these companies were or are still contemplating to carry on business in Nigeria. These are the foreign companies defined in S.368(b) of the companies Decree 1968. S.370 provides that such foreign companies shall:-

(i) give notice in writing of its intention to the registrar whether or not it wants to carry on business in Nigeria. If it does intend to carry on business, then S.370 goes on -to provide that:

(ii) as soon thereafter (i.e. after the notice of intention to carry on business in Nigeria must have been given), the foreign company shall take all the steps necessary to obtain incorporation as a separate entity in Nigeria.

(iii) and until the company is so incorporated, it shall not have a place of business in Nigeria for any purpose (i.e. for trading etc) other than the receipt of notices and other documents, as matters preliminary to incorporation under the Decree.

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Put in different words, foreign companies coming under S.368(b) and therefore under S.370 must take steps either under section one of the Companies Decree 1968 or sections 2, 3 and 4 of the Decree to incorporate the company as a Nigerian company otherwise it is not permitted to do business in Nigeria.

Section 1 of the Decree provides the mode for incorporating a company in Nigeria while sections 2, 3 and 4 provides requirements where a company is to be Limited by shares; Limited by guarantee or where a company is Unlimited respectively. And by S.370(1) unless a foreign company obtains a certificate of incorporation in Nigeria, it shall be barred from having an established place of business in Nigeria. The only thing it would be able to do would be to receive notices and documents relating to and preparatory to its incorporation under the Decree.

The effect of S.370(1) to foreign companies defined in S.368(b) is that such foreign companies must start a new, as if though it did not exist in its country of origin, to incorporate itself, just as any group of persons in Nigeria would start from the scratch to incorporate a company.

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In other words foreign companies coming under S.370 (1) are not deemed incorporated in Nigeria like their counterparts in S.368(a) coming under S.369. Under S.369 a foreign company that does not intend to continue to do business in Nigeria, need not seek incorporation. Although certain sections of the Decree would automatically apply to it, it should apply to be wound up or be wound up in accordance with the Nigerian companies Decree. If however, it intends to continue carrying on business in Nigeria, it should take steps to be incorporated.

In comparison however, foreign companies coming under S.370(1) do not have such protection. From the beginning, they either take steps to be incorporated as Nigerian companies, or would never be allowed to do business in Nigeria. The difference is because one already has an established place of business in Nigeria and so creditors and investors ought to be protected, while the other is yet to do business or to have an established place of business in Nigeria, so there does not exist yet in - the company, any interest to be protected.

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Finally, S.370(2) provides that -the steps to be taken by the foreign company under the Decree to become incorporated in Nigeria shall not include any invitation (by the company to the public) to subscribe for shares or -otherwise howsoever on the basis of a prospectus, without prior approval of the commissioner (of trade). Here again, the objective is to prevent mischief (of illegality and fraud) by protecting the prospective investor who might not have the knowledge that the company is still foreign (and therefore not Nigerian), and is yet to be incorporated. Subection (2) of S.370 is therefore aimed at protecting such investors.

3. GENERAL EFFECTS OF NON-COMPLIANCE WITH SECTIONS 369 & 370

A question can be asked; what happens to foreign companies which do not comply with the provisions of sections 369 and 370 of the companies Decree?

We shall attempt to illustrate what can happen to the foreign company or show the effects of non-compliance with the leading case of:

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WEMA BANK LTD, V N.N. SHIPPING LINE LTD[19]

In this case, the applicants, a German Firm, applied to the court to be joined as a party to an action against the National Shipping Line Ltd.

The plaintiff contended that the applicants not being a juristic person, having not complied with the relevant provisions of the companies Decree No.51 of 1968 in particular and in accordance with Nigerian law, has no right of action and cannot be properly joined.

The argument of the plaintiff was interalia that: the applicant company is a foreign company within the provisions of S.368 of the companies Decree. It has not been incorporated in Nigeria since it has not complied with - either the provisions of S.369 nor with those of S.370(1) of the said Decree. The cumulative effect of these omissions is that the applicant company cannot sue in its name in this country nor exercise any of the powers of an incorporated company.

The issue before the court therefore was whether a foreign company or an oversea company which has not complied with the provisions of the companies Decree 1968 can apply to be joined in its own name in a suit in which its interests are adversely affected.

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The court held inter alia that:

Although foreign companies not incorporated in Nigeria are juristic persons by their country of incorporation, such companies lack the power to sue or be sued in their own name having not complied with the provisions of the companies Decree 1968.

Thus the General effect on foreign conpanies for non-compliance with sections 369 and 370 of the companies Decree are:-

(i) That the foreign company, would not be a juristic person to be able to sue and be sued in its own name.

(ii) That therefore, its interests cannot be protected by law, and

(iii) that the penalties in S.371 of the Decree shall apply to it.

4. CONSEQUENCES OF FOREIGN COMPANIES BECOMING INCORPORATED AS NIGERIAN COMPANIES

1) One of the most important consequences of foreign companies becoming incorporated as Nigerian companies is that the Nigerian Enterprises promotion Decree of 1977 would automatically apply to them.

The Nigerian enterprises promotion Decree popularly known as the indigenization Decree was promulgated by the Military in June, 29th 1977[20].

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The Decree which established the Nigerian Enterprises Promotion Board to implement the provisions of the Decree, has as its object, theconcentration of enterprises in Nigeria in - the hands of Nigerian citizens and associations. The Decree therefore affects all Alien or foreign enterprises[21] and is aimed at promoting and protecting Nigerian participation in all areas of the economy controlled by foreigners.

The word "alien", is defined in - the Decree to mean a person or association whether corporate or unincorporated other than a Nigerian citizen or association.[22] It is clear from the definition therefore that the enterprises intended to be affected by the Decree are those owned by foreigners in Nigeria and these must include foreign companies turned Nigerian Companies.

Under the Decree,[23] all the 40 businesses which are within the competence of indigeneous expertise are reserved exclusively for indigeneous exploitation and listed in schedule 1. Other businesses in which joint (between foreigners & Nigerians) participation is still considered to be required are classified into two categories and listed separately in schedules 2 and 3 (schedule II, 57; schedule III, 38).

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The ownership of these businesses must reflect a minimum Nigerian interest of 60%[24] in the case of businesses listed in schedule 2, and 40%[25] in respect of businesses listed in schedule 3. In addition to the above, an existing enterprise "(foreign)" whose operations incorporate activities listed in schedule 1, 2 and 3 (see appendix II) or in any two of those schedules and whose annual turnover is not less than ₦25 million and whose business is being carried on in not less than ten states of the Federation, is required to have a minimum Nigerian Equity interest of 60%[26].

Thus one of the effects of a foreign company becoming a Nigerian company is that it must be indigenised. As at 7th March 1981[27] a total of 1,856 "foreign" companies in Nigeria had been indigenised while 110 were yet to be indigenised. Also as at that time, 500 new "foreign" companies had registered with enterprises promotion Board for necessary compliance with the Decree.[28]

The Decree provides certain penalties to ensure that foreign companies comply with its provisions[29] and in cases of default these penalties are met out against the companies.

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Some of these penalties listed in Sections 13, 17 and 18 of the Decree include sealing-up of the premises of the firms and convictions for 5 years or fine of ₦10,000 or both. The Nigerian Tribune of Monday July 22nd, 1981 listed 23 defaulting "foreign" companies liable to such penalties.[30]

> "Usually,[31] however the structure of Equity ownership ought to a large extent, determine the structure of control. But unfortunately by resorting to a clever device the requirement of 60 percent equity participation by Nigerians in schedule II enterprises under the Decree of 1977 may be circumvented and Nigerians deprived of their intended legitimate majority management control.
> Within the legal frame work of the companies Decree, strictly speaking, it is perfectly valid to issue equity or ordinary shares with weighted voting rights or even without voting rights. Issue of equity shares with weighted voting rights gives one group of persons voting rights disproportionate to their investment and enables them to become holders of the majority voting power with relatively small financial stake in the undertaking. In line with the traditional English policy of laissez faire, it is under the decree left to the enlightened self interest of the incorporators or shareholders to issue shares carrying one special rights, voting or otherwise[32].
>
> But this traditional English policy, it is submitted, if followed in Nigeria would in effect frustrate the main objective of the indigenisation policy that the major interests in ownership and effective control of an undertaking should as a rule be Nigerianised.
> A spectacular instance of manipulation or use of the ingenious device by a foreign collaborator against the spirit and intent of the Nigerian Enterprises promotion Decree of 1977 is presented by the recent case of Kehinde V Registrar of Companies[33] in which the federal high court upheld the validity of equity shares with

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special weighted voting rights in favour of the foreign equity holder under the Articles. In this case, two Nigerian citizens subscribed their names to the memorandum and Articles of Association of "Honda Manufacturing (Nigeria) Ltd." and submitted them for registration to the registrar of companies. Under the Articles of Association the capital of the company was ₦100,000 divided into 70,000 'A' shares of ₦1 each and 30,000 'B' shares of ₦1 each. All 'B' shares were to be allotted to Honda Motor Company Ltd. of Tokyo, Japan. In so far as the requirement of equity participation is concerned, there was due compliance with the Decree of 1977 but the Articles gave special voting rights to holders of 'B' shares for the appointment and conditions of service of the Managing Director and the Assistant Managing Director (designated as special matters).

The Articles provided that on all special matters "the 'A' directors shall have one vote per director and the 'B' directors shall have three votes per director". In other words, although the Nigerian shareholders were presented as having 70 percent of the total shares of the Company and the Japanese as having 30 per cent of the shares, the Nigerian directors would have 70,000 votes as against the Japanese who would have 90,000 votes on resolutions concerning "special matters". The Registrar of companies objected to the Articles and refused to register them. Kehinde and another applied to the Federal Revenue Court (as it then was) for the issue of an order of mandamus for registration of the memorandum and Articles of Association. According to Mr.Justice Anyaegbunam the provision of weighted voting rights in the Articles "infact made a mockery of the majority shareholding in favour of Nigerians" as provided for by the Nigerian Enterprises promotion Decree 1977. In the opinion of his lordship, unless the articles were altered, "Nigerian shareholders will be perpetually condemned to an inferior status while Japanese share holders are exalted to a superior and overriding status when it comes to decision as to who will be Managing Director and who will be Assistant Managing Director of the Company and their service of conditions".

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Although His lordship detected the loophole in the law, he however, found himself helpless to plug it and held inter alia that the Registrar had no legal grounds to refuse registration. This is rather unfortunate.

The heart of the matter therefore is that, even by majority equity participation, the ingenous expatriate can reverse the internal control process by recourse to weighted voting rights in his favour and the tail could be said to be wagging the dog, notwithstanding that only a small financial stake in the undertaking, a foreign investor, may retain complete control, Thus the Nigerian majority shareholders, who because of their fragmented or widely dispersed shareholdings as against the concentrated substantial minority holdings of their foreign counterparts are already at a disadvantageobs position as regards their voice in the corporate decision making, could be further deprived of their legitimate degree of control by the device of weighted rights, thus defeating the very purpose of the indigenisation policy.

One of the basic defects in the Nigerian Enterprises promotion Decree 1979 therefore is the failure to match equity control with Management control. Needless to say, this failure is rather aggravated by the devise of weighted voting rights. Even if ownership is therefore indigenised, the control and Management could still remain in foreign hands not because they are voted in power as directors by virtue of their professional or technical competence or managerial expertise but by means of manipulation and circumventions. In the light of the foregoing analysis therefore it is submitted that reforms in -the Nigerian Company law for effective implementation of the Nigerianisation policy is needed.

The first shortcoming of the Nigerian Company Law is the complete freedom it gives to a company to issue any shares with special rights or restrictions in regard to voting as the company may determine. The laxity of the law in this regard may give rise to grave abuse and help the inefficient management to perpetuate itself.

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Once in power and control with relatively lesser financial stake but by means of weighted voting rights, the directors or the chief executive can sit tight on the management of corporate funds (only a minority of which has been contributed by them) even if they have lost the confidence and are opposed by the majority owners. It is therefore submitted that the Nigerian investors or collaborators should not be left to protect themselves in this respect from the wishes of the unscrupulous foreign investors and managers and therefore Government must step in. The companies Decree should therefore be amended so as to ban the issue of non-voting equity shares and equity shares with varied or weighted voting rights. Each equity share should carry only one vote. The principle of "one share, one vote" has been followed in most continental systems and has quite recently been introduced in Ghana and India."

2. The second effect of foreign companies becoming incorporated as Nigerian companies is that their personal law and status which was hitherto determined by the law incorporating them, ceases, and is now replaced by the Nigerian law (companies Decree 1968). All further activities of the company are also to be regulated by Nigerian law and all foreign laws ceases to govern their transactions.

3. Thirdly, but not the least, foreign companies who comply to be incorporated as Nigerian companies become juristic persons recognised as such by Nigerian law.[34] Non-incorporation makes them not legal persons.

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5. EXCEPTION TO FOREIGN COMPANIES COMING UNDER S.368(a) AND (b) AND SECTIONS 369 AND 370

The only exception to the definition of foreign companies in Nigeria (S.368 (a) & (b)) and so to the compliance of sections 369 and 370 of the Decree, is the provisions of companies (special provisions) Decree No.19 of 1973.

The Decree which was also promulgated by the military, empowers the Federal Executive Council to grant exemptions to certain specified categories of foreign companies from complying with the provisions of Part X of the companies Decree 1968 which provisions make it obligatory for all foreign companies carrying on business in Nigeria to incorporate in Nigeria. Exemption to be granted as per the special provisions are to be for a limited duration only or in relation to certain specified projects.

But even before the coming into effect of companies (special provisions) Decree 1973, the exemption view had already been expressed by the court in the unreported case of:

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OXFORD UNIVERSITY PRESS V REGISTRAR OF COMPANIES[35]

Where, the Oxford University Press took out a summons for the determination by the court of the question whether or not it was a company affected ty the provisions of Part X of the companies Decree.

The court held that the Oxford University Press was not incorporated as a foreign company and that the mischief which the provisions seek to prevent does not contemplate a body like the Oxford University Press, thus the provisions of Part X of the companies Decree were held not to apply to it.

In the words of the Court:

> "The companies exempted were foreign government owned companies already engaged solely in export promotion activities and engineering consultants and technical experts already engaged in specialist projects under contracts with any of the governments in the federation or their agencies or with private sector of the economy when such contracts have been approved by the government of the federation".

The companies (special provisions) Decree came and adopted and modified the situation and specifically provided in a statutory form, exemption for certain specified categories of foreign companies (whether already doing business or are about to do business in Nigeria) from complying with Part X of the companies Decree 1968.

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Section 1(1) & (2) of the companies (special provisions) Decree 1973 provides that a foreign company may apply to the Federal executive council for exemption from the provisions of Part X of the companies Decree 1968 if that foreign company belOng to one of the following categories:

(i) Foreign companies invited to Nigeria by or with the approval of the federal government to execute specific projects.

(ii) Foreign companies which are in Nigeria for the execution of specific loan projects on behalf of donor countries or international organisations.

(iii) Foreign Government owned companies engaged solely in expert promotion activities and

(iv) Engineering consultants and technical experts engaged on specialist projects under contracts with any of their agencies or with any other body or person where such contracts have been approved by the federal governments.

An application for exemption made under the Decree shall be in writing and addressed to the Secretary to the Federal Government, and shall set out the following:-

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(a) the name and place of business of the foreign company outside Nigeria;

(b) the name and place of business or the proporsed name and place of business of the foreign company;

(c) the name and address of each director, partner or other principal officer of the foreign company;

(d) a certified copy of the charter, statutes or memorandum and articles of association of the company or other instrument constituting or defining the constitution of the company, and if the instrument is not written in the English language, a certified translation thereof;

(e) the names and addresses of some one or more persons resident in Nigeria, authorised to accept on behalf of the foreign company, services of process and any notices required to be served on the company;

(f) the business or proposed business in Nigeria of the foreign company and the duration thereof, and

(g) such other particulars as may be required by the Secretary to the Federal Government.

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Now, where the Federal Executive Council upon the receipt of an application for exemption is of the opinion that the circumstances are such as to render it expedient that such an exemption should be granted, it may, subject to such conditions as it may prescribe, exempt the foreign company from the obligations imposed by Part X of the companies Decree.[36]

The exemption shall also specify the period or the project(s) for which it is granted and the exemption shall lapse at the end of such period upon the completion of the projects.[37]

The Federal Executive Council may also at any time revoke any exemption granted to any company if it is of the opinion that the company has contravened any provision of the special provisions or has failed to fulfil any condition contained in the exemption order.[38]

A company that has been granted exemption shall have its name gazatted and the gazatte shall specify the period and the project(s) for which the exemption was granted. Also if the exemption has been revoked, the name of the company whose exemption has been revoked and the effective date of such revocation shall be published in the Gazette.[39]

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Finally, the companies (special provisions) Decree 1973 provides that a company which is granted exemption will have the status of an un-registered company[40]. The Decree also provides penalties for any foreign company which gives false information for the purpose of obtaining the exemption or which does not comply with the Decree[41].

Thus under the companies (special provisions) Decree 1973, a foreign company exempted from the provisions of Part X of the companies Decree 1968 is not a foreign company within the definition of S.368 of the Decree and so not liable to comply with sections S.369 and 370. Foreign companies that come under the special provisions are therefore exemptions to the provisions of these sections.

The exception it can be said, was necessitated by the dearth of manpower and skill in the Nigerian Economy and the desire to transfer Technology to Nigerians. Any rigid implementation of Part X of the Companies Decree 1968 therefore would have made such objectives un-attainable. The exemption (or exception) was therefore aimed at providing incentive to the specialist foreign companies and countries that could want to offer aid to Nigeria, into doing business in Nigeria.

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Finally, foreign companies exempted from Part X of the companies Decree 1968 will have their personal law and status determined by the foreign statute incorporating them. Their transactions except contracts in Nigeria, should also be regulated by the law of their country of origin.

6. CONSEQUENCES OF EXEMPTION ON FOREIGN COMPANIES IN NIGERIA

Section 8 of the Immigration Act 1963 provides that:

> "No person other than a citizen of Nigeria, shall on his own account or in partnership with any other person, practice a profession or establish or take over any company with limited liability for any purpose without the consent in writing of the commissioner".

Put in different words, a foreign company or its members exempted by the provisions of the company (special provisions) 1973 cannot undertake any other business in Nigeria except the one(s) approved by the Federal Executive Council.

And no foreigner or foreign company can acquire or establish any interest in any company without the consent of the commissioner of Internal Affairs.

Thus in the case of:-

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ONWUKA V TAYMANI[42]

The defendant who was normally resident in Ghana purported to subscribe to the memorandum of Association of a Company in Nigeria. One of the issues before the court for determination was whether or not the defendant was a member of the company. The court held that as there was no evidence that the minister's consent was obtained for the purpose of enabling any interest in sharos to be created in his favour or any interest in shares to be taken by or issued to him, no shares of the company could validly be taken by him or alloted or issued to him. Thus any purported issue or allotment being tainted with illegality was void.[43]

Because the foreign company would neither be deemed incorporated or be incorporated in Nigeria, it would not be a Nigerian Company and so not a citizen of Nigeria. Therefore any profession, practice or interest undertaken in Nigeria other than the one(s) approved by the Federal Executive Council would be illegal, unless the consent of the commissioner for Internal Affairs is obtained. This is one of the effects and disabilities on a foreign company in Nigeria.

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Secondly, a foreign company or its members have restriction to hold land in Nigeria. For example, under the Native Land Acquisition Law (Cap.80 laws of Western Nigeria) 1959 which applies to the Western States (Ondo, Oyo, Ogun and Bendel States) and the Acquisition of Land by Aliens Law (Cap.2 laws of Eastern Nigeria 1963) which applies to the Eastern States (Imo, Anambra, Rivers and Ctoss Rivers States) an alien cannot acquire any interest or right in Land from a native unless the transaction under which the interest or right is acquired has been approved by the Governor[44] and even then, all that the alien can acquire is leasehold interest not exceeding 99 years. Also under the land tenure law of 1962 (which applies to the Northern States) a non-native cannot acquire or take any interest in land without the consent of the Governor[45]. The word "Alien" is defined in these laws as including any company or association or body of persons corporate or uncorporate other than a body incorporated under the companies Decree where the corporate body is composed solely of natives of Nigeria.

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A case in point over land restriction to foreign companies is the case of:

BRITISH & RRENCH BANK LTD V AKANDE[46]

Where it was held that a bank which was not solely owned by Nigerians could not take an equitable Mortgage on the land of a native in Western Nigeria without theapproval of the Governor as required by S.3 of the Native Lands Acquisition Law and that in the absence of such approval, no equitable Mortgage could be validly created.

In Lagos State, a similar law to those of the Western, Eastern and Northern States is in operation. This is the Acquisition of land by Aliens Edict 1971. Under the Edict, unless Nigerians have majority shares in a company, it was an Alien not capable of holding any title to land without the approval of the Governor[47]

Thus in Nigeria, a foreign company not incorporated as Nigerian company would suffer disabilities in terms of restriction to the actual project at hand and acquiring title to land.

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FOOT NOTES

1. The companies Decree 1968 requires that a Nigerian Company must have directors and a Secretary.

2. N.C.L.R. 1971 (1) P.213

3. See Prof. L.C.B. Gower's Article: Nigeria and Companies in West AFRICA of November 2 1968 at P.23.

4. "Foreign firms in Nigeria" by M.B. Taiwo in WEST AFRICA of November 23 1968 P.26.

5. The representative of the Company in Nigeria authorised to receive services in Nigeria on behalf of the Company.

6. Of Companies as provided in S.395 of Companies Decree 1968.

7. S.1 of the Companies Decree prescribe modes of incorporating a company in Nigeria.

8. S.369(3) Companies Decree 1968.

9. "Nigeria and Companies": L.C.B. Gower cited Ibid

10. "Foreign firms in Nigeria": M.B. Taiwo as cited Ibid

11. A.L.R. Vol.2 (1970) P.78

12. Ibid

13. Ibid

14. It is reasoned that if 3 months is prescribed by the Decree as enough for any foreign company to make -up its mind as to whether or not to do business in Nigeria, another 3 months should be okay for the foreign company to seek the winding up order if it does not intend to do business in Nigeria.

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15. 1 G.L.R. P.246

16. Wema Bank Ltd. V N.N. Shipping Line Ltd. Vol.1 (1976) F.N.C. P.45.

17. S.371 Companies Decree 1968.

18. See Chapter two of the thesis

19. F.N.C. Vol.II (1976) P.106

20. S.25(2) Nigerian Enterprises Promotion Decree 1977.

21. S.8 of N.E.P. Decree 1977

22. S.23(1) N.E.P. Decree 1977

23. S.4(1) N.E.P. Decree 1977

24. S.5 Ibid

25. S.6 Ibid

26. S.7 Ibid

27. See New Nigerian of Saturday 7th March, 1981 P.12.

28. New Nigerian of 7/3/81 as cited Ibid

29. SS.9, 10 and 11 of the N.E.P. Decree 1977

30. They include among others:

    (i) Farisco Industries (Nig) Ltd., Apapa, Lagos
    (ii) The Cedar Press (Nig) Ltd.
    (iii) Neon Africa (Nig) Ltd., Lagos
    (iv) Weide & Co (Nig) Ltd., Lagos
    (v) Euforganes (Nig) Ltd., etc. etc

31. The rest of the discussion on the indigenisation Decree is based solely on Prof.R.K. Goel's Article: Indigenisation: Corporate control A Plea for Company Law reform in Nigeria in Nigerian journal of Public affairs Vol.X No.11 October 1981 at P.76. The writer is grateful to acknowledge his permission to quote the Article verbatim extensively, for no better words to use.

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32. See Companies Decree 1968 Table 'A' Article 2.

33. Suit No.F.R.C/L/M/79 unreported.

34. See Wema Bank Ltd. V N.N. Shipping Line 2 (1976) F.H.C. P.40.

35. C.C.H.C.J/1072/73, unreported

36. S.1(3) of the cmpanies (special provisions) Decree 1973. Examples of foreign companies granted exemption from complying with Part X include among others:

(i) Balfour Beatty Engineering Ltd
(ii) Alfred Mc Alphine (overseas) Ltd
(iii) International Harvesters of Great Britain etc

The first two were granted exemption to handle the ₦50m health care project under the Mid-land Bank loan in Plateau State while the third was for Agricultural purpose. (Source of information: Ministry of Finance & Economic Development, Pdateau State).

37. S.1(4) Ibid

38. S.1(5) Ibid

39. S.1(6) Ibid

40. S.3(1) Ibid

41. SS.3 & 4 Ibid

42. 1968 2 A.L.R. P.13

43. See also the case of Obikoya V Matter HCLD/655/66 of 21/7/66 where it was held that the appointment of an alien as a director of a Company on October 11th 1963 was in contravention of S.8 of the Immigration Act. 1963.

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44. S.3 Native Land Acquisition Law Cap.80 (Western Nigeria) and S.3 acquisition of land by Alien Law 1963 (Eastern Nigeria).

45. S.28 land tenure Law 1962

46. 1961 W.N.L.R. P.277

47. S.8 Lagos State Acquisition of land by Aliens Edict 1971.

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CHAPTER SIX

LEGAL PROCEEDINGS AGAINST FOREIGN COMPANIES IN NIGERIA

As we have seen, the companies (special provisions) Decree 1973 provides exemption for certain specified foreign companies from being incorporated as Nigerian companies. Also foreign companies in S.369 who do not intend to do business in Nigeria may exist by default although they are required to wound-up! The question however is: since these companies would exist in Nigerian community and are bound to interact with Nigerians with a possibility of those interactions leading to some legal obligations and incidents, what would be the procedure for instituting legal proceedings against such foreign companies? In other words do Nigerian courts have jurisdiction to entertain matters relating to foreign companies in Nigeria and if they do what is the procedure for service of processes?

In tackling this subject-matter we shall confine ourselves to matters relating to Jurisdiction of courts and service of processes only with the hope that when we come to the Chapters on penalties and winding up of foreign companies, we shall then have a complete picture of the whole subject:

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Legal Proceedings against foreign companies in Nigeria.

1. JURISDICTION OF COURTS

In treating this aspect of legal proceedings against foreign companies in Nigeria, we would crave for indulgence to look at the attitude of courts in some other African countries who have similar legal system like ours: first, because we have dearth of materials in Nigeria as regards the subject-matter, and secondly because it is our belief that the same attitude would apply in Nigerian situations.

Now, where a foreign company through an agent makes constracts and carries on business within a jurisdiction, the Nigerian courts have held that the foreign companies are not only bound to third parties within the jurisdiction but they have jurisdiction to entertain legal proceedings against such companies.

In thecase of:

SPIROPOULOUS & CO. LTD V NIGERIAN RUBBER CO. & THOMAS BARLOW & BROS.[1]

The plaintiff, a company trading in rubber at Sapele brought an action against the defendants (the 1st defendant being a company trading in rubber also at Sapele while the 2nd defendant resident in London also traded in Rubber)

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to recover money due under contracts and damages for breach of contracts and a loan.

The second defendants (Thomas Barlow & Bros) were a firm of rubber merchants in England and the plaintiff company was a rubber producer in mid-western Nigeria. Under agreements between the second defendants and the plaintiff, the second defendant negotiated in London and the plaintiff shipped to buyers abroad on the contracts.

The second defendant had no office in Nigeria. The first defendant was their agent in Mid-Western Nigeria. As an agent for a disclosed principle, the first defendant accepted and carried out the second defendant's instructions in relation to their business interest in Nigeria (Mid-West), and saw to the execution of the agreements they had -with the plaintiff; it passed the contracts they negotiated and their instructions to the plaintiff; it made pre-shipment advances of their money to the plaintiff and sued for money over-paid, it kept a watch on the plaintiff's fulfillment of the rubber sales contracts and it looked after the second defendant's interests and had no interests of its own in the affairs between them and the plaintiff in which it was engaged.

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The second defendant stopped negotiating contracts for the sale of the plaintiff's rubber and the plaintiff instituted the present proceedings to recover damages for breach of contract and loan from the first defendant.

The first defendant contended that it had paid its loan and that in any case it was not liable on transactions between the plaintiff and the first defendant's disclosed principal: the second defendant.

The second defendant on the other hand, contended that they could not be sued in Nigeria (Mid-West) because they were not in Nigeria or carrying on business there.

The question before the court therefore was whether it had jurisdiction to entertain the matter.

The court upheld the contention of the first defendant on the basis that where a person contracts on behalf of a disclosed principal he is not personally liable, but rejected the argument of the second defendant and held that where a foreign firm is carrying on business within a jurisdiction through an agent who makes a contract then the court has jurisdiction and the firm bound to the third parties by agent in jurisdiction:

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Said Ekeruche J. "I now wish to deal with the other submissions put forward by counsel in this case which I have not touched on in earlier portions of this judgement. The said counsel submitted that the second defendant did not carry on business within the jurisdiction of this court and as such could not be sued in this court. Here, it is not a case of a local agent just accepting order. It is a case of a local agent seeing to the execution in this country of contracts made by its foreign principal, which contracts, are in part to be exeucuted in this country. In my view, it is clear that thesecond defendant were carrying on business within the jurisdiction of this court and that the first defendant was not just an agent simpliciter but a servant of the second defendant accepting instructions from the second defendant and carrying out those instructions in relation to their business interests in this jurisdiction. In my view therefore, the second defendant can be and have been properly sued within the jurisdiction of this court and is bound to 3rd parties if any".

Thus where a foreign company is carrying on business in Nigeria either directly or through an agent or servant and the business involves execution of contracts in Nigeria, then Nigerian courts have jurisdiction to entertain matters relating to the contracts (entered into by foreign companies) as it affects third parties in Nigeria. And the test whether a foreign company is carrying on business within the jurisdiction through an agent is whether the agent in carrying on the business of the company makes a contract on its behalf or for it.

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If the agent does so, then the foreign company is carrying on business within the jurisdiction and the Nigerian courts have jurisdiction over matters relating to the transactions.

The position is however **different** when it is transactions by a foreign company's forwarding agent in a jurisdiction. Because such an agent would be one simpliciter without power of making contracts for the foreign company, it does not amount to transactions by theforeign company through the forwarding agent for the purpose of establishing the company's presence or residence in that jurisdiction. And in such a case the courts would have no jurisdiction.

Thus in the Kenyan case of:

RE-LOWENTHAL AND AIR FRANCE[2]

The applicant, Air France (which was the defendant in Zambia) brought an application in Kenya to set aside registration of a decree of the high court of Zambia which was registered in Kenya under the foreign judgements enforcement Act.

In a suit for damages for breach of contract of tenancy, judgement was given by the high court of Zambia in the absence of the defendant (Air France) in favour of theplaintiff.

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As the defendant company (Air France) had ceased to transact business in Zambia, notice of the proceeding in Zambia had been served on an employee (Miss Hurter) of an independent company which represented the defendant company commercially. The judgement was ordered to be registered in Kenya on an Ex-parte application in Zambia. Notice of the registration was served on an agent in Zambia who had no authority to receive.

The question before the court in Kenya was whether Air France was transacting -business in Zambia at that time, so as to establish Air France's presence or residence in Zambia in order to make valid the service of a court process on Air France in Kenya through an agent in Zambia.

The court held that transactions by a foreign company's forwarding agent in a jurisdiction does not amount to transactions by thecompany through the forwarding agent for the purpose of establishing the company's residence in that jurisdiction and so service on Air France in Kenya through its forwarding agent in Zambia was held not to be proper service.

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In other words the court in Zambia did not have jurisdiction to entertain matters over a foreign company that was merely carrying on transactions through a forwarding agent, in Zambia.

One question that has also arisen is the issue of domicile of parties.What happens when both parties are foreign companies in a jurisdiction? Would Nigerian courts have jurisdiction over transactions by the foreign companies? Although there is no Nigerian case yet on the matter, it is submitted that the position in Ghana should -apply. In Ghana, it has been held -that Domicile is irrelevant if parties are effectively before the courts. Put in different words, domicile of the parties is irrelevant as a test to determine whether a court has jurisdiction to hear a claim arising out of a contract between two foreign companies, if the two (parties) are effectively before the court.

Thus in the Ghanian Case of

C.I.L.E. V CHIAVELLI AND TIMBER IMPORT-EXPORT GHANA LTD[3]

Plaintiff brought an action against the defendants for the value of the plaintiff's goods sold by the defendants and for the return of goods of the plaintiffs.

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The plaintiff and the 1st defendants were companies incorporated in Italy, while the second defendant was registered in Ghana.

The first defendant was the second defendant's managing Director and the plaintiff's representative in Ghana. By an arrangement entered into in Italy, the plaintiff consigned goods to Ghana invoiced to thesecond defendants. The invoices were in Italian and as translated. One of them provided: "For every dispute, only the forum of the judicial authority in Modena is competent:". The plaintiff instituted the present proceedings in respect of the goods, alleging they were theirs. The first defendant alleged that the plaintiff had sold the goods to the second defendant..

The defendants, relying on the above quoted provision of the invoice, raised the preliminary objection that Ghanian courts had no jurisdiction because the parties had contracted for the settlement of disputes between them in a court in Italy. They also relied on the Articles of Association of the plaintiffs company which provided interalia that the domicile of the shareholders of whom the first defendant was one, was to be interpreted as being at the company's head office.

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The plaintiff on the other hand contended that the provisions of -the invoice affected only buyers, and they had not sold to -the defendants; and that the domicile of the parties was irrelevant since they were effectively before the court and it thus had jurisdiction.

The defendants in reply contended that the provisions of the invoice referred to all disputes arising out of the subject-matter of the invoice, including disputes over the nature of the transaction itself.

The qeustion before the court was whether among other things the court had jurisdiction over the two foreign companies since -they were not domiciled in Ghana and since the invoice of the contract specified that all disputes relating to the contract was to be settled only in the judicial authority of Modena, Italy.

The court held that the domicileof the parties is irrelevant as a test to determine whether a court has jurisdiction to hear a claim arising out of a contract between two foreign companies if the parties are effectively before the court especially if the defendant is originally within the jurisdiction:

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> "I do not see", said judge Amissah J.A., "what the suggested method of interpretation of the domicile of shareholders has to do with the jurisdiction of this court in this case, especially where the defendants are ordinarily resident in this country and are properly before me. The plaintiff say they claim in detinue, the defendants resist on the ground that there was no sale. Whether the claim be in tort or in contract, the domicile of the parties seems to me irrelevant in the instant case as a test to determine whether this court has jurisdiction."

On the issue of the note on the invoice which specified that all disputes are to be settled in the judicial authority of Modena the court said:

> "But does this oust the jurisdiction of this court? Mr. Annancy for the plaintiff has rightly submitted that our courts have jurisdiction to entertain actions relating to contracts whereever made in all cases where the parties are effectively before this court, as where when the parties have voluntarily submitted to the jurisdiction".

Lastly, though not the least, where the court is of the view that a third party's right would be substantially prejudiced if it does not entertain jurisdiction over a foreign company, the court would assume jurisdiction and decide the case on its merits. In other words, courts are competent to decide the merits of a case. Buttressing this principle is the Ethiopian case of:

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ETHIOPIAN CEMENT CORPORATION V COMMERCIAL BANK OF ETHIOPIAN INGRA AND YUGOSLAV BANK OF FOREIGN TRADE[4]

The plaintiff corporation applied for an injunction to prevent the first defendant Bank paying a sum of money to the second defendant under a guarantee.

The second defendant, a Yugoslav corporation, contracted to build, install and put into peration a cement factory for plaintiff. In accordance with the provisions of the contract, the plaintiff asked for the bank's guarantee for finance. The bank agreed to guarantee for each contract an unconditional payment of all sums in the manner provided for in the contract between the Ethiopian buyer and the Yugoslav seller.

However, prior to the completion of the factory, the contracts between theplaintiff and the second defendant were terminated. As a result of this termination, a dispute arose between the parties as to the amount claimed by the second defendant from the plaintiff and counter-claim by the plaintiff from the second defendant under the guarantee.

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The parties agreed to settle the dispute by reference to arbitration and arbitrators were nominated by the plaintiff. The second defendant then claimed the guarantee amount plus interest from the first defendant in consolidation of the dept. The plaintiff filed an application for an injunction to prevent such payments in the present proceedings. The second defendant however maintained that the court had no jurisdiction to hear the case.

The court rejected the second defendant's argument that it had no jurisdiction to hear the case and granted the plaintiff's application for an injunction by ordering the first defendant not to remit or pay any amount under the guarantee:

> "If the Telegram" said judge Dr. W. Buhagair, "is intended to mean that this court is not competent to grant the application because realisation of a guarantee is a matter between the first and the second defendant, that is a question of the merits of the case and the court is competent to decide on such merits".

Summing up therefore, it can be submitted that Nigerian courts have or would have jurisdiction over foreign companies in transactions that include:

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(i) matters relating to contract agreements executed in Nigeria;

(ii) a foreign company which is carrying on business in Nigeria through an agent with powers to bind the company;

(iii) parties who submit themselves voluntarily to the jurisdiction of the court;

(iv) rights of third parties;

(v) the merits of a case.

2. SERVICE OF PROCESS AND VENUE

Since the courts have or would have jurisdiction over foreign companies in certain cases, the next question one can ask is: do the courts have powers to serve foreign companies with processes? Here the answer would depend upon whether the foreign company is carrying on business in or outside the jurisdiction; the remedy sought and the rules of the court.

For instance it has been held that where a foreign company which is domiciled outside the jurisdiction, is a party to an action within the jurisdiction, process may be served outside the jurisdiction if the

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company was carrying on business within the jurisdiction at the commencement of the action.

Thus, in the Case of:

AZEBUE V THOMAS APLIN & CO. LTD.[5]

(This case was an appeal from the judgement of the learned magistrate sitting at Sapele, which struck out an action brought by the plaintiff upon a prelimiary objection taken by the defendant). The plaintiff's claim against the defendant was for a "sum of 144.6s.2d, being the balance of the amount due and owing to the plaintiff by the defendant on the plaintiff's trading account with the defendant in apele between July 26th 1960 - June 12th 1964".

The plaintiff who was resident in Sapele filed his claim in the magistrate court Sapele and later obtained leave of the court for service of writ out of the jurisdiction on the defendant at their head office Onitsha.

When the case came up for hearing, learned counsel for the defendant took objection to the jurisdiction of the court which according to him could not entertain a claim in which the cause of action arose out of the jurisdiction of the court or alternatively which relates to the defendant who was resident outside the jurisdiction of the court.

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The question before the court therefore was whether the defendant foreign company could be served out of jurisdiction.

The court held inter alia that:

Where a company which is domiciled outside the jurisdiction is a party to an action within the jurisdiction, process may be served outside the jurisdiction if the company was carrying on business within the jurisdiction at the commencement of the action:

> "The defendant", said Idigbe CJ," having lodged a protest as to the jurisdiction of the court, ought to be satisfied that the venue of action was within the district and this ought to be some satisfactory evidence that the defendants at the time of commencing action carried on business within the district. There is no doubt that the lower court had jurisdiction in personal actions on contract and the rules of court provide for service outside the jurisdiction of the court in circumstances which are set out in the relevant rule. One of these dircumstances arose when the defendant carried on his business at the time of commencing the action within the jurisdiction of the court. The unqualified statement of the defendant's witness Erefibi, who is a branch manager of the company's office at Warri that, "Thomas Aplin carries out its business normally in this country, including Warri and Sapele", was sufficient basis for the view that action was justiceable within the Sapele magisterial District. It is therefore my view that the action should not have/struck out on the ground that the proper venue was not Sapele".

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Finally, though not the least, it has been held in the case:

EZEOKE V REGISTRAR OF COMPANIES[8]

That in the upsence of rules made by the Chief Justice of the federation under S.375 of companies Decree 1968 in respect of procedural matters under the Decree (which rules have not been made) recourse must be made to the practice and procedure for the time being in England.

From the foregoing then, it can safely be said that:

(i) where foreign companies carry on business within jurisdiction, process of the court can can be served on the company within the jurisdiction;

(ii) where however the foreign company is outside the jurisdiction of the court, service of process can be affected on it if:

(a) it was domiciled in the jurisdiction at the commencement of the action;

(b) the action relates to financial matter (account);

(c) if it is carrying on business at any fixed place in the country.

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(iii) Finally, in other cases and in the upsence of rules made persuant to S.375 of the companies Decree 1968, the practice and procedure for the time being in England shall apply as it relates to service of process.

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FOOT NOTES

1. N.C.L.R. Vol. 1970 PP.94
2. 1966 (2) A.L.R. PP.301
3. 1968 1 A.R.C.R. 329
4. A.L.R. 1967 (1) 298
5. 1966 (2) N.C.L.R. 97
6. Ibid
7. Ibid
8. N.C.L.R. (1970) PP.404

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CHAPTER SEVEN

PENALTIES AGAINST FOREIGN COMPANIES IN NIGERIA

The only section in Part X of the Decree that deals with the consequences on foreign companies for non-compliance with Part X of the Decree is Section 371.

However before we deal with the section, it is pertinent, I believe, for us to know what Part X of the Decree makes obligatory on foreign companies to do in which failure will lead to penalty. Put in a different way: what are the offences in Part X of the Decree which draws penalties in S.371?

First, as we have seen (in chapter five), it is obligatory for a foreign company (which had an established place of business in Nigeria (on 18th November, 1968) or its principal officer, within 3 months of the date on which it is deemed incorporated persuant to S.369(1) to inform the registrar of companies as to the future intentions of the company in respect of its operations in Nigeria.

Secondly, it is also obligatory on such a foreign company if its business is to continue to be carried on in Nigeria, that its principal officer, should forthwith take all necessary steps to incorporate the company in Nigeria persuant to Section 1 of the Decree.

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Thirdly, without the approval or authorisation of the commissioner of trade, no foreign company which has not been incorporated in Nigeria can issue any prospectus inviting subscription from the members of public.

Also and fourthly, if the foreign company informed the registrar of companies that it does not intend to carry on business in Nigeria, its principal officer, within a reasonable time. should apply to the court to have the company wound up under the supervision of the court.

Fifthly, we have also discussed that where a foreign company had ceased to exist in the country of its incorporation before the 18th of November 1968 (the commencement date), action should be taken by the principal officer or the company to wind up the company in Nigeria.

Sixthly, foreign companies who have no established place of business on the 18th day of November 1968 are required:

(i) to give notice in writing of their intention to the registrar, and then,

(ii) take all necessary steps to obtain incorporation as a seperate entity in Nigeria.

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Finally, we have seen that until foreign companies coming under S.368(b) get incorporated, they will not have a place of business in Nigeria.

All these seven obligations imposed on foreign companies in part X of the Decree are the penal laws in which S.371 prescribes penalties. Every foreign company that contravenes any or all of them shall be punishable under S.371. By Section 371:

> "If any foreign company fails to comply with the requirements of this part of this Decree in so far as they may apply to the company, that company:
>
> (i) shall be equity of an offence and liable on conviction to a fine of not less than £1000 (₦2,000);
>
> (ii) and every officer or agent of the company who knowingly or wilfully (i.e. intentionally) authorises or permits the default or failure to comply, shall, whether or not the company isalso convicted of any offence, be liable on conviction to a fine of not less than £100 (₦200);
>
> (iii) and where the offence is a continuing one, to a further fine of £10 (₦20) for every day during which the default or failure continues."

Thus section 371 provides penalties for both the foreign company and the principal-officer[1] of the company who defaults or aids to default compliance with the mandatory provisions or penal laws of Part X of the Decree.

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It is important to note that the mandatory obligations are penal provisions because S.371 talks of "guilty of an offence", and "conviction". Only in penal laws are such words used. The fact that the section does not provide for imprisonment is no ground to dismiss the contravention of the obligations as not being penal. Fines are provided instead of imprisonment, first, because it serves a better purpose (revenue) than imprisonment, secondly, a company not being a human person cannot be imprisoned! One can argue however that the principal officer in default can be sentenced to imprisonment since he is a physical person; but the question would be: If the principal officer of the company is imprisoned, who will take steps to correct the default?
It is submitted therefore that it is in realisation of this fact that S.371 does not provide for imprisonment. All the same that does not prevent the punishments provided in the section from being penal.

In addition to these penalties the case of:

WEMA BANK LTD V N.N. SHIPPING LINE LTD[2]

establishes that every foreign company which fails to comply with the provisions of Part X of the Decree shall:

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(i) Not be a juristic person (i.e. will not exist in law) and

(ii) Not be able to sue or be sued in its own name.

The corollary consequence of the above consequences would be that such a foreign company cannot have its interests protected in Nigeria.

The position in Ghana[3] seems to be similar to S.371 of the Decree and infact supports the decision in Wema Bank V N.N. Shipping Line Ltd and the above submissions under S.313(1) and (2) of Ghana's company code:

(1) "... Any external company or any local manager (i.e.principal officer) or process agent of an external company who fails to comply with any of the obligations imposed upon it or him by the foregoing provisions (i.e. provisions applying to non-Ghanian companies) of this chapter (Chapter V of the code), the external company and any local manager or process agent who is in default shall be liable to a fine not exceeding £G50 or in thecase of continuing default £G50 for every day during which the default continues.

(ii) If there is any default in delivering to the registrar any document required to be delivered for registration persuant to the foregoing provisions of this chapter of the code, the rights of the external company under or arising out of any contract made in Ghana during such time as default continues shall not be enforceable by action or other legal proceedings..."

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Thus in both Nigerian and Ghanian laws, the foreign or External company and the principal officer or local Manager of the foreign company are both liable to conviction and fine in cases of non-compliance with obligations imposed on them. In the case of Ghana, however, the law goes further to provide statutorily, that apart from the conviction and penalty of fine that the foreign company may suffer, it shall also be disabled to enforce its rights by any legal action.

Thus in the already discussed Ghanian case of:
WEST AFRICAN MAHOGANY CO. LTD V F. HILLS & SONS LTD[4]

The court refused to enforce the rights of an external company because it had defaulted for six years to comply with theprovision of delivering documents to the registrar of companies and it could not prove that such default occured despite acting with reasonable deligence.

Summing up, penalties against foreign companies in Nigeria are for non-compliance of the obligations imposed on them by Part X of the Decree as enumerated. And it is submitted that it is the duty of the registrar of companies to refer such defaulting companies to the Attorney-General of the Federation for prosecution or in the alternative, personally prosecute the defaulting companies in the court.

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1. It is the principal officer that is liable, because of the definition of "Officer who is in default" in S.392 of the Decree.

2. 2 1976 F.H.C. PP.68

3. See Chapter V Ghana Companies Code 1963: Provisions applicable to non-Ghanian companies S.313(1) and (2).

4. 1 G.L.R. PP.246

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CHAPTER EIGHT

WINDING UP OF FOREIGN COMPANIES IN NIGERIA

Winding up of foreign companies in Nigeria is governed by the same rules[1] as the winding up of registered Nigerian companies. The only difference is that the grounds for the winding-up are not the same.

Unlike in the case of companies registered or incorporated in Nigeria where there exists at least six[2] main grounds in which a company may be wound up by court viz:-

(i) if the company has by special resolution resolved that the company be wound up by the court;

(ii) if default is made in delivering the statutory report to the Registrar or holding the statutory meeting;

(iii) if the company does not commence its business within a year from its incorporation date or suspends its business for a whole year;

(iv) if the number of members is reduced, in the case of a private company, below two, or in the case of any other company, below seven;

(v) if the company is unable to pay its debts (for a sum exceeding £50 (₦100)[3] and

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(vi) if the court is of the opinion that it is just and equitable that the company should be wound up; the grounds for foreign companies are different.

The grounds for winding up of a foreign company are only two namely:

1. Where a foreign company coming under S.368(a) informs the registrar that it does not intend to carry on business in Nigeria[4] and
2. Where the foreign company (also coming under S.368(a) has already ceased to exist in the country of its incorporation.[5]

Taking the first ground, S.369(3) provides that:

> "If the foreign company within the period of 3 months mentioned in subsection(2) of this section, informs the registrar that the company does not intend to carry on business in Nigeria, and the principal officer aforesaid fails within a reasonable time thereafter to apply to the court to have thecompany wound up under the supervision of the court, the registrar may so apply, and the court upon such application - shall make a winding up order accordingly".

What the section is saying in effect, is that: if the deemed "Nigerian" company persuant to S.369(1) does not after all intend to continue to carry on business in Nigeria:

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1. Its principal officer within a reasonable time (after the 3 months granted it in S.369(2) to consider whether or not to continue to carry on business in Nigeria) should apply to the court to have the company wound up under the supervision of the court.
2. However, if the principal officer of such company fails to do so, the registrar of companies may so apply and the court upon such application shall make a winding up order accordingly.

Now, one may ask: which courts have jurisdiction to wind-up foreign companies in Nigeria and what is the procedure for initiating the winding up process in the court?

By S.208 of the companies Decree 1968[6],

the High Courts have jurisdiction to wind up every type of company in Nigeria (i.e. including foreign companies). Even then, the High Court having jurisdiction to wind up a company shall be the one within whose area of jurisdiction the registered office of the company is situated. And for the purpose of determining the registered office, the section goes on to stipulate that it shall mean the place which has longest been the registered office of the company during the six months immediately preceeding the winding-up.

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Also, the procedure for initiating winding up of companies is by filing petitions[7], while the rules of court for winding up of companies are found in schedule 15 of the Decree made persuant to S.375 and S.395 of the companies Decree 1968.

Now, winding up of foreign companies, under the provisions of Part X of the companies Decree 1968 is permissive not obligatory. However an order for winding-up subject to the supervision of the court is OBLIGATORY under S.369(3) of Part X of the Decree on an application relating to a foreign company which does not intend to carry on business in Nigeria.

The leading case on winding up of foreign companies -under S.369(3) of the Decree and the butresser of the above principle is the illustrative case of:

IN RE GRESHAM LIFE ASSURANCE SOCIETY LTD

Vs

OCHEFU[8]

This was a petition by the Gresham Life Assurance Society (Nigeria) Ltd., that inter alia, the company be wound up under the supervision of the court in accordance with the provisions of the companies Decree 1968.

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The Gresham Life Assurance Society (Nig) Ltd., was a company incorporated under the English companies Act and was registered in Nigeria under S.239 of the former companies Act. This company was on November 18th 1968 deemed to be incorporated in Nigeria.

However, the petitioner company not intending to carry on business in Nigeria, and in accordance with S.369(3) of the companies Decree, wrote a letter through its principal officer to the registrar of companies giving notice that the company does not intend to carry on business in Nigeria and therefore brought this present action for compulsory winding up under the supervision of the court.

Counsel for theRegistrar submitted that under Part X of the companies Decree, winding-up was permissive, but the question was whether under S.369(3) winding up was voluntary or compulsory?

The Court held inter alia that winding up under S.369(3) is compulsory if the foreign company has an established place of business in Nigeria, but that since in this case, the petitioner company had no established place of business in Nigeria in which case it can not claim to be a foreign company under the perview of 369(3), the winding up sought was not a

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compulsory winding up in which it would be done

under the supervision of the court:

> "A foreign company" said the court, "that has an established place of business in Nigeria, comes within the provisions of S.368(a) in which case, winding-up is compulsory when the principal officer of the company gives notice of his intention not to continue business in in Nigeria. Counsel for the petitioner company sought to bring this application within the provisions of S.369(3). He contended that such application in subsection 3 means either an application by the registrar or the principal officer. He therefore submitted that since the company was a foreign company coming within the provision of S,368(a) winding up was mandatory .... I agree with the submission of counsel for the registrar of companies that under Part X of the Decree, winding up is permissive. The petitioner company had carried on business by an agent namely, the GuineaInsurance Company Ltd., and it is my view that the petitioner had no established place of business in Nigeria within the meaning of S.368(a) of the companies Decree. This is not therefore a compulsory winding-up and Gresham Life Assurance Society (Nig) Ltd cannot evoke the provisions of S.369(3) to support their petition that the company should be compulsorily wound-up".

Thus to qualify for the compulsory (or obligatory) winding-up under S.369(3), a foreign company not intending to do business any more in Nigeria:

1. must be a foreign company coming under S.368(a) in definition and (2) must have had an established place of business in Nigeria on 18th November, 1968.

Where these conditions are not met, the court would use its discretion on whether or not to wind up the foreign company.

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The court may therefore refuse to wind up a foreign company on the ground that, a creditor has a pending action against the company for a breach of contract.

In the same Case of:

IN RE GRESHAM LIFE ASSURANCE SOCIETY LTD.

Vs

OCHEFU[9]

The petitioner company petitioned for winding-up under the supervision of the court. The petitioner was an insurance company incorporated -outside Nigeria but registered in Nigeria -under S.239 of the former companies Act. After the coming into force of the companies Decree 1968, the petitioner informed the registrar of companies that it did not intend to carry on business in Nigeria and instituted the present proceedings for winding-up subject to the supervision of the court.

The petitioner did not propose that its Nigerian business should be continued by another insurer, but said that the policy holders who wished to continue paying premiums should be allowed to do so to the liquidator.

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On the 28th July, 1968 the petition was opposed by Lt. Col. Ochefu, an officer in the Nigerian Army and a creditor and policy holder of the company who had a pending action against the petitioner for breach of contract.

The court refused to grant the petition on the ground inter alia that the effect of winding-up the company in this case would mean a stay of proceedings in the case pending in court where the respondent is instituting an action against the petitioner for breach of contract:

> "Since the winding-up cannot be brought under the provisions of S.369(3) of the companies Decree" said George J.I "it is within the discretion of the court to decide whether the company should be wound-up or not. The effect of winding-up the company in this case would mean a stay of proceedings in the case pending in court where the respondent is instituting an action against the petitioner for breach of contract. Besides -that, this is a company whose principal business is to carry on life insurance policies. There may be thousands of policy holders who have relied on the goodwill of the company and have invested money by taking out policies of insurance. It would not be in the interest of the public to grant the petition more especially as the petitioner does not pray that the Guinea Insurance Company Ltd should continue the business of the Gresham Life Assurance Society (Guinea Insurance Company was the petitioner's agent in Nigeria). Instead, the prayer is that Mr. Babatunde Olusola Benson, a member of the Bar, be appointed Liquidator, and that the policy holders under the existing Nigerian policies who wish to continue paying premiums to get their contract in force should be allowed to do so.

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> This in effect means that the present policy holders would deal directly with Mr. Babatunde Olusola Benson and not with the Guinea Insurance Co. Ltd. I do not think this will be in the interest of thepolicy holders or in the good name of the company itself. Life Assurance is such an important policy that I do not consider it safe that it should be placed in the hands of an individual".

Thus where a case is pending against a foreign company wishing to be wound up and the winding up is not compulsory, the pending case must be disposed of first before such a company is wound up. The rational here is to protect the interests of the creditors and investors who may otherwise not be adequately protected if the company were to be wound up without allowing for remedies arising out of contractual obligations.

The second and the last ground for winding up of foreign companies under Part X of the companies Decree deals with a situation where the foreign company as incorporated outside Nigeria has ceased to exist in the country of its incorporation.

S.369(6) provides:

> "This section shall extend and apply to any case where, immediately before the date of commencement of this part of this Decree, a foreign company had in Nigeria an established place of business and not withstanding that fact, it is thereafter made to appear to the registrar that the foreign company as incorporated outside Nigeria had ceased to exist in the country of its incorporation before that date.

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> If then or thereafter the registrar is satisfied that it is expedient to wind up in Nigeria the affairs of the company reconstituted under this section, or thereafter under this part of this Decree, as the case may be, and no action in that behalf is taken by any other person, the registrar may refer the case to the Attorney-General of the Federation for directions; and the registrar in proper case may petition the court for an order winding up that body corporate under the supervision of the court, and the court shall make the order accordingly, subject to such conditions as the court in particular circumstances may impose".

Put in different words S.369(6) is saying that, the mere fact that a foreign company has been dissolved or has ceased to exist under its personal law, is no bar to the Authority of Nigerian courts to sanction its winding up proceedings. Indeed the fact that it has been dissolved is a specific ground for such a course of action i.e. it is a ground on which an order may be made to wind up a foreign company. Accordingly, under the provision, the defunct company will be resurrected and then put into Liquidation.

In winding-up a foreign company under Subsection 6 of section 369, the procedure is that if the deemed "Nigerian" company had ceased to exist in its country of incorporation before or on the 18th day of November 1968, but had an established place of business in Nigeria, the principal officer of the company should take steps to wind up the company.

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If he fails, the registrar of companies may refer the case to the attorney-general of the Federation for directions; and the registrar in proper case may petition the court for an order of winding-up.[10]

Now, it is pertinent to note that in the two grounds for winding up a foreign company under Part X of the companies Decree the winding-up have both to be done under the supervision of the court. The importance to a creditor of this authority of the Nigerian Court cannot be over-emphasised. This is so because the protection afforded creditors under Part X of the Decree could and may prove illusory. The winding up procedure under the supervision of the courts therefore fills the gab and comes as a welcome remedy. Moreover, it is not only the creditors that might benefit, the shareholder himself may be able to persue a claim afforded by the procedure. The provisions of winding-up therefore fills the gab in protecting both the investor and the creditor against any fraud etc. that might have been committed by the foreign company.

One may however ask, what happens to the assets of the companies? S.369(5) stipulates that the assets in Nigeria of such companies coming within the meaning of paragraph(a) of section 368 of the Decree shall

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vest in the company as reconstituted subject to all equities (if any) affecting same. It is therefore submitted that by this provision, the assets which the court or the liquidator may collect and distribute are those owned by the companies at the commencement of the winding-up.

Also, it is submitted that the consequences of winding up of such foreign companies is that contracts entered into by or for the companies are treated as terminated or broken.

Finally, it must be said here that since foreign companies coming under companies (special provisions) Decree 1973 are exempted and therefore do not qualify to come under the meaning of foreign companies in S.368(a), Nigerian courts would have no jurisdiction to wind them up in Nigeria irrespective of the circumstances. All that can happen to them is for the Federal Government to revoke their exemption and thereby compel them to go back to their country of incorporation. Otherwise such companies can only be wound up in their countries of origin according to their personal laws.

As for the foreign companies coming under the definition in S.368(b) the issue of winding them up under Part X does not arise, because they have no established place of business in Nigeria yet and by S.370 cannot even commence business until they are incorporated under Nigerian law.

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FOOT NOTES

1. This cannot be otherwise since by S.369 of the Decree they are deemed Nigerian companies. See rules for winding up Nigerian Companies in Sections 211, - 216, S.375, S.397 of companies Decree 1968.

2. S. 209 of Companies Decree 1968

3. S. 210 of Companies Decree 1968

4. S. 369(3) of Part X of Companies Decree 1968

5. S. 369(6) of Part X of Companies Decree 1968

6. S.7(c) of the federal revenue court (now federal high court) Act 1973 also confers jurisdiction on the court to exercise jurisdiction in eivil matters and causes arising from the operation of the companies Decree 1968 or any other enactment regulating the operation of companies incorporated under the companies Decree 1968"

7. S.211(1) of companies Decree 1968

8. N.C.L.R. 1970 PP.78

9. Ibid

10. See Chapter two of the thesis for the analysis of the sentence.

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CHAPTER NINE

SUMMARY, PROPOSAL FOR REFORM AND CONCLUSION

1. SUMMARY

From the foregoing, it is clear that to a large extent, the status of foreign companies in Nigeria is different from the status of foreign companies in England. For, apart from the fact that the definition of foreign companies may take the same shape, in that in both, foreign companies implies a company incorporated otherwise than in Nigeria or England and apart from the fact that the position of the personal law of foreign companies in Nigeria (before the application of PartX of the Decree) and in England (as at now) may have been the same as regards the fact that their existence and powers were to be determined by thelaw of the country to which they were incorporated, nothing else appears in common between foreign companies in Nigeria and in England.

In England for example, if the foreign company is a corporate entity and has established a place of business there, it is required by law[1] to deliver to the Registrar of companies for registration the following:

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(i) a certified copy of the instrument containing its constitution (and if in foreign language, its certified translation thereof);

(ii) a list of its directors and company secretary showing the names, their residential addresses, their nationalities and business occupation etc;

(iii) the name and address of one or more persons resident in England who is or are authorised by the company to accept service of documents on its behalf.

This disclosure requirement which is compulsory for foreign companies doing business in England to comply with, is completely absent in the Nigerian situation. In Nigeria the foreign companies with established place of business (on the commencement date of Part X of the companies Decree) are sort of "Nationalised" automatically by being deemed to be Nigerian companies and then thereafter are required to take steps to be actually incorporated as such. Those foreign companies on the other hand that are yet to establish a place of business, are required to take steps and incopcrate as Nigerian companies before commencing any business. Failure to get re-incorporated, would get the foreign companies in the former category wound up in Nigeria, while in the later cases they cannot commence business.

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In the case of England however failure by an oversea company to deliver the said documents to the Registrar of companies does not render its corporate status being disregarded. Nor does it render it incapable of disposing of property or invalidate any contract or other transaction entered into by the company or prevent it from enforcing its rights[2].

The purpose of reguiring foreign companies in England to deliver those documents is only aimed at providing limitation on the general English Principal that it is the law of incoporation which determines the companies organs. For a foreign company in England may well not have had a director or a secretary as one of its officers or organs of operation and this infact might not have been a requirement by the personal laws of the company, but with the disclosure requirement, a foreign company in England is compelled to have Directors and a Secretary. Besides this reason, nothing appears to happen to foreign companies that default to deliver the documents.[3]

Secondly in England, the personal law of foreign companies throughout their stay there, is determined by the law of thecountry incorporating them, This is so because the English rules of conflict of laws accord to the personal laws of foreign companies the law of their domicile. Thus in England for instance, the question whether or not a foreign company exists as a

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corporate body or not would depend according to English law on the law of the place where it was allegedly incorporated. Also based on the same principle, English Law would treat the question whether a foreign company's transaction is Ultra-vires according to the law of the place of its incorporation. This cannot be otherwise since the capacity of a company is limited by its constitution and the law of the country of its incorporation. Furthermore the questions whether the human members of the foreign company are personally liable for the company's debts and what constitutes its agents or organs with power to act for it is by the same principle, governed according to English Law by the law of the country of incorporation of such foreign company. Furthermore all internal questions arising between the company and its members are governed by the law of the place of its incorporation. Thus as can be seen, it is only in little instances that English laws interfere with foreign companies or better still it is only in a minority of cases that foreign companies' personal laws causes difficulty in England.

In Nigeria on the other hand, the personal law of incorporation of the foreign companies (not exempted) has been rejected outright in favour of the laws of the country. Thus the issue of personal law of foreign companies in Nigeria has no relevant except in cases

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where foreign companies are exempted by the federal government from complying with sections 369 and 370 of the Decree.

Finally, in the area related to winding-up of foreign companies in England, the same provisions that apply to unregistered companies in England apply also to foreign companies[4]. In Nigeria however, the grounds for winding up of a foreign company are specifically provided for and made peculiar to them. Thus all cases of winding up of the foreign companies must be under the supervision of court. This is not everytime the case with Nigerian companies incorporated under the Decree.

It can be seen from the foregoing, therefore that Nigerian company law has made some departure from the English law as it relates to foreign companies. For apart from the fact that Nigerian law distinguishes two types of foreign companies, it goes further to reject in its entirety the personal law of the foreign companies by completely making them Nigerian companies, while in the absence of their becoming Nigerian companies, they are wound-up: This is a great departure from the English law.

It can thus be safely said that foreign companies in their own character and nature have no place in Nigeria as is the case in England.

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2. PROPOSAL FOR REFORM

However, can it be said that the Nigerian law relating to foreign companies is perfect? In other words in which areas of the law relating to foreign companies can Nigeria improve upon? In answering this question I would attempt to compare the provisions of the law in Nigeria with the legislation of a sister country (Ghana) (which to my mind has one of the finest ligislations in Africa relating to the operations of foreign companies) and see to what extent Nigeria needs to improve in its law relating to foreign companies.[5]

First, the definitive problem. S.368(a) & (b) of the companies Decree 1968 which tries to define what in Nigeria constitutes a foreign company does not go far. All that it does is to distinguish between two types of foreign companies viz: those incorporated outside Nigeria before the 18th November 1968 and have established a place of business in Nigeria on that date, and those incorporated outside Nigeria before or after the 18th November 1968 and having the intention of carrying on business in Nigeria on or after that date. In the section, there is no attempt made whatsoever at the definition of the terms: "Established a place of business" or "Carrying on business". This has given rise to great doubt and difficulty. The courts on the other hand have not helped matters, as can be seen in the different types of meanings attached to the phrases by them.

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Thus something more definite and specific is needed for the sake of certainty. This is what S.302(3) of Ghana companies code 1963 has done. Apart from defining what is an external (foreign) company, it goes further to provide specifically what is meant by the term "Established place of business" as follows:

> "The term "established place of business" means a branch, management, share, transfer or registration office, factory, mine or other fixed place of business, but does not include an agency unless the agent has and habitually exercises, a general authority to negotiate and conclude contracts on behalf of the body corporate or maintains a stock of merchandise belonging to that body corporate from which he regularly fills orders on its behalf..."

Even without going into the other provisions of the subsection, it is submitted that this specific provision provided in the Ghana companies code adequately summarizes the decisions of Nigerian Courts on what amounts to an "established place of business" or "Carrying on business" and should be adapted in Nigeria if only for the sake of certainty and clarity of the phrases.

Furthermore, Part X of thecompanies Decree 1968 refers in S.369(2) and (3) to the term "principal officer" in Nigeria of the foreign company without making any attempt at prescribing qualifications for such an officer or defining him, thereby giving room for the foreign company to appoint anybody it deems fit to appoint to that position.

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It is my submission however that because of the enormous responsibility bestowed on the principal officer to be done on behalf of the foreign company, our law is defective in that it lays down no requirements regarding the position of the "principal officer" of foreign companies. I believe that every country should be entitled, for the protection of its own nationals, to insist that a competent principal officer is appointed by the foreign company who can be assumed to have power to bind the company. For instance, such an officer should not be an infant or a lunatic or a bankrupt or a criminal!

This defect in Nigerian law is what S.305(1) and (2) of the Ghana companies code has remedied in the Ghanian law by providing that:

(1) "An external company shall not appoint any person as its local manager or cause any person to be named as such in any statement or notice delivered to the Registrar under the foregoing sections of this code unless such a person is competent, in accordance with section 182 of this code, to be appointed a director of a company formed in Ghana under this code.

(2) The acts of any person registered as the local manager of any external company while carrying on business in Ghana of that company shall bind the company unless the local manager has no authority so to act and the person with whom he was dealing had actual knowledge of the absence of authority or having regard to his position with or in relationship to the company, ought to have known of such absence of Authority".

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To my mind these provisions with some modifications ought to be adapted by Nigerian law in order not to leave room for foreign companies to manouver things. And a competent person, it is submitted should be a person who is an adult, sane and with clean records.

The other matter which also deserves serious attention is the issue of service of process on the foreign companies. No provision exists whatsover in Nigerian company law as regards service of process on foreign companies. Yet considering the importance of service of process - since without service, no suit can commence in the courts - it is imperative and clear that something urgent needs to be done to make Nigerian law more satisfactory both to the foreign companies and to their creditors.

Under the English Act, a foreign company is bound to give the name of some one authorised to accept service. Once it has done so however, there seems to be no way of removing the name of that person unless another name is substituted notwithstanding that the company has even ceased to carry on business in England[4]. Thus English law itself appears to be unsatisfactory as regards service of process on foreign companies carrying on business in England.

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However S.306(1) of the Ghana companies code which is an amended version ofsection 412 of the English Act seems to provide a satisfactory solution to the problem of service of process on external companies in Ghana as follows:-

(1) "Any process or other document shall be sufficiently served on an external company if delivered or sent by post to the person last registered as the company's process agent at his last registered address even if the process agent refuses to accept service or the company has ceased to maintain a place of business in Ghana.

(2) Where no registration of name and address of a person as the process agent of an external company has been affected --- any process or other document shall be sufficiently served on the company if delivered or sent by post to any place of business of the company in Ghana or if the company has ceased to have any place of business in Ghana, to the registered office or principal place of business of the company in the country of its incorporation.

(3) Any document to be served by post on an external company shall be posted in such time as to admit of its being delivered in due course of delivery within the time, if any, prescribed for the service thereof, and in proving service, it shall be sufficient to prove that a letter containing such document was properly addressed, prepaid, and posted, whether or not by registered post.

(4) If it shall be proved that any document was in fact received by any local manager or process agent or by the Board of Directors, Managing Director or Secretary of the external company, such document shall be deemed to have been served on that company not withstanding that service may not have been affected in accordance with the foregoing subsection of thissection.

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(5) Nothing in this section shall derogate from the power of any court to direct how service shall be affected of any document relating to legal proceedings before that court."

Under these provisions, steps have been taken to ensure that there is always the name of someone who must accept service and that service on such a person is effective. It would probably appear unnecessary to state expressly as subsection (1) does that service is effective even if the process agent refuses to accept service, for the requirements are satisfied by sending the document by post. However in the light of the English position, it seems advisable to state this specifically. Also, service of process according to subsection (2) may be served at any place of business of the company in Ghana. In case the company no longer has a place of business there, subsection (3) provides that service can be made by post. And in case all the processes in the subsections fails, subsection (6) provides that nothing shall derogate the power of the court to direct how service can be affected.

It can also be noticed that these provisions do not apply only to service of process, but equally covers service of any notice or document on the external company.

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To my mind, not only is there need to provide specifically for the service of process on foreign companies in Nigeria, but the above Ghanian provisions are comprehensive enough and therefore aptly reconcile all Nigerian cases on the issue and so should therefore be adapted with modification to suit local circumstances.

Another disturbing and vague provision in the Nigerian law relating to foreign companies is to be found in S.369(6). This is the section which deals with the winding up of foreign companies already wound up in their country of incorporation. It states in part as follows:-

> "This section shall extend and apply to any case where, immediately before the date of commencement of this part of the Decree, a foreign company had in Nigeria an established place of business and not withstanding the fact, IT IS THEREAFTER MADE TO APPEAR TO THE REGISTRAR THAT THE FOREIGN COMPANY AS INCORPORATED OUTSIDE NIGERIA HAD CEASED TO EXIST IN THE COUNTRY OF ITS INCORPORATION BEFORE THAT DATE ---") emphasis mine).

The question is: How can it be made to appear to the registrar of companies that a foreign company has ceased to exist in its country of incorporation? What signs should he see before assuming that position? What should be the criteria or the yardstick in which the Registrar can use to judge that a foreign company has been dissolved in its home land, so he can commence action to wind it up?

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The right thing that ought to be done is to impose a duty specifically on the foreign company to inform or disclose to the Registrar the fact that the company has been wound up in its country of origin. This would avoid making the Registrar guess - a situation that may, if care is not taken, result to an embarrassment!

Secondly, foreign companies that have been wound up in their country of incorporation should be stopped from doing any further business. Nor should Nigerian citizens be encouraged to make transa ctions with what in law does not exist!

It is for these reasons that I find S.311 of the Ghana companies code very relevant and vital and therefore recommend same into Nigerian law with some little modifications:

S.311 status as follows

(1) "Where, in the case of an external company -
(a) a winding up order is made by a court of the country in which the company is incorporated; or

(b) a resolution is passed or other appropriate proceedings are taken in that country to lead to the voluntary winding up of the company; or

(c) the company is dissolved or otherwise ceases to exist according to the law of the country in which it was incorporated;

The local managers and process agents of the company shall, within 28 days thereafter, cause notice thereof in the prescribed form to be given to the Registrar who shall register the same and cause the particulars contained therein to be published in the Gazette.

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(2) Where any such events have occured as referred to in paragraph (a) and (b) of subsection (1) of this section, the local managers of the company shall, on every invoice, order, or business letter issued in Ghana by or on behalf of the company, being a document on or in which the company's name appears, cause a statement to appear in legible letters to the effect that the company is being wound up in the country where it is incorporated.

(3) If any person shall in Ghana carry on, or purport to carry on business on behalf of the company after the date on which it was dissolved or has otherwise ceased to exist in the country in which it was incorporated, he shall be liable to a fine not exceeding £G5 for each day during which he continues so to do.

(4) Nothing in this section contained, shall derogate from the provisions of the debtors and Creditors protection Act 1963 enabling an external company, whether or not it has been dissolved or has otherwise ceased to exist according to the law of the country in which it was incorporated, to be wound up under the Act".

This section it must be pointed out contains provisions which do not even appear in the English Act. It is thus innovative and novel. Basically, apart from the notification requirement, it is designed to prevent the appalling problems which have at times faced countries when corporations operating in their territory have been dissolved according to the law of the country of incorporation. For, the companies then cease to exist as legal persons with all the legal consequences following. Thus the singular advantage of this section, is to prevent such companies from continuing to operate after dissolution.

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Finally, but not the least the issue of penalties. Section 371 of the companies Decree 1968 provides penalties on foreign companies who fail tc comply -with the requirements of -Part X of the Decree. But they do not go far. Apart from fines imposed by the section, nothing else happens. It is our considered opinion however that because creditors and or investors might suffer certain consequences which will not be of their making if foreign companies default to comply with the provisions of the law, harsher punishments should be imposed on foreign companies that do not comply with the provisions of the law. And for this, we suggest in addition to the fines provided by the section, a disability on the part of the foreign company, not to be able to enforce by action or other legal proceedings its rights or entitlements. This is precisely what S.313 (2) of the Ghana companies code has done. It states in part as follows:

> "If there is any default in delivering to the Registrar any document required to be delivered for registration persuant to the foregoing provisions of this chapter of this code, the rights of the external company concerned under or arising out of any contract made in Ghana during such time as the default continues shall not be enforceable by action or other legal proceedings ---"

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Correspondingly a company which has an established place of business in Nigeria should not overlook its legal obligations under the Nigerian law. That is why I recommend a similar provision such as the one -above to the law relating to foreign companies in Nigeria.

3. CONCLUSION

Suming up, it can be said that the magnitude of the problems posed by multinationals all over the world and especially in developing countries are too numerous and too large for a work of this nature to contain. These problems in Nigeria among others include: Foreign companies doing business in Nigeria and circumventing the tax and tariff law of their host; maximising profits through exploitation of indigenous labour; transferring through dubious means (e.g. false declarations, over-invoicing of goods; purchase of fake raw materials etc) foreign exchange against the spirit and intent of foreign exchange regulations of Nigeria; residing over-seas but doing business in Nigeria through agents inorder to avoid re-incorporation and jurisdiction of Nigerian courts, and circumventing the indegenisation law by providing weighted votes to their numbers thereby negating the spirit of Nigerianising the companies etc.

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The scope of inquiry of this thesis has not been to tackle each and every concievable problem that the multinationals pose to Nigeria. The scope has had to be limited to the problem areas that touch on company law with the hope that other disciplines such as economics and social sciences can tackle the other problems that appropriately belongs to them.

Throughout therefore , the aim has been to see to what extent the Nigerian company law has attempted to tackle some of the legal problems posed by the subsidiaries of the multinationals in Nigeria.

And as we have seen, the Nigerian company law has evolved from a laxed position to one of strict control of their activities. Thus the mode changed from persuading or encouraging foreign companies to incorporate local subsidiaries to one of conpulsion. With the coming in of Part X, no further time was given to foreign companies already operating in Nigeria to form local subsidiary. Every such company in respect of its Nigerian operations was automatically converted into a Nigerian company. Thus all foreign companies were hooked up - whether they liked it or not. As regards those foreign companies coming into Nigeria in the futute, they are required to form a local company for the purpose of establishing a place of business or commencing any business in Nigeria.

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Thus provisions relating to foreign companies in Part X of the Decree in a way "naturalises" the foreign companies!

But that is where they stop. The Nigerian company law did not go as far as expropriating or nationalising the foreign companies as is the case in some other third world countries. The wisdom in that is because for mostenterprises, Nigerians have not acquired the skill or know how to manage them. Thus while the philosopy is to -make Nigerians masters of their economic distiny, Nigeria does recognise the need in certain areas for continued participation of foreign investment in the hope that, that would provide the needed incentive for aid and the transfer of skills and technology from the foreign concerns to her populous. Thus the concept of indegenisation as seen is based on the joint-business ventures.

But as we have seen, this spirit could be defeated by the unscrupulous and ill-motivated expatriates as illustrated by Kehinde's case. Thus by thedevise of weighted voting rights ingenous foreign concerns can reverse the control process of the companies. The solution to this as we have also seen is to amend the companies Decree to prohibit the issue of non-voting equity shares and equity shares with varied or weighted rights.

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All in all, we can say that the devices built in/Part X of the companies Decree (i.e. conversion and re-incorporation of foreign companies in to Nigerian companies in order that "foreign companies" will be regulated by Nigerian laws) and the attempt made by the indigenisation Decree both to control and check the nefarious activities of foreign companies have not all gone in vain. By them, alot of malpractices formally pepetuated by the foreign companies have been reduced to the barest minimum. To effectively plug every loophole however, the companies Decree needs to be reformed as proposed in the work.

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FOOT NOTES

1. Companies Act of England 1948 S.407 (1)

2. This position was held in the case of Curragh Investment Ltd. Vs. Cook (1974) 3 ALL E.4 PP.658.

3. See Chapter two of the thesis: footnotes number 4.

4. See Sabatier V the Trading Co. (1927) 1 Ch.495.

5. In recommending some Ghanian provisions of law for Nigeria, the writer is not saying that after all the recommended provisions have been brought into Nigerian law, the Nigerian law will be perfect and so have no problems with the multinationals. It would only aid to put the Nigerian law into a better shape. Afterall the law finds itself grabling with new problems everyday.

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APPENDIX I

COMPANIES DECREE 1968

PART X COMPANIES INCORPORATED OUTSIDE NIGERIA

Foreign Companies defined

368. The Provisions of this Part of this Decree shall apply to every "foreign company" which, where the expression is used in this Part and elsewhere in this Decree unless the context otherwise requires means:-

(a) A company before the commencement of this Decree incorporated outside Nigeria, and having on the commencement thereof an established place of business in Nigeria;

(b) a company before or after the commencement of this Decree incorporated outside Nigeria, and having the intention of carrying on business in Nigeria on or after such commencement.

Conversion of foreign companies already established in Nigeria.

369. - (1) Every foreign company within paragraph (a) of section 368 of this Decree shall, in respect of its operation in Nigeria, be deemed to have become incorporated under this Decree as a separate entity from the company incorporated outside Nigeria in whose name a -place of business in Nigeria was established, and the company so deemed to have been incorporated in Nigeria shall have as part of its name (unless already therein) the word"(Nigeria)", so however that until other provision is made in accordance with subsection (2) of this section -

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- (2) The Principal officer in Nigeria (by what name soever described) of the foreign company shall, within 3 months after the date on which it is deemed to be incorporated pursuant to subsection (1) of this section, inform the Registrar as to the future intentions of the foreign company in respect of its operation in Nigeria, and if the business is to continue to be carried on in Nigeria that officer shall forthwith thereafter take all necessary steps to incorporate the company in Nigeria persuant to section 1 of this Decree; and when duly incorporated thereunder subsection (1) of this section shall, in so far as it imposes Tables A and B on the company cease to have effect. but nothing in this section be construed so as to authorise the issue of any prospectus inviting subscription, without the approval of the Commissioner.

- (3) If the foreign company within the period of 3 months mentioned in subsection (2) of this section informs the registrar that the company does not intend to carry on business in Nigeria, and the principal officer aforesaid fails within a reasonable time thereafter to apply to the court to have the company wound up under supervision

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of the court, the Registrar may so apply, and the court upon such application shall make a winding up order accordingly.

- (4) Subsection (3) of this section shall have effect notwithstanding that any other procedure for winding up may be available under this Decree.

- (5) The assets in Nigeria of a foreign company within the meaning of paragraph (a) of section 368 of this Decree shall vest in the company as reconstituted under this section, subject to all equities (if any) affecting the same.

- (6) This section shall extend and apply to any case where, immediately before the date of commencement of this Part of this Decree a foreign company had in Nigeria an established place of business and notwithstanding that fact, it is thereafter made to appear to the Registrar that the foreign company as incorporated outside Nigeria had ceased to exist in the country of its incorporation before that date. If when or thereafter the registrar is satisfied that it is expedient to wind up in Nigeria the affairs of the company reconstituted under this part of this Decree, as thecase may be,

and no action in that behalf is taken by any other person, the registrar may refer the case to the Attorney-General of the Federation for directions; and the registrar in proper case may petition the court for an order winding up and the court shall make tte order accordingly, subject to such conditions as the court in particular circumstances may impose.

Foreign Companies to be incorporated as domestic companies before commencing business.

370 - (1) Every foreign company within paragraph (b) of section 368 of this Decree shall give notice in writing of its intention to the registrar; and as soon thereafter as may be, the foreign company shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for the purpose aforesaid, but until so incorporated the foreign company shall not have a place of business in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Decree.

- (2) Steps to be taken under this Decree to become incorporated in Nigeria shall not include any invitation to subscribe for shares or otherwise howsoever on the basis of a prospectus without the prior approval of the Commissioner;

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but save to that extent, all other provisions of this Decree as to formation shall apply with any necessary modifications. Penalties.

371. If any foreign company fails to comply the requirements of this Part of this Decree in so far as they may apply to the company, that company shall be guilty of an offence and liable on conviction to a fine of not less than £1,000; and every officer or agent of the company who knowingly and wilfully authorises or permits the default or failure to comply shall, whether or not the company is also convicted of any offence, be liable on conviction to a fine of not less than £100 and where the offence is a continuing one to a further fine of £10 for every day during which the default or failure continues.

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APPENDIX II

SCHEDULES 1, 2 and 3 OF NIGERIAN ENTERPRISES PROMOTION DECREE, 1977

SCHEDULE 1

ENTERPRISES EXCLUSIVELY RESERVED FOR NIGERIANS

1. Advertising and public relations -business.
2. All aspects of pool betting business and lotteries.
3. Assembly of radios, radiograms, record changers, television sets, tape recorders and other electric domestic appliances not combined with manufacture of components.
4. Blending and bottling of alcoholic drinks.
5. Blocks and ordinary tile manufacture for building and construction works.
6. Bread and cake making.
7. Candle manufacture.
8. Casinos and and gaming centres.
9. Conemas and other places of entertainment.
10. Commercial transportation (wet and dry cargo and fuel).
11. Commission agents.
12. Departmental stores and supermarkets having an annual turnover of less than ₦2,000,000.
13. Distribution agencies excluding motor vehicles, machinery and equipment and spare parts.
14. Electrical repair shops other than repair shops associated with distribution of electrical goods.
15. Establishments specialising in the repair of watches, clocks and jewellery, including imitation jewellery for the general public.
16. Estate agency.
17. Film distribution (including cinema films).
18. Garment manufacture.
19. Hairdressing.

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20. Ince-cream making when not associated with the manufacture of other diary products.
21. Indenting and confirming.
22. Laundry and dry-cleaning.
23. Manufacturers' representatives.
24. Manufacture of jewelerry and related articles, including imitation jewellery.
25. Manufacture of suitcases, brief cases, hand-bags, purses, wallets, portfolios and shopping bags.
26. Municipal bus services and taxis.
27. Newspaper publishing and printing.
28. Office cleaning.
29. Passenger bus services of any kind.
30. Poultry farming.
31. Printing of stationery (when not associated with printing of books).
32. Protective agencies.
33. Radio and television broadcasting.
34. Retail trade (except by or within departmental stores and supermarkets).
35. Rice milling.
36. Stevedoring and shorehandling.
37. Singlet manufacture.
38. Travel agencies.
39. Wholesale distribution of local manufactures and other locally produced goods.

SCHEDULE 2

ENTERPRISES IN RESPECT OF WHICH NIGERIANS MUST HAVE AT LEAST 60 PER CENT EQUITY INTEREST

1. Banking-commercial, merchant and development banking.
2. Basic iron and steel manufacture.
3. Beer brewing.
4. Boat building.
5. Bottling of soft drinks.
6. Business services (other than machinery and equipment rental abd leasing) such as business management and consulting services; fashion designing.

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7. Clearing and forwarding agencies.
8. Canning and preserving of fruits and vegetables.
9. Coastal and inland waterways shipping.
10. Construction industry.
11. Departmental stores and supermarkets having annual turnover of not less than ₦2,000,000.
12. Distribution agencies for machines and technical equipment.
13. Distribution and servicing of motor vehicles, tractors and spare parts thereof or similar objects.
14. Fish and shrimp trawling and processing.
15. Fertilizer production.
16. Grain mill products except rice milling.
17. Industrial cleaning.
18. Insecticides, pesticides and fungicides.
19. Internal air transport (scheduled and charter services).
20. Insurance all classes.
21. Lighterage.
22. Manufacture of bicycles.
23. Manufacture of biscuits and similar dry bakery products
24. Manufacture of cement.
25. Manufacture of cosmetics and perfumery.
26. Manufacture of cocoa, chocolate and sugar confectionery.
27. Manufacture of dairy products, butter, cheese, milk and other milk products.
28. Manufacture of food products like yeast, strarch, baking powder, coffee roasting; processing of tea leaves into black tea.
29. Manufacture of furniture and interior decoration. Manufacture of metal fixtures for household, office and public building.
30. Manufacture of leather footwear.
31. Manufacture of matches.
32. Manufacture of metal containers.

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33. Manufacture of paints, varnishers or other similar articles.
34. Manufacture of plastic products such as plastic dinnerware, tableware, kitchenware, plastic mats, plastic machinery parts, bottles, tubes and cabinets.
35. Manufacture of rubber products, rubber footwear, industrial and mechanical rubber specialties such as gloves, mats, sponges and foam.
36. Manufacture of tyres and tubes for motor vehicles.
37. Manufacture of soap and detergents.
38. Manufacture of wire, nails, washers, bolts, nuts, rivets and other similar articles.
39. Other manufacturing industries such as non-rubber and non-plastic toys, pens, pencils, umbrellas, canes, buttons, brooms and brushes, lampshades, tobacco pipes and cigarette holders.
40. Mining and quarrying.
41. Oil milling, cotton ginning and crushing industries.
42. Paper conversion industries.
43. Plantation sugar and processing.
44. Plantation agriculture for tree crops, grains and other cash crops.
45. Printing of books.
46. Production of sawn timber, plywood, veneers and other wood conversion industries.
47. Petro=chemical feedstock industries.
48. Publishing of books, periodicals and such like.
49. Pulp and paper mills.
50. Restaurants, cafes and other eating and drinking places.
51. Salt refinery and packaging.
52. Screen printing on cloth, dyeing.
53. Inland and coastal shipping.
54. Slaughtering, storage associated with industrial processing and distribution of meat.
55. Tanneries and leather finishing.
56. Wholesale distribution of imported goods.
57. Photographic studios, including commercial and aerial photography.

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SCHEDULE 3

ENTERPRISES IN WHICH NIGERIANS MUST HAVE AT LEAST 40 PER CENT EQUITY INTEREST

1. Distilling, rectifying and blending of spirits such as ethyl alcohol, whysky, brandy, gin and the like.
2. Tobacco manufacture.
3. Manufacture of basic industrial chemicals (organic and inorganic) except fertilizers.
4. Manufacture of synthetic resins, plastic materials and man-made fibres except glass.
5. Manufacture of drugs and medicines.
6. Manufacture of pottery, china and earthenware.
7. Manufacture of glass and glass products.
8. Manufacture of miscellaneious non-mineral products such as concrete, gypsum and plastering products, including ready-mixed concrete; mineral wool, adhasive; asbestos products; graphite products.
9. Manufacture of primary non-ferrous metal products such as ingots, bars and billets; sheets, strips, circles, sections rods, tubes, pipes and wire rods; casting and extrusions.
10. Manufacture of (fabricated metal) cutlery, hand tools and general hardware.
11. Manufacture of structural metal products-components of bridges, tanks, metal doors and screens, window frames.
12. Manufacture of miscellaneous fabricated metal products, except machinery and equipment, such as safes and vaults; steel springs furnaces; stoves, and the like.
13. Manufacture of engines and turbines.
14. Manufacture of argicultural machinery and equipment.
15. Manufacture of metal and wood working machinery.
16. Manufacture of speeial industrial machinery and equipment, such as textile and food machinery, paper industry machinery, oil refining machinery and equipment, and the like.
17. Manufacture of office, computing and accounting machinery.
18. Manufacture of other machinery and equipment except electrical equipment, pumps, air and gas compressors; blowers, air=conditioning and ventilating machinery; refrigerators, and the like.

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19. Manufacture of electrical industrial machinery and apparatus.
20. Manufacture of electrical appliances and houseware.
21. Manufacture of radio, television and communication equipment and apparatus.
22. Manufacture of electrical apparatus and supplies not elsewhere classified, such as insulated wires and cables, batteries, sockets, switches, insulators and the like.
23. Ship building and repairing (excluding boat building).
24. Manufacture of railway equipment.
25. Manufacture of motor vehicles and motor-cycles.
26. Manufacture of aircraft.
27. Manufacture of processional and scientific and measuring and controlling equipment, such as laboratory and scientific instruments, surgical, medical and dental equipment, instruments and supplies and orthopaedic and prosthetic appliances.
28. Manufacture of photographic and optical goods.
29. Manufacture of watches and clocks.
30. Ocean transport/shipping;
31. Oil servicing companies.
32. Storage and warehousing the operation of storage facilities and warehouses (including bonded and refrigerated warehouses) for hire by the general public.
33. Textile manufacturing industries.
34. Hotels, rooming houses, camps and lodging places.
35. Data processing and tabulating services (on a fee or contract basis).
36. Production of cinema and television films (or motion picture production).
37. Machinery and equipment rental and leasing.
38. All other enterprises not included in Schedule 1 or 1 not being public sector enterprises.

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